The Journal Of The Section Of Litigation American Bar Association

Litigation

Vol. 9 No. 1 Fall 1982

Trends

The Trials of Vickie Daniel

by Jack B. Zimmermann

The scion of a Texas dynasty bled to death in his country home on a rainy January night in 1981. The cause of death was a severed aorta, the result of a round from a .22-calibre rifle allegedly fired by his attractive young wife.

The dead man, Price Daniel, Jr., had been the speaker of the Texas House of Representatives and a candidate for attorney general of Texas. His father, Price Daniel, Sr., was a former governor of Texas, a former United States senator, and a former justice of the Supreme Court of Texas. The Daniel family is one of the leading families of Liberty County, and the son's death shocked all of Texas.

His widow, Vickie Daniel, was indicted for the murder of her husband a short time after his funeral. Our firm defended Mrs. Daniel.

The defense of this case differed from the usual murder defense and presented several novel questions of law and trial strategy. After the death, our client had been put to trial in a child custody case by the sister of Price Daniel, Jr., and forced to testify. We decided to prove in the murder trial that the wife had accidentally fired the rifle whose round pierced her husband's stomach. We tested the correctness of our theory by dismissing the jury after two days of defense testimony, and allowing the judge to decide the case.

Liberty, Texas, where the death and both the trials took place, is a town of 10,000 people 45 miles east of Houston. Two state district judges with felony jurisdiction sit in Liberty. Both judges recused themselves, and a special judge, Leonard J. Giblin, Jr., was assigned from nearby Beaumont.

The defendant stood trial for murder only after she had testified in one of the most highly publicized child custody cases in Texas history. Shortly after the death of Price Daniel, Jr., his sister had filed for custody of the couple's two young sons. Vickie Daniel had already been indicted for murder. The murder case was held back, and the custody case proceeded to trial first. Both district judges had also recused themselves from the custody case, and Judge Sam Emison of Houston was designated to preside at the custody trial.

It is quite unusual for a custody case to precede over a criminal prosecution over the same issue. The theory of the custody case was that the mother had murdered her husband; therefore, the children were in danger from their "unfit" mother. As Judge Emison later testified at the pretrial stage of the murder case, he had presided over some 200 child custody cases, and the only one that preceded a criminal case involving the death of one of the parents was the Daniel case. Even the presumption of Vickie Daniel's innocence did not forestall the bitter, six-week custody trial. The jury ruled that the mother could keep her two sons, and seven months later, the murder trial began.

Because of great public interest in the murder case and the prior intense publicity, the court conferred with the lawyers for both sides at the outset regarding the need for a gag order. Judge Giblin, concerned that the case not be tried in the press, suggested that certain guidelines be met without requiring a gag order. All lawyers agreed and voluntarily complied. No gag order was ever needed, although there were daily stories in newspapers and on television throughout Texas and portions of neighboring states.

The rules were that no future testimony or evidence would be discussed, and trial strategy was not to be disclosed. The lawyers could discuss the impact or significance of daily activities and give their reactions to matters of record. In abiding strictly by these guidelines, we imposed a total ban on interviews with Vickie Daniel.

It was not easy to remain courteous and cordial to reporters from the press, radio, and television and still comply with the guidelines. First of all, the press representatives were nice people to whom it was natural to be courteous. Second, it was important to honor their requests for interviews at each intermission and at the

The author is a partner in Haynes & Fullenweider in Houston. He represented Vickie Daniel in her murder trial in 1981, together with Clinard J. Hanby.

end of each day so that the defense was treated fairly in the news. Finally, it was difficult to carefully word every recorded response, because a three-minute interview might get cut to 20 seconds on television. Our client was relieved, of course, at our rule barring interviews of her because it took all the pressure of the reporters away from her.

Logic of Solomon

A novel question surfaced at the pretrial motions. The defense moved to prohibit the use at the criminal trial of all trial and deposition testimony of Vickie Daniel from the civil trial on the ground that the testimony was legally involuntary. Testimony was elicited from the civil trial judge, counsel for Price Daniel's sister, the defendant's counsel Richard Haynes of Houston, and the defendant herself.

