

Throwing Away The Book

By: Greg Westfall, '02

There is a book somewhere out there that says how a criminal trial is supposed to go. The book says that the prosecutor wears the white hat and the defense lawyer wears the black hat. The book says the prosecutor always seeks justice and the defense lawyer can't be trusted because he is not concerned with justice, but will instead lie, cheat and steal for his client in a effort to "get him off." The book says the defense lawyer should be concerned about making the prosecutor and judge mad. The book says that all that really matters is the law and we should concern ourselves with educating the jury on the law. The book goes step-by-step on how we conduct the trial. The only problem with this book is that the last words are, "the state wins." In Texas, unfortunately, too often the last words are, "the defendant dies."

Recently, a newspaper article ran here in Fort Worth, Texas. The headline was "*Texans strongly support the death penalty,*" and it ran in the Fort Worth Star-Telegram on March 16, 2003 at page 5B (for anyone who would like to find it). It showed the results of a poll of 1,000 adults in Texas. The upshot was that 76% of those polled support the death penalty. A whopping 69% believe that Texas has actually executed innocent persons, but support the death penalty

nonetheless. This being established, only 41% support a moratorium like the one in Illinois. These are the folks who show up for jury service in Texas. These are the people who decide whether our clients live or die.

I always knew “the book” didn’t work, although I admit I have tried plenty of cases “by the book” and got the predicted result. Before coming to TLC, though, I didn’t know exactly why the book didn’t work. The reason the book doesn’t work is because real people don’t follow the book – only lawyers do. A real person doesn’t acquit somebody of a criminal offense because he is “faithfully adhering to the presumption of innocence” or is “holding the state to its burden.” To a real person, these are merely justifications for doing what they want to do. If the juror wants to convict your client, then the law gives her a way to do that. If the juror wants to acquit your client, then the law gives her a way to do that also. *But the law is not what the juror bases her decisions on.* This points up the fallacy of spending much time “educating the jury on the law.” I am pretty much unconcerned about whether a juror will follow the law. I am very concerned, on the other hand, with how the juror will follow the law – what is the juror’s decision-making process is. I already know *that* a juror will follow the law, I want to know *how*.

Here is where TLC has helped me in jury selection. Before TLC, I was not

in any material sense “real.” As I was not “real” myself, I had no idea how to speak to jurors (or anyone else) in a “real” way. I have come to believe that becoming “real” is a life-long process, so I am still taking baby steps. But even the baby steps have caused a quantum leap in how I relate to jurors. “Realness” is honesty. And I never knew what it was like to be honest with myself until I did psychodrama at TLC. “Realness” is also love. When I began to be real, I began to have some intuition about other people and that has been the number one thing that has helped me as a trial lawyer since I left TLC. The “chair back” technique merely helps us develop this intuition, I believe. Even the short distance I have traveled in becoming “real” has given me the gift of this intuition, much to the benefit of my clients, those who are close to me, and to myself.

I have tried two death penalty cases. Only one of those has gone all the way as a death penalty case. In the other, the prosecutor waived the death penalty three weeks into jury selection. The first death penalty case I tried was *Texas v. Anthony D. Williams*. Anthony was a 20 year-old African American who was deeply involved in gangs. He was a Blood from a set called “East Berry Street Piru.” He and some other Bloods committed a string of driveway robberies that over a couple of months became more and more violent until at last a man was killed. Of the thirteen driveway robberies with which he was charged, six people

had been shot, one died. I had been a lawyer less than five years when I tried this case as the first chair. I had never tried a death penalty case as second chair, so this was also my first death penalty experience.

I had boards printed up showing all the law that applied to the case. The prosecutor had a PowerPoint presentation of essentially the same thing. I rarely used the boards, however. I mainly talked about seemingly irrelevant stuff. Even though I was ignorant of TLC techniques at that time, I thought that whether or not someone lives or dies was more of a metaphysical question than a legal one. So I would look at the juror's questionnaire and try to find something close to that juror that we could discuss so I could just see how that juror "feels" to me. By and large, I just went on my gut after talking to the juror. I didn't realize that I was actually doing it "right."

