Force Multipliers: Trial Presentation Tips for Prosecutors

By Boyd Patterson, Assistant District Attorney General, Chattanooga, Tennessee

Too often, prosecutors lose cases because juries fail to resonate with even overwhelming evidence of guilt. Does superior evidence carry the greatest weight in a jury's decision? Thankfully, yes. If jurors pay attention, will they usually see the defendant's guilt? No doubt about it. Does the wrong thing happen in court anyway? Every day. Defense attorneys acclimated to not having helpful facts develop proficiencies with the indirect tactics, jury psychology and presentation techniques that facilitate such results. The good news: you too can apply the same unconventional methods used by defense attorneys to raise even your good cases to the next level.

The British learned in the War of Independence. The U.S. learned in the Vietnam Conflict. The Soviets learned in Afghanistan. The lesson: superior military power cannot guarantee victory. Even with an overwhelming supply of armaments, cutting-edge technology, and highly trained personnel, senselessly plodding forward against one's enemy exposes one to grave risks of defeat. By contrast, asymmetric combat techniques can stave off any juggernaut, whether used by 300 Spartans or by our current terrorist enemies. Accordingly, all modern militaries plan to expect unconventional attacks. In fact, the most powerful nations in the world now employ the same, indirect techniques.

This article contains observations that go beyond "having good evidence." They deal with the psychological dynamics related to your communication skills. They identify some indirect defense tactics and how to neutralize them. They deal with the ethics of and best mindset for high-stakes, intellectual combat. Some of these observations came at a high price. Now they can help you, the beginning prosecutor, to recognize the hidden dangers and intangible factors that have little to do with the actual evidence and everything to do with how juries make decisions.

Boyd Patterson

A defense attorney's personality becomes a facet of your trial.

A defense attorney's personality can be bombastic or soft spoken, confident or frightened, sophisticated or as country as a bowl of grits. The skilled defense attorneys all share one characteristic: the appearance of being too guileless to misrepresent the facts. Wide-eyed. Slower speech pattern than usual. A smooth, lyrical rise-and-fall of voice pitch. Adopting a guise of confusion about a victim's answer in order to "politely" attack the witness. Searching the eyes of the individual jurors during closing argument, as if desperately seeking for someone with the common sense to recognize his client's innocence.

It still astounds me how some defense attorneys can openly celebrate baffling the jurors when the judge happens to be out of the courtroom, then later adopt the "guileless" persona quicker than Meryl Streep can say "I'd like to thank the Academy." However, you can discuss Hollywood in voir dire to call the jurors' attention to defense tactics. Ex: "Mrs. Dupree, name a movie you've seen where an actor gave a great performance." Discuss the movie and actor briefly. "Now, assume you sat on a jury listening to a robbery trial. Five eyewitnesses all separately picked the defendant out of

a line-up. The store videotape clearly showed the defendant's face as he aimed his pistol at the clerk. His fingerprints were on the store's marked money recovered from under his bed and the detective played his videotaped confession, in which he discusses in detail how he cased the store for hours before robbing it. Then, in closing argument, his defense attorney stands up, looks you in the eye, does his best (pick a great actor) impression and plaintively sobs, 'Ladies and gentlemen, my client did not do this.' Mrs. Dupree, will you think 'Wow. That was impressive. Maybe he really didn't do it.'?"

Look to the rest of the potential jurors. "Does everyone see the difference between personality and evidence?" For this example, you could discuss an actor or famous role with characteristics that resemble the defense attorney's style. Additionally, get a transcript of a previous voir dire conducted by opposing counsel. Get educated by your colleagues about his particular tactics. If an exceptional defense attorney comes across as genuinely guileless, mention in closing how defense attorneys have to base their presentation upon whatever version their client tells them. This helps the jurors to see that the defense attorney may be a nice guy who got duped, but the defendant is still guilty.

Your authentic personality, whatever it is, will work.