In the custody case, Judge Emison had denied the petitioner's motion for a bench trial on the issue of temporary custody (from which there was no right of appeal), and ordered instead a full jury trial on permanent custody. But he had taken this action on the proviso that Mrs. Daniel would waive her Fifth Amendment right not to testify against herself and submit to depositions and trial testimony. She testified that Mr. Haynes had advised her that a bench trial at which she invoked her right not to be a witness would most likely result in the loss of her children, probably until a jury trial could be reached on the docket, an extended time. She testified that she thought she had no choice but to request a full jury trial and testify to keep her children. Finally, she testified that her understanding was that she could not have a jury trial and a right to appeal unless she testified. The state argued that her decision to testify was not coerced and that she voluntarily waived her right to remain silent.

In this case of first impression in Texas, Judge Giblin applied the logic of Solomon: he ruled that the waiver by Mrs. Daniel was voluntary, rejecting our contention about judicial coercion. However, he apparently accepted our argument that permitting the state to introduce the transcripts of the civil testimony in its case in chief would amount to permitting the state to call a defendant in a criminal case to the stand. Therefore, he applied the federal analogy when there has been a technical Miranda violation and issued a preliminary ruling that the state would be permitted to utilize the civil testimony only to impeach or rebut the defendant's testimony in the criminal trial. If the state considered it essential to use such evidence in its case in chief, the prosecution would have to approach the bench and obtain a new ruling. While certainly not a total victory for the defense, the ruling did avoid the unfairness of permitting the state to use the evidence in its case in chief. At the same time, the ruling gave the state a means to expose inconsistent statements if the defendant testified differently at the murder trial. Actually, not one word of Mrs. Daniel's civil testimony was introduced in the criminal trial.

At the civil trial, all parties had been ordered by the court to submit to examination by a psychiatrist. At the criminal trial, we moved to exclude any report or testimony from this examination on the ground that it had been involuntary and was also irrelevant since no insanity defense or issue of mental competence was being raised. The court granted this motion, and the uncomplimentary report of the doctor from the other side in the civil trial was not admitted.

Another unusual question of law litigated before the murder trial was whether the searches of the family home, conducted for several days after Price Daniel's death without a search warrant and while the defendant was hospitalized because of an hysterical reaction, were made in violation of the Fourth Amendment prohibition against unlawful searches. The state argued that the deceased's sister (named executrix by his will) had authorized the searches and that an emergency exception applied. The defense argued that the defendant had not consented and that *Mincey v. Arizona,* 434 U.S. 1343 (1977), controlled. The court ruled that only the evidence seized on the night of the shooting and until the investigating officer completed his initial search was admissible. Thus much of the state's physical evidence, including clothing, documents, and weapons, was not admitted.

With these preliminary rulings, the trial got underway. The Liberty County district courtroom, reported to be the largest in the state with almost 300 seats, still had revolving fans suspended from the high ceiling. It also had only one long table for counsel for both sides to share. The court granted our motion for separate counsel tables, although our suggestion merely to saw the 100-year-old original table in half was not taken.

The procedure for jury selection was unusual. Because of the intense publicity of the prior trial and the small size of the county's population, 250 prospective jurors were called to select 12. It had been agreed to devote a week to jury selection and then to consider a change of venue.

The first day of jury selection was to be used to accept statutory exemptions and physical excuses. The second day, each side was to be given four hours to ask general questions of the remaining panel as a group. The remainder of the week was to be used to question the remaining members of the panel individually, out of the presence of the others, until 32 qualified veniremen were selected. After each side had exercised 10 peremptory challenges, the final 12 would be sworn.

As it developed, there were still about 120 prospective jurors after the first two days. When the first individual voir dire took 45 minutes, the judge decided to change the procedure and shorten the voir dire. This proved to be a crucial decision for the strategy of both sides.

The panel was split in two groups of 60, and only the first group returned the next day. Instead of individual questioning outside the presence of the others, the state was permitted to ask questions of members of the first panel, but while all were present. The defense was then given an equal amount of time for the same process. More than 32 panel members remained at the completion of this procedure, so the court directed the lawyers to use their 20 strikes. By the end of the third day, 12 jurors were sworn. Yet, because of the change in procedure, neither side was totally satisfied with the depth of knowledge gained of each juror. This became a critical consideration later in the trial.

