

Conducting Jury Trials



Including Defendants Charged
with
Misdemeanor Domestic Battery

Presented by Chief Judge Michael Gibbons



Short History of Jury Trials in Nevada

Chicago - 25 or 6 to 4 - 1970 – Tanglewood, MA



Jury Trial Procedure 1967-1983



- **Section 1.** NRS 175.011 is hereby amended to read as follows (**1967/1983**):

175.011 1. In a district court, cases required to be tried by jury [**shall**] *must* be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state.

2. In a justice's court, a case [**shall**] *must* be tried by jury only if the defendant so demands in writing not less than [**5 days prior to**] *30 days before* trial.

Jury Trial Procedure 1967-1983



- **Sec. 2.** NRS 175.021 is hereby amended to read as follows:
 - 1. Trial juries for criminal actions are formed the same as trial juries in civil actions.
 - 2. **[Juries shall be]** *Except as provided in subsection 3, juries must consist* of 12 jurors, but at any time before verdict, the parties may stipulate in writing with the approval of the court that the jury **[shall]** consist of any number less than 12 **[.]** *but not less than six.*
 - 3. *Juries must consist of six jurors for the trial of a criminal action in a justice's court.*

Right to a Jury Trial and Number of Jurors



- 1967-2022: **There and back again (12-6-0-6-12)**
 - 12-person jury trials for serious misdemeanors; changed to 6 person by the Legislature in 1983

1983-2019: What is a serious offense

- Jury trials only required for serious offenses
 - ✦ DUI not serious. *State v. Smith*, 99 Nev. 806, 672 P.2d 631 (1983); *Blanton v. North Las Vegas Municipal Court*, 103 Nev. 623, 748 P.2d 494 (1987); *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).

Blanton v. City of North Las Vegas



- “It has long been settled that ‘there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision’”
- “Viewed together, the statutory penalties are not so severe that DUI must be deemed a ‘serious’ offense for purposes of the Sixth Amendment. It was not error, therefore, to deny petitioners jury trials”
 - *Blanton*, 489 U.S. at 545.

Right to a Jury Trial and Number of Jurors



- Battery Domestic Violence is serious. *Anderson v. Eighth Judicial Dist. Court*, 135 Nev. 321, 448 P.3d 1120 (2019).
- Effective until Dec. 31, 2021
 - in Justice and Municipal Court, criminal actions require **six jurors**
- Currently - 2022
 - Juries must consist of **12 jurors**
 - ✦ Any time before jury selection, the parties may stipulate in writing with the approval of the court that the jury consist of any number less than 12 but not less than 6



Why Are We Here Today?

Andersen v. Eighth Judicial District Court

135 Nev. 321, 448 P.3d 1120 (2019)



- Facts

- Petitioner Andersen was arrested and charged with first-offense battery constituting domestic violence (domestic battery), a misdemeanor pursuant to NRS 200.485(1)(a), and simple battery
- Before the municipal court, Andersen made a demand for a jury trial, arguing that a conviction for domestic battery was a serious offense and thus compelled a jury trial
 - ✦ The municipal court denied the demand

Andersen v. Eighth Judicial District Court



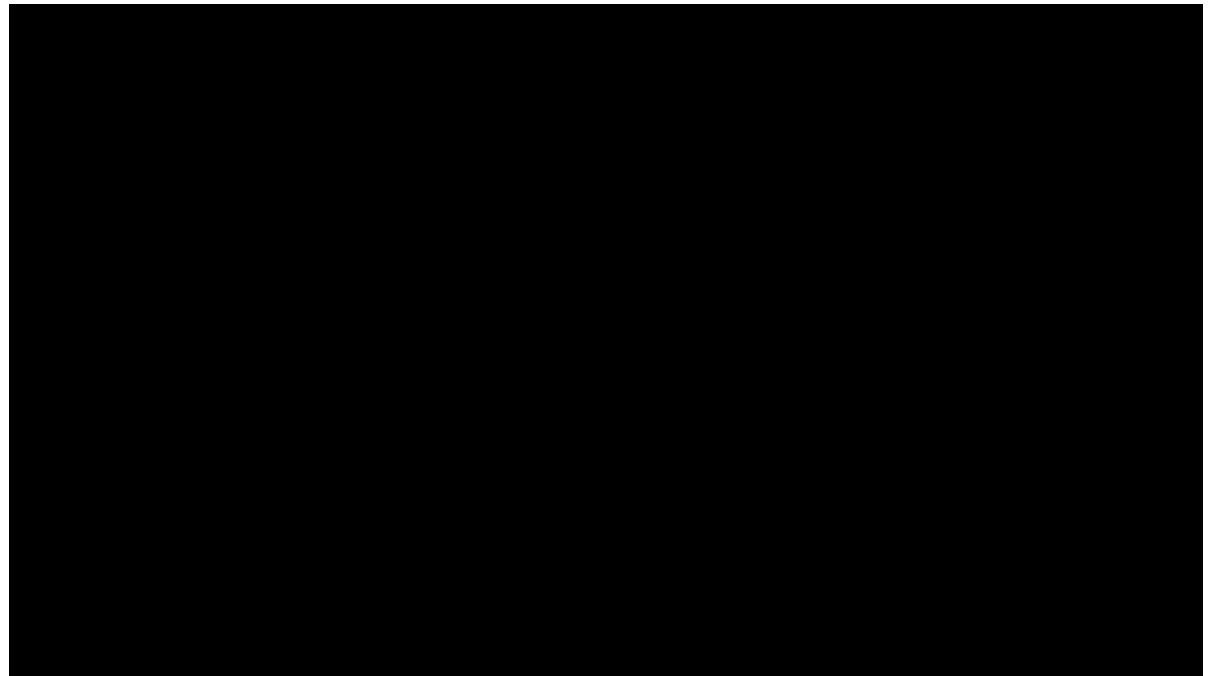
- Issue

- On appeal, Andersen's sole contention was that he was erroneously denied the right to a jury trial
 - ✦ The district court affirmed the conviction; Nevada Supreme Court granted writ relief
- Whether the offense of misdemeanor battery constituting domestic violence is a serious offense such that the right to a jury trial is triggered

Andersen v. Eighth Judicial District Court



- Discussion
 - The right to a jury trial, as established by the Sixth Amendment of the United States Constitution and Article 1, Section 3 of the Nevada Constitution, extends only to those crimes that are considered serious offenses
 - Our Legislature has restricted the possession of a firearm that automatically flows from a conviction for misdemeanor domestic battery
 - ✦ This new penalty – a prohibition on the right to bear arms as guaranteed by both the United States and Nevada Constitutions – clearly reflects a legislative determination that the offense of misdemeanor domestic battery is a serious one



<https://youtu.be/AoPNFRcN6o4>

Right to Jury Trial for Misdemeanor Domestic Violence Cases

Seven Takeaways from the Most Significant Nevada Supreme Court Case of the 21st Century



<https://thenevadaindependent.com/article/seven-takeaways-from-the-most-significant-nevada-supreme-court-case-of-the-21st-century>

1. Domestic battery is both more and less serious than you might think
2. The people who get convicted of domestic violence aren't always who you'd think
3. The Nevada Supreme Court takes individual liberties and civil rights very seriously
4. Prosecutors are going to have to be much more selective
5. Prosecutors are panicking, but the smart ones understand the value to their offices
6. This is going to cost you
7. Laws will have to change



AB 42 Changes

Background on 2021 NV A.B. 42



- In 2019, the Nevada Supreme Court held in *Andersen* that a battery which constitutes domestic violence is a serious offense, because it results in a limitation on the possession of a firearm, thereby triggering a constitutional right to a jury trial
- The court reasoned that the Legislature elevated the seriousness of the offense when it amended NRS 202.360 in 2015, limiting a person's constitutional right to bear arms by prohibiting the possession or control of any firearm by a person who has been convicted of the crime of domestic violence as defined in 18 U.S.C. § 921(a)(33)