The trial process will also highlight your own personality. Yet, you hold a position superior to the defense attorney's because you have evidence that the defendant is guilty. Just present that evidence using your particular style of confidence, whatever that style happens to be. The soft-spoken intellectual has a way to communicate his genuine *conviction* that the defendant is guilty. The grizzled office veteran has a way to communicate his genuine *conviction* that the defendant is guilty. You have an authentic personality, thus a style, to communicate your genuine, authentic, core-level *conviction* that the *defendant is guilty.* Again, not annoying self-assuredness. Case-assuredness. You do not need eloquence. You do not need a lot of air time. Just present your authentic self, with absolute confidence in the defendant's guilt. If you value courtesy, demonstrate polite confidence. If you like taking the offensive, charge forward with confidence. If you appreciate humor, talk about the ridiculous aspects of the defense theory, with confidence. Again, whoever you are, just exude your confidence of the defendant's guilt, authentically. A "belief" in the defendant's guilt will not suffice. You have to know it in your bones for the jury to resonate with it. You have been handed the evidence. Preparation produces the story. Confidence is how you deliver it. Preparation and confidence. Preparation and confidence. Preparation and confidence.

Consider your co-counsel's personality.

I work with a couple of colleagues with completely different perspectives who recognize valuable aspects about our cases that I do not notice. When hitched up with another prosecutor, you should evaluate both personalities on the team. Who would do better presenting the scientific evidence? Who needs to handle the thug witnesses? Who should cross-examine the defendant? Your style can gel with almost any other style, as long as both of you avoid certain mistakes. *Don't* celebrate the points you score; it makes you look needy, even petty. *Don't* giggle in front of jury; it makes the case look less important. *Don't* act like you have the verdict sewed up; it motivates the jury to do the opposite of what you expect. *Don't* slouch or look too relaxed; it too invites a comeuppance. *Don't* apologize too much, if at all; it makes you look clumsy and inexperienced. In general, don't look like this is your first jury trial. *Do* demonstrate that you try cases all the time—that the courtroom serves as your office and you feel comfortable moving around in it. If you need a tactful method of communicating any of these points to your co-counsel, suggest that he read this entire article for new ideas for your upcoming trial.

You have an authentic personality, thus a style, to communicate your genuine, authentic, core-level conviction that the defendant is guilty.

Your offstage remains onstage.

From the moment the potential jurors walk in the courtroom to begin voir dire, until the moment your office door closes behind you after the verdict—you are onstage. When you guzzle water during the reading of the preliminary jury instructions. When you nervously fidget at the bench dur-

ing a sidebar. When the judge pulls the deliberating jurors back into the courtroom to answer a question and they see you slouching in your chair—you are onstage. When you pull your car into the parking garage every trial morning. When you walk to lunch during the afternoon recess. When you are carrying your file materials out of the courtroom—you are onstage.

You are always onstage. In fact, you are *especially* onstage when not presenting anything, for in those moments jurors look into what they perceive as the cracks of your presentation. "The prosecutor smirked when that nice, young defense attorney dropped his file (he's mean and petty)." "The prosecutor used profanity when he was cutting up in the hallway (his courtroom courtesy is false)." "The prosecutor cut some old lady off in his car when pulling out of the parking garage yesterday (he deserves to lose)." Jurors evaluate you, the defense attorney and the defendant when you each appear unaware of their scrutiny.

So, how do you use this? How to pass the evaluation? Easy. "That well-mannered prosecutor asked the defense's alibi witness if she needed some water." (When you attack, it's not mean-spirited against the witness, just against her bogus story.) "The prosecutor stared coldly at the defendant when the witness described the rape." (The lawyers know more than we do, and this one knows the defendant is guilty). "The prosecutor struggled for his words, even pausing for several seconds, before summing up what this case is all about." (He's not a polished speaker, but he's being real with us.)

Bench conferences do not always happen outside the hearing of the jury.

The jurors who cannot stay awake during key DNA testimony will sprain their necks trying to hear the hushed sidebar discussions. They believe that we know the rest of the story, which they will not get, unless they sneak a peek behind the curtain. A choice defense tactic involves planting seeds during a sidebar, by arguing in that hoarse, dramatic whisper just loud enough for at least some jurors to hear. From Defense Misinformation 101: "Why is the prosecutor only striking black jurors?" "Judge, I've been telling the prosecution for months that they've got the *wrong* man (add pounding fist on bench for emphasis)." "I think the jury should know (psst psst psst)."