Jury selection alone distinguished this trial from the ordinary. On the first day, when the courthouse was full and the judge was taking legal excuses and exemptions from the group as a whole, we noticed a gray-haired man sitting at the side of the courtroom in the first row. He and a small group of other people were watching the proceedings carefully. We saw him make notes when members of the jury panel came to the bench. We double-checked to make sure that he was who we thought he was. At the next opportunity, we approached the bench off the record and requested that the court excuse Governor Daniel from the courtroom. We did not think it was proper for such an influential man from the county to be monitoring the citizens called for jury duty in such a manner. The district attorney said he saw nothing improper, and the court denied our request.

As the size of the panel began to shrink, and the court was beginning to entertain the subjects of bias and pretrial publicity, we became more concerned because it appeared that notations were being made by Governor Daniel on what appeared to be a jury list. At that point, we objected on the record and moved for his exclusion from the courtroom. The objection and motion were denied.

Our request to make a bill of exceptions was granted, and after the panel was excused for the day, we called Governor Daniel to the stand. He acknowledged that he had used a copy of the jury list to note the comments of prospective jurors during the questioning by the court. He said his reason was that he did not like some of the comments that had been made by jurors excused from the civil trial. He said he wanted to know if anyone had bad things to say about the Daniel family. He testified that he needed this information to be on the lookout. He denied that he was there to intimidate the panel, claiming instead that he was acting only as a check on the prospective jurors.

We moved to dismiss the murder charges on the ground that the defendant's right to a fair trial had been violated. That motion was denied, but the court stated that it would entertain a motion to quash the entire panel.

Before taking that step, we learned that it would take four months to arrange schedules, courtrooms, and paperwork to call 250 more jurors. Rather than do that, we moved to invoke the rule prohibiting witnesses from attending sessions of court, since the Daniel family members appeared on the state's witness list. This motion was granted, and the governor was sworn as a witness and ordered not to discuss the case with anyone but the lawyers. He did not appear in the courtroom again until final argument.

A significant aspect of the selection of this jury was that the defense was able to devote 30 minutes to question members of the panel regarding their perceptions of the battered wife syndrome. To some, the term "battered wife syndrome" connotes only physical abuse such as beating. Actually, the syndrome entails domination by emotional abuse as well. Because this was the theory most applicable to our facts, I referred to it as the "dominated wife syndrome" after the initial questioning.

The Abused Wife

I was surprised how much information the prospective jurors had about this subject. While the problem has doubtless always existed, its classification, study, and public acknowledgment is relatively recent. We first determined the depth of knowledge of the symptoms and characteristics of the battered wife syndrome itself, and then explored in some detail the reaction the prospective jurors had to its application to the law of homicide and self-defense. In Texas, the statute dealing with criminal homicide states:

> In all prosecutions for murder or voluntary manslaughter, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

TEX. PEN. CODE § 19.06.

Thus the prospective jurors were examined (and thereby instructed) as to the application of this statute seen through the eyes of an abused wife. I reviewed the Texas law of self-defense as follows:

> When a person is attacked with unlawful deadly force, or she reasonably believes she is under attack or attempted attack with unlawful deadly force, and there is created in the mind of such person a reasonable expectation or fear of death or serious bodily injury, then the law excuses or justifies such person in resorting to deadly force by any means at her command to the degree that she reasonably believes

immediately necessary, viewed from her standpoint at the time, to protect herself from such attack or attempted attack. And it is not necessary that there be an actual attack or attempted attack, as a person has a right to defend her life and person from apparent danger as fully and to the same extent as she would had the danger been real, provided that she acted upon a reasonable apprehension of danger, as it appeared to her from her standpoint at the time, and that she reasonably believed such deadly force was immediately necessary to protect herself against the other person's use or attempted use of unlawful deadly force.

You are instructed that in determining the existence of real or apparent danger, it is your duty to consider all of the facts and circumstances in the case in evidence before you and consider the words, acts, and conduct, if any, of the deceased at the time of and prior to the alleged assault and consider whatever threats, if any, the deceased may have made to the defendant and consider any difficulty or difficulties which the deceased had had with the defendant, and in considering such circumstances you should place yourselves in the defendant's position at the time and view them from her standpoint alone.

