

JURY SELECTION BASICS

Katherine Simmons, Assistant Public Defender
Mecklenburg County

Shamelessly stolen (with permission) from Mike Kabakoff, APD

Includes materials from: Ira Mickenberg, Mike Howell, and Kelley DeAngelus

WHAT IS THIS ALL ABOUT?

- **Jury Selection IS...**
 - Deselection: identifying the worst jurors, removing them.
 - A conversation, NOT a cross-examination.
 - A way to discover which jurors are going to hurt our client .



WHAT IS THIS ALL *NOT* ABOUT?

- Jury Selection is **NOT**...
 - About stereotypes about race, age, gender, ethnicity, profession* or lack thereof, etc.
 - About convincing jurors to abandon their strongly held beliefs.
 - Indoctrinating jurors on **complex** topics



JUDGE'S INTRODUCTION TO CASE

15A-1213

- Prior to the start of jury selection, the judge MUST* identify the parties, their counsel, and briefly inform the prospective jurors of the name of your client, the date of the alleged offense, the name of the alleged victim (if any), the defendant's plea (not guilty) and any *affirmative* defense raised by the defense.
- The judge cannot read or show the jury the charging instrument.
- This is important to keep in mind when it comes to serving notice of an affirmative defense, *and* when considering whether to withdraw an affirmative defense before jury selection starts. You don't want the jury to hear from the judge that you will be putting on evidence of self-defense, for example, if you no longer intend to pursue that defense.

*But do they always? Your results may vary.

BASIC PROCEDURES

15A-1214

- State goes first
 - Twelve prospective jurors are selected at random by the clerk and seated in the box.
 - State conducts their examination of all twelve.
 - State exercises their peremptory challenges and challenges for cause.
 - If a juror is removed by peremptory or challenge for cause, that seat is immediately filled with a new prospective juror.
 - The State starts continues until they are satisfied with all twelve jurors in the box.
- Defense goes second
 - Defense questions the twelve jurors passed by the State and exercises their peremptory challenges and challenges for cause.
 - Jurors remaining become trial jurors.
 - Removed jurors are replaced with new prospective jurors. The process starts again with the State.

HOW ARE JURORS REMOVED?

- Peremptory Challenge 15A-1217
 - Each side gets 6 challenges total for first 12 jurors (14 peremptories for capital cases).
 - Each side gets 1 challenge per number of alternate jurors selected.
 - Asking for sanctions? Ask judge to give you extra peremptories or strip the State of theirs.
- Challenge for Cause 15A-1212
 - Unlimited because you are challenging a juror's qualifications to be on the jury.
 - If challenge for cause is due to a juror's bias, the standard is:
 - Do the juror's views/feeling/beliefs **substantially impair** them from being a neutral juror in this particular case.

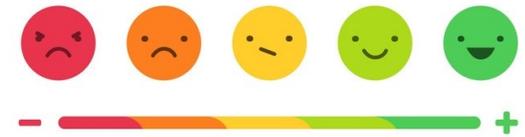
CHALLENGES FOR CAUSE

- 15A-1212 – the four most common grounds for a for cause challenge are:
 - (4) the juror is incapable by reason of mental or physical infirmity of rendering jury service.
 - (6) the juror has formed or expressed an opinion as to the guilt or innocence of the defendant.
 - (8) as a matter of conscience, regardless of the facts and circumstances, the juror would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
 - (9) For any other cause, the juror is unable to render a fair and impartial verdict.

RATING SYSTEM?

UP TO YOU

- Mike Howell has provided a rating system adopted for non-capital cases
- Rated on a scale of 1-6, from jurors who are so biased for the defense that they are legally excludable for cause to jurors who are so biased for the state that they are legally excludable for cause.



