QUESTIONING JURORS ON VOIR DIRE

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A criminal defense attorney recently asked how far can counsel go in questioning prospective jurors on voir dire and my reply, not intending to be flippant, was, "as far as the judge will let you."

While jury selection is arguably THE MOST IMPORTANT part of any jury trial insofar as you are selecting the six or 12 people who will be deciding your client's fate, some judges, prosecutors and defense attorneys approach it like having dinner with their least favorite relatives (i.e. a most unpleasant experience that must be endured no longer than is absolutely necessary).

While counsel must always be mindful of taking as much time as he or she can get away with to identify and select those people who will be receptive to their case and client, judges are usually thinking about getting the jury picked as quickly as possible in order to get the show on the road. So, counsel must observe the jurors closely and listen carefully to their answers to questions posed by the court and by the prosecutor who has the luxury of preceding you, because juror attention (and court patience) may well be at low ebb by the time you stand up, typically right before lunch time, and say, "MAY IT PLEASE THE COURT, COUNSEL AND MEMBERS OF THE JURY."

(If possible, whenever counsel is called upon to begin questioning jurors close to or during the lunch hour, he or she should consider approaching the bench with opposing counsel and request that proceedings be adjourned until after the luncheon recess. (It may well be denied). Counsel could also make the request aloud which, while earning favor with peckish jurors, may arouse the ire of an impatient jurist).

Lest there be any doubt, trial judges have broad discretion, and indeed are required to initiate the jury selection proceedings, move things along with the option of imposing time limits upon counsel) and to keep a tight rein on matters by curtailing repetitious, irrelevant and improper questions. (See Preiser, Practice Commentary to CPL 270.15, McKinney's Vol 11a p 274; People v Boulware 29 NY2d 135 [1971]). In other words, courts have wide latitude to control the scope and breadth of voir dire. (People v Carter 285 AD2d 384 [1st dep't 2001]).

Subdivision 1b of CPL 270.15 states that the court "shall initiate the examination of prospective jurors by identifying the parties and their respective counsel and briefly outlining the nature of the case to all prospective jurors." The court must then question them under oath about their qualifications to serve. Thereafter, as required by subdivision c, the court must permit the prosecutor and then defense counsel to question the jurors collectively or individually (preferably both), with respect to their qualifications to serve.

According to the statute, each party must be given a "FAIR OPPORTUNITY" to question the jurors as to "ANY UNEXPLORED MATTER AFFECTING THEIR QUALIFICATIONS," BUT the court SHALL NOT PERMIT QUESTIONING THAT IS REPETITIOUS OR IRRELEVANT, OR QUESTIONS AS TO A JUROR'S KNOWLEDGE OF RULES OF LAW." If necessary to prevent improper questioning of a juror with respect to any matter, the court must personally question that juror regarding that matter. The court also controls the scope of the examination and may, after counsel's questioning, ask further questions regarding a juror's qualifications to serve.

With respect to setting times limits, which some courts do as a matter of routine, counsel must be afforded a reasonable opportunity to question jurors relative to their qualifications to serve, their ability (and willingness) to judge the facts fairly and impartially, and to follow the courts instructions on the law and factors affecting witness credibility. (See, for example, People v Thompson 45 AD3d 876 [2d dep't 2007]; People v Harris 23 AD3d 1038 [4th dep't 2005], error to curtail counsel's questions pertaining to juror's ability to follow the court's limiting instructions with respect to Molineaux evidence; People v Porter 226 AD2d 275 [1st dep't 1996], error to cut off counsel's questions regarding juror's willingness to consider witness' criminal record in assessing credibility; People v Rubicco 42 AD2d 719 [2d dep't 1973), error to not let counsel question jurors regarding attitudes toward certain ethnic group).

Counsel may not, however, inquire after jurors' attitudes on matters of law which is considered beyond their purview as factfinders. (See People Martinez 298 AD2d 897 [4th dep't 2002]; People v Corbett 68 AD2d 772 [4th dep't 1979], and attorneys should generally stay away from positing hypotheticals (a frequent practice of some prosecutors), because they can invite premature deliberations. (People v Salley 25 AD3d 473 [1st dep't 2006]). (See also People v Glover 206 AD2d 826 [4th dep't 1994], court may properly refuse to permit counsel to ask jurors about their understanding of the presumption of innocence [which the court will explain in due course]).