Each potential juror was different and my conversation with each was unique to that juror only (much to the prosecutor's consternation). For instance, one juror had put on his questionnaire that a person should get the death penalty when that person has "given up the image of God." That struck me as interesting and I wanted to talk to him about that. The chat went like this:

Q. When you give up the image of God, does that mean that you have to get the death penalty?

A. If you do but – there is the good – what I think you were starting to preface your whole question with is who makes the decision. ... It puts you in a very gray area of life. It's not a black and white kind of issue. Who makes that decision or who decides that, yes, the person is beyond rehabilitation, boy, I do not know. That's when I've got to say, honestly, I do not know. That's why I like the American jury system so well. Yes, the prosecution has to prove beyond a reasonable doubt. They've got to do it and a group of persons, peers, unanimously have to say yes. And in my own religious system, I don't think God can – will allow that many people to be, you know, misled. That's just my hope and my – one of my beliefs, although I know there's something called mob mentality and all that kind of good stuff. But when things are rationally presented by both the Defense and the prosecution –

Q. You know the Defense doesn't have a burden of proof?

A. And they don't have a burden of proof, they don't have anything to prove, but when the prosecution presents some evidence and you've got a jury of the peers and you've got a Judge riding roughshod over everybody making sure they mind their p's and q's –

Q. Okay.

A. – you know, that’s when they feel more comfortable with, yes, the decision has to be made and it can be made better within that kind of system.

Q. And your responsibility is to apply the burden of proof faithfully.

A. Uh-huh.

Q. And to ensure as an individual that we don’t get a bad result. Is that kind of the way you feel?

A. Yes.

Q. Will you uphold your responsibility?

A. Yes.

Q. Thank you very – Do you have any questions of me?

A. No, no questions, just a reflection.

Q. Okay.

A. Earlier you said what did I think when I first saw – What’s the Defendant’s name?

Q. Anthony.

A. I just thought, Anthony, I’m sorry. I thought about a lot of the grousing, you know, heard from fellow jurors. You know, boy, I don’t like to be called in here. I’m having to take time off from some – I was thinking about that versus, he, this man has his can on the line and these people are

grouching about missing a day of work. I said, something doesn't – I said, the priorities don't make sense to me. I'm sorry, I just had to share that with you, Greg.

Q. I can't say I disagree with that and I appreciate it.

Pretend like you are the prosecutor for a second. Do you let this person sit on a jury that you are going to ask to kill somebody? His questionnaire, as I remember, was kind of scary. On its face, the business about "giving up the image of God" was unsettling. I sure liked it a lot more after he and I talked about it. He sees shades of gray. He basically believes nobody is beyond rehabilitation. It truly seems that what matters to him is the person, not the facts of the case. The state accepted this juror and ultimately, he and the other eleven who ended up on the jury unanimously agreed that Anthony should live.

Without knowing I was doing it, I gave this juror permission to show me how he thinks and makes decisions and he took the invitation enthusiastically. I guess the prosecutors, who are far more interested in knowing whether the juror can "follow the law," never picked up on the fact that this guy would have a very, very hard time killing anybody.

The second death penalty case I tried (or was in the process of trying, anyway) was *Texas v. Jamien Demon Nickerson*. Jamien was charged with two

capital murder cases and was facing the death penalty in both independently. In the first case, a man was murdered in his car. He was at a car wash here in Fort Worth in a bad neighborhood. Oftentimes in such neighborhoods, the phone booths will be set low so you can stay in your car and make a call. The victim was sitting in his Camaro making a call when a man walked up beside him and pointed an AK-47 in his face. The victim spoke no English. The man with the AK-47 ordered him to get out of the car. He ordered him not to move. He ordered him not to try to pull off. The victim figured he was getting robbed, so he pulled out his wallet and some cash and tried to hand it to the man with the AK-47. But the man with the AK-47 wanted the rims off his car. The victim was not doing what he was told to do, so he was shot in the face at point-blank range. His body was then dumped onto the parking lot and his car was stolen. The state charged my client as the shooter.

In the second case, my client had taken part in a burglary of a tire store. The property taken was hidden at a young lady's apartment not far from the tire store. The police came to her apartment and she told them who burglarized the tire store, specifically naming my client. Once he found out, he and three other people took her and her infant son in her car. She was essentially tortured to death for snitching them off. She was beaten for hours in the car. She finally suffocated

from having her head wrapped with packing tape. Her body was then dumped in the woods of Louisiana, where it was scavenged by wild animals, probably dogs. Jamien was believed to be the ringleader of this incident.

What follows is my voir dire of the first potential juror – a very nice lady who is pretty typical of a kind of jurors we see. She is a middle class caucasian lady with pretty limited life experience. I generally find such people to be fairly black and white in their views and to have generally not given anything very deep thought, much less the death penalty.