HOW TO START



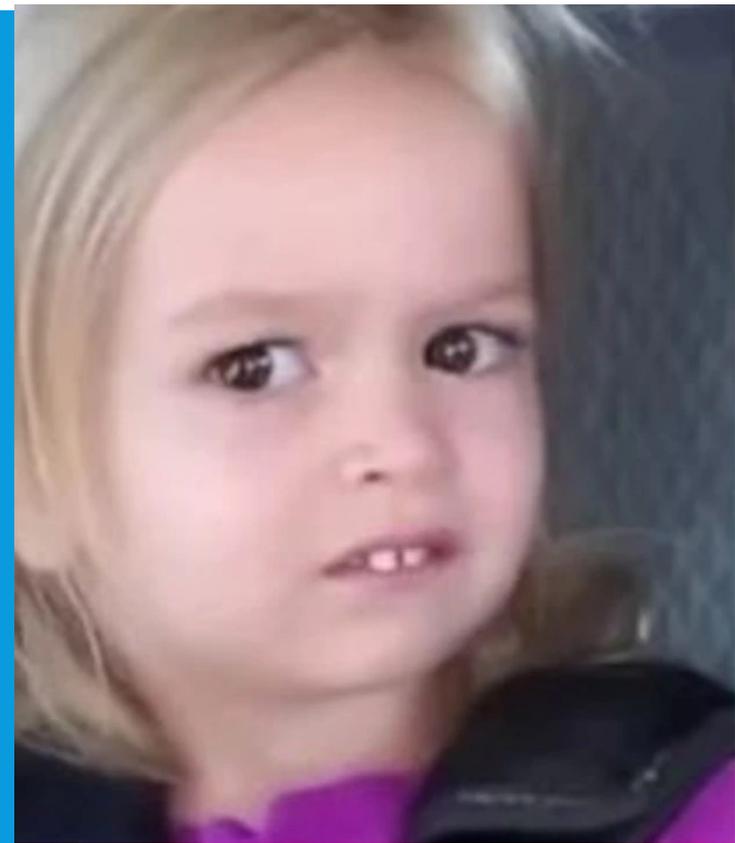
- BE YOURSELF – this is your opportunity to get to know each other.
- Be ready with a greeting! Speak in plain language! Tell them how important this part of the trial is.
- Set yourself apart from the ADA, who has probably been lecturing from a jury selection binder for the last couple hours. Consider correcting the ADA's "mistakes" (misstatements on burden of proof, "right to testify...")
- Read the juror questionnaires and engage jurors on their responses!

DECIDING WHAT TO ASK

- **WHAT IS THE THEORY OF YOUR CASE?**
- What do you need jurors to believe, accept, or understand in order to win?
- What experiences or beliefs do you need to know about the jurors in order to decide if they are right for your case?
- What has the juror already told the Judge and/or the ADA?

WATCHING THE JURORS

- Watch the jurors for reactions while you, the ADA, or other jurors are talking.
- Their physical cues can lead to an important conversation.
- “Ms. Jones, I noticed that when Mr. Smith said that he didn’t trust all police officers, you seemed to shake your head and fold your arms, can you tell us about your thoughts on that topic?”
- **MAKE A RECORD OF WHAT YOU SEE!**
 - If a juror is squirming, shaking their head, crying or tearing up, it might be a good idea to memorialize that to animate the appellate record.
 - Example: sister with heroin addiction



THE CLIENT'S ROLE

- Client should feel welcome to offer opinions and observations during jury selection, and the client hopefully appears engaged and invested to the jurors.
- If a real impasse between you and your client arises as to whether a juror should be retained or struck, client's wishes rule. You might choose to make a record of this outside the jury's presence. *State v. Freeman* 202 N.C. App. 740 (2010)

IV. Right to Make Final Decisions

Defendant argues that the trial court erred by allowing defense counsel to make the final decision regarding the use of a peremptory challenge when defendant and defense counsel disagreed over the striking of a juror. We agree and remand this case for a new trial.

HNZ Tactical decisions in trial, "such as which witnesses to call, 'whether and how to conduct cross examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer . . .'" *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991) [***10] (quoting *State v. Luker*, 65 N.C. App. 644, 649, 310 S.E.2d 63, 66 (1983), *rev'd on other grounds by*, 311 N.C. 301, 316 S.E.2d 309 (1984)).

