FUNDAMENTALS OF TRIAL ADVOCACY COURSE

September 19-23, 2016
Phoenix, Arizona

CLOSING ARGUMENTS

Presented by:

AMY DIEDERICH
Deputy County Attorney
Pinal County Attorney's Office

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 West Camelback Road, Suite 202
Phoenix, Arizona 85015

ELIZABETH ORTIZ
EXECUTIVE DIRECTOR

CLOSING ARGUMENTS

Amy Diederich, Deputy County Attorney
Maricopa County Attorney's Office

Closing Argument

- Closing Argument is your only chance to combine the facts and the law in a way that demonstrates why the Defendant is guilty of what you have charged him with
- Goal of closing argument should be to eliminate the greatest threat to a conviction:

CONFUSION

Closing Argument - Obstacles

- Disorganization
  - Absence of theme and theory
- Lack of preparation
- Becoming lost in a mess of details which are unimportant
- Repetition of inherently confusing trial presentation

Closing - Preparation

- Preparation for your closing starts when you begin to prep for your case
- Set yourself up well:
  - Case overview sheet
  - Trial Notebook with notes for each witness, opening, closing

The Art of Persuasion

- Facts are essential, but they cannot alone win cases
- Persuasion is the bridge between what the evidence is and the way the jury views it
- Your ability to argue your case in a logical and organized way may make the difference in your verdict

The Art of Persuasion

Trust me. I'm a lawyer.

- We are persuaded by things and people that we trust. Therefore, in order to persuade, we must be trustworthy
- Think about people you consider to be trustworthy. What characteristics do they exhibit?

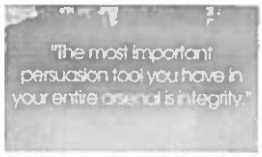
The Art of Persuasion

- When it comes to persuasiveness, prosecutors have a distinct advantage:

TRUTH

The Virtuous Prosecutor

- Humility: take the case seriously, but not yourself
- Admit error immediately to set an example
- Do not fear trying a difficult case against a guilty defendant because you are afraid to lose. Your belief in your case will come through



Outline – First Close

- Theme
- Theory of your case in narrative form
- Elements
  - Identify and eliminate uncontested
  - Describe contested
  - Instructions relevant to winning contested
- Portillo Instruction
  - Firmly Convinced
- List evidence that shows "Firmly Convinced" on disputed evidence
- Theme and call to Action

Theme

- What did the Defendant do that deserves punishment
- These are the FIRST words out of your mouth
  - As the first words out of your mouth, they are the ones the jurors are most likely to remember. Do not waste them on thank yous and apologies
- Should be substantially the same as opening, but may require refinements in order to take advantage of what came out in evidence

Narrative

- This differs from the narrative in your opening in that you can now use actual testimony and evidence to enhance your story. This narrative can and should be argument!
- Play to all 5 of your jury's senses in order to paint a picture with your words:
  - What you arresting officer saw
  - What your victim experienced
  - What your defendant plotted

Narrative

- Utilize direct quotes from trial testimony:

"I don't think anyone should take pride in taking another man's life. Regardless of the circumstances, he had a family, and that brings me sadness. It's not something I think should be celebrated or talked about"

"I felt forced to do this"

Narrative

- DO NOT:
  - Repeat what each witness told them at trial in the order they told it
    - "…" and then you heard from_____, who told you_____."
  - Describe what the police did in order to bring the Defendant to justice

Your goal is not to prove beyond a reasonable doubt what the officers did

Elements – Eliminate Confusion

- In most cases, a number of elements are not in dispute
  - For example, in an APC case, there is usually no dispute as to whether the Defendant was impaired to the slightest degree and above a .08. The focus is on whether he was the driver of the vehicle
  - ID is often not an issue in DUI cases
- By eliminating the undisputed elements, you show the jurors where to focus

Elements – Eliminate Uncontested

28-1381(A)(2)
Driving or Actual Physical Control With an Alcohol Concentration of 0.08 or More within Two Hours of Driving

The crime of driving or actual physical control with an alcohol concentration of 0.08 or more within two hours of driving requires proof that

1. ~~The defendant [drove] [was in actual physical control of] a vehicle in this state~~ *and*
2. The defendant had an [alcohol concentration of 0.08 or more] within two hours of [driving] [being in actual physical control of] the vehicle, *and*
3. ~~The alcohol concentration resulted from alcohol consumed either before or while~~ [driving] [being in actual physical control of] the vehicle

Source: A.R.S. § 28-1381(A)(2) (statutory language as of September 19, 2007)

State v. Jackson

- Undisputed Elements?