EXAMINATION BY MR. WESTFALL:

Q. How are you doing?

A. I'm doing great. How are you?

Q. Doing okay. I'm Greg Westfall.

A. Nice to meet you.

Q. Ms. Joetta Keene and this is our client Jamien Nickerson?

A. Nice to meet you, sir.

Q. And I got to tell you I'm scared. I am. This is a death penalty case and you're the first juror and I haven't gotten my butterflies out yet, but mainly, I'm scared because this is a death penalty case and I feel like Joetta and I have Jamien's life in our hands.

A. Right.

Q. It really scares me. And I just I just want to kind of talk to you?

A. Okay.

Q. Today the prosecutor kind of went over the law and I just want to kind of talk to you a little bit, go over the law if I need to?

A. Okay.

Q. Where -- first of all, I have been living here for 20 years I was born out in West Texas but I grew up in Florida so I'm kind of a transplant here also. You have been living here for 10 years?

A. Yes, sir.

Q. And you grew up in?

A. Iowa.

Q. Where?

A. Newton. Thirty miles west of Des Moines.

Q. Is that a farming community?

A. Well it is, but it's the home of the Maytag Company so I was the receptionist there for 10 years.

Q. I didn't even know that.

A. Right.

Q. Maytags are made in Iowa?

A. In my town.

Q. What was it like up there in the small town?

A. It's the best life you could imagine. It's a great place to raise children. Iowa ranks 8th from the top in the nation for education so it's great for education.

You learn a lot of morals. Family is very close knit, very, very tight.

Everyone sticks together, it's just a great place, a great place but there's not a lot of opportunity once you graduate from high school and I knew that would be happening to my daughters, there wouldn't be a lot of opportunity and they would be moving.

Q. Is that why you moved down?

A. Well, I moved here because my mother, my father and my brother and two sisters had all died and I had one brother left and he lived here in Arlington and I had never left that town in 40 years so I thought it's now or never if I'm going to move, so I moved down here. I was married at the time, and my husband was going to transfer down here but he didn't transfer down here, so I came down here and was fortunate enough to get on with American Airlines as soon as I got here and that has kept me here.

Q. Do you think you'll stay?

A. Oh, I'll never leave. I would never leave my job I would like to go back but I would never leave my job.

Q. And you're getting adjusted to Arlington?

A. I love it.

Q. Arlington's changed a lot in 10 years.

A. It has changed it's grown quite a bit but it's still small I live in the northwest part which is the older part and it's still small there so I don't venture out too much.

Q. It, it sounds like you have given some thought to the death penalty?

A. Yes, sir.

Q. I want to talk to you about that.

A. Okay.

Q. But before I say that, I want you I want you to know that everyone's views are their own views I've got my own views about the death penalty, Joetta has hers, and no one's views are right or wrong, o.k.?

A. Right.

Q. And I just want to talk to you about whatever thought you've given to the death penalty and whatever thought process you might use in deciding in a case where there is a death penalty.

A. Okay.

Q. What was your view when you were in Iowa before you came down here?

A. I had never been exposed to a crime where I felt the death penalty was justified. I probably didn't listen to a lot of world news or national news and I really had never been exposed to it to agree with it. I should say to agree with it. Not that I had given it much thought. I hadn't. Growing up I was never exposed to the criminal justice system. I must be honest in saying my first thought of the death penalty came during the Sharon Tate murders, and that was the first, I really think that was the first time I ever gave thought to the death penalty, and I did kind of follow that trial a little bit and that was my first time to think about it that was such a heinous crime, but I don't know that I ever, ever gave it much thought until I moved down here and with it being an option down here, you hear a lot about it, and I think from hearing a lot about it down here has made me think more about it.

Q. What do you kind of think now?

A. I can think of an incident that happened in the last 10 years that made me believe in the death penalty, that made me, that I felt was justified for the death penalty and I didn't follow the case so I don't -- I don't even know that that happened, but the case made me so angry that I felt that would have

been justified.

Q. Could you talk about it?

A. It was the dragging death of that black gentleman in Jasper, Texas when they tied him up behind that truck and drug him. It just was the worst thing I could have ever imagined. I just I couldn't fathom that. I just couldn't fathom doing that to someone's father and I was angry at those people that did it.

Q. What do you think about the way Texas uses the death penalty in terms of do you think they use it too little? Too much? Just about right?

A. Well, I have to believe that when a person is found guilty, that it's been proven that he is guilty. I mean hopefully, the evidence was there and the guilty verdict was correct and as the prosecutor stated if there's, you know, two circumstances there which is the law in Texas (pause) I have to believe that that's -- that's what's going to happen. I mean, I -- it's hard to it's hard to imagine someone dying like that, but you take someone's life and that's the way it goes. I mean, that's what happens.