The panel was then examined (and thereby instructed) about the application of this defense when viewed from the standpoint of an abused woman. Critical points covered in the carefully constructed questioning included that we were dealing with a woman, not a man, and testing the reactions of a reasonable woman when defending herself against perceived danger from a man. This led to some interesting responses, for example, that the average woman was as strong physically as the average man. That response was seized upon to educate the jury that a woman five feet two inches tall and weighing 110 pounds could not be expected to defend herself only with her hands against a man five feet eight weighing 155 pounds.

During lunch someone called in a death threat against the defendant.

Our strategy was always to use the words "woman," "she," and "her" in the standard jury-charge language, so that the prospective jurors began to think in terms of how these principles applied to this case, where the citizen on trial was a woman. We stressed the equalizer concept—that is, that it was reasonable for a physically weaker person, here a female, to protect herself against a stronger attacker, here a male, and resist the infliction of death or serious bodily injury by using some type of weapon to equalize the force involved. Throughout this portion of voir dire, we carefully planned to focus on the plight of this real live woman, Vickie Daniel, and to avoid even the hint that the women's movement or some other cause was the issue.

Thus the members of the eventual jury were prepared for final argument, during which the reasonableness of the expectation of fear was to be measured in the context of a female who had been abused over a period of time and had experienced difficulties with the attacker. We wanted the jury to gauge her response when viewed from her standpoint alone. The key point we tried to remember when presenting the theory of the battered wife syndrome to a criminal jury was that it is not a novel defense, but a longstanding part of the law of homicide and self-defense in Texas.

Death Threat

During the afternoon of the third day of jury selection, we experienced perhaps the most memorable aspect of this jury selection. When prospective jurors were approaching the bench for private discussions with the court and the lawyers, I was standing with my back touching the bench, looking out at the spectators. Extra deputy sheriffs were sitting inside the bar and standing at the doors to the courtroom.

Over lunch, someone had called in a death threat against the defendant. With the permission of the court, I had Mrs. Daniel move her chair to where I was standing. I positioned myself so that I could hear and speak, but simultaneously observe the doorways and spectators. Jury selection proceeded. Only afterward did the press learn of the threat.

Cross-examination became a critical aspect of the trial. In Texas, no act done by accident is an offense. One must voluntarily engage in conduct or voluntarily perform an act that is prohibited before she can be held criminally responsible. Obviously, the testimony of a credible, strong witness can raise the issue. But if only the accused states that an act was accidental, the jury may not be much impressed.

Since our client insisted she neither intended to kill nor to shoot her husband, we looked for scientific evidence to determine how the shot had been fired. As a result, we were able to raise the defense of accident on cross-examination. The prosecution, in attempting to disprove accident, was not able to overcome the reasonable doubt raised on this issue.

For the scientific evidence essential to this theory, we used the testimony of the state's witnesses: the chief medical examiner and experts on ballistics, weapons, and fingerprints. Dr. Joseph Jachimczyk of Houston, the medical examiner, described the point of entry and trajectory of the bullet. He then disclosed that remnants of trace metal were found on Price Daniel's hand in a pattern consistent with grabbing a cylindrical metal object the size of a .22 rifle barrel. He testified that the test results were the color one would expect from the metal on the barrel of the weapon.

I drew a large hand on poster board. The pattern

established by the expert's test was transferred to the drawing and colored in red. This was done not only to illustrate for the jury what had been described in words, but also because the studies show that a juror remembers what he sees to a far greater degree than what he hears.

The ballistics expert testified that the distance from the muzzle of the weapon that killed Price Daniel, Jr., to the point of entry of the bullet was about 15 inches. He demonstrated this distance by holding the weapon in front of the jury while I grabbed the barrel, showing that the muzzle was within arm's reach. The weapons expert testified that considering the trigger pull, it was possible for the weapon to discharge if the butt were struck hard enough against an object while a finger was on the trigger. The trial judge was also aware that an FBI expert's report stated that the weapon had been tested and would fire without anyone pulling the trigger if the bolt were struck from the rear with sufficient force.