The only method I know to combat this involves body language. Jab your finger at the defense attorney to communicate that he's full of it. Use slowed hand and head movements to assert confidence. Smile good-naturedly to express your obvious comfort with the situation and that "this issue is no big deal." You never want the defense attorney to appear as the one wanting the hidden story to come out. Therefore, nod your head in agreement with the defense attorney that the jury should know (psst psst psst), while telling the judge "as long as they also hear about _____."

You are always onstage. In fact, you are especially onstage when not presenting anything, for in those moments jurors look into what they perceive as the cracks of your presentation.

Start telling the story in voir dire.

You may discuss legal concepts with the jurors in voir dire, in order to ascertain their understanding about topics relevant to the case. You can discuss their understanding of direct and circumstantial evidence. Of criminal responsibility. Of their duty to assess credibility. If the discussion stays in theoretical terms and examples, you can cover nearly every aspect of your case. Use those opportunities to tell the story.

Example: You have a murder case where the defendant fled the scene. Discuss the relevant legal topic that "a defendant's intent can be inferred by his subsequent actions" by using the example of a Wal-mart security scanner that goes off as a customer walks through it. Get their thoughts about a customer that does not wait for a store security officer but instead runs away. Thus, you highlight the difference between an innocent person who would remain at the scene and a criminal's flight from it.

Example: You have a robbery case in which the victim's empty purse was discarded along a roadway that leads directly to the defendant's neighborhood. Discuss "circumstantial evidence" in terms of a child that sneaks a cookie from the kitchen but leaves a trail of crumbs to his bedroom.

Example: You have an unsympathetic drug dealer as a murder victim. Ask the potential jurors: "If a gang member

gets executed by another gang member, and we know who the killer is, do we still get to prosecute them?" The answer will always be: "Of course." Develop voir dire examples that resemble your facts and highlight the key issues.

Oblique approaches in voir dire yield helpful responses.

Typically, you want stable members of the community on your jury. People who have worked at the same place for a long time. People who have earned what they own. People who take responsibility for themselves and their families. Some of this information can be obtained with direct questions in voir dire. "And how long have you worked for that company, Mr. _____?" However, most jurors feel a natural tendency to please. Whether they realize it or not, jurors tend to give answers that keep them in the jury box. Direct questions often make the "right" answer obvious. Only one answer exists to "Mr._____, can you follow the law as the judge instructs you?" and how much will that juror's affirmative answer help you make a decision? Sure, you need to ask those questions, but also ask what TV shows they watch. Where they get their news. What clubs they belong to. When they do not know the "right" answer, they just talk. And the more they talk about their favorite movie, their preferred leisure activities, the most difficult aspect of their job, etc., the more clearly their true values come into focus.

Consider the number of your preemptory strikes.

Hypothetical: voir dire questioning has concluded and you only have a few remaining peremptory strikes. The 14 people (including the two alternates) currently seated in the jury box are so-so. They will comprise your jury, unless you or the defense attorney gives the boot to someone in the box. The next three jurors in line to enter the box look like they were recently kicked out of the ACLU because of their overly radical, anti-establishment beliefs. The following two, after the radicals, served in the armed forces and seem to be waiting for permission to shoot the rapist you are trying. You have three strikes left, while the defendant has two remaining. What should you do to improve your jury? What can the defense do to help their own chances? The answer for both of you is the same: wait. If the defendant strikes someone to get radical #1 in the box, then you have enough to get at least one of the military guys in, with no radicals. If you strike first, then you will be stuck with at least one of the radicals. If you both play smart, then neither side will strike first. If one side does not do the math, then the other side gets a potential advantage.

What if you have four strikes and the defendant has one? Strike first. What if you have five and the defendant has two? It depends; you will get to the people beyond the next five if either of you strike. Everyday courtroom math. When you need an extra strike that you do not possess, you could try getting someone in the box excused for cause. If a juror in the box has an old DUI or criminal trespass on their record, ask the jurors as a group if anyone has ever been arrested or convicted for a criminal offense. If someone keeps their hand down when they should raise it, you can now argue to your judge that the juror should be stricken for cause. If successful, then you return to the math.

