



We're Just Going to Talk

Presenting Your Case in Opening Statement and Closing Argument¹

By Victor I. Vieth²

"The heart of a fool is in his mouth, but the mouth of a wise man is in his heart."

—BENJAMIN FRANKLIN³

Introduction

Although we sometimes assert that it is actions and not words that matter, the reality is that words matter a great deal—and they often are the cause of actions.⁴ In the courtroom, a jury renders a verdict based on the evidence, but the words of the prosecutor guide jurors through the maze of testimony and exhibits, and aid the trier of fact to see the guilt of an offender.

This article provides a roadmap for child abuse prosecutors to use in drafting and delivering an opening statement or closing argument, particularly for those cases in which a verdict rests on the credibility of the accuser versus the accused. Although some case law and learned treatises are cited in support of the recommendations, case law differs throughout the country, and even within a particular state, judges often have their own views as to permissible opening statements or closing arguments. Accordingly, make sure your presentation to the jury or judge is allowable in your jurisdiction.

Opening Statement

Although an opening statement is primarily an outline of what the government expects the evidence to be,⁵ the importance of the prosecutor's opening statement in a case of child abuse cannot be

¹ This article was previously published as two separate articles more than a decade ago. In this draft, the articles have been combined and updated, and several cases have been added in support of the various arguments advanced.

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³ PEGGY ANDERSON (ed.), GREAT QUOTES FROM GREAT LEADERS 25 (1992).

⁴ As one example, the eloquence of Abraham Lincoln contributed to his success as a leader during the Civil War. See RONALD C. WHITE, JR., THE ELOQUENT PRESIDENT (2005).

⁵ Thomas E. Dukes & Philip Frank Moring, *Don't Say It and Don't Let Them Say It Either: A Compendium of Improper Opening Statements and Closing Arguments*, 30 No.3 Trial Advoc. Q.19 (2011); *Chin v. Caiaffa*, 42 So.3d 300, 307 (Fla.3d DCA 2010).

overstated. At the close of an often lengthy voir dire process, jurors are anxious to see what the case is really about.⁶ Many jurors will develop a bias—either in favor of or opposed to the government's case—based on the prosecutor's opening statement. Although an opening statement is not an argument for finding a defendant guilty, it can be equally persuasive.⁷

Persuading the Jury Through Your Opening Statement

Prosecutors can do at least two things during their opening statement to help persuade a jury toward the government's case. First, a prosecutor can present a narrative of the fact pattern. Second, a prosecutor can develop and articulate a theme for the case. Each of these trial techniques is more fully discussed below.

1. *Present a narrative account of the facts and evidence.*

A narrative account of the fact pattern is generally more effective than a recitation of what each witness will testify to. As one court notes, there is “nothing wrong with a narrative as long as it remains clear to the jury that the narrative is a prediction of what will be established by the evidence.”⁸

In developing a narrative, the prosecutor may want to simply provide a chronological recitation of the facts. The prosecutor may also want to do what many newspaper reporters do: provide a “teaser” to capture the attention of the audience. A teaser takes a portion of the fact pattern, usually from the middle or end of the narrative, and places those facts up front in the presentation. For example, assume the victim was chained in a cellar for years. During that time, the child was beaten, starved, raped, and eventually murdered by her mother and father. After the killing, the parents tossed the naked body in a ditch where it was discovered the next day by a man driving home from work. A prosecutor could take the end of this “story,” the discovery of the body, and place it up front in the opening statement as a means of capturing the attention of the jury. The opening statement might start like this:

On January 18, 2019, Robert Smith was anxious to get home from work. It had been a tough day at the office and he couldn't wait to get home, change clothes, and make it to his weekly racquet ball game. On this particular day, though, Mr. Smith would not arrive home in a timely fashion. In fact, he never did make it to that racquet ball game. For as Mr. Smith was driving home on I-90, he saw out of the corner of his eye something that appeared eerily human. He slowed and then stopped his car. He got out, walked to the side of the road, and there in the ditch he saw something he will never forget. He saw a girl. A girl not more than 10 years of age. A girl who was obviously beaten, obviously emaciated, obviously dead. Who was this girl? How did she get there?

Although the teaser offered above is not an argument, it is a persuasive recitation of the facts in that it brings the jurors inside the mind of the man who discovered the body—a man who could just as

⁶ “Most jurors are anxious to see the selection process end and are eager to find out what the case is *really* about. Their attention will be at a high point as you stand to deliver your opening statement.” AMERICAN PROSECUTORS RESEARCH INSTITUTE, INVESTIGATION & PROSECUTION OF CHILD ABUSE 316 (3rd ed. 2004).

⁷ Although the purpose of an opening statement is to “outline the evidence the State intends to present to support the charges, the opening can go far in persuading jurors of the defendant's guilt even though argument is usually not permitted.” AMERICAN PROSECUTORS RESEARCH INSTITUTE, INVESTIGATION & PROSECUTION OF CHILD ABUSE 316 (3rd ed. 2004).

⁸ *Commonwealth v. Deloney*, 794 N.E.2d 613, 618 (Mass. App. Ct. 2003).

easily have been one of the jurors. In all likelihood, the jurors are very attentive, if not on the edge of their seats, wondering who would commit such an atrocity—and what needs to be done to hold the perpetrator(s) accountable.

2. Develop a theme and weave it throughout the opening statement.

A second way the prosecutor can be persuasive during an opening statement is to articulate a theme for the case. A theme is a one- or two-word sentence or phrase that summarizes everything the case is about. Think of it as a bumper sticker—a catchphrase that emotionally connects the jurors to the case.