Elements – Eliminate Confusion

- Do this for each count until you are only left with what your trial is really about
- Explain the disputed element(s) using your theory of the case. Include important definitions

Review Important Instructions

- Which Instructions play an important role in the jury's evaluation of your case?
- Don't be afraid to make suggestions as to how they should proceed
- Jury instructions are written by lawyers, and therefore full of confusion
- Self-Defense
- Presumptions of Intoxication
- Credibility of Witnesses
- Direct and Circumstantial Evidence

Portillo Instruction

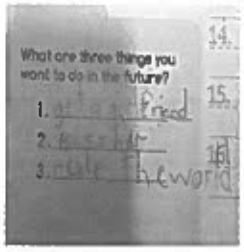
Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Make a List

- Once you have articulated how your theme applies to the disputed elements, pull together every fact that proves your side of the disputed element
  - "Members of the Jury, there are 5 reasons why you should be firmly convinced that the Defendant's BAC was .08 or above:"
  - "Members of the jury, there are 15 pieces of evidence that show why you should be firmly convinced the Defendant was in Actual Physical Control:"

Make a List

- Why this works:
  - People like lists
  - Lists are organized and easy to follow
  - Jurors will copy down lists
  - Emphasizes the totality of the case against the Defendant



Close Strong

- Theme and call to action
- Tell the jury exactly what you want them to do
- Prepare something ahead of time!

"Find the defendant guilty on all counts. The facts lead you to his guilt. The evidence proves it, and justice demands it"

Closing Tips

- Don't be afraid to suggest an order of deliberations
- Rhetorical questions can be extremely effective
- Be organized – do NOT ramble

Outline – Rebuttal Close

- Theme
  - Re-direct them to your position
    - "this case isn't about ___ and ___, its about (state your theme)
- State and own our burden
- Explain why Defendant's "doubt" isn't reasonable
  - Crush them by using every piece of evidence that contradicts their theory/arguments and show why it is unreasonable to believe the Defense
  - Refer jurors back to instructions
- Theme and call to action

Rebuttal Close

- Come back to your theme.
  - "This isn't a case about_____, it's a case about……"
- Do NOT chase after Defendant's arguments as if you are on a Snipe hunt!

IT WASN'T UNTIL LATER THAT NOAH EXPLAINED THE "SNIPE OVERBOARD" GAG TO A NOT-VERY-HAPPY CREW

Rebuttal Close

- The evidence for your case is strong and subject to only one reasonable interpretation
- You must demonstrate that whatever "doubts" defense has raised are not reasonable
- Usually, defense has attempted to distract the jurors on a collateral matter

Rebuttal Close

- Group proposed defenses based on your organization, not theirs
- Restate Defendant's position fairly
- Mass all of the facts you have to show that Defendant's position isn't reasonable

Example: "Defendant wants you to believe his BAC is inaccurate because of possible errors with the intoxilyzer"

"However, here is all the evidence you have before you that shows it was working properly on the night of his test"

- Make a list:

Go Back to the Instructions

Furthermore, Defendant's argument is based purely on guesswork, which is exactly what you have been instructed NOT to do

- Standard Criminal 1: Duty of Jury

"Determine the facts only from the evidence produced in court. When I say "evidence", I mean the testimony of witnesses and the exhibits introduced in court. <u>You should not guess about any fact</u>. "

Rebuttal Close

Dealing with Defenses:

- Poor Investigation
  - Show the jury all the evidence they have as a result of the investigation
- Lack of Scientific Evidence
  - Defendant planned it this way
- Witness Credibility
  - Defendant chose victim he thought wouldn't be believed
- Conspiracy
  - If this was a conspiracy, it was a pretty terrible one
- Remind them of Voir Dire / Oath

Example:

- The Defendant is the reason we don't have direct evidence:
  - Mask, Bandana, gloves ==> No DNA or Prints

[redacted]

  - Fled at over 100 MPH away from police
  - Bailed from car before Deputy Schiess could see
  - Fled on foot into the dark field

Closing Argument Don'ts

- Stating your opinion
  - "I believe the evidence has clearly shown the Defendant to be a liar"
- Vouching
  - "you must believe Officer Smith because he is a witness for the State, and we all know the prosecution are the good guys"
- Hyperbolic descriptions about Defendant or the case
  - "just look at those eyes. They are the eyes of a killer."
- Personal attacks on Defense counsel
  - "he lied to you throughout this trial"
- Comments on Defendant's right not to testify or invocation of his rights
  - "If Defendant had nothing to hide, he would have just answered the officer's questions."

Questions???