2021 NV A.B. 42



- A person convicted of a battery which constitutes domestic violence for the first or second offense within 7 years is guilty of a misdemeanor
- Section 12 of this bill **establishes a statutory right to a jury trial for a person charged with a battery which constitutes domestic violence** that is punishable as a misdemeanor and may prohibit the person from owning, possessing or having under his or her control or custody any firearm
- Section 12 also requires the provision of a jury trial regardless of whether the person has previously been prohibited from owning, possessing or having under his or her control or custody any firearm

2021 NV A.B. 42



- Section 2 of this bill
 - (1) expands the courts in which DV cases must be tried by a jury, which would **necessarily include justice courts and municipal courts**; and
- Section 3 of this bill requires that **all** criminal actions, whether in district court, justice court or municipal court, **must be tried by a jury of 12 jurors unless** before jury selection the parties stipulate in writing with the approval of the court that the jury consist of any number less than 12 but not less than 6

2021 NV A.B. 42



- Sections 8 and 15 of this bill allows municipal courts to conduct jury trials:
 - (2) where such a trial is required pursuant to the United States Constitution, the Nevada Constitution, or statute
- Section 12 of this **bill eliminates the “no plea bargaining” language**

2021 NV A.B. 42



- Section 13 of this bill revises the list of persons prohibited from owning or having in their possession any firearms
- Includes a person who has been convicted of the crime of battery which constitutes domestic violence pursuant to NRS 200.485, *or* the same or substantially similar conduct in another jurisdiction, committed against or upon certain persons, *instead* of a person who has been convicted of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33)



New Statutes

Trial by Jury NRS (175.011)



- Effective: January 1, 2022
 - (1) cases required to be tried by jury **must be so tried unless the defendant waives a jury trial in writing** with the approval of the court and the consent of the prosecuting attorney
 - (2) except as otherwise provided in subsection 1, in a justice [or municipal] court, **a case must be tried by jury only if the defendant so demands in writing not less than 30 days before trial.** Except as otherwise provided in NRS 4.390 and 4.400, if a case is tried by jury, a reporter must be present who is certified court reporter and shall report the trial

Formation of jury; number of jurors (NRS 175.021)



- **Effective: January 1, 2022**
 - (1) trial juries for criminal actions are formed in the same manner as trial juries in civil actions (see NRS Chapter 16)
 - (2) juries must consist of 12 jurors, but at any time before jury selection, the parties may stipulate in writing with the approval of the court that the jury consist of any number less than 12 but not less than six
 - **(3) the list of potential trial jurors for justice court must include the entire county not just the township**



Criminal Case but Civil Procedure

Civil Case Jury Procedure applies



- NRS 16.030 Drawing and examination of jurors
 - (1) and (2): jurors are randomly selected; list can be created in advance by jury commissioner
 - (3) Traditional selection method
 - ✦ 12 people called for examination; if excusals, replacement jurors called from the audience

Civil Case Jury Procedure applies



- (4) Arizona selection method (23 prospective jurors)
 - ✦ $12 + 8$ (number of peremptory challenges) + 1 alternate from 3 more prospective jurors = 23 to select 13
 - ✦ Alternate may be picked at the conclusion of trial by stipulation



Pretrial Proceedings

Judge vs. Defense Counsel



Pretrial Motions



- NRS 174.105 Defenses and objections which must be raised by motion
 - 1. Defenses and objections based on defects in the institution of the prosecution... may be raised only by motion before trial
 - 2. Failure to present any such defense or objection as herein provided constitutes a waiver thereof

Pretrial Motions



- NRS 174.115 Time of making motion
 - The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter

Pretrial Motions



- NRS 174.125 Certain motions required to be made before trial
 - 1. All motions in a criminal prosecution **to suppress evidence...** for **withdrawal of counsel**, and all other motions which by their nature, if granted, delay or postpone the time of trial must be made before trial, unless an opportunity to make such a motion before trial did not exist
 - 2. in any judicial district in which a single judge is provided:
 - ✦ (a) all motions must be made in writing, with not less than 10 days' notice
 - 3. in any judicial district in which two or more judges are provided:
 - ✦ (a) all motions must be made in writing not less than 15 days before trial

Pretrial Motions



- NRS 174.135 Hearing on Motion
 - 1. A motion before trial raising defenses or objections **shall be determined before trial** unless the court orders that it be deferred for determination at the trial of the general issue
 - *Brass v. State*, 138 Nev., Adv. Op. 23 (April 7, 2022)

On the eve of trial, Brass moved for the substitution of counsel due to counsel's failure to adequately prepare for trial. The district court denied Brass' request because he should have raised his concerns at an earlier time, the State would suffer prejudice, and the issues were differences in trial strategy

The Court held the district court abused its discretion by denying the motion. The court noted that a defendant may substitute retained counsel at any time unless the motion to substitute is untimely and the resulting disruption of the orderly process of justice outweighs the defendant's right to counsel of choice

Joinder of Defendants



- **NRS 173.135 Joinder of Defendants**
 - Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses

Joinder of Offenses



- NRS 173.115 Joinder of offenses
 - 1. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or gross misdemeanors or both, are:
 - ✦ (a) based on the same act or transaction; or
 - ✦ (b) based on two or more acts or transactions connected together or constituting parts of a common scheme or plan
- Example below!

Relief From Prejudicial Joinder



- NRS 174.165(1) Relief from prejudicial joinder
- If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants,
- The court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Example of Proper Joinder



- *Farmer v. State*, 133 Nev. 639, 405 P.3d 114 (2017)
 - ✦ Farmer was charged with numerous sex offenses based on accusations that he used his position as a nursing assistant to take advantage of multiple patients in his care
 - ✦ Five female patients who were treated at one hospital over a two-month period testified that Farmer touched them in a sexual manner

Farmer v. State (cont'd)



- ✦ The State argued Farmer should face all five of his accusers in one trial and Farmer argued in favor of separate trials
- ✦ The trial court granted the State's motion to join the offenses under the theory that they were committed pursuant to common scheme or plan according to NRS 173.115(1)

Farmer v. State (cont'd)



- Supreme Court of Nevada decision
 - ✦ The district court properly joined the offenses for a single trial
- When determining whether a common scheme exists, determine whether the offenses share common features supporting a common design

Farmer v. State (cont'd)



- Features that are relevant to the analysis include:
 - ✦ (1) degree of similarity of offenses
 - ✦ (2) degree of similarity of victims
 - ✦ (3) temporal proximity
 - ✦ (4) physical proximity
 - ✦ (5) number of victims
 - ✦ (6) other context-specific features

Joining Misdemeanor Offenses with BDV?



Douglas County District Attorney
1000 West 1st Street
Minden, Nevada 89423
(775) 782-9800 Fax (775) 782-9807

1 CASE NO. 20-CR-0531
2 DA 20-0813M
3 DCSO 20SO14417

RECEIVED
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Douglas County
East Fork Justice Court

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6 IN THE JUSTICE COURT OF EAST FORK TOWNSHIP
7 COUNTY OF DOUGLAS, STATE OF NEVADA

8
9 THE STATE OF NEVADA,
10 Plaintiff,

11 v.
12 MATTHEW TERRANCE CHEEK,
13 DOB: 09/05/1990
14 Defendant.