A possible theme that works in many cases of child abuse is the theme of “family secret.” Think of all the typical components of a child sexual abuse case that can be woven together with this theme. For example, the prosecutor looking for a way to help the jurors understand the victim’s delayed disclosure might say: “This is a case about a family secret. A secret so horrible, the victim could not and did not tell for a very long time.” A prosecutor concerned about how the family rallied around the perpetrator and ostracized the child victim could utilize this theme and say, “The evidence will show the code of silence was so deeply ingrained in this family that anyone who violated the code would be cast aside.”

Another theme that works well in most cases of child abuse is the theme of “vulnerable child.” This theme works particularly well in cases involving an older victim with a troubled history.

Assume, for example, the victim is a 14-year-old girl who developed a crush on her schoolteacher. The victim’s birth parents were both neglectful and abusive. Thus, parenteral rights were terminated, and the girl was eventually adopted into a new family. As a result of her history of trauma, the child has a history of drug and alcohol use, promiscuity, and delinquent behaviors. The teacher is very popular in the school and the community. Although the prosecutor has filed rape shield and other motions to exclude the child’s troubled history and concerning conduct from the jury’s consideration, the defense attorney argues that his client was aware of the child’s history and reached out in kindness to address the child’s emotional and behavioral problems. According to defense counsel, the victim has retaliated for this “kindness” by making a false allegation of abuse. Under these circumstances, the judge concludes that the child’s history can be presented to the jurors as part of the defense case.

With this ruling, the prosecutor is now certain that the child’s negative behaviors will come into evidence. In response, the prosecutor may choose to make these “negative facts” the heart of the prosecutor’s case. The theme of vulnerability could work well in such a case. The opening statement might sound something like this:

This is a case about a vulnerable child. The evidence will show that she comes from a dysfunctional, troubled home. The evidence will show that she has turned to drugs and alcohol and promiscuous behavior—all in search of the solace that her birth family could not or would not provide for her. And this is a case about a schoolteacher whose job and ethical duties obligated him to care for all the children in his classroom. In this case, though, the evidence will show that this teacher did not care for his students. In fact, he preyed on the most vulnerable girl in his classroom.

In closing argument, when the prosecutor is free to argue, he can return to this theme and drive the point home:

The defendant knew exactly what he was doing. He was not going to target the homecoming queen or the straight-A student. He looked around his classroom precisely in search of a child with a hole in her heart. He then filled that hole with his own lust, and he did it all in the cynical confidence that if she ever dared tell, no one would believe her.

The Ten Building Blocks of a Powerful Opening Statement

In addition to developing a narrative and clearly articulating a theme, prosecutors can build an even stronger opening statement by using these ten building blocks.

1. *Use descriptive language.*

In reciting the fact pattern to the jurors in opening statement, make a concerted effort to bring the narrative to life. If the child victim was curled up on a couch eating snacks and drinking a soda shortly before the sexual assault, describe the scene with enough detail that the jury can picture the crime, and the crime scene, in their minds. Under this scenario, the prosecutor might say:

On a hot summer afternoon in August, 15-year-old Shirley Smith was curled up on a beat-up beige couch in her basement watching TV. She was eating Pringles potato chips and drinking from a bottle of Coca Cola. At that moment in her life, she was completely oblivious to the fact that as her drunken uncle descended the staircase, he was about to steal her childhood.

In this narrative, the prosecutor provides enough detail to create a word picture of a typical teenage carefree moment. The prosecutor then uses the facts to create the image of a cruel interruption, even ending, of the victim's childhood by a man with lustful, criminal intentions.

In describing the actual sexual assault, the prosecutor should make a concerted effort to use adverbs and not adjectives. An adverb brings the event to life to a greater extent than an adjective, and it more closely connects the defendant to the crime. For example, if a prosecutor simply says, "The attack of this girl by the defendant was brutal," the emphasis is on the attack and the connection to the defendant is awkward. The sentence can be shortened and made more powerful by using an adverb: "The defendant brutally attacked this girl."

2. *Avoid legal terms or a recitation of the elements of the crime.*

Although it is proper to tell the jurors which crimes the defendant is charged with, it is probably not helpful to detail the legal definitions of those crimes or otherwise get bogged down in legal terms and explanations. These issues are best addressed in closing argument after the judge has instructed the jury about them. Instead, during opening statement, provide the jurors with the context in which they will later apply the law. That context is the fact pattern, and a powerful presentation of these facts should be the prosecutor's focus during opening statement.

3. *Don't ignore "negative facts" during the opening statement.*

The prosecutor should at all times demonstrate the highest ethical standards possible. It is essential that the jurors understand the prosecutor is not working to "win" a case but to secure justice.

Accordingly, if there are “negative facts” that may undermine the government’s case, the prosecutor should be the first to point out these facts in her opening statement. Assume, for example, the child has recanted her allegation. If the prosecutor doesn’t mention this fact in her opening statement, the defense attorney may appropriately attack the prosecutor’s credibility in his opening statement by saying, “There are some key facts the prosecutor ‘forgot’ to mention—such as the fact that her key witness has recanted the allegation of abuse.”

However, the prosecutor doesn’t necessarily have to treat these facts as negative. Instead, the prosecutor can place these negative facts in the context of the case as a whole and thus help the jurors understand the recantation. For example, the prosecutor might say:

After Molly revealed the family secret, her world came apart. She was removed from the only home she has ever known and forced to live with strangers. In school, she was teased. In counseling, her mother called her a “whore.” In church, her pastor urged her to confess her “sinful” role in the sexual abuse. Eventually, Molly told her school counselor “living with the lie was a lot easier than telling the truth.” Two days after she made this statement, in the office of defense counsel, Molly signed a written recantation. We will offer expert testimony about the issue of recantation—testimony explaining that recantation is not unusual in cases of child sexual abuse, particularly when enormous pressures are placed on a child.

