THE OPENING ACT

The curious thing about jury selection is that once you've got your jury in place, the trial is really over but the lawyers don't know it yet. You still have to go through the kabuki exercise of calling witnesses and putting in actual proof, but if you have the right group of people sitting there, the rest of it doesn't matter a hell of a lot. After all, the twelve of these citizens have waited in line, sometimes for days, for their tickets to the front row and they're expecting a boffo show to keep them engaged, interested, and satisfied so they can reach the conclusion that they've already reached except they too don't know it yet either.

It's one of the tritest lines in every prosecutor's opening statement that the opening is designed to be "like the table of contents of a book" so that the jury can get a preview of what is to come. This is both bullshit and pointless. First of all, like almost everyone else in Google America, jurors don't read books any more. And if they do, they usually turn first to skim the pictures and then turn to the index to see if their names are there or if anyone they know is mentioned. If there are references to any kind of sexual performance or perversion, they go to those pages first. If the prosecutor is smart and knows what they are doing (two factors notably absent in the Jeffrey Peterson trial), the D.A. will present a compelling version of The Big Picture, laying out the story – and it's got to be a *story* – in such a way that the jury is left glaring at the defendant even though they are told by the judge *and the prosecutor* that they haven't heard any proof yet. Of course, that's not how the law is supposed to work. The law says that the prosecutor is simply to inform the jury what the allegations are and how the case will be proven through the calling of witnesses and the presentation of evidence. No arguments allowed, no sales pitch, nothing to move the jurors permanently over to the D.A.'s side of the courtroom. Some prosecutors follow these proscriptions and forgo the opportunity to close the deal on the opening gambit. They wind up as in-house counsel to insurance companies or doing house closings for the rest of their career. I'm not advocating breaking any rules here and, truly, any D.A. who breaks the rules deserves criticism. But you're not a trial lawyer if you're not an advocate, a zealous one, and if your cause is righteous, your cause deserves all you've got in your persuasion toolbox.

The defense opening has a different objective. If you stand in front of a jury and remind them that the burden of proof is always on the prosecutor and you and your client don't have to prove anything at all, you would then appear to be either a moron or a hypocrite if you go on to tell them *what you're going to prove* (one of my standby lines – which now sounds silly to me but I use it all the time – is that we could be sitting there playing pinochle and not ask any questions and the burden would still be on the prosecutor). If the jury is sitting there, just having had the prosecutor barrage them with all the reasons your mope of a client is so profoundly guilty that a child could see it, you have to respond with *something*. They expect you to *prove* something, even though the judge – and even you! – has just reminded them that you don't have to and you're not expected to. But something.

Forget the "table of contents" bullshit. Tell them a story. It's sort of the same story the D.A. is trying to tell – sort of – but it has a different point of view and you are definitely working towards a very different ending. One of the things I frequently do at these moments is that I hold up my hand with my fingers splayed out and wait a beat and ask the jury, "Do you see my hand?" Since you're

not allowed to engage them in conversation (wouldn't that be a hoot if you could do that during a trial?), I wait a second to let the question register and say, "No. You don't see my hand. What you see is see the front of my hand. There's another side." And then I slowly rotate my hand so they can see the back. "Would you remember that? There's another side? Don't let this prosecutor show you only his side of this story. There's another side." I don't, of course, tell them either what that other side is or whether or not I'm going to "prove" it (or anything). I'm just asking them to hold off judgment and be alert to "another side". I've done this so often that I'm near embarrassed to do it because it smacks of being one of those dreaded "lawyer's tricks" and something just short of phoney; but I'm not embarrassed because it actually is effective and I've had more than one juror tell me he remembered it.

So, really, for both sides of the case, the opening statement is an important opportunity for each lawyer and how they go about it tells you a lot about where they are coming from and definitely where they are going.

My all time favorite opening statement got me in trouble. I was prosecuting a guy named Larry Williams, a genuine O.G. long before Snoop ever came up with the term. Larry was charged with Criminal Possession of a Weapon in the 2nd Degree, in this case a sawed-off shotgun.

Legally, it was a really interesting case because when Larry was stopped by the police (who had responded to a drive-by shooting minutes earlier), he was sitting in the passenger seat of a Pontiac Bonneville and under his seat were three separate things: the barrel of a sawed off shotgun, a stock, and a live slug. Under the law, Larry could only be convicted if he possessed a loaded operable firearm of a size which was "concealable upon the person" (i.e., a sawed-off). His lawyer made the superficially logical argument that Larry was only a passenger, he didn't "possess" anything, and even if he was in proximity to the barrel, the stock, and the slug, those three things were not a gun. They were just three things. Not a gun. Made perfect logical sense. But, as most people know, logical sense frequently bears no relationship to legal sense. Larry's lawyer's argument was the equivalent of arguing against the law of gravity.

I countered with my legal version of the Ali Shuffle, dazzling the judge with cases and statutes (all written or decided, of course, by judges and lawyers who used to be prosecutors) which held – as a matter of law – that everyone in a car is presumed to possess whatever is in the car (unless they rat out the true possessor) *and not only that!*, if the components of a firearm are in close proximity and can be readily assembled, then those components *are* a gun, *and not only that!*, if the "operable firearm" is in proximity to live ammunition, the quickly assembled components not only constitute an operable firearm they constitute a *loaded* firearm. *And not only that!*, but once the barrel was attached to the stock, the whole thing was under 27" thereby meeting the "concealable upon the person" requirement and qualifying the possessor thereof to a lengthy stay in a State-run facility with three hots and a cot for a very, very long time.

