NO. 41970-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ODIES WALKER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Bryan Chushcoff

No. 09-1-02784-8

CORRECTED SUPPLEMENTAL BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

The State adopts its statement of the case, both procedural and factual, from its Response Brief. With the court's permission, the defense filed a supplemental brief. This is the State's response to that brief.

C. ARGUMENT.

1. THE DEFENDANT BEARS THE BURDEN TO ESTABLISH A CLAIM THAT PROSECUTORIAL MISCONDUCT IN CLOSING DEPRIVED HIM OF A FAIR TRIAL, AND WHERE THE CONDUCT WAS NOT OBJECTED TO, THAT BURDEN IS PARTICULARLY HIGH.

The right to a fair trial is secured by both the United States and Washington Constitutions. The right to a fair trial arises from the Due Process clauses of the Fifth and Fourteenth Amendments. However, it is given specific form by the Sixth Amendment, which enumerates particular guarantees. *See* ***U.S. v. Wade***, 388 U.S. 218, 226-27, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). The Fourteenth Amendment also makes the right to a fair trial applicable to the States. ***Cone v. Bell***, 556 U.S. 449, 451, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009).

The Washington Constitution's protection of a fair trial parallels the federal. The right to a fair trial arises from the Due Process Clause of Article I, section 3, while Article I, section 22 enumerates particular guarantees that apply to criminal prosecutions and thereby serve to protect

the due process right to a fair trial. *See* ***State v. Clark***, 143 Wn.2d 731, 773, 24 P.3d 1006 (2001). The due process clause of article I, section 3 has repeatedly been held to provide the same protections as the due process clause of the federal constitution. ***State v. McCormick***, 166 Wn.2d 689, 699, 213 P.3d 32 (2009); ***In re Dyer***, 143 Wn.2d 384, 394, 20 P.3d 907 (2001) (citing ***State v. Ortiz***, 119 Wn.2d 294, 304, 831 P.2d 1060 (1992)); ***Young v. Konz***, 91 Wn.2d 532, 538-39, 588 P.2d 1360 (1979); ***State v. Pitney***, 79 Wash. 608, 610, 140 P. 918 (1914).

Some acts of prosecutorial misconduct can rise to the level that deprives a defendant of the right to a fair trial. ***State v. Davenport***, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The first United States Supreme Court case to use the phrase "prosecutorial misconduct" was ***Namet v. United States***, 373 U.S. 179, 186, 72 S. Ct. 1151, 10 L. Ed. 2d 278 (1963). In this case, the Court recognized that some lower courts opined that error may be based upon a concept of prosecutorial misconduct. Such a claim was said to arise when the government makes a conscious and flagrant attempt to build its case out of inferences arising from the use of the testimonial privilege. In other words, such a claim did not arise out of mere negligence, or out of "simple" trial error. The Court, applying this understanding to the facts of the case, stated that the record, which included advance notice to the

prosecutor that the witnesses intended to invoke their privilege against self-incrimination, did "not support any inference of prosecutorial misconduct." ***Namet***, 373 U.S. at 188.

Four years after ***Namet***, the Washington Supreme Court used the phrase "prosecutorial misconduct" for the first time. ***State v. Nelson***, 72 Wn.2d 269, 432 P.2d 857 (1967). ***Nelson*** involved a conscious error on the part of the prosecutor—namely the calling of a witness whom the prosecutor knew would claim the Fifth Amendment privilege against self-incrimination—solely as a means of getting the government's theory of the case before the jury. Not only did the prosecutor know that the witness would assert the privilege from the first trial of the defendant, the prosecutor's questions were designed to place before the jury the evidence that resulted in the reversal on appeal, of the defendant' first conviction. ***Nelson***, 72 Wn.2d at 281-83.

A defendant claiming prosecutorial misconduct in closing bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. ***State v. Finch***, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); ***State v. Binkin***, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996); ***State v. Mak***, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986). The defendant has this burden because before an appellate court

should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." ***Beck v. Washington***, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)).

Even where improper remarks occur, they do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury's verdict. ***Finch***, 137 Wn.2d 792 at 839. The trial court is best suited to evaluate the prejudice of the statement. ***State v. Weber***, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. ***State v. Bryant***, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998) ("remarks must be read in context"). ***State v. Pastrana***, 94 Wn. App. 463, 479, 972 P.2d 557 (1999). If a curative

instruction could have cured the error, and the defense failed to request one, then reversal is not required. ***Binkin***, at 293-294.

Moreover, if the defense failed to object to the claimed improper conduct, the issue is waived on appeal unless the misconduct was so "flagrant and ill intentioned" that no curative instruction to the jury would have obviated the prejudice it engendered. ***State v. Fisher***, 165 Wn.2d 727, 202 P.3d 937 (2009); ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); ***State v. Ziegler***, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), ***State v. Belgarde***, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

It is error for the State to tell the jury it must determine who is telling the truth and who is lying in order to decide the case. ***State v. Wright***, 76 Wn. App. 811, 824-26, 888 P.2d 1214, *review denied*, 127 Wn.2d 1010 (1995). In ***Wright***, the court stated that it is improper to tell the jury that to acquit the defendant it would be necessary to conclude the State's witnesses were lying. ***Wright***, 76 Wn. App. at 824 (citing ***State v. Riley***, 69 Wn. App. 349, 848 P.2d 1288 (1993)). However, the court in ***Wright*** affirmed an argument that:

> To believe (as opposed to acquit) Wright [the defendant] the jury would need to believe that the State's witnesses were mistaken (as opposed to lying).

Wright, 76 Wn. App. at 824. [Italics in original.] Error will exist in those situations where the prosecutor presents the jurors with the false choice

between believing the State's witnesses and acquitting the defendant. ***Wright***, 76 Wn. App. at 825.

> Where [...] the parties present the jury with conflicting version of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.

Wright, 76 Wn. App. at 825. [Footnote omitted.]

In ***State v. Emery*** the Washington Supreme Court recently clarified the standards that apply when prosecutorial misconduct occurs in closing argument. ***State v. Emery***, 174 Wn.2d 741, 278 P.3d 653 (2012). The court in ***Emery*** emphasized that even when misconduct has in fact occurred "'[m]isconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom'" such that "...[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant and ill intentioned and more on whether the resulting prejudice could have been cured." ***Emery***, 174 Wn.2d at 761-62.

Indeed, the reviewing court should not be overzealous in its efforts to root out perceived misconduct.

> ... [T]he adversary system permits the prosecutor to "prosecute with earnestness and vigor." In other words, "while he may strike hard blows, he is not at liberty to strike foul ones."

Young, 470 U.S. at 9 (quoting ***Berger v. United States***, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 74 L. Ed. 2d 1314 (1935)). Indeed,

> These [ABA] standards reflect a consensus of the profession that the courts must not loose sight of the reality that "[a] criminal trial does not unfold like a play with actors following a script." It should come as no surprise that "in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused."

Young, 470 U.S. at 10 (quoting respectively ***Geders v. United States***, 425 U.S. 80, 86, 96 S. Ct. 1330, 1334, 47 L. Ed. 2d 592 (1976) and ***Dunlop v. United States***, 1655 U.S. 486, 498, 17 S. Ct. 375, 379, 41 L. Ed. 799 (1897))

> Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding. Instead, as ***Lawn*** teaches, the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. In other words, the court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly.

Young, 470 U.S. at 12(referring to ***Lawn v. United States***, 355 U.S. 339, 78 S. Ct. 311, 2 L. Ed. 2d 321 (1958).

The issue is always whether the prosecutor's improper statement, taken in context, unfairly prejudiced the defendant. *See* ***Young***, 470 U.S. at 12.

> "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and ... the Constitution does not guarantee such a trial."

United States v. Lane, 474 U.S. 438, 445, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986) (quoting ***United States v. Hasting***, 461 U.S. 499, 508-09, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983). *See also* ***State v. Paumier***, 176 Wn.2d 29, 57, 288 P.3d 1126 (2012); ***In re Elmore***, 162 Wn.2d 236, 267, 172 P.3d 335 (2007).

2. THE CLOSING IN THIS CASE WAS PROPER, DID NOT PREJUDICE WALKER AND CERTAINLY DID NOT DEPRIVE HIM OF HIS RIGHT TO A FAIR TRIAL.

In the supplemental brief, the defense argues that the PowerPoint presentation in the State's closing deprived Walker of his right to a fair trial such that his conviction should be reversed. Supp. Br. App. at 6. In support of that claim, the defense relies solely upon the Washington Supreme Court's ruling in ***In re Glasmann***, 175 Wn.2d 696, 286 P.3d 673 (2012). Supp. Br. App. 6-10.[1]

Washington has a broad and well established caselaw regarding prosecutorial misconduct in closing. The court's opinion

in ***Glasmann*** did not purport to overturn, reverse, or even clarify any of that law. *See* ***Glasmann***, 175 Wn.2d 696. Indeed, quite the contrary, the court in ***Glasmann*** endorsed and relied upon that law. *See* ***Glasmann***, 175 Wn.2d at 703-705; 707. When the court's opinion in ***Glasmann*** is considered in conjunction with the totality of the Washington case law on the issues raised in the supplemental brief of appellant, that complete body of law establishes that the closing in Walker's case is proper.

When a defendant raises a claim of prosecutorial misconduct in closing, the defense always has the burden to show that prosecutorial misconduct occurred, and that he was prejudiced thereby. ***State v. Finch***, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). Walker fails to meet this burden.

Moreover, because the defense did not raise such objections to the closing at the time it was given, the error is waived unless Walker can meet the much higher burden of showing that 1) the prosecutor's conduct in this case was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice, and further 2) that prejudice could not have been

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[1] The Supplemental Brief of the Appellant cites no other case than ***Glasmann*** in support of its argument.

neutralized by an admonition to the jury.[2] ***State v. Thorgerson***, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where Walker fails to establish prejudicial prosecutorial misconduct in the first place, he also fails to meet his burden as to this much higher standard.

a. The Closing In This Case Was Proper

i. The Prosecutor did not improperly express a personal opinion regarding Walker's guilt

(α) *The Closing Did Not Express a Personal Opinion Under Washington Supreme Court Caselaw.*

It has been long and well established by the Washington Supreme Court that,

> While it is improper for a prosecuting attorney, in argument, to express his individual opinion that the accused is guilty, independent of the testimony in the case, he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact.
> ....
> In other words, there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.

[2] Defense counsel's only objection was to a slide explaining premeditation. 12 RP 1376, ln. 17 to p. 1380, ln. 14.

State v. McKenzie, 157 Wn.2d 44, 134 P.3d 221 (2006) (quoting ***State v. Armstrong***, 37 Wash. 51, 54-55, 79 P. 490 (1905). *See also* ***State v. Long***, 65 Wn.2d 303, 308, 396 P.2d 990 (1964); ***State v. La Porte***, 58 Wn.2d 816 821, 365 P.2d 24, (1961); ***State v. Ragan***, 157 Wash. 130, 135, 288 P. 218 (1930); ***State v. Peeples***, 71 Wash. 451, 459, 129 P. 108 (1912).

> Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

McKenzie, 157 Wn.2d at 53-54 (quoting ***State v. Papadopoulos***, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)). *See also* ***State v. La Porte***, 58 Wn.2d 816, 820-21, 365 P.2d 24 (1961).

In ***McKenzie***, the court held that the prosecutor's use of the word "guilty" four times in rebuttal did not constitute a "clear and unmistakable" expression of the deputy prosecutor's personal opinion, divorced from the evidence. ***McKenzie***, 157 Wn.2d 44, 134 P.3d 221 (2006). In each of the four instances, the word "guilty" was used in response to defense counsel's argument, and in relation to the facts in that case. *See* ***McKenzie***, 157 Wn.2d at 56.

Moreover, a number of cases have held that even where the prosecutor used a self-referential statement, it was either not an expression of personal opinion when considered in light of the total argument, or that it was not prejudicial. *See* ***State v. Hoffman,*** 116 Wn.2d 51, 94-95, 804

P.2d 577 (1991) (holding that use of phrases such as "I think..." or "I think the evidence shows..." was not improper where all such statements contained material supported by the evidence); ***State v. Lane***, 37 Wn.2d 145, 150-51, 222 P.2d 394 (1950) (holding that statement, "...it would be a shock to me and anybody who knows of this case to not have a verdict of guilty brought in by you" did not warrant reversal where no curative instruction was requested); ***State v. George***, 58 Wash. 681, 687, 109 P. 114 (1910) (holding that statement, "It is my sincere belief that defendant is guilty of murder in the first degree" did not constitute reversible error where the instructions proposed by the defense but rejected by the court were covered by other instructions given).

The situation in ***Glasmann*** differed from the use of the word "guilty" in ***McKenzie*** because in ***Glasmann***, the word "guilty" alone was superimposed on an inflammatory photo of the defendant looking unkempt and bloody, and the word "guilty" was used without reference to the evidence in the case. *See* ***Glasmann***, 175 Wn.2d at 706. Additionally, in ***Glasmann***, the prosecutor used the word "guilty" in three consecutive slides, each of which had only the word superimposed on the image, one, two and three times, respectively. ***Glasmann***, 175 Wn.2d at 702, 706-07.

The defense claims that the prosecutor here improperly expressed a personal opinion because slide no. 261 contained text that included the

word "guilty" superimposed over Walker's picture. However, the slide here did not improperly express a personal opinion for three reasons. First, the slide did not use a self-referential phrase expressing the prosecutor's opinion or belief. Second, it did not use the word "guilty" in isolation. Rather, it used the phrase "guilty beyond a reasonable doubt." That phrase refers to the State's burden of proof, and as such demonstrates that it argument related to the evidence rather than an expression of personal opinion. Third, the connection to the evidence is further reinforced because the background upon which Walker's photo is superimposed is the summaries of the interlocking pieces of evidence.

(b) The closing did not express a personal opinion under United States Supreme Court Case Law

In ***United States v. Young***, the United States Supreme Court overturned the court of appeals and affirmed the defendant's conviction where the prosecutor made statements of personal opinion in closing. ***United States v. Young***, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). In ***Young***, the prosecutor made a number of statements in rebuttal that expressed a personal opinion regarding Young's guilt. ***Young***, 470 U.S. at 5-6.

First and foremost, what is notable about ***Young***, is that in ***Young***, the prosecutor used explicit, self-referential subjective phrases that express

personal opinion such as "I think," "I call it," and "I don't believe it." *See* ***Young***, 470 U.S. at 5-6. Thus the statements at issue in ***Young*** fall within the well established norm that a statement of opinion requires an actual express assertion of a self-referential opinion, such as "I think," or "I believe." *See* Gershman, Bennett L., PROSECUTORIAL MISCONDUCT, SECOND ED., 2009-2010 ed., § 11:26, p. 517-18. This was more expressly egregious than the statements of opinion the court took issue with in ***Glasmann***, which consisted of the word "guilty." *See* ***Glasmann***, 175 Wn.2d at 709-10.

Nonetheless, notwithstanding the explicit expressions of personal opinion, the court in ***Young*** held that the statements by the prosecutor, although error, did not seriously affect the fairness of the trial and did not warrant reversal of the conviction. ***Young***, 470 U.S. at 20.

Similarly, in ***Darden v. Wainwright***, the prosecutor made a number of statements expressing a personal opinion by using self referential statements of opinion such as, "As far as I am concerned...," "...the only way I know ...," "I wish...," "...that I know of..." The opinion in ***Darden*** is discussed further in section 2.c below because in ***Darden***, the prosecutor's statements of opinion nearly get lost in the inflammatory rhetoric in which they are imbedded. Nonetheless, as was the case in ***Young***, the court in ***Darden*** held that the prosecutor's statements did not so infect

"'...the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Darden***, 477 U.S. at 180. "'Darden's trial was not perfect - few are - but neither was it fundamentally unfair.'" ***Darden***, 477 U.S. at 182 (quoting from the District Court's opinion ***Darden v. Wainright***, 513 F.Supp. 947, 958 (1981)).

Unlike the prosecutor's comments in ***Young***, here, the prosecutor did not make any self-referential statements that express a personal opinion. As explained in the preceding section, the prosecutor made an argument that Walker was "guilty beyond a reasonable doubt," and did so in a way that was related to the evidence and was not an expression of personal opinion. For this reason, the closing in this case did not improperly express a personal opinion when considered under United States Supreme Court precedent.

ii. The Prosecutor in Walker's case did not introduce evidence not in the record under Washington Supreme Court Case Law.

The Washington Supreme court has held that it was not an abuse of discretion for the trial court to allow a prosecutor to conduct a demonstration in closing for the purpose of showing that the defendant

might have sat on the victim. ***State v. Kroll***, 87 Wn.2d 829, 558 P.2d 173 (1976). Thus, the precedent of the Washington Supreme Court did not preclude the State from making a demonstration in closing thereby introducing material extraneous to the record.

The following cases stand for the proposition that the slides did not constitute matters outside the record because the slides did not add any facts or matters that were not already before the jury from the admitted evidence. Additionally, the State has wide latitude to argue the facts and reasonable inferences from the evidence. Moreover, even if the court were to hold the slides did constitute facts outside the record, they did not rise to the level of improper extraneous facts. Nor did they prejudice the defendant.

In closing argument, the State has wide latitude to argue reasonable inferences from the evidence. The court held that the Prosecutor's improper reference during closing to the minor victim having made additional out-of-court statements consistent with in-court testimony did not prejudice defendant. ***State v. Thorgerson***, 172 Wn.2d 438, 258 P.3d 43 (2011).

In trial for sexual abuse of a minor, the prosecutor's statement that children assess very carefully who they will disclose sexual abuse to and that long delays are common because people frequently repress sexual abuse was not supported by the evidence, but the court held that the

defendant failed to show that he was prejudiced by the prosecutor's comments. ***State v. Warren***, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

The prosecutor's request that the jury consider the dynamics of domestic violence relationships, without reaching whether it was improper was held not so egregious as to warrant reversal. ***State v. Magers***, 164 Wn.2d 174, 189 P.3d 126 (2008).

Prosecutor's statement that defense "... had access to their own experts to look at...this evidence, very few of whom you heard from." was not so prejudicial as to warrant a new trial where the defense objected to the statement and the court reminded the jury it was to consider the evidence before it. ***State v. Russell***, 125 Wn.2d 24, 88, 882 P.2d 747 (1994).

The court held incurable the prosecutor's statement that the defendant is "strong in" "a deadly group of madmen," and "butchers that kill indiscriminately," as well as comparing the group to "Kadafi" and "Sean Finn" of the IRA where such statement constituted testimony of matters outside the record and was highly inflammatory). ***State v. Belgarde***, 110 Wn.2d 504, 509, 755 P.2d 174 (1988)

iii. The United States Supreme Court

The State was unable to locate any opinions of the United States Supreme Court that address this issue.

b. The Prosecutor's Conduct was not Flagrant and Ill-Intentioned.

Because this issue involves a lengthy review of authorities that render it excessively long for purposes of this section, it is treated separately in section 5 below.

c. There Was Overwhelming Evidence Of Walker's Guilt.

The killing of Kurt Husted at the beginning of the robbery was recorded by Walmart security video in front of numerous witnesses. The evidence was overwhelming that Husted was murdered. The only question at trial was whether Walker was either a principal or accomplice in the crime. However, there was overwhelming evidence of that as well.

A witness inside the Walmart store, Mr. Brown, observed the men who robbed Kurt Husted, followed them outside, and observed them get into the white getaway car. 4 RP 136, ln. 17 to p. 138, ln. 2. He observed a partial license plate number that led the police to Calvin Finley. 4RP 137, ln. 23-24; p. 154, ln. 15-20. Finley is Walker's blood cousin, and lived with him at the time. 7RP 596, ln. 17-18; p. 628, ln. 19 to p. 629, ln. 3; p. 632, ln. 2-4; p. 633, ln. 16 to p. 633, ln. 22.

The getaway car was observed by other witnesses as well. 5 RP 293, ln. 10-12; 5 RP 298, ln. 9 to p. 299, ln. 23. One witness observed the

getaway car leaving the scene observed the driver, who she later identified as Walker. 5RP 235, ln. 4-14; p. 240, ln. 12 to p. 243, ln. 17; p. 331, ln. 19 to p. 332, ln. 2.

Tonie Williams-Irby and Walker considered themselves to be husband and wife. 7 RP 627, ln. 21 to p. 628, ln. 6. Walker had been an employee at the Walmart for about four months prior to planning the robbery. 7RP 646, ln. 3-15 Tonie Williams-Irby was an employee at the Walmart. 5 RP 309, ln. 23-25. The store would have staff meetings every morning that employees were free to attend. 5 RP 308, ln. 23 to p. 309, ln. 2. The purpose of the meetings was to go over sales and the meetings would include a discussion of the profit the store was making. 5 RP 209, ln. 8-14.

Months in advance of the robbery, Tonie Williams-Irby heard Walker talking with Finley about killing the guard. 7 RP 665, ln. 1 to p. 666, ln. 21.

Walker was the mastermind behind the robbery and the murder. In March of '99, Walker and Calvin Finley began sitting around whispering with someone named Jonathan all the time and talking about Walmart a lot. 7 RP 663, ln. 5-17. They talked about a robbery of the Walmart in which Walker would be the getaway driver because he could drive better than the rest of them, and because everybody in the store would know him

because of his arm. 7 RP 664, ln. 20. Calvin was supposed to take the bag, and originally, Jonathan's role was to back him [Calvin?] up. 7 RP 664, ln. 23-25.

Turpin was a friend of Irby-Williams's son Darrell Parrott. 7 RP 663, ln. 1-4. Walker told them that they needed to hurry up and do what they had to do and that they couldn't wait. 7 RP 659, ln. 23 to p. 660, ln. 1. If they messed [it?] up he would kill them because they would all go to jail. 7 RP 659, ln. 24 to 660, ln. 3. He also told them if they did the job without him, he would kill them. 7 RP 660, ln. 3-5.

At some point Walker talked to Finley about getting the money bag from the guard and with regard to killing the guard to get the bag, told Finley to "do what you got to do." 7 RP 665, ln. 10-21.

Before the robbery occurred at Walmart, Walker had talked to Jessie Lewis about committing such a robbery. 9 RP 902, ln. 25 to p. 903, ln. 13. Calvin Finley was also present for the conversation. 9 RP 904, ln. 4-8. Lewis's role was to be to shoot the armored car guard at the Walmart. 9 RP 904, ln. 11-12. Walker's role was to be the driver. 9 RP 905, ln. 14-21. They were joined later by Turpin, who owned a gold Maxima. 9 RP 963, ln. 12-16.

Immediately after discussing the robbery with Lewis, Walker then took Lewis over to the Walmart Store to rob the armored car guard. 9 RP

904, ln. 21 to p. 905, ln. 5. Walker showed Lewis weapons that would be used, including a 9-milimeter and a black .45 [caliber]. 9 RP 905, ln. 10-11. After Lewis showed reluctance, they told him to go in there and Calvin would do whatever they had to do, shoot the guard, or whatever. 9 RP 906, ln. 4-9. At first Lewis was interested and they went over to the Walmart store in a white Buick. 9 RP 906, ln. 11-21.

For months prior to this Walker would sit in the parking lot with Marshawn and Calvin and watch the truck every day to time its movements, so he knew the schedule for the armored the truck, which appeared that day when he told Lewis it would. 7 RP 661, ln. 2-8; p. 662, ln. 8-13; 9 RP 906, ln. 17-23.

Prior to entering the Walmart, Walker tried to give Lewis a 9-millimeter gun, but Lewis got nervous about the whole thing and didn't take it. 9 RP 911, ln. 9-23. Turpin had gone ahead of them into the store to scout things out, track the guard, and he gave them a call. 9 RP 911, ln. 6-8; p. 912, ln. 1; p. 926, ln. 10-11.

Lewis and Finley went inside the store. 9 RP 906, ln. 909, ln. 22 to p. 910, ln. 6. Their intent was to rob the armored car guard. 9 RP 910, ln. 19-22. Lewis walked into the store behind Finley, who was showing him how they were going to do the crime. 9 RP 912, ln. 1-4.

But Lewis knew they weren't going to getaway with the money like that and that it wasn't going to go down like they were trying to plan it to go down. 9 RP 912, ln 4-10. Lewis knew that someone was going to get killed. 9 RP 912, ln. 11-12. So instead, he walked out of the store. 9 RP 912, ln. 4.

Because Lewis left the store, they called him a bitch. 9 RP 912, ln. 15-16. Walker said they could have done it, but Lewis told him he wasn't doing that. 9 RP 913, ln. 20-21. Lewis told Walker that somebody was going to die and Lewis wasn't going to be involved in a murder. 9 RP 913,ln. 1-2. Walker told him that they were going to getaway, that it was a clean "lick" [robbery] and tried to persuade Lewis to do it, but Lewis knew better. 9 RP 913, ln. 4-9.

On the day of Tonie Williams-Irby's birthday party, Walker tried to recruit Lewis to commit the robbery again. 9 RP 914, ln. 11-12.

Jordan Lopez, the mother of Lewis's baby, overheard Walker talking about the robbery with Lewis before the day of the birthday party. 9 RP 900, ln. 5-10; p. 943, ln. 1-4. She also saw that Finley was present. 9 RP 943, ln. 10-16.

At the birthday party, Lopez saw Walker with a chrome colored gun clipped to the inside waist of his pants. 9 RP 947, ln. 12-19.

After Walker was unsuccessful recruiting Lewis to participate in the robbery of the armored car, he tried to recruit Williams-Irby's son, Darrell Parrott. 9 RP 966, ln. 18-25; p. 968, ln. 22 to p. 969, ln. 3. He told Parrott he could walk into Walmart with Finley and Walker would pay Parrott $5,000 for that. 9 RP 698, ln. 20-24. Walker told Parrot that he would have to walk in with a gun to watch Finley's back. 9 RP 969, ln. 7-10. They were going to rob the armored car. 9 RP 969, ln. 1-3. This was going to happen maybe a couple of days after the birthday party. 9 RP 970, ln. 11-15. Parrot declined. 9 RP 970, ln. 20-23.

At trial, the defendant, Walker, stipulated that Calvin Finley killed Kurt Husted inside the Walmart store in Lakewood, Washington. 6 RP 372, ln. 21 to p. 373, ln. 10; Ex. 67. Walker also stipulated that Marshawn Turpin was with Calvin Finley inside of the Walmart store in Lakewood when Kurt Husted was killed. 6 RP 373, ln. 1-16; Exs. 68.

On the day of the robbery, Walker had Tonie Williams-Irby go to the staff meeting so she could call to tell him the numbers for how much money the store made the day before. 8 RP 701, ln. 19 to p. 703, ln. 7. After she heard someone had been shot, she realized they had done what they said they were going to do. 8 RP 708, ln. 18 to p. 709, ln. 5.

After the robbery as Irby-Williams rode with Walker to the house of someone named Al, and she discussed with Walker what he did during

the robbery and murder of the Loomis driver. 8 RP 723, ln. 4-7. Walker stated that he was sitting outside in the car on the phone with Finley. 8 RP 723, ln. 13-14. He said the man laughed at Finley, so Walker told Finley to kill the mother fucker. 8 RP 723, ln. 15-24.

The video shows that Finley walked up to the guard and shot him within two seconds of approaching him. Ex. 9. Turpin didn't flinch, but just reached down and grabbed the bag, suggesting he knew that the shooting was coming. Ex. 9.

After Walker was arrested, officers interviewed him at the Lakewood Police Department. Walker admitted being at the Walmart on the day of the shooting, to pick up a car, a gold Maxima. 6 RP 411, ln. 18-21; 7 RP 561, ln. 16 to p. 562, ln. 3. A gold Maxima had been used in the robbery and had met up with the white car prior to the occurrence of the robbery. 7 RP 562, ln. 6-12. Walker said he had been asked by his cousin, Calvin to pick up the Gold Maxima. 7 RP 564, ln. 17-19. Walker was shown two different pictures of the two subjects that were involved in the robbery and asked if he knew either of those people. 7 RP 563, ln. 4-8. Walker said it looked like his cousin. 7 RP 563, ln. 15-17. The officer asked if it looked like his cousin or was his cousin, to which Walker replied that it was his cousin, Calvin. 7 RP 563, ln. 20-25. Officers asked

if it was Calvin Finley, and Walker said that it was. 7 RP 563, ln. 25 to p. 564, ln. 2.

After the arrests of Walker and Williams-Irby, officers conducted a search of their residence at 6110 59th Avenue West in University Place. 6 RP 480, ln. 15-18. In the master bedroom, officers found a pair of shoes that contained 9-millimeter ammunition. 6 RP 483, ln. 7 to p 485, ln. 2. In a cereal box in the closet, officers found a gun holster. 6 RP 485, ln. 6 to p. 486, ln. 11. A nine millimeter gun was never found in the house. 6 RP 485, ln. 3-5; p. 533, ln. 24 to p. 534, ln. 1. A safe was found in the closet that contained $20,000. 6 RP 462, ln. 6-13; p. 462, ln. 25 to p. 463, ln. 3; p. 465, ln. 6-8; 6 RP 489, ln. 11 to p. 490, ln. 25; Ex. 144. Officers were able to open the safe in the front yard. 6 RP 491, ln. 6-9. Inside was a white plastic bag with a Hi Point .44 caliber pistol, loaded and with a spare magazine. 6 RP 491, ln. 11-13. Underneath the gun in the bag was a piece of paper, and when officers lifted that up, underneath there were the stacks of cash that totaled $20,000. 6 RP 491, ln. 18 to p. 492, ln. 2; 7 RP 6-9. In an outbuilding officers found another safe, inside which was a small black box that contained three rounds of 9mm Luger ammunition. 7 RP 530, ln. 16 to p. 532, ln. 13.

Walker's fingerprint was found on the seat belt buckle of the white Buick getaway car. 10RP 1156, ln. 22 to p. 1163, ln. 16; p. 1207, ln. 15 to

p. 1209, ln. 22. A swab from the gearshift of the Buick tested positive for DNA that matched Walker as 1 in 160 quadrillion 10RP 1179, ln. 8 to p. 1180, ln. 8; 11RP 1143, ln. 1246, ln. 4.

Detectives searched an Oldsmobile that was impounded after Finley's arrest and recovered a safe from the trunk that contained $21,830 in paper currency. 6 RP 447, ln. 20-23; p. 453, ln. 5-19; p. 459, ln. 14-22.

d. Walker Was Not Deprived of His Right to A Fair Trial.

For all the foregoing reasons, the slides used in the prosecutor's closing at Walker's trial did not unfairly prejudice him. Walker has failed to meet his burden to show that under the facts of his case, taken in the context of the entire closing argument, the challenged slides were so prejudicial that no instruction could have cured the prejudice. Accordingly, his claim should be denied.

e. Walker's Case Is Distinguishable From ***Glasmann***.

While this case presents a superficial similarity to ***Glasmann***, it is in fact quite different and distinguishable, so that ***Glasmann*** does not control. Unlike ***Glasmann*** Walker's trial was not unfair and therefore Walker's conviction should not be reversed.

Glasmann was charged with first degree assault, attempted first degree robbery, first degree kidnapping, and obstruction for acts perpetrated against his fiancee. ***Glasmann***, 175 Wn.2d at 700. Glasmann did not argue to the jury that he did not commit the acts. ***Glasmann***, 175 Wn.2d at 699, 702-03, 708, 710. Rather, the defense argued that the State overcharged three of the crimes and that Glasmann was only guilty of the lesser included offenses of assault in the third or fourth degree, attempted robbery in the second degree, and unlawful imprisonment. ***Glasmann***, 175 Wn.2d at 699, 702-03, 708, 710.[3] The defense argued that the State's charges did not reflect what, in reality, happened that night, nor did they reflect what the State proved beyond a reasonable doubt happened that night. ***Glasmann***, 175 Wn.2d at 702-03.

Glasmann presented evidence that he lacked the intent necessary to commit the crimes as charged because he consumed alcohol, methamphetamine and ecstasy and the events constituting the crime unfolded rapidly. ***Glasmann***, 175 Wn.2d at 708. Glasmann testified at trial. *See* ***Glasmann***, 175 Wn.2d at 701. Glasmann's testimony was contrary to that of the victim and the State's other witnesses. *See* ***Glasmann***, 175 Wn.2d at 701.

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[3] ***Glasmann*** conceded that he committed the obstructing charge.

It is only with this background in mind that it is possible to understand why the closing in Glasmann's case was prejudicial and why the closing in this case was not.

Because Glasmann was not arguing that he didn't commit the crimes, but rather argued proof beyond a reasonable doubt as to the degrees of the three crimes at issue, the element of his intent when he committed the crimes was critically important to Glasmann's defense. ***Glasmann***, 175 Wn.2d at 708. Therefore, Glasmann's credibility was crucial where it would have been the only direct evidence as to his intent at the time he committed the crimes.

However, in its closing, in ***Glasmann***, in two slides the State used the booking photo that showed Glasmann in an unkempt and bloody condition, combined with captions stating "Do you believe him?," and "Why should you believe anything he says about the assault?" ***Glasmann***, 175 Wn.2d at 706. These slides served to improperly tarnish Glasmann's credibility, not based upon the content of his testimony, but rather because of his unkempt and bloody appearance that visually presented him as unworthy of trust or credibility. ***Glasmann,*** 175 Wn.2d at 705-06.

This error was compounded when, in the course of discussing Glasmann's credibility, the prosecutor misstated the law, when he advised the jury that in order to reach a verdict, it must determine whether the

defendant told "...the truth when he testified." ***Glasmann***, 175 Wn.2d at 701, 710. This argument improperly shifted the burden of proof from the State to Glasmann. *See* ***Glasmann***, 175 Wn.2d at 710. It is well established that such burden shifting is improper. ***Wright***, 76 Wn. App. at 824-26.

Glasmann's unkempt and bloody booking photo was again shown at the end of the slide show three times, with the word "guilty," imposed on it one, two and three times respectively. ***Glasmann***, 175 Wn.2d at 702. This series of slides only reinforced and visually connected Glasmann's untrustworthiness with regard to his credibility to his being undeserving of any verdict other than "guilty."

Moreover, the use of these images was particularly prejudicial to Glasmann because his defense was a rather unusual one, based solely upon the nuanced distinctions that separate degrees of a crime. ***Glasmann***, 175 Wn.2d at 710. In the context of such a defense, the variety and volume of serious errors in the prosecutor's closing cumulatively caused prejudice that rendered the jury's verdict on Glasmann unfair so that a new trial was required.

This case differs from ***Glasmann*** in a number of significant ways. First, Walker's defense was not one of nuanced distinctions between degrees of the crime. Walker's defense was that the State failed to prove

he committed any crime. More specifically, Walker argued that the State failed to prove that he was a participant in or accomplice to the crime. *See* 12RP 1403, ln. 1-2ff.

Additionally, Walker did not testify, so his credibility was not at issue. Accordingly, there was also no contest between his credibility and that of the State's witnesses.

Further, the booking photo of Walker did not present him as unkempt, and bloody. Indeed, the grayscale photo of Walker in the slides at issue is not much different from the picture of Walker taken a week after the crime by the security cameras at the Federal Way Walmart as he entered the store, other than the fact that the security photo was shot from a higher angle. 6RP 375, ln. 9-25. Compare slide 3 with slide 189. Thus, unlike Glasmann's, the photo of Walker is not an inherently prejudicial visual in and of itself that was improperly over-emphasized.

Most importantly, the prosecutor in Walker did not misstate the law and shift the burden of proof to Walker.

Without this confluence of errors, the only thing Walker's case has in common with Glasmann's is that some of the evidentiary photos have captions or statements combined with them. However, even in that regard, the slides in Walker's case are substantially different.

Out of 267 total slides, the only slides in Walker's case that combine text with an exhibit are slides nos. 3, 15, 65, 106, 178, 179, 180, 232, 261, 264, 265, and 266. The slides can be divided into four types.

First, slides 3, 265, and 266 have a quote from Walker overlaid on a photograph.

Second, slides 65, 106, and 232 have photos of Walker at the center surrounded by photos or text with arrows connecting the surrounding material to Walker by pointing toward Walker's photo, however, none of the text or graphics are superimposed over Walker's photo.

Third, slides 15, 178-180, and 264 have a photo with a caption, and/or summary of the money recovered overlaid on it.

Fourth, slide 261 has a puzzle background, each piece of which is labeled with a description of some of the evidence against Walker. Overlaid on that is the photo of Walker, and on top of that is the phrase "guilty beyond a reasonable doubt."

The first group of slides, nos. 3, 265, and 266, do not go outside the record because both the photos and the quotes are part of the record. The presentation of those slides does not render the prosecutor an unsworn witness. *See, e.g.* Gershman, Bennett L., PROSECUTORIAL MISCONDUCT, Second Edition, 2009-10 ed., § 11:32, p. 525, c. 2009 Thompson

Reuters/West. Thus, the slides at issue here differ from those in Glasmann, where it was the prosecutor's statements in the caption.

The second group of slides, nos. 65, 106, and 232, do not "alter" the photos because no text or graphic is overlaid on the photos. The photos are juxtaposed next to each other with connecting arrows, much as they might be if set on the sill of an easel, blackboard, etc. or taped on a board, wall, etc. The arrows and text have not been used to modify the image. Accordingly, there is nothing improper in these slides either.

The third set of slides, 178 to 180, and 264 overlay the prosecutor's text on the images. However, in two of the slides the underlying photo is of the money recovered, while the text consists of a caption and a summary of various breakouts of the money. Slides 180 and 264 have a picture of the victim, Kurt Husted in the background. Slides 178 to 180 all have the caption, "stolen from Kurt Husted." It is hard to see how they effect any particular unfair prejudice to Walker where they are showing what was taken (the money) and from whom (Kurt Husted).

Slide 15 has just the caption that, "money is more important than human life" superimposed over the photo of the money. This slide too does not impose any unfair prejudice of significance on Walker. The statement is not particularly inflammatory, but rather descriptive of the

fact where there was ample evidence that Walker directed his accomplices to shoot the guard and take the money.

Nor did slide 264 impose any significant unfair prejudice on Walker. It gives a summary of which accomplice received how much of the total under the heading, "defendant's greed and callous disregard for human life." The statement is not inflammatory. It merely argues in a measured way, that human life wasn't even a consideration in conducting the robbery.

The fourth type of slide was a single slide, no. 261. It contains Walker's photo over which the puzzle pieces sequentially appear, thereby covering up Walker's photo. The puzzle pieces each contain a caption summarizing some of the evidence against Walker. Walker's photo then reappears on top of the puzzle. Finally, Walker's photo is overlaid with the text, "Guilty Beyond A Reasonable Doubt."

This slide is most comparable to the slides in Glasmann that had the word "Guilty" imposed from one to three times over Glasmann's photo. However, this slide too is significantly different from the slides at issue in ***Glasmann***.

Walker's photo did not present him as bloody and unkempt, as did Glasmann's. The phrase overlaid on Walker's photo refers to "reasonable doubt" thus referencing the State's burden of proof. Because of this, it

does not constitute an expression of personal opinion as was the case with the use of the word "Guilty" in ***Glasmann***. Moreover, that context is further reinforced by the interlocking puzzle pieces, each of which refers to the evidence against Walker.

The inclusion of the reasonable doubt standard takes the word "guilty" out of the realm of opinion it had when it stood alone in ***Glasmann***. By itself, the word "guilty" was susceptible of interpretation as an assertion of fact separate from the evidence, in a way that it is not when used in reference to the reasonable doubt standard and the evidence in the case. It is perhaps also worth mentioning that because the word "reasonable" extends beyond the photo on both sides, it appears more clearly as an overlay on the photo separate from it, rather than as an inherent part of the photo. This difference too serves to demarcate the phrase as argument.

Thus, even if the court were to hold that any of the slides in Walker were improper under ***Glasmann***, none, either individually or cumulatively were improperly prejudicial in the way that the slides in ***Glasmann*** were in the context of the issues in that case.

Here, the jury also received the standard instruction advising it that the closing arguments are only that, and not evidence and that it is to rely on its own recollection of the facts in the case. Jury Instruction 1, CP 203.

Walker has failed to demonstrate that he was unfairly prejudiced. Indeed, he demonstrates no prejudice in his supplemental brief, instead merely asserting, without explaining how, that he was prejudiced. Defense counsel did not object to the slides at trial precisely because they were not unfairly prejudicial. Moreover, the defense has not asserted a claim of insufficient evidence in this case.

Moreover, Walker has certainly has failed to show that the challenged slides were so prejudicial that no instruction could have cured them. Accordingly, Walker is unable to meet his burden to show that he was unfairly prejudiced to such a degree that he was deprived of his right to a fair trial. For this reason, Walker's claim should be denied as without merit.

3. THE CASE LAW OF OTHER JURISDICTIONS INTERPRETING THE RIGHT TO A FAIR TRIAL ALSO SUPPORTS THE PROPRIETY OF THE CLOSING IN THIS CASE.

a. Other Jurisdictions require an express, self-referential subjective expression for a prosecutor's statement to constitute an expression of personal opinion.

i. Federal Courts

The United States Supreme Court precedent on this issue is discussed in detail above. Accordingly, the review here is limited to the additional federal case law.

The various other federal cases fall into four general types. First, those which held that a prosecutor's apparent statement of opinion by use of explicit self-referential opinion language, such as "I think," "I believe," etc. was in fact not an improper expression of opinion, but rather argument. Second, cases in which the prosecutor's statement did not use explicit self-referential statements such as "I think," or "I believe" and was held not to be an expression of personal opinion. Third, cases in which the prosecutor improperly expressed a statement of personal opinion, but it did not deprive the defendant of a fair trial. Fourth, cases in which the prosecutor's statement was an improper expression of personal opinion and it did deprive the defendant of the right to a fair trial.

(a) Explicit self-referential statements such as "I Think," or "I Believe" that were held not to constitute an improper expression of personal opinion.

Cases of this type include:

U.S. v. Bernal-Benitez, 594 F.3d 1303, 1315 (2010) (holding "And I think the evidence is overwhelming that they were all there to buy cocaine" statements were simply argument, stating conclusions the jury should draw, and were entirely proper).