However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, *the client's wishes must control*; this rule is in accord with the principal-agent nature of the attorney-client relationship. In such situations, however, defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached.

Id. (emphasis added).

STAKING OUT

- A “stake-out” question asks a juror to commit to a way of voting depending on a given situation.
- If you’re describing your case’s facts to the jurors and asking follow-up questions, be mindful of the possibility of a stake-out objection.



REOPENING JURY SELECTION

(THE DA'S "BUYER'S REMORSE" TOOL)

- N.C.G.S. § 15A -1214(g) – any time after a juror has been accepted but before the jury is impaneled, the Judge may permit the reopening of questioning if it is discovered “that a juror has made an incorrect statement during *voir dire* or that some other good reason exists”
- In the discretion of the trial judge, Jury selection may also be reopened *after* the jury is impaneled. *State v. McLamb*, 313 N.C. 572 (1985).
- Once questioning is reopened, *any previously selected juror is open to being struck*.



HOW DO WE FORM THE QUESTIONS?

1. Start with an **IMPERATIVE COMMAND**
 - Tell us about...
 - Describe for us ...
 - Share with us...
2. Use a **SUPERLATIVE** to describe the experience you want them to talk about
 - The best / worst/ most serious
3. Ask for a **PERSONAL EXPERIENCE** or the **EXPERIENCE OF SOMEONE THEY KNOW.**
 - That you or someone close to you saw
 - That happened to you or someone you know

HELP! NO ONE WILL TALK TO ME!!!

- Are you asking open-ended questions?
- Get Socratic! Call on specific jurors!
- Try focusing on one juror who is talking. After they answer the questions, switch to a silent juror and ask them what they think about what the talking juror just said.
- Respond to one word answers with “Why?” “How so?” “Tell me more about that.”
- Don’t give up!
- Thank and praise jurors who do open up, especially about sensitive subjects.
- Often, jurors will get talkative as they try to top each other’s stories.

WHAT DO I DO WITH ALL THIS INFORMATION?

- Remember to take your time. Try not to let anyone rush you.
- Write down what the jurors are saying using their exact words, if you can.
- Ask yourself: which jurors show through their answers they will not be able to listen to or consider your theory with an open mind?
- Which jurors **PRESENT THE BIGGEST DANGER?**

CHALLENGE FOR CAUSE

1. Restate the juror's answer EXACTLY the way they said it.
2. Ask them to tell you even more about it.
3. Don't be judgmental. Thank them for being honest. Remind them that it is normal to have strong opinions. Ask if anyone else agrees.
4. Now you can finally switch to leading questions! The goal is to lock in their strongly held belief.
5. Suggest how the juror's belief might affect their ability to be a neutral and impartial juror
6. Get the juror to agree that their feelings and beliefs will affect their ability to evaluate the evidence. ("substantially impair")

QUICK CHALLENGE FOR CAUSE SCRIPT

- You told us your nephew is a police officer. (Yes.)
- And because of that and other experiences with police, you believe police always tell the truth. (Yes.)
- And you said you believe that police are heroes and it would be wrong to question their credibility or their tactics. (Yes.)
- Do you think that you could set that aside or do you think that's what you'll think about the police in this trial? (I don't think I can set that aside completely.)
- Is there anything I could say, or the ADA could say, or the Judge could say that would change your mind about that? (No.)
- Tender for cause. (Judge and ADA might or might not try to rehabilitate but answers are on record.)

DENIAL OF FOR CAUSE CHALLENGE AS BASIS FOR APPEAL

- N.C.G.S. § 15A-1214(h) – in order to seek reversal of conviction based on denial of for cause challenge, the defense must show 1) that all peremptory challenges were used, 2) that the defense renewed any previously denied challenges for cause, and 3) that the Judge denied that renewal motion.

CHALLENGE FOR CAUSE IS DENIED...

Can still use a peremptory challenge
to strike the juror.

