

Jury Duty: Murder Trial

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The first thing the prosecuting attorney at the murder trial said was that real trials are nothing like what you see on TV.

I could imagine a TV show called *Jury Selection!* Steamy romances would ignite and flame out. During a break a young man with tattooed arms was hitting on “Christine”, tall and thin, the cutest of the young women in the jury pool, a face that relaxed into a deep frown but burst into a dazzling smile, a researcher for a labor organization. He talked about the business he’d started, and then bragged that he was always excused from juries. Indeed he was. When questioned by the judge, he said he’d once been on trial -- for “187”. The judge nodded and moved on. When he was called into the jury box, he took a seat next to me. It was as though he’d hit a trampoline. The prosecuting attorney excused him instantly, and he sprang up and was gone.

It seems that 187 is the section of the California Penal Code that defines murder.

I asked Christine later if she had given him her phone number, and she recoiled in horror at the thought.

We were assigned numbers, and as soon as I got #11, I knew I’d be on the jury.

Judge Bachner was an attractive brunette woman in her 50s, but a hard-nosed, no-nonsense judge. One Hispanic man said he was so angry at the justice system because of the incarceration of his nephew that he could not possibly be fair; she reassigned him to civil court, “where the cases are about contracts and last three months”. Then Juror #5, sitting right behind me, raised the same objection. He said because of his experience as a gang member, he’d never believe anything a policeman said. “Even the sky is blue?” she asked. “No,” he replied. But she refused to dismiss him. Then he saw that students were allowed to postpone till their first vacation, so he said he was a student too. “What did you do?” she asked. “Look up howtogetoffjuryduty.com before you came here?” But she let him reschedule.

Juror #1 said he could not make a decision that could ruin someone else’s life. He was willing to spend the whole trial there, but he would abstain from voting. The judge didn’t dismiss him, but he was gone with an early peremptory challenge by the prosecuting attorney.

The defense usually doesn’t like policemen on a jury, and the first one thanked and excused by the defense attorney was Juror #12, a Secret Service agent. After he was finished with his list, the defendant suggested Juror #10 too. Good thing. She was a Fish and Wildlife officer, charged with stopping illegal importation of exotic birds at LAX. Marginally police at best, I thought, until I overheard her in the hall during a

break confiding, against the rules, to the Secret Service agent, "Seems like a pretty open-and-shut case."

A biology teacher was excused by the prosecution because she knew too much about DNA. The defense excused a woman whose sister had been murdered. Another woman said she had been assaulted in 1984 and then broke into tears; the judge excused her. An Iraqi man who claimed he didn't understand English despite living in America 23 years was dismissed when the judge asked, "Can you be fair?" and he said he didn't understand the word "fair".

At the end, I was one of only two of the original jurors who remained, making me think I must be incompetent. The final jury was six European-Americans and six Asian-Americans, half men and half women, sitting in judgment in 2011 over an African-American man, charged with murdering a Hispanic-American woman in 1995. I love L.A.

The first witness in the trial was the victim's African-American boy friend. He had been in jail "for possession" for two months. Early on, he'd talked to his girl friend on the phone everyday, but he didn't pay his phone bill and it was cut off. This turned out to be significant. He was released in the evening and walked several miles to his girl friend's apartment, arriving around 3:00 a.m. There he found her body lying on the bed, strangled. He called 911 and they told him to move her to the floor and give her CPR. He moved her to the floor, but didn't give her CPR.

The other witnesses for the prosecution were the police investigators who examined the crime scene and a DNA expert. It was stipulated by both sides that around 9 p.m. the night of the murder, people in other apartments of that building saw two black men in their 20s walk up the stairs with the victim. One wore a baseball cap backwards; the other had an uneven Afro. Halfway up she sent them on up alone and went back down the stairs for something. (The defendant at that time would have been in his late 30s.)