Q. Do you feel it should be automatic if you take someone's life that you should get the death penalty?

A. No. No. No. No. There, you have to listen to the circumstances.

Definitely not automatic.

Q. Can I talk to you about one legal concept real fast?

A. Sure.

Q. It's beyond a reasonable doubt. Beyond a reasonable doubt is a term that you've heard and I'm sure it's in the Judge's instructions also?

A. Yes, it is.

[A fairly uninteresting discussion about “beyond a reasonable doubt” has been removed.]

Q. Do you feel comfortable with those concepts, the fact that we don't have to prove anything and the fact the State has to prove everything and the fact that as Jamien sits here right now he is 100 percent innocent?

A. I didn't realize until now that's the way it is, but I totally agree with that. I felt he, I had always been under the impression that he had to prove his innocence. He shouldn't have to prove his innocence in my opinion. He is innocent and I'm glad that the State has to prove his guilt, so I agree with that concept. Did I answer that correctly? Do you understand me?

Q. Oh, sure. Sure. Sounds like you got a real good understanding of it.

A. Right.

Q. What do you like about your job and American Airlines?

A. I handle passenger complaints from the irate passengers at the airport.

THE COURT: I'm sorry. Did you ask her what does she like about her job?

A. I like the challenge of the irate passengers, the ones that are screaming at me, and I just I just enjoy that challenge just trying to turn the situation around, not always to their benefit, not always to mine, but I just like that challenge. I don't know why, but I just like that challenge.

Q. Does it happen every day that people are yelling at you?

A. Every day. About every hour.

Q. You came from Iowa to do that. And you don't want to leave?

A. No, I don't.

(Laughter in courtroom.)

A. No, I don't.

Q. You know if you're on the jury, sometimes it can get contentious back in the jury room. Have you ever been on a jury before?

A. No, sir.

Q. You may get to experience people yelling at you back there?

A. Okay.

Q. One thing I want you to understand, every single juror has no more power than any other juror.

A. Right.

Q. Every single juror is one vote. There are 12 of you but you're all individuals and you all have your own consciences.

A. Correct.

Q. And can you give me an example of the last time somebody was yelling at you and you didn't back down?

A. We do secondary screening at the gates, which means once you've gone through the security at the airport we do secondary screening prior to getting on the plane, and that's a random selection, and we don't tell people this, but it's -- usually we select the person standing closest to us so we can get going on the boarding process, and the lady that I selected was an African- American lady and the minute I selected her for the random screening, she started, she just went ballistic. She felt it was racial and that I was profiling her and she spit on me and she pushed me and it just, it just became very, very very, it was outrageous, and she thought I was going to back down because the louder she screamed, I mean she just really thought I was going to back down and I just explained to her there was no profiling, it was not racial, there was nothing involved, and when she pushed me. I, of course, called 9-1-1, and when the police officer got there she, you know, I

tried to tell him it was it was profiling or racial or whatever was involved and I just, they ended up arresting her and she's facing a prison sentence because it was the first, it was the first time that the new law had been where you're interfering with the official act of screening, that's the first time the law was put into effect, and this happened two months ago, but when I make a decision, I make a decision, there's no if and or buts about my decision. I made that decision. I didn't, I didn't put anything into that decision when I selected her except that she was standing right there. Nothing she's going to say is going to convince me that I put anything else into that decision and that's what she was trying to do. She just felt that I had a lot of, of, you know, thought into my decision and I didn't. That was it. That was my decision. I selected her because she was standing there and that's it, no other circumstances, and she was not going to change my decision.

Q. Do you want to be on this jury? You know ultimately you may get a chance to decide whether or not Jamie here lives or dies?

A. Uh-huh.

Q. Do you want to be a part of that decision making process?

A. I do because I want it, I feel I can be here. I know I'm fair. Being fair is probably a big part of being a mother, and I know you're always accused of

not being fair, but you have to learn to be fair when you have four kids you have to learn to be fair, and in my job I have to be fair and I am fair. I do think things through, I'm intelligent and I do give a, I do make a good decision, and if Jamie's innocent, I want to be part of that decision. I want my vote in there that he is innocent, and if he's guilty, I want my I want my vote to be in there that he's guilty, because I know I make a fair decision.

Q. When you vote, understand this: It takes 12 people --

A. Yes.

Q. -- to be unanimous and to convict or acquit, but it only takes one person to stop a verdict. If you believe something is violating your conscience, you don't have to vote.