CRIMINAL COMPLAINT

15 Matthew Johnson, Deputy District Attorney, with the Douglas County District
16 Attorney's Office, County of Douglas, State of Nevada, on information and belief, being first
17 duly sworn, makes complaint and charges Matthew Terrance Cheek with the crimes of
18 BATTERY THAT CONSTITUTES DOMESTIC VIOLENCE, a violation of NRS 200.485 and
19 NRS 200.481, a misdemeanor, COERCION, a violation of NRS 207.190, a misdemeanor, and
20 PETIT LARCENY, a violation of DCC 9.205.240, a misdemeanor, committed as follows:

21 The defendant, Matthew Terrance Cheek, on or about June 1, 2020, and prior to the
22 filing of this complaint, in the County of Douglas, State of Nevada,

23
24 **COUNT ONE: BATTERY THAT CONSTITUTES
DOMESTIC VIOLENCE, a violation of NRS
200.485 and NRS 200.481, a misdemeanor**

25
26 did willfully and unlawfully use force or violence upon Rachel Cook, a
27 person within the definition of NRS 33.018, to-wit: the defendant forcibly
28 took a diaper bag containing Rachel Cook's cell phone out of her hands
causing her to fall to the ground and then got on top of her while she
screamed for him to get off of her, all of which occurred in the County of

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Douglas, State of Nevada,

**COUNT TWO: COERCION, a violation of NRS 207.190, a
misdemeanor**

did willfully and unlawfully deprive another person of any tool, implement
or clothing or hinder the person in the use thereof; or attempt to intimidate
the person by threats or force, with the intent to compel the other person to
do or abstain from doing an act which the other person has a right to do or
abstain from doing, to-wit: the defendant took Rachel Cook's cellular
phone to prevent her from calling 911, all of which occurred in the County
of Douglas, State of Nevada,

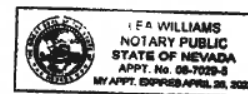
**COUNT THREE: PETIT LARCENY, a violation of DCC
9.205.240, a misdemeanor**

did willfully and unlawfully steal, take, or carry away the personal property
of another person, having a value of less than \$650.00, with the intent to
permanently deprive the owner thereof, to-wit: the defendant took Rachel
Cook's cellular phone and buried it in the dirt near a patch of sage brush,
all of which occurred in the County of Douglas, State of Nevada,

against the peace and dignity of the State of Nevada. Complainant prays the Defendant be dealt
with according to law.

[Signature]
COMPLAINANT

SUBSCRIBED and SWORN to before me by
Matthew Johnson, this 3rd day of June, 2020.
[Signature]
Justice of the Peace/Notary Public



Should a misdemeanor BDV offense be joined?



- AB 42 Sec. 1 (2) (b) (2021)
 - “A battery which constitutes domestic violence that is punishable as a misdemeanor pursuant to NRS 200.485 must be charged in the same indictment or information in district court as a felony or gross misdemeanor or both if the battery is based on the same act or transaction as the felony or gross misdemeanor”

Uncharged Bad Acts



- *Hubbard v. State*, 134 Nev. 450, 422 P.3d 1260 (2018)
 - ✦ Several people were at a residence in Las Vegas one night in 2013 when the doorbell rang
 - ✦ When the door was answered, three men barged in and began robbing the people inside at gunpoint
 - ✦ The homeowner met Hubbard, who was carrying a gun, on the stairs and shot at Hubbard hitting him in the shoulder

Bad Acts



- *Hubbard v. State* (cont'd)
 - ✦ About 15 minutes later, Hubbard entered a market located about four miles from the residence with blood on his shirt
 - ✦ Hubbard had been shot in his left shoulder
 - ✦ In his statement to police, Hubbard indicated that he was randomly shot while walking down the street

Bad Acts



- *Hubbard v. State* (cont'd)
 - ✦ Hubbard was charged with burglary, conspiracy and robbery
 - ✦ The district court granted a pretrial motion in limine by the State to admit evidence of Hubbard's prior conviction for a burglary that occurred in WA
 - ✦ The State argued it was admissible to prove motive, intent, identity, and absence of mistake and to rebut a claim that Hubbard was an innocent victim of an unrelated, random, drive-by shooting

Bad Acts



- *Hubbard v. State* (cont'd)
 - The victim of the WA burglary, Davis, testified during the trial
 - ✦ **The district court gave the jury a limiting instruction** that Davis's testimony could be considered "*only for the limited purpose of proving the defendant's intent and/or motive to commit the crimes alleged or the absence of mistake or accident*"
 - ✦ Davis testified that she locked herself in her bathroom after her doorbell rang repeatedly. She heard people come into the house and male voices, and someone attempted to force open the bathroom door without success
 - ✦ After intruders left, Davis discovered jewelry and other items missing. Davis never actually saw any individuals in her home

Bad Acts



- *Hubbard v. State* (cont'd)
 - Hubbard appealed from the judgment of conviction and won
 - The Court of Appeals (2-1) concluded that the district court manifestly abused its discretion in admitting testimony of the 2012 burglary
 - It was not relevant for any of the State's proffered non-propensity uses. Also, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice

Bad Acts



- *Hubbard v. State* (cont'd)
- The Nevada Supreme Court granted the State's petition for review
 - Law: Evidence of other crimes, wrongs, or acts is not admissible to prove a person's *character* in order to show the person acted in conformity therewith, but may be admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" NRS 48.045(2)
 - "A presumption of inadmissibility attaches to all prior bad act evidence"

Bad Acts



- *Hubbard v. State* – reversed and remanded
 - To overcome the presumption of inadmissibility the prosecution must demonstrate that
 - ✦ (1) the prior bad act is **relevant** to the crime charged and for a purpose other than proving the defendant's propensity to commit crimes
 - ✦ (2) the act is **proven by clear and convincing evidence**, and
 - ✦ (3) the **probative value** of the evidence is **not substantially outweighed by the danger of unfair prejudice**

Bad Acts



- *Hubbard v. State* (cont'd)
- Holding
 - ✦ Prior bad acts not admissible to prove intent or absence of mistake when not at issue in the case [the defense was SODD]
 - ✦ District court's error not harmless [even with a limiting instruction]



Pretrial Motions in the Case the Mock Trial is Based On

Mock Trial Case



- **Roles**
 - Judge: Hon. Scott Freeman (Second Judicial District Court)
 - Prosecutor: Hon. Melisa De La Garza (Las Vegas Justice Court)
 - Defense Counsel: Zachary Meyer (Federal Deputy Public Defender)
 - Victim: Michelle Gibbons (Legal Assistant at Heritage Law)
 - Witness: Hon. Lidia Stiglich (Nevada Supreme Court)
 - Jurors: judges from the audience (all court levels)
 - Narrator and Court Clerk: Hon. Michael Gibbons (Nevada Court of Appeals)

Rivas-Valenzuela v. State

No. 80652-COA, 2021 WL 1440401 (Nev. Ct. App. Apr. 15, 2021)



- **Facts**

- Victim and defendant were romantically involved at the time of the alleged offense
- Victim spent the night at defendant's apartment on the evening of July 13, 2019
- On the morning of July 14, 2019, defendant took the victim's dog for a walk
- When defendant returned to the apartment, he unleashed the dog and the dog ran out of the apartment

Rivas-Valenzuela v. State



- Facts - according to the victim
 - Defendant charged at her and pushed her to the floor
 - He stated he was going to kill her
 - The victim testified that while straddling her on the floor, the defendant wrapped the rope he used to walk Sparky around her neck
 - He repeatedly cinched and loosened the rope, allowing her to gasp for air but tightening the rope immediately afterward
 - The victim smacked the defendant, dazing him, and rolled him off of her
 - The victim then crawled away, got up, and ran out of the apartment to look for Sparky