By putting the recantation in the context of pressures placed upon the child, the jurors can understand the need not to jump to conclusions but to examine the evidence as a whole.

4. Show sincerity during opening statement—and throughout the trial.

Many years ago, I tried a difficult case of child abuse. After seven days of testimony, and a long deliberation, the jury returned verdicts of guilty on all counts. Early the next morning, a newspaper reporter called me at home asking for a quote. Off the record, the reporter said to me, “The big difference between you and the high-priced defense attorney is that you came across as someone who really believed in the case, someone who believed a wrong had been committed that needed to be righted. In contrast, the defense attorney came across as someone paid to put on a show for his client as he thundered about the courtroom shouting objections.” The comments from the reporter remind us that jurors and others in the courtroom are impacted not only by the evidence but also by the conduct and sincerity of the prosecutor or other attorneys involved in the case. Indeed, some studies have documented this phenomenon.⁹ A prosecutor who is not prepared, who has not filed motions or taken other precautions to protect child witnesses,¹⁰ or who is not functioning as part of a multidisciplinary team and making sure his investigators respond promptly and thoroughly to allegations of abuse¹¹ may send the message to jurors that “this case is not that big a deal.”

⁹ For example, in a study of the trial transcripts of 45 child sexual abuse cases, researchers concluded that defense attorneys who asked complex questions of child abuse victims, or were otherwise perceived as attempting to confuse or intimidate the children, were “over two times more likely to achieve a conviction of their own client..” Angela D. Evans, Kang Lee, Thomas D. Lyon, *Complex Questions Asked by Defense Lawyers But Not Prosecutors Predicts Convictions in Child Abuse Trials*, 33 *LAW & HUM. BEHAVIOR* 258 (2009).

¹⁰ See Victor I. Vieth, *A Children’s Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment*, 1(2) *CENTERPIECE* (2008).

¹¹ See Detective Mike Johnson, *The Investigative Windows of Opportunity: The Vital Link to Corroboration in Child Sexual Abuse Cases*, 1(9) *CENTERPIECE* (2009); Victor Vieth, *Picture This: Photographing a Child Sexual Abuse Crime Scene*, 1(5) *CENTERPIECE* (2009).

5. *Create a sense of rhythm in the opening statement.*

A prosecutor with a monotone, one-pitch delivery style runs the risk of losing the attention of one or more jurors.

Instead, make a concerted effort to speak more loudly at appropriate points in your opening statement, and other times to speak more softly. Similarly, make a concerted effort to speak more quickly and, at other times, to slow the rate of the presentation. Varying cadence, pitch, and volume will help keep listeners engaged.

6. *Consider adding a visual component to the opening statement.*

We live in a media-driven age where jurors are used to color, sound, and moving objects. Whether due to habit or based on their individual needs, some jurors are visual learners. These jurors will need more than a description of the crime or the crime scene during your presentation.

To help these jurors process your remarks, consider using PowerPoint or trial presentation software to provide them with a visual summary of the evidence. A prosecutor may also want to file a motion to admit certain documents or exhibits in advance so they can be used in the opening statement.

7. *Personalize the victim.*

In preparing the opening statement, look for facts that humanize the victim—that make her seem more like a child who might live in a juror's neighborhood, or even their home. What grade is the child in and what does she like best about school? What does the child like to do when not in school? What's the name of her dog? In homicide cases, these details may be particularly important since the victim will obviously not be able to testify. But they are also important in cases in which the child is available. Defense attorneys are often quick to point out all the negative behaviors of a child abuse victim or otherwise suggest the victim is disturbed or somehow different from other children.¹²

Unfortunately, many child abuse victims engage in behaviors that allow the defense counsel to create this caricature. I have worked with child victims who smear feces on bathroom walls, who drop their pants in the presence of strangers, who engage in delinquent behavior, and who have used drugs or alcohol. Although these behaviors can be explained as the result of victimization or perhaps as the reason a particular child was targeted, it also helpful for the jurors to see that there is more to this child.

In one case, for example, a teenage victim used drugs and alcohol, showed up to court wearing suggestive clothing, and was quick to display bad language. When, however, the prosecutor put into evidence the cotton nightgown the child was wearing when her father sexually assaulted her, the jurors were able to see that, beneath the short skirts and beyond the potty mouth, there lived a girl—a girl who wore a cotton nightgown covered in pictures of puppies. When the prosecutor asked her about the puppies, she explained that she loved dogs because animals, unlike people, never lie or consciously hurt children.¹³

¹² See generally, *Abbott v. State*, 138 P.3d 462 (Nev. 2006) (appellate court agreeing with defense counsel that there was a "reasonable basis for believing that the victim's mental or emotional state may have affected her veracity" and thus granting a request for an adverse psychological examination).

¹³ This is a case in which I was involved.