How much time is not enough for counsel's voir dire so as give rise to a constitutional violation, depends on the facts and circumstances of each case. For example, in People v Jean 75 NY2d 744 (1989), granting each side 15 minutes for each of the first two rounds and ten minutes each for the third round did not deprive the defendant of a fair opportunity to question jurors on relevant matters or abridge his right to a fair and impartial jury. (See also People v Wright 13 AD3d 726 [3d dep't 2004] and People v Garrow 151 AD2d 877 [3d dep't 1989], ten minutes each for each side first three rounds and three minutes each in fourth round not an abuse of discretion). As long as the court gives each side a fair opportunity to question prospective jurors about relevant and material matters, time limits are allowed. (People v Wheeler 268 AD2d 448 [2d dep't 2000]). This is especially so where the court has been thorough in its questioning of jurors. (See People v Rodriguez 184 AD2d 317 [1st dep't 1992], People v Barry 134 AD2d 917 [4th dep't 1987]).

The following is one approach to jury selection in a hypothetical gunpoint robbery at a 711 store where the defense is misidentification (or, to cite an Alfred Hitchcock movie, "The Wrong Man").

May it please the court, counsel, members of the jury. As the judge told you before we broke for lunch, (judge was hungry), my name is _____, and I represent Emanuel Balestrero (the real wrong man upon whom the story was written) who stands before you (defendant rises as counsel approaches and places his hand on his shoulder and faces the jury) accused of the crime of Robbery in the First Degree.

This morning, you heard from the judge who acquainted you somewhat with the case we will be trying and with the names of witnesses who may testify, and you were then questioned at some length by the prosecutor relative to your qualifications and willingness to serve as jurors. I now have the opportunity (privilege) to ask you some questions, recognizing that I am the third person in line to do so, but realizing how very important it is to my client, as it would be to any one of us if we found ourselves sitting at that table, to take the time that this court will allow to make sure that we select the right jury to decide this case. And by the "right jury", I mean 12 (six) reasonably intelligent, fair-minded people whose only agenda is to decide this case fairly and impartially upon the evidence presented in this courtroom rather than upon improper and extraneous things like sympathy, prejudice, preconceived ideas or biases, or perhaps concerns about what others might think if we decide this case one way or the other.

As you've already been told, my client has been charged in an indictment accusing him of committing the crime of Robbery in the First Degree. When people hear that someone has been "indicted," (by a Grand Jury), many think,"oh, that person must have committed a serious crime." And Robbery to be sure, is a very serious crime. My point is that many people assume that if someone has been indicted, their guilt must be a fait accompli, a given thing if you will." But that is NOT the case.

Does everyone understand that an indictment (as the judge mentioned) is ONLY AN ACCUSATION and NOT Evidence of guilt or proof of anything alleged in it? (Get a collective verbal acknowledgement from everyone).

Alternative version. (If the prosecutor mentions the Grand Jury or reads the indictment verbatim, and the court allows): Does everyone understand that an indictment is nothing more than a formal accusation based upon a one-sided, secret presentation of a bare-bones version of the facts without benefit of any cross examination of witnesses upon a standard of proof that is much lower than the BURDEN of PROOF BEYOND A REASONABLE DOUBT that the People must meet here at trial in order to convict my client?

And speaking of reasonable doubt, the judge will define that phrase for you at the appropriate time, but does everyone understand that in a criminal case, the burden of proof belongs only to the prosecution and it NEVER SHIFTS to the defense?

Is everyone comfortable with that concept? Does anyone think it shouldn't be that way? (Mr/Ms So-and-So, how do you feel about that?)

Here, the prosecution has levelled a serious accusation against my client and under our system of justice, they are required to "put their money where their mouth is," ("put the proof in the pudding)"so to speak, and prove the accusation BEYOND A REASONABLE DOUBT. WE don't have to prove or disprove anything.

Is everyone all good with that?" (Get a collective verbal affirmation from the jurors or pick out one or two to articulate their agreement…or disagreement, in which case, they should be excused for cause).

And when we say, "prove the accusation," we mean "PROVE EVERY ELEMENT OF THE CRIME" beyond a reasonable doubt INCLUDING THE DEFENDANT'S IDENTITY as the PERSON WHO COMMITTERD IT." Agreed?

You know, in some countries, when a person is charged with a crime, he or she is assumed to be guilty and therefore is obligated to prove or establish his innocence. THAT IS NOT THE CASE here.