U.S. v. Younger, 398 F.3d 1179 (9th Cir. 2005) (holding that it was not an improper expression of opinion or vouching where prosecutor

repeatedly used the phrase "we know" in summarizing the facts showing defendant's guilt as the phrase was used to marshal admitted evidence.)

(b) Statements that did not use explicit self-referential statements such as "I Think," or "I Believe," which statements were held not to be an expression of personal opinion.

Loggins v. Cline, 568 F.Supp.2d 1265 (2008) (prosecutor's act of writing "guilty" on a chalk board during closing was not improper because the act related to a discussion of the evidence).

The court held that it was not an improper statement of personal opinion for the prosecutor to state:

> Ladies and Gentleman, the government submits to you that it's presented a case of manufacture, it's presented a case of possession with intent of a mixture or substance containing a detectable amount of methamphetamine in excess of 500 grams, and that man is guilty of it.

U.S. v. Sherrill, 388 F.3d 535, 538 (6th Cir. 2004). [Emphasis added.]

Fahy v. Horn, 516 F.3d 169, 203-04 (3rd Cir. 2008) (holding that statement in closing "Is that believable?" in regard to defendant's testimony and also characterizing defendant's testimony as "lies" was not improper and did not violate the defendant's right to due process because where a defendant testifies, a prosecutor may attack his credibility to the same extent as any other witness, so that the statements were not an expression of personal opinion).

Mogenstahl v. Mitchell, 688 F.3d 307 (6th Cir. 2012) (prosecutor may assert that a defendant is lying when emphasizing discrepancies between the evidence and the defendant's testimony, but only so long as such comments reflect reasonable inferences from the evidence adduced at trial).

Cristini v. McKee, 526 F.3d 888 (6th Cir. 2008) (holding not improper and moreover not prejudicial the prosecutor's arguments that defense alibi witnesses were "unbelievable," "lying," "a liar," testimony "was bogus," "commit[ed] perjury," and calling the defendant a liar multiple times, where the argument was based on the evidence and none of the comments would create an impression that the prosecutor knew of evidence not presented to the jury).

Referring to the defendant as a liar several times throughout closing was reasonable and not an expression of opinion where they were based on the evidence, which the prosecutor demonstrated by carefully walking the jury through the evidence and pointing out inconsistencies. ***U.S. v. Moreland***, 509 F.3d 1201, 1214-15 (9th Cir. 2007), *vacated on other grounds*, 555 U.S. 1134, 129 S. Ct. 997, 173 L. Ed. 2d 289 (2009).

"Impermissible vouching occurs only when 'the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' credibility, either through explicit personal assurances of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witness' testimony'" ***Patton v. Mullin***, 425 F.3d

788, 813 (10th Cir. 2005) (quoting ***United States v. Bowie***, 892 F.2d 1494, 1498 (10th cir. 1990)).

(c) Statements In Which The Prosecutor Improperly Expressed A Personal Opinion, But It Did Not Deprive The Defendant Of A Fair Trial

U.S. v. Warshak, 631 F.3d 266, 303-308 (6th Cir. 2010) (holding improper but harmless the statement "Do I believe that these people were weak, that they sought self-aggrandizement, personal gain, and they sought it at the expense of other people consumers? And, in fact, it's okay to lie to banks, because who cares about them anyway? Do I believe that they believe that? Yes.")

U.S. v. Wright, 625 F.3d 583, 609-14 (9th Cir. 2010) (holding improper but not prejudicial the prosecutor's statements regarding his reference to his experience in prior trials as improperly introducing evidence outside the record as a means of commenting on the defense case and defendant's credibility, as well as his repeated reference to how he viewed the evidence).

The prosecutor made statements, in closing that "I feel comfortable and the United States feels comfortable that they have proven beyond a reasonable doubt that this man delivered five kilograms of cocaine...," and in rebuttal that "...that is what matters. I have proven it, absolutely. We

have met our burden." On appeal, the government conceded error, however, the court held that the remarks did not likely affect the outcome of the trial. ***U.S. v. Andujar-Basco***, 488 F.3d 549 (1st Cir. 2007).

See also ***U.S. v. Hermanek***, 289 F.3d 1076, 1097-1102 (9th Cir. 2002).

(d) Statements Of Personal Opinion That Did Deprive The Defendant Of The Right To A Fair Trial.

Bates v. Bell, 402 F.3d 635 644 (6th Cir. 2005) (throughout summation in death penalty case prosecutors appealed to the fears of individual jurors and emotion, repeatedly argued that the jurors would be responsible for the murders the defendant would inevitably commit unless sentenced to death, and suggesting that failure to support the death penalty would make the jurors "accomplices to his current and future crimes).

Where the prosecutor told the jury on four separate occasions what he "personally believed" and the court refused to give a curative instruction, the defendant was denied due process. ***United States v. Gonzalez Vargas***, 558 F.2d 631, 632-33 (1st Cir. 1977).

At the outset of closing the prosecutor stated "We, first of all, heard from Officer Kelly, Metro officer; credible police officer." This statement was objected to, and the court directed the prosecutor not to vouch, but overruled the objection. The prosecutor then went further:

> They had no reason to come in here and not tell you the truth. And they took the stand and they told you the truth. I guess, if you believe Mr. Valladeres [defense counsel], they must have lied at the scene there; they came into this court and they lied to you; they lied to this judge; they lied to me; they lied to my agent, Agent Baltazar. I guess they lied to the dispatcher when they called it in. These are officers that risk losin' their jobs, risk losin' their pension, risk losin' their livelihood. And, on top of that if they come in here and lie, I guess they're riskin' bein' prosecuted for perjury. Doesn't make sense because they came in here and told you the truth, ladies and gentlemen.
>
> The prosecutor made additional statements, as well.
>
> [Taylor's] statement about being threatened I don't believe is truthful, ladies and gentlemen.
>
> The point, ladies and gentlemen is he told the truth in that handwritten statement that he gave on that morning, he told the truth when he came into the Grand Jury under oath, and he was in front of you today and told the truth to you.

U.S. v. Weatherspoon, 410 F.3d 1142 (9th Cir. 2005) (holding that vouching arose from the implication that the prosecutor knew what he consequences would be for the officers). *See also* ***United States v. Gonzalez-Gonzales***, 136 F.3d 6, 10 (1st Cir. 1998) (collecting cases of prosecutorial misconduct in closing).

b. Other Jurisdictions Have Held That Visuals That Were Not Admitted At Trial May Be Used In Closing Without Violating A Defendant's Right To A Fair Trial.

i. Other Federal Courts

The side by side presentation in closing of pictures of the defendant's daughter and a luxury car he leased, just above the defendant's statement that he was not going to use his "life lines" to pay child support was held not to be improper. ***U.S. v. Hanna***, 630 F.3d 505 (7th Cir. 2010)

Prosecution's use during closing argument of collage that contained previously admitted photos, one of the robbery suspect, and another with an image of the defendant in a similar pose was proper. Moreover, charts or summaries presented during closing argument may include assumptions and conclusions that are based upon evidence in the record. ***U.S. v. McGhee***, 532 F.3d 733 (8th Cir. 2008).

A prosecutor's statements involving misdescriptions of the evidence will ordinarily be sufficiently corrected by a jury instruction where the evidence was not intentionally misstated. ***Olszewski v. Spencer***, 466 F.3d 47 (1st Cir. 2006).

ii. Other State Courts

Prosecutor's use of computerized presentation during closing argument, which summarized testimony in arson trial, did not constitute prosecutorial impropriety. ***State v. Francione***, 46 A.3d 219 (2012).

Prosecutor's time line chart used during closing in murder trial served as a useful, non prejudicial aid to jurors where there was no showing that it was an inaccurate reflection of argument. ***Com. v. Lao***, 948 N.E.2d 1209 (2011).

c. The PowerPoint Closing In This Case Did Not Constitute An Attempt To Inflame Passions Under The Law of Other Jurisdictions

i. The United States Supreme Court

The proper standard of review is the narrow one of due process, not the broad exercise of the court's supervisory power. ***Darden v. Wainwright***, 477 U.S. 168, 181, 106 S. Ct. 2464 (1986) (citing ***Donnelly v. DeChristoforo***, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). In ***Darden***, the prosecutor made a number of statements that the court considered highly improper and deserving of the condemnation they received from every court to review them. Those comments are as follows:

> As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons.... Can't we expect him to stay in a prison when they go there? Can we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" "Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them.

> I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose.
>
> As far as I am concerned, and as Mr. Maloney said as he identified this man this person, as an animal, this animal was on the public for one reason.
>
> He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.
>
> I wish [Mr. Turman, [the victim]] had had a shotgun in his hand when he walked in the back door and blown his [Darden's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun.
>
> I wish someone had walked in the back door and blown his head off at that point.
>
> He fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself.
>
> I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time.
>
> [D]on't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat.

Even so, the court agreed with every prior court to consider the case, that even these extreme comments did not deprive the defendant of the right to a fair trial. "The prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the

accused such as the right to counsel or the right to remain silent." ***Darden***, 477 U.S. at 182. This was because much of objectionable content was invited by or responsive to the summation of the defense. ***Darden***, 477 U.S. at 182. "The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence." ***Darden***, 477 U.S. at 182. Additionally, the defense was able to use much of the prosecutor's closing argument against them in a manner more likely to engender disapproval of the State than inflame passions against the petitioner. For these reasons, the United States Supreme Court agreed with the district court below that "Darden's trial was not perfect-few are-but neither was it fundamentally unfair." ***Darden*** 477 U.S. at 182.

i. Other Federal Courts

Fahy v. Horn, 516 F.3d 169 (9th Cir. 2008) (holding the right to a fair trial was not violated by the prosecutor's statement "...that the representative of Satan" is sitting right over there [in defendant's seat] where it was responsive to defense counsel who first argued that the perpetrator of the crime was "some representative of Lucifer or Satan" and the prosecutor argued that the evidence in the case indicated that it was the defendant who was such).

Kellogg v. Skon, 176 F.3d 447, 451-52 (8th Cir. 1999) (referring to defendant as a "monster," "sexual deviant," and "liar" created inflammatory prejudice, but did not render trial unfair).

4. THE COURT SHOULD CONSTRUE ***IN RE GLASMANN*** AS NARROWLY APPLICABLE TO THE FACTS OF THAT CASE WHERE A BROAD READING OF ***GLASMANN*** WOULD BE CONTRARY TO ESTABLISHED PRECEDENT.

For the reasons stated above, this court should construe the court's opinion in ***Glasmann*** narrowly as limited to the facts of that particular case. Specifically, the court should construe the prejudice Glasmann as arising from the combined confluence of the fine distinctions between degrees of the crimes relevant to his defense, his credibility as essential to that defense, the prosecutor's misstatement shifting the burden of proof, and the use of the inherently prejudicial photo of Glasmann, that shows him unkempt and bloodied.

Any broader interpretation ***Glasmann*** would put it in conflict with the substantial body of well established precedent on prosecutorial misconduct in closing.

5. THE PROSECUTOR'S CONDUCT HERE WAS NOT FLAGRANT AND ILL-INTENTIONED WHERE STANDARD RESOURCES AVAILABLE TO PROSECUTORS PRIOR TO CLOSING CONTAINED NOTHING TO SUGGEST THE SLIDES WERE IMPROPER.

a. Neither The ABA's Model Rules, Nor The Washington Rules Of Professional Conduct Expressly Prohibited The Prosecutor's Conduct In ***Glasmann.***

i. The Closing Here Did Not Violate The ABA Model Rules.

The opinion in ***Glasmann*** cites to the American Bar Association Standards for Criminal Justice. ***Glasmann***, 175 Wn.2d at 706. Unlike court rules, which will often identify the scope and purpose of the rule and thereby provide guidance for their application, the ABA Standards contain no provision identifying the proper scope or application of the standards. However, the introduction does address the background, history and purpose of the standards. One of the separately bold-faced titled sections of the introduction is "The Suggestive --Nonmandatory--Philosophy of the Standards." ABA Standards for Criminal Justice, 2nd ed. p. xix-xx. [Hereinafter "Standards for Criminal Justice."] That section begins:

> Precisely how a jurisdiction may choose to implement these standards and to what degree is its choice alone. It can do so by translating the standards into a code, by incorporating the principles of the standards into rule of court or practice, or by encouraging its judicial officers to look to the standards as authority in deciding appropriate cases before them.
>
> [...]

[...]

> *[T]he Standards are a balanced, practical work intened to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual. Taken as a whole, they can be utilized by the varioius states and the federal system to elevate criminal justice to a new level--one that is reasonable, workable, and above all fair. They are valuable tools to undertake the massive task of overhauling the entire criminal justice system. They need not be accepted on an "all or nothing" basis but used as a resource for improvement.*
> [quoting Burger, Warren E. Introduction: The ABA Standards for Criminal Justice, 12 Am. Crim. L. Rev. 251, 251-52 (1974).]

> Consistent with that philosophy, the standards are not model codes or rules, and hence were not drafted in such language. Rather, they are guidelines and recommendations intended to help criminal justice planners design a system, set goals and priorities to achieve it, and propose procedures for adoption by the legislature, courts, and practitioners to operate and keep it viable--all targeted toward achieving a criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future.

> Continuous reevaluation, adjustment, and growth are vital characteristics of the criminal justice system if it is to effectively accommodate the dynamics of human growth and cultural evolution. [...]

ABA Standards, 2nd ed. p. xix-xx.

The express statement within the introduction to the standards itself is consistent the position of the United States Supreme Court when

considering challenges relating to the right to a fair trial, "...'American Bar Association Standards and the like' are 'only guides' to what reasonableness means and not its definition." ***Bobby v. Van Hook***, 558 U.S. 4, 16, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009) (reversing the Sixth Circuit's application of ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, rev. ed.2003 to an assessment of ineffective assistance of counsel under the Sixth Amendment, and quoting ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Such restatements are only guides of a general advisory nature and may serve as evidence of what a reasonable attorney may do, but are not "inexorable commands" with which all counsel must comply. *See* ***Bobby v. Van Hook***, 558 U.S. at 17 (citing ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

> Restatements of professional standards...can be useful as "guides" to what reasonableness entails, but only to the extent that they describe the professional norms prevailing when the representation took place.
> [...]

See ***Bobby***, 558 U.S. at 16. The court emphasized that with regard to the question of whether the defendant received a fair trial, the same is true of State standards of professional conduct for counsel as well as the standards of private organizations:

> "[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices."

Bobby, 558 U.S. at 17 (quoting ***Roe v. Flores-Ortega***, 528 U.S. 470, 479, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)). The touchstone is the constitutional right to a fair trial, not whether particular advisory guidelines, or even obligatory State rules were violated.

Although the Standards for Criminal Justice are merely advisory guidelines, the courts have looked to them as one source of guidance with regard to issues of prosecutorial misconduct. *See, e.g.,* ***U.S. v. Young***, 470 U.S. 1, 7, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). As the court in ***Young*** indicated, the Standards of Criminal Justice are useful guidelines which can compliment codes of professional responsibility and the efforts of the federal courts with regard to issues of prosecutorial misconduct. *See* ***Young***, 470 U.S. at 8.

The Standards for Criminal Justice include six chapters, one of which is on "The Prosecution Function." Standard 3-5.8(c) pertains to the prosecutor's argument to the jury. The court in ***Glasmann*** first quoted the language of standard 3-5.8(c) at the beginning of the court's analysis. [4] ***Glasmann***, 175 Wn.2d at 704. It provides: "The prosecutor should not

use arguments calculated to inflame the passions or prejudices of the jury."

The court later quoted from a portion of the general commentary to Standard 3-5.8 as a whole. ***Glasmann***, 175 Wn.2d at 706. The complete paragraph from which the quote in ***Glasmann*** was excerpted is as follows:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office. Unfortunately, some prosecutors have permitted an excess of zeal for conviction or a fancy for exaggerated rhetoric to carry them beyond the permissible limits of argument. Of course, a prosecutor must be free to present arguments with logical force and vigor. As the Supreme Court has remarked, however, "while he may strike had blows, he is not at liberty to strike foul ones." To attempt to spell out in detail what can and cannot be said in argument is impossible, since it will depend largely on the facts of each case. Nevertheless, certain broad guidelines based on the function of argument and the experience of courts in typical situations can be established.

---

[4] The complete text and commentary pertaining to standard 3-5.8 are attached as Appendix B.

Standards for Criminal Justice, std. 3-5.8, p. 3-89. Moreover, the specific comment with regard to subsection (c) relating to appeals to passion or prejudice is as follows:

> Arguments that rely on racial, religious, ethnic, political, economic, or other prejudices of the jurors introduce into the trial elements of irrelevance and irrationality that cannot be tolerated. Of course, the mere mention of the status of the accused as shown by the record may not be improper if it has a legitimate bearing on some issue in the case, such as identification by race. But where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused or the accused's witnesses, such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence. Accordingly, many courts have denounced such appeals to prejudice as inconsistent with the requirement that the defendant be judged solely on the evidence.

Standards for Criminal Justice, std. 3-5.8, p. 3-90.

ii. The Closing Here Did Not Violate The ABA Model Rules On Professional Conduct.

Rule 3.4(e) provides in pertinent part that:

> A lawyer shall not:
> [...]
> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge or facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;
> [...]

Bennet, Cohen, and Whittaker, Annotated Model Rules of Professional Conduct, 7th ed., pub. American Bar Assoc., c. 2011. [Hereinafter "Annotated Model Rules."] The comment to rule 3.4 does not reference subsection (e). However, there is an annotation to subsection (e). A complete copy of the rule and annotation is attached as Appendix A.

iii. Washington's RPC 3.4

Washington's RPC 3.4, is identical to the ABA's model rule, except that subsection (f) is reserved.

b. Nothing In The Standard Reference On Prosecutorial Misconduct Would Suggest To A Prosecutor That The Slides Or Statements Challenged In This Case Are Improper.

Arguably the most commonly relied upon treatise resource on prosecutorial misconduct is Bennett L. Gershman's PROSECUTORIAL MISCONDUCT, 2nd Edition, c. 2009 Thompson Reuters/West. Closing argument in Walker's trial occurred on March 23, 2011. Thus, at the time the State was preparing its closing, the copy most likely available the Prosecutors in Walker's case was the 2009-2010 edition.

Gershman thus serves as a valuable resource with regard to whether the prosecutor's conduct was flagrant and ill-intentioned where it is the primary resource compiling what is, and what is not permissible for

prosecutors to do in closing. As Gershman clearly indicates, a prosecutor expresses a personal opinion on the defendant's guilt by the use of an explicit, self-referential subjective statement such as, "I believe," "I think," etc. Gershman § 11:26.

Nothing in Gershman would suggest it is improper for a prosecutor to assert the defendant's guilt where such is done without the use of self-referential phrases such as "I believe," or "I think." Certainly, nothing in this passage would give a prosecutor cause to believe that the use of the statement "guilty beyond a reasonable doubt" is an improper expression of personal opinion about Walker's guilt.

Similarly, nothing in Gershman would suggest to a prosecutor that the combination of text with an exhibit would constitute the introduction of material from outside the record.

> A prosecutor's argument must be confined to the facts in the record, reasonable inferences from those facts, and matters of common public knowledge. It is improper for a prosecutor to misstate the evidence, misrepresent the issues, mislead the jury or argue on the basis of facts outside the record.

Gershman, § 11:28. A prosecutor may not comment on matters outside the four corners of the record. Gershman § 11:32. Here, the prosecutor had no reason to believe that the slides, with text laid over

images, was improper because the slides did not introduce any new or different facts or matters outside the record.

Third, nothing in Gershman would suggest to a prosecutor that the slides used here would constitute an attempt to inflame the jury. Certainly, "A prosecutor is forbidden to use arguments calculated to inflame the fears, passions, and prejudices of the jury." Gershman §11:2, p. 480. However, the cases listed in the footnote provide illustrative examples of things like "insinuation that defendant did not work, was heavy drinker, and a deadbeat," "reference to defendant's association with Hell's Angels motorcycle gang," insinuating member in drug gang, referring to defendant as Saddam Hussein, etc. None address the use of visuals in closing as somehow inherently calculated to inflame the passions of the jury. Gershman, § 11:2 n. 1.

The sections following § 11:2 go on address the most common examples of inflammatory appeals. They include: Name calling and abuse (§ 11:3); Law and order appeals (§ 11:4); Insinuation of threats and violence against witnesses (§ 11:5); Appeals to racial prejudice (§ 11:6); Appeals to religious, ethnic, and gender prejudices (§ 11:7); Appeals to patriotism (§ 11:8); Appeals to wealth and class bias (§ 11:9); Appeals to jurors as parents (§ 11:10). None of these sections even remotely deal

with the idea that certain types of visual presentations outside these categories are somehow inherently inflammatory against the defendant.

Gershman serves as yet another resource that demonstrates that the prosecutor's conduct was not flagrant and ill-intentioned where nothing in that standard treatise on prosecutorial misconduct would suggest to a responsible prosecutor that the presentation was improper.

c. The Challenged Slides Are Substantially Similar To Visuals That Have Been Encouraged For Prosecutor's Proper Use In Closing By The National College Of District Attorneys.

The former National College of District Attorneys is the publisher of a book entitled VISUALS FOR TODAY'S PROSECUTORS, by Ronald E Bowers, c. 2003 (hereinafter VISUALS).[5] Copy attached as Appendix C. That book discusses the use of visuals at trial, provides examples, and includes a CD of sample images in digital format that can be used as slides in digital slide shows, or that can be printed as posters, etc.

The book is a significant resource for the use of visuals in closing by prosecutors. A number of the slides in the slide show used by the prosecution in closing at Walker's trial are substantially similar to those

[5] Apparently the National College of District Attorneys is now the National District Attorneys Association. See http://www.ndaa.org/nationa._training_bios2.html. From the "Publications" page on their web site, the book does not appear to currently be in print. http://www.ndaa.org/publications.html.

discussed and recommended in the book. This includes a number of the slides at issue in this claim.

See, e.g. images 2-22 (p. 22); 2-27, 2-28, 2-29, 2-30 (pp. 24-25); 2-31 (p. 26); 2-37, 2-38, 2-39, 2-40 (p. 29); 4-9 (p. 85); 4-12 (-. 87); 4-21, 4-23, 4-24 (p. 91); 4-27 (p. 92); 4-35, 4-36 (p. 96); 4-38 (p. 97); p. 103; 5-13, 5-14 (p. 110); 5-18, 5-19 (p. 112); 5-23 (p. 113); 6-5, (p. 119); 6-7 (p. 120); 6-13 (p. 122); 6-35 (p. 132); 6-38 (p. 134); 4-25 (p. 91); 4-28 (p. 92); 4-39, 4-40 (p. 98); 4-42 (p. 99); 6-33 (p. 131); p. 117; 6-31 (p. 130); p. 142; 143; 7-1, 7-2 (p. 144); 7-5 (p. 145); p. 149; p. 151; p. 155; p. 156; p. 159; p. 161; 7-32 (p. 162); p. 165; p. 166; p. 167; 7-53 (p. 174); 7-56, 7-57 (p. 175).

Moreover, Chapter 9 discusses using posters in trial. Much of the discussion is focused on what it refers to as "action visuals" which are charts that consist of various pieces that are affixed with Velcro or repositional tape and are sequentially added or removed for demonstrative effect. *See* p. 203, 208, 212. These can include a photo of the defendant, or other evidence as one of the pieces. *See* p. 204. They can also end with a piece that consists of the word "guilty." *See* VISUALS, p. 204, p. 206.

Chapter 9 is followed by Chapter 10, which discusses computer slide shows. The second paragraph of that chapter contains the sentences contrasting computer slide shows to older, photographic slide shows:

"Computer slides could be animated...so text and objects could be revealed on the slide either by a click of a remote or automatically. This allowed the presenter to control what the audience saw and when they saw it." VISUALS, p. 220.

The clear implication is that electronic slide shows are merely an electronic extension of action visuals. Electronic visuals have the advantage of being controlled better so that electronic visuals can be presented more effectively than poster visuals, but additionally, electronic visuals can modified quickly and easily in short time, unlike posters that took time to change and print. VISUALS, p. 220. The point is that it should be appropriate for the prosecutor to do the same thing with electronic visuals as with tangible posters.

The book also includes a CD-ROM of sample slide shows. The CD-ROM contains a sample slide show entitled Photo Displays, which includes a slide on using photos as a background image with textual overlay. *See* [Drive letter]:\VIP - CD\2. Taining\3.Graphics\4. Photos\ 4. Photos.ppt.[6]

Compare Walker slide 198, 260 and 261 with images 4-33 (p. 95), 7-24 (p. 157), and digital image [Drive letter]:\VIP - CD\2. Training\4.

[6] The court should be forewarned that the PowerPoint presentation entitled "4 Photos.ppt" contains a number of photographic images of an extremely graphic nature that appear to be crime scene or autopsy images of victims from actual homicide cases.

Argument\Argument.ppt, slide 66. Compare Walker slide 206 with image 5-24 (p. 114)), and digital image [Drive letter]:\VIP - CD\3. Database\1. Charts & Slides\Murder\Guilt Phase\Murder Terms\0 Premeditation.ppt. Compare Walker slide 232 with image 4-28 (p. 92), and digital image [Drive letter]:\VIP - CD\2. Training\4. Argument\Argument.ppt, slide 57.

Because the slides used by the prosecutor in Walker's closing are substantially similar to those promoted by the National College of District Attorneys as proper for closing, the prosecutor's conduct in Walker was not flagrant and ill-intentioned.

6. TRIAL COUNSEL WAS NOT INEFFECTIVE.

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Moreover, to raise a claim of ineffective assistance of counsel for the first time on appeal, the defendant is required to establish from the trial

record: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. ***McFarland***, 127 Wn.2d at 333-34; ***State v. Riley***, 121 Wn.2d 22, 846 P.2d 1365 (1993).

However, where an appellant claims ineffective assistance of counsel for trial counsel's failure to object to the admission of evidence, the burden on the appellant is even higher. To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: not objecting fell below prevailing professional norms; that the proposed objection would likely have been sustained; and that the result of the trial would have been different if the evidence had not been admitted. ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). To prevail on this issue, the appellant must also rebut the presumption that the trial counsel's failure to object "can be characterized as legitimate trial strategy or tactics." ***In re Personal Restraint of Davis***, 152 Wn.2d at 714 (quoting ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added in original)). Deliberate tactical choices may only constitute ineffective assistance if they fall outside the wide range of professionally competent assistance, so that "exceptional deference must be given when

evaluating counsel's strategic decisions." ***In re Pers. Restraint of Davis***, 152 Wn.2d at 714 (quoting ***McNeal***, 145 Wn.2d at 362).

Trial counsel's failure to anticipate changes in the law does not constitute deficient performance. ***State v. Slighte***, 157 Wn. App. 618, 624, 238 P.3d 83 (2010).

Courts engage in a strong presumption that counsel's representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. ***McFarland***, 127 Wn.2d at 338 n. 5. The burden is on an appellant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. ***McFarland***, 127 Wn.2d at 334.

Where any errors in closing were not prejudicial to Walker in light of the facts of his case, it may have well served defense counsel's tactical interests not to object to the slides in closing. The defense tried to argue that the State's case against Walker all depended upon the testimony of Williams-Irby and that she had received something more valuable than gold or money in exchange for her testimony: her freedom. The defense argued that it was the State that determined the truth. In the context of such an argument it would be a sound tactical decision for defense counsel not to object to the State's closing where the slide did not unfairly prejudice Walker. Had he objected, the State would have clarified its

statement and the court would have merely issued a limiting instruction. By not objecting, the slides served to reinforce the defense argument that the State was overzealous in its pursuit of the case.

Walker has not met his burden to show that he was prejudiced by the slides at issue. He certainly cannot show that he was prejudiced by defense counsel's failure to object to slides.

For this reason, Walkers claim of ineffective assistance of counsel is without merit and should be denied.

D. CONCLUSION.

Walker's claims are without merit. ***Glasmann*** should be construed narrowly lest it conflict with established precedent. The use of the slides here is distinguishable from the prejudice in ***Glasmann*** because the slides at issue in ***Glasmann*** disparaged his credibility, which was significant given the role that intent played in the fine distinctions between the different levels of offense. This was particularly so where the prosecutor's comments in ***Glasmann*** improperly shifted the burden of proof to the defendant, and where the photo of Glasmann was inherently inflammatory, especially as to the issue of credibility, because of his unkempt and bloody appearance.

Here, Walker did not testify, and his credibility was not at issue. The image of him was not inherently prejudicial, with the result that he suffered no prejudice. Accordingly reversal is unwarranted.

Where Walker suffered no prejudice, he also fails to meet his burden to establish a claim of ineffective assistance of counsel. Both his claims should be denied.

DATED: May 20, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

STEPHEN D. TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/20/13 Johnson
Date Signature

Appendix A
ABA Model Rule on Professional Conduct 3.4

Seventh Edition

Annotated Model Rules of Professional Conduct

Ellen J. Bennett
Elizabeth J. Cohen
Martin Whittaker

Center for Professional Responsibility
American Bar Association
www.americanbar.org

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The ABA Model Rules of Professional Conduct, including Preamble, Scope, and Comment, were adopted by the ABA House of Delegates on August 2, 1983, and amended in 1987, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1997, 1998, 2000, 2002, 2003, 2007, 2008, and 2009. The analyses, conclusions, and views expressed in these annotations are those of the American Bar Association Center for Professional Responsibility's research lawyers.

Nothing contained in this book is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This book is intended for educational and informational purposes only.

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Rule 3.4
Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important

procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

ANNOTATION

Rule 3.4 explains the lawyer's duties to adverse parties and counsel to ensure that litigation is conducted fairly. As Comment [1] notes, "[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."

Although Rule 3.4 subjects a lawyer to professional discipline for abusive litigation tactics, it is normally the presiding judge who initially takes the corrective action, such as retrial, exclusion of evidence, disqualification, and payment of monetary sanctions. A court is likely to consider Rule 3.4, as well as other ethics rules, when imposing these litigation sanctions. *See, e.g., Whittenburg v. Werner Enters.*, 561 F.3d 1122 (10th Cir. 2009) (ordering retrial because of lawyer's improper closing argument); *Mezu v. Morgan State Univ.*, 269 F.R.D. 565 (D. Md. 2010) (threatening monetary sanctions against lawyers for all parties for abusive deposition behavior); *Briggs v. McWeeny*, 796 A.2d 516 (Conn. 2002) (affirming disqualification of lawyer who attempted to prevent dissemination and production of report adverse to client's interests).

Subsection (a): Alteration, Destruction, or Concealment of Evidence; Obstruction of Another's Access to Evidence

DESTRUCTION OR ALTERATION OF EVIDENCE

Subsection (a) of Rule 3.4 prohibits a lawyer from altering or destroying "a document or other material having potential evidentiary value." *See In re Enna*, 971 A.2d

110 (Del. 2009) (lawyer subject to order of protection destroyed tape recording of argument with his wife); *In re Zeiger*, 692 A.2d 1351 (D.C. 1997) (lawyer altered client's medical records and submitted them to opposing party's insurance company); *Idaho State Bar v. Gantenbein*, 986 P.2d 339 (Idaho 1999) (lawyer in personal injury case intentionally altered medical report and submitted it to opposing counsel); *Ky. Bar Ass'n v. Yocum*, 294 S.W.3d 437 (Ky. 2009) (lawyer used medical reports "prepared not by physicians, but by [lawyer] himself" in lawyer's own personal injury case); *Attorney Grievance Comm'n v. White*, 731 A.2d 447 (Md. 1999) (lawyer who was plaintiff in employment discrimination case destroyed portions of autobiographical manuscript relevant to her claims); *In re Caranchini*, 956 S.W.2d 910 (Mo. 1997) (lawyer used forged document to support client's claim); *Disciplinary Counsel v. Robinson*, 933 N.E.2d 1095 (Ohio 2010) (lawyer being sued by his former firm destroyed documents he took from firm); *In re Disciplinary Proceeding against Poole*, 125 P.3d 954 (Wash. 2006) (lawyer backdated accounting paperwork of former client who sued lawyer in dispute over fees); *Lawyer Disciplinary Bd. v. Smoot*, No. 34724, 2010 WL 4679256 (W. Va. Nov. 17, 2010) (defense lawyer disassembled and produced only portion of independent medical examination of pro se black lung claimant); Mich. Informal Ethics Op. RI-345 (2008) (lawyer's complying with request of CEO of corporate client to return discoverable documents so that he may destroy them would violate Rule 3.4(a)).

• *Duty to Safeguard Physical Evidence of Client Crimes*

In 2002, language was added to Comment [2] calling attention to the law regarding a lawyer's possession of physical evidence of client crimes. The new language states that "[a]pplicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances." *See In Re Olson*, 222 P.3d 632 (Mont. 2009) (lawyer's failure to turn over photographs removed from client's residence did not violate rule; lawyer "was not, at that point in the proceedings, obligated to turn the items over to the police or prosecutor by virtue of a statute or court order"); *cf.* W. Va. Ethics Op. 98-02 (1998) (obligation of criminal defense lawyers who have fruits or instrumentalities of crime "involves a resolution of two competing important public policies: the policy supporting the attorney-client privilege and the policy which prohibits an attorney from engaging in the obstruction of justice"); *Restatement (Third) of the Law Governing Lawyers* § 119 (2000) (when reasonably necessary, lawyer may take possession of physical evidence of client's crime and retain it for reasonable period; lawyer may conduct tests "that do not alter or destroy material characteristics of the evidence," but must notify prosecuting authorities and turn evidence over to them).

OBSTRUCTING ANOTHER PARTY'S ACCESS TO EVIDENCE

According to Rule 3.4(a), a lawyer may not "unlawfully obstruct another party's access to evidence . . . ." *See In re Stover*, 104 P.3d 394 (Kan. 2005) (lawyer disobeyed court order to give former client access to computer lawyer used for client's represen-

tation); *Attorney Grievance Comm'n v. Protokowicz*, 619 A.2d 100 (Md. 1993) (lawyer helped former client break into former client's wife's house to remove documents useful as evidence in client's pending divorce); *In re Forrest*, 730 A.2d 340 (N.J. 1999) (lawyer failed to notify opposing counsel of death of lawyer's client); *In re Disciplinary Action against Dvorak*, 611 N.W.2d 147 (N.D. 2000) (lawyer violates rule "not only when she denies access to a witness completely, but also when she unlawfully attempts to dissuade a witness from providing particular information"); Ky. Ethics Op. E-422 (2003) (improper for lawyer to issue deposition subpoena duces tecum to nonparty and unilaterally cancel deposition after documents tendered without also disclosing documents to opponent); Phila. Ethics Op. 2008-13 (2008) (plaintiffs' lawyer in case in which common-law marriage contested must inform opponent if clients file separate declaratory judgment action regarding marriage and such action is within scope of discovery requests).

• *Procuring Absence of Witness*

Procuring the absence of witnesses also constitutes the obstruction of evidence in violation of Rule 3.4(a). *See, e.g., Harlan v. Lewis*, 982 F.2d 1255 (8th Cir. 1993) (defense lawyer for one physician in medical malpractice case suggested to other treating physician that he not testify for plaintiffs); *Sanderson v. Boddie-Noell Enters., Inc.*, 227 F.R.D. 448 (E.D. Va. 2005) (plaintiff's lawyer contacted employer of defendant's expert witness and suggested witness's testifying breached employment contract); *In re Geisler*, 614 N.E.2d 939 (Ind. 1993) (lawyer obstructed prosecutor's access to evidence by helping witness become unavailable for service and trial); *In re Jensen*, 191 P.3d 1118 (Kan. 2008) (lawyer told nonparty witness subpoenaed by adversary that witness "did not need to appear at the scheduled hearing unless he heard from" lawyer); *State ex rel. Bar Ass'n v. Cox*, 48 P.3d 780 (Okla. 2002) (lawyer told physician friend that if he testified for lawyer's opponent, lawyer would have to "dig up dirt" about physician); Utah Ethics Op. 99-06 (1999) (as part of plea bargain in DUI case, neither prosecutor nor defense lawyer may seek agreement of police officer to ignore subpoena in defendant's parallel state administrative proceeding); *Restatement (Third) of the Law Governing Lawyers* § 116(3) (2000) ("lawyer may not unlawfully induce or assist a prospective witness to evade or ignore process obliging the witness to appear to testify").

UNLAWFUL CONCEALMENT OF EVIDENCE VERSUS LEGITIMATE FAILURE TO DISCLOSE

Rule 3.4(a) prohibits a lawyer from "unlawfully" concealing material having potential evidentiary value. This does not impose a duty to volunteer all relevant information that a lawyer has, but prohibits concealing potential evidence a lawyer has a legal duty to disclose. *Sherman v. State*, 905 P.2d 355 (Wash. 1995) ("RPC 3.4 does not itself create a duty of disclosure"); *see also Miss. Bar v. Land*, 653 So. 2d 899 (Miss. 1994) (lawyer failed to reveal insurance investigator's report regarding accident in response to interrogatories and document requests asking for such evidence); *In re Carey*, 89 S.W.3d 477 (Mo. 2002) (in response to discovery requests lawyers denied existence of "conversations and documents which had in fact occurred and did exist"); *In Re Olson*, 222 P.3d 632 (Mont. 2009) (lawyer's failure to turn over certain items to prose-

cution not a violation because lawyer "was not, at that point in the proceedings, obligated to turn the items over . . . by virtue of a statute or court order"); *State ex rel. Okla. Bar Ass'n v. Upton*, 991 P.2d 544 (Okla. 1999) (lawyers' withholding subpoenaed documents not a violation because civil procedure statute allowed withholding after proper objection).

COUNSELING OR ASSISTING IN DESTRUCTION OR CONCEALMENT OF EVIDENCE

Rule 3.4(a) prohibits a lawyer from counseling another person to violate, or assisting another person in violating, the other provisions of the subsection. This provision is similar to that of Rule 1.2(d) (prohibiting a lawyer from counseling a client to engage in—or assisting a client in—criminal or fraudulent conduct), and Rule 8.4(a) (prohibiting a lawyer from assisting or inducing person in violating the ethics rules).

Subsection (b): Falsifying Evidence, Assisting with False Testimony, or Offering Unlawful Inducement to Witness

Rule 3.4(b) prohibits a lawyer from falsifying evidence. *See, e.g., Fla. Bar v. Salnik*, 599 So. 2d 101 (Fla. 1992) (disbarring lawyer who used judge's stamp to forge judgment, which he then sent to opposing counsel to intimidate him); *Idaho State Bar v. Gantenbein*, 986 P.2d 339 (Idaho 1999) (lawyer in personal injury case intentionally altered medical report, submitted it to opposing counsel, and republished it in subsequent administrative and federal court proceedings); *In re Swarts*, 30 P.3d 1011 (Kan. 2001) (after learning that evidence consisting of brown paper sack containing handkerchief was missing, county prosecutor brought his own to court and placed it on counsel table during plea change and sentencing hearing); *In re Watkins*, 656 So. 2d 984 (La. 1995) (lawyer made false statements to obtain Social Security benefits for clients); *In re Neitlich*, 597 N.E.2d 425 (Mass. 1992) (lawyer misrepresented to court and to client's ex-wife's counsel purchase price of client's condominium); *In re Disciplinary Action against Fuller*, 621 N.W.2d 460 (Minn. 2001) (lawyer submitted false evidence in disciplinary proceeding).

This prohibition is a counterpart to Rule 3.3's prohibition against offering false evidence. Rule 3.4(b) casts this obligation as being owed to an opposing party and counsel, while Rule 3.3 casts the obligation as part of a lawyer's duty of candor toward a tribunal. A single act, of course, can violate both obligations. *See In re Disciplinary Proceedings against Dynan*, 98 P.3d 444 (Wash. 2004) (lawyer who inflated his hourly rate in fee petition filed in court and served on opponent violated both rules).

COUNSELING OR ASSISTING WITNESS TO GIVE FALSE TESTIMONY

A lawyer may not advise or assist a witness—whether a client or not—to give false testimony. *See, e.g., Goodsell v. Miss. Bar*, 667 So. 2d 7 (Miss. 1996) (lawyer allowed witness to testify about matter lawyer knew to be untrue); *In re Oberhellmann*, 873 S.W.2d 851 (Mo. 1994) (lawyer advised witness to testify falsely concerning residence); *In re Storment*, 873 S.W.2d 227 (Mo. 1994) (lawyer counseled client in divorce action to tes-

tify untruthfully about whether she was involved in adulterous incident); *In re Feld*, 737 A.2d 656 (N.H. 1999) (lawyer stood by as clients testified inaccurately at deposition and then failed to correct record; "a lawyer always has a duty to correct errors created by his client when the attorney learns of them"); *In re Edson*, 530 A.2d 1246 (N.J. 1987) (lawyer counseled and assisted witness to testify falsely during trial); *In re Geoghan*, 686 N.Y.S.2d 839 (App. Div. 1999) (lawyer offered to have client testify falsely in criminal matter in exchange for defendant's settlement of civil matter); *Office of Disciplinary Counsel v. Valentino*, 730 A.2d 479 (Pa. 1999) (lawyer's subornation of perjury violated Rule 3.4(b); lawyer had advised mother to give false testimony at arbitration hearing); *see also In re Disciplinary Action against Moeller*, 582 N.W.2d 554 (Minn. 1998) (lawyer who directed secretary to forge clients' signatures on retainer agreements and counseled client to stage workplace accident disbarred); N.Y. County Ethics Op. 741 (2010) (lawyer who learns client lied in deposition must counsel him to correct testimony and if client will not, lawyer must take other remedial measures); Utah Ethics Op. 03-02 (2003) (lawyer who discovered that medical provider submitted inflated bills to client's insurer must scrutinize future bills to ensure no further false billing). *See generally* W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, within the Bounds of the Law*, 30 Tex. Tech L. Rev. 1343 (1999).