Rivas-Valenzuela v. State



- **Facts**

- By the time the victim found Sparky and returned to Rivas-Valenzuela's apartment, police had arrived in response to a call from the apartment manager
- The manager called police because the victim had previously been removed from the property and told she could not return. The manager did not report an altercation
- One of the responding officers called paramedics to examine the victim because she had ligature marks on her neck
- Police knocked on Rivas-Valenzuela's door but he did not answer. Police did not seek a warrant or interact with Rivas-Valenzuela on July 14

Rivas-Valenzuela v. State



- Facts

- One of the responding officers obtained a statement from the defendant's neighbor
 - ✦ The neighbor did not indicate that he heard the defendant say that he was going to kill the victim or that he observed the defendant hitting, choking, or pushing the victim, or any altercation at all
- The defendant was arrested the following day, July 15

Charges



- The State filed an amended information alleging:
 - Count 1
 - ✦ Domestic battery by strangulation using a rope or rope-like object
 - Count 2
 - ✦ Coercion constituting domestic violence
 - Count 3
 - ✦ Domestic battery with substantial bodily harm
- Each count provided that the defendant pushed the victim to the ground and placed “a rope or rope-like object around her neck”

Rivas-Valenzuela Pretrial Hearing



- During the pretrial hearing, the neighbor claimed for the first time that he saw the defendant and the victim in a physical conflict in the doorway to the defendant's apartment on July 14
 - The neighbor testified that the defendant threatened to kill the victim at some point, struck the victim, choked her with his bare hands, and that the defendant appeared to be pushing the victim out of his apartment
 - The neighbor further testified that he could not see inside the apartment, did not observe the defendant choke the victim with a rope or rope-like object
- The district court admitted the neighbor's testimony as res gestae evidence and found that the neighbor's testimony was "day in question testimony"

Mock Trial



**BASED ON RIVAS-VALENZUELA V. STATE,
NO. 80652-COA, 2021 WL 1440401
(NEV. CT. APP. APR. 15, 2021)**

District Court Trial



- The district court admitted the neighbor's testimony as res gestae evidence
- During deliberations, the jury asked the district court about the instructions for count 1, domestic battery by strangulation, and asked if strangulation had to include the rope
- The jury found the defendant guilty of domestic battery by strangulation (count 1), not guilty of coercion constituting domestic violence (count 2), and guilty of domestic battery with substantial bodily harm (count 3)

District Court Trial



- Appellate Court Discussion
 - Under NRS 48.035(3), a witness may only testify to an uncharged act or crime if it is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act or crime
- Appellate Court Holding
 - Here, the witness testimony of an uncharged crime or act should not have been admitted as *res gestae* evidence. The testimony had substantial and injurious effect or influence on the jury's verdict, and therefore was not harmless error

Jury Questions During Trial



- Jury asked district court about the instructions for domestic battery by strangulation (count 1):
 - “On the back of [page] 3 it states ‘placed a rope or rope-like object’ but on [page] 28 it just says ‘strangulation.’ Does the strangulation [count 1] have to include the rope?”
- District Court responded:
 - Directed jurors to apply the definition of strangulation that was already in the instructions

Jury Questions During Trial



- Jury followed up more specifically:
 - “We are not looking for the definition of strangulation, we are attempting to understand for count 1, must the strangulation occur by the rope or can the charge of the strangulation occur without the said rope or rope like object?”
- District Court responded:
 - “No. Strangulation is established by any evidence introduced at trial that satisfies the definition of strangulation as provided in Instruction 34”
 - Conclusion: “res gestae evidence” ruling was not harmless



Introduction to Trial

Bench Book Instructions (Excerpt D)



Introduction to Trial



- Criminal jury must consist of 12 jurors; civil trial 8 jurors

The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors (NRS 175.061(1))

Most courts will seat one alternate juror

Opening of the Court



- Before the trial judge enters the courtroom, the Marshal will ensure all parties are ready to proceed
- The Marshal will bring the jury venire into the courtroom
- The judge will then take the bench



Jury Selection Process



Impaneling of Jury



- Case number and name
- Representation of the parties
- Stipulation of presence of jury venire panel
- Judge introduction (welcome, importance of the jury, ct. personnel)
- Stating the charges
- Purpose of a trial
- Approximately how long the trial will take
- Obligation to serve as a juror



<https://youtu.be/jDzY4SKawzg>

New Girl

“I need help getting out of jury duty”

Impaneling the Jury



- The court may excuse a juror for good cause
- Roll call of jurors (if no list from jury commissioner)
- Oath (mandatory)
 - “Do you, and each of you, (solemnly swear, or affirm under the pains and penalties of perjury) that you will well and truly answer all questions put to you touching upon your qualifications to serve as jurors in the case now pending before this court (so help you God)?”
NRS 16.030(5)

Qualifying of Jury



- Series of questions asked by the presiding judge
 - Expedite by asking obvious disqualification questions of all prospective jurors at the outset; later ask specific disqualification questions of selected prospective jurors like undue hardship or public necessity (caring for someone)
 - ✦ For example, ask at the outset if anyone is sick or does not meet the statutory qualifications (qualified elector) or has an exemption such as 70 or older, police officer, insufficient knowledge of English, or convicted of a felony, (NRS 6.010-.030)
- Jurors may be dismissed by for-cause challenges or peremptory challenge





<https://youtu.be/RnBHYVN7SYo>

How Dan Cummins Got Out of Jury Duty

“The truth will set you free”

For Cause Challenges



- If a juror appears biased, counsel can ask the judge to dismiss that juror for cause
- Can the juror adjudicate the facts fairly (NRS 175.036(1))
(*See also* NRS 16.050)
 - For example, a juror can be dismissed for cause if a close relative of one of the parties or one of the lawyers, or if works for a company that is part of the lawsuit
- An unlimited number of jurors may be excused for cause
- Each request is be considered individually by the judge



<https://youtu.be/MxxtAEYorPk>

Nevada Judge Yells at Juror Who Claims Bias

Peremptory Challenges



- In addition to challenges for cause, each party has four peremptory challenges (8 if crime is punishable by life). (NRS 175.051)
- One additional peremptory challenge may be used for the alternate juror (NRS 175.061(5))
 - A greater number of challenges are allowed if three or more alternates
- These challenges permit a party to excuse a potential juror without stating a reason (Arizona method allows un-selection)
- In effect, strikes allow dismissal of a juror on a belief that the juror is less likely than others to serve the best interests of the client
- Strikes can't be used to discriminate on the basis of race, gender or sexual orientation (or potentially against other protected classes)



<https://youtu.be/8gvOILkwsRo>

The Judge 2014 **Selecting a Jury**

Structural Error



- A structural error is one that affects the framework within which the trial proceeds rather than being simply an error in the process itself
- Examples of structural error include racial discrimination in selection of a jury or the failure to hold a public trial

Weaver v. Massachusetts

137 S. Ct. 1899 (2017)



- Public Trial
 - Courtroom seating could only accommodate 50-60 people, and the pool of potential jury members was 60-100 people
 - The trial judge brought all potential jurors into the courtroom so he could introduce the case and ask certain preliminary questions of the entire venire panel
 - ✦ The courtroom was so full, some potential jurors had to stand in the courtroom because there were no remaining seats

Weaver v. Massachusetts



- After the preliminary questions, the potential jurors who had been standing were moved outside the courtroom to wait during individual questioning of the other potential jurors
- As all of the seats in the courtroom were occupied by the venire panel, an officer of the court excluded from the courtroom any member of the public who was not a potential juror – the petitioner’s mother and her minister came to observe jury selection and were turned away

Weaver v. Massachusetts



- Holding
 - **Violation of the right to a public trial is a structural error**
 - ✦ When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted
 - When a structural error is raised in the context of an ineffective-assistance claim, however, petitioner must show prejudice to obtain a new trial
- Disposition
 - Affirmed; a violation of the right to a public trial during jury selection is not inherently prejudicial, nor does it render every trial unfair