8. Prepare the jury for the child's demeanor.

Even if a child has not engaged in delinquent or problematic behavior, the mere fact that they are children makes them unpredictable. The child may not explain the abuse exactly the same way she did during the forensic interview, or she may display nervousness in an unusual way. Accordingly, it is best to remind the jury that children are unpredictable, and they should not hold a child to adult standards when receiving their testimony. As an example, consider the following comments in an opening statement:

Members of the jury, this is not a Hollywood movie or a television drama. No one who testifies this week is following a script. So I cannot tell you for certain what the child will say or do when she takes the witness stand. The evidence will show she has not seen her father for some time and that she loves and misses him. Perhaps she will run up to her dad and give him a hug. The evidence will show that when this child is nervous, she laughs. Maybe she will sit in the witness box and answer every question with a nervous giggle. The evidence will show that she is scared of talking about her abuse in front of each of you. Perhaps she will curl up in a ball and not be able to speak at all. I cannot tell you for sure what will happen because this is real life. However, I can promise you this. Irrespective of what the child says or does in this courtroom, I will return to you at the close of this case and, based on the entire evidence, ask you to return a verdict of guilty.

In this opening statement, the prosecutor is not only preparing the jurors for the possibility that the child may behave in a surprising yet understandable manner, but the prosecutor is also reminding the jurors that the child's testimony is only one part of the government's case and that they should pay attention to all of the evidence. This strategy can be enhanced during jury selection by exploring jurors' expectations of child victims and whether they are willing to lay those aside to fairly evaluate the evidence.

9. Do not overstate the case.

Because children are unpredictable, a prosecutor may need to be cautious in stating in detail what the child will testify about. If the prosecutor tells the jurors the child will testify about multiple acts of sexual abuse and then details each of these acts in his opening statement, he may lose credibility when the child testifies and is too nervous to recall a certain incident or the details of a certain incident. Unless the prosecutor is absolutely certain the child will be able to recount the abuse exactly the same way she did in the forensic interview or on prior occasions, it may be best to summarize what the child will say and otherwise avoid excessive details in the opening statement.

10. Conclude your opening statement with confidence.

If the prosecutor conveys doubts about his or her case, jurors may understandably conclude there is a reasonable doubt. Comments such as "This is a tough case" or "I wouldn't want to be in your shoes" convey to jurors that the government is not confident it has a strong case. If a prosecutor has genuine doubts about the guilt of the accused, the case should not be prosecuted. If, though, the prosecutor is confident the case is appropriately charged and that the evidence he will present is sufficient to find guilt beyond a reasonable doubt, it is appropriate to convey this confidence.

For example, a prosecutor may want to conclude an opening statement by saying, "That is the case of the State in a nutshell. I am now eager to present it to you in detail. I ask only one thing: I ask that you

remain attentive throughout these proceedings and carefully consider all the evidence that is presented. If you do this, you will do justice in the end."

A statement along these lines is not an argument—it is a simple request that jurors remain attentive during the presentation of the case. Moreover, it is hard to imagine defense counsel objecting to the government's request that the jurors remain attentive or that they carefully consider the evidence. In making these statements, though, the prosecutor is subtly communicating confidence in his case.

Closing Argument

All of the factors that contribute to a powerful opening statement, such as descriptive language and having a clearly communicated theme, also apply to drafting and delivering the closing argument. What is unique about the closing argument, however, is that the government is not simply presenting a narrative account of the evidence. It is also offering an interpretation of the evidence and arguing that jurors should draw one or more conclusions.

This article provides suggestions for preparing a closing argument, for convincing the judge or jury that a child victim's account of sexual abuse is truthful, and for responding to some of the common arguments offered by defense attorneys.

Preparing the Closing Argument

There are three essential rules to follow in preparing a closing argument. Each of these rules is detailed below.

1. Draft the argument before the trial.

When preparing for trial, drafting the closing argument should be the very first thing a prosecutor does. The closing argument forces the prosecutor to focus on the essential evidence he or she will rely on in arguing for a conviction. By identifying the most salient evidence ahead of time, the prosecutor can better highlight it during the trial. The prosecutor may also more easily identify the most effective theme to use, enabling him or her to incorporate that theme into direct or cross examinations of witnesses. Given the importance of the closing argument, drafting it immediately takes much of the pressure off and allows the prosecutor simply to tinker with the argument during the course of the trial to reflect any unexpected testimony or other issues that arise.

2. Write out the closing argument verbatim.

Drafting the argument verbatim allows the prosecutor to polish word choices and minimizes the chance of making an accidental statement that could result in a mis-trial. Famed prosecutor Vincent Bugliosi understands the value of writing out an argument verbatim. Specifically, Bugliosi concludes:

In my opinion, a summation must either be written out or set down in a comprehensive outline. The problem with even an outline is that although all the points the lawyer wants to make are there, he does not have the all important articulations; that is, he does not have his points expressed in the most effective way...and it's simply not possible to powerfully articulate a great number of points, one immediately following another,

extemporaneously. There is a best way to make a point, and to find it takes time and sweat on the yellow pad....¹⁴

Winston Churchill, arguably the greatest orator of the past century, also understood the value of drafting an oral presentation verbatim in writing.¹⁵ Indeed, Churchill went so far as to script out “stage directions” on the margins of his paper, writing cues such as “pause: grope for a word” so that his presentations would have the appearance of being extemporaneous.¹⁶

In drafting the closing argument, give some thought to the very last statement you will make to the jury. Make sure your final words are strong. It may be as simple as saying, “Find truth. Find Justice. Find the Defendant Guilty.” If the victim made an outcry seeking help, you might say, “The victim's first cry was for help. Her second is for justice.”

3. *Practice, practice, practice.*

An additional benefit to drafting the closing argument early in trial preparation is that it gives the prosecutor the opportunity to practice the presentation. In an era of television courtroom dramas, many jurors expect a polished presentation.¹⁷ Even if that is not the expectation of the jurors, seasoned prosecutors know that a polished, practiced presentation is far more effective than an outline pieced together moments before it is delivered.