OFFERING ILLEGAL INDUCEMENT TO WITNESS

Rule 3.4(b) also forbids a lawyer from offering to a witness an inducement that is prohibited by law. *See, e.g., Fla. Bar v. Wohl*, 842 So. 2d 811 (Fla. 2003) (lawyer drafted agreement for witness to receive up to $1 million "bonus" if information she provided proved useful); *In re Hingle*, 717 So. 2d 636 (La. 1998) (lawyer bribed witness); *In re Geoghan*, 686 N.Y.S.2d 839 (App. Div. 1999) (lawyer offered to have client testify falsely in criminal matter in exchange for defendant's settlement of civil matter); *In re Disciplinary Proceedings against Bonet*, 29 P.3d 1242 (Wash. 2001) (prosecutor violated Rule 3.4(b) by offering to dismiss criminal charges against potential witness for defendant if witness would absent himself from defendant's trial by invoking witness's right against self-incrimination). Offering lawful inducements does not violate the rule. S.C. Ethics Op. 2008-05 (2008) (defense lawyer may advise client to pay fees of prosecution witness's own lawyer if witness insists his own lawyer be present at interview, to extent such payment "may be legally permissible").

WITNESS FEES

According to Comment [3], "it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee."

• *Occurrence Witnesses*

Most jurisdictions permit occurrence witnesses to be paid for time and expenses incurred as witnesses, provided such payments do not amount to inducements to testify in particular ways. *See, e.g.*, ABA Formal Ethics Op. 96-402 (1996) (nonexpert witness may be compensated for time spent attending trial or deposition or preparing for

testimony if payment not conditioned upon content of testimony and does not violate any law); Ala. Ethics Op. 93-2 (1993) (lawyer may reimburse witness for expenses and lost time, but compensation must be reasonable relative to witness's occupation and normal wages); Ariz. Ethics Op. 97-7 (1998) (lawyer may compensate former employee of corporate client for time spent preparing and testifying at depositions and trial); Cal. Ethics Op. 1997-149 (1997) (lawyer may pay nonexpert witness for preparing for or testifying at deposition or trial if compensation reasonable and not contingent upon content of witness's testimony or outcome of case); Colo. Ethics Op. 103 (1998) (lawyer may compensate nonexpert witness in civil matter for reasonable value of time and expenses if payment not contingent upon witness's testimony or outcome of case, and not prohibited by law); Conn. Ethics Op. 92-30 (1992) (lawyer who drafted will for testator and testified as witness—without representing any party—in subsequent will contest may be compensated for time lost to testify); Del. Ethics Op. 2003-3 (2003) (fact witnesses may be compensated for actual expenses and lost time); N.H. Ethics Op. 1992-93/10 (1993) (lawyer may reimburse fact or opinion witness for attorneys' fees that witness incurred defending contempt action arising out of litigation); Vt. Ethics Op. 2009-06 (2009) (to secure attendance of out-of-state witness, lawyer may offer to reimburse lost wages and pay statutory attendance fees). *But see* Pa. Ethics Op. 95-126 (1995) (Pennsylvania rule does not expressly forbid, but may be interpreted to prohibit, compensating nonexpert fact witnesses for time spent reviewing documents in advance of testimony). *See generally* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 Pepp. L. Rev. 1 (2000).

Accordingly, a witness may not be paid for "telling the truth" or on a contingent-fee basis. *See, e.g., Commonwealth v. Miranda*, 934 N.E.2d 222 (Mass. 2010) (court affirmed verdict notwithstanding that prosecutor certified cooperation of eyewitnesses who then received $2,000 reward for testimony, but held "prosecutors in the future may not provide (or participate in providing) monetary awards to witnesses contingent on a defendant's conviction"); *Comm. on Legal Ethics v. Sheatsley*, 452 S.E.2d 75 (W. Va. 1994) (lawyer acquiesced in payment of compensation to witness contingent upon content of testimony or outcome of case); *see also Golden Door Jewelry v. Lloyds Underwriters*, 117 F.3d 1328 (11th Cir. 1997) (barring use of testimony from paid witnesses was adequate penalty for violating Rule 3.4(b) and did not constitute abuse of court's discretion); *Wagner v. Lehman Bros. Kuhn Loeb Inc.*, 646 F. Supp. 643 (N.D. Ill. 1986) (lawyer disqualified for promising to remit percentage of potential recovery in case to induce witness to "tell the truth"); *cf. United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) (overruling per se exclusion of testimony of informant paid contingent fee; concurring opinion noted that practice violates Rule 3.4); Phila. Ethics Op. 2003-7 (2003) (treating physician who is also lawyer may accept noncontingent fee for his time in testifying as physician, but may not accept referral fee as lawyer). *But see Addamax Corp. v. Open Software Found., Inc.*, 151 F.R.D. 504 (D. Mass. 1993) (lawyer who stated that subpoena duces tecum might be withdrawn if affiant recanted affidavit did not violate Model Code's rule barring payment of "compensation" to witness contingent upon content of testimony).

• *Expert Witnesses*

An expert, unlike a lay witness, may be compensated for his or her testimony, but fees must be reasonable and generally may not be contingent upon the outcome of a case. *See New Eng. Tel. & Tel. Co. v. Bd. of Assessors*, 468 N.E.2d 263 (Mass. 1984) (majority rule "is that an expert witness may not collect compensation which by agreement was contingent on the outcome of a controversy"); *see also Swafford v. Harris*, 967 S.W.2d 319 (Tenn. 1998) (contingent-fee contract for services of physician acting as medical-legal expert is void as against public policy); Ky. Ethics Op. E-394 (1996) (lawyer may not compensate expert witness on contingent-fee basis, or provide "bonus" if recovery exceeds particular amount). *But see* D.C. Ethics Op. 233 (1993) (noting District of Columbia's version of Rule 3.4 permits payments of contingent fees to expert witnesses as long as they are not based upon percentage of recovery). *See generally* Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 Geo. J. Legal Ethics 465 (Spring 1999).

Subsection (c): Obeying Obligation to Tribunal

COURT ORDERS

Subsection (c) prohibits lawyers from disobeying, or advising their clients to disobey, court orders. *People v. Mason*, 212 P.3d 141 (Colo. O.P.D.J. 2009) (lawyer continued to practice law despite order of suspension); *Fla. Bar v. Bailey*, 803 So. 2d 683 (Fla. 2001) (lawyer holding funds in trust continued to use them in contravention of court orders); *Fla. Bar v. Canto*, 668 So. 2d 583 (Fla. 1996) (lawyer continued to litigate case despite order of disqualification); *In re Hagedorn*, 725 N.E.2d 397 (Ind. 2000) (lawyer appointed as guardian failed to file inventory and accounting as ordered by court and took fee from guardianship funds without court approval); *Iowa Supreme Court Bd. of Prof'l Conduct v. Hughes*, 557 N.W.2d 890 (Iowa 1996) (lawyer advised client to ignore trial judge's orders that client undergo substance abuse evaluation; decided under analogous Model Code provision); *In re Wiles*, 210 P.3d 613 (Kan. 2009) (lawyer practiced law after order of suspension); *Ky. Bar Ass'n v. Leadingham*, 317 S.W.3d 589 (Ky. 2010) (lawyer ordered to move for brief deadline extension or to dismiss appeal but failed to do either); *Attorney Grievance Comm'n v. Byrd*, 970 A.2d 870 (Md. 2009) (lawyer disobeyed bankruptcy judge's order to vacate home and violated automatic stay by filing state court action concerning home); *In re Disciplinary Action against Giberson*, 581 N.W.2d 351 (Minn. 1998) (indefinite suspension for lawyer who willfully refused to comply with court-ordered child support and spousal maintenance); *In re Farley's Case*, 794 A.2d 116 (N.H. 2002) (lawyer converted client's funds after having been ordered by court not to dispose of or convey client's assets); *State ex rel. Okla. Bar Ass'n v. Braswell*, 975 P.2d 401 (Okla. 1998) (federal court order holding lawyer in contempt for failing to pay sanctions established violation of Rule 3.4(c)); *Lawyer Disciplinary Bd. v. Martin*, 693 S.E.2d 461 (W. Va. 2010) (lawyer who was replaced as executor of decedent's estate ordered to refund fees and turn over file to successor but failed to do so for months); *In re Disciplinary Proceedings against Ratzel*, 578 N.W.2d 194 (Wis. 1998) (lawyer disobeyed court order to refrain from further representation regarding estate matter); *Bd. of Prof'l Responsibility, Wyo. State Bar v. Bustos*, 224 P.3d 873 (Wyo. 2010)

(after federal appellate court issued order to show cause regarding lawyer's failure to file appellate brief, lawyer "did nothing").

COURT RULES

Rule 3.4 also prohibits lawyers from disobeying the rules of a tribunal. *See, e.g., In re Gabriel*, 837 P.2d 149 (Ariz. 1992) (lawyer failed to comply with discovery requests and orders in personal injury suit in which he was defendant); *In re Disciplinary Action against Fuller*, 621 N.W.2d 460 (Minn. 2001) (lawyer did not disclose to court or obtain its approval for fees as required by bankruptcy rules); *Mathes v. Miss. Bar*, 637 So. 2d 840 (Miss. 1994) (lawyer accepted fees from two clients without first petitioning court for necessary approval); *In re Alcantara*, 676 A.2d 1030 (N.J. 1995) (lawyer who violated Rule 4.2 by talking with another lawyer's client without permission, and Rule 3.4(f) by asking that person to refrain from giving testimony favorable to state, thereby violated Rule 3.4(c)); *Disciplinary Bd. of Supreme Court v. Robb*, 618 N.W.2d 721 (N.D. 2000) (lawyer failed to follow court rule governing withdrawal from representation); *In re Mozingo*, 497 S.E.2d 729 (S.C. 1998) (lawyer failed to turn over file after he was suspended, in violation of rules of tribunal); ABA Formal Ethics Op. 93-378 (1993) (lawyer representing client in civil matter not prohibited by Model Rules from engaging in ex parte contacts with opponent's expert witness, but must conform to tribunal's discovery rules, which frequently include restrictions on lawyer-witness contacts); *see also* ABA Formal Ethics Op. 94-386 (revision 1995) (Rule 3.4(c) does not forbid lawyers from citing other jurisdiction's unpublished opinions in jurisdiction that does not have such ban; lawyers must still inform court to which opinion is cited of limitation placed on it by issuing court).

Subsection (d): Abusing Pretrial Procedure

GENERAL PROHIBITION

A lawyer's duty of fairness to the opposing party and counsel prohibits the lawyer from abusing pretrial discovery procedures. Subsection (d) states that a lawyer shall not make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party. *See, e.g., Meier v. Meier*, 835 So. 2d 379 (Fla. Dist. Ct. App. 2003) (lawyer required to produce documents upon valid request by adverse party despite client's instruction to withhold them); *Idaho State Bar v. Gantenbein*, 986 P.2d 339 (Idaho 1999) (defense counsel falsified medical report and obstructed plaintiff's lawyers in their efforts to determine who altered it); *In re Harris*, 186 P.3d 737 (Kan. 2008) (lawyer failed to provide responses to discovery as requested); *Jones's Case*, 628 A.2d 254 (N.H. 1993) (lawyer disbarred for misrepresenting to opponent and court that neither he nor client had copy of letter that client's boss, the U.S. attorney, wrote to his superiors seeking permission to discharge client when, in fact, lawyer had already received letter); *Moseley v. Va. State Bar*, 694 S.E.2d 586 (Va. 2010) (after filing contract suit prohibited by arbitration clause, lawyer demanded voluminous discovery and denied existence of arbitration clause); *see also* Model Rule 3.1 (Meritorious Claims and Contentions); Model Rule 3.2 (Expediting Litigation). *See generally* Babak Shamsi, *Some of Them Want to Abuse You: A Critique of Attorney Responses to Deposition Abuse*, 22 Geo. J. Legal Ethics 1135 (Summer

2009) (arguing it serves policy of Rule 3.4 if lawyers suspend depositions when abusive questions or answers offered, and seek protective order rather than allow deposition to proceed).

Subsection (e): Limiting Trial Tactics

IMPROPER QUESTIONS OR STATEMENTS

Subsection (e) prohibits lawyer misconduct at trial and limits certain trial tactics. It prohibits a lawyer from alluding to irrelevant matters or matters not supported by admissible evidence. *Whittenburg v. Werner Enters.*, 561 F.3d 1122 (10th Cir. 2009) (lawyer's argument "violated the cardinal rule of closing argument: that counsel must confine comments to evidence in the record and to reasonable inferences from that evidence"); *Falkowski v. Johnson*, 148 F.R.D. 132 (D. Del. 1993) (plaintiff's lawyer's reference to insurance in automobile case requires retrial); *Grosjean v. Imperial Palace, Inc.*, 212 P.3d 1068 (Nev. 2009) ("attorneys violate the 'golden rule' by asking the jurors to place themselves in the plaintiff's position or nullify the jury's role by asking it to 'send a message' to the defendant instead of evaluating the evidence"); *Amelia's Auto., Inc. v. Rodriguez*, 921 S.W.2d 767 (Tex. App. 1996) (lawyer's criticism of opposing counsel during cross-examination of opposing party violated ethics rules); *cf. Attorney Grievance Comm'n v. Alison*, 709 A.2d 1212 (Md. 1998) (though trial judge ordered mistrial for comments violating Rule 3.4(e)—including that one can "expect to get jerked around" when dealing with insurance company—court in disciplinary matter held comments "do not rise to the level requiring discipline"); *State v. Jones*, 558 S.E.2d 97 (N.C. 2002) (prosecutor improperly degraded defendant as "lower than the dirt on a snake's belly").

Subsection (e) also prohibits a lawyer from asserting personal knowledge regarding facts at issue, except when testifying as a witness. *People v. Segal*, 40 P.3d 852 (Colo. O.P.D.J. 2002) (defense lawyer told jury that police officer's description of post-arrest events occurring in presence of lawyer were false and that "I was present"); *Holt v. Commonwealth*, 219 S.W.3d 731 (Ky. 2007) (prosecutor must not "make a statement of fact, the credence of which is always more or less strengthened by his official position").

Subsection (e) also prohibits a lawyer from stating a personal opinion regarding the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused. *United States v. Brown*, 508 F.3d 1066 (D.C. Cir. 2007) (it is "for the jury, and not the prosecutor, to say which witnesses [are] telling the truth"); *Michael v. State*, 529 A.2d 752 (Del. 1987) (defense counsel, like prosecutor, must refrain from interjecting personal beliefs into argument to jury); *Lainhart v. State*, 916 N.E.2d 924 (Ind. Ct. App. 2009) (prosecutor vouched for honesty of police officer witnesses in voir dire and closing argument); *State v. Morris*, 196 P.3d 422 (Kan. Ct. App. 2008) (referring to defense witness in closing argument, prosecutor stated, "I think that her motives are a little suspect here, quite honestly"); *Harne v. Deadmond*, 954 P.2d 732 (Mont. 1998) (defense counsel's personally vouching for credibility of client in closing argument constituted reversible error); *State v. Bujnowski*, 532 A.2d 1385 (N.H. 1987) (prosecutor informed jury of personal opinion regarding credibility of witnesses' testimony and expressing opinion about guilt of defendant in closing argument). *But see*

Cox v. State, 696 N.E.2d 853 (Ind. 1998) (prosecutor's remark in opening statement that defendant lied to police not improper expression of opinion of credibility when defendant did not testify and there was ample evidence that defendant did, in fact, lie). *See generally* Silas Crawford, *May an Attorney Assert His or Her Opinion as to the Credibility of Witnesses or the Guilt or Innocence of Defendants?*, 22 J. Legal Prof. 243 (Spring 1998) (discussing manner in which courts deal with improper statements of opinion by prosecutors).

Subsection (f): Discouraging Voluntary Disclosure

Subsection (f) prohibits a lawyer from asking a person other than a client to refrain from voluntarily giving relevant information to "another party," unless that person is a relative, employee, or other agent of a client and the lawyer believes that the person's interests will not be adversely affected by complying with the request. *See, e.g., Castaneda v. Burger King Corp.*, No. C-08-4262 WHA, 2009 WL 2382688 (N.D. Cal. July 21, 2009) ("Plaintiffs' counsel have also allegedly advised putative class members not to talk to Defendants' counsel. If true, this would be a violation of [Model Rule 3.4.]"); *Briggs v. McWeeny*, 796 A.2d 516 (Conn. 2002) (lawyer instructed witness and his counsel not to discuss damaging engineering report with anyone); *In re Stanford*, 48 So. 3d 224 (La. 2010) (criminal defense lawyers procured affidavit from victim that included confidentiality provision that discouraged testimony); *In re Kornreich*, 693 A.2d 877 (N.J. 1997) (lawyer attempted to dissuade witness from returning from another state to testify at trial); *see also In re Smith*, 848 P.2d 612 (Or. 1993) (en banc) (lawyer for workers' compensation client sent letter to examining doctor threatening to sue him and insurer if doctor expressed particular medical opinion in course of compensation proceeding); Colo. Ethics Op. 120 (2008) (lawyer may not instruct corporate constituent not to provide information to corporation's opponent unless lawyer determines it will not be harmful to constituent); Utah Ethics Op. 04-06 (2004) (corporation's lawyer may not direct opposing counsel not to contact corporate employees who are outside control group unless those employees have formed actual client-lawyer relationship with lawyer); Va. Ethics Op. 1854 (2010) (prosecutor may not condition plea offer upon defense lawyer's not telling defendant identity of certain prosecution witness). *See generally* Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 Or. L. Rev. 481 (2008).

Appendix B
ABA Standards For Criminal Justice
Standard 3-5.8

Paragraph (c) is similar to standard 3-3.6(e), which recommends that the prosecutor not call a witness before the grand jury when it is known that the witness plans to invoke the constitutional privilege not to testify.

Unfounded Questions

It is an improper tactic for the prosecutor to attempt to communicate impressions by innuendo through questions that would be to the defendant's advantage to answer in the negative, for example, "Have you ever been convicted of the crime of robbery?" or "Weren't you a member of the Communist party?" or "Did you tell Mr. X that . . . ?" when the questioner has no evidence to support the innuendo.[11] Generally, questions may be asked on cross-examination if, as recommended in paragraph (d), a "good faith belief" in the factual predicate implied in the question is present.[12]

Standard 3-5.8. Argument to the jury

(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by

11. *See* ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR7-106(C)(1); 6 WIGMORE, EVIDENCE §1808(2) (1940).

12. *See, e.g.,* United States v. Pugh, 436 F.2d 222 (D.C. Cir. 1970); People v. Lewis, 180 Colo. 423, 506 P.2d 125 (1973); Hazel v. United States, 319 A.2d 136 (D.C. 1974). However, in some situations in some jurisdictions, it may be necessary to have more than a good faith basis to ask a question on cross-examination. It has been held, *e.g.,* that a witness may not be cross-examined as to prior convictions if the examiner does not have a certified record of the conviction available to rebut a denial of the conviction. *See, e.g.,* State v. Williams, 297 Minn. 76, 210 N.W.2d 21 (1973); People v. Di Paolo, 366 Mich. 394, 115 N.W.2d 78 (1962). *Contra,* People v. Lewis, *supra.*

injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

(e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

History of Standard

Paragraph (e) has been added. The substance of this addition appeared as standard 5.10 of the original Function of the Trial Judge standards. In addition, there is a stylistic change.

Related Standards

ABA, Code of Professional Responsibility DR7-102(A)(5), DR7-106(C)(3), (4)
ABA, Standards for Criminal Justice 4-7.7
NAC, Courts 4.15(3)
NDAA, National Prosecution Standards 17.17(A)

Commentary

The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.[1] Unfortunately, some prosecutors have permitted an excess of zeal for conviction or a fancy for exaggerated rhetoric to carry them beyond the permissible limits of argument.[2] Of course, a prosecutor must be free to present arguments with logical force and vigor. As the Supreme Court has remarked, however, "while he may strike hard blows, he is not at liberty

1. *See* Di Carlo v. United States, 6 F.2d 364 (2d Cir. 1925); Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case,* 54 COLUM. L. REV. 946 (1954).

2. *See, e.g.,* Berger v. United States, 295 U.S. 78 (1935); People v. Talle, 111 Cal. App. 2d 650, 245 P.2d 633 (1952); Rowe v. Commonwealth, 269 S.W.2d 247 (Ky. 1954).

to strike foul ones."[3] To attempt to spell out in detail what can and cannot be said in argument is impossible, since it will depend largely on the facts of each case. Nevertheless, certain broad guidelines based on the function of argument and the experience of courts in typical situations can be established.

Inferences Warranted by the Evidence; Misrepresentation

The most elementary rule governing the limits of argument is that it must be confined to the record evidence and the inferences that can reasonably and fairly be drawn therefrom. Assertions of fact not proven amount to unsworn testimony of the advocate and are not subject to cross-examination. In a few cases prosecutors were condemned for the clearly improper use before the jury of evidence that had not been or could not have been introduced in evidence at the trial.[4] Standard 3-5.6 treats this subject more fully.

The intentional misstatement of evidence is particularly reprehensible.[5] It has long been established that a lawyer may not knowingly misquote testimony of a witness or in argument assert as a fact that which has not been proved.

Personal Belief

Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued. Such argument is expressly forbidden by the Code of Professional Responsibility,[6] and many courts have recognized the impropriety of such statements.[7] This kind of argument is easily avoided by insisting that lawyers restrict themselves to statements such as "The evidence shows . . ." or something similar.[8]

3. Berger v. United States, 295 U.S. at 88.

4. *See, e.g.*, People v. Brophy, 122 Cal. App. 2d 638, 265 P.2d 593 (1954). *See generally* Annot., 46 A.L.R.2d 1423 (1956).

5. *See* Berger v. United States, 295 U.S. 78 (1935).

6. ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR7-106(C)(4). *See also* H. DRINKER, LEGAL ETHICS 147 (1953).

7. *See* Annot., 50 A.L.R.2d 766 (1956).

8. *See* Harris v. United States, 402 F.2d 656, 657-659 (D.C. Cir. 1968).

The line between permissible and impermissible argument is a thin one. Neither advocate may express personal opinion as to the justice of his or her cause or the veracity of witnesses. Credibility is to be determined solely by the triers, but an advocate may point to the fact that circumstances or independent witnesses give support to one witness or cast doubt on another. The prohibition pertains to the advocate's personally endorsing, vouching for, or giving an opinion. The cause should turn on the evidence, not on the standing of the advocate, and the testimony of witnesses must stand on its own.

Appeals to Passion or Prejudice

Arguments that rely on racial, religious, ethnic, political, economic, or other prejudices of the jurors introduce into the trial elements of irrelevance and irrationality that cannot be tolerated. Of course, the mere mention of the status of the accused as shown by the record may not be improper if it has a legitimate bearing on some issue in the case, such as identification by race. But where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused or the accused's witnesses, such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence. Accordingly, many courts have denounced such appeals to prejudice as inconsistent with the requirement that the defendant be judged solely on the evidence.[9]

Injection of Extraneous Issues

References to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision.[10] Predictions as to the effect of an acquittal on lawlessness in the community also go beyond the scope of the issues in the trial and are to be avoided. Some courts have reversed convictions where such arguments were made.[11] Of course, the restriction must be reciprocal;

9. *See, e.g.,* Tannehill v. State, 159 Ala. 51, 48 So. 662 (1909); Cooper v. State, 136 Fla. 23, 186 So. 230 (1939); Annot., 45 A.L.R.2d 303, 322-368 (1956).

10. *See* Annot., 3 A.L.R.3d 1448 (1965).

11. *See, e.g.,* Cooper v. State, 136 Fla. 23, 186 So. 230 (1939); People v. Sawhill, 299 Ill. 393, 132 N.E. 477, 484 (1921); Note, 54 COLUM. L. REV. 946 (1954); Annot., 44 A.L.R.2d 978 (1955).

a prosecutor may be justified in making a reply to an argument of defense counsel that may not have been proper if made without provocation. The better solution to this problem, however, lies in adequately instructing advocates on the limits of proper argument and on the willingness of trial judges to enforce fair rules pertaining to such limits.

Standard 3-5.9. Facts outside the record

It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

History of Standard

There are no changes.

Related Standards

ABA, Code of Professional Responsibility DR7-106(C)(1)
ABA, Standards for Criminal Justice 4-7.9, 4-8.4(c)

Commentary

The problem of digression from the record can arise at both the trial and the appellate levels. It is indisputable that at the trial level it is highly improper for a lawyer to refer in colloquy, argument, or other context to factual matter beyond the scope of the evidence or the range of judicial notice. This is true whether the case is being tried to a court or a jury, but it is particularly offensive in a jury trial. It can involve the risk of serious prejudice with a mistrial as a possible remedy. Ordinarily a trial court should summarily exclude any reference to factual matter beyond the scope of the evidence in any significant way. The broad discretion a trial court has in such matters enables it to deal with them as they arise by allowing a party to reopen the case or to take other appropriate steps to enlarge the record so as to provide an evidentiary basis for the matter the party wishes to argue but has for some reason

Appendix C
Visuals For Today's Prosecutors*
by Ronald E. Bowers

*Pursuant to the court's ruling of April 18, 2013, the State has substituted excerpted portions for the entire text that was originally submitted. In the event that any members of the court wish access to other portions of the text or the complete text itself, the State will make it available upon request, including in a version that can be photocopied easily if that is preferred.

VISUALS
FOR TODAY'S PROSECUTORS

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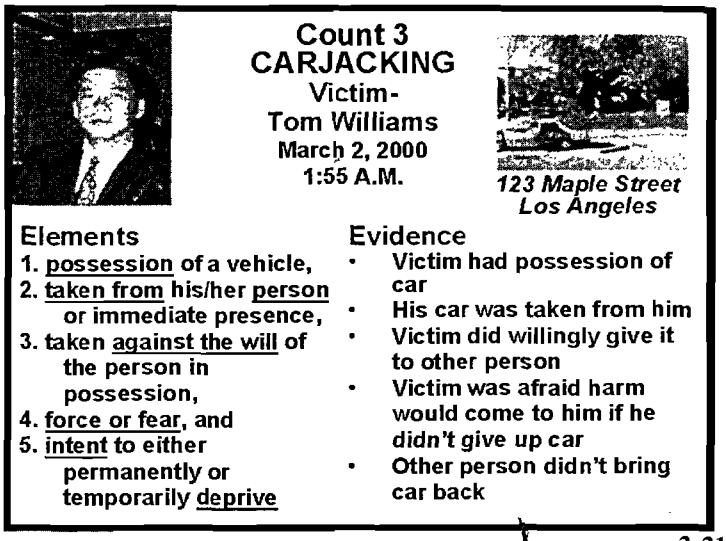
CONTENTS

CHARGES CHART

Individual Charge Chart

Sometimes you want to explain the basic information about each individual charge. The so called "individual charge" chart works well in cases with only a few counts. You may break the counts down by each victim. In this way, you can explain in considerable detail each count.

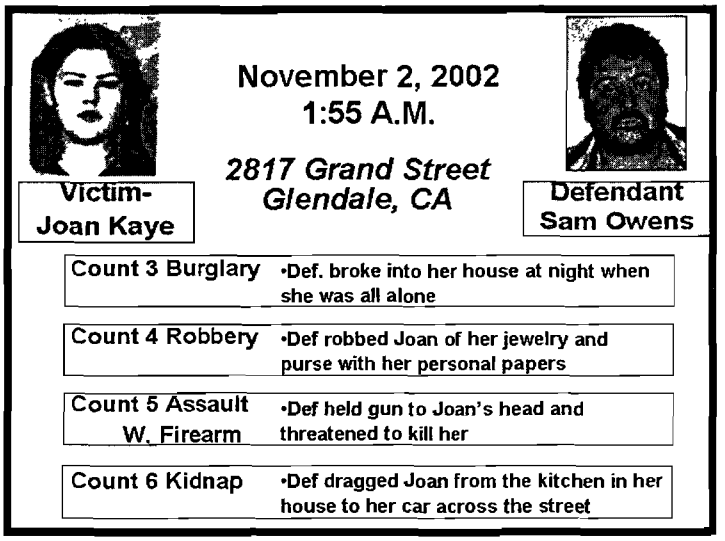
This chart takes one count and explains all the facts. By combining the facts with the photos, the jurors can better understand everything regarding this individual count.



2-21

This chart is an example of what can be done when you have several counts that pertain to an individual victim. With this chart, the jurors start thinking of the case in terms of the victims. You may have additional charts each listing the charges as to that particular victim.

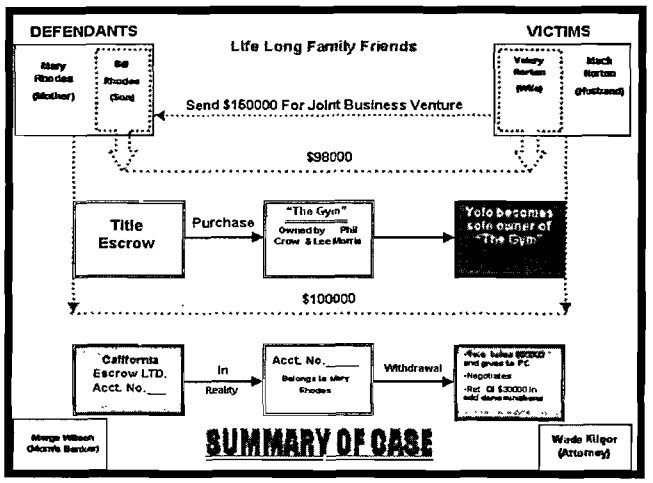
These individual charge charts can be useful in sex crime cases where an individual victim may be connected to numerous sex charges.



2-22

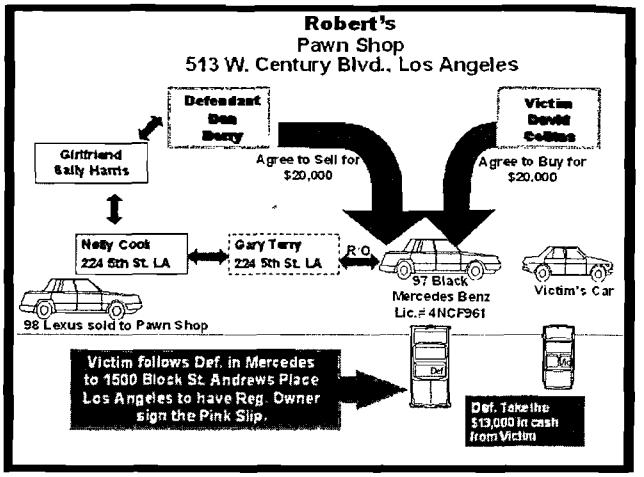
SUMMARY CHART

A summary chart will often appear like a flow chart, relationship chart or even slightly like a timeline chart. It is really a combination of several forms of charts discussed in this chapter. By combining these different types of charts, you are able to summarize the evidence, parties and events all on one poster or slide.



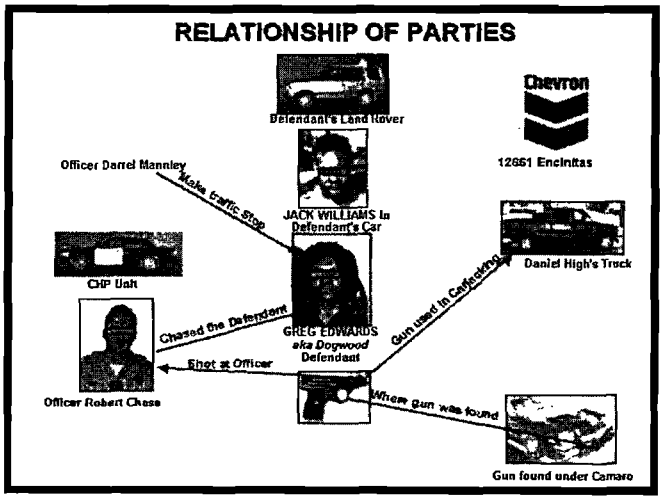
2-25

This chart was used to show the transactions and events involved in a fraud case. It is easy for the jurors to get lost in all the transactions, but a chart like this helps you explain the case.



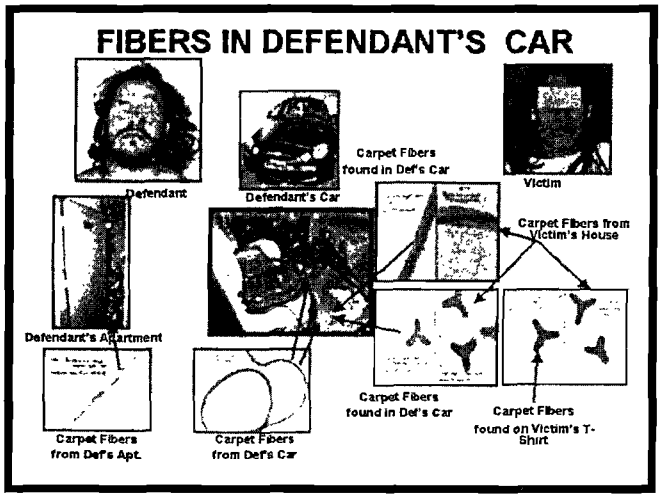
2-26

This chart was used to show the connection between the parties and the involvement of several different cars. It also shows the flow of all the events that occurred.



2-27

This summary chart was used to show that a police officer stopped the defendant and a passenger. The defendant took off, ran, pulled a gun and shot at the officer. He ran to a Chevron service station where he tried to highjack a truck and threw the gun under a car.



2-28

Here the summary chart was used to explain how the triangle fibers in the defendant's car could have only come from the rape victim's house prior to his kidnapping her in his car.

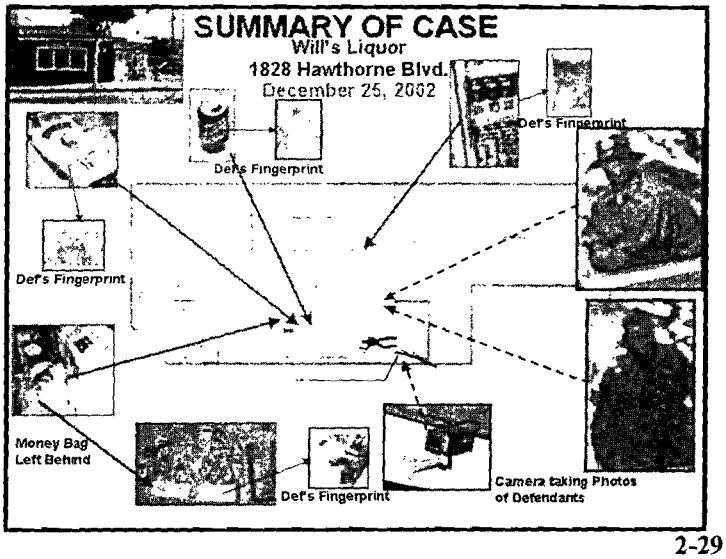
SUMMARY CHART

Complex Summary Charts

When you have a case that is factually complicated, you know that the defense will benefit from such situations by trying to create confusion and claim that there is reasonable doubt. You want to take all the facts and figuratively wrap your hands around them. The defense wants to discuss each fact separately and show how unimportant each one is individually. Often it is the cumulative effect of all the facts that convinces the jury of the defendant's guilt. That is why the summary chart is so crucial in complex cases.

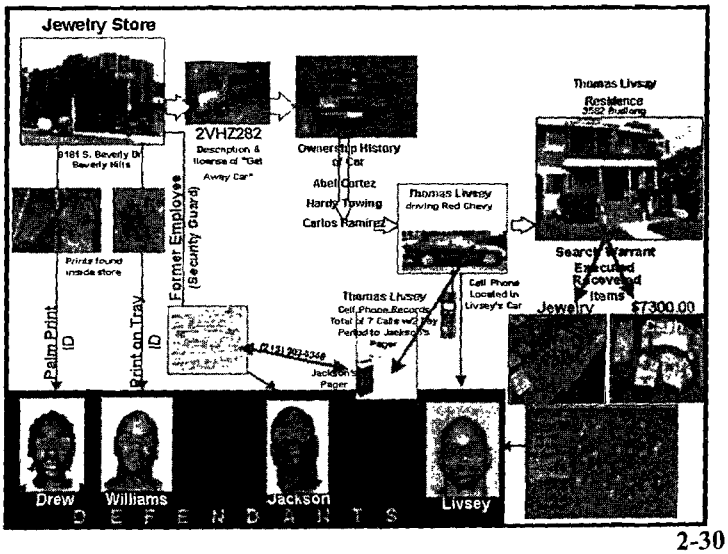
At first glance, a summary chart may appear too busy with many entries and text. Because of this, it is good to use photos and clip art to break up the content of the chart. Also, arrows are important to guide the jurors from point to point. Your job as a prosecutor is to walk the jurors through all the evidence in the case. You can use other charts to fill in the details, but you continue to refer to the summary chart as the center of the case. By placing everything on one summary chart, the jurors get the feeling that this is a case that they are capable of understanding.

This summary chart was used to explain all the evidence against the defendants in a liquor store robbery-murder. It was important for the jury to understand where each fingerprint was found such as on the cooler handle, the Mountain Dew can, the Zig Zag paper and the receipts inside the bag with the money. Also, it was relevant for them to know the location of the security camera, which took images of the suspects.



2-29

In this summary chart it was important for the jury to understand each defendant's involvement in the robbery of a Beverly Hills jewelry store. In order to connect the crime to some of the defendants, it was important to understand the ownership of the getaway car. The car was linked to one of the defendant's house where most of the jewelry was recovered. That defendant had a cell phone in his car that had called a phone number of the former security guard of the jewelry store the day before the crime. Two of the other defendants were directly connected to the robbery by their fingerprints.

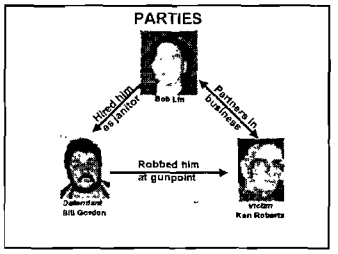


2-30

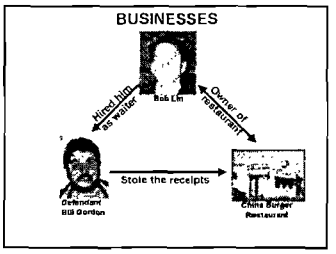
RELATIONSHIP OF PARTIES CHART

Sometimes you want to focus the jurors' attention to the connections between the parties and the evidence more so than discussing the entire case with the summary charts. Relationship charts can take various appearances, as seen below:

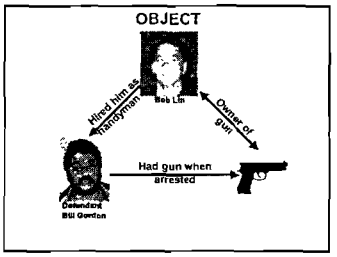
- **Parties to other Parties**



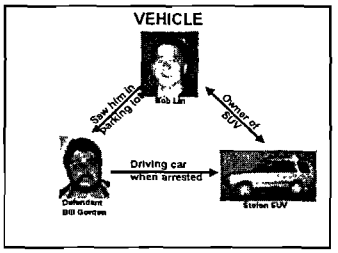
- **Parties to Businesses**



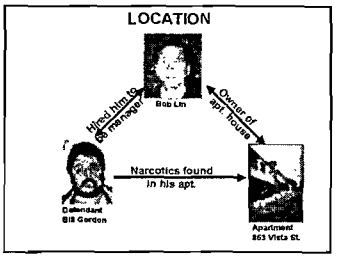
- **Parties to Object**



- **Parties to Vehicle**



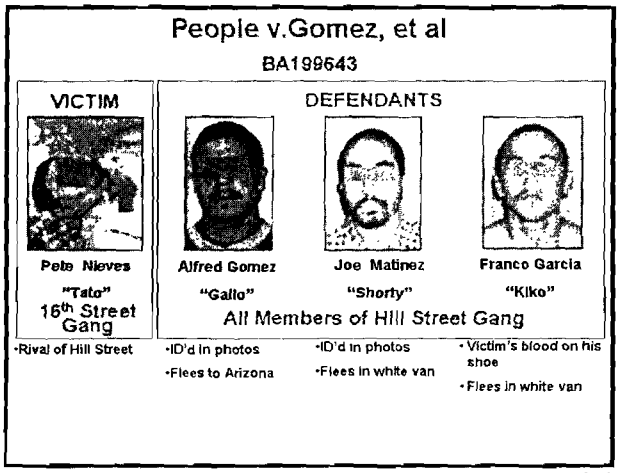
- **Parties to Location**



2-31

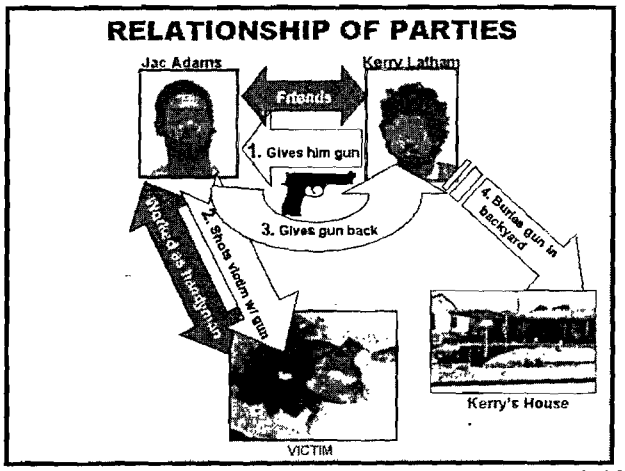
RELATIONSHIP OF PARTIES CHART

There are many variations of the relationship charts as you can see below. They take on many different forms because of the many different types of connections between the parties and the evidence. The charts below involve numerous defendants, and they illustrate how different these types of charts can be.



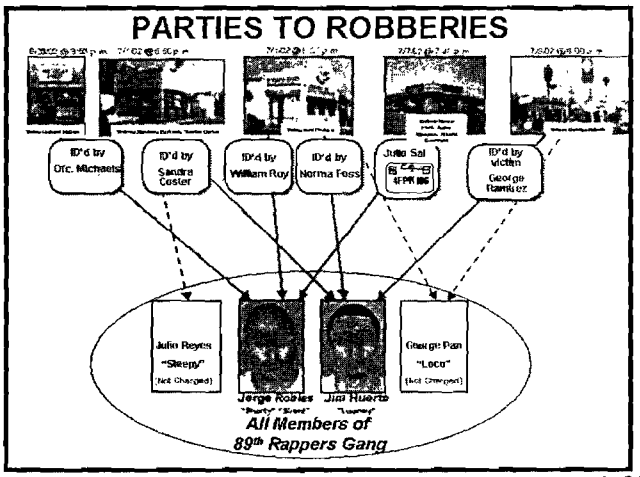
2-37

This chart shows all the parties to a murder. The defendants are all connected by the fact they are all members of the same gang while the victim was affiliated with a rival gang.