Jeremias v. State



134 Nev. 46, 412 P.3d 43 (2018)

- Jeremias was on trial for murder
- The prosecutor objected to Jeremias's family being present during jury selection
- The district court explained that every seat was needed for prospective jurors and that the family would be asked to leave anyway
- The defense did not object to the family being excluded during jury selection
 - Family was allowed to attend the rest of the trial

Jeremias v. State



- On appeal, Jeremias argued the district court violated his right to a public trial
- Disposition - Affirmed
 - ✦ Violation of right to public trial not inherently prejudicial
 - ✦ Unlike defendant in *Weaver*, Jeremias did not object and thereby waived his argument on appeal
 - ✦ Under plain error, Jeremias failed to demonstrate that excluding his family for small portion of jury selection was prejudicial or rendered the trial unfair

Batson v. Kentucky (discrimination)

476 U.S. 79 (1986)



- Facts
 - A Black man was indicted in Kentucky
 - The prosecutor used peremptory challenges to strike all four Black persons in the venire resulting in a jury of all white persons
 - Batson moved to discharge the jury on the ground that the prosecutor's strikes of the Black jurors violated his rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community and to equal protection of the laws

Batson v. Kentucky



- Holding
 - **The Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from using peremptory challenges to remove prospective jurors based on their race**
- Disposition
 - Because the trial court rejected the timely objection without requiring the prosecutor to give an explanation for his action, the Court remanded for further proceedings
 - ✦ If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not offer a race neutral explanation for his action, the conviction is reversed

J.E.B. v. Alabama ex rel. T.B.

511 U.S. 127 (1994)



- **Facts**

- On behalf of T.B., mother of a minor child, State of Alabama filed a complaint for paternity and child support against J.E.B.
- The panel of 36 potential jurors was 12 males and 24 females. The court excused 3 jurors for cause and 33 jurors remained. Only 10 of the remaining jurors were male. **The State used 9 of its 10 peremptory strikes to remove male jurors.** TB struck the final male juror. As a result, **all the jurors were female**
- Petitioner objected to the State's **strikes on** the ground that they were exercised against male jurors solely on the basis of **gender**

J.E.B. v. Alabama ex rel. T.B.



- Issue
 - Whether the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race
- Holding
 - **The Equal Protection Clause prohibits discrimination in jury selection on the basis of gender**, or on the assumption that an individual will be biased in a particular case for no reason other than the person happens to be a woman or a man
- Disposition
 - Judgment reversed

Nevada's *Batson* Inquiry



- The process consists of
 - (1) the opponent of the peremptory challenge **must make a prima facie showing of discrimination**
 - (2) if the prima facie showing is made, the proponent **must present a nondiscriminatory explanation** for the peremptory challenge; and
 - (3) the district court **hears argument** and then **determines** whether the opponent **has proven purposeful discrimination**

Standard of Review - *Watson*



- When an appellant argues that the State improperly exercised its **peremptory challenge** in violation of the Equal Protection Clause, the appellate court “affords **great deference to the district court’s factual findings** regarding whether the proponent of a strike has acted with discriminatory intent... and [**the appellate court**] **will not reverse** the district court’s decision ‘**unless clearly erroneous**’”

Watson v. State, 130 Nev. 764, 775, 335 P.3d 157, 165-66 (2014)

- Failure to object results in waiver of appellate review
 - But may be reviewed for plain error

Diomampo v. State

124 Nev. 414, 185 P.3d 1031 (2008)



- During jury selection, the State used all four of its peremptory challenges to dismiss four prospective jurors who were all members of recognized ethnic minorities
 - Ramirez – challenge violated *Batson* because the State could not have plausibly concluded that his understanding of English was insufficient
 - Nelson – challenge violated *Batson* - the prosecutor failed to dismiss nonminority jurors who were also divorced under comparable or worse circumstances
- The two *Batson* violations require reversal and remand for a new trial as a matter of law

Guitron v. State



131 Nev. 215, 350 P.3d 93 (Ct. App. 2015)

- Victim was pregnant at 12 years old. DNA testing confirmed Guitron, the father of the victim, was also the father of the victim's baby
- On appeal, Guitron contends the State improperly used its peremptory challenges to remove *non-white* venire persons from the jury pool in violation of Guitron's Fourteenth Amendment right to equal protection
- Here, **the State provided clear, reasonably specific, facially legitimate reasons for excusing jurors and did not communicate an inherent discriminatory intent**
- The district court did not err in denying the *Batson* challenges

Ford v. State

122 Nev. 796, 138 P.3d 500 (2006)



- Ford was convicted of conspiracy to commit robbery and robbery with the use of a deadly weapon
- During jury selection the State used peremptory challenges to exclude three African-American prospective jurors
- Ford failed to demonstrate that the State intentionally discriminated against the three excluded African-American prospective jurors

Ford v. State



- Juror A – Not a violation. The prosecutor stated that Juror A's answers showed distrust of the jury system because she felt her brother was treated unfairly. Other jurors stated the system had treated their relatives fairly
- Juror B – Not a violation. The prosecutor stated Juror B had been arrested for domestic violence and thought he was treated unfairly. Another juror had been arrested for domestic violence who the State also struck
- Juror W – Not a violation. The prosecutor felt the juror's previous arrest for domestic violence would make it difficult for the juror to remain impartial

Protected Classes



- Race-based peremptory challenges
 - *Batson* – a juror may not be struck for being African American
 - *Diomampo* – a juror may not be struck for being Hispanic
- Gender-based peremptory challenges
 - *J.E.B.* – a juror may not be struck for being male or female
- Sexual orientation-based peremptory challenges
 - – a juror may not be struck for being gay
 - ✦ *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014)

Morgan v. State, 134 Nev. 200, 212, 416 P.3d 212, 225 (2018)



- *Morgan v. State* – Nevada adopts *SmithKline*
- If a juror is struck from one of these protected groups (race, gender, sexual orientation), upon objection and prima facie showing of discrimination, the court will look at the circumstances to determine discrimination
 - Pattern of striking members of this same group during voir dire
 - Whether the case is sensitive to bias
 - Nature of questions and statements made during voir dire

Limits



- *Batson* would apply to any group who the U.S. Supreme Court, Nevada Supreme Court or Nevada Court of Appeals extends **heightened scrutiny** under the Equal Protection Clause
- Err on the side of finding a protected class
 - Establishing a prima facie case of discrimination is “not onerous.” *Morgan v. State*
 - “[E]ven though striking one or two gay individuals may not always constitute a prima facie case, it is preferable for the court to err on the side of the defendant’s rights to a fair and impartial jury.” *Id.* at 213, 416 P.3d at 225 (quoting *SmithKline*).