It is simply not possible to practice the closing argument too much, and prosecutors must find the time to practice despite their hurried schedules. Winston Churchill also grasped the importance of practicing his speeches and, in the midst of World War II, found the time to practice his presentations for up to eight hours *for each speech*.¹⁸ Churchill would practice at every opportunity, often in front of the mirror, and even in the bathtub.¹⁹

A Simple Organizational Structure

The closing argument must have a logical flow, which can only be achieved by following a clear outline. One simple, but effective outline in a child abuse case is as follows:

1. *Refer back to the theme.*

The best way to begin a closing argument is the same way a prosecutor should begin the opening statement—with a reference to the theme for the case. If, for example, the prosecutor's theme is “family secret,” he might begin the opening statement by saying, “This is a case about a family secret.” He might refer back to this theme in closing argument by saying, “The secret is out.”

¹⁴ VINCENT BUGLIOSI, *OUTRAGE* (1997).

¹⁵ STEPHEN MANSFIELD, *NEVER GIVE IN: THE EXTRAORDINARY CHARACTER OF WINSTON CHURCHILL* (1995).

¹⁶ *Id.*

¹⁷ See generally, Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist?*, 9(2) *VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW* 331 (2006).

¹⁸ Mansfield, note 15, at 166.

¹⁹ *Id.*

2. *Recite the elements of the crime in the context of the victim's testimony.*

Point out to the jury that the child's statements, standing alone, satisfy each and every one of the elements of the crime the defendant is alleged to have committed. A prosecutor may introduce the subject in this way:

As the court instructs you on the elements of the crime with which the defendant is charged, one thing will become very clear: if the victim's testimony is accurate, the defendant has committed each and every element of these crimes.

After each element, recite the victim's testimony on that element and then remind the jury that if they believe the victim, this element has been proved. For example, if the first element is that the child is below the age of 13, the prosecutor might point out the child testified to being only eight years old. If the second element is that the child had sexual contact with her father, the prosecutor can summarize the child's testimony on this point. You could use PowerPoint slides or other visuals in which one side of the screen lists a particular element and the other side of the screen summarizes the victim's testimony on that point.

The advantage of this approach is that it focuses the jury on the elements of the crime in the context of the victim's eyewitness testimony. The question becomes not whether the elements of the crime have been proved but simply whether the jury should believe the child. The entire case is reduced to one simple question: is the child telling the truth?

3. *List the reasons the jury should believe the victim.*

As a general rule, a prosecutor can comment on the credibility or believability of a witness, including a child abuse victim or a perpetrator of maltreatment. As noted by one court, a "prosecutor can address, in closing argument, a witness's demeanor, motive for testifying, and believability, provided such remarks are not based on the prosecutor's personal beliefs."²⁰ When credibility is an issue, "it is certainly proper for counsel to argue from the evidence why a witness should be believed."²¹

There may even be jury instructions that outline relevant factors in assessing the testimony of a witness, including a child witness.²² If so, you may wish to cite these instructions to the jury and then add something to this effect:

If the child's testimony does, indeed, establish the elements of each of these crimes, then perhaps the most important question during your jury deliberation, is simply this: why should we believe this child? Members of the jury, there are at least 11 reasons you should believe the victim.

Then proceed to recite the reasons the jury should find the victim's testimony credible. Possible reasons include:

- **The victim testified under oath, she understood this oath, and thus she had an incentive to tell the truth.** It is, of course, a crime to lie under oath, and there is research that children can

²⁰ *Commonwealth v. Deloney*, 794 N.E.2d 613, 619 (Mass. App. Ct. 2003).

²¹ *Id.*

²² See, e.g., *California Penal Statute section 1127*.

understand both an oath and that it is bad to lie in court.²³ Moreover, a child's demeanor in court may indicate they understood and took the oath seriously. When supported by the evidence, the following argument is appropriate:

Members of the jury, did you notice what Billy was wearing when he walked into the courtroom? He was wearing a little boy's suit complete with a clip-on tie and Velcro dress shoes, clothes he told you he only wears for Sunday school and the day his Grandpa was buried. Clothes that reflect his understanding that coming to court is a very serious thing. Did you notice how solemn he looked as he filed past each of you and assumed his seat in the witness box? Did you notice his hand was shaking when he raised it to take the oath? Did you notice how big his eyes got when the judge asked him if he knew it was important to tell the truth in court? Is there any doubt that Billy understood he was walking into a grown-up world, and that meant he had to live by grown-up rules. In this courtroom, the number one rule is tell the truth, and Billy made it very clear he knew that.

If defense counsel responds by saying the oath is a wash in evaluating the evidence because his or her client also testified under oath, the prosecutor may consider a reply along the following lines:

Defense counsel is correct in asserting his client also testified under oath. If, though, you reach a point in your deliberations where you conclude beyond a reasonable doubt that he committed these crimes, then under those circumstances, the defendant would not have the same incentive to tell the truth. Under those circumstances, lying under oath would help him escape much more serious crimes.

- **Not only does the victim have, as a result of the oath, an incentive to tell the truth, she has absolutely no incentive to lie.** Courts have held that a prosecutor can argue from the evidence that a child victim has no incentive to lie.²⁴ A prosecutor could argue as follows:

We know from the evidence that Molly loves her father. She expressed this during the forensic interview, and when the police spoke to her father, he also admits that she loves him. If this is true, then she has no motive to lie. Simply stated, jurors, we don't lie to get into trouble people we care about, people we love. Moreover, what advantage would she gain by lying? Again, jurors, look at the evidence. This child had to tell a police officer and a social worker about sexual conduct that most of us as adults would have difficulty speaking of. She had to endure an uncomfortable medical examination. She is the one removed from the home, not the defendant. She then had to come to court, in front of her father and 12 strangers and tell it all again only to endure a cross-examination at the hands of her assailant's attorney. Why would she endure all of that unless she was telling the truth?