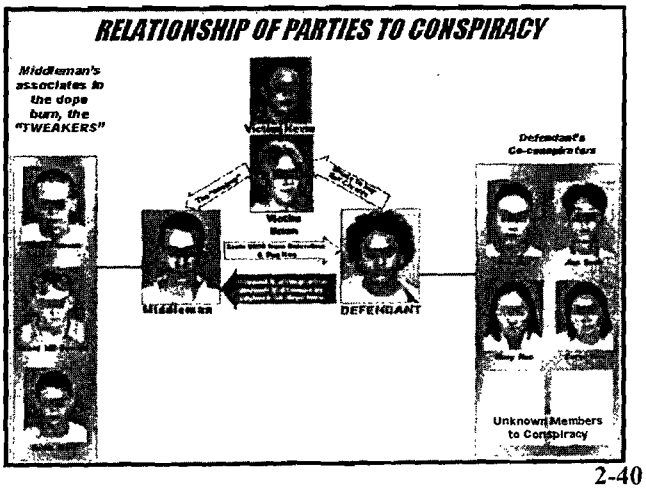
2-38

Again, this chart shows all the parties to a murder. But the emphasis is on the connection to the victim, the gun and the house where the murder occurred.



2-39

This case involved a string of robberies committed by a gang. It was important that the jurors understand the connection to the gang. Two of the gang members were never caught, so they were listed by their names in the blank boxes.



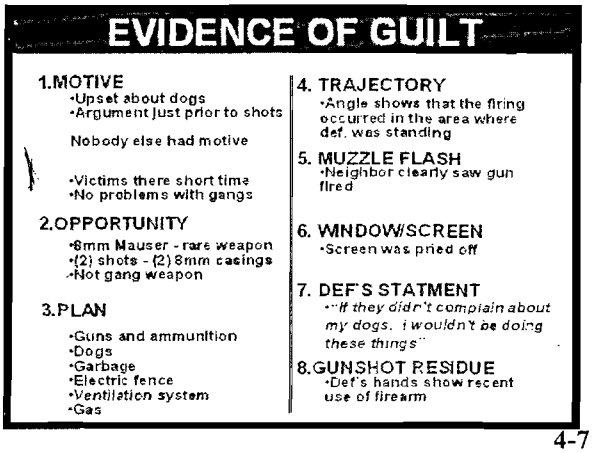
2-40

In this murder case, many parties were involved. In order for the jury to keep everyone straight, the parties were listed in the various groups.

LIST OF EVIDENCE CHART

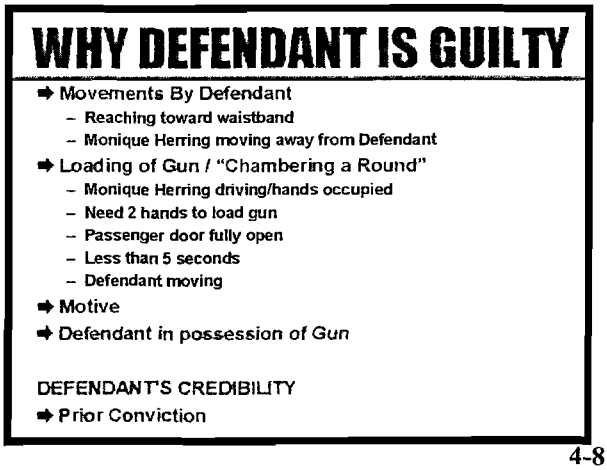
Many different techniques liven up a text driven list chart. You can use different colors and fonts or anything that breaks up the text.

This list chart divides the evidence into eight categories and lists the evidence that supported each of the categories. Different colored fonts for the main and sub-topics assist the viewer to understand so much text.



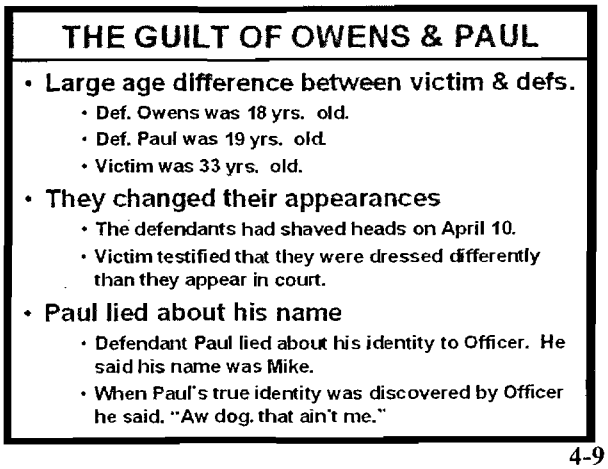
4-7

Again, the list chart (right) displays the main topics with the supporting evidence underneath them. This is a simple and clear way to present the evidence for your argument.



4-8

Similarly, you can list the incriminating evidence under the main headings that state the argument points . Below each topic you have a secondary list of the facts that support that topic.



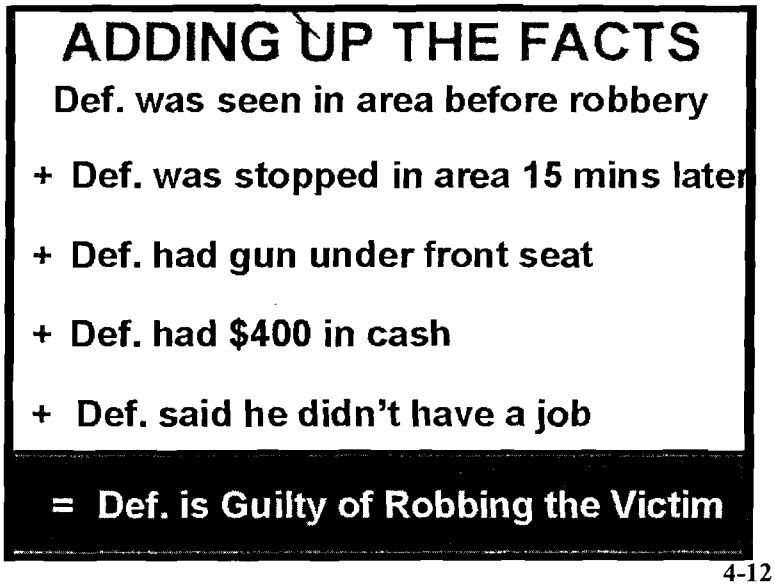
4-9

LIST OF EVIDENCE CHART

Adding Up The Facts Chart

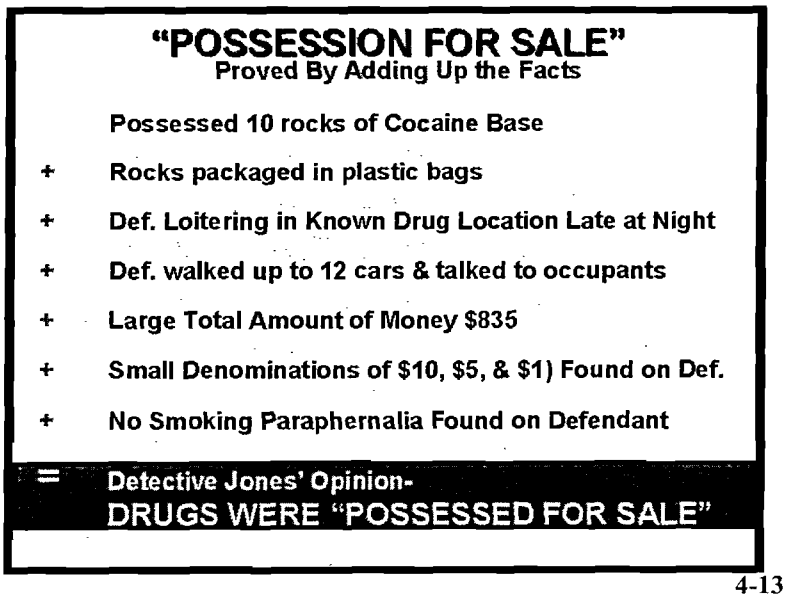
Another form of the list chart is the so called "adding up the facts" chart. This is a simple approach and easy for the jurors to comprehend. The evidence is added up and the bottom line of the chart states the inevitable conclusion that the defendant is guilty. In some cases, the bottom line is the requisite mental element for the crime. Or, the chart can list the evidence supporting the expert's opinion which is the bottom line. Jurors, especially teachers and accountants, respond well to adding up the facts charts,. However, to create this chart you have to narrow down the points so they can be listed as one liners.

This chart shows that all the evidence adds up to the defendant being guilty of robbery. This differs from the list charts in that you use plus signs instead of numbers for each point.



4-12

This add up chart lists the evidence that supports an expert's opinion, such as the opinion here "Possession For Sale." Again, the difference from the list chart is that the bottom line tells the jurors the ultimate conclusion.

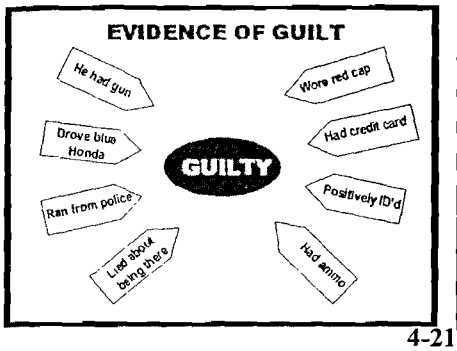


4-13

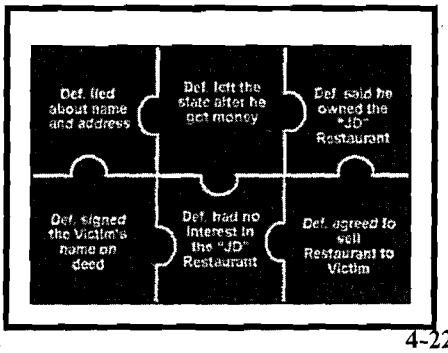
BUILD CHART

A build chart can dramatically enhance closing argument. This type of chart is made up of numerous pieces and when put together, illustrates how the evidence proves a certain point such as the defendant is guilty. The prosecutor gradually assembles the chart piece by piece during closing argument.

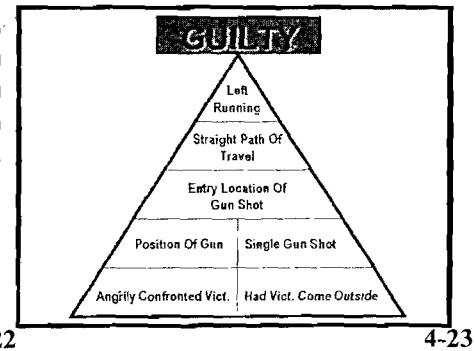
Build charts are easy to create and use as part of your computer slide show. You utilize the computer animation feature to make the pieces come together on cue. Build charts also can be used as posters by cutting out the parts and attaching them to your poster board with Velcro or some other method. Chapter 9 discusses in more detail how to use them in court.



4-21



4-22

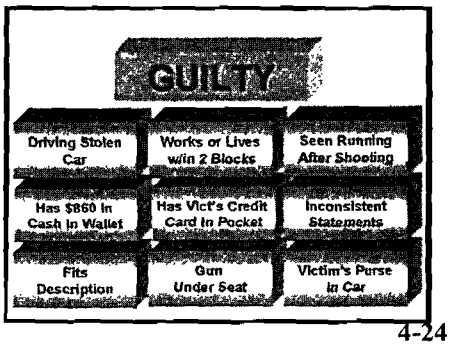


4-23

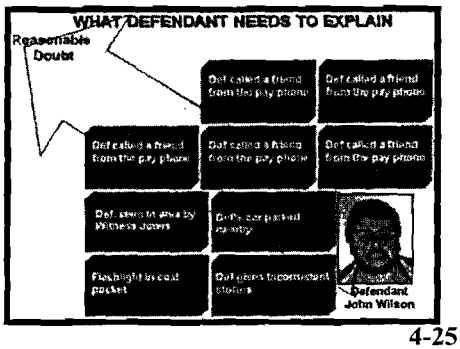
Arrow Chart - This is the most common because all you do is place the arrows on the board pointing to the center.

Puzzle Chart – During closing, you put all of the pieces of the puzzle together. You argue that this shows how all the evidence fits together.

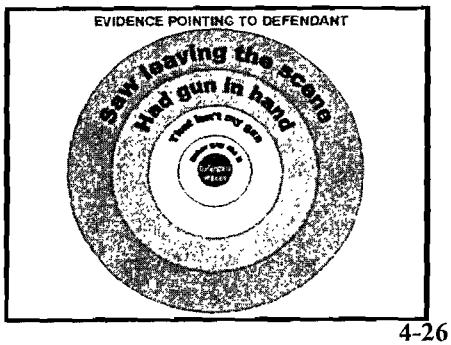
Pyramid Chart - Here you place each block in place to build the pyramid. When completed they all point to "guilty".



4-24



4-25



4-26

Wall Chart - This is similar to the pyramid chart but you are building a wall which supports the word "guilty".

Corner Chart - This is similar to the "wall" chart but in essence surrounds the defendant in the corner.

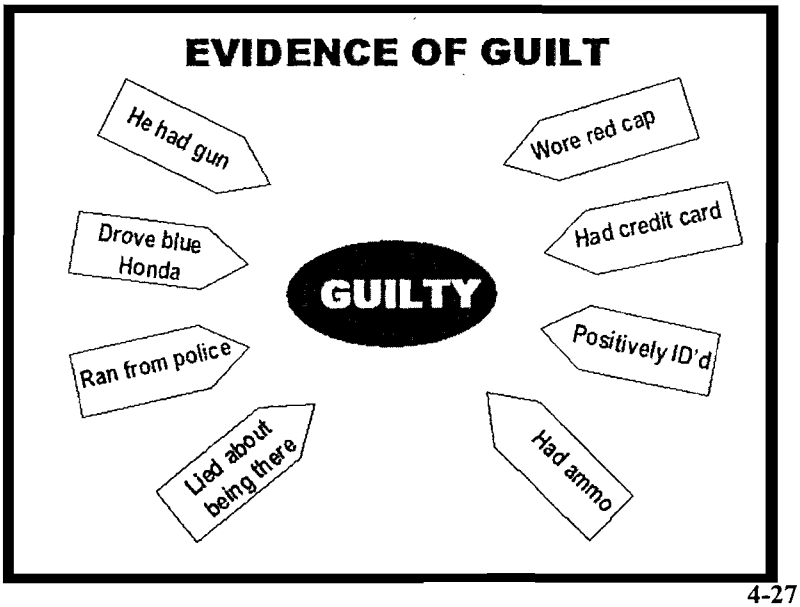
Target Chart - This allows you to build the evidence ring by ring. This can be done from the center out or the outside to the center.

BUILD CHART

Arrow Chart

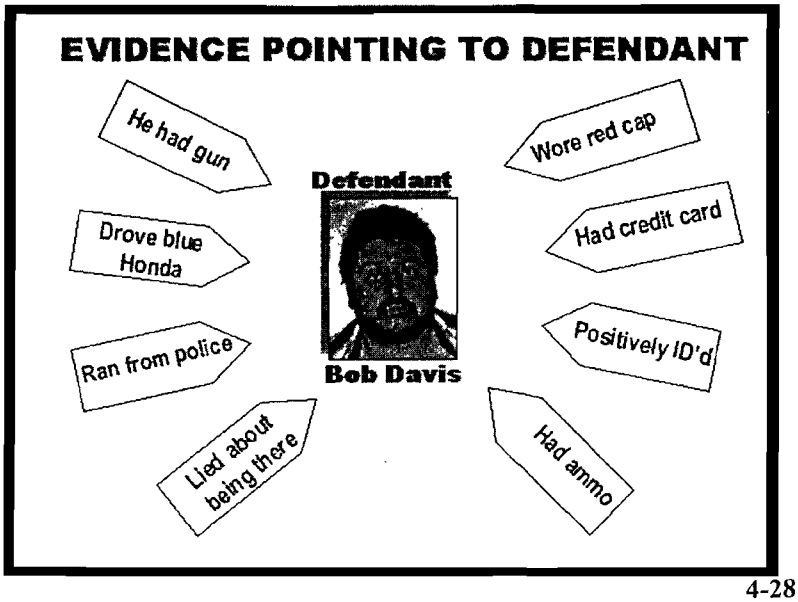
For your argument, you may want to use an arrow chart to illustrate how all the evidence points to the defendant. You can use a photo or just the name of the defendant in the center of the chart or slide. The most common arrow chart has a one-line statement in each arrow box. The chart is most compelling when you have at least five arrows. After ten arrows, this chart loses its effectiveness.

This arrow chart uses the various pieces of evidence that point to the defendant's guilt.



4-27

This arrow chart shows the pieces of evidence that point to this defendant. You can place either a photo or the name of the defendant in the center .



4-28

BUILD CHART

Pyramid Chart

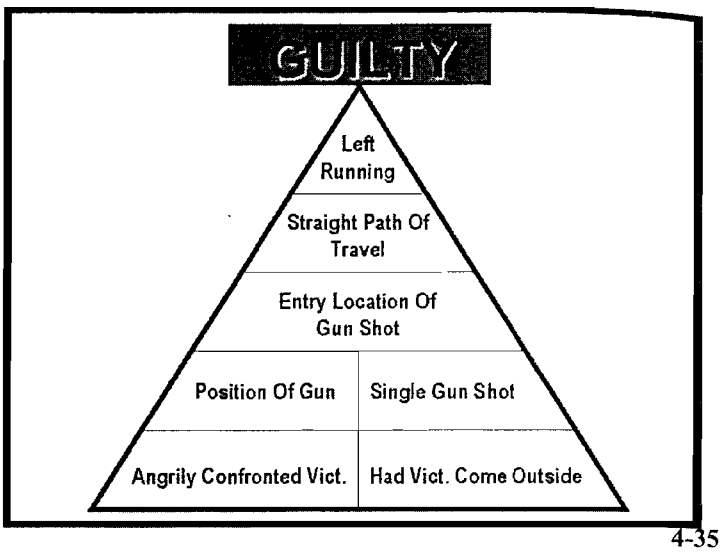
The pyramid chart displays how your evidence builds from the bottom and ultimately points to the word "Guilty" at the top.

Pyramid charts come in five to nine pieces of text. As with the puzzle chart, you have to be able to express the idea concisely because there is not much space for text, especially at the top of the pyramid.

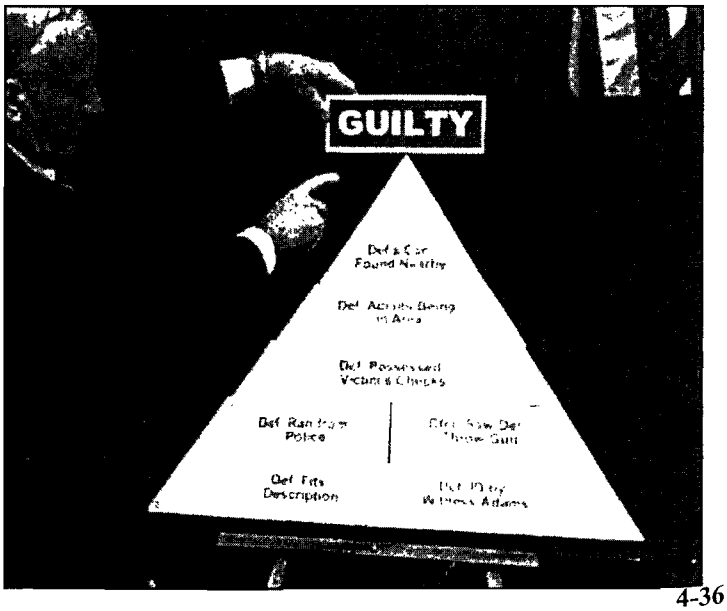
Some jurors like this type of approach since they can better understand all the points if they can visually see where the argument is leading.

When using the pyramid chart in court, you start at the lower left and build across, row by row. When all your pieces of evidence have been attached, you place the word "Guilty" at the top.

This type of chart is most effective when done in a computer slide show with animation. However, as is shown on the right, it can work in the poster format by using Velcro to attach each piece to the poster.



4-35



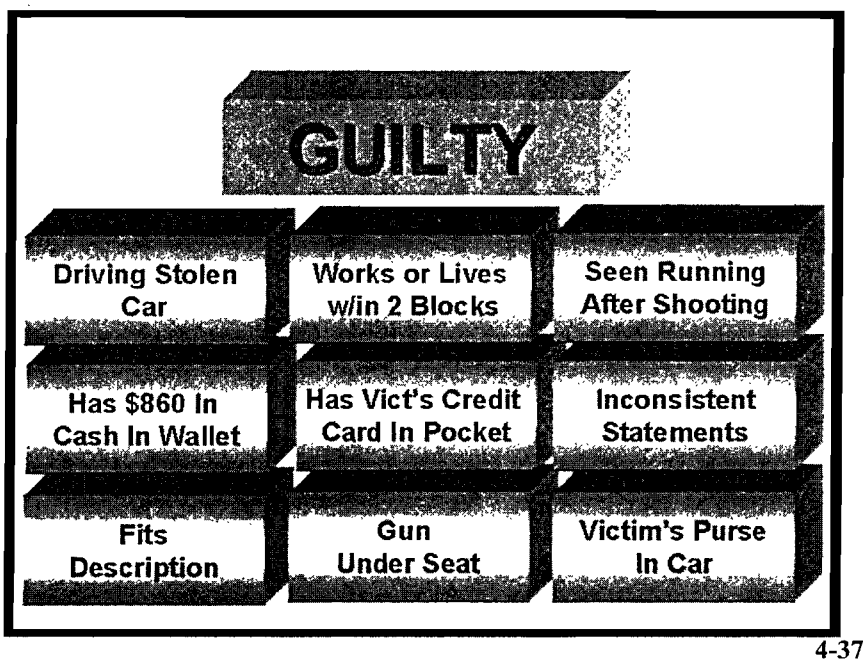
4-36

BUILD CHART

Wall Chart

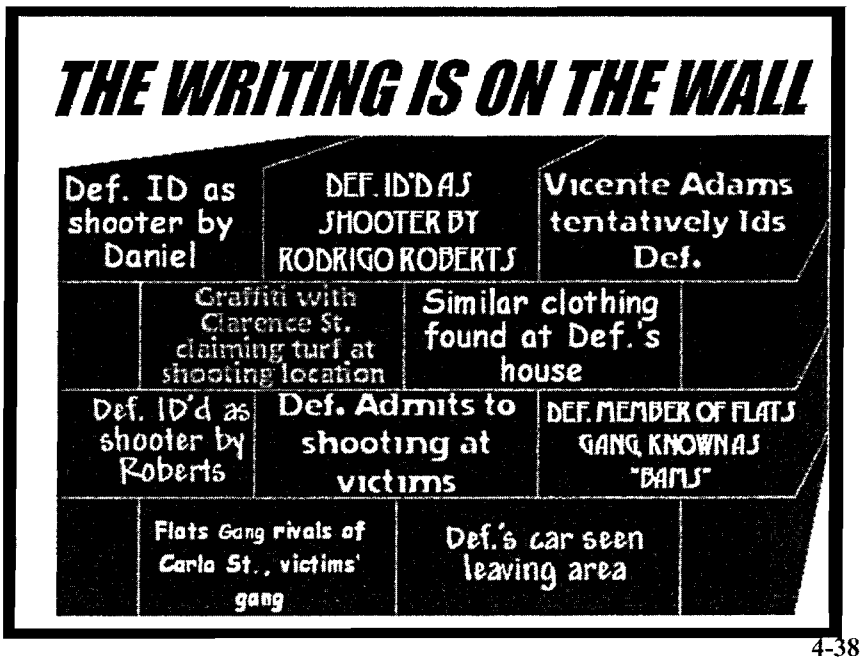
The wall chart has each piece or block of evidence sitting on top of another block of evidence. The idea is that the wall is solid and can support the word "Guilty." The wall chart can accommodate six to 16 blocks of text.

The most common wall chart is constructed with building blocks. You place each block in place starting in the lower left hand corner and work your way across row by row. When you have finished, the jurors see the cumulative effect of the many blocks of evidence with the word "Guilty" on top.



4-37

Another wall chart approach applies to gang cases. You create a block wall and give the appearance that it is covered with graffiti. You write the various pieces of evidence on the wall just like it would appear on a wall located in one of the gang territories.



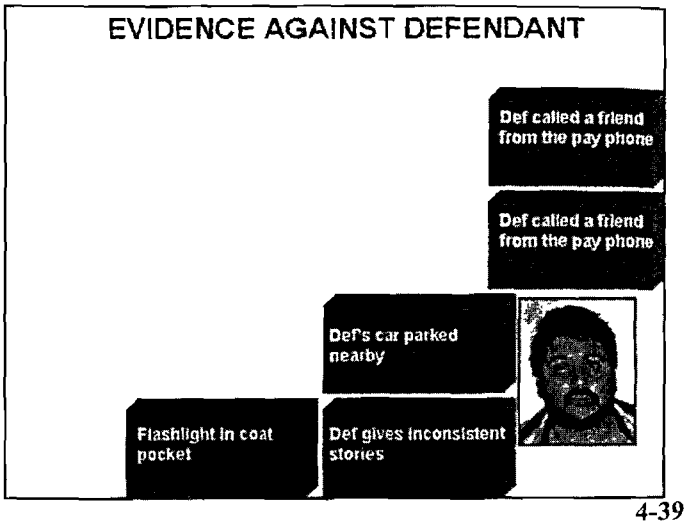
4-38

BUILD CHART

Corner Chart

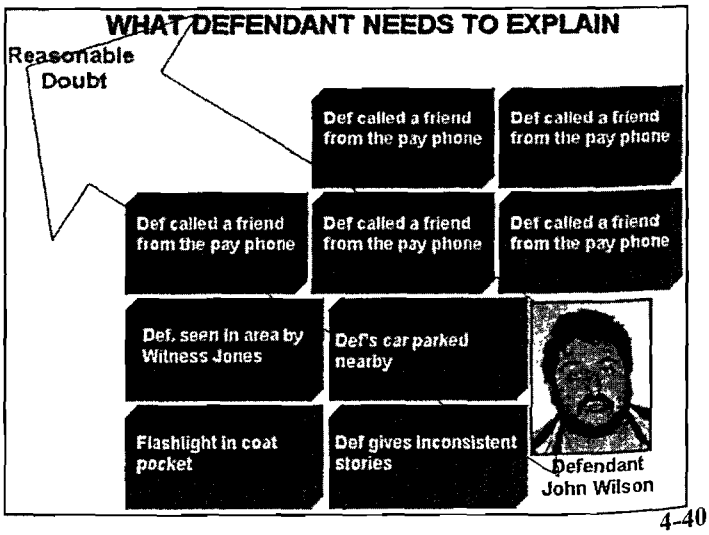
Some prosecutors prefer a slight variation of the wall chart, which is called the "Corner" chart. It also utilizes the same type of blocks with text, but it arranges them differently. Here the blocks are placed in a way to block the defendant into a corner. The defendant's name or photograph is placed in one of the corners. In closing, the prosecutor places blocks on the chart one at a time as the prosecutor discusses each piece of evidence. The prosecutor continues placing the blocks until there is no way for the defendant to escape.

On the right you can see how the blocks are placed around the defendant. You continue to add more and more blocks until there is no escaping the conclusion that the defendant is guilty.



4-39

Some prosecutors will place the words "reasonable doubt" at the top and on the other side of the chart. The essence of the argument is that the defendant has to remove a number of these blocks in order to get to the position of "reasonable doubt".



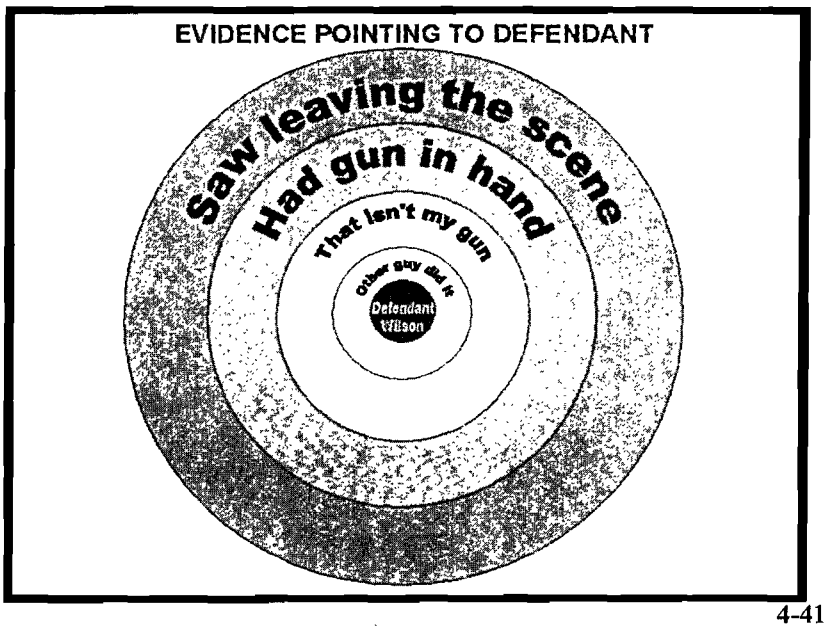
4-40

BUILD CHART

Target Chart

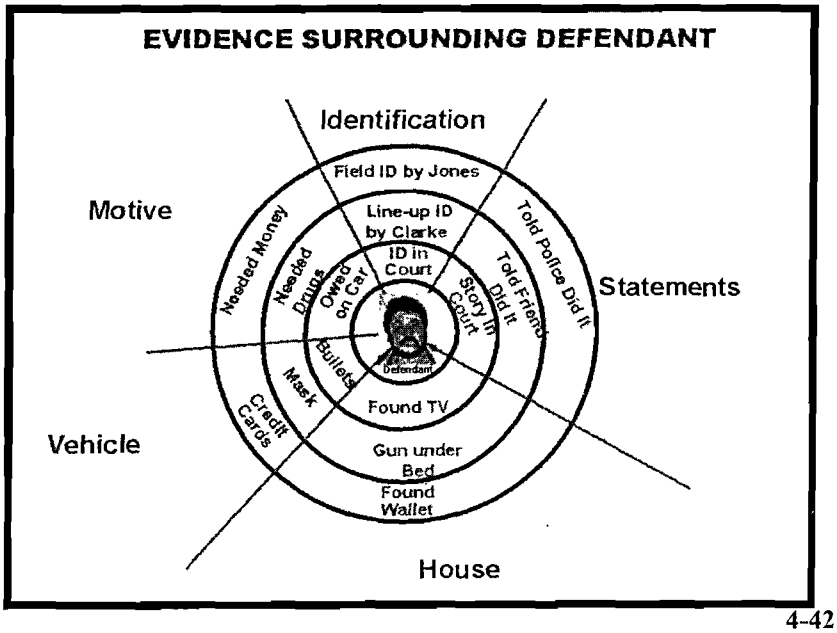
Another form of the build chart is the target chart, which allows you to build your argument ring by ring. You surround the defendant with all the incriminating evidence. In a computer slide show, you can build the target by layering. The target chart can be made into a static poster, but it is not easy to use it as a build chart because the rings are difficult to construct.

This target chart allows you to place rings of evidence around the defendant. You can start on the outside and work your way inward. In the center you can place either the name of the defendant or the defendant's picture.



4-41

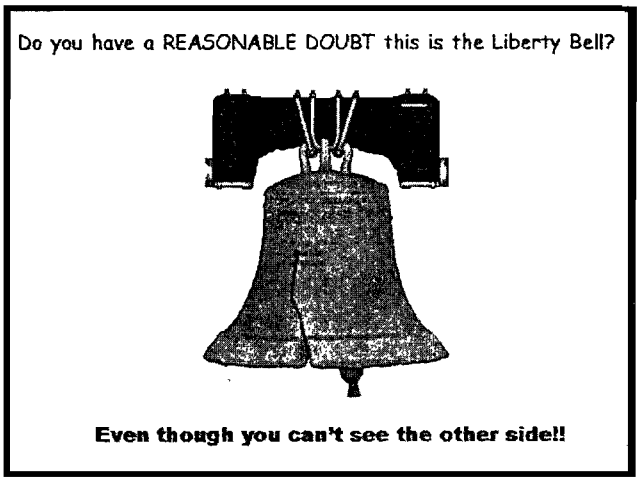
The sectional target chart permits you to group the pieces of evidence in sections. Again, the defendant's name or photo is in the center of the target. You list a heading for each section. In each section, list the evidence that proves that point.



4-42

Reasonable Doubt

This is another way of expressing the concept of reasonable doubt in understandable terms.



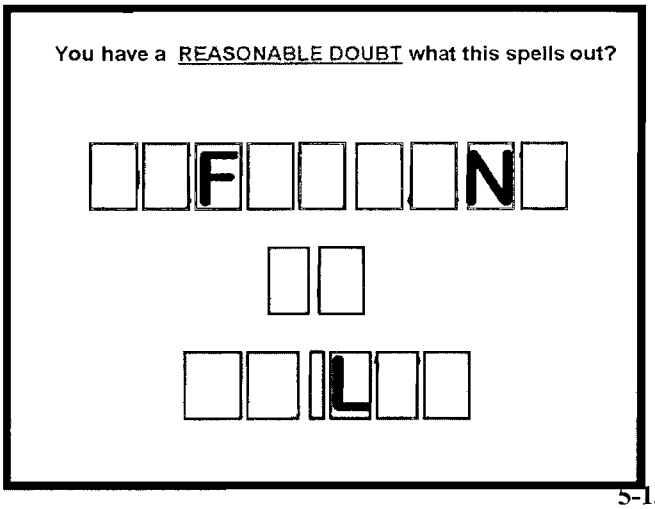
5-11

Reasonable Doubt

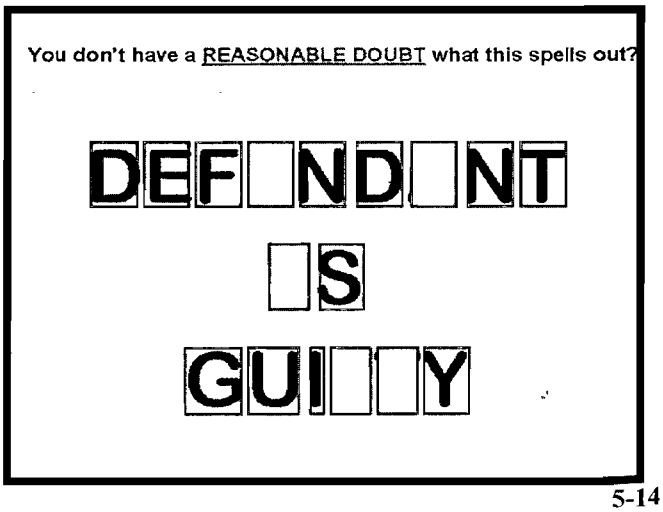
Some prosecutors like to use this method of explaining reasonable doubt. This is best done as part of a computer slide show. In the first slide, the jurors cannot figure out what is being spelled out.

A second slide has a few more letters revealed. Some jurors will get the picture. But, they still might have some doubt as to what is underneath.

Finally, the last slide still has several letters that are covered. At this point, the jurors understand the concept of reasonable doubt even though several letters are missing.



5-13

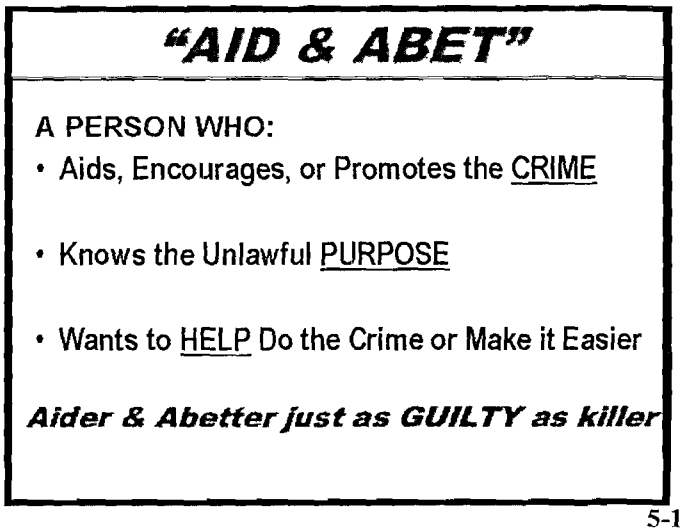


5-14

DEFINITIONS CHART

Aiding and Abetting

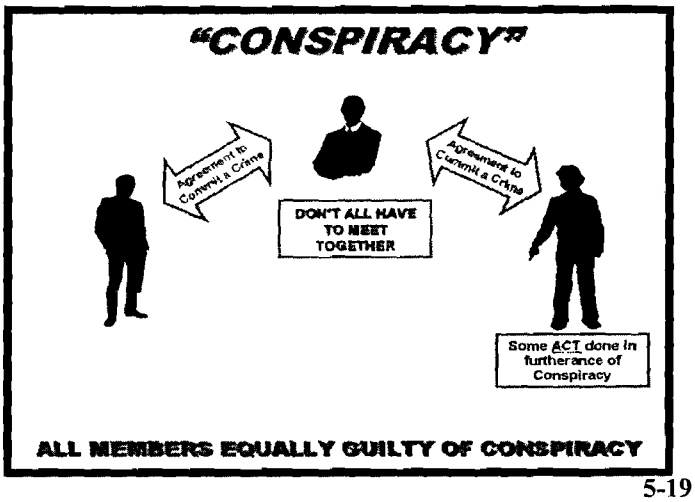
Aiding and abetting is another legal concept that can be explained with a text chart, like the one to the right.



5-18

Conspiracy

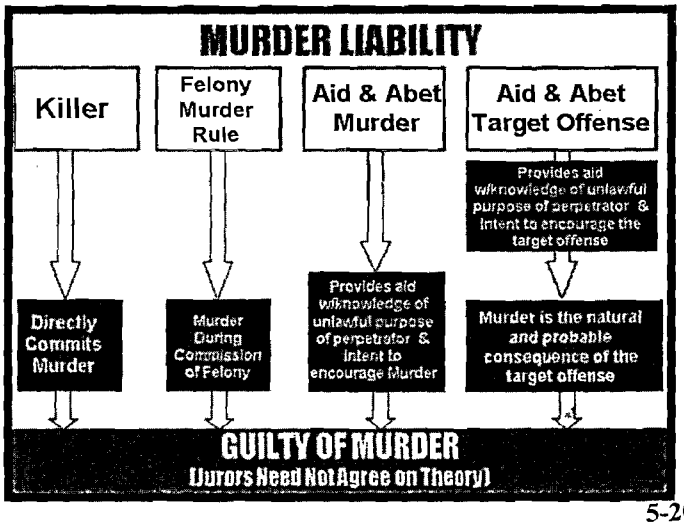
The definition of "conspiracy" can be complicated. A definition chart with some clip art serves as a visual aid to explain the meaning of "conspiracy."



5-19

Criminal Liability

When there are a number of criminal liability theories against the defendant, merely talking about them does not clarify the subject for the jury. This definition chart breaks down the theories and shows what is required for each to be proven.

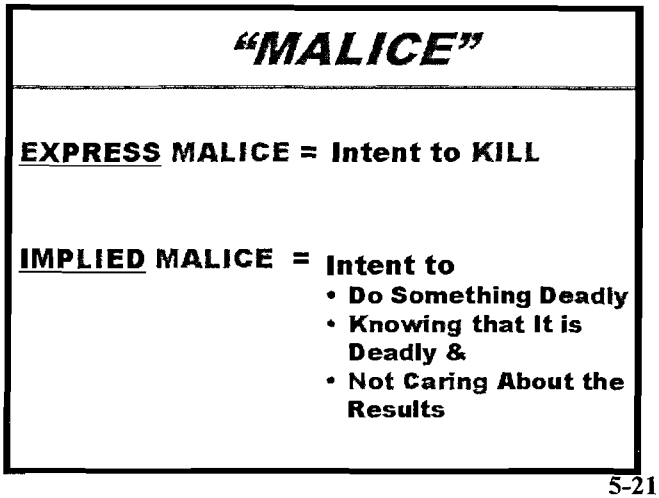


5-20

DEFINITIONS CHART

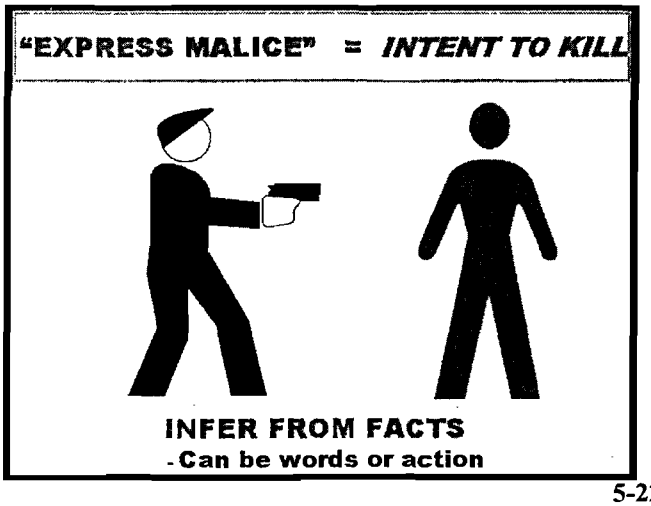
State of Mind

Some definitions are of the mental element of a crime. "Malice" is one of those mental elements and an example of a definition chart for malice is to the right.