I got the barrel and the stock from the evidence vault and practiced assembling them quickly. Very quickly. It got to the point that I could actually do it blindfolded and I was stunned at how easy it was to assemble and disassemble these two things. My cop friends pulled my coat on the subject

of street guns like this one. The whole point of the detachable barrel is to get your shots off and start booking, tossing the barrel in one direction, the stock in the other, making it harder for the police to find anything. Apparently, Larry hadn't gotten the Memo containing this particular gem of street wisdom because the stock and the barrel were laying together on the Bonneville carpeting under his seat. Maybe he was saving them for his next school project, I don't know. But even though nobody could finger him for the drive-by, he was still sitting atop of what I was going to show was a loaded sawed-off, no matter how many pieces it was in.

Larry's lawyer brought a motion to suppress the gun on the basis that the police had no cause to stop the car. Denied. He then brings a motion to rule that the gun was not a sawed-off, "concealable upon the person". Judge rules this is a fact for the jury to decide so the motion is denied.

We pick a jury and as luck would have it I couldn't have ordered a more perfect group for this case if Amazon was conducting a one-day flash sale of "12 Citizens Likely To Convict Someone of a Gun Crime". All men. All with military experience. 10 of them owned shotguns. Guaranteed to be diddling with the stock and the barrel as soon as those pieces of evidence went into the jury room.

You may be wondering why Larry went to trial in the first place and didn't try to save himself some prison time by plea bargaining. As I said before, Larry was hard-core O.G. but that wasn't the only reason we're going to trial over the sawed-off. For Larry, this was a pure two-fer. While this case was pending, Larry got indicted for murdering a guy named Raymond Ford whom he shot five times in the back. At close range. In a bar. In front of 10 witnesses. Larry might have thought that he was Michael Corleone at Louis's Restaurant in the Bronx when he shoots Sollozzo and McClusky and nobody can or will identify him. Three of the witnesses are Raymond Ford's cousins and they already hated Larry for an earlier street beef. Larry's not going anywhere. He could just as easily spend a few days in court on the gun trial as wander around the day room in the Justice Center looking for a pickup b-ball game or playing hearts. Larry knew he was going down on the Raymond Ford homicide and he didn't give a shit. I knew he was going down too, but I did give a shit. He wasn't getting a freebie off me.

So now it's time for my opening statement. I'm usually not a suit and tie kind of guy, but part of the standard trial package is conveying an aura of seriousness of purpose so when I'm on trial I usually dress like I'm attending a rich client's kid's bar mitzvah. Not this time. I dug out a brown baggy three piece corduroy ensemble which I apparently thought looked very cool when I was a graduate student and tried it on in my office in view of a full length mirror. This was not my customary daily exercise at self-admiration. I assembled the shotgun, slid the stock deep into the generous right front pocket of the baggy suit, and then nestled the barrel along my right side up to my armpit. The folds of the brown corduroy were indistinguishable from the deadly verticality of what once was Larry's gun. Perfect. I then took the gun out, gathered it up with the rest of my trial file, photos, and evidence and headed over to the courtroom.

There's always a few minutes at the start of each trial day when there's a lot of milling about, setting up, and sphincter tightening. I take advantage of the distractions by ducking into a small

bathroom conveniently located inside the courtroom. (They don't make courthouses now like they used to. You need to take a pee you need three forms of I.D. and a card pass to get into the bathroom down the hall.) I then slide the gun into my pocket and up my side and walk stiffly out the door, reminding myself it wouldn't be a good idea to sit down. The Judge enters and everybody is told to "Please rise." Not a problem, 'cause I'm still standing. As is his habit, Judge Burke says, "The People are here, the Defendant and his counsel are here. We'll have your opening statement Mr. Menkin."

I really can't remember much about what I mostly said in my opening statement. I was still very much a rookie prosecutor and I probably gave them the "table of contents" bullshit. But I do remember I'm giving them the story of the drive-by, the stop, the separate pieces of weaponry on the floor of the Bonneville under Larry's seat, and then, when I'm winding down, I get to the issue of concealability:

> Now one of the issues we're going to deal with is whether the gun in question is something that is concealable upon the person. The Judge is going to instruct you on what the law says about that. Now, I've been talking to you here for about 10 minutes and I doubt that any of you realize that I'm armed.

And with that, I slowly draw out the sawed-off from under my coat.

Pandemonium. One of the jurors gapes open-mouthed and slightly rises from his chair. Larry's attorney is decompensating, shouting for a mistrial. I hear Larry say – clearly – "Man, that was slicker than snot." Judge Burke is not amused. He sends the jury out, listens to the mistrial motion, thinks about it, and denies the motion, telling me that if I was intending to do something like that I should have given him some prior notice but since, as I argued, the gun was coming into evidence anyway he couldn't find anything legally wrong. But he wags his finger at me, "No more heroics."

Well, Larry was right. It *was* slicker than snot. Apparently, however, my snot was a little too slick for the Appellate Division which, woefully lacking a sense of the dramatic or even a sense of humor, reversed Larry's conviction. I still say it was the greatest opening statement I ever gave.

I'd do it again, but maybe a little differently