The DNA of three men was found on a blanket and a towel, and also near the victim's vagina. Epithelial or "touch" DNA was also found on a 14-foot telephone cord that was the probable murder weapon. It had a one-foot long smear of her blood on it. The DNA of one of the men, not the defendant, was a match with DNA found in the apartment of another woman who had been strangled several months earlier, a few blocks away. The DNA of one of the other men was, with a possibility of error of one in 100 quintillion, that of the defendant.

The match with the defendant's DNA was found in 2005. A police officer first interrogated the defendant about the crime in 2007, and then again in 2008. Under cross-examination the officer allowed that the defendant did not refuse to talk to him, did not ask for a lawyer, invited him into his house despite no search warrant, and voluntarily provided another DNA sample. He was finally brought to trial in 2011.

At this point the prosecution rested. I was dismayed. I did not think the case as presented so far was strong. I wanted something more decisive. But I also wanted justice for the victim. The judge emphasized to us more than once that we could not take into account the fact that a defendant does not testify in his own behalf, and I've heard lawyers give reasons why it might not be a good idea for even an innocent person to do so. But if I were wrongfully accused of a crime, I would insist on testifying. I can't imagine any innocent person who wouldn't insist on it. But we'd been instructed on the principle enough that I didn't expect him to testify. Overnight, I came to the conclusion that I could probably find the defendant guilty unless he testified and gave a plausible account of the facts presented so far that didn't implicate him. But that would be ignoring his right not to testify.

The defense began with a few inconsequential witnesses. Then came their DNA expert. The significant things we learned from him were that there was a possible fourth contributor, slightly above noise, to the external vaginal swab sample; that the "external" swab sample does not mean it was deposited externally but is the result of "seepage"; and that sperm DNA would last in the vagina for 48 to 72 hours. So all the prosecutor had proved was that the defendant had had sex with the victim within three days of the murder.

We were sent to the jury room for fifteen minutes. You're not supposed to talk about the case with other jurors, but that's all any of us was thinking about, so very little was said.

We were called back into the courtroom, and I was electrified. The defendant was sitting in the witness chair. (Probably our trip to the jury room was so they could seat him there without us being prejudiced by seeing the restraints.) He was a gentle-looking man in his early 50s with a short gray beard, wearing a blue suit.

The defense attorney began with his police record. In the 1990s he was a crackhead, and was convicted of robbery three times and served time in prison. What about his relationship with the victim? They would get high on crack together and have sex. Where? Sometimes in the carport, sometimes in her living room, and sometimes in her bedroom. How many times? Six or seven. When was the last time he had sex with her? About six o'clock the evening she was murdered, in the carport. Did he love her? The defendant replied, "I liked her. She was nice. But you have to understand. I was a crackhead. I loved crack." When did he find out about her murder? He thought it was about 12:30 that night, but in his crack-induced fog he had little sense of time. It could have been three or four in the morning. He saw the police cars and asked a woman whose street name was "Coco" what had happened, and she told him. He referred to the neighborhood, Belmont Hills, as "the J's", for "the jungles".

Had he ever made a phone call from her apartment? No, the phone was out of order. Did he ever touch the phone cord? Once he sat on the bed and pulled the phone to him by the cord, but it was out of order.

He'd been questioned about the murder twice, once in 2007 and once in 2008, and had been very cooperative both times. He even volunteered to take a polygraph test, though none was administered.

The cross-examination focused on slight discrepancies in the number of times he said he'd had sex with her.

"Did you say in 2007 you'd had sex with her once or twice?"

"Yes," the defendant answered firmly.

"And in 2008 did you say four or five times?"

"Yes."

"And did you say today six or seven times?"

"Yes."

He didn't strike me as the sort of man who keeps a tally.

The prosecutor also asked about the phone. "Why didn't you tell the detective about pulling the phone cord?"

"He didn't ask about that."

"Did he ask if you'd used the phone?"

"Yes."

"And what did you say?"

"It was disconnected."