5-21

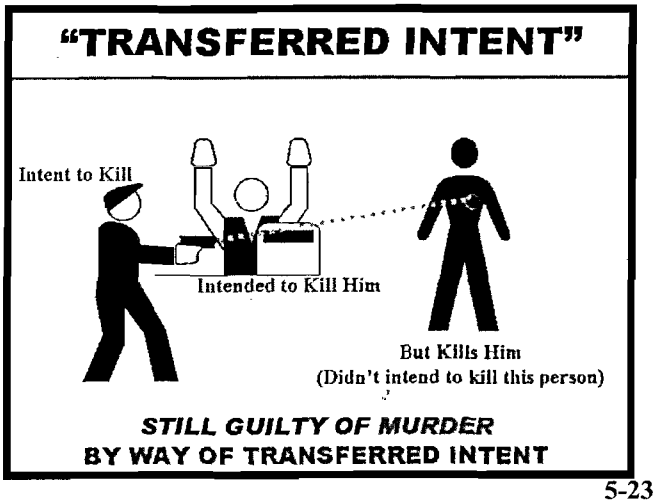
Another definition used in murder cases is the "intent to kill." This is a definition chart with the help of clip art.



5-22

Transferred Intent

A more complicated legal concept is that of transferred intent. Again, Clip Art in a definition chart explains this concept in a simplified form.

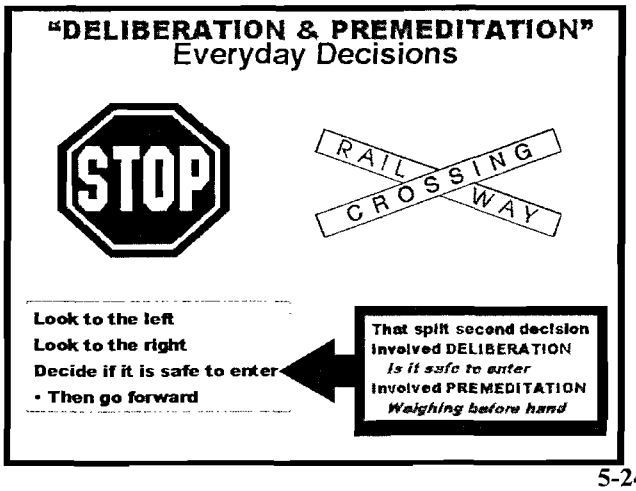


5-23

DEFINITIONS CHART

Premeditation

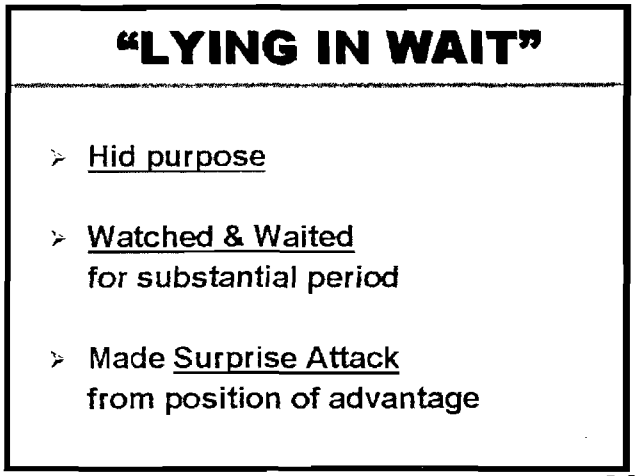
Sometimes, in a murder case, the defendant had a short period of time to form the intent to kill and deliberation or premeditation is an element. This definition chart combines clip art and text to show that in everyday life we premeditate and form an intent in a short time frame.



5-24

Lying In Wait

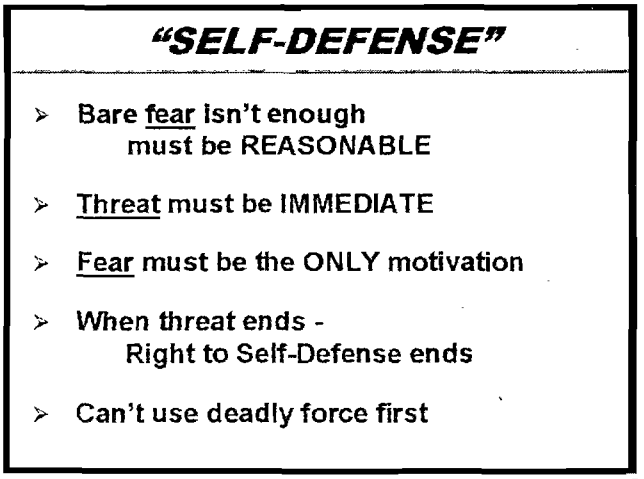
"Lying in wait" is an easily misunderstood concept. Your job is to put it in terms the jurors will understand. This text definition chart does that job.



5-25

Self-Defense

Defense attorneys often try to explain self defense so it applies when it does not. Your job is to explain what constitutes valid self defense. This definition text chart helps you argue that the defendant has not established legitimate self defense.

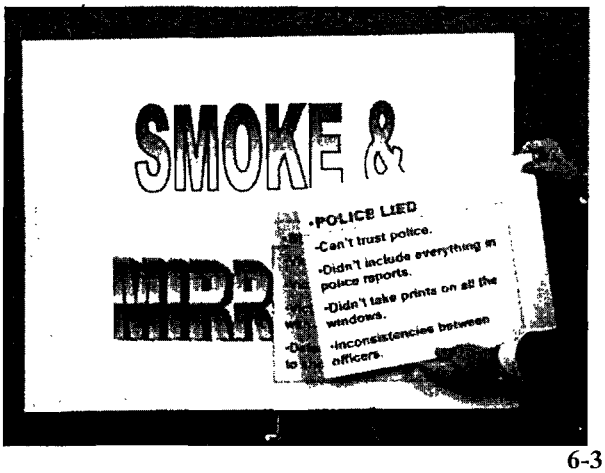


5-26

REBUTTAL ARGUMENT VISUALS

Examining the Defense Chart

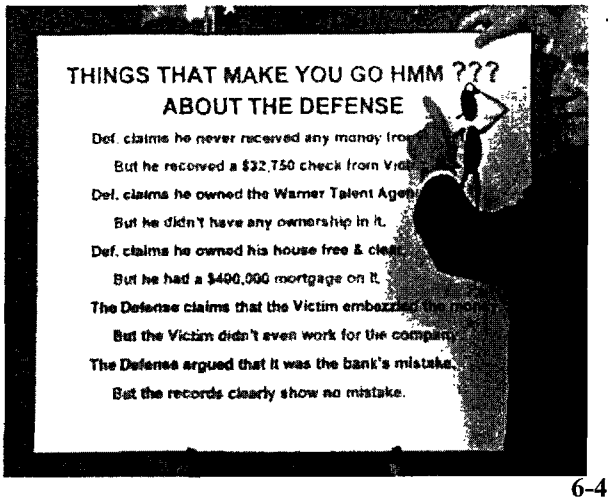
This is the most dramatic way of illustrating that the defense has no merit. By peeling off each of the defense's points, the jurors can see that there is nothing behind the defense.



6-3

Questioning the Defense Chart

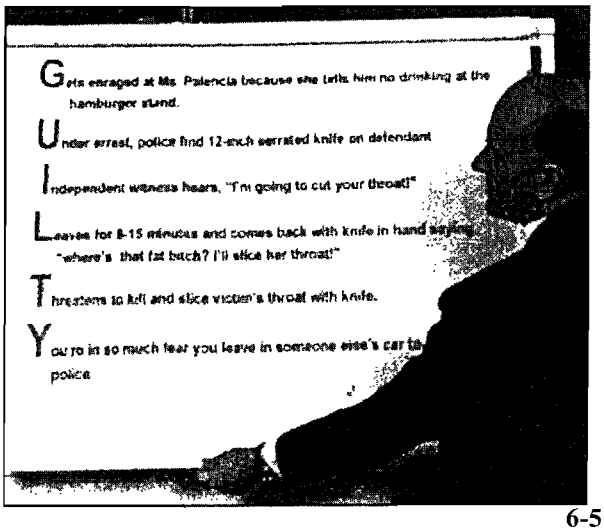
This type of chart requires the greatest degree of anticipation, but it has high impact. The chart reveals the weaknesses in the defense argument. It is very impressive to show there are responses to the defense claims.



6-4

Closing Remarks Chart

These types of charts are good for winding up your rebuttal argument in a powerful fashion or finishing your closing if you have only one closing argument. The spell out chart is one example of a closing remarks chart.



6-5

RESPONDING TO THE DEFENSE CHART

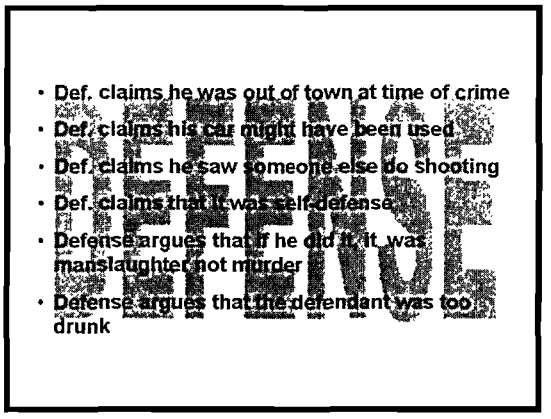
Rebuttal List on Word Chart

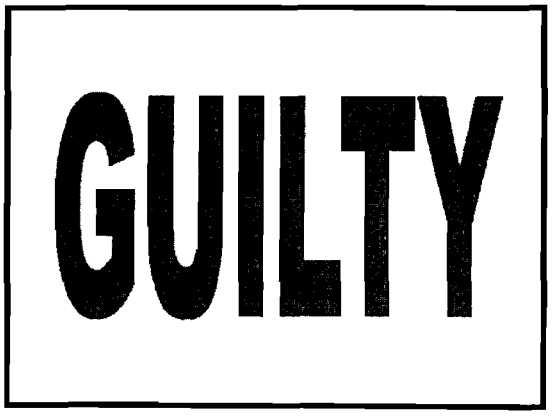
Chapter 4 covered how the list on word chart can improve your initial argument. However, there are several situations where you may want to use this type of chart in your rebuttal argument. Because this type of chart is easy to make, it is a natural for your rebuttal. This chart works best in a computer slide show. Some of the words that are particularly suitable to rebuttal are the following:

- CONSCIOUSNESS OF GUILT
- CORROBORATION
- CREDIBILITY
- DEFENSE
- GUILTY
- INCONSISTENT STATEMENTS
- LIED
- QUESTIONS FOR DEFENSE

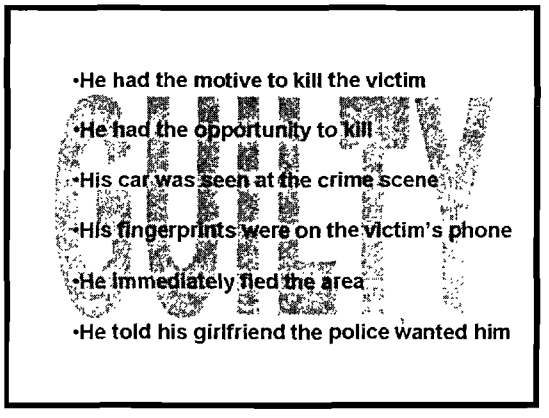
These words are in the VIP CD computer data base. To create a computer slide show, first you call up the slide with the word such as "DEFENSE" and the next slide has that same word watermarked in the background. Then, you start adding your response line by line. The jury can see what your points refer to, i.e., the watermarked word, while you continue to argue and reveal the points.

6-6





6-7



RESPONDING TO THE DEFENSE CHART

You can respond to the defense claims with the so called "HMM" chart. This allows you to comment on each defense point one at a time. Your response will answer each claim and demonstrate how ridiculous the claims are. On this chart (right), the word "PLEASE" is used as in the expression "Please don't insult my intelligence with such an argument."

THINGS THAT MAKE YOU SAY *PLEASE*

- *Def. claims he doesn't know anything about shooting*
  - But he knows all the parties & was seen in area.
- *Def. claims he wasn't present at time of shooting*
  - But his car was seen driving away.
- *Def. claims he has never had a handgun*
  - But a handgun was found under front seat of his car.
- *Def's friend claims the Def. was in Las Vegas*
  - But friend doesn't remember where they stayed.
- *Def. claims some else must have borrowed his car*
  - But didn't give anyone his keys.

6-11

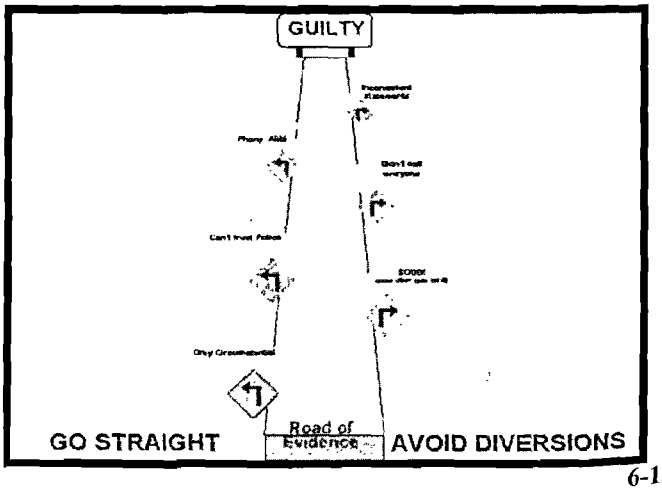
This chart is useful to show how unreasonable the defense explanations are. The action or fact is placed in the left column. The prosecution's inferences from the facts are placed in the "Reasonable" column in the center while the defense interpretation is placed under the "Unreasonable" column on the right.

INTERPRETATION OF FACTS

Action	Reasonable	Unreasonable
Def. asked U/C Ofcr. what he wanted to buy	Def. was trying to sell drugs	*Def. was just being sociable*
Def. takes $20 from U/C Ofcr.	Def. signalling to holder to bring drugs	*Def. just being friendly waving at passing cars*
Def. waves to car across street	Def. was accepting payment for drugs	*Def. was just holding money for U/C Ofcr. because he was afraid he would be robbed*
Person from across street hands something to Def.	Holder gives the drugs to the def.	*Another person was giving defendant some cigarettes*
Def. hands something to U/C Ofcr.	Def. was completing	*Def. had no idea that what he was handing U/C Ofcr. was an illegal drug*

6-12

If your law permits, you can explain to the jurors that the defense's goal is to divert the jurors' attention from the facts and have one or more jurors make a turn onto one of the side roads that would prevent them from arriving at GUILT. This visual can assist with that argument.



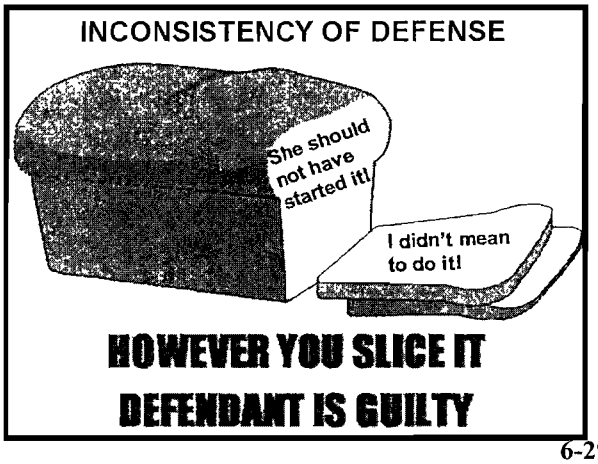
6-13

EXAMINING THE DEFENSE CHART

Inconsistent Defenses Chart

The defense argument has inconsistencies in their positions, and you need to be able to convey those inconsistencies to the jury. Sometimes the inconsistencies are very slight. Also, the inconsistent statements of the defendant can be telling. The best way to expose inconsistencies is with an argument visual.

The sliced bread visual works well when the defense takes inconsistent positions, either of which would leave the defendant guilty of the crime.

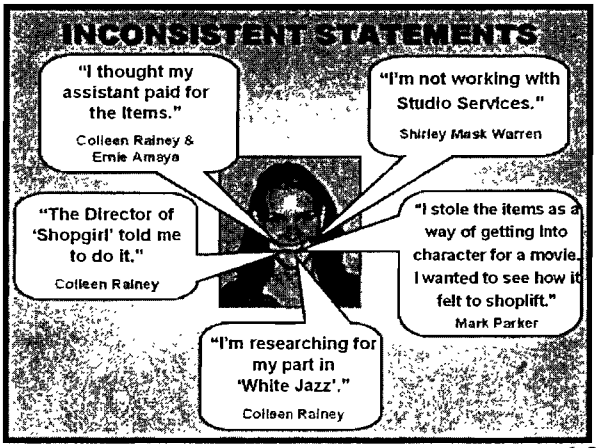


6-29

The missed target chart is a good way to illustrate how far away the defense claims are from hitting the reasonable doubt bulls eye.

6-30

This chart illustrates all the inconsistent statements made by the defendant. The booking photo of the defendant was placed in the center and around it were placed the various statements made by the defendant to the security officers and police. The argument is that the defendant's several inconsistent statements show consciousness of guilt.



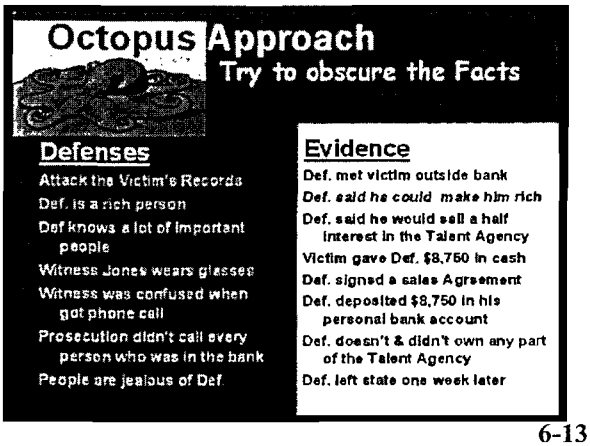
6-31

EXAMINING THE DEFENSE CHART

Explaining the Defense Approach Chart

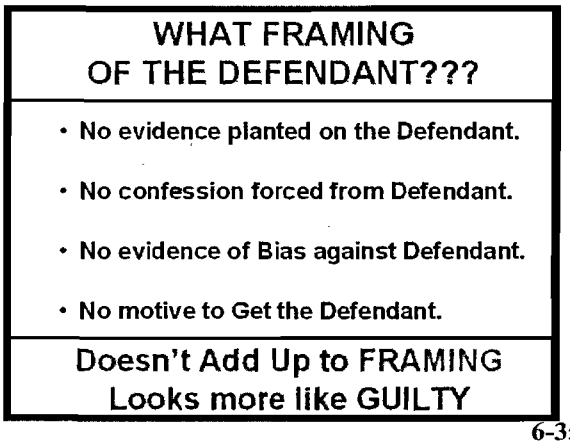
In some states, the prosecutor is permitted to comment on the defense's approach to argument. In those states that permit commenting, you want to explain to the jury that the defense argument is intended to create confusion, and that the defense then argues that this confusion is the equivalent of a reasonable doubt. Great care must be taken to avoid any suggestion that defense counsel is deceitful or in any way trying to mislead the jurors because in some jurisdictions that argument and visual can constitute trial error and may result in a mistrial or reversal.

The octopus chart illustrates the prosecution argument that the octopus will ink the water in an effort to escape just as the defense argument clouds things. The chart spells out the defense points in an inky blue background. On the other side, the chart lists the prosecution evidence on a white background.



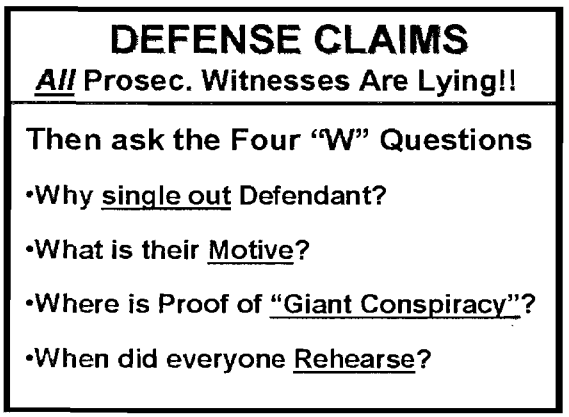
6-13

When the defense makes this bold argument without any facts to back them up, this framing chart delivers a strong rebuttal visual.



6-35

The defense may try to make the jurors believe that there is a giant conspiracy by the police and prosecutor to target the defendant. This chart displays the preposterousness of this argument. You want the jurors to ask themselves the four "W" questions listed on the chart.



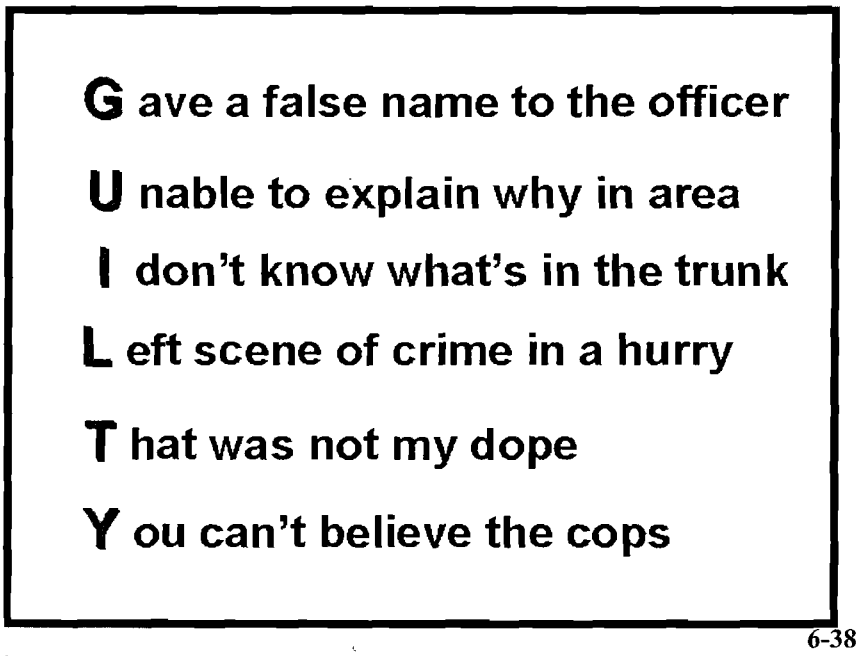
6-36

CLOSING REMARKS CHART

Spell Out Chart

A reliable way to end your rebuttal argument is with a spell out chart. A spell out chart is memorable for the jurors and provides the prosecutor with a good visual aid to assist in summarizing the evidence. For years, prosecutors have utilized the spell out chart on posters or flip charts, but it works even better in a computer slide show. Some of the spell out words are:

- **GUILTY**
- **LIAR**
- **MURDERER**
- **CONVICT**
- **I DID IT**
- **FRAUD**



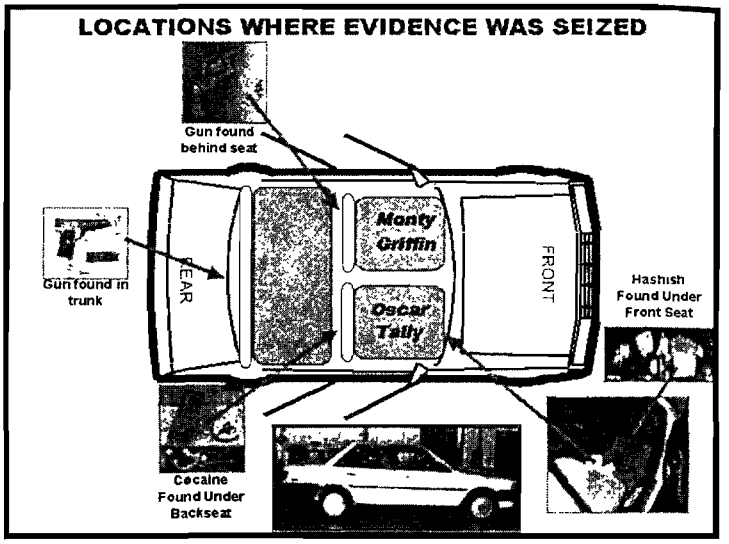
6-38

6-39

DRUG CASE

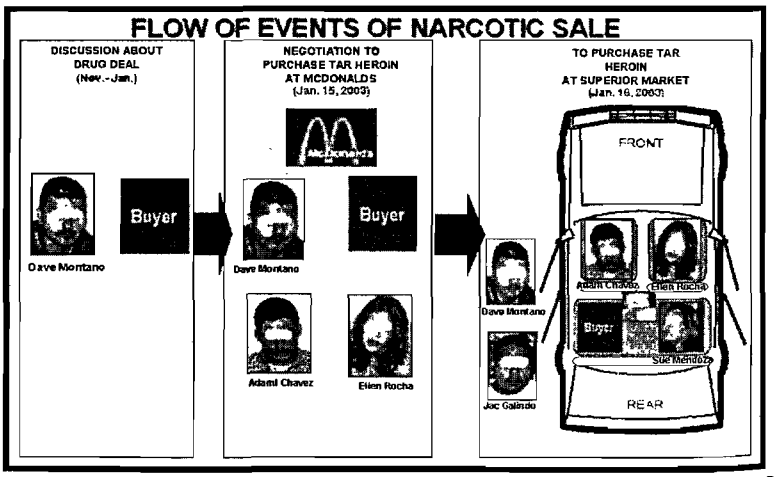
When drugs are found in a vehicle, it can be important for the jurors to know how close the drugs were to the various occupants of the vehicle so they can determine who had dominion and control over them. A visual of the vehicle can assist the witnesses in describing for the jury where the drugs were found.

The vehicle diagram is labeled to show where drugs and weapons were found. The names of the defendant occupants are placed where they were seated. The jury can see that the evidence was within arms reach of the defendants.



7-1

Another approach is to showing the location of all the defendants in the vehicle during the narcotic transaction. This flow chart shows who was involved at each meeting of the sales transaction. Ultimately, the exchange of money for dope took place in a vehicle. The objective of the chart was to communicate how close each defendant was to the sale.

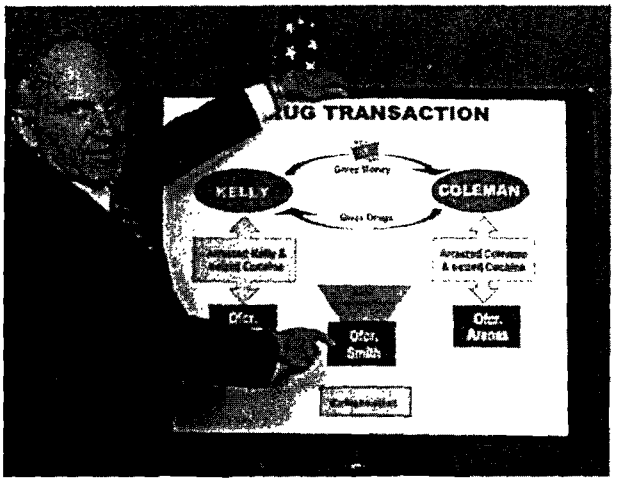


7-2

DRUG CASE

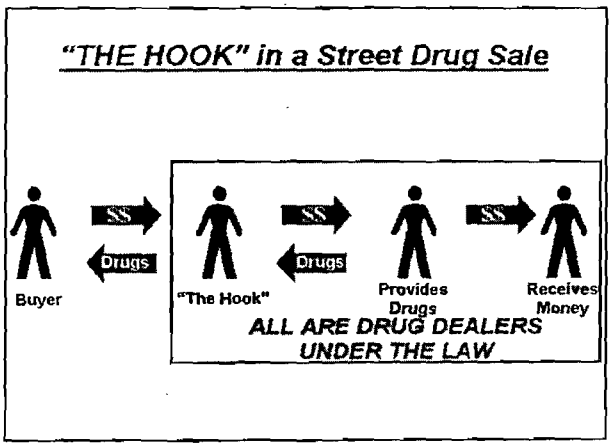
In sales of controlled substances cases, you can utilize a flow of events chart combined with a relationship of parties chart to explain the transaction and who participated. When several people are involved in a drug transaction, this can be confusing to the jury. This chart introduces the jurors to the parties, shows the connection to each other and specifically what each person did.

In undercover buy situations, many people may be involved on the dealer's side as well as a number of officers. This flow chart can orient the jurors to the players and their roles.



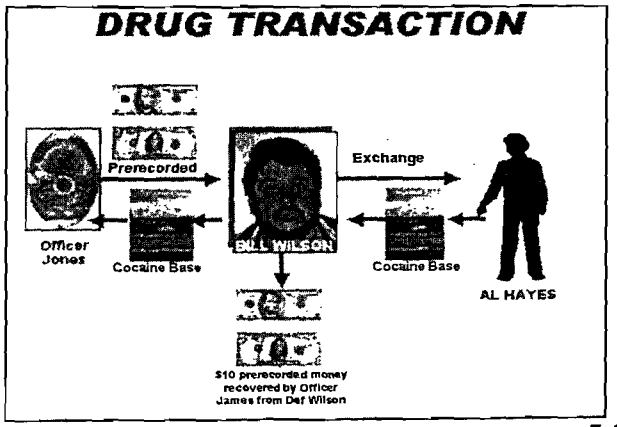
7-3

The "Hook" chart helps explain to the jurors the role and involvement of the middleperson. Most jurors are unfamiliar with the terminology and procedure of a drug transaction. This chart provides the jurors with a clear picture of the drug deal.



7-4

A more elaborate flow chart includes photos of the parties, the money used and the drugs. This chart makes it easy for the jurors to see who did what during the drug transaction. If officers do not want their photos used on the chart, a police badge can be substituted.

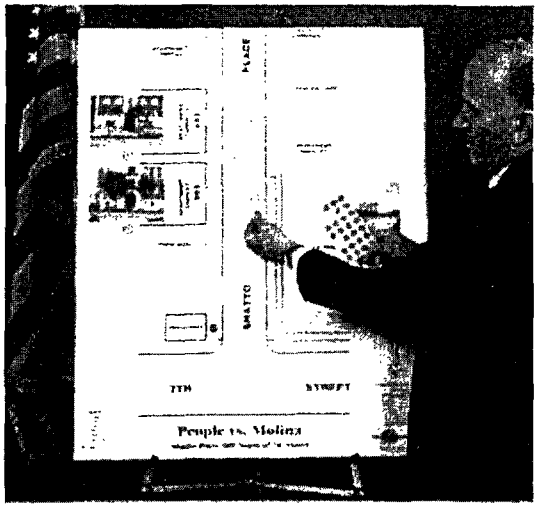


7-5

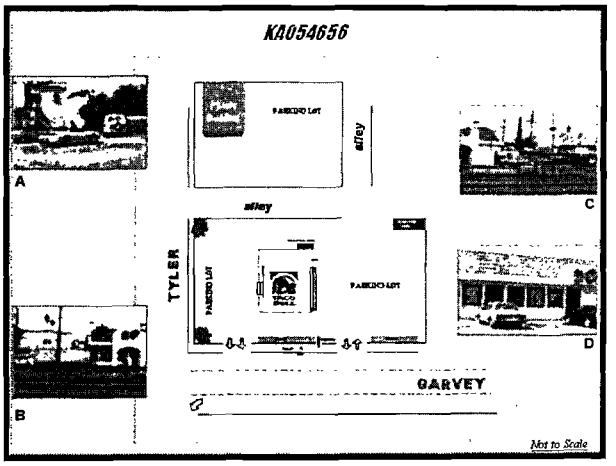
ROBBERY CASE

Besides a map, a robbery case lends itself to a crime scene diagram. It shows the closeness of the victim to the defendant, and it aids in establishing the reliability of the identification. Also, the diagram helps jurors understand the testimony describing the movement of the defendant during the robbery.

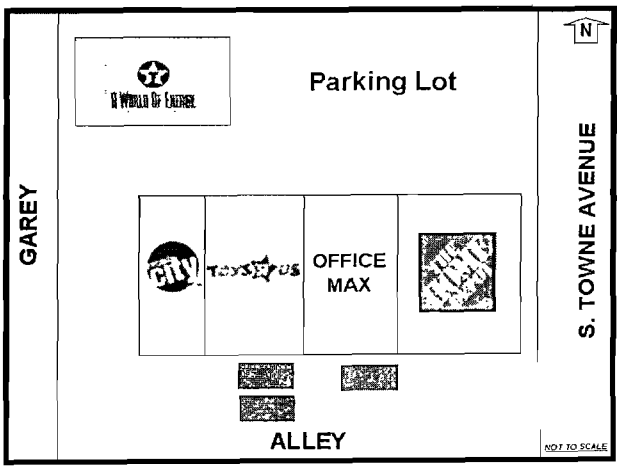
The crime scene diagram oriented the witnesses and jurors as to where everything happened. Shown here is the path the defendant took as he ran down the street. Dots were placed at each location where a witness was able to identify the defendant.



A combination of a crime scene diagram with photos helped the jurors visualize what happened in this Taco Bell robbery case. It was important for the witnesses to be able to describe where they saw the defendant when he was leaving the crime scene.



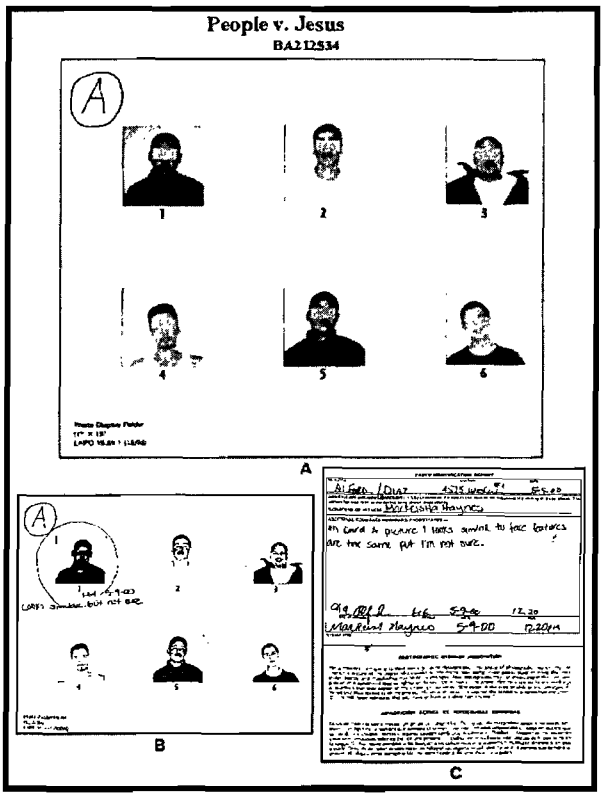
This diagram shows where many of the witnesses worked in the business complex. Logos aided the jurors in remembering the business locations.



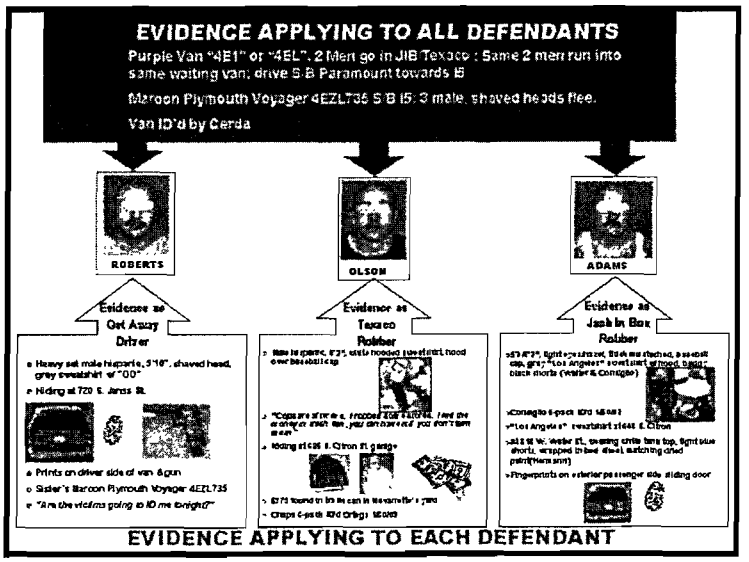
ROBBERY CASE

Identification is crucial in most robbery cases. Several visuals can assist the jurors with the identification evidence. When the witnesses identified the defendant in a photo line up, you want the jury to see the actual photo line up and the documents on which the witnesses wrote their identification.

Creating a photo line up display chart involves four steps. First, you enlarge the actual photo line up that was shown to the witness and mount it on the poster board. Second, you copy the photo line up which was marked by the eyewitness and place it on the board. Third, you copy the admonition and also mount it. Finally, you copy the written statement of the eyewitness, which identifies the defendant. In some jurisdictions, this is a part of the admonition.

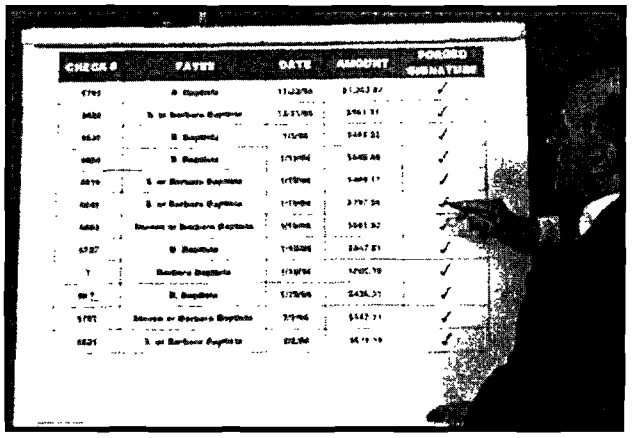


Often in robbery cases, you have several robbers and some of the evidence applies to all of them and other evidence applies only to a specific robber. This chart lists the evidence that applies to all the defendants on the top. The specific evidence that was found on or near each defendant is listed on the bottom of the chart.

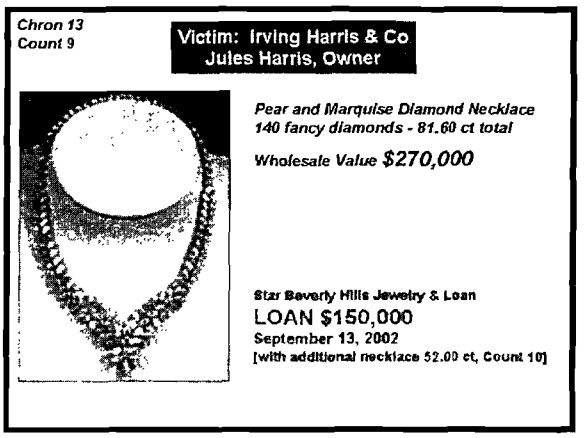


FRAUD CASE

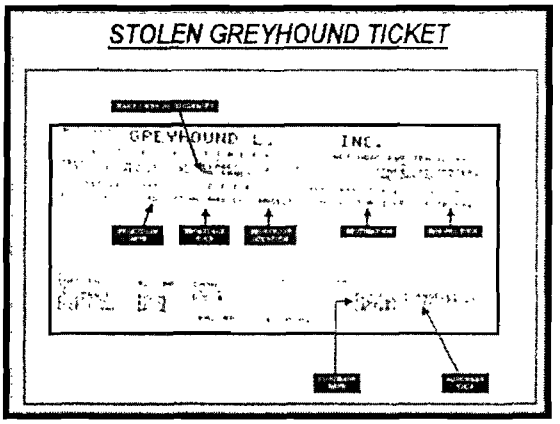
Besides displaying who was involved, the jurors need to be shown what happened in the case. If numerous checks were passed, you can list them on a chart. If the fraud involves expensive items such as jewelry, you want to display it to the jury along with relevant information. If the fraud occurs at a number of businesses, then a map of the locations would be helpful. Examples of these fraud charts are shown below.



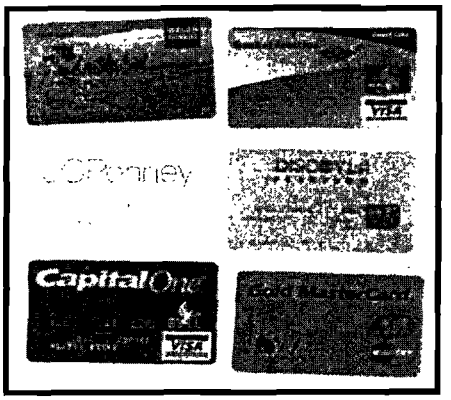
Forgery of numerous business checks



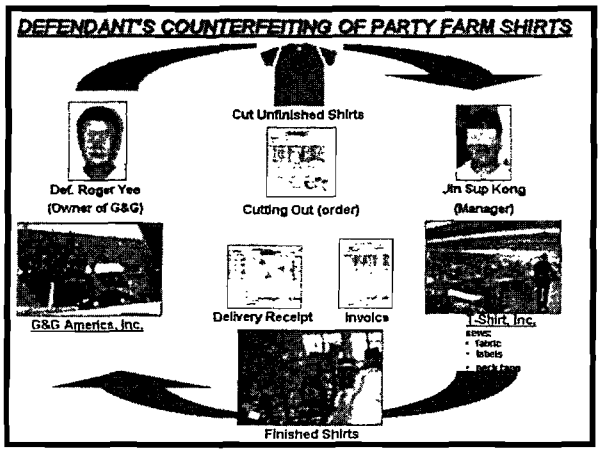
Fraudulent appraisal of jewelry



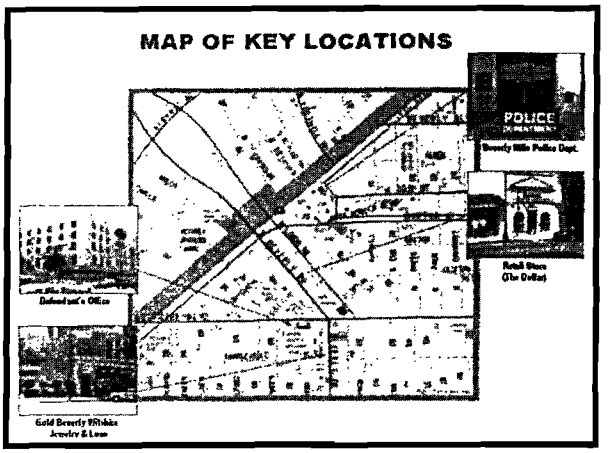
Forgery of Greyhound bus tickets



Credit card scam and forgeries



Counterfeiting of name brand shirts

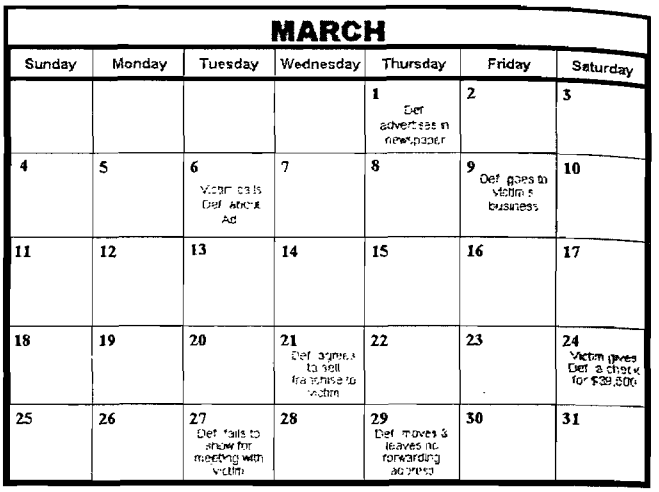


All the locations to be discussed in fraud case

FRAUD CASE

When a fraud evolves over time, a timeline visually communicates when the various business transitions occurred.

