

UMKC LAW REVIEW

Vol. 77

Summer 2009

No. 4

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SMOKE

Marc Bookman*

For Maggie, In Memory

I. INTRODUCTION

One thing was for sure and two things were for certain: I could represent Rafiq Fields only if I understood that he had nothing to do with the double murder outside the Red Rock Lounge in northwest Philly. Not claim that he was innocent, not act as if he were innocent, not litigate to show his innocence – *understand that he was innocent*. If I could do this, if I could put aside all the lawyer crap I had learned over the years, all the tricks and deceptions, then I could represent Rafiq Fields. He made it sound like an honor.

So we started out with a big problem, because death penalty lawyers have a regrettable but understandable tendency to consider innocence the defense of last resort. We know that a failed innocence claim is the most likely path to a death sentence – not only has the accused exhibited a lack of remorse, but he has had the unmitigated gall to try to trick the jury. No decent defense attorney starts out with an *understanding* that his client is innocent, or any understanding at all, for that matter. When it comes to the question of innocence or guilt, you learn the evidence, you scrutinize the evidence, you challenge the evidence, you might even be fortunate enough to suppress the evidence, but it is always about *the evidence*. I didn't say any of this to Rafiq Fields, however. Instead I said, "I do understand." But I could tell he didn't believe me. "One thing's for sure, two things are for certain," he said. "You ain't getting me to plead to this, I don't care if they offer probation." I had not even mentioned the possibility of a plea, and probation for a double murder was an urban myth; but I nodded knowingly. This was the end of the beginning of my relationship with Rafiq Fields.

II. THE CRIME

The Red Rock Lounge was plainly visible from the regional rail line connecting Chestnut Hill with center city Philadelphia. As I lived just outside Chestnut Hill, I got to view the crime scene twice a day. According to the police reports the location was a confusion of ballistics and blood – an argument started outside the Lounge, a crowd gathered, shots were fired, and two men were dead. One victim, John Jackson, died instantly; his body was on the sidewalk directly in front of the bar when the police arrived within minutes of the shooting. The second victim, Lyle Tyson, had staggered down the street and around the corner, where he lay choking in his own blood when the police found him.

"Help me, help me, I'm dying," Tyson said.

"Who shot you," asked Officer Holland.

"Smoke," Tyson whispered.

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"Smoke like from a fire?"

"Yes."

They loaded him into an ambulance and took him to Albert Einstein Medical Center, where he was pronounced some hours later.

Eight witnesses were interviewed by the police. Three names of interest emerged: Arnold Newcombe, Victor Byrd and Jake. Most of the witnesses identified Newcombe as "running" the bar, not in the sense of managing the Lounge but more in charge of all illegal rackets in the general area, mostly drugs and gambling. Byrd was noted by almost everyone as an eyewitness, and had told several people that Jake was the shooter – but Byrd himself had never been interviewed by the police. Several witnesses stated they had heard that Jake did the shooting, but no one claimed to have actually seen him do it. Five witnesses identified a man named Smokes as a participant in the argument, and two of them noted that Rafiq Fields's nickname was Smokes. Another witness saw Rafiq walking up the street after the shooting with a gun in his hand. Arnold Newcombe, the man in charge, identified Rafiq Fields as the shooter.

Two weeks later the police interviewed three more people. Since "Jake" was mentioned as a possible shooter, the police rounded up the usual Jakes and found two. Jake Long said that he lived near the Lounge, but that he was on a religious retreat in the Poconos on the night in question. Jake Powers stated that he was in fact at the Red Rock celebrating his birthday, but that he left around midnight, a good two hours before the shooting. The last witness, Rashon Howell, had recently been arrested for a car theft, and the police spoke to him in jail. He told them that he watched the shooting through the window of the bar, and that Rafiq Fields shot both men, then stepped over the man who fell and punched him in the face. This last fact was consistent with the Medical Examiner's report detailing a fractured right orbital on the face of John Jackson that was inconsistent with a terminal fall.