Procedure



- Prospective jurors must be sworn in before voir dire
 - ✦ The judge conducts questioning
 - ✦ Each party is entitled to ask supplemental questions
 - ✦ A judge may
 - Use questionnaires after prospective jurors are sworn, or
 - Question prospective jurors individually outside presence of the others if necessary
- Challenges for cause must come before peremptory strikes
- Peremptory challenges must be **outside** presence of prospective jurors
- Who can challenge a peremptory strike? Any party

Summary



- How is a prospective juror classified as one in a protected class?
And what to do if yes
 - What is a protected class
 - ✦ Race, gender and sexual orientation (possibly religion)
 - Use a pretrial or trial questionnaire – verify after oath
 - Ask counsel to stipulate
 - Ask the juror
 - Make the record (1. Prima facie showing of discrimination 2. Neutral or discriminatory reason for the strike 3. Argument, then findings)
 - *See Excerpt C: District Court Rules of Criminal Procedure (Rule 17)*

Swearing of Jurors



- When both parties and the court have agreed upon a jury, the jurors are sworn in to try the case by the court clerk
- Those not selected are excused (generally no fees paid)
- Oath of the jury
- NRS 175.111 and
- NRS 16.070



Informing Jury of Right to Take Notes/Ask Questions (NRS 175.131)



- Tell the jury they can take notes as long as it does not distract them
- The marshal will distribute notebooks and pencils
 - The marshal should secure the notebooks at each recess and any overnight recess or lock the courtroom/jury room



Jury Admonition (NRS 175.121)



- I must admonish you that:
 1. No juror may share any fact relating to the case from his/her own knowledge, and
 2. If a juror discovers that he/she or another juror has personal knowledge of the case the juror must inform the court, and
 3. Juror with personal knowledge to be examined by judge and/or counsel to determine whether juror or entire jury must be dismissed

Jurors' Role



- The jury's role is to listen to the evidence conscientiously and not draw premature conclusions
- Jurors should have the right to ask questions of witnesses
 - *Flores v. State*, 114 Nev. 910, 913, 965 P.2d 901, 902-03 (1998)
 - ✦ Supreme court held that allowing juror-initiated questions in a criminal case is more beneficial than harmful, but is matter committed to sound discretion of trial court following a seven-point process

Jury Improvement Commission



“The right of trial by Jury shall
be secured to all and remain
inviolable forever ...”

— Nevada Constitution



Report of the Supreme Court of Nevada

JURY IMPROVEMENT COMMISSION

October 2002

Supreme Court of Nevada

A. William Maupin, Chief Justice
Cliff Young, Vice Chief Justice
Robert E. Rose, Justice
Miriam Shearing, Justice
Deborah A. Agosti, Justice
Myron E. Leavitt, Justice
Nancy A. Becker, Justice

Published by the Administrative Office of the Courts

Ron Titus, State Court Administrator
201 South Carson Street

Bill Gang, Statewide Court Program Coordinator
Carson City, NV 89701 (775) 684-1700

Jurors' Role



Jury Improvement Commission Report:

[https://nvcourts.gov/AOC/Committees and Commissions/Jury Improvement/Documents/Jury Improvement Commission Final Report/ \(October 2002\)](https://nvcourts.gov/AOC/Committees%20and%20Commissions/Jury%20Improvement/Documents/Jury%20Improvement%20Commission%20Final%20Report/(October%202002))

- Nevada Supreme Court adopts recommendations for juror questions in ADKT 351 (Dec. 16, 2004):

<https://caseinfo.nvsupremecourt.us/document/view.do?csNameID=24680&csIID=24680&deLinkID=399223&onBaseDocumentNumber=04-23808> (See excerpt B)

Juror Questions (see excerpt A next)



- Explain at the outset of trial the right to question witnesses
 - Factual questions only
 - ✦ To clarify information already presented
 - ✦ If the answer is allowed under the rules of evidence
 - Questions must be in writing
 - Opportunity to object outside the jury's presence
 - Only admissible evidence will be allowed
 - ✦ Admissibility determined outside the jury's presence
 - Counsel may ask follow-up questions
 - Jurors must not place undue weight on the responses (simply because it is a juror-initiated question)

Informing Jury of Right to Ask Questions



Suggested Opening Charge To Jury

A trial is a search for the truth using the rules of law. Therefore, the court will allow members of the jury to ask written questions of any witness called to testify in this case. You are not encouraged to ask questions, because that is the responsibility of the attorneys. Nevertheless, if you believe that an important question has not been asked, or that an answer needs clarification, you may submit a question. Keep in mind that a witness scheduled to testify later in the trial may be the best person to answer that question.

A question may be asked in the following manner: Please write it down and pass the paper to the bailiff or the law clerk. Copies will then immediately be made for counsel and the court. The court will privately confer with the attorneys at a convenient time and then decide if the question is appropriate under Nevada law. If the question seeks factual information from the witness and is designed to clarify information about issues in this trial, the court or the attorneys may question the witness regarding the points raised in the juror question. No emphasis should be placed on the answer to the question merely because the question came from a juror. If a question submitted by a juror is not asked, no adverse inference can be drawn. The question was simply not allowed under the Nevada rules of evidence, and must be disregarded.

Jury Asking Questions-Procedure



Additional Explanation To Counsel

The law clerk or bailiff will write on the paper, under the juror's question, "plaintiff objects" or "plaintiff does not object," "defendant objects" or "defendant does not object." The parties are to review the question and indicate, in writing, their position. If there is not an objection by any party or by the court, counsel may then ask the question during the normal course of interrogation of a witness, without calling attention to the fact that a juror initiated the question. If there is an objection by any party, the question may not be asked until the court has heard the objection on the record, outside the presence of the jury, and the court has made a ruling on the admissibility of the evidence or on the form of the question.

If the court overrules the objection and allows the question, the court will pose the question to the witness. See NRS 50.115 and 50.145. All juror questions shall be retained by the court clerk as court exhibits and will be part of the official trial record.

Actual Jury Questions in the Cheek Case



has he been under
a docs. care; was
he tested for
schizophrenia,
is he on medication
or is he supposed to
be on meds.

was he ruled
competent?

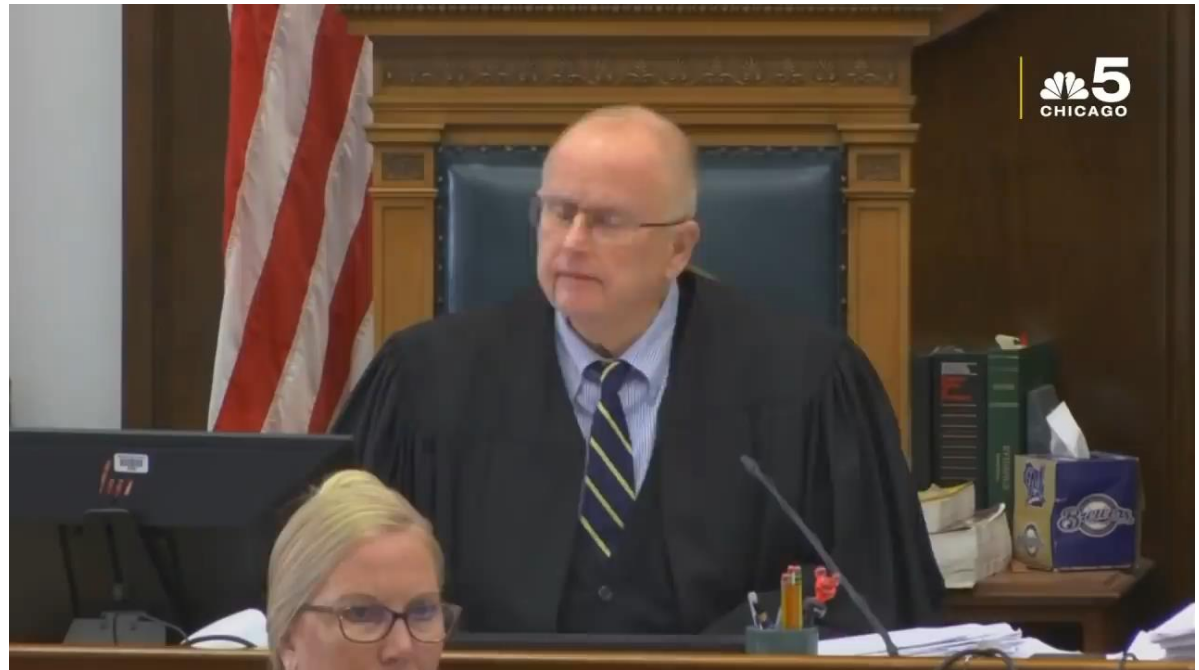
Jury Intimidation Concerns



Jury Protection



- **NRS 199.040** **Influencing juror or prospective juror is a felony**
- **NRS 199.030** **Jurors and others accepting bribes is a felony**
- **NRS 199.340** **Criminal contempt**
 - (1), (2). Disorderly, contemptuous or insolent behavior committed in the immediate view and presence of the court or jury, and directly tending to interrupt the proceedings or to impair the respect due to the court
 - 3. Breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of a court or jury