Often a calendar works as a visual aid for jurors to understand when transactions occurred. This chart allows them to visualize the various events and when they occurred in relationship to each other.

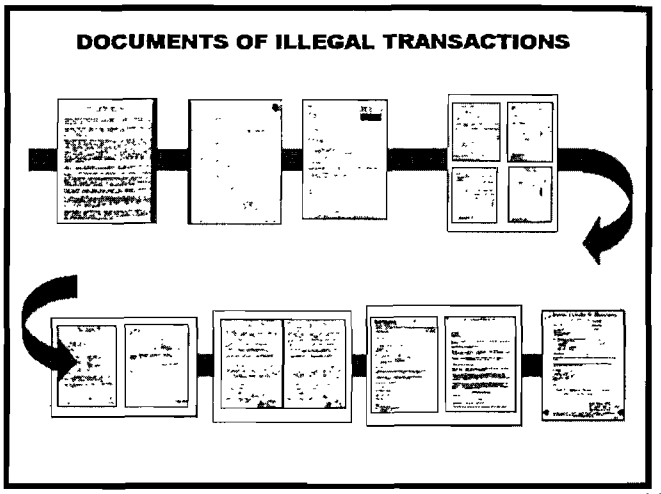


MARCH

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1 Def advertises in newspaper	2	3
4	5	6 Victim calls Def about Ad	7	8	9 Def goes to Victim's business	10
11	12	13	14	15	16	17
18	19	20	21 Def agrees to sell franchise to victim	22	23	24 Victim gives Def a check for $39,500
25	26	27 Def fails to show for meeting with victim	28	29 Def moves & leaves no forwarding address	30	31

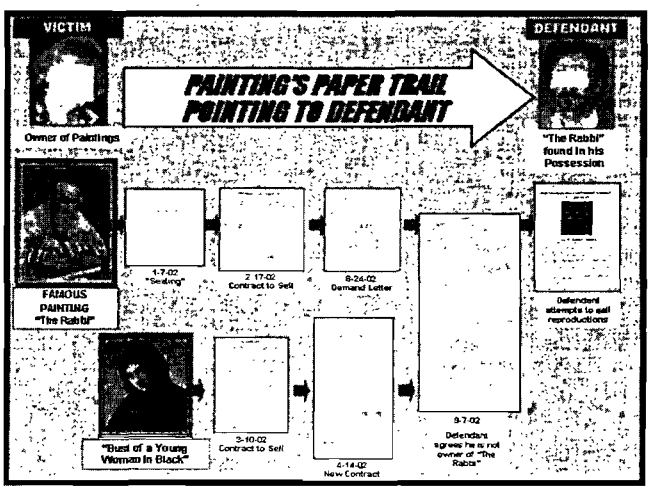
7-21

Since there are so many documents in a fraud case, you can create a flow chart showing each document and how they fit together.



7-22

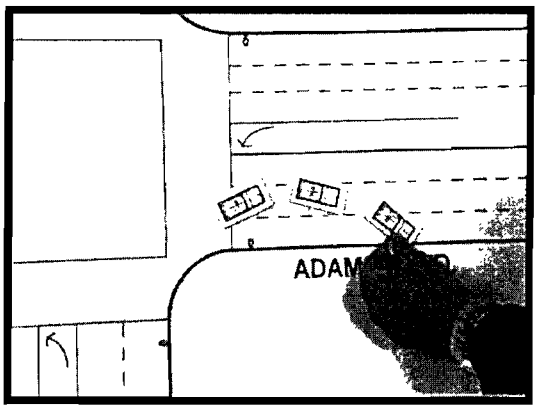
This chart was created for an art fraud case. It was important for the jury to understand the order of the transactions. Here, the timeline incorporated the paintings and the accompanying documents.

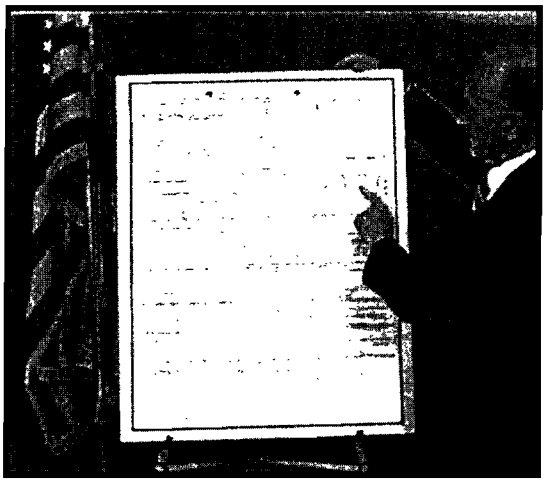


DRIVING UNDER THE INFLUENCE CASE

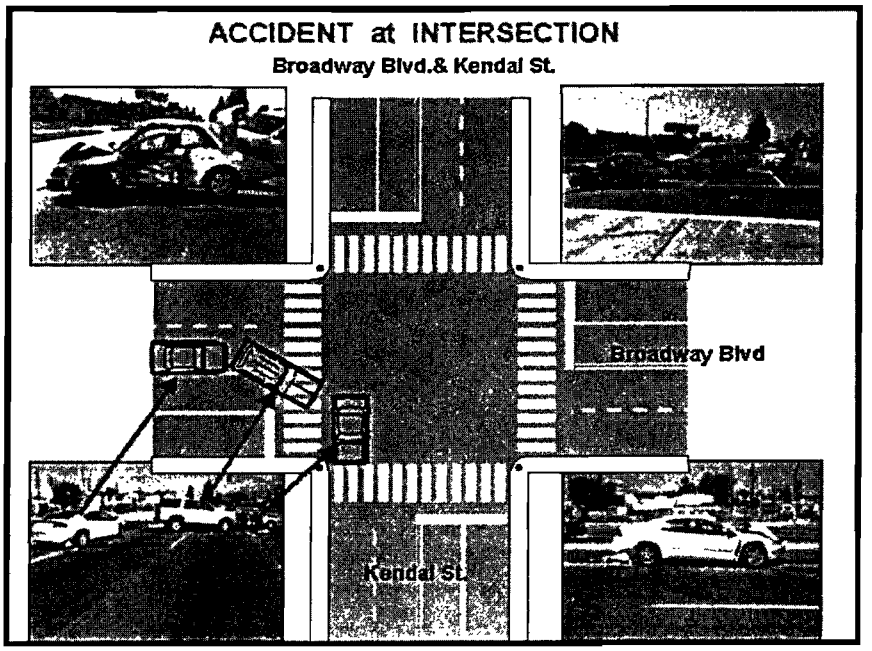
There are several visuals that can enhance a driving under the influence case whether it is a DUI, a vehicular homicide or vehicular assault. Those visuals include:

1. Diagram of the driving;
2. Photo of the chemical test instrument;
3. Chemical test checklist enlarged, and
4. Printout of chemical test enlarged.





In a vehicular homicide or vehicular assault case, there generally will have been a collision. In those cases you want the jurors to see a diagram of the accident scene. If you have photographs, you can place them around the street diagram.

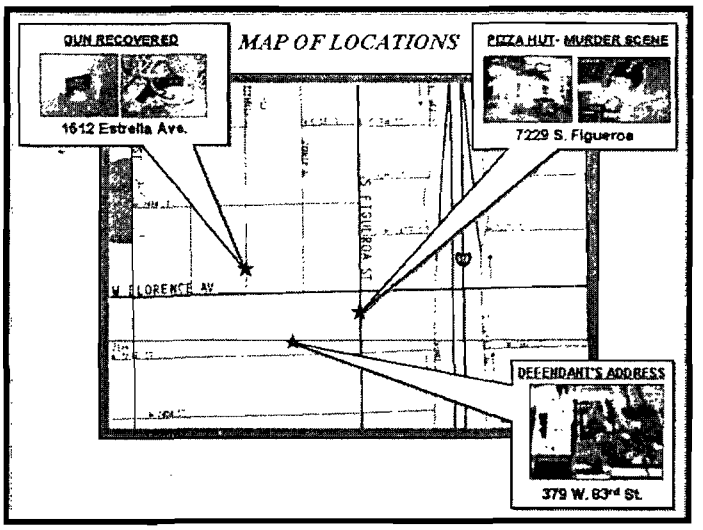


MURDER CASE

A murder or manslaughter trial by its nature piques the jurors' interest, and jurors have a high expectation as to what they are about to see. You, as a prosecutor, are expected to be well prepared and persuasive. One of the ways to convey your professionalism is through your visual aids. For instance, during opening statement you want to orient the jury to the facts of the case with maps and diagrams.

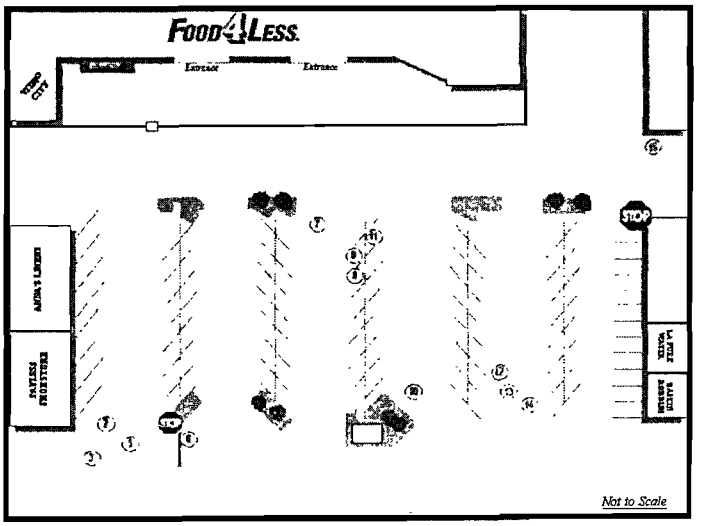
Maps

Maps, like the one to the right, when used in conjunction with photographs, communicate to the jury the distances between relevant locations and what happened at those places.



Diagrams

A diagram of the crime scene can be used in opening to set the stage for the story of what happened and where evidence was found. In this murder case, the shooting occurred in the market parking lot, and a label was placed where each piece of evidence was found.

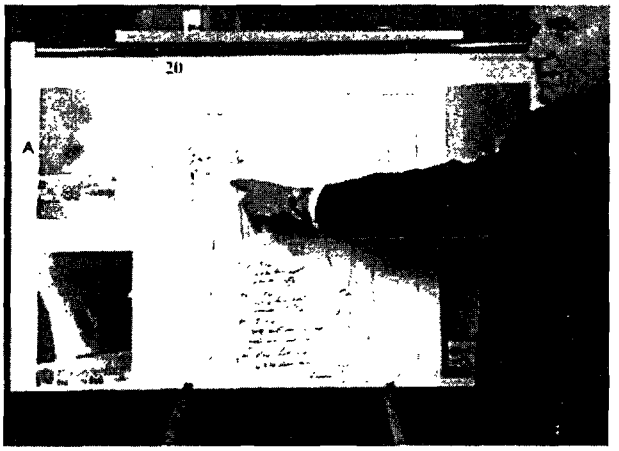


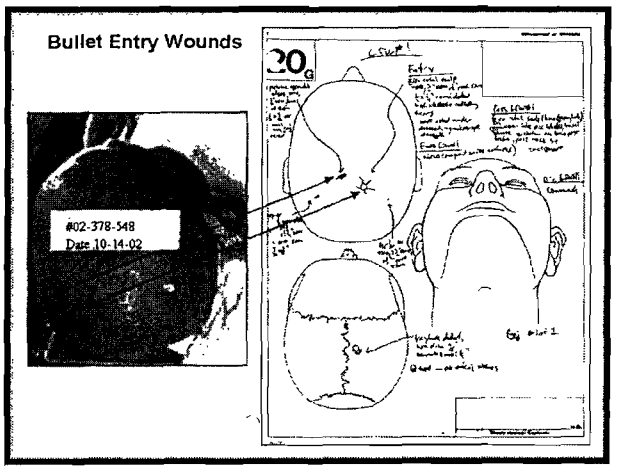
MURDER CASE

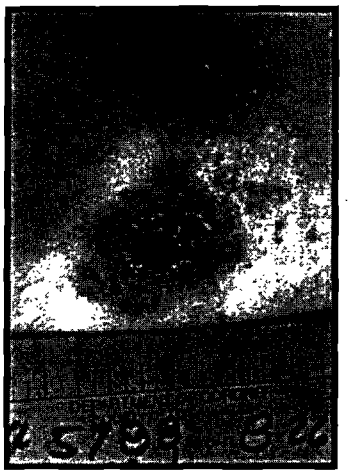
Pathologist

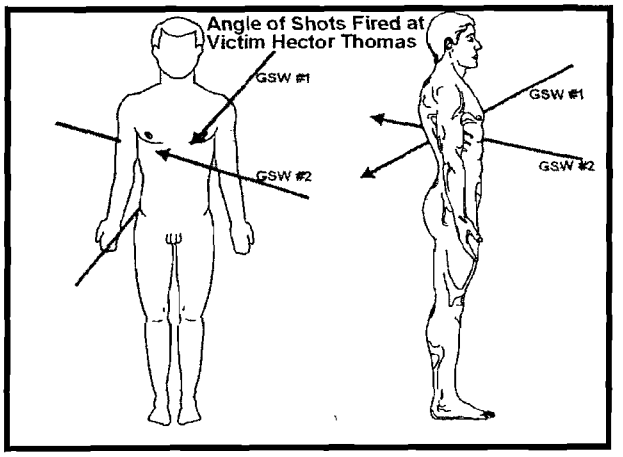
Usually in a murder case, the prosecutor will need to call a pathologist to establish various facts about the victim's death. Because of TV and movies, jurors tend to look forward to this expert's testimony. However, in the real world the pathologist's testimony often involves complicated medical terms . Some pathologists are not good communicators. Therefore, visual aids are vital to ensure the pathologist's testimony is clear and understandable. Visuals can do the following:

- Explain entrance and exit wounds;
- Explain cause of death
- Explain order of injuries;
- Explain type of weapon used;
- Prove identity, and
- Prove prior beating injuries.









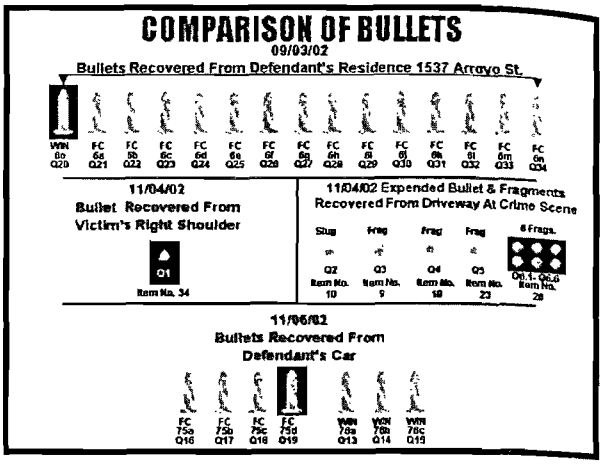
MURDER CASE

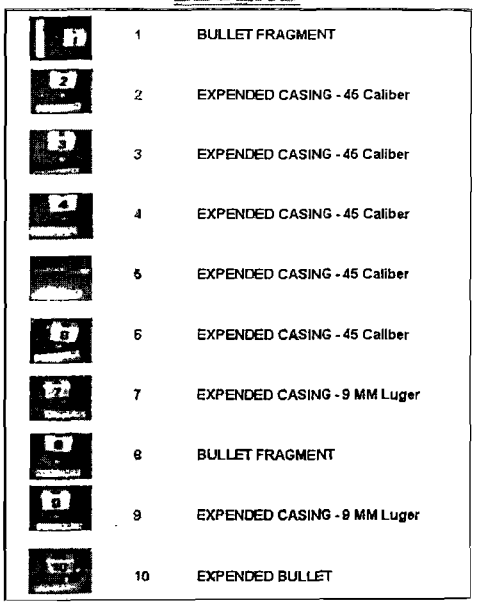
Firearms

Visual aids can enhance a firearms expert's testimony in several ways. Again, like the testimony of a pathologist, this testimony can be critical and its impact depends upon the expert's communication skills. Most firearms experts are members of law enforcement, and the defense may try to create the image that your expert is biased for the prosecution.

Visual aids can make the firearms expert's testimony understandable and more credible. The following are some ways in which visuals can be of assistance.

- Explain type of firearm used;
- Explain how to determine what firearm was used in a shooting through either the shell casing markings or striations on the projectile, and
- Explain the trajectory of the bullet from the position where the weapon was fired or the path of the bullet.



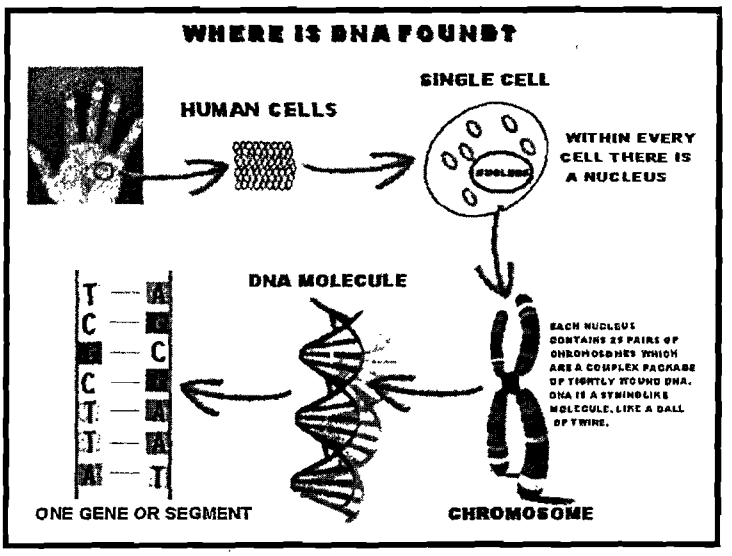


MURDER CASE

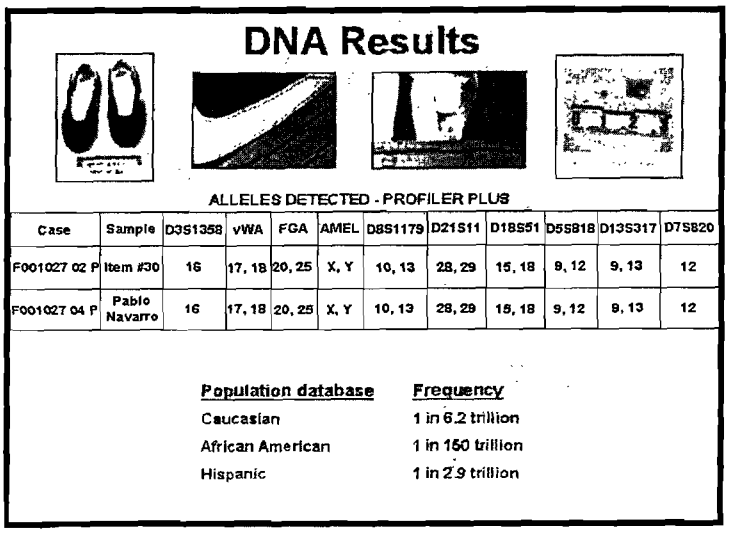
DNA

DNA evidence has become common in murder cases. Sometimes the prosecution's most important evidence is the DNA expert's testimony. For the jury to accept the DNA expert's opinion, you want to use visuals that help the jurors understand the science of DNA. Because DNA science is complex, a prosecutor cannot thoroughly educate the jurors on the subject. However, DNA visuals can make DNA fundamentals understandable and provide the jurors with a comfort level so they trust the expert's testimony.

This flow chart simplifies the scientific explanation of DNA. A photo of a hand is combined with a drawing of a cell and a double helix. This chart is helpful in educating the jurors about the basics of DNA.



This visual that summarizes the DNA results is very persuasive. It shows the extremely high likelihood that the specimen from the crime scene matched the defendant's DNA. Photographs were added to show where the drops of blood were found on the defendant's shoe.



Case	Sample	D3S1358	vWA	FGA	AMEL	D8S1179	D21S11	D18S51	D5S818	D13S317	D7S820
F001027 02 P	Item #30	16	17, 18	20, 25	X, Y	10, 13	28, 29	15, 18	9, 12	9, 13	12
F001027 04 P	Pablo Navarro	16	17, 18	20, 25	X, Y	10, 13	28, 29	15, 18	9, 12	9, 13	12

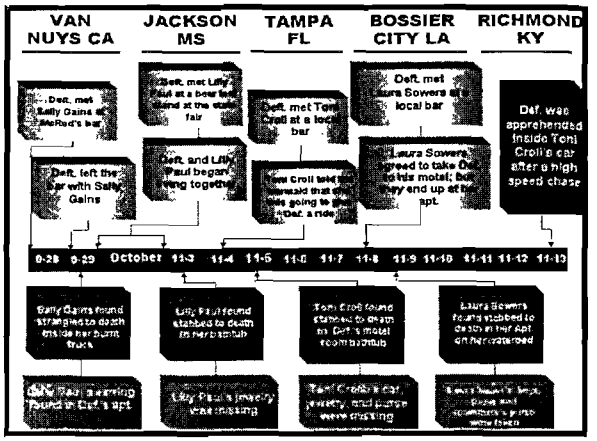
Population database	Frequency
Caucasian	1 in 6.2 trillion
African American	1 in 150 trillion
Hispanic	1 in 2.9 trillion

MURDER CASE

Argument

A visual can be utilized when you have other crimes evidence in the murder case.

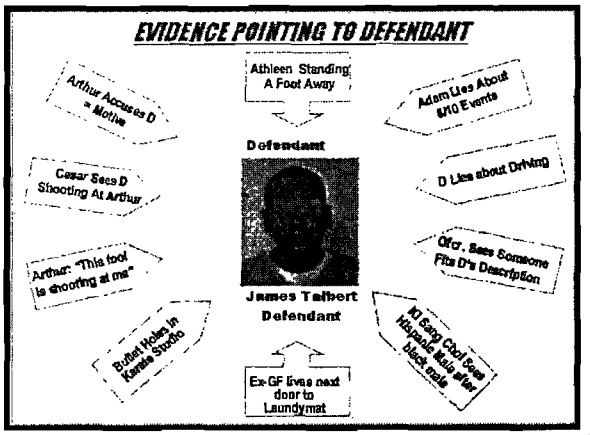
This case involved a serial killer of women all over the country. The chart shows that the defendant committed other murders in a similar manner. It employs a timeline showing when the other murders occurred and blocks spelling out how similar they all are to the others.



7-52

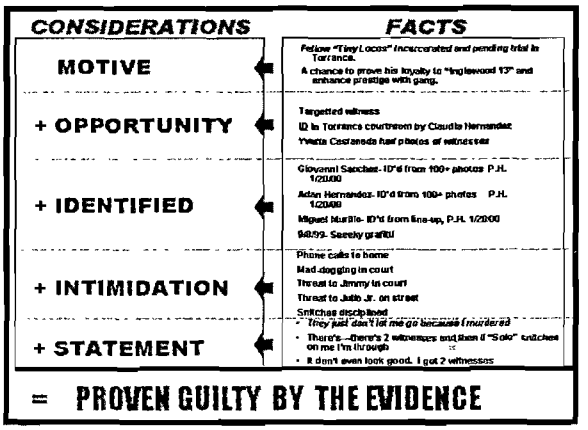
During your argument, you are trying to bring the evidence all together, and many of the other visuals we have discussed can apply.

An arrow chart is simple and can effectively illustrate that the evidence only points to this defendant.



7-53

Sometimes you want a visual that groups the evidence together. This chart is good when you are relying on motive and opportunity.

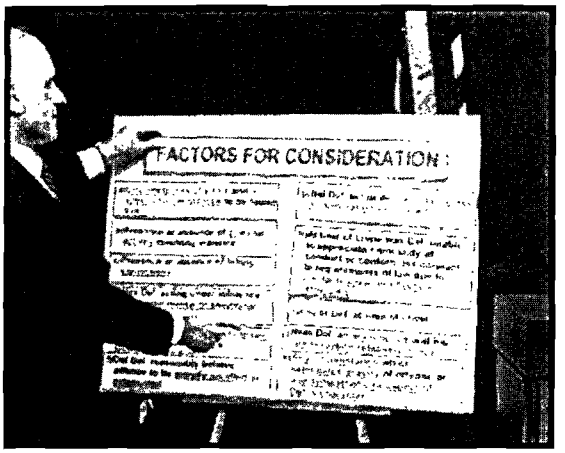


7-54

DEATH PENALTY PHASE

Penalty Phase Argument

Most jurors do not feel comfortable with having the awesome task of deciding whether another human being should live or die. Some jurors look for any excuse to avoid being involved. Capital punishment is one of the lightning rod issues dividing society. The prosecutor has a formidable task in persuading the jury to impose the death penalty.

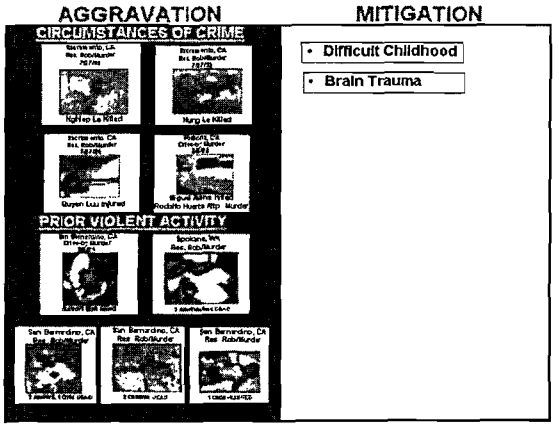


7-55

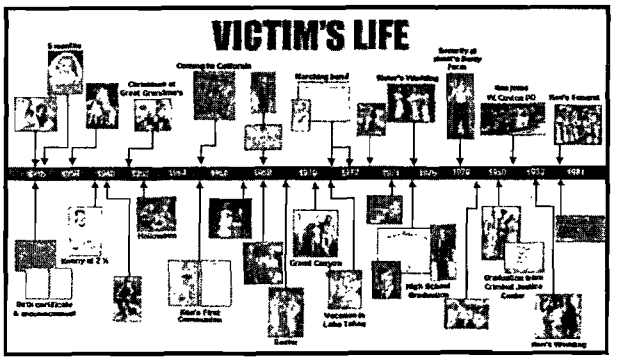
Evidence the jury must consider in deciding on the death penalty

Visuals play an important part in persuasion during the penalty phase. Some of the things you want to accomplish with the visuals are the following:

1. Eliminate confusion regarding the law and the process the jurors are to follow;
2. Convince the jury that this type of murder case deserves the death penalty;
3. Show the jury the facts that can be considered as aggravating circumstances;
4. Persuade the jurors that the defendant has been a violent and dangerous person for a long time;
5. Explain the concept of victim impact and relate the victim impact evidence, and
6. Illustrate why the aggravating circumstances outweigh the mitigating circumstances.



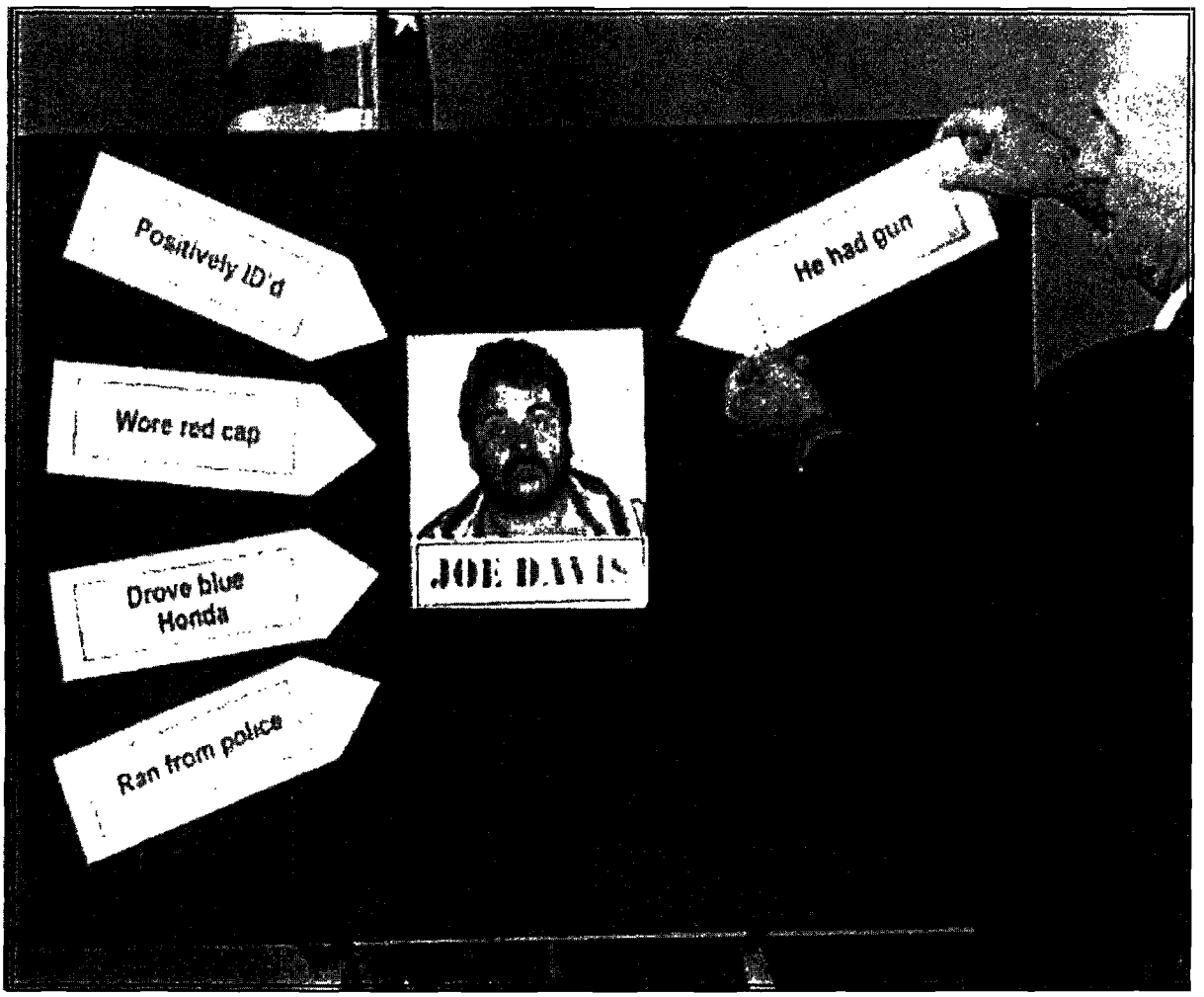
Comparing the aggravating circumstances with those in mitigation 7-56



A victim impact chart 7-57

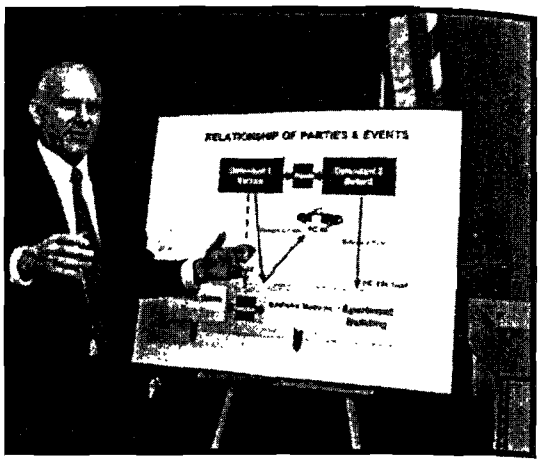
Chapter 9

USING POSTERS



Be Prepared and Organized

It is easy to say you should be well prepared and organized when using visual aids. Unfortunately, when you are in trial things happen unexpectedly, such as a witness does not appear. As the old saying goes, "Don't let the audience (jurors) see you sweat." In other words, you have to look prepared and organized even if it is an illusion.



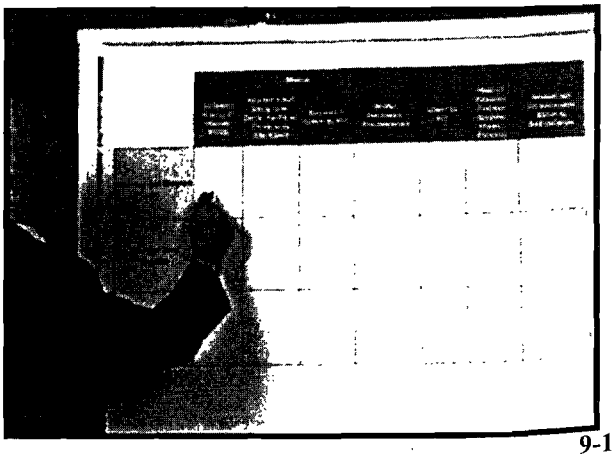
You need to know when is the best time to use your visual aids and in what order. You can have the best visuals, but if you do not have a plan on how to use them, their effectiveness will be lost on the jury.

Think Like a Juror

In order to have the greatest impact on jurors, you have to put yourself in the position of the jurors. Remember what we stated in Chapter 1 that your job is to inform, to clarify, to make memorable and ultimately to persuade. Visuals are important because they force you to organize your ideas by putting them on paper. In preparing a visual aid, you categorize and compartmentalize the evidence which is exactly how the jurors want it. Jurors do not want to be overwhelmed; they want things simplified. In this way they can easily assimilate the facts and law.

Break Up Your Oral Presentation

The average human being, and that means jurors, can only absorb about eight to ten minutes of oral argument. Visuals aids can be used to awaken and revitalize jurors. Visuals can be used to expand the jurors' attention spans. The most effective opening statements and closing arguments are those in which the oral presentation is divided by visual presentations every few minutes

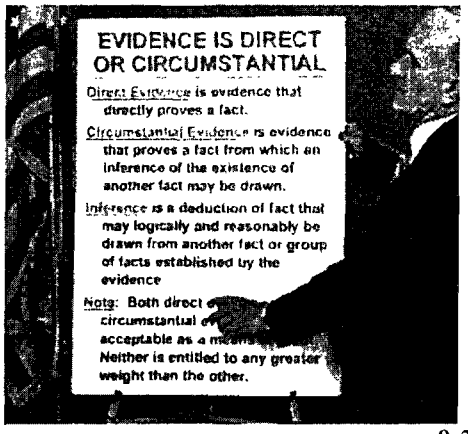


9-1

ESSENTIAL PRINCIPLES

Poster Placement

Visuals need to be readable by all of the jurors. This is not as easy as it seems because jury boxes tend to be quite wide, making it difficult to find a central location to display your posters. You want to place your poster as close as you can to the jurors without invading their so called personal space. If the visual is a diagram, map or photo display, you may want to place the poster reasonably close to the witness stand. In this way, the witness can refer to the visual and the jurors can see the witness' testimony.



9-2

Another concern in using visuals is making sure that you do not block the jurors' view of the poster especially when you are referring to it. By using a pointer, you can stand to the side and point to specific items you want the jurors to see.

Multiple Posters

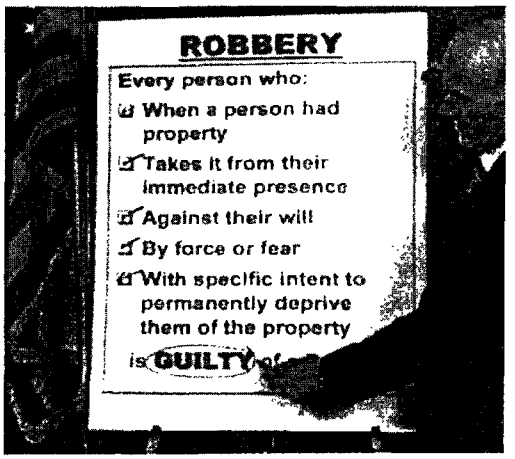
Sometimes you want to display several charts at the same time. It is highly effective to have one chart that summarizes the entire case and display it throughout your presentation. Then you use another easel for all your detailed charts.

Multiple Formats

Another method that is highly effective is using a slide show in conjunction with your posters. Jurors can focus on the message displayed on the big screen and then you can supply the details with a poster chart displayed on an easel to the side of the screen. Switching back and forth between two media will expand the jurors' attention span.

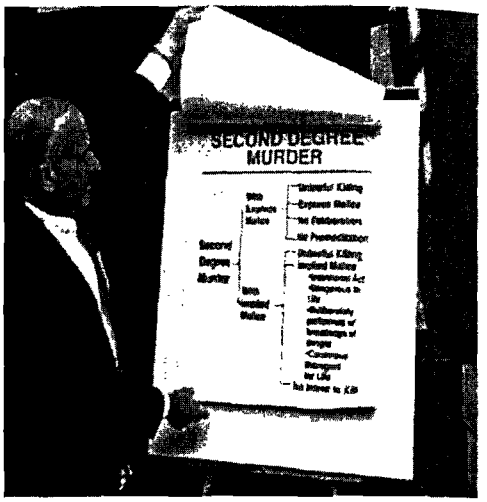
Highlighting and Emphasizing

There are many ways to emphasize a point in front of the jury. Use a large marker to place a check mark in front of one of the points on your chart. Another technique is to underline a portion with a color marker. Also, you can place a bright colored dot in front of a point for emphasis. When you highlight a point, you convey to the jurors that you have proved that point, and they can move on to the next point.



9-3

If you are going to use a visual as an exhibit, you must show it to defense counsel and the court before it is presented to the jury. However, it is not quite as clear whether you must show the defense your argument visuals. There are two schools of thought on the prosecutor's obligation to reveal to the defense prior to argument the types of visuals that will be used during the argument.



9-4

Some prosecutors take the position that the defense does not have the right to see the prosecutor's notes before argument. Therefore, why should they be given an opportunity to look at the argument charts? These prosecutors contend that if the prosecutor discloses in advance, the defense will object to some of the charts. Often, the judge, to appease the defense or out of an abundance of caution, will reject some charts. Unfortunately, this can be devastating when the prosecutor has counted on using that chart to explain a certain point in an argument.

Other prosecutors take the position that it is better to have the issue settled before you start your argument. These prosecutors also point out that resolving questions in advance prevents defense interruptions.

Leaving the Visual Up

You finish your argument and sit down at counsel table. Your charts are still up in front of the jury when the defense attorney starts argument. This may seem advantageous to have your charts with your argument on them in full view during the defense argument. However, some case law and courtroom custom suggest that leaving your charts up after you have finished arguing may be inappropriate.

Another issue is whether you should object to the defense attorney using or marking your charts during the defense's argument. Generally, it is beneficial to the prosecution for the defense to use the prosecution's charts. You may want to take advantage of the situation. In your rebuttal argument, you can mention the fact that the defense apparently did not have much evidence because they did not seem to have enough points to fill up a chart of their own.

ACTION VISUALS

Most posters, including charts, maps, diagrams, exhibit enlargements and photo displays, are static in nature. These visuals are shown to the jury in their entirety with all the informational content revealed, and the prosecutor does little or no writing on the chart. However, action visuals do not reveal all the information, and the prosecutor actively discloses the content during discussion with the jury. Action visuals are excellent in keeping the jurors' attention during argument because the visual is in action.

Even though action charts require more extensive preparation than static visuals, you can reuse them by merely changing the text. Action charts provide considerable flexibility and permit you to quickly prepare an effective chart even if you have only limited resources.

These types of visuals are very useful in small offices because they are generic and do not require expensive equipment. Many of these visuals can be made with a desktop computer and an inexpensive ordinary printer. Larger offices should have an adequate supply of these action charts which could be used for last minute situations in their visual aid shops. Some of the common categories of action visuals, which are discussed in this chapter, are as follows:

- –Build Charts
- –Focus Charts
- –Connecting Charts
- –Explaining the Law Charts
- –Explaining the Defense Charts
- –Showing Movement Charts

BUILD CHARTS

One of the most effective argument visuals a prosecutor can employ are the so called "build charts." They consist of various pieces that you affix to a poster board with Velcro or repositional tape. Advantages of the build chart are: that the jurors cannot read ahead when you are arguing; the charts create a degree of suspense and drama because the jurors are waiting to see what you place next on the poster board, and the biggest benefit is the cumulative effect when the final visual appears before the jurors.

Build charts take some time to initially prepare. The advantage is that they can be used over and over by different prosecutors. The construction requires poster boards and black or white Velcro. The build charts permit the text to be changed for each case. The text is prepared by computer and printed out on a laser or inkjet printer on a standard size sheet of paper. This is attached to small pieces of poster board by double sided or repositional tape. It is more effective if you use a color printer with legal size paper, but even a black and white printer will do.