The homicide detectives considered what they had – two witnesses identified Rafiq Fields as the shooter. Maybe they weren't the cleanest of citizens, but homicide witnesses rarely were. Besides, they were corroborated by the broken eye of one of the victims, which supported the account of Rashon Howell, and a third witness who saw Fields walking down the street after the shooting with a gun. Not to mention the *coup de grace* – victim Tyson's dying declaration that Smoke, aka Rafiq Fields, had shot him. Yes, there was some hearsay about a man named Jake, and an alleged eyewitness named Byrd who apparently didn't want to be found; but when all was said and done the police trod the predictable path and arrested Fields for the murders of Jackson and Tyson. After all, no case was perfect, but this one was considerably better than most.

III. THE TEAM

Capital defense is not solitary work. To do it correctly requires a team of investigators, assorted experts, and, most crucially, mitigation specialists; ours was Dana Cook. I left out the lawyers, of which you need at least two. Often that last part is the catch, and what separates the craft of criminal defense from

the art of capital defense. Criminal lawyers don't grow up as team players, and forcing them to listen to any voice but their own is often like making children share their favorite toys. But a death penalty case, like any complex litigation, is too much work for one, so every death penalty lawyer has a partner; and this partnership can last the length of a case, or as long as the two can stand to work with each other. My partner, for the past fifteen years, has been Karl Schwartz; but Rafiq Fields came as close as any client ever did to ending this remarkable association. And ultimately, the challenge of the team was three-pronged – not to let the state kill Rafiq Fields; not to kill him ourselves; and not to let him provoke us into killing each other.

IV. THE INVESTIGATION

Many cases are won in court. Good cross-examination and a powerful closing argument can often persuade a jury, and these skills are the stock in trade of the successful defense attorney, who makes a living questioning the credibility of biased police officers, confused eyewitnesses, and hapless victims. But capital cases are not won in court – the crimes are too heinous, the victims too devastated. Such cases are so terrible that capital litigators often redefine the notion of victory to include anything less than the death of their client.

Capital cases are won in investigation. Not the thrilling investigation of dark movies and late night car chases, but the labor-intensive and occasionally stultifying gathering of documents and speaking to all sorts of witnesses, not just of the crime but also of the background of the client. It was this sort of investigation that we began in the Fields case, and our starting point was Victor Byrd.

Byrd, you may recall, was the reluctant eyewitness. It is not unusual for eyewitnesses to be reluctant; indeed, it is unusual when they are not. But Byrd separated himself from the typical in three significant ways: 1) instead of simply lying to the police and saying he had seen nothing, he took the rare step of fleeing; 2) instead of ducking out to his mother's house in North Philadelphia, where most eyewitnesses are found several weeks later and pressured to come clean by the police, he fled as far as he could without a passport, to Oakland, California; and 3) instead of clamming up, he took extraordinary lengths to tell everyone but the police everything he had seen before heading cross-country.

According to Byrd's hearsay, Jake had shot both men following an argument in front of the bar. The police, before deciding to rely on the evidence they had rather than the evidence they had to work for, enlisted the Oakland police department to help them interview Byrd. Their efforts were minimal before the arrest of Fields, and, not surprisingly, non-existent afterwards. But we did not have the luxury of ignoring Mr. Byrd, and we were lucky enough to know a terrific investigator in the Bay area. She set up a surveillance of his known address, and eventually came face to face with him outside his apartment building, whereupon he denied having any idea who Victor Byrd was. When she pulled out his photograph and a subpoena, he turned and ran off down the street. This was as close to thrilling as the investigation got. We persuaded a Philadelphia judge to issue a material witness warrant for Byrd, and an Oakland

judge did the same; but ultimately our love for Mr. Byrd went unrequited, and no member of the defense team ever laid eyes on him again.

Rafiq was furious at our inability to persuade Byrd to testify on his behalf. He felt that our efforts had been less than stellar, and that other inmates, with far better attorneys than us, had managed to find witnesses more recalcitrant than Byrd. There are homicides getting thrown out left and right back there, he said, jerking his arm toward the cellblock. Who, I asked. This was a mistake I'd made often with Rafiq – while my partner stayed calm and nodded his head sagely, I questioned. You don't know because you don't want to know, Rafiq said. I said I was disappointed that Byrd had eluded us; then I moved on to a sticking point between us that had been left unspoken – Byrd, while claiming that Jake had been the shooter, nonetheless mentioned Smokes along with several others who had been at the scene of the crime. One thing's for sure and two things for certain, Rafiq replied. No one is right all the time.