²³ Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 SOUTHERN CALIFORNIA LAW REVIEW 1017 (2000); Jodi A. Quas, Stacia N. Stolzenberg, Thomas D. Lyon, *The Effects of Promising to Tell the Truth, the Putative Confession, and Recall and Recognition Questions on Maltreated and Non-maltreated Children's Disclosure of a Minor Transgression*, 166 JOURNAL OF EXPERIMENTAL CHILD PSYCHOLOGY 266 (2018).

²⁴ See, e.g., *Commonwealth v. Helberg*, 73 Mass. App. Ct. 175, 180 (Mass. 2008).

- **The victim's testimony is corroborated by medical evidence.** This argument can be made even in the absence of medical findings.²⁵ If the child alleged sexual contact, for example, the absence of medical evidence is consistent with the history given by the child. Accordingly, a prosecutor could argue:

If, as defense counsel is contending, this child is lying, this is how her brain must have worked. That day in kindergarten, when this five-year-old girl decided to tell her teacher about this fictitious account of sexual abuse, she must have said to herself, "You know, the mandated reporter statute is going to kick in now. As a result, they are going to send a deputy to the school to question me about my sexual history. Once that is over, the deputy will take me to a Children's Advocacy Center where I'll receive a forensic interview followed by a sexual assault examination. And then, about six months from now, there is going to be a trial, and I'll be forced to testify. If I'm going to fool the jury then about the lie I'm making up today, I'm going to have to allege some sort of sexual contact that won't produce medical findings. I've got it—I'm going to allege fondling, not penetration. That will fool everyone." C'mon, jurors, who among you really believes this little girl could think that far in advance with that degree of sophistication? In this case, the absence of medical evidence, because it is consistent with the history she has always given, does not detract from, but rather enhances her credibility.

- **The victim's testimony is corroborated by other witnesses.** Relate to the jury each portion of the child's testimony that is corroborated by another witness. If, for example, the child says he was sexually abused by a grandfather on a particular weekend at a particular campsite, the registrar who can place the child and his grandfather together at that time and place corroborates this portion of the child's statement. If the child says he was fishing with his grandfather the day of the assault, a camper who saw them fishing corroborates this portion of the child's statement.
- **The victim's testimony is corroborated by the victim's behaviors.** Although sexual and other behaviors are not diagnostic of abuse, they may be consistent with it.²⁶ Consistent behaviors may include truancy, running away, acts of delinquency, depression, suicidal ideations, cutting behaviors, eating disorders, sleeping disorders, and numerous other factors often associated with trauma. Again, none of these behaviors are diagnostic of abuse, but they are consistent with abuse and are often present in cases of abuse. It is important to assess the onset and timing of the behaviors. If the child's behaviors, such as bedwetting, occur only after visits or interactions with the alleged perpetrator, the evidence may be particularly strong.

²⁵ In cases of child sexual abuse, medical evidence is extremely rare. Heger et al., *Children Referred for Possible Sexual Abuse: Medical Finding in 2384 Children*, 26 CHILD ABUSE & NEGLECT 645 (2002) (finding that only 4% of all children referred for medical evaluation of sexual abuse have abnormal examinations at any point in the evaluation).

²⁶ See Vincent J. Felitti & Robert F. Anda, *The Relationship of Adverse Childhood Experiences to Adult Medical Disease, Psychiatric Disorders and Sexual Behavior: Implications for Healthcare*, in RUTH A. LANIUS, ERIC VERMETTEN & CLARE PAIN, *THE IMPACT OF EARLY LIFE TRAUMA ON HEALTH AND DISEASE: THE HIDDEN EPIDEMIC* (CAMBRIDGE UNIVERSITY PRESS 2010); Victor I. Vieth, *Recognizing and Responding to Developmentally Appropriate and Inappropriate Sexual Behaviors of Children: A Primer for Parents, Youth Serving Organizations, Schools, Child Protection Professionals, and Courts*, in R. GEFFNER, J. WHITE, L.K. HAMBERGER, A. ROSENBAUM, V. VAUGHAN-EDEN, *HANDBOOK OF INTERPERSONAL VIOLENCE ACROSS THE LIFESPAN* (SPRINGER 2021).

- **The victim's testimony is corroborated by the physical evidence.** A good investigation should produce some physical evidence.²⁷ Obviously, semen, hair, and other evidence is powerful, but such evidence can be so strong that many of those cases do not go to trial. Cases that do go to trial, however, may have other evidence. If the victim describes a particular picture or a particular bedspread in the room where the abuse occurred, these items should be seized or at least photographed to document the reliability of the child's memory.²⁸
- **The victim's testimony is corroborated by the defendant.** Even if the defendant denies the allegation, there is often some detail the prosecutor can use. I had a case in which the child said she was sleeping in her bedroom in a finished basement. The child said she had a dog that got outside and was scratching on a basement window. The defendant, the boyfriend of the girl's mother, was sleeping over. The defendant went outside, retrieved the dog, and brought the animal to the child. The defendant then kissed and hugged the girl while he climbed into bed and fondled her. When questioned by the police, the defendant admitted to all of these facts except for fondling the child—he claimed that just as the dog got outside another man who looked like him must have entered the house and fondled the child. Under this scenario the prosecutor could argue:

Even the defendant, who has an incentive to lie, corroborates so much of what the child has said. The defendant admits he was in the house the night of the sexual assault, that he went outside and brought the dog to the girl, and that he hugged and kissed the girl. The defendant even admits the girl was sexually abused—he simply claims she mistook him for someone who looks exactly like him.