Does everyone understand that my client, as would be the case with anyone charged with a crime in this country, IS PRESUMED INNOCENT of the charge and he CANNOT be found guilty of anything UNLESS AND UNTIL the People overcome the presumption of innocence with CREDIBLE EVIDENCE that PROVES BEYOND A REASONABLE DOUBT to EACH AND EVERY ONE OF YOU EVERY ELEMENT OF THE CRIME AND THAT MY CLIENT IS THE ONE WHO COMMITTED IT?

Now some people may think, "that's easy for you to say but there he sits, indicted for a serious crime, so he must be guilty of something,", (or he wouldn't be here).

Does anybody feel that way?

Does anyone think, like some people are inclined to do, that "if there's smoke there's fire," not considering that smoke can also appear when a fire has been extinguished for lack of oxygen or kindling (i.e. evidence) to keep it going?"

Mrs. So-and-So, how do you feel about that?

Does everyone understand that there is a world of difference between an accusation made, which is where we are right now, and proof beyond a reasonable doubt?

Does everyone also understand that we are all obliged to proceed upon the presumption of innocence and NOT upon an assumption of guilt?

Does anyone feel that they can't accord my client the presumption of innocence and hold the prosecution to the burden of proof beyond a reasonable doubt?

Now, because my client is presumed innocent and the prosecution always bears the burden of proof, my client is under no obligation to call witnesses in his own behalf or to testify. In fact, we don't have to do anything if we don't want to, and if the People did not meet their burden of proof in their case -in-chief, you would be obliged to return a verdict of NOT GUILTY.

I can assure you that we will not sit back and do nothing. To the contrary, I expect that we will vigorously challenge the prosecution's evidence by cross examination of their witnesses, highlighting what we perceive to be serious flaws in their case. But whether or not my client testifies, or we call any witnesses, those are decisions that we will make at the appropriate time.

If we elect not to have him testify or call any witnesses, which is our constitutional right, is there anyone among you who would hold that against him (even though the court has instructed you that you CANNOT draw any adverse inference (i.e. an inference of guilt) from his not testifying?

Is there anyone who would think, "he must be hiding something," or "if I were in that position, I would take the stand and profess my innocence to the high heavens?" Or can you comfortably say, "No, he is presumed innocent, they (i.e. the prosecution) have the burden of proof and if they don't meet their burden of proof beyond a reasonable doubt, regardless of what the defense does or doesn't do, WE MUST FIND HIM NOT GUILTY."

So, in case you haven't already figured it out, which I'm pretty sure you have, we are looking for jurors who are sincerely willing to listen to the evidence with an OPEN MIND, resisting any temptation to rush to any premature conclusions, to critically evaluate the testimony of every witness, to give full and fair consideration to the arguments of counsel on both sides, to follow and apply the judge's legal instructions to the letter and to the best of your ability, and to deliberate upon the evidence by expressing your own views of the case but also by listening to what your fellow jurors have to say before making up your own minds. Remembering of course, that before you can reach a verdict one way or the other, ALL 12 (or six) OF YOU MUST AGREE ON THE OUTCOME.

As you might imagine, not everyone is cut out for this kind of responsibility. We all know people who are close-minded, stubborn or so opinionated based on life experience or whatever reason, that they make decisions based on their biases, sympathies or prejudices regardless of what the facts may or may not show. Frankly, we don't want people like that deciding this case.

We also don't want people who don't know what they believe or who are all over the place like confetti in a wind storm. In other words, people who, instead of making up their own minds based on the evidence, just latch on to the conclusions expressed by the last person who to have spoken. In short, we don't want lemmings or push-overs but people who are willing to reach their own conclusions and speak their own minds.

Serving on a jury also requires people who have the courage of their convictions (maybe choose a different word like "beliefs":), and who, while willing to consider the reasonable views of their colleagues before making up their minds, will not give in or knuckle under to the collective voice of the masses just to go along with the group or to get it all over with.

Is there anyone among you who has any concerns about your ability to participate in this process of jury deliberation?

Mr/Ms So-and-So, if, after deliberating upon the evidence, and considering the views of your fellow jurors as well as your own, you reach a conclusion with respect to a verdict, and you believe it to be right and just under the law, would you be able to stand firm and hold true to your conclusion and not give in to the others?

You all know a little about this case and you know that it involves a serious crime. The accusation, as you heard, is that on _____ it the late evening hours at the 711 gas station on _____ a fellow by the name of _____ was robbed at gunpoint of $25.00 as he was pumping gas into his vehicle.

So, it's perfectly clear, we don't necessarily dispute that Mr _____ was robbed by someone who was carrying what Mr _____ thought was a gun.