Finally, a fingerprint expert was unable to develop identifiable fingerprints from the smudges he found on the barrel. This expert also testified that he asked the sheriff's department to fingerprint the dead man before burial but this was not done. He never was provided with Price Daniel's prints to compare to the prints he did develop on the other parts of the weapon.

Pointing the Rifle

I asked the medical examiner to step in front of the jury and point the rifle at me. I then jumped on a chair, and asked him to point the rifle up at me at the same angle as the trajectory of the bullet's path in the body. When I reached out and quickly jerked the rifle with my hand, he agreed the muzzle distance, trajectory, angle, and trace metal tests performed on the body were all consistent with what one would expect to find as a result of the demonstration.

This testimony was tied together. We put on evidence that showed the distance from the door jamb behind Vickie Daniel when the shot was fired to the stomach of a man Price Daniel's height. This distance was measured with the man standing on the third step of the folding ladder coming down from the attic, where Price Daniel was standing when he was shot. The distance was the length of the weapon from butt to muzzle, plus 15 inches.

In final argument, I argued that it was not clear whether Price Daniel had jerked the rifle toward him to get it away from Vickie, thereby discharging the weapon, or pushed it backwards against the door jamb, thereby discharging the weapon. Either explanation fit the scientific evidence and was not disproved by the state. Both acts were clearly involuntary, I argued. The trigger was not intentionally pulled by Vickie. Therefore, I argued, the acts were not a violation of the criminal statutes.

We had to show the jury why Vickie was authorized under the law to have the rifle in her hands in the first place. Otherwise, we risked a finding of guilt on a lesser included offense. The Texas statutes say that a person is justified in threatening the use of force against another when she reasonably believes the threat is immediately necessary to protect herself against the other's use of unlawful force or attempt to use it. Justification even extends to a threat to cause death or serious bodily injury by the production of a weapon, as long as the purpose is limited to her creating an apprehension that she will use deadly force if necessary.

Our theory was that the act was not voluntary and that the defendant was lawfully defending herself against an attack when the shooting occurred. Under this reasoning, no crime had been committed at all. This defensive theory required the application of complex legal principles. This was neither the typical accident that follows a struggle over a weapon nor the classical self-defense case.

Although we had selected the jury carefully and we believed the atmosphere in the courtroom was sympathetic toward Vickie Daniel, we began to consider whether the case should be decided by the jury or the judge. On the one hand, we confidently believed that the overwhelming majority of the jury doubted the state's contention that this was an intentional murder. We also thought the jury believed the defendant had been unfairly treated. On the other hand, we discovered after testimony began that one juror had failed to disclose that, in the murder case at which she had acknowledged being a state's witness, the victim had been her husband.

When the state rested, we thought we were in a good position for an instructed verdict. In the argument we contended that reasonable doubt existed as a matter of law. The state argued that there was sufficient evidence to make out a fact question for the jury. During this discussion, the subject of the appropriate test for the court to use surfaced.

Waiving the Jury

The strength of the prosecution's case in chief need not be of the same character to avoid an instructed verdict when a jury is sitting as when there is a bench trial and the defense moves for a judgment of acquittal. The court stated it was going to deny our motion for an instructed verdict because there was a jury question. At that point, I remarked that I ought to discharge the jury, so that the test would change, and move the court for a judgment of acquittal.

The district attorney knew I would not do that, so he told me to go ahead. In Texas, once the case has begun, the approval of the state and the court is required to dismiss the jury. At that point the judge said if the lawyers for both sides agreed, he would give his approval to a motion to discharge the jury. With a strong, believable, mistreated client for a witness, though, we dismissed the thought.

After the defendant's testimony, which we believed was convincing, she began to say that she wanted the case to end. The ordeal expected on cross-examination had not developed. She was beginning to show the effects of the six-week custody trial and the three-week murder trial. She was reliving the trauma of the killing. We began to discuss whether to ask the court for a bench trial. Both the district attorney and the judge had stated that they would agree to dismiss the jury, although we

(Please turn to page 60)

Vickie Daniel

(Continued from page 37)

doubted they thought we would do it.