- **The victim is not sophisticated enough to pull off the lie alleged by the defendant.** All human beings can and do lie. However, generally speaking, children are not the sophisticated liars that adults are.²⁹ Accordingly, a prosecutor may argue:

The defendant wants you to believe the victim is so sophisticated she can tell a believable lie about sexual abuse. The problem with this argument is that the victim is only five years old. Her parents testified that they had no pornography in the house, and the child had never seen her parents engaged in such intimacy. If this is true, then where did she acquire the information necessary to speak of detailed acts of sexual abuse? Molly told you of her love of Sesame Street and other children's shows. Obviously, these are not the sort of programs that would discuss cunnilingus, fellatio, dildos, vibrators, or the sounds a grown up makes when having an orgasm. In the forensic interview, though, and from the witness stand, this child gave you all of these intimate details of the sexual assault she endured from the defendant. Since we know from the evidence that there was no other source for this sexual knowledge, these details must have come from the actual experience of being

²⁷ See generally, Mike Johnson, *The Investigative Windows of Opportunity: The Vital Link to Corroboration in Child Sexual Abuse Cases*, 1(9) CENTERPIECE (2009), available online at zeroabuseproject.org.

²⁸ For further information on using crime scene photos as corroborating evidence, see Victor Vieth, *Picture This: Photographing a Child Sexual Abuse Crime Scene*, 1(5) CENTERPIECE (2009), available online at zeroabuseproject.org.

²⁹ Catherine Dixon, *But Children Lie, Don't They? Developmental Influences on Lying and Deception in Children*, presented at BEYOND FINDING WORDS: EMERGING ISSUES IN FORENSIC INTERVIEWING, Tunica, Mississippi, March 7, 2006.

abused. Applying your own common sense, your own experience with children, a child cannot lie about things she has no subject matter knowledge of.

- **If the victim is lying, why did she not exaggerate the lie?** In many cases, a victim's testimony is less damning than what you would expect from someone making a false accusation. The victim may allege contact, not penetration. The victim may deny she was threatened by the perpetrator. Find nuggets like these in the victim's statements and testimony and point them out to the jury as evidence this child is not on a crusade to crucify the perpetrator. After all, if the child were really out to get the defendant, why would she not claim he threatened her? The answer of course is the victim is telling the truth. She tells the truth irrespective of whether the truth hurts or helps the defendant.
- **The interviewers knew what they were doing.** If the investigators who took the initial statement from the child are well-trained professionals who know how to speak to a child, you can point this out as further evidence that the child's initial and subsequent statements are reliable.³⁰
- **The victim's testimony is corroborated by expert witnesses.** If you have expert witnesses, other than medical personnel, whose testimony in some way supports the victim's testimony, point this out as an additional reason to believe the victim and convict the defendant.

Prosecutors should summarize these reasons for the jury one more time and do so in a way that highlights the absurdity of any claim the child is lying. You may consider language like:

When you consider the child testified under oath, when you consider the child has no reason to lie, when you consider the child is not sophisticated enough to pull off such a convincing lie, when you consider that some or all of the child's statement is corroborated by medical personnel and other witnesses who also have no reason to fabricate, and when you consider that even the defendant corroborated portions of the victim's testimony, it is clear the defendant is guilty beyond a reasonable doubt.

Address the Defendant's Arguments

At some point in a prosecutor's closing argument, it is necessary to address the defense counsel's attack on the credibility of the child witness or the government's case. Below are three common defenses with some thoughts on how the prosecutor can respond.

Inconsistent Statements

If the defendant claims the victim has made inconsistent statements, the prosecutor has at least two arguments.

- **First, the prosecutor can argue the statements are not inconsistent.** For instance, if the child in one interview claims to have been raped over a 10-minute period and in another interview

³⁰ For a more complete discussion about the use of a forensic interviewer as an expert witness, see Victor Vieth, *The Forensic Interviewer at Trial: Guidelines for the Admission and Scope of Expert Witness Testimony Concerning a Forensic Interview in a Case of Child Abuse*, 47 MITCHELL HAMLINE LAW REVIEW 847 (2021).

alleges a 15-minute period, you can effectively contend these statements are not inconsistent. Try something like this:

The victim never said she had a stopwatch that she dutifully punched at the beginning and end of the rape so she could satisfy the inquiries of those who seek to discredit her. When asked on multiple occasions to estimate the duration of the rape, she gave her best estimate. In this context, the statements of 10 and 15 minutes, though different, are not inconsistent. During each interview, the victim tells us the rape occurred over a relatively brief period of time, a matter of minutes.

- **Second, the prosecutor can argue a child's statements are inconsistent but explainable.** If the inconsistencies are unimportant, such as giving different colors of the room where the sexual assault occurred, ask the jury to think of an important event in their lives such as their wedding. Ask them how many times they have recounted their wedding over the years. Ask them if they have been consistent as to each detail each and every time they have spoken about their wedding. Remind them that sometimes we are tired and may not tell all the details of an event. Sometimes we are responding to different questions and that accounts for emphasizing different aspects of an event. Sometimes we have not correctly heard or understood a question and thus give a different answer. As time passes, our memory for details fades. The day after our wedding, we may recall the gift Aunt Bertha gave. Several years later, we may not even recall that Aunt Bertha was at the wedding. How can we expect more of a child than we expect of ourselves as adults?

The interviewer engaged in suggestive practices.