BUT WHAT WE DO CONTEST, WHAT WE ABSOLUTELY DENY is that my client was the person who committed this crime, and that is why we want you, if you are selected, to see and hear the evidence in this case so you can understand why my client has entered a plea of NOT GUILTY and requested a jury trial.

And if you are selected as a juror, we will be asking you to focus carefully and closely on the testimony of the alleged victim, in particular on things like the state of his sobriety that night, the speed with which this incident took place, his opportunity to observe the assailant, how he described the individual in

physical appearance and manner of dress to the police compared to our client's actual appearance (when the police dragged him out of his car several blocks away with only $15.00 in his possession) [maybe too much detail], and presented him in handcuffs for identification to a victim who could barely even see straight after a night of drinking.

We will also ask you to consider the words and conduct of the police to see whether the complainant's identification was the result of his own personal observation or perhaps, some not so subtle suggestion by the officers.

Can everyone assure us that you will listen with an open mind and consider all the relevant factors that the court will instruct you upon in assessing the credibility of their witnesses and the reliability of their evidence?

(If a snitch testifies). As the prosecutor mentioned, one of the witnesses on their list is someone who will claim that my client made certain statements to him in the Holding Center before posting bail. I assume they brought it up out of concern that you may not be inclined to believe someone with a long criminal record who comes forward to testify against another person, not because it would be the right or civic thing to do, but because they WANT SOMETHING IN RETURN, like LENIENCE, in their own criminal case.

Can everyone assure us that you will closely scrutinize the testimony of any such witness and decide whether you can credit any part of it under the circumstances?

Every witness who testifies will swear to tell the truth before answering questions.

Does anyone think that just because a person takes an oath to tell the truth, he or she must be telling the truth?

Can you assure us that you will carefully scrutinize the testimony of every witness and decide whether you believe some, all or none of what they tell you, using your own common sense and life experience?

Now these days, most people know or may even be related to a police officer or someone on law enforcement. As you heard, some of the prosecution's witnesses will likely be police officers.

Does anyone feel that someone who is a police officer is by virtue of their occupation, more likely to be telling the truth than a civilian or non-police officer?

Can we all agree that police officers, like any other human being from whatever walk of life, are capable of telling the truth? Of telling a lie? Of being correct and accurate in their memory or inaccurate? Of being neutral or biased? So you would agree then that nobody walks in to this courtroom with an advantage or leg up in the credibility department?

Has anyone had or anyone close to you have had any negative experience with a police officer, whether being pulled over for no good reason, falsely accused of wrongdoing, or roughed up, that would cause you to be inclined to disbelieve a police officer regardless of what they say?

Can you assure us that you will evaluate the credibility of any police witness in the same way you would any other witness, and not hold them to any higher or lower standard of evaluation for truthfulness?

Just a couple more questions?

Has anyone ever seen someone that you thought you recognized only to be mistaken?

Have any of you ever been mistaken for someone else?

Has anyone here ever had a sudden, unexpected traumatic experience?

Does anyone not know what effects alcohol can have on our ability to perceive and describe people and events?

Finally, members of the jury, if at the end of your deliberations, you conclude either that the People have not proven beyond a reasonable doubt every element of the crime charged or that my client was in fact the person who committed it, will you have the courage to follow your oath to render a true and just verdict and FIND MY CLIENT NOT GUILTY?

Just how far counsel will be able to go, as noted above, will largely depend on the judge, including how thorough he or she is during the initial voir dire. If the judge (and/or the prosecutor) has already covered a topic, the court may be less inclined to let you re-plow the same field unless there is a logical follow-up question (or questions) that went un-asked. But as with cross examination, just because the prosecutor covers a particular subject does not mean that the defense cannot follow suit. Counsel should also listen closely to the prosecutor's questions (e.g. about jurors' willingness to consider testimony that was bought- and- paid -for) and, wherever possible, use their words as a starting point for your questions on the topic.

Defending a client against a serious accusation is just too important to let the judge bully or browbeat you into silence when you have important matters to cover and relevant questions to ask. The more serious or complex or high-profile the case, counsel should petition the court (i.e. those who impose specific time constraints) beforehand for more time. If denied, counsel may want to make an offer of proof outlining the proposed areas of inquiry, (if necessary, what you intend to ask of whom), and why they are important to your ability to make informed decisions in selecting a truly fair and impartial jury. If nothing else, you will have made a good record for appeal in the event the jury actually believes that your client was the robber after all.