The defense rested. We were given a break in the jury room again. Everyone was somber and quiet, perhaps like me stunned by the defendant's testimony. I found him believable, in part by his serious, straightforward demeanor, and in part by some unpredictable details in his testimony that one would be unlikely to think to make up, like sex in the carport. I thought he might be lying about pulling the phone cord, because that's not the sort of thing people remember. But whether memory, manufactured memory that he believed, or outright lie, the important thing for me was that it was plausible.

When we returned to the courtroom, the prosecutor recalled the police officer who had interrogated the defendant in 2007 and 2008. His questions struck me as inconsequential. Then the witness and the defense attorney had an exchange that I will describe below. And that was it. No more witnesses.

The judge read us about twenty pages of instructions. A lot of it was about how to think, that I can summarize in one word: abduction. A lot about first and second

degree murder and the special circumstances of rape and sodomy. A little on "reasonable doubt".

The next day came the closing arguments. The prosecuting attorney seemed to me to waste this time by flatly repeating what the judge had told us about first and second degree murder. The defense attorney gave a dynamic summary of his case and the weaknesses of the prosecution's case.

The prosecuting attorney then got the final word, and he raised two very good issues. The only evidence we have that the defendant and the victim were friends is the defendant's word; no corroborating evidence was presented. That hadn't occurred to me. I'd taken the defendant's testimony at face value. Then he questioned whether the defendant had pulled at the phone by the phone cord. He held up a photograph of the crime scene and said, "Look at the phone cord! There's no phone at the end of it!"

But in fact this made me angry. Lawyers' statements are not evidence, and he had made these statements at the one point in the entire trial when he could not be challenged.

I was foreperson of the previous jury I was on, and I didn't want to be again. The foreperson is responsible for achieving group consensus, and I felt constrained in what I could say as a result. At lunch one day several of the women had suggested that "Judy", a bank lawyer in her 50s, would make a good foreperson, and I concurred.

The one man I did not want to be foreperson was "Franklin", a Chinese-American man in his 50s. One day as we chatted in the jury room he said he didn't have a cell phone; he didn't need one; he didn't have any friends, he "joked". Several of us looked at each other; we believed him.

As we waited in the jury room after the closing arguments, someone remarked harmlessly that the trial hadn't taken as long as he'd thought it would. "Don't discuss the case!" Franklin barked out, as though he were the judge's enforcer.

The judge called us back for one last instruction – choose a foreperson.

We sat around the table in silence. Fortunately Judy was the first to speak. She asked if anybody had been a foreperson before. I said I had, but I'd be happy to give someone else the experience. I suggested Judy. Franklin interrupted and said it's too early; we're not supposed to choose a foreperson until the bailiff comes in. Then the bailiff came in and asked, "Have you chosen a foreperson yet?" I started to say yes, Judy; Franklin said no.

The bailiff left. Judy said she'd be willing to do it or to let someone else do it. Franklin came close to volunteering. I suggested we vote, confident most of the group was behind Judy. Franklin yielded, and Judy was the foreperson.

Franklin then said we should write rules of conduct on the blackboard, like don't make faces when others are talking. One of the women muttered, "He thinks we're in grade school."

Judy began our deliberations. "Let's go around the table giving our opinions."

Franklin said, "No, let's lay out the facts first."

Judy said firmly, "No, let's go around the table giving our opinions." And she went first.

I was impressed with the seriousness and intelligence of my fellow jurors. Everyone was acutely aware of the power they had over the defendant's life and their responsibility to get this right. I found it a sometimes exhilarating experience of joint problem solving, with consequence.

"Vincent" was typical. A European-American man of 60, he worked as an in-home, all-subjects teacher for the public schools, recently for a girl in her last month of pregnancy and a boy with two broken legs. He complained that the prosecution had provided no motive. Franklin agreed with him, adding that no man would kill a woman he is getting sex from. Judy said maybe the cocaine made him violent. "Larry", a prematurely gray Chinese-American 9th grade teacher in his 40s, said he wasn't sure if cocaine made people violent. I said it had never made me violent.