On the next several pages you will see examples of build charts that prosecutors have used. There are endless possibilities of ways to make your argument dynamic and several of them that are covered in this chapter are as follows:

- –Arrow
- –Puzzle
- –Pyramid
- –Wall of Evidence
- –Circle of Evidence
- –Scales

Arrows

Purpose

Chapter 4 discusses the arrow chart as a static chart. However, the arrow chart can be more effective when it is used as an action visual. When you place each arrow individually on the board, this generates more interest and captures the attention of the jurors. The effect of the arrow chart is that it illustrates how all the evidence points to this defendant.

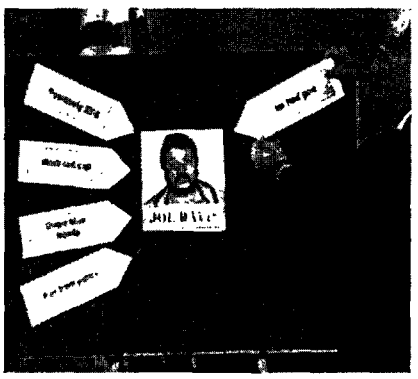
Material

In order to create an action visual, you need a black poster board and several pieces of white poster board for the arrows. Also, you need some black Velcro.

Preparation

Make the backing of the visual from a black poster board 40"X32". Depending on the thickness of the poster board, you may want to glue two poster boards together in order to make it sturdier. Next, place four vertical black Velcro strips on the backing as seen in the illustration below. Place two smaller parallel strips in the center for the photo and name of the defendant. Cut out arrows from the white poster board and place the other part of the Velcro on the back of each arrow. Prepare the text that you will affix to the arrows. Create the wording on your computer, remembering to be concise. It is more effective to print them out in color if you have a color printer. Generally, you can print out the text for two or three arrows on one sheet of paper. Then, you cut the text to fit the arrow and affix it with small strips of double sided tape or with a glue stick. In order to be able to reuse the arrows, you want the text sheets to be easily removable when you are finished. Enlarge a photo of the defendant and affix it to a small poster board that has Velcro on the back. If you do not have a photo, then you can print out the name of the defendant and place it on the poster board.

You start by placing an arrow pointing toward the defendant's photo or name in the center.



You continue to place arrows around the defendant by attaching them to Velcro.

When you are finished, you have surrounded the defendant with arrows and can place the "Guilty" sign under the defendant.

9-5

Puzzle

Purpose

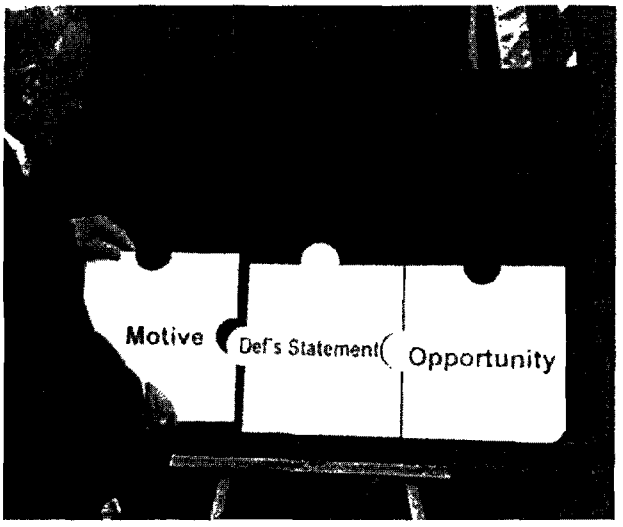
This build chart differs slightly from the arrow chart. The theme is that all the evidence fits together. The puzzle chart is very effective in circumstantial evidence cases. As you place each piece of the puzzle on the board, the jurors are fascinated by how they fit together and what the next piece will be. Also, when you have completed the puzzle, the jurors have a feeling of satisfaction like a person who has finished a jigsaw puzzle.

Material

You need a black poster board, a white poster board and black Velcro.

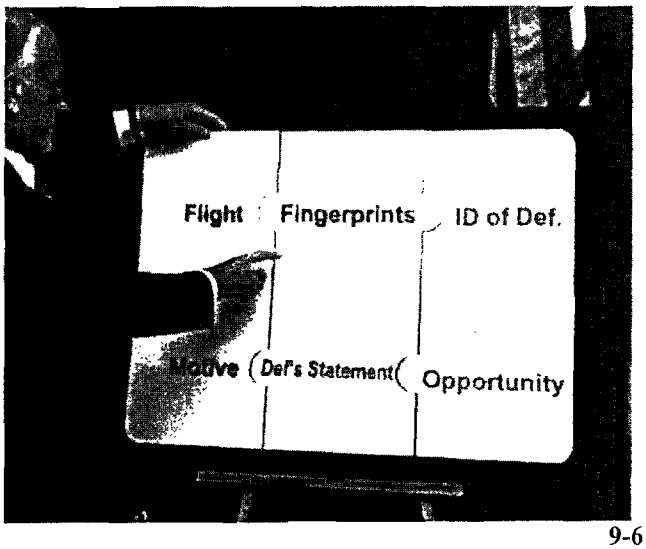
Preparation

As with the arrow charts, you start by creating the black poster board background. But this time, you place two horizontal black Velcro strips across the board. The tricky part is cutting the white poster board into puzzle pieces. You can use a knife to cut out the edges of the puzzle. Generally, you use five or six pieces for the puzzle and place Velcro on the backside of the pieces. Finally, you prepare the text similar to the arrow charts in your computer and print out the text on one sheet of paper. You affix them lightly to the puzzle pieces so you can reuse the pieces again in another case.



9-5

You start by placing one puzzle piece at a time on the black background . After each piece, you explain how it fits to the next piece.



9-6

When you are finished and all the pieces are connected, you tell the jurors that all the evidence fits together like a puzzle.

Pyramid

Purpose

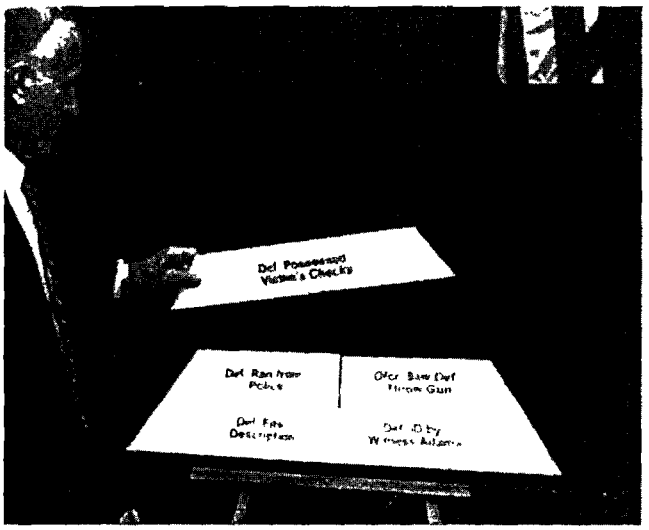
The pyramid chart is an excellent vehicle for discussing your evidence piece by piece in an interesting way. The jurors see before their eyes how the various points fit together on top of each other. The advantage of the pyramid is that all the parts point to the top where you place the word "GUILTY." You argue that just like a pyramid all the evidence points to the guilt of the defendant.

Material

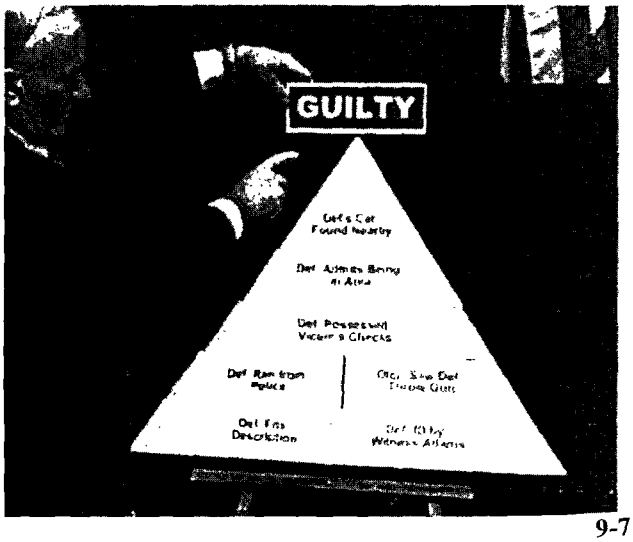
You need a black poster board, a white poster board and black Velcro.

Preparation

The backing is made of black poster board with small horizontal black strips of Velcro. Use white poster board for the pieces. These pieces are easier to cut out than the puzzle because all the cuts can be made on a large paper cutter. Generally, you have six or seven pieces for the pyramid. You prepare your text for the pyramid just like in the arrow chart. Print out the word "GULITY" and affix it to a rectangular piece of poster board with Velcro on the back.



You start in the lower left hand corner building piece by piece. You describe how it all fits together.



Ultimately, you put every piece in place. Then, you indicate how it all points to the top. Finally, you place the word "GUILTY" on top.

BUILD CHARTS

Wall of Evidence

Purpose

The wall of evidence chart is the ultimate build chart because it permits you to discuss numerous pieces of evidence. This can be especially useful in complex cases when you have a considerable number of topics you want to discuss with the jury. The advantage of the wall is that you show the jurors how all the pieces continue to build and support each other. The chart has a cumulative effect in that the jurors constantly see all the pieces even after you have finished discussing each individual piece. Finally, when you have completed the wall, you take your "GUILTY" sign and place it on top of the wall to show that it is supported by the evidence.

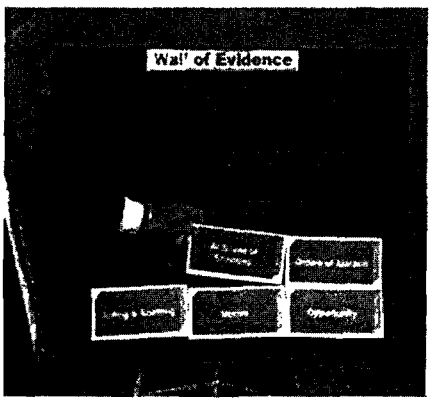
Material

You need a black poster board, a white poster board and black Velcro.

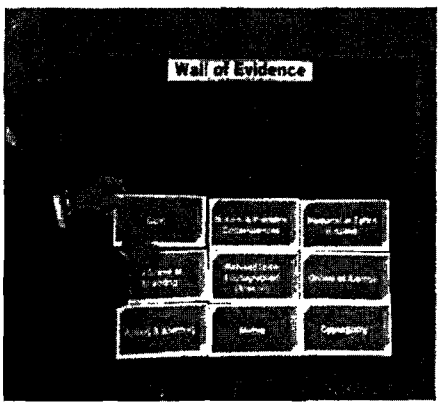
Preparation

The backing is made of black poster board with horizontal black strips of Velcro for each row of blocks and a small strip at the top. You use white poster board for the blocks or bricks. These pieces are easy to cut out because all the cuts can be made on a large paper cutter. Generally, you have nine to 12 pieces for the wall.
You prepare your text for the wall just like in the arrow chart. By using the 3-D feature, you can make the wall pieces look like bricks. If you are printing them in color, you may want to use a reddish-orange color to make them look more like bricks. Also, print out the small word "GULITY" and affix it to a rectangular piece of poster board with Velcro on the back.

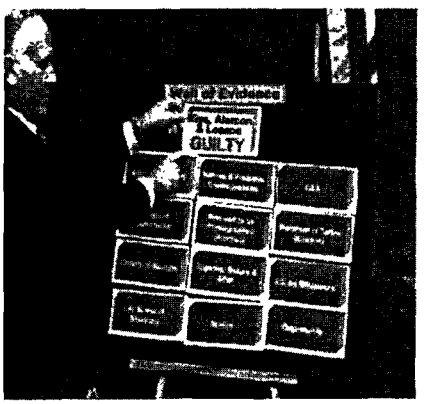
9-7



You start in the lower left hand corner on the bottom row. You discuss each point as you go.



You continue to build your wall brick by brick by attaching each piece to the board.



9-8

You end up with a solid wall of bricks which supports the word "GUILTY" which you place on top.

BUILD CHARTS

Circle of Evidence

Purpose

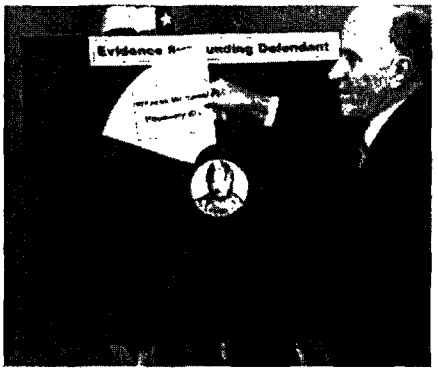
The rings of evidence chart is a take off on the so called target chart that was discussed in a previous chapter. It is not practical to cut out and build a target, but you can do this as part of a circle. The object is to take parts of a circle and surround the defendant. You argue that the evidence completely surrounds the defendant and proves that the defendant is guilty. This is the most difficult build chart to make and use, so it is employed less frequently.

Material

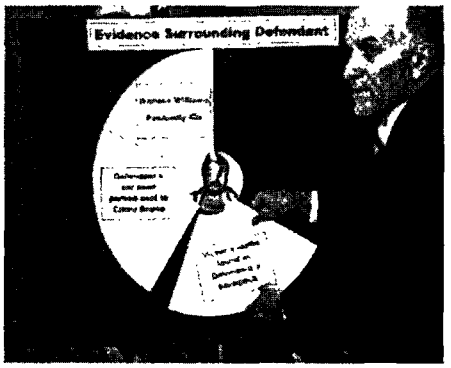
You need a black poster board, a white poster board and black Velcro.

Preparation

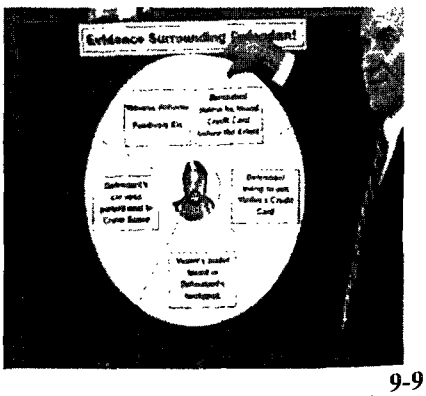
The backing is made of black poster board with pieces of black strips of Velcro where the edges of the circle meet. You take the white board and cut it out into a large circle. Then, with a pencil, divide the circle into five or six sections. After that, you cut out the center so that it is large enough to place a photo of the defendant in it. This piece is glued to the center of the black poster board. Finally, you cut out the sections of the circle making sure that you number every section. You prepare your text for the circle just like in the puzzle chart. You print them out in text boxes one sheet at a time. While you have all the sections of the circle in place on the black board, you lightly attach the printed out text boxes to the appropriate section.



You can go in a clock wise or counter clock wise direction if you wish, as long as you continue in that direction.



You continue to add sections to the circle as you discuss each point.



9-9

You end up with a complete circle that surrounds the defendant just like the evidence does.

BUILD CHARTS

Scales

Purpose

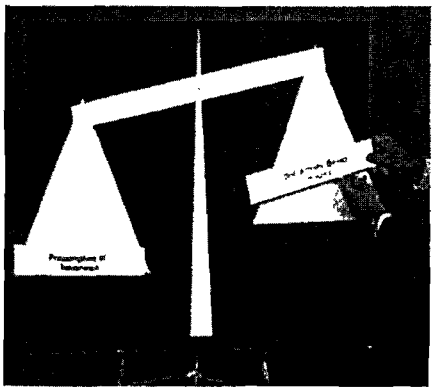
The scales concept is familiar to most jurors. The defense usually stresses that the defendant is cloaked in the presumption of innocence. An effective way to respond to this argument is with the scale build chart, which illustrates how the prosecution overcame the presumption with evidence. The weight of the evidence tips the scales right in front of the jury. This is dramatic and is memorable for the jurors. Some prosecutors find this useful and others think it is too mechanical. This visual is presented as the last build chart. With these ideas for build charts, you might consider using one of them or they may have given you an idea for another you want to create.

Material

You need a black poster board, white poster board and white Velcro. Also, you need three small bolts and a drill to make the holes.

Preparation

The backing is made of black poster board. You take the white board and with the use of a large paper cutter, cut out the pieces to form the triangles for the scales. In order to assemble the pieces, you make holes in the respective places and insert small bolts with washers to attach the scales. You place white Velcro on the edges of the scales. You cut out five or six small rectangular boxes that will be used for the text boxes. On the back of the boxes you attach Velcro. Finally, you prepare your text for the small boxes just like in the arrow chart. You print out several text boxes to a sheet of paper. With double sided tape, you lightly attach the printed out text to the text boxes.



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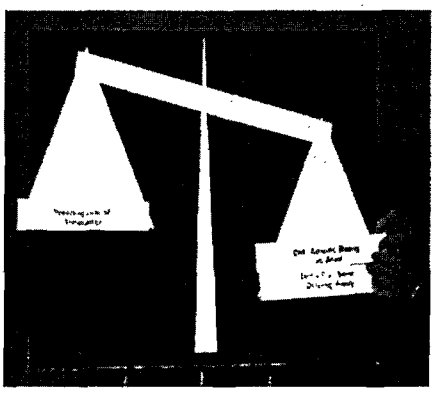
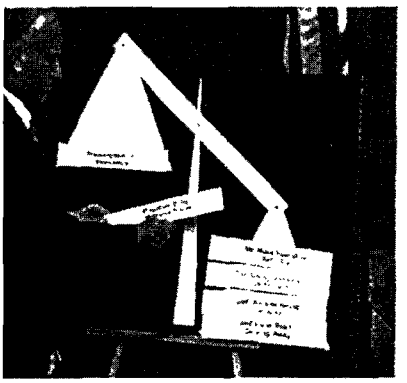
You start by placing the "Presumption Of Innocence" box on the left hand side, which slightly tilts the scales to the left.



You continue to add the evidence boxes on the right side as the scales starts to tilt to the right.



9-10

Finally, the weight of the evidence tips the scales to the right to overcome the defendant's presumption of innocence.

FOCUS CHARTS

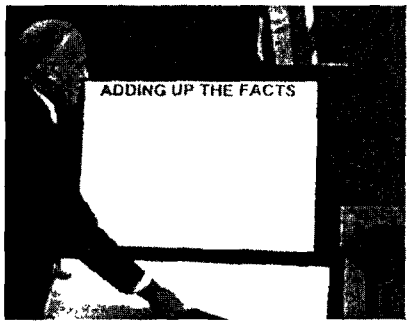
The focus chart is similar to the build chart, but is different in that it involves revealing one line of text at a time. This allows you to focus the jurors' attention on each point as you are discussing it, thereby preventing the jurors from reading ahead while you are arguing.

Pull Down Chart

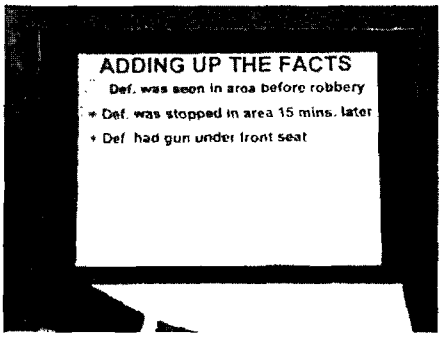
Purpose- This technique allows you to control what the jurors see.

Material- You need a white poster board for the backing and a black poster board for your frame. Also, you need thick butcher paper to cover the text as you pull it down.

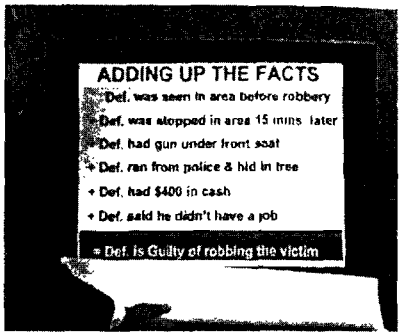
Preparation- You prepare your points on the computer and print them out poster size. This requires some cutting, stapling and gluing. You tape the poster of the text and place it inside the framed black board. You take the butcher paper and slide it inside the frame to cover the poster.



You pull down the paper that is covering the text to show the first line.



You continue to pull it down line by line while explaining each point.



Finally, you pull the paper all the way down revealing that the defendant is "Guilty."

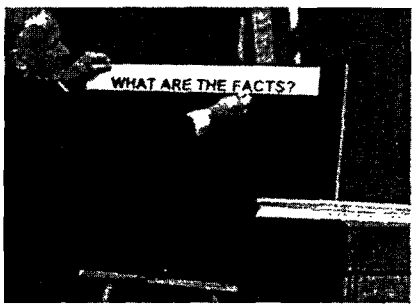
911

Stick On Chart

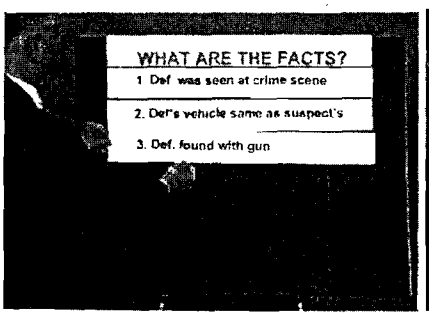
Purpose- This can be used for the same purpose as the pull down chart.

Material- You need a black poster board, a white poster board and black Velcro.

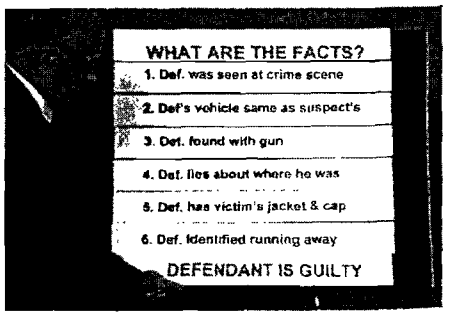
Preparation- By using a large paper cutter, you cut out six to eight strips from the poster board. You place two long vertical strips of Velcro on the black poster board. Next, you place Velcro on the back of the strips. Then, print out your points on an enlarged poster and cut and tape them to the one line strips.



You place the first line at the top and with the Velcro affix it to the poster board.



You continue to add the points one by one, lining them up on the left hand margin.



When completed, all the lines are attached to the poster board showing that the defendant is guilty.

9-12

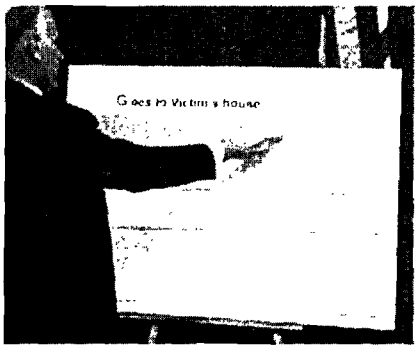
FOCUS CHARTS

Spell Out Strips

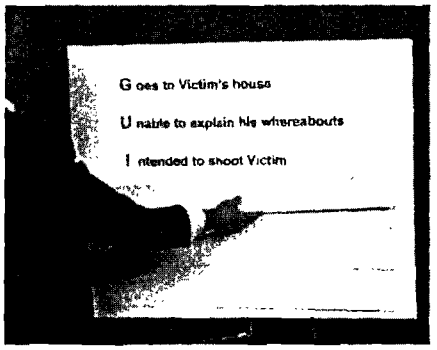
Purpose- This is another form of the stick on chart. The only difference is that you are vertically spelling out a special word from the first letter of each line of text. That can be the word "GUILTY," "MURDERER," "I DID IT," "LIAR," etc.

Material- You need two white poster boards and white Velcro.

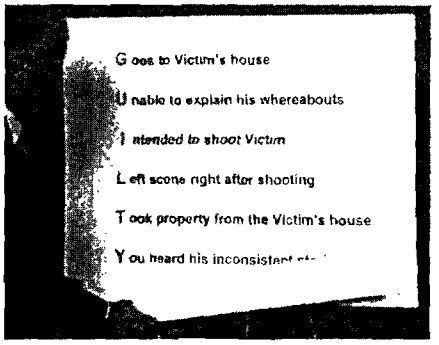
Preparation- You cut one poster board into the number of pieces in the word you are trying to spell out. You place white Velcro along the vertical edges of the other poster board as well as Velcro on the back of each of the cut pieces. Enlarge the text poster size and tape it to the poster board.



You start by removing the first strip revealing the first line of text.



You continue to remove additional strips as you explain each point.



Finally, you pull off the last strip and you tell the jury that the evidence spells out "GUILTY" as in this case.

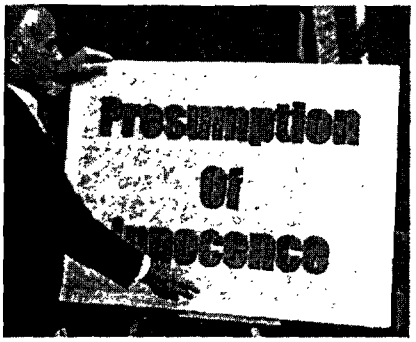
9-13

Peel Away Chart

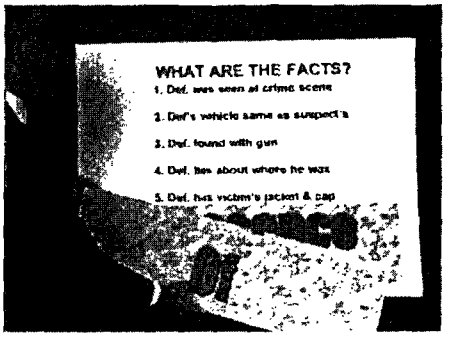
Purpose- The peel away chart is a good way to explain how the prosecution overcomes the defendant's presumption of innocence.

Material- You need two white poster boards and white Velcro.

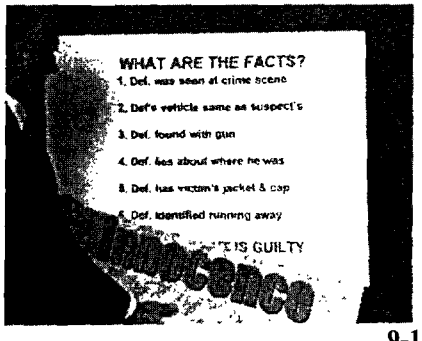
Preparation- Print out in poster size the words "Presumption of Innocence" and attach it to the front poster board. Then cut it into three parts with each word on it and place Velcro on the back sides. On the back poster board, place white Velcro on the vertical edges. You prepare your points on the computer and print it out poster size. Then you tape it to the back poster board.



You start with the complete "Presumption Of Innocence" covering your poster.



You peel off the words to expose the facts that you have proven in court.



Finally, you peel off the last word "Innocence" and reveal the rest of the evidence.

9-14

CONNECTING CHARTS

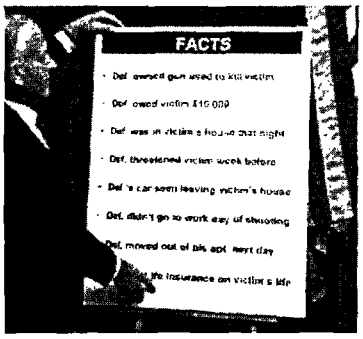
These charts have several poster boards connected with packaging tape. This technique keeps the jurors' attention directed toward the material you are discussing. You reveal the other posters and discuss them one at a time, like reading pages in a book. There is a cumulative effect when the jurors see all the posters are connected.

Fold Out Chart

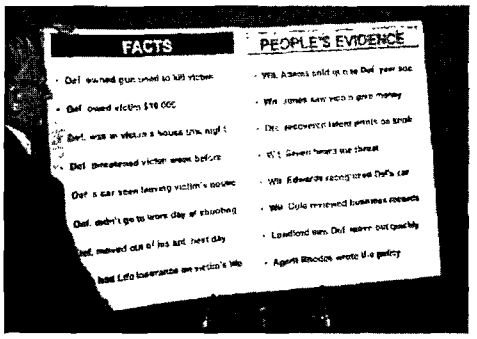
Purpose- This takes three posters and makes them into one giant chart.

Material- You need three poster boards and clear packaging tape.

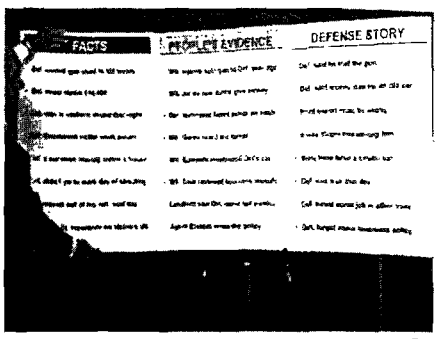
Preparation- Tape the enlarged posters to the boards. Then, connect the three posters together with packaging tape on their back sides. The secret is shaving an 1/8 of an inch off the last poster so it fits behind.



You start by discussing the top poster with the other posters folded behind.



Next, you unfold the back poster and discuss it. Now you can compare the two posters.



9-15

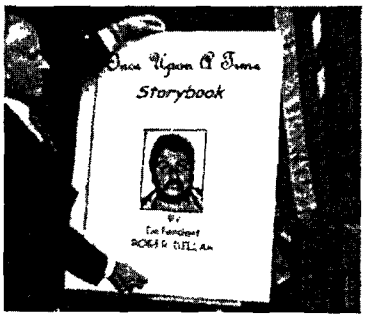
Finally, you unfold the last poster and discuss it, thereby giving the jurors a chance to see how they all fit together.

Storybook

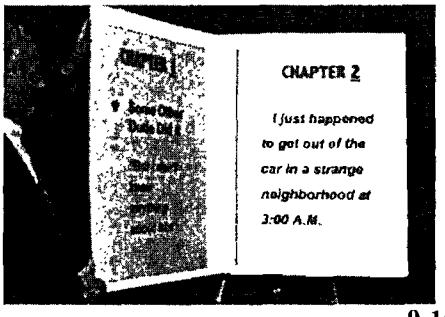
Purpose- This visual graphically illustrates how the defendant gave various stories about the events at different times to different people.

Material- You use white poster boards for each story plus the cover as well as clear packaging tape.

Preparation- With your computer, you create each story as a chapter and make a book cover with the defendant's name and photo, if available. You enlarge them and tape them on the poster board. Then you connect all the chapters with the clear packaging tape.



You start with the cover indicating that the defendant has created a storybook for the jurors.



9-16

You turn the various pages and indicate that the defendant has given numerous stories of what happened.

EXPLAINING THE LAW CHARTS

USING POSTERS IN TRIAL

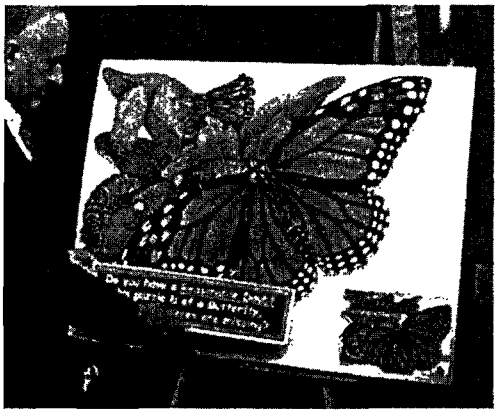
Visuals provide several ways you can easily explain legal concepts so that jurors can comprehend them. Using a recognizable puzzle with missing pieces can be highly beneficial in explaining legal concepts.

Reasonable Doubt Puzzle

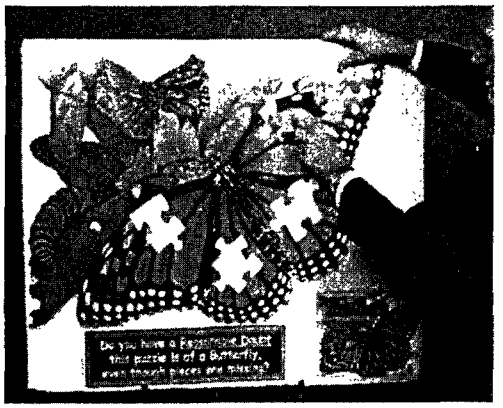
Purpose- Explain reasonable doubt by using the missing pieces of a puzzle.

Material- You need to obtain a large puzzle that has a few large pieces. Examples are a child's puzzle of a butterfly and a map of the United States (below). You need a white poster board, white Velcro and glue.

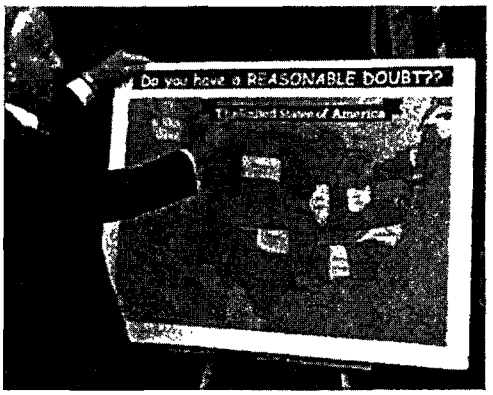
Preparation- Glue the pieces of the puzzle on the white poster board except for four or five pieces. For these remaining pieces, place white Velcro where the missing pieces would go as well as on the back of those remaining pieces.



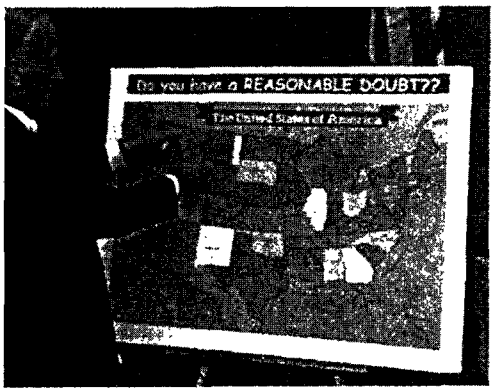
You start with all the pieces of the puzzle in place. You can use a sign to explain what you are trying to convey to the jurors.



Then you remove the Velcro pieces and indicate that there is not a reasonable doubt that this is a puzzle of a butterfly even if several pieces are missing.



You start with all the pieces of the puzzle in place. Then you start removing several of the states.



Again, you finish by removing some of the states while reminding the jury they still do not have a reasonable doubt what it is even without all the pieces.

EXPLAINING THE LAW CHARTS

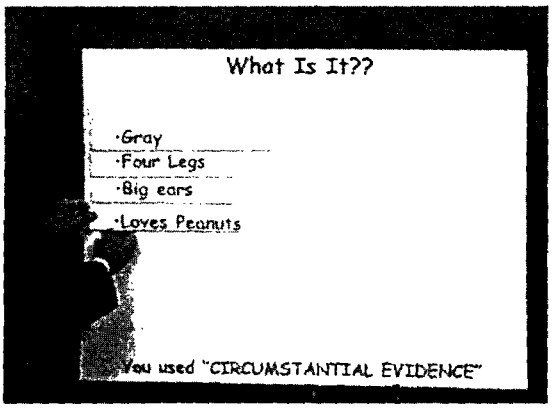
USING POSTERS IN TRIAL

Circumstantial Evidence Elephant

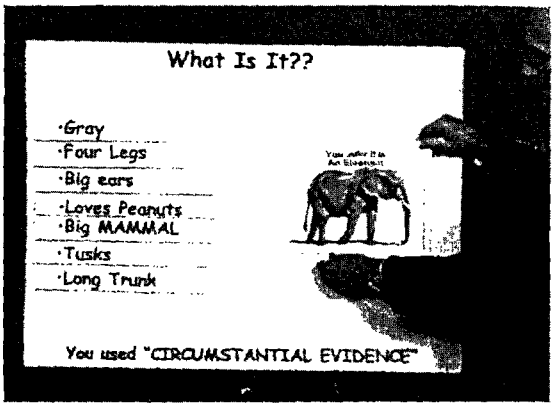
Purpose- You illustrate how circumstantial evidence is used every day to reach conclusions.

Material- You need a white poster board, several smaller pieces of poster board and white Velcro.

Preparation- You place white Velcro in two vertical strips on the left and right side of the board. With your computer, you print out the elephant's features and tape them on small strips of poster board with Velcro on the back. Utilizing clip art or a scanned photo of an elephant, you print it out and tape it to a small piece of board with Velcro on the back.



You start with the clues and continue to slowly add more clues.



On the other side, you attach the elephant and tell the jurors they have just used the concept of circumstantial evidence.

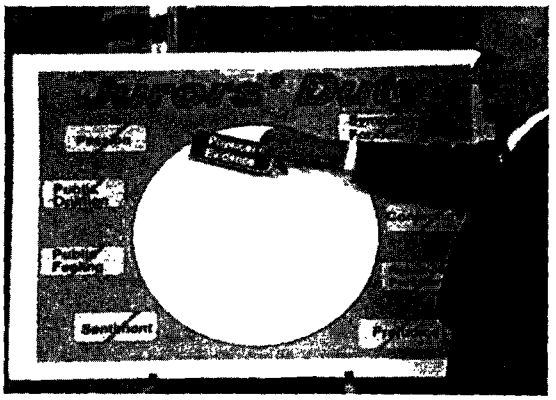
9-17

Jurors' Duties

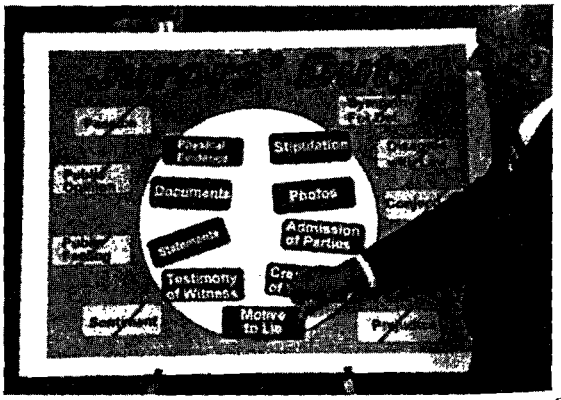
Purpose- This is used to focus the jurors on what they can and cannot consider.

Material- You need a poster board, some small pieces of poster board and white Velcro.

Preparation- You use VIP to print out the jurors' duty chart and mount it on poster board. Then, use your computer to print out the proper factors that the jurors are permitted to consider and tape them to the small poster boards. Place white Velcro strips in the center of the circle on the large poster board and Velcro on the back of the small pieces.



You explain to the jurors that they are not to consider what is outside the circle. Then, you start attaching what they can consider.



Finally, you place all the items that the jurors' can consider inside of the circle.

9-18

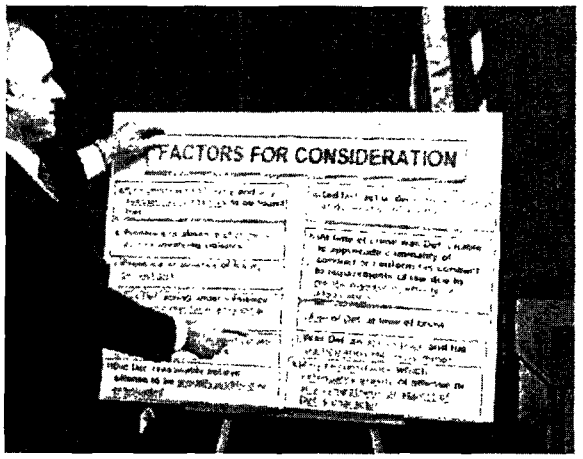
EXPLAINING THE LAW CHARTS

Death Penalty - Factors for Consideration

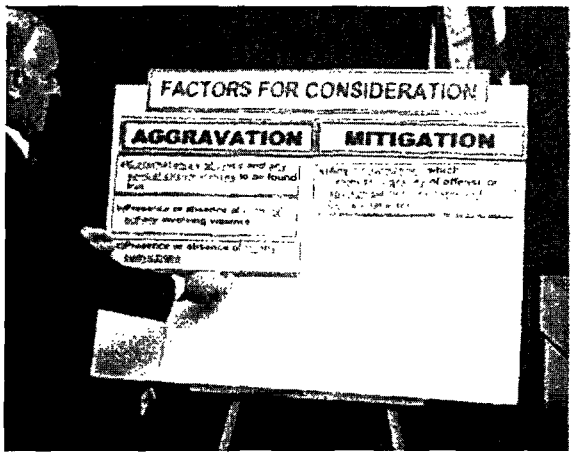
Purpose- You can use a chart of this kind to explain aggravating and mitigating circumstances.

Material- You need two white poster boards and white Velcro.

Preparation- Using your computer, you go into VIP and make a copy of the "Death Penalty Factors For Consideration" chart and enlarge it to poster size. Then, you cut up the various factors and tape them to small pieces of poster board. You print the words "Aggravation" and "Mitigation." You affix Velcro to the back of these pieces and run parallel strips of white Velcro on both sides of the poster board.



You start by removing the factors from "A" to "K" that are not in issue in your case.



You can rearrange the factors by placing them under the words "Aggravation" and "Mitigation".

Explaining The Defense

After the defense has argued, it is the time that the prosecutor refutes the defense argument and wraps up the case for the jury. Some jurors are tired and have their minds on other things. Other jurors have been swayed by the defense argument and are waiting for you to come back with a strong response. Without a doubt, your rebuttal argument can be your biggest challenge and most powerful persuasive argument.

But, the question is: How can you wake up and revitalize the jury? The answer is that visuals catch the attention of the jurors. What you want to do is to go on the offensive and convince the jury that there is nothing behind the defense. You can do this with pull off charts on which you have outlined the defense's argument on the top layer. As you rebut each argument, you pull the argument off the chart. Depending on your courtroom style, you may decide to take the peeled off defense argument and throw it into a courtroom trash can. For some prosecutors this may be too dramatic, but it is memorable and will convey to the jurors what you think of the defense's argument.

You want the jurors to visualize what is behind the defense arguments after you have peeled them off the board. Underneath the defense arguments, you either leave a blank page or print out some words that you believe describe the defense, such as "Smoke and Mirrors," "Red Herring," "Nothing" or "Empty."

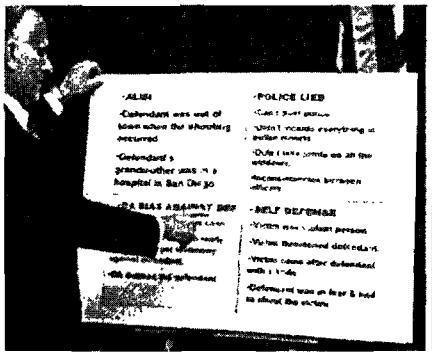
EXPLAINING THE LAW CHARTS

Smoke and Mirrors

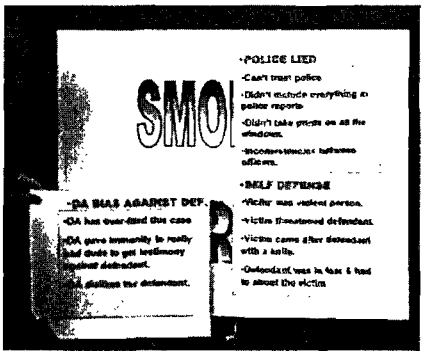
Purpose- You want to show that the defense arguments are made up of merely speculation, innuendo and have no substantial evidence.