<https://youtu.be/6mCboPWTYZM>

News Reporter Following Jury Bus



<https://www.youtube.com/watch?v=inchAZDf8Po>

Man With AR-15 Protesting Outside Courthouse

Reading of Complaint and Preliminary Instructions



Reading of Complaint



- The clerk reads the entire complaint to the jury
- (unless Defendant is charged with DV 2nd in which case the Clerk will read a redacted copy removing references to a prior offense;
- or there are other charged offenses not being decided by the jury)
- The clerk states the day it was filed, and the plea thereto

Reading of Preliminary Instructions



- Explain the trial process

Defendant is entitled to presumption of innocence

1. Opening statements
2. State will introduce evidence
3. Cross-examination
4. Defendant may or may not present evidence

If there is an Objection



5. If an attorney makes an objection, I will then make a ruling as a matter of law
 - If I sustain the objection, it means I agree with the objection and disallow the question, testimony, or evidence
 - If I overrule the objection, it means that I disagree with the objection and allow the question, testimony, or evidence
 - I may also permit the attorney to rephrase the question to correct whatever was objectionable

Reading of Preliminary Instructions



6. It may be necessary for the judge to consult privately with attorneys
7. The law as given by the Court constitutes the only law you may rely upon and it is your duty to accept and follow it
8. Closing arguments
9. Jury will retire to the jury room to consider the case. Select a foreperson. Deliberate. Arrive at a unanimous verdict

Reading of Preliminary Instructions



10. The evidence which you are to consider consists of the testimony of witnesses and the exhibits admitted in evidence. Rules of evidence determine what evidence you may consider. **You may not consider testimony or exhibits to which an objection was sustained or which has been ordered stricken**
11. You must not be influenced in any degree by any personal feelings or sympathy for or prejudice against any party to this action, for each party is entitled to the same fair and impartial consideration
12. You are to determine the facts. You alone must decide upon the believability of the evidence and its weight and value

Admonition (NRS 175.401)



- Tell the jurors they may not discuss the case with anyone or remain within hearing of anyone discussing it until the case is submitted to them for deliberation. Must be advised at every recess
- Jurors are also not to read, watch, or listen to any report or commentary on the trial from any medium of information including all forms of social media, newspapers, radio, and television. Must be advised at every recess
- Tell jury to keep an open mind and not form or express any opinions during the trial. Must be advised at every recess

Trial Begins



Exclusion of Witnesses (NRS 50.155)

(see also NRS 171.204)



- You have the right to have all witnesses excluded from the courtroom during the trial of this case, if you so desire
 - If witnesses are excluded, advise witnesses to wait outside and not discuss the case with any other witnesses until all the evidence is submitted
 - Witnesses and victims must be provided a secure waiting area. NRS 178.5696. An attendant may be present in court to provide support to the victim. NRS 178.571

Misconduct by Defendant (NRS 175.387)



- - 1. Whenever a defendant interferes with the orderly course of a trial by disruptive, disorderly or disrespectful conduct, the court may:
 - (a) Order the defendant bound and gagged
 - (b) Cite the defendant for contempt
 - (c) Order the defendant removed ... and proceed with the trial
 - 2. No such order or citation shall issue except after the defendant has been fully and fairly informed that the defendant's conduct is wrong and intolerable and has been warned of the consequences of continued misconduct
 - 3. A defendant who has been removed from the courtroom may be returned upon the defendant's promise to discontinue such misconduct

Commencement of Trial



- Opening Statement: “are the parties ready to proceed?”



Opening Statements





<https://youtu.be/RLkNv9LUxuo>

My Cousin Vinny
Prosecution's Opening Statement



<https://youtu.be/Tbp3-Dp-lNc>

My Cousin Vinny
Defense's Opening Statement

Presentment of Cases





<https://youtu.be/W7YoxrKa4fo>

Defense Theory:

***My Cousin Vinny* Direct Examination**

Control and Objections



The judge controls the courtroom



- Mode and order of presentation (NRS 50.115)
 - 1. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence:
 - (a) To make the interrogation and presentation effective for the ascertainment of the truth;
 - (b) To avoid needless consumption of time; and
 - (c) To protect witnesses from undue harassment or embarrassment

Control (NRS 50.115)



- 2. Cross-examination is limited to the subject matter of the direct examination and matters affecting the credibility of the witness, unless the judge in the exercise of discretion permits inquiry into additional matters as if on direct examination
- 3. Except as provided in subsection 4:
 - (a) Leading questions may not be used on the direct examination of a witness without the permission of the court
 - (b) Leading questions are permitted on cross-examination

Control (NRS 50.115)



- 4. Except that the prosecution may not call the accused in a criminal case, a party is entitled to call:
 - (a) An adverse party; or
 - (b) A witness identified with an adverse party,
- And interrogate by leading questions. The attorney for the adverse party may employ leading questions in cross-examining the party or witness so called only to the extent permissible if the attorney had called that person on direct examination



<https://www.youtube.com/watch?v=SKvQrmNiiXw>

I strenuously object

A Few Good Men



Objections



- NRS 48.035 Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time
- 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury
- 2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence

Expert DV Evidence is Admissible



NRS 48.061 Effects of domestic violence

1. [E]vidence of domestic violence and expert testimony concerning the effect of domestic violence, including the effect of physical, emotional or mental abuse, on the beliefs, behavior and perception of the alleged victim of the domestic violence that is offered by the prosecution or defense is admissible in a criminal proceeding for any relevant purpose []
2. Expert testimony concerning the effect of domestic violence may not be offered against a defendant pursuant to subsection 1 to prove the occurrence of an act which forms the basis of a criminal charge against the defendant

Prohibitions on the use of certain evidence



- **NRS 48.069 Previous sexual conduct of victim of sexual assault:** Procedure for admission of evidence to prove victim's consent. (*see also* NRS 50.090)
- In any prosecution for sexual assault or for attempt to commit or conspiracy to commit a sexual assault, if the accused desires to present evidence of any previous sexual conduct of the victim of the crime to prove the victim's consent:
 - 1. The accused must first submit to the court a written offer of proof []
 - 2. If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury []
 - 3. [I]f the court determines that the offered evidence: is relevant and not required to be excluded under NRS 48.035
 - 4. The court shall make an order stating what evidence may be introduced...