Use pictures, diagrams, videos, records, models, etc., to emphasize witness testimony.

Some jurors absorb more information by seeing a photograph. Some learn best by hearing a description; some by following a chart or diagram; some from watching the actions of others. Every person learns through repetition. Valuable information for a trial lawyer.

Most jurors feel a natural tendency to please. Whether they realize it or not, jurors tend to give answers that keep them in the jury box.

Start out a key witness's direct examination by having him describe what he saw. "The defendant walked up to the clerk and pulled his gun out. He got the money from the register. He ran out the back door." Next, show the witness a poster-sized diagram of the crime scene. "Please indicate on the diagram the door that the *defendant walked through* right before he robbed the store. (Witness complies.) Please indicate where the *defendant drew his pistol* and pointed it at the clerk. (Witness complies.) Please indicate where the clerk was standing when the *defendant pointed the gun* at him. (Witness complies.) Please indicate the door the *defendant ran out* after he robbed the store. (Witness complies.)"

Then, go to the photos. "This photo depicts the front door the *defendant walked through* right before he robbed the store." And so on. The jurors hear about the robbery through straight testimony, again while watching the witness point at a big diagram and again while viewing pictures of the crime scene. All while hearing, over and over, that the *defendant committed the robbery.*

I did an aggravated child abuse trial in which the emergency room physician testified about his findings of abuse, went through the stack of individual x-ray and surgical reports upon which he based his findings, showed the actual x-rays of the child's bone fractures, physically demonstrated the level of force required to cause the injuries and used a model of the human brain to illustrate where the head injuries occurred. Repetition with variation.

Physical evidence keeps it real.

Photos and videos enable the jurors to look backwards in time, into the crime scene. Physical evidence brings the actual crime into the courtroom, plopping it onto the jurors' laps. The shell casings that still reek of cordite. The 9mm projectiles removed from the victim's torso. The victim's clothing, wallet, personal effects. All such items serve as emotional force multipliers for the rest of your evidence because crime involves true emotional pain. Accordingly, make time to visit the evidence room. Go through those boxes and bags. Pick out some items you want the jurors to have to look at in the jury room while they discuss whether or not to let the defendant go. Find the best way to display them in closing argument. Real bullets hitting real people make the defendant a real murderer.

Use the defendant's presence.

A prosecutor can easily forget about the actual defendant in the courtroom. We usually direct the jurors' attention in the other direction. Toward the witness testifying from the stand; toward the pictures and video on the screen; toward the pipe wrench he used to beat the victim. When you stand at the podium conducting direct examination, remember that the cause of all the chaos sits right behind you. Incorporate his presence into your case-in-chief. Turn around and face him every now and then. Look coldly at him when the crime scene video slowly pans across the bloody bedroom. Leave the podium and point at him when asking the witness "Is this the man you saw beating the life out of his ex-wife?"

In closing, talk to the jury while looking at him. Stare him down. The jury will sense what you already know, that the defendant is a really bad guy who needs to be put away.

Accept that game plans rarely go as expected.

I had a trial once where nothing got by me. Every curveball the defense threw at me got hit. The defendant's witnesses lied for him and I was ready to impeach them with their prior statements. The defendant testified and sounded great at first, but on cross-examination he disagreed with his only credible witness. My crime scene investigator testified that the shooting happened much differently than how my star witness described it, yet the scientific details of the testimony further established that the defendant murdered the victim, another cocaine dealer. All this happened in July 2005 and it has not happened before or since. Moral of the story: trials rarely, if ever, go as expected.

Preparation significantly reduces the number of surprises and their scope, but you *will* get surprised about something in almost every trial. Your witness will turn on you. You will wish you had sent something else to the lab. Your judge will give you a screwy evidentiary ruling. You will adjust. You will maintain your balance. You will keep moving forward, like the running back who somehow keeps his feet moving when wrapped up in the arms of all three linebackers.