Material- You need two white poster boards with white Velcro.

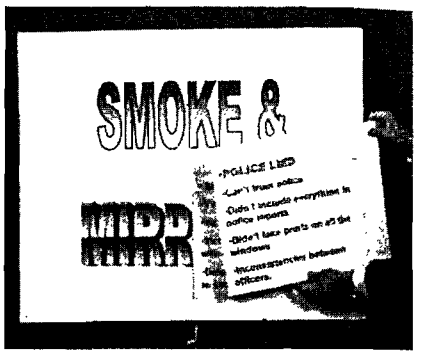
Preparation- On your computer, you divide the defense arguments into four segments, print these pages out and tape them to small pieces of poster board. Then, you enlarge the words that describe the defense such as "Smoke and Mirrors" and tape them to the large poster board. These can be found in the VIP database. Finally, you place white Velcro along the edges of the poster board and on the back of the small pieces.



You start by explaining the first point made by the defense.



Next you peel off each of the defense points and throw them aside.



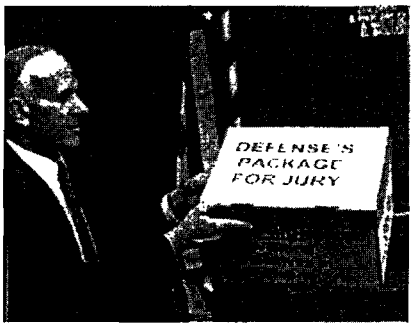
While you are discarding each point, the jurors start to see what is behind the defense.

Empty Box

Purpose- You want to illustrate that there is no substance to the defense.

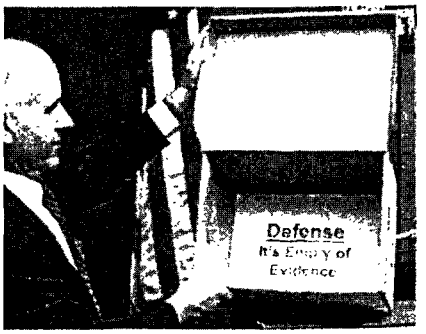
Material- You need an empty box and double sided tape.

Preparation- On your computer, you create four pages that describe the defense and the top sheet which states "Defense's Package For Jury" and the inside sheet stating something like the "Defense Is Empty of Evidence."



You start by explaining that the defense has presented the jury with a box of bold claims.

You show the jury the four sides illustrating the defense claims.



Finally, you open the box and show the jurors that it is empty of evidence, merely filled with hot air.

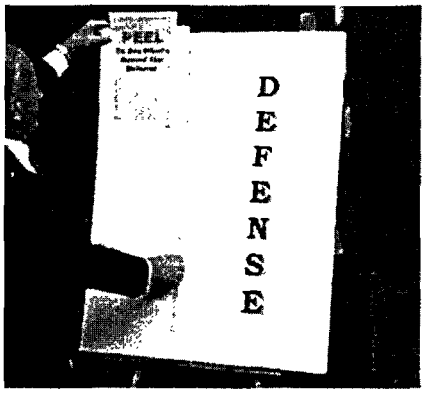
EXPLAINING THE LAW CHARTS

"SODDI" Defense

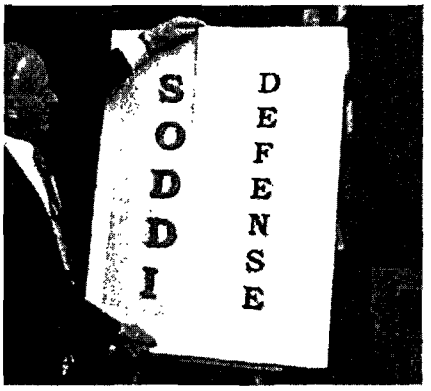
Purpose- This is an excellent response in alibi cases and makes your point.

Material- Two white poster boards and white Velcro.

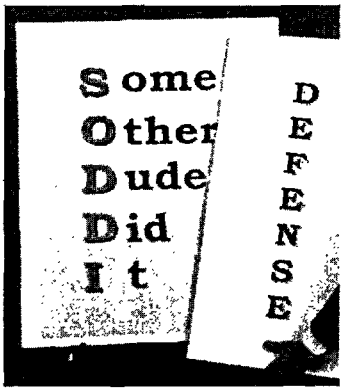
Preparation- You use the sample in the charts data base of VIP and enlarge the two pages and tape them on poster boards. Then, you cut the top board with the word "Defense" on it so that it exposes the word "SODDI." Finally, you affix the Velcro around the edges so you can remove the top layer.



You start by peeling off the left hand portion revealing the word "SODDI."



You explain to the jury that this is just another so called "SODDI" defense.



9-21

After the jurors are wondering what type of defense this is, you peel off the word "Defense."

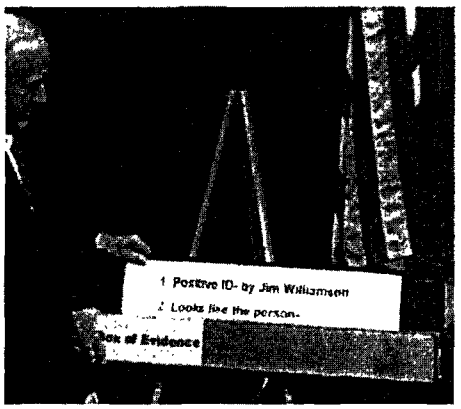
9-20

Box of Evidence

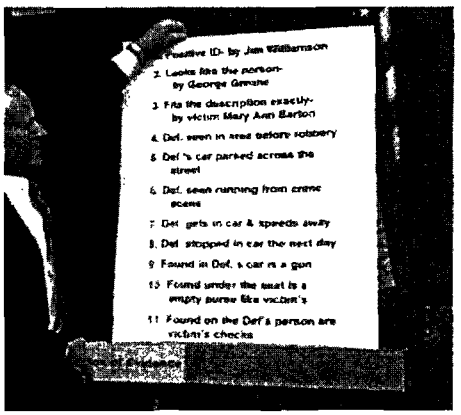
Purpose- This is used to show how extensive the prosecution's evidence is.

Material- You need a long box that paper rolls come in.

Preparation- With your computer, create a list of all the evidence that you have presented and then enlarge it. Roll it up and place it inside the box that you have cut a long slit into. Staple a long strip of black poster board to the top of the list so it remains outside of the box.



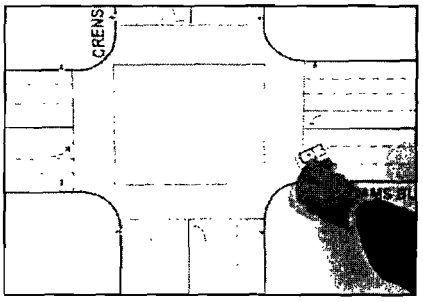
You start by pulling the list up revealing each point you want to discuss with the jury.



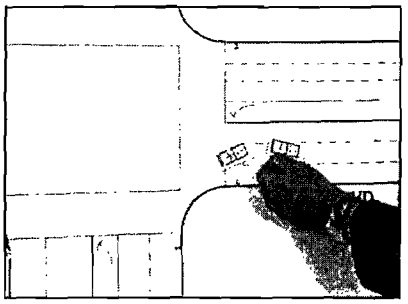
You continue pulling the points out of the box and holding the paper high in the air to illustrate how lengthy all the evidence is.

SHOWING MOVEMENT ON CHARTS

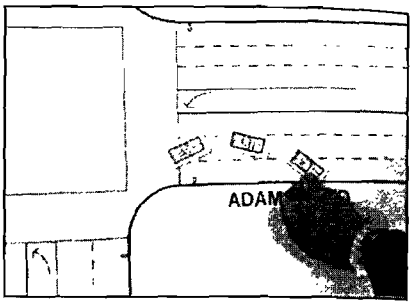
One of the disadvantages of static posters is the fact that a diagram or map does not in and of itself show movement. However, we have developed techniques for illustrating movement on action visuals. People or vehicles move from place to place over time. You can show this with symbols for the people and vehicles. You can number each symbol and have the witness affix these to the poster with double sided tape or Velcro. If a person or vehicle is constantly moving, Velcro works well.



To show the original location, you place a symbol of the car with #1 on the top.

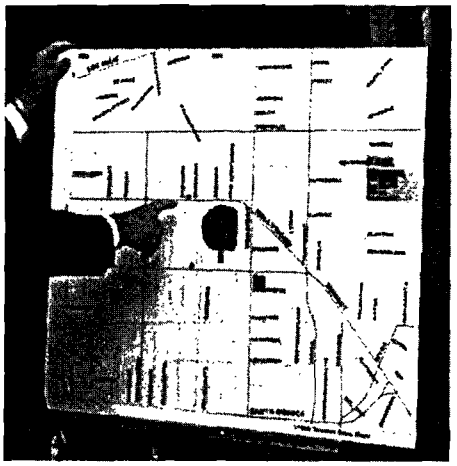


To show continued movement you have the witness place a car with the # 2 on top.

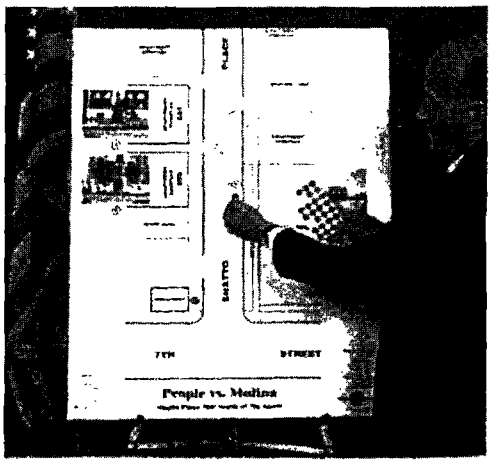


Again, you use another car with the #3 on top to show where the car came to rest.

Another way to show movement is with color dots. You can use a different color for each of the parties. To show the movement, just attach various dots of the same color and number them accordingly.



You can use various color dots on the map to designate the location of various witnesses.



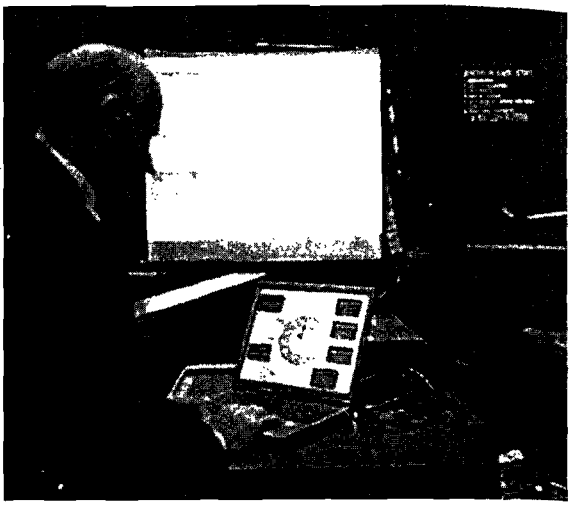
Here, you can use the same color dots but write different numbers on each one thereby showing the movement of a person or vehicle.

Chapter 10

PREPARING COMPUTER SLIDE SHOWS

PREPARING COMPUTER SLIDE SHOWS

Slide shows in the courtroom are nothing new. For years, Kodak Carousel slide shows were used to show crime scenes and photographs. Experts relied on film slide shows to explain their field, findings and opinions to the jury.



However, the computer brought new dimensions to the slide show. Computer slide shows permitted the easy addition of text to the slides. Computer slides could be animated, not like cartoons, but animated so text and objects could be revealed on the slide either by a click of a remote or automatically. This allowed the presenter to control what the audience saw and when they saw it.

The reason the computer slide show was so warmly embraced by attorneys is because not only does it provide powerful visuals, more effective than a poster, but also it can be modified easily and quickly. When you are trying a case, you cannot wait for the film to be developed. With a computer, an attorney can create or modify a slide show moments before it is to be shown.

The type of computer slide show developed by prosecutors varies greatly depending on the level of experience and skill of the individual prosecutor. A basic slide show can be quickly prepared by any prosecutor with minimum computer skills. It may not have the high impact that a more polished presentation would have, but it is certainly more effective than no visual aid at all. Usually, a novice prosecutor starts with text, title boxes and a bullet format. Eventually the prosecutor progresses to the shapes feature of PowerPoint applying circles or rectangles into which text can be placed. This permits the prosecutor to group ideas and show how they are linked to each other.

Most prosecutors do not have the opportunity to see other prosecutors present their slide shows in court. This is unfortunate because there are many great slide shows that prosecutors have successfully utilized in court, and the best way to learn how to prepare a slide show is to see what other prosecutors have created. This is why the VIP CD-ROM was developed. Now, you can view sample slide shows done by other prosecutors. A section of the VIP CD is devoted entirely to slide show ideas of other prosecutors. VIP does not include every great presentation, but it does include samples of various styles for your consideration. Moreover, you can copy the templates in VIP and modify them for your presentations.

PREPARING COMPUTER SLIDE SHOWS

WHEN TO USE SLIDE SHOWS

Prosecutors can utilize a slide show at any of the four stages of the trial. The type of slide show depends on the case, its complexity, the necessary preparation time to create the show and the equipment available.

Opening Statement

A computer slide show can have the most impact on a case during the opening statement. This is the time you want to orient the jurors about your case. Nothing has a more dynamic effect than throwing the facts of your case on a wide screen. A strong slide show will set the tone for the case.

Evidence During Trial

The computer slide show is used less during the evidentiary phase of the trial. However, it is particularly suitable as a visual aid for expert testimony. For instance, a computer slide show can be an educational tool to assist an expert explaining DNA and the findings.

Argument

Closing argument is when the computer slide show is most often used. The slide show helps the prosecutor be more persuasive.

Rebuttal

Provided you have a separate rebuttal argument, a different slide show can be fashioned for it and be crucial. The reason that it is so important is because the jurors are by then saturated with rhetoric, and visuals can be used to revitalize the jurors and hammer home the prosecutor's arguments. Unfortunately, little time exists to craft new rebuttal arguments while listening to defense counsel argue. This is why stock rebuttal slides are so valuable.

DESIGNING COMPUTER SLIDE SHOWS

Number of Slides

There is no exact number of slides a prosecutor should include in a courtroom presentation. However, there are limits as to how few and how many slides. When you announce to the jury that you are going to conduct a slide show, the jurors expect they will see something significant, and they will be disappointed with only a few slides. Therefore, as a rule of thumb, you need at least a dozen slides to make it worthwhile for the jurors.

On the other hand, jurors can tire of a lengthy slide show. Have you been subjected to your neighbor's endless number of travel slides or photographs? Any more than 50 slides can be fatal. The average number of slides for an argument runs between 25 to 30 slides. If you feel compelled to show more than 50 slides, you must break up your presentation to prevent losing the jurors' interest. Experienced prosecutors intersperse graphic slides within a group of ten or more text slides. These graphic slides can be photographs or diagrams or anything to lessen the monotony of text slides.

DESIGNING COMPUTER SLIDE SHOWS

Size of the Computer File

Text slide shows can be saved in a small computer file that can be transferred and stored on a floppy disk. But, when the slide show contains numerous scanned photos or textured backgrounds, the computer files can become huge. If the prosecutor is not careful, the size of the computer file can become gigantic - ten megabytes or more. The file size will determine how you can transfer the slide show from your desktop to the laptop computer. But the biggest problem is the increased risk of failure during a courtroom presentation .

Organization

The jury needs to know where you are going with your presentation. A group of slides without a clear structure makes the case seem confusing, which could send the message that there is a reasonable doubt. You have to organize the slides into a clear structure.

Like any presentation to a group of people, it must contain a beginning, a middle and an end. The beginning slides explain what the presentation is about and what to look for. During the middle part, you have the core substance of your presentation. Finally, you should end by wrapping all together and delivering the message you want the jurors to remember.

Opening Statements- This requires the prosecutor to address these fundamental questions:

- What happened? (Use a charges slide);
- Who is involved? (Use a relationship of parties slide or witness slide);
- When did it occur? (Use a timeline slide), and
- Where did it occur? (Use a map or diagram).

Argument- The prosecutor should apply the law to the facts. Every case will require a different organization, but basic slides would be as follows:

- Facts by charge slide;
- Facts by witness slide;
- Bullet listing slide;
- Adding up the evidence slide;
- Evidence pointing to defendant slide, and
- Jury instruction slides.

DESIGNING COMPUTER SLIDE SHOWS

Organization

Rebuttal Argument- This needs to be especially well organized. The prosecutor should not appear to merely answer the defense arguments. The prosecutor needs to go on the offensive in the rebuttal as follows:

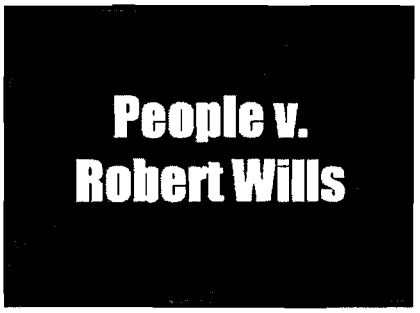
- Comparison of defense with facts slide;
- Reasonableness vs. unreasonableness slide;
- Credibility of witnesses slide, and
- Questions the defense did not answer slide

Minimize Use of Text Slides

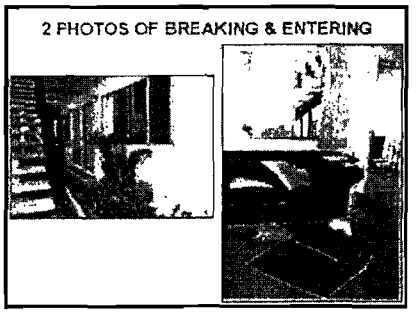
Text slides are easy to create and require very little computer skills. However, jurors can only digest a limited number of text slides. A series of five or more text slides can mesmerize a jury. It is like someone trying to explain every page of an IRS tax form. Limit the number of text slides you put in a row and insert other visuals to break up the presentation.

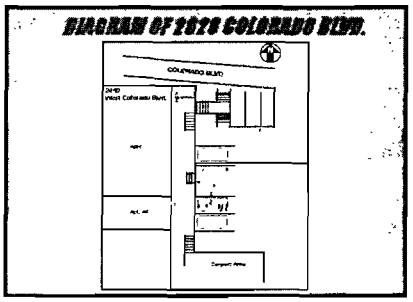
Assembling Slides

You start putting the slides in the order you want them to appear in your presentation. Below is a sample of how you build your slide show. You can easily change the order.



Cts.	Charges	Date	Spec. Alleg.
1	Murder	06/22/1999	-Pers. use of firearm -Lying in wait
2	Threaten	11/11/1998	
3	Battery	11/11/1998	
4	Corporal Injury	06/15/1999	
5	Burglary	06/22/1999	-GBI -Pers. use firearm
6	Disobey Order	06/22/1999	
7	Dissuade Witness	06/22/1999	-GBI -Pers. use firearm





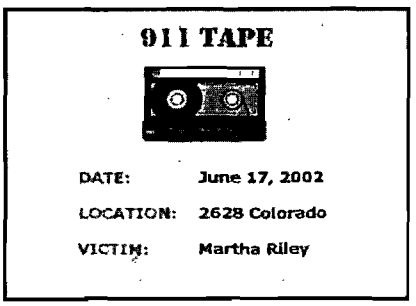
MURDER & MALICE

Penal Code § 187

1. A human being was killed,
2. The killing was unlawful,
3. The killing was done with malice aforethought that is:

EXPRESS MALICE
Manifestation of an intention to kill

IMPLIED MALICE
1. Killing resulted from an intentional act
2. Natural consequences of act are dangerous to human life, and
3. Act was deliberately performed with knowledge of danger to & conscious disregard for human life.



Categorizing the Slides for Jurors

If your slide show has to be lengthy, you can do things that will keep the jurors from getting lost. First, group your slides by subject and give them a different background. For example, if the slides on identification have a beige background, give the jury instructions slides a white background and the defendant's statements a gray background. Jurors will recognize when you are changing the subject by the background change. The most common way to do this is by restating the title of the subject in parentheses at the top center of the slide. Another way is to place a single word in one of the upper corners. With this labeling, the jurors are always aware of where this slide fits in with the others.

Type of Individual Slides to Use

Ideas for Slides

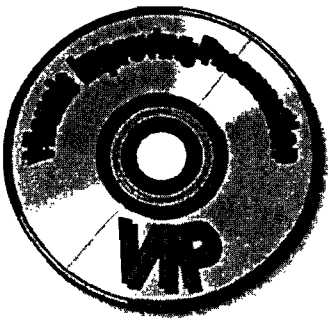
To make an effective slide show, you need to have it made up of individual slides that are more than just text or an illustration of a photo. Most slides are derived from charts that have been used for years. The advantage of the chart type slide is that it has a cumulative effect when you have numerous points on one page. When you put all your points on individual slides, the jury never sees them together. The defense attorney wants the jury to concentrate on each point individually so as to create some form of reasonable doubt. You, as a prosecutor, want the jurors to view all the evidence so they can visually feel its weight.

How to Create Slides (Review Poster Chapter)

Chapter 8, on preparing posters, discussed the various ways to create charts and this is the identical way computer slides are created. The slides are printed out, enlarged and put on poster board. Highlighting certain text can be done by underlining, italicizing, bullets and color. You can use different fonts and font sizes as well as boxing and inverting the text. Wordsmithing is important. Select descriptive, emotional and understandable words. Design the slide to include various shapes and arrows to give flow to the slide. You want to insert photos, maps, diagrams and clip art to make the slides more interesting.

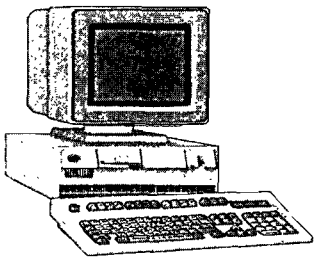
Use of VIP Database

The best place to start in deciding what slides to use is with VIP. Its database contains hundreds of slides that have been successfully employed by other prosecutors. It is easy to call up sample slides and modify them for your case.

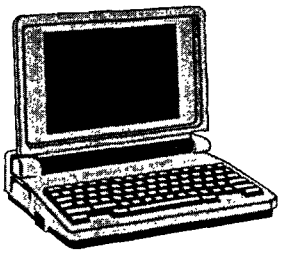


DESIGNING COMPUTER SLIDE SHOWS

Which to Use – Desktop or Laptop?



Some prosecutors and staff use their laptops to create slide shows. You can load the CD of VIP on a laptop and have it available to you with all the templates of visuals that you need to create a slide show. When you use the laptop, you do not have the problem of transferring your slide show when you have it finished.



However, most prosecutors would rather design the slide show on a desktop computer because it is easier to scan and print out drafts. You can use either and the deciding factors are convenience and the availability.

Tips and Techniques

Backgrounds to Use

When you start to design a slide show, you need to decide upon either a light or dark background. It is hard to change after you have already started creating your slides. There are two schools of thought that divide slide show users. One holds that a dark background is preferable because it is easier on the viewer's eyes. However, the downside of that position is that viewers tend to doze off faster because there is not as much light stimulus on the eyes.

Others contend that the light background is harsher on the eye but the viewer tends to be more alert. It is up to you to decide which you think is preferable. A compromise is to apply a neutral light yellow which cuts down on some of the harshness. Also, a light variable design can look professional but allows enough light to come through to stimulate the eyes.

Colors to Use

The types of colors one uses depend to a large degree on the individual's personal preference. The most important consideration is that there be sufficient contrast between the text and the background. There are certain colors that seem inappropriate in the courtroom environment such as pastel pink, purple, and light blue. The browns and greens are not strong PowerPoint colors so they are avoided whenever possible.

The most common text colors are dark red, dark blue, yellows, grays, black, white, beige, dark and teal green.

Photographs and Exhibits

There are two ways of importing objects that provide impact into the slide show. First, you can bring objects into the PowerPoint program by importing them from other files. This is done to bring in diagrams and maps created on other programs and adding them to a PowerPoint slide. In a similar fashion, digital photos can be easily transferred into a new presentation. The other way is by scanning photos and exhibits, such as charts and diagrams, into PowerPoint directly or by placing these objects into files that can be later accessed by PowerPoint. Nothing captures the jurors' attention more than integrating photos and exhibits into a text presentation.

DESIGNING COMPUTER SLIDE SHOWS

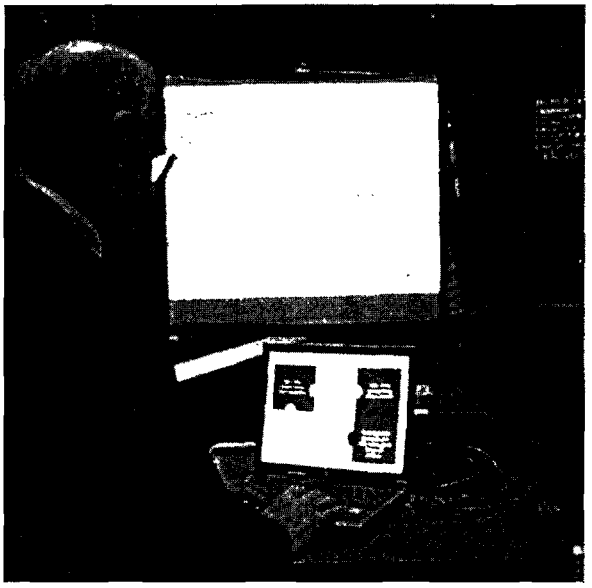
Using Features

Animation

The PowerPoint animation feature provides the prosecutor with the opportunity to focus the jurors' attention on specific words and objects one at a time. The problem with posters is that all the text is displayed to the jurors at once, unless the prosecutor employs an action visual described in the preceding chapter. As a result, the jurors tend to read ahead or are distracted from the prosecutor's presentation.

Animation is one of the most effective methods of keeping the jurors in step with you. Another benefit of animation is that it has a magical quality of causing text or objects to appear out of thin air. This captures the jurors' attention and makes the contents memorable.

One of the most distracting aspects of a slide show presentation is when the presenter appears to be showing off all the neat features in PowerPoint. Often, the presenter applies numerous forms of animation of text to one slide. The text zooms in from every direction causing the jurors to play the guessing game as to where the next line of text comes from. No one is impressed by a show off. Therefore, limit your use of animation, slide transitions and background color to the same characteristics for all slides.



This is a puzzle chart that has been animated. Each piece is a separate text box and will appear by a click of your mouse or remote.

The puzzle pieces fly in from the outside. You discuss each piece as is appears on the screen.

DESIGNING COMPUTER SLIDE SHOWS

Using Features

Dimming

An accompanying feature to animation is the capability to dim previous text. This feature forces the jurors to concentrate on the new text while allowing them to faintly see what was previously discussed. This is extremely valuable when you want the jurors to be aware of the cumulative effect of all the items without being distracted from the point you are presently discussing.

MURDER DEFINED
(Penal Code §187)

1. A human being was killed,
2. The killing was unlawful,
3. **The killing was done with malice aforethought.**

REASONABLE DOUBT

- It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

Advanced Features

Sound

To enrich your presentation even more, you can add sound with audio tapes such as 911 calls or the defendant's statements. This feature does require a higher level of technical support, but certain cases may merit this level of attention. However, you have to be aware that this requires a significant amount of computer memory since the audio file will be very large.

Video

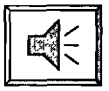
You can incorporate a video into your slide show. This requires special software to digitize the video and create it in a file that PowerPoint can identify and run. As glitzy as it appears, it has some downside. First, it will greatly increase the size of the slide show computer file. This may cause a risk of a computer failure during your presentation. Occasionally, laptops will freeze when attempting to open a large file. Some prosecutors prefer using a VCR or DVD to play video clips. This avoids the risk of a computer crash in front of the jury.

DESIGNING COMPUTER SLIDE SHOWS

Advanced Features

Hyperlink

The hyperlink feature allows you to click on certain objects on the screen, and it will open a hidden file behind it. This is a great feature when you need flexibility such as in a rebuttal argument. By clicking on the hyperlink buttons, you can quickly adapt your argument to respond to what the defense has argued. Like all great features, the downside is that it requires a high level of computer expertise to make sure that the links are correct when the slide show is transferred from one computer to another. The connecting path has to be exactly the same as in the computer where the slide show was created.

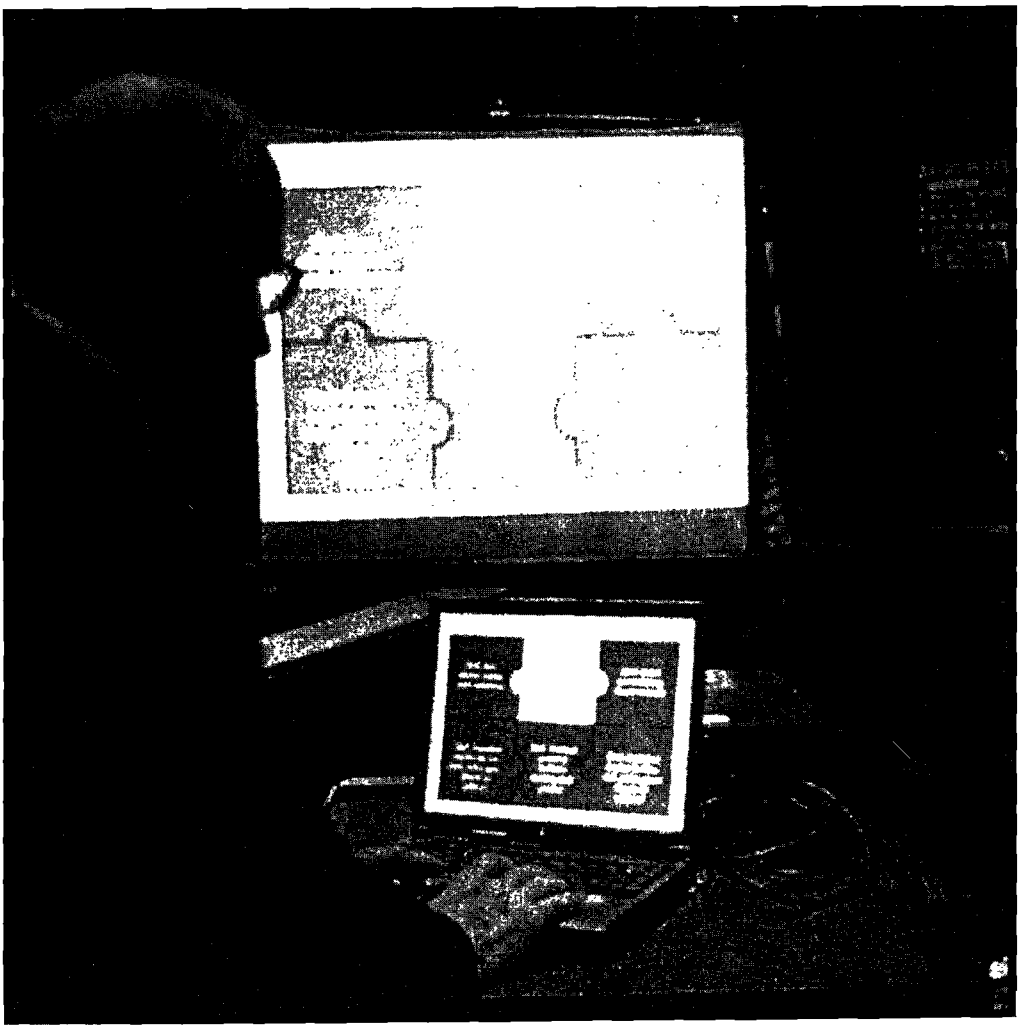


Audio Hyperlink Button

Video Hyperlink Button

Chapter 11

USING COMPUTER SLIDE SHOWS IN TRIAL



Monitor vs. Projector

There are two different ways that slide shows are shown to jurors in a courtroom. Either the jurors view the slide show on a TV monitor or on a large screen. Both methods require a laptop computer sending out a digital signal. The monitor system converts the signal into a TV format with a scan converter. The other method sends the signal to a LCD projector, which converts it and projects it onto a large screen.

Which system you use is dictated by the equipment available to you. Many prosecutors prefer the projection system because the wide screen has a greater impact on the jurors. Also, it permits the prosecutor to stand next to or below the screen, and the jurors are not fixed looking at a monitor instead of the prosecutor. The monitor system requires more maintenance to assure all the equipment is working correctly.

Judges tend to like the monitor system because they have the capability of blocking what the jurors see by merely the turning of a switch. However, because most prosecutors prefer and utilize the projector system in court, the projector system is the focus of this book's discussions of slide shows.

Equipment Needed for Slide Show

Computer Equipment

You need the appropriate equipment in order to create and present a slide show. You can use a desktop or laptop computer to prepare your slide show. You need the proper software such as Microsoft PowerPoint or Corel Presentation. VIP (Visuals Improving Prosecution) software was developed on PowerPoint because a survey determined that most prosecutors had access to PowerPoint and few had access to Presentation.

Your laptop computer, which is what you use in court, should have sufficient RAM (at least 256 MB) to be able to smoothly operate some of the larger presentations. The laptop needs to have a CD-ROM player in order to transfer large slide shows. It is also helpful to have a CD-ROM writer in order to remove large modified presentations so they can be further worked on at a desktop computer. Discussion about the type of laptop becomes an emotional and personal issue especially with those who use Mac computers. However, the majority of the laptop computers used by prosecutors are PC computers. The VIP software is written for PC computers, but it can be converted to work on Mac.

Projector

There are many vendors of LCD projectors. The main things you need to consider regarding projectors are the brightness, fan noise and weight. You need a projector that is bright enough to be easily viewed by all jurors no matter where they are seated. For security reasons, most courtrooms require some or most of the lights to be left on. Also, some courtrooms are large and have high ceilings which require a very bright projector. Projectors with 1000 to 2000 lumens work well in a closed conference room setting. However, for the courtroom environment you need a projector with 2000 to 3000 lumens. This size still allows portability so that it can be easily moved from one courtroom to another.

Screen

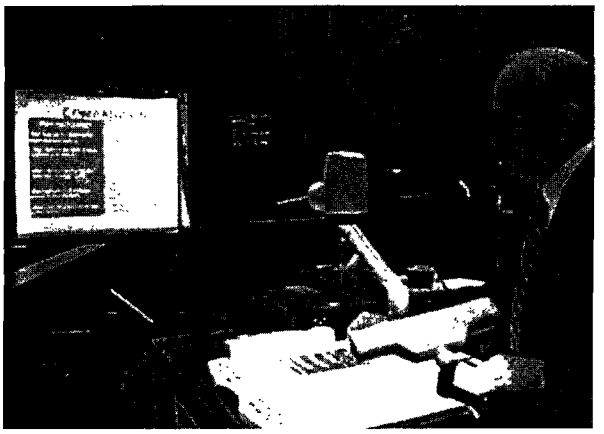
It is preferable to have a wall mounted screen in the courtroom. If there is not one built in, then a 60"X 60" portable screen will be sufficient.

Cart for Transportation and Storage

If the equipment has to be transported from courtroom to courtroom, you should have some type of cart. When the equipment is on a cart it is less likely to be damaged. Also, it can remain hooked together preventing the connecting cables from being lost.

Visual Presenter

Even though a visual presenter (right), also known as a document camera, is not necessary for a slide show, it is often connected to the LCD projector. A visual presenter is an excellent tool for the jurors to see photos, documents and any type of exhibit.



Setting Up of Equipment

Where's the AV Guy?

Unfortunately, only a limited number of prosecutors' offices have an audio visual staff to set up all the equipment in the courtroom. Even when the office has a staff, often it is the prosecutor who gets stuck at the last minute trying to set up the equipment and make it work. Setting up the equipment can be complicated, but if a prosecutor learns what is required, the prosecutor can pull it together and not panic. This is especially true if everything is left hooked up on a cart.

Location of Screen and Projector

If the projector and screen are not built into the courtroom, then you have to find the best location for the equipment so all the jurors can view your presentation. Some of the limitations are dictated as to how close you have to have the projector to the screen. Even with the zooming in and out feature, the projector has to be reasonably close to the screen.

Setting Up Equipment

Connecting Cables and Power Cord

The power cord to the projector is often removed for transportation. You should make sure you have it for court. Often, the laptop is disconnected from the projector, and you should check for the display cable to make sure you have it. Finally, for the remote control to work on the projector, you need a special cable connecting the projector to the laptop.

Extension Cord and Power Strip

If you have to supply the equipment to the courtroom, you want to bring your own extension cord and power strip. This seems so elementary, but the show will not go on if you do not have power.

How to Operate the Equipment

Where's That Law Clerk Who Knows Computers?

Most prosecutors like to concentrate on the big picture and leave it to others to figure out the details. That is why prosecutors have law clerks and paralegals to whom they can delegate the detail work. However, when a slide show is not working, the judge looks to you, the prosecutor, and says, "I'll give you five minutes to get it working or you go on without your little slide show." Therefore, you must know how to make things work. The following is a checklist of things you should know about dealing with the operation of the equipment.

Laptop

- Connect all cables before turning on the computer. Some computers search to see what is connected when you start up the computer. If you connect the projector after you have turned on the computer, many computers will not recognize those devices such as a projector.
- Do not run the laptop on batteries. If you do, what will happen is that just as you are in the middle of your slide show the batteries die and so will you.
- Turn off Power Saver (Snooze). Unfortunately, in all trials there are delays before you can start your slide show and the laptop automatically shuts down. This can be problematic because it may require considerable time to restart the slide show.

- Use hard drive instead of CD. Although you can run a slide show off the CD-Rom Drive, it is better to save your presentation to your hard drive. This will prevent a lot of potential problems.
- Place an icon or shortcut on the main screen. In order to prevent delays as you search for your presentation file, you can create an icon on your main screen. All you need to do to start your presentation is to click on it.
- Turning off screen or monitor. You can use a function key to turn off the projector screen or the computer monitor. Using this feature can be dangerous because it can be difficult to bring the slide show back to the projector screen.
- Resizing pixels for projector. On older equipment, you may have to reset the pixel size. This is why you need to check out the equipment in advance to avoid this type of problem.
- May need to load software to operate projector. Laptops and projectors need to be able to talk to each other. Often, you have to load in advance the software into the laptop before connecting to the computer in order to make them compatible.

Projector

- Turn off Snooze. Just like laptop computers, some projectors have automatic turn offs. Unfortunately this can happen as you are waiting to make your presentation, such as a rebuttal argument.
- Double click Turn Off. Occasionally, you can be impatient waiting for the projector to warm up the bulb before the projector comes on. If you push the on switch twice, it will turn off the projector. This is disastrous because it will take two minutes before you can turn the projector back on. This is called your time to do a two minute song and dance.
- Key stoning You have to learn how to adjust the projector in order to eliminate the key stoning. This is not fatal if not done, but can make for a more professional image on the screen.

Remote Control

- Check batteries and have an extra set. You never know when the batteries in the remote will go dead. But when they do, you are locked into standing next to the laptop computer or telling your assistant, "Next slide, please."
- May need cable. Most remotes require a cable from the projector to the computer's mouse port.
- Cannot go backwards. Most remotes do not give you an easy way to go back to the previous slide. It is easier to use the laptop's up arrow key to return to the prior slide.

Multi-Media

Switching back and forth. You need to learn which switch on the projector to press to toggle back and forth between the laptop, the visual presenter and the VCR. This is very simple to do as long as you press the right button.

Tips and Techniques for Effective Presentations

Narration

The slide show should not become the messenger. You, the prosecutor, deliver the message. The slide show is meant to enhance your delivery of the message. Some prosecutors lose sight of the reason for a slide show. They end up making the slide show the sole object of the jury's attention. The prosecutor does not want to be the mere reader of the words on the screen or monitor. It is insulting to jurors because it appears to them that you do not think they are capable of reading what is on the screen. You can refer to what is on the screen, which should be a paraphrasing of what you are orally telling the jurors.

Timing

It is important to practice the timing of your presentation. A common criticism is that the presenter goes through the slides too quickly without allowing sufficient time for the jurors to comprehend the content of the presentation.

Using the Notes Feature

Some prosecutors use the Notes feature of PowerPoint so they can list the points they want to cover with each slide. It is a convenient way to combine your oral argument with the slide show.

Have a Plan for Your Slide Show

You want to have a seamless presentation with the slide show emphasizing the main points of your oral statements. You have to have a plan and follow it .

Positioning

Obviously, you do not want to block the jurors' view of the screen. On the other hand, you want to be positioned so the jurors do not have to be continually turning their heads to see you and the screen. Give some thought as to where you should be standing so the jurors are not easily distracted by what they see behind you.

Backup Plan

Murphy's Law

You do not want to think negative thoughts that things will fail. You want to project a positive image to the jury. But, when you are relying on technology, you have to be realistic. Something can go wrong. Therefore, you must have a contingency plan so you can carry on no matter what the obstacle.

Visual Presenter if Available

Some prosecutors will print out their slide show and have it available to use with the visual presenter. If the computer goes down, all you do is place the paper of the slide under the visual presenters camera and you have your slide up on the big screen. All you lose is the animation, and the visual is not as clear.

Several Poster Charts

Other prosecutors will create several summary poster charts as backups. These backup posters may include a brief summary of the points you were planning to cover in the slide show. Often, this summary list is not even mounted, but left rolled up. If it is needed, you can quickly thumbtack it to the corkboard or tape it to pages of the flip chart in the courtroom.

PIERCE COUNTY PROSECUTOR

May 20, 2013 - 3:35 PM

Transmittal Letter

Document Uploaded: 419700-Other Brief~2.pdf

Case Name: State v. Odies Walker

Court of Appeals Case Number: 41970-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Other__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: **hjohns2@co.pierce.wa.us**

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backlundmistry@gmail.com