

From: **Nathan Poston** <nposton.jac@gmail.com>
Date: Thu, Jul 9, 2020 at 3:24 PM
Subject: My first trial with COVID19 restrictions
To: WACDL list serve eff. 3-28-13 <State@list.wacdl.org>, WDA felony listserve <felony@lists.defensenet.org>, <misdemeanor@lists.defensenet.org>

Good Afternoon,

I concluded a jury trial late yesterday afternoon receiving the verdict a little after 5 pm. HC was charged with 3 counts of PCS with Intent to Deliver.

I'm writing this email because I thought it might be helpful or informative to those of you going out to trial in the near future. I've included a couple of attachments that show how I tried to address the issues that were related specifically to COVID.

Jury Selection

Spokane County is sending one case per week out to trial. I believe that 35 jurors were called in on Monday with the idea that if a jury could not be picked from that group and additional 35 would be brought in Tuesday. Jury selection occurred in the jury assembly room. The jurors were social distanced and required to wear masks. The layout and seating of the room was apparently approved by the local health department. When asked, the majority of them were not excited about wearing the masks. In the attached voir dire exhibit, I sketched out a rough layout of the room. I also requested and received permission to photograph and file pictures of the room for purposes of record. Hopefully this is helpful in showing how to make a record for appeal. In addition to taking these pictures, I also had the jurors call out who could see me and my client and then made a record of it orally.

The jurors were supposed to come to a podium in the center of the room to answer questions. By the time we got to my voir dire, the jury was tired of that process and only small number of jurors got out of their chairs to answer questions. I may have contributed to this because I had multiple issues with microphones that were provided to me, and asked for and received permission from the jury to yell my questions out to them with my mask.

The judge was very receptive to striking jurors for cause if they indicated that the prospect of catching covid from serving would distract them or inhibit their ability to focus on the evidence. Some of the briefing I've attached addresses this issue along with asking for extra time for voir dire. I think this is important. This worked out well for me for the most part, but it did result in a favorable juror being stricken. As for the actual panel, I was able to select two black jurors. I get that two minority jurors is a long ways away from a diverse jury panel, but it was two more than I usually end up with. I had to use all of my peremptories and struck about 8 jurors for cause to get to the second black juror. (Some of these were COVID strikes and some were the more traditional strikes. I did have an ATF agent, Former LAPD officer, WSP trooper, and Air Force Marshal in the vaneer and they all got bounced either for cause or using a peremptory)

I felt like I did a good job striking jurors but I also felt like, overall, I knew more about how they felt about COVID as opposed to the facts that were likely to be presented at trial.

I don't know all of the workings, but it would appear that the Court did a good amount of jury science research. For example, the Court sent the jurors in small groups to the jury rooms for their breaks. But they mixed the groups up to avoid the same people taking breaks together and the forming of cliques prior to deliberations. Regardless of what you think about doing a jury trial, I felt it was incredibly thoughtful.

The trial itself

The jurors were seated with 6 in the box and 6 in the gallery. I could not see the 6 behind me and that was obviously less than optimal. It was already predetermined that the witnesses would not wear masks while testifying, so that issue did not need to be litigated. The attorneys were not required to wear masks while speaking. When I looked around I felt like the jurors were paying attention.

I thought I wouldn't be able to social distance with my client, and I was correct. There was a plexiglass shield at counsel table but I would just lean around it when I needed to speak to him. I hadn't really thought a lot about whether my client would be social distancing in the days leading up to the trial. I tried not think about it because he was out of custody and objectively speaking, I more than likely assume that he wasn't. If you were looking at 60-120, you probably wouldn't want to isolate yourself either.

The jury acquitted him on the 3 counts of PCS w/Intent to Deliver and convicted him of the lesser included. It was success in that regard. In closing, we are constantly faced with obstacles and challenges. Some of these obstacles are unique, but it doesn't mean that we can't win. **There may be a lot of good reasons not to go to trial, but don't think that you can't win because of the pandemic.**

--

Nathan Poston
Counsel For Defense
1116 W. Broadway Ave
Spokane, WA
(509) 477-4905