Warning:
explicit language



<https://youtu.be/sAoglbG6c-8?t=37>

You're Out of Order

Jury Instructions



Instructions to the Jury (NRS 175.161-.211)

(See Benchbook)



- The instructions of law should be settled prior to the date of trial (and given after argument unless counsel stipulate otherwise)
 - Nevertheless, counsel must be given the opportunity to object on the record to individual instructions and offer alternative instructions and verdict forms for the record
- Read jury instructions to the jury with copies given to jurors or projected on screen
- Judge explains the beyond a reasonable doubt standard of proof—**statutory definition only**. NRS 175.211

Closing Arguments/Misconduct



Examples of Prosecutorial Misconduct



- “Appeal[ing] to juror sympathies by diverting their attention from evidence relevant to the elements necessary to sustain a conviction”
 - *E.g. Pantano v. State*, 122 Nev. 782, 793, 138 P.3d 477, 484 (2006) - prosecutor argued jury should convict the defendant to make the victim’s parents feel better
- Injecting personal beliefs or opinions into trial
 - *E.g. Turner v. State*, 136 Nev. 545, 556-57, 473 P.3d 438, 449-50 (2020) – prosecutor argued the State could have brought additional charges against defendant

Examples of Prosecutorial Misconduct



- Disparaging defense counsel personally or disparaging legitimate defense tactics
 - *E.g. Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84-85 (2004) – prosecutor used many adjectives and analogies to portray defense tactics as trying to fool or distract the jury and to imply that defense counsel had acted in bad faith
- Arguing facts or inferences not supported by the evidence
 - *E.g. Williams v. State*, 103 Nev. 106, 110, 743 P.2d 700, 703 (1987) – prosecutor contended the defendant has purchased alibi testimony although there was no evidence from which to draw that inference

Examples of Prosecutorial Misconduct



- Shifting burden of prove from State to defendant
 - *E.g. Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) – prosecutor asking “whose fault is it that we don’t know the facts in this case?” suggested that the accused had the burden of proving or disproving the crime
- Commenting on a defendant’s decision not to testify
 - *E.g. Gunera-Pastrana v. State*, 137 Nev. Adv. Op. 29, 490 P.3d 1262, 1268-69 (2021) – prosecutor stated “There's two people that *1269 know what happened, and [M.M.] told you what happened. She told you what he did to her.” indirectly referencing defendant’s decision not to testify

Preparing the Jury to Retire (NRS 175.441)



- Tell the jury it is time for them to retire to the jury room for deliberation and that copies of jury instructions will be provided along with the evidence admitted during trial
- **Jurors are to relinquish all cell phones and other communication devices to the Marshal/Bailiff**
- **No juror outside contact or internet connections during deliberations**

Preparing the Jury to Retire (NRS 175.441)



- Clerk swears in the jury's marshal/bailiff
- Jurors should provide names and phone numbers if they wish the court to communicate with a significant other that the jury is in deliberation and jurors cannot speak to anyone else until done
- Excuse the jurors and get the cell number for the alternate juror and ask him/her to stay there or within the vicinity in case his/her services are requested

Jury Deliberations



Jury Deliberations

(see generally NRS 16.120)



- After being charged, the jury goes into deliberation, the process of deciding whether a defendant is guilty or not guilty
- During this process, no one can contact the jury without the judges and lawyers present except the marshal/bailiff
 - The marshal/bailiff's job is to ensure that no one communicates with the jury during deliberations. Every communication must be in writing and preserved

Jury Deliberations



- The jury will take the exhibits introduced into evidence and the judge's instructions into the jury room. NRS 175.441
- The court provides the jury with written forms of all possible verdicts, so that when a decision is reached, the jury has only to choose the proper verdict form
- The verdict in a criminal case must be unanimous;
- 3/4 in a civil case

Jury Requests During Deliberation (NRS 175.451)



- If the jury has a question on the law, procedure or their comfort, the foreperson must write a note to the judge and give to the marshal or bailiff
- Before the jury is given any information, a copy of written request is to be given to the District Attorney and Defense Counsel who have a right to be present and comment before the court makes its response, which must be in writing

Jury Sequestration



- If the jury cannot come to a decision by the end of the day, the jurors may be sequestered, or housed in a hotel, secluded from all contact with other people and media
- The jury will almost always go home at night
- The judge must instruct the jurors to follow the normal rules when in recess. NRS 175.401
- And especially not to consider or discuss the case while outside the jury room

Possible Hung Jury



- If jury indicates to the Marshal they are deadlocked, the court should notify counsel and solicit input as to the proper response
 - If the jury has been deliberating for a short period of time, the response might be to simply tell the jurors in writing to keep deliberating
 - If the jury has been deliberating for a lengthy period of time, then a written inquiry from chambers to the foreperson of a jury as to the numerical division of the jurors - without indicating which way the jurors are leaning
- The court may then decide whether or not to give the jury an *Allen* instruction (see Benchbook)



<https://youtu.be/YqB7hMVVT-o>

**Legal experts reveal what takes place
in jury room during deliberations**

Announcement of the Verdict



Announcement of the Verdict



- After it reaches an agreement on the verdict, the jury will notify the marshal/bailiff. The judge will notify the lawyers and the defendant to immediately return to open court
- Everyone is present in court for the reading of the verdict

Return of the Jury



- Ask the foreperson if the jury has reached a decision
 - If yes
 - ✦ the foreperson hands the verdict to the marshal, who hands the verdict to the judge
 - ✦ the judge will read the verdict to her/himself and hand it to the clerk if there are no inconsistencies or any incompleteness
 - ✦ The clerk will read the verdict aloud (alternatively, foreperson can read it)

Hung Jury (NRS 175.461)



○ If no decision

- ✦ Ask the foreperson if the jury might reach a verdict if given more time
- ✦ If the foreperson says no, then the court announces the jury has failed to reach a verdict and declares a hung jury and a mistrial

Mistrial



- The case is not decided, and it may be tried again at a later date before a new jury, or the prosecution may decide not to pursue the case further and there will be no subsequent trial, or a plea agreement may be reached (or settlement in a civil case)
- The jury is dismissed in the same manner as if there had been a verdict

Poll (NRS 175.531)



- When a verdict is returned and before it is recorded, ask the parties:
 - Does either party request that the jury be polled
 - ✦ If the request is made, the clerk calls roll and asks each juror if this is his or her verdict. If any juror answers no, the jury must be sent out for further deliberation
 - The clerk then records the verdict of the jury in the minutes of the proceeding

Dismissal of Jury



- Thank the jurors for their service
- Excuse the jury
- Tell them they are now free to discuss the case with anyone but they are not required to answer any questions
- Jurors are provided (or promised checks) (\$40 a day plus mileage)

Actions towards the defendant



- If the verdict is not guilty
 - The defendant is ordered released from custody and any bail posted exonerated
- If the verdict is guilty
 - A judgment of guilt is entered and defendant is sentenced at a later time after notice is given to the victim of the right to provide an impact statement. Bail may be increased or revoked

Jury Dismissal



- Again, thank the jurors!
- Do not criticize the jurors or verdict
- Send thank you letter. Include a questionnaire to asking how to improve the process. (See example in excerpt B)
- Gather all evidence/exhibits/written questions to make sure the record is preserved. Destroy jurors' notes if left behind

Judgment



- The verdict of the jury doesn't take effect until the judge enters a judgment on the decision – that is, an order that it be filed in public record after sentencing
- In criminal cases, the judge generally has no authority to modify the verdict
- (*but see* NRS 175.381(1) (advisory verdict); (2) and (3) (judgment of acquittal or new trial))

Sentencing



- If the defendant is convicted, the judge will set a date for sentencing
- The judge will inquire whether the victim is present, and if so, whether the victim would like to address the court
- The victim has a statutory right to speak last at sentencing (NRS 176.015)

Mock Trial Time



Mock trial: State v. Johnson



- Roles
 - Judge: Hon. Scott Freeman (Second Judicial District Court)
 - Prosecutor: Hon. Melisa De La Garza (Las Vegas Justice Court)
 - Defense Counsel: Zachary Meyer (Federal Deputy Public Defender)
 - ✦ For Defendant Ronald Johnson
 - Victim: Michelle Gibbons (Legal Assistant at Heritage Law)
 - ✦ As victim Mikayla Roe
 - Witness: Hon. Lidia Stiglich (Nevada Supreme Court)
 - ✦ As witness Lisa Anderson
 - Jurors: judges from the audience (all court levels)
 - Narrator and Court Clerk: Hon. Michael Gibbons (Nevada Court of Appeals)

2001: A Space Odyssey opening



- Richard Strauss
- *Also sprach Zarathustra*
 - (Friedrich Nietzsche: *Thus Spoke Zarathustra*)