Yes, think of how you can do some damage control. Draft the extra questions you now have to ask your detective. Get someone to locate the additional witness you now have to call to the stand. Formulate the new angle you now have to take during your closing. However, when you find yourself with no answers, no brilliant comeback, no help from anyone, soldier on. Because that is litigation. That is trial law. Your profession requires you to occasionally take it on the chin and if it ever gets too painful for you, well, the world needs lawyers to write wills, too.

Take the high road when the defense attorney ignores the rules of professionalism.

You have the most heroic job description in the practice of law. You serve as an agent of truth. You protect nice people, families and children. You fight against real bad guys. How many people, let alone lawyers, can say that? Furthermore, not all defense attorneys play dirty. In fact, the ethical defense attorney constitutes the greatest, most needed asset to our justice system right now. The ethical defense attorney has a different job than yours. He makes you work for a conviction and finds a way to do so honorably. The ethical defense attorney provides you the gift of intellectual

combat, improves your game and never sinks below his ethical obligations. The ethical defense attorney should be personally admired and publicly respected. On the other hand, your lowest adversary claims a professional duty to obscure the truth, a job which typically "just happens" to be to his financial benefit. He prides himself in creating believable falsehoods and revels in all acquittals, the more egregious the better. He prefers the fleeting ego-stroke of victory over a victim's abiding trauma. You stand between him and his hollow self-glorification.

The right thing will never just happen without some effort on your part. Child rapists either go to prison or return to someone's neighborhood, depending on how you fare in the competition of ideas. Yet, even with such potentially life-and-death consequences, when your opponent ignores the rules of professionalism, when his blows land below the belt and the ref does not call it, you still fight fair. What if, after the trial has started, he suddenly reneges on his prior stipulation to the chain of custody? You still abide by your agreements. What if he wins a suppression motion to keep out the defendant's gang affiliation, then argues with a straight face in closing that his teenage client had no motive to do the drive-by shooting? That ship has sailed. What about when he accuses the married rape victim of consenting to sex with the air conditioner repairman, who the jury will never know is a repeat sexual offender? You still show the warts of your case. Playing fair while dealing with all that will make you the hero, regardless of whether the defendant gets convicted.

Arm the jurors on your side.

The most obvious goal of closing argument is your persuasion of jurors. The more lasting goal of closing argument is your enabling jurors to persuade other jurors. When the jurors finally get sent back to the jury room to deliberate, they will split into three camps: those for you, those for the defense and those undecided. As brilliant as I know your closing will be, you probably will not persuade all of the undecided camp, or any in the defense camp. So, you need to provide short, pithy phrases in your closing in order to arm the people in your camp to continue your argument in the jury room. Simple phrases work best. Felony murder? "Sign on for robbery, victim dies, guilty of felony murder." Circumstantial case? Help them "connect the dots" back to the defendant. Got forensic evidence? Science "points the finger forever" at the defendant. No need to recreate Shakespeare here. Short and basic = clear and memorable.

Consider the jurors' personal details when finalizing closing.

Society truly hates the plague of crime. Society attempts to protect its vulnerable members from predators. Society resents criminals and wants to convict/punish/remove those offenders whose crimes have been clearly proven. The hang-up is that "society" was recently reduced to the 12 individuals sitting in your jury box. You need to reach the retired science teacher, the unemployed diesel engine mechanic, the grocery store assistant manager and everyone sitting with them on their own level. You need all 12 of the jurors' individual value-systems to resonate with the State's position.

The good news: again, you have evidence. Enhance the appeal of that evidence by integrating it with the personal information you learned in voir dire. When a juror tells you he drives a cab, you know he has been called out to bad neighborhoods, where he was unsure if the guy in the back seat was going to pay him the fare or stab him with an ice-

The most obvious goal of closing argument is your persuasion of jurors. The more lasting goal of closing argument is your enabling jurors to persuade other jurors.

pick. Accordingly, the following might fit into your closing: "Predators like the defendant brush shoulders with hard working citizens every day. Yet, he sees them as targets. As prey. As his way of life, even if it means taking theirs."