A. Right.

Q. Do you understand that?

A. Yes, sir.

Q. And would you, well, you just don't seem to me like somebody who would cast a vote even though it violated your conscience?

A. Never.

Q. The flip side of that is everybody is responsible for whatever verdict is handed down.

A. Correct.

Q. Because everybody has the power to stop it?

A. Right.

Q. Have you ever known any criminal Defense lawyers?

A. Personally?

Q. Uh-huh.

A. No.

Q. Then you know me about as well as anyone?

A. Right.

Q. Do you have any questions that you would like to ask me?

A. I -- I just -- I don't understand why you would get into something like this. I mean what -- what -- what would draw you to being a criminal defense lawyer? Is it just like me, you want to make sure that everyone is treated fair and everything is done correct by the book or --

Q. You know, when I came out of law school I was going to be a plaintiff's lawyer and I already had a job and I tell you, my plan, I probably should be embarrassed to say this now. My plan was to be a millionaire in five years.

A. You're almost there.

(Laughter in courtroom.)

Q. Well, I've done this almost 10 years now and got nothing but a mortgage to show for it. I started doing criminal defense because I wanted to have more trials, and I really hated civil work, it was very hard for me, and I like this a lot more, and I have come to learn that there's good in everybody and yeah, most people that -- that are in the criminal justice system are guilty, that's just a fact of life, but there is good in everybody and that's why I stay around doing this, it's taught me compassion where I didn't have it before.

A. That's right. I see that. I understand.

Q. I really thank you for talking to me today.

A. Thank you.

Q. Thank you very much.

What do you think? Do you put her on the jury? Is she a killer? Here is what I think. There is not a doubt in my mind that she is a killer. Not only is she a killer, but if she decided to kill, she would be so convinced that she was right, she probably would not give it much thought after she left the courtroom. She sees things in absolutes – right or wrong, black and white. Those were her obvious liabilities. As for assets, if she felt like she was right and the other jurors were wrong, you couldn't torture her into changing her mind. She also listed some pretty heinous cases as the only ones she can think of that called for the death

penalty – the Manson murders and the James Byrd dragging death. I have a sneaking suspicion, though, that if I threw some other names at her, her list would grow. All in all, I believed she was not a good juror for me. But there were others who were far worse.

The important thing here is that I would have never known squat about her if I had just talked to her about the law. Of course she can “follow the law,” but what does that mean? I would love to hear your opinions on whether she would have been a good death penalty juror. I would love to hear Gerry’s.

I will never know whether she was good or not because the jury never got a chance to decide whether Jamien should live or die. As I said before, the state waived the death penalty three weeks into jury selection. In the newspaper, the prosecutor said it was because he had some problems with his DNA that he did not know about before. It is true that he did have some problems with his DNA that he did not know about but that we did. He learned he had problems with the DNA after we hit the crime lab with an exhaustive subpoena.

The jury selection, though, had not gone well for the state. The speech I was able to make to this lady was just the tip of the iceberg. I had one lady look at Jamien, call him by his first name, and tell him how important it would be for her to be fair to him. They actually talked to each other and she had tears in her eyes.

Another juror had said on her questionnaire that as a hobby, she studies the “end times.” I had to talk to her about that, of course. After discussing the end times with me for about twenty minutes, I asked her if she had a magic wand and could make any change she wanted to our world, what would she do. She responded that if she could do that, she would make our world “just as Dr. Martin Luther King envisioned it to be” and went on to make a tearful and passionate speech about bigotry and hatred. She was white.

It is amazing how people, by and large, will open up and tell you how they feel and how they work. This kind of voir dire is baffling to the state. It is like suddenly we have started speaking a foreign language. The prosecutor, by the way, had a puppy when I made my compassion speech to the first juror. By about the third day, they were openly mocking us for how we were conducting the voir dire (“touchy feely” was the term they used). In the third week they waived the death penalty.

Here in Fort Worth, juries have just given two death sentences in as many weeks. Since the beginning of the year, there have been at least four death sentences handed down in this city that I can think of right off the top of my head. In the one last week, the condemned had witnessed his father murdered right in front of him when he was ten years old. Week before last, the jury gave the guy a

death sentence in a little over an hour.

How do we contend with people that make such decisions? Doing it “by the book” clearly does not work. We have to get the jurors to be honest with us, so we can hopefully get rid of the killers. I have now found that when we are honest with them, they will generally do their part.

Take care and keep doing right.