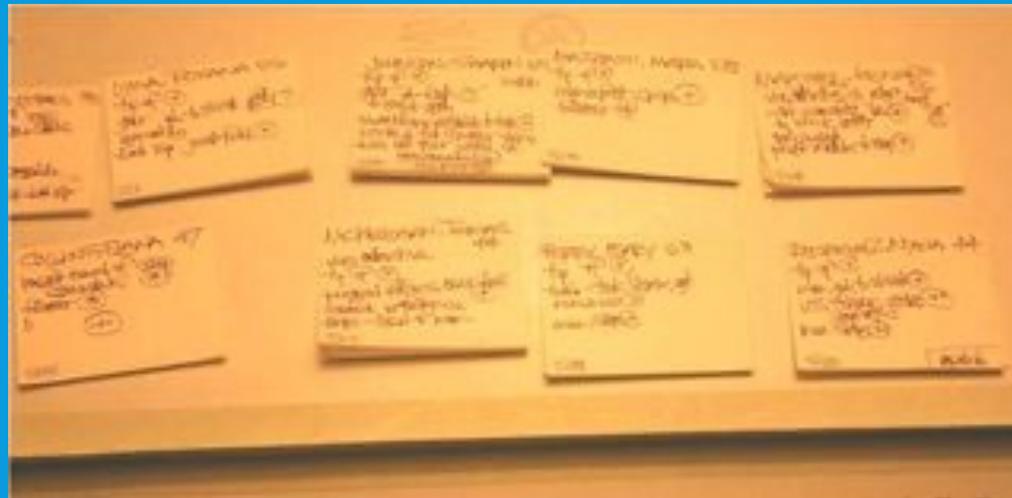
But remember, you only get 6
for the entire process!

PROTECTING THE HOLDOUT

- It is worth asking jurors about their ability to maintain their firmly held conclusions (based on the evidence and their analysis of it).
- Can a juror promise that they will not change their vote due to pressure from other jurors?
- You do not want to have a juror commit to not changing their mind even in the face of evidence, reason, and logic. This opens them up to a challenge for cause. There is a balance.
- “If you see and hear the evidence, and reach a conclusion based on that, would you change your mind because other jurors want you to? Even if they don’t cause you to sincerely change your mind?”
- The judge and ADA are unlikely to emphasize the power of the individual juror to maintain their position, so you should.

HOW DO I KEEP TRACK OF EVERYONE?

How you keep track is less important
than making sure you keep track



CASE EXAMPLE #1

Your client is charged with Felony Larceny of a Dog. The dog is owned by the client's neighbors. Your client and his neighbors have a long history of disputes. The neighbors claim they saw their dog running through your client's yard when the client grabbed the dog and said "I'll take care of this once and for all." The dog is missing and has never been found. Your client owns and raises pit-bulls. He states that he loves all dogs, and would never steal a dog. He also states that he was one hour away from home at the time of the alleged theft.



CASE EXAMPLE #2

Your client is charged with assault on a female, assault by strangulation, kidnapping, and possession of a stolen firearm. Police responded to an anonymous call for service saying that a man and a woman were fighting in a car at the intersection of Main Street and 12th Street. Police arrive and find a woman outside of a car with red marks and scratches on the left side of her face and neck. She points to your client (in driver's seat) and says "HE HIT ME, HE CHOKED ME!" Police pull client out of car and find a gun on the console, which was reported as stolen six months before. Client says nothing to police and is arrested. After you get the case, he tells you his girlfriend saw a text from another woman on his phone while they were driving, and she started attacking him in the car. He says he pushed her away and hit her in self defense. He says he bought the gun from a friend and didn't know that it was stolen.



CASE EXAMPLE #3

- Challenge a juror for cause based on their feelings about police credibility.

MATERIALS

- Please see jury selection guides and sample command superlative questions prepared by Ira Mickenberg and Mike Howell (available from the SOG).
- Please see *Batson* challenge materials from Elizabeth Hambourger (from the Center for Death Penalty Litigation), and remember to record, as best as possible, details that are relevant to *Batson* challenges and later appellate efforts. These notes and records can include demographic information relevant to *Batson* as well as copies of the potential juror questionnaires, which you might consider copying and filing as court exhibits.