Nurses see the aftermath of violent confrontations every week. So: "The defendant is one of those people who does not care about the consequences of his actions. He does not care about the destruction, physical and emotional, he leaves behind."

Teachers know the hopeless situation of not being able to throw an uncontrollable kid out of the classroom and not being able to effectively teach with him in the classroom. Try: "DJ's pain from getting horribly beaten by the defendant, his own father, was not just physical pain. Where could

he go? Who could protect him from the grown man who was supposed to be protecting him? Nobody. He was stuck, for the rest of his short life."

Every occupation, every topic, every detail that gets discussed in voir dire gives you a greater context that can help the evidence resonate with your 12 particular jurors.

Argue both directly and obliquely.

We have already covered how to authentically communicate with jurors in voir dire, by supplementing your direct questions ("Can you follow the law?") with oblique questions ("Mrs. Dupree, what TV shows do you enjoy watching?"). The same approach applies to closing arguments, and I have observed defense attorneys use this frequently. I know that your closing argument will competently cover all the evidence that directly establishes the defendant's guilt. I know that you will stare down the defendant and tell the jury "That man is guilty of _____."

Supplement those direct statements with some indirect ones that demonstrate your knowledge of the defendant's guilt. For example: "Who knows why people think they can murder someone, then get away with it by simply lying to the police? I do not know. I only know that it happens frequently. And it happened in this case." For example: "Unfortunately, there are some people in the world who look at children as sexual objects." For example: "I'm sorry to have to inform you that the defendant is not the only extremely violent drug dealer in the world." Statements that presume the defendant's guilt show more of the greater context to jurors, certainly more than the repeated clanging of "He's guilty! I really promise!"

Jurors just have to figure out something on their own.

Without exception, a jury always attempts to discover something about your case that got overlooked by everyone else. A possibility that somehow slipped by the police force, DA's Office, crime lab scientists, defense team, judge, etc., over the previous four years of investigation and litigation. After a few days of their first exposure to a criminal proceeding, the jurors work diligently to crack the case. Maybe they eventually tire of passively receiving information and seek to become more proactive. Maybe it flows from the fact that most people do not like to simply do what other people, especially lawyers, tell them.

Whatever the reason, jurors will hardly ever consider a case to be as simple as it looks. A better approach may exist somewhere, but I just highlight one of the interesting, legally insignificant mysteries about the case. Using motive: "Ladies and gentlemen, we may never know why he did it. Maybe he needed money for something. Maybe he was just mad at the victim." Using a fact not an element of crime: "I must admit that we do not know where the defendant got the gun he used to shoot the victim." Using a witness's state of mind: "Some of you may be wondering why the defendant's neighbor decided to lie for him. I can only guess, but maybe some of you have a better read on that than I do." Providing them a legally insignificant issue to speculate on makes it easier for them to focus upon just the evidence regarding more lackluster questions, like guilt or innocence.

Your job continues after the jury gets sent to deliberations.

Most juries get pulled out of deliberations at some point. When they need some guidance from the court, before they get sent home for the day or when they think they might be hung, the judge will bring them back into the courtroom. On those occasions, the jurors need to see the detective awaiting the verdict. That visual snapshot communicates that this is a significant case against a significant criminal. You need the jurors to see the victim's tearful family members. That can soften the undecided jurors and the jurors on the defense side, while motivating the jurors on your side. You need the jurors to see you silently confident, looking them in the eye. That maintains the strong vibe you hopefully projected during the trial.

Conclusion

Modern prosecution requires you to recognize the unconventional tactics long utilized by defense attorneys. Jurors today expect the *CSI* television star Bill Peterson to take the stand and dazzle them with scientific confirmation of the defendant's guilt. If you cannot give them that (or a recorded confession), you start out in the hole. Incorporate asymmetrical tactics to maximize the chances that the right thing will happen. I know you will get what the jury needs into evidence. Hopefully, the observations listed above will assist you in communicating the strength of the evidence, while creating a receptive audience for that evidence. Coupling your straightforward evidence with unconventional presentation strategies will usually get your best case to the jury. Achieve that and you achieve the ultimate objective of frontline prosecution.