Christine went to the blackboard and drew a map of the apartment as we all tried to reconstruct the scene from the prosecution's photographs. Something I found initially implausible was that the defendant would just happen to touch the phone cord. I have a phone next to the bed, and the phone cord goes behind the night stand and under the bed. I don't have occasion to touch the cord from one year to the next. But in the victim's apartment, there was a two-foot space between the bed and the wall beside it, and the cord was plugged into that wall and coiled around on the floor. Anyone getting out on that side of the bed could easily step on it. "For all we know, they were rolling around on top of it," Judy said.

So the question was, how much of the defendant's DNA was there on the phone cord and where was it? Was it spread all over, or was it concentrated on either side of the one-foot segment of the cord that had the victim's blood on it? None of us had the answer in our notes, so we requested that the court reporter read back to us the testimonies of the prosecution's DNA expert and the criminalist who took swabs from the phone cord.

We might not have asked, if we'd known how long it would take her to put her notes into readable form, or how tedious it would be to listen to it all – "Please spell your last name." "D – A –" "Is that D as in David?" The defense attorney fell asleep and snored, and, embarrassed, the defendant nudged him awake. But finally she got to the key sentence from the DNA expert. "It is consistent that the defendant is a minor contributor to the phone cord by touch DNA." Not a very strong statement.

The criminalist never said where on the phone cord she took the swabs from.

That night I was leaning toward Not Guilty, but I had one last qualm, one I was not supposed to have. Many people assume that if someone is put on trial, he or she is very probably guilty. I asked a criminal lawyer once if he'd ever represented an innocent client, and he replied, "Innocent or not guilty as charged?" One client charged with murder should have been charged with manslaughter, he felt. Okay, the defendant was innocent until proven guilty. But why did the prosecution bring this case to trial? I pieced together an explanation for myself out of three trivial bits of information, adding 2 and 2, and 2, so to speak, and getting 10. (Abduction.)

The lawyers and jurors are not supposed to talk to each other, and never did. But I was on a crowded elevator one afternoon with the prosecuting attorney, when a colleague asked how he was. He said he was busy; he'd already had nine trials in four months this year, while last year he'd only had three trials all year. That was the first bit of information.

The second came when the defense lawyer was cross-examining the detective who interrogated the defendant. The lawyer asked, "You interrogated him in 2007 and 2008. Why is he being brought to trial only now, three years later?" Then he added quickly, "Never mind, we can talk about that later." (During appeals, maybe?) The officer responded with a silly grin.

The jury gets a very narrow window on the events. Half the trial is fought with the jury standing out in the hall or sitting sequestered in the jury room, with the lawyers battling about what they can and can't be told and shown. I took this exchange to mean that the issue of why this case was brought to trial now was something that could not be raised before the jury, as it might be prejudicial to the prosecution.

You are not supposed to read newspaper accounts of the trial. There was little danger of that. No one cares about a black crack addict murdering a Hispanic prostitute sixteen years after the fact. So the judge didn't bother to admonish us not to read the newspapers. But about halfway through the trial, there was a story in the *LA Times* about the pressure the district attorneys in California were under to prosecute cold cases where there is now technology to analyze the DNA evidence. That was the third bit of information.

My conclusion: The defendant was brought to trial because of political pressure on the district attorney.

I'm an academic, and therefore have a lot of experience framing arguments. So I suspect I had more than a 1/12 influence on the outcome.

We began the second day of deliberation by taking a secret vote. It was Not Guilty: 9; Guilty: 3. Then we went around the table giving our opinions, beginning with me. I said I was 80% innocent, 20% not proven guilty. I said, "If a prostitute had sex with ten men in one night and the tenth one strangled her, the police would have

exactly the same evidence against the other nine men that they have against the defendant.”