V. THE CLIENT

Capital defense teams are archeologists. It is our job to dig up every single detail about our client's past, and then reorganize those details in a way that a jury might feel it has received a reasonable explanation for a terrible act. So before too long we knew quite a bit about Rafiq Fields. Stories abound of the humanity that lies just beneath the surface of our most violent citizens – indeed I have known many inmates for whom it is impossible to imagine the behavior attributed to them. Rafiq Fields, however, was not one of them. He was disagreeable and argumentative from the start, and he played one team member against the other with the skill of a "Survival" contestant trying to stay on the island. Nothing could satisfy him; and no matter how many motions we filed or witnesses we tracked down or holiday visits we made to see him, his concerns that we were against him could not be allayed. Then we found out why – Rafiq Fields had a long history of schizophrenia, and had been committed to a mental hospital a mere two weeks before the crime. A laundry list of commitments and psychological evaluations trailed behind him, and it was obvious Rafiq had suffered the lay influence of the experts whose paths he'd crossed. I have Schizo-Bifecto, he said. I, for one, wasn't going to correct him.

But mental illness is like a weed – it doesn't grow alone, and it doesn't disappear just because it's detected. Rafiq's history was replete with abuse and abandonment. He was low-functioning and drug dependent, and adamantly refused all help, including medication our own psychiatrist had prescribed. One day he would read a motion of mine and proclaim me the greatest lawyer, and best friend, he'd ever had – a few days later he would tell Dana Cook I was a disgrace to my profession. His father was long gone, and his mother was generally hostile, particularly after listening to her only son explain how we had mistreated him. And finally, there was what Rafiq called our "communication" problem: we didn't understand what he was saying, we didn't understand how his neighborhood worked, we didn't understand what kind of people the dead guys were. What he never said, through all the tantrums and silences, was that every member of our team was white, and he wasn't. Not that he was too polite to say

it; rather, it was too obvious. In short, we were on one side of a chasm, and Rafiq Fields was on the other - we had no way to reach him but to keep on trying, and this we did over and over until the very day of trial.

VI. THE INVESTIGATION

After several months of interviewing witnesses from the Red Rock Lounge, we had reached two conclusions:

- 1) Rafiq Fields, known to his acquaintances as Smokes, had been outside the bar at the time of the shooting. Were it not for his insistence otherwise, this fact would have been assumed rather than investigated. Every witness without exception mentioned Smokes as one of the men involved in the argument - the bartender, when pressed if he was sure it was Rafiq he saw, actually laughed and said, "Why, did he tell you he wasn't even there?" - but as the evidence piled up, Rafiq seemed to get more enraged by it. There must be ten guys named Smokes in that area, he said. Besides, the victim said the killer was "Smoke," not "Smokes;" it's not the same. Indeed, as we pushed further into our probe, the missing "s" played an ever-increasing role in Rafiq's theory of the crime.
- 2) The victims of the shooting were men of ill repute. Both had been arrested numerous times for violent offenses, and even the Commonwealth's witnesses had one of the victims waving a gun around in a threatening manner. The same bartender who laughed at the idea that Rafiq wasn't there had this to say about the gun-toting John Jackson: the guy looked for trouble every day of his life; no one could pick a fight with a complete stranger as easily as he could.

In short, the case set up like a perfect self-defense - violent victims, threatening behavior, a gun, and a dying declaration that Smoke did it. But when I suggested the idea, providing case law, a jury instruction and my explanation that self-defense was real and legal, Rafiq stood up in a huff and walked out of the interview booth. "He just doesn't get it," he said, clearly to himself.

The investigation continued. Our next three targets were in some form of custody, which made things easier. First we went to Arnold Newcombe, who was on house arrest for a drug and gun charge just around the corner from the Red Rock Lounge. We found him on a bench outside the courtroom where he waited for his