On the second day of the case for the defense, we proved the wife had been bruised and presented other evidence of abuse during their marriage. We were now convinced that the state had not proven its case. After court, I asked the district attorney if he was serious about agreeing to a bench trial. He said he was. We both acknowledged that a mistrial was likely, thanks to the juror whose husband had been the victim. I expected a second criminal trial would follow.

My co-counsel and I discussed the following points that told us to go to the court alone:

1. The prosecution had not proved its case.
2. Because of the legal complexity, a jury might not be able to apply the law to the facts as well as the judge.
3. There was a strong chance of a mistrial and a second prosecution for our client, which would mean her third trial.
4. We could not know how much longer the case would continue if we put on two more

days of testimony followed by rebuttal and surrebuttal, and our client's emotional state was changing quickly.

We decided that trying the balance of the case to the judge should produce an acquittal. The trial would end much sooner because each side would trim its witness list if no jury were sitting, especially the number of its character witnesses. We were convinced we were correct on the law and the facts; we hesitated only about whether the judge could be trusted to do the right thing if the state's case was unproved. After all, this was a major case, perhaps the most publicized murder trial of the year in Texas. Authors were writing books; movie rights were being hinted at by others. The Daniel family was one of the most powerful, influential, and wealthy in the state. Could we rely on this judge?

I called my office. One partner said, "Don't do it. You don't know the judge at all." I then called my partner Richard Haynes. He was trying a case in Corpus Christi. When I told him what I was considering, he said, "You're considering *what*?"

Because we were both in trial in different cities at the same time, he knew what had actually occurred in the Daniel trial only from the newspapers. His advice was that he accepted my analysis of the facts and the law but that neither of us knew the judge. Haynes gave me names of Beaumont lawyers to call and left me in an uncomfortable position with this advice: you are the commander in the field; you know the case as it has developed. Reach a decision on the judge, and if you have a doubt about him, do not waive the jury. We wake up in the morning and go to bed at night praising the jury system. Waive the jury only if it will further the client's interests. Do not gamble with her life.

I called the Beaumont lawyers. I spoke with the court reporter and the bailiff who worked with the judge every day. I reviewed the way he had handled the case, beginning with his ruling that our motions were not timely filed two months before trial because of the technical wording of the statute. I recalled how he had ruled on the pretrial motions and how he had handled the dozens of objections lodged every day for three weeks. I concluded that in every ruling he had listened to argument, read any authority cited, and ruled in an appropriate manner. Based on our trial briefs and arguments, he had excluded all of the physical evidence taken after the first 20 hours, the results of the court-ordered psychiatric examinations of the accused in the civil case, several statements made by the defendant on the night of the shooting, and her civil testimony.

On our motion, he had reviewed the state's file after the state rested and provided us with several items of exculpatory evidence, including the FBI report that the weapon was subject to discharge without pulling the trigger. He had permitted a full and searching cross-examination of all witnesses by each lawyer. We considered his evidentiary rulings correct almost all the time, and the wrong ones were on minor issues. He listened, and he seemed to rule for a reason rather than arbitrarily.

We decided that this criminal district judge knew the law. He had a reputation for being state-oriented, but he also was known for having the courage to decide cases on their merits. After a sleepless night, I went to the judge on the morning of the third day of the defense's case and told him we wanted to dismiss the jury. The district attorney signed the waiver, and the judge inquired of Mrs. Daniel whether she understood and agreed with the waiver. The judge announced to the jury that their service in the case was appreciated and they could go back to their homes and businesses.

The press polled the jury and reported ten votes to two for acquittal. The two in the minority (one being the woman whose husband had been killed by a defendant acquitted on a theory of self-defense) did not hear instructions on the law of accident, self-defense, presumption of innocence, burden of proof, and reasonable doubt. They did not hear the argument of counsel. If they had been properly instructed and heard argument, I believe they would have reached the same conclusion the others had reached.

With the jury excused, the defense concluded its case that same day. The next day, the state put on a short rebuttal. Argument followed.

At noon on Friday, October 30, 1981, Judge Giblin thanked counsel for their arguments, and announced that the court would be in recess for 20 minutes. At exactly 12:20 P.M., the court was called to order. The judge announced: "Mrs. Daniel, I find you not guilty." A crowd of 300 roared. The judge quickly adjourned court and left the bench. The trials of Vickie Daniel were over.