“Aline”, an attractive Armenian-American dental hygienist of about 40, said Not Guilty, “for all the reasons Jerry said.” (She wore thick, bright red lipstick that reminded me of those wax lips we had when I was a kid and made me think of her at first as garish, but she was open and friendly to everyone and more than anyone else responsible for the camaraderie we all felt at the end. One morning she brought a box of chocolate éclairs for everyone. I found myself falling in next to her as we filed off to lunch each day.)

“Ellen”, a quiet, beautiful Chinese-American pharmacist in her 20s sitting next to me, had voted Guilty, but said I had convinced her otherwise.

“Fred”, a mostly reticent Chinese man who spoke very poor English, said he was suspicious of the way the defendant had changed his story about how many times he’d had sex with the victim, from “one time or two times” to “six or seven times”. He thought someone would remember which of those two it was. I responded that he hadn’t said “one time or two times” but “once or twice”, and that’s just a colloquial way of saying “several”, perfectly consistent with “six or seven times”. Fred changed his vote.

The only Guilty vote left was Franklin. He said he was 55% Not Guilty, 45% Guilty, or maybe the other way around. He was stuck on the phrase “beyond a reasonable doubt”. What does it mean? I quoted the definition – “an abiding belief”. Aline asked what “abiding” means. I said “stay”; it means you won’t change your mind every three days. Franklin studied and re-studied the jury instructions.

Then he raised the Obama birther issue: is it reasonable to doubt that Obama was born in Hawaii? Christine and another woman exploded, “Oh come on!” Judy shouted, “No, we are not going to discuss that!” I whispered to Ellen that he was enjoying the social event and didn’t want it to end. She smiled in agreement and whispered that he’d said he didn’t have any friends. I said to him that 55-45 either way sounded like reasonable doubt to me. Finally, he gave in and changed his vote to Not Guilty. We had a verdict.

The victim’s family, about a dozen of them, had been in the courtroom one day, as it happens, the day the defendant testified. I was glad they weren’t there when the verdict was read. The only people there were two women friends of the defendant’s. The bailiff handed our verdict to the judge, and I thought she read it with a look of distaste. She handed it to the court reporter, who announced the verdict. One of the women let out a whoop and immediately stifled it. The defendant buried his face in his hands and cried. As the jury filed out, the other woman mouthed, “Thank you,” to us.

This all felt very good, even heroic. An innocent man was being tried for political reasons, and it’s only the courageous action of a jury that saves him from a terrible injustice.

The trial was over, and now we could speak freely with the lawyers. I wanted to, and waited outside the courtroom for a few minutes. But they didn't emerge, and everyone else was leaving, so I did too. I got onto a crowded elevator with Aline and Franklin.

Just as the elevator doors were about to close, the two lawyers appeared in the hallway. I blocked the doors with my foot, and the three of us jumped off.

I told the defense attorney, "I thought the defendant's testimony was decisive."

He replied, "Yes, he did much better than I thought he would."

I asked, "Well, did we get it right?"

He smiled mysteriously and said, "We'll never know."

Then he turned to the prosecuting attorney and asked, "Should we tell them?"

"Go ahead. The trial's over."

"In 1979 in Pennsylvania the defendant was convicted of homicide, by attempted ligature strangulation and then stabbing."

The prosecuting attorney had wanted to bring that in, but he needed a witness to do that, and all the police and detectives from that crime were dead. "It's very hard to bring in a crime that old," he said.

Then the two lawyers caught an elevator.

I walked with Aline the two blocks up the hill to the Disney Hall parking garage. Now I thought it was probably 80% not proven guilty, 20% innocent. That wouldn't have changed the outcome, I don't think. It just would have made the decision harder. But I felt deflated. I said to Aline, "I wish I hadn't been told that." She agreed with me.

It feels strange to get to know people in a situation like this, and then part, knowing you'll never see them again. I asked her if she was on Facebook. "No, but my husband is," she said. At the bottom of the escalator we hugged once, and went our separate ways to where our cars were parked.

I told this story to a friend of mine. Her response was "And how is this not like what you see on TV?"