In many child abuse cases, particularly child sexual abuse cases, the defendant does not attack the child but rather the person or persons who interviewed the child. In response, concede there is no perfect interview, and if the defendant can point to a handful of questions that could have been phrased differently, so what? The question is whether the interview or interviews as a whole were so improper that the child was coerced or otherwise led into making a false statement. If you have a visually recorded statement that is admitted into evidence, challenge the jury to find any statement by the interviewer in which the child was threatened or even encouraged to say something false. Point out statements of the interviewer encouraging the child simply to tell the truth.³¹ Recite to the jury numerous open-ended, clearly proper questions the interviewer asked. Point out times in the interview where the child disagreed with an assertion of the interviewer. Perhaps the child denied penetration. A denial such as this can be used to show the child was not manipulated by the interviewer. You may also point out any improper questions the interviewer asked that benefited the defendant. For example, the interviewer may have asked a young child how many times the abuse happened. Unable to comprehend the value associated with a number, the child may have said the abuse took place a million times. Point out to the jury that this was clearly an inappropriate question given the child's age and that it is ironic the defendant has no qualms about this question.

³¹ For a discussion of the role of truth-lie inquiries and other instructions in the forensic interview process, see Amy Russell, *Best Practices in Child Forensic Interviews: Interview Instructions and Truth-Lie Discussions*, 28 *HAMLIN JOURNAL OF PUBLIC LAW AND POLICY* 99 (2006).

The child's mother has coerced the child into making a false allegation.

In cases of child abuse in which the defense suggests that a mother or some other caretaker convinced the child to make a false accusation of abuse to score points in a custody fight, a prosecutor has several counter punches. Many of the arguments already advanced may negate the claim that a custody battle is behind the allegation. For instance, if the child and mom are out to get the defendant, why is the allegation not more egregious than it is? How is it that the police could find some corroborating evidence? How convenient that even the defendant joined in the conspiracy and made incriminating statements. Do not, though, stop here. Take the issue of the divorce and use it as further evidence corroborating the victim's allegation. Perhaps the divorce came about because of the child abuse. If the allegation arose sometime after the abuse instead of while it was ongoing, argue that once the defendant was out of the home and Mom was no longer supportive of the perpetrator, the child felt free at last to disclose the abuse. If the child first revealed the abuse to a teacher or friend, this also indicates the mother was not behind the allegation. If it were Mom, after all, would we not expect to see her marching the child into the police station to make a statement? Remind the jury of the mother's testimony and the emotional toll of her child's violation. Point out the many ways she has demonstrated love and support for her child and how inconsistent it would be for her to create this trauma for her child by fabricating an allegation.

Other Points

Two other points are worth discussing. First, a prosecutor should limit any sarcasm because it may appear unprofessional. Nonetheless, there may be times when it is appropriate to mock an outrageous statement from a defendant. Second, for jurors unaccustomed to legal terms such as "circumstantial evidence," it is helpful if the prosecutor can use analogies that jurors can relate to. These additional points are addressed below.

Responding to an outrageous statement from the defendant.

In one case³² a defendant claimed that although he is the child's father and has lived with her all his life, he has never been alone with the child. Prosecutors may want to pounce on an absurd statement like this in closing argument because it bears directly on the credibility of the accused. In closing, a prosecutor could argue:

The defendant's statement that he lived with his daughter for 12 years but was never alone with her is simply not credible. In this household, apparently, Mom never went anywhere without the children. Are we to believe that if Mom, Dad, and child were watching TV in the living room, and Mom went to the bathroom, Dad would follow Mom or run outside to avoid being alone with his daughter? In 12 years, he never took her to a doctor or dentist, never played ball with her, never picked her up or dropped her off at school, never tucked her into bed or read a story, or did anything else with this girl unless someone else was physically present? Members of the jury, if you conclude this is not credible, that the defendant lied to you about something so inconsequential, it is fair to ask, "What else did he lie about?"

³² This was a case I handled as a prosecutor.

I once had a case where the defendant's counsel proudly produced letters the victim wrote the defendant expressing her love. The letters, supposedly, were inconsistent with her claim that Dad abused her. In such a case, the following response would be appropriate:

According to the defendant, the victim loves him and thus you can't trust her. Does that make any sense? The fact of the matter is that it is precisely because of her love that you can trust this victim. A child who harbors only affection for her father yet is willing to tell you the evil her father committed is inherently trustworthy. If you love someone, you do not falsely accuse that person in an effort to send him to prison. What apparently upsets the defendant is that his daughter does not love him enough to perjure herself.

Use analogies to drive home complex legal concepts.

To explain the concept of circumstantial evidence, prosecutors could say:

Members of the jury, the court has given you a definition of circumstantial evidence, but let me give you a hypothetical scenario that drives the point home. Let's say that before you go to bed for the night one November evening in Minnesota, you notice there is no snow on the ground. Let's say that when you wake up the next morning, there is snow on the ground. Combining the fact of an absence of snow before you retired with the presence of snow when you woke up, you conclude it snowed during the night. Now, that is not the only conclusion you could have reached. Maybe someone brought a truck filled with snow and dumped it on your lawn. This, however, is not consistent with our everyday understanding of the world. We rely on circumstantial evidence each day of our lives when doing so makes sense. Members of the jury, it makes sense in this case.

Conclusion

The importance of an effective closing argument cannot be overstated. At this juncture of the trial the prosecutor becomes the voice of the child and the victim's last, best chance for justice. The prosecutor who rises to this occasion serves both the child and the profession with honor. Simply stated, our words matter. They matter to the jury, and they matter to the children whose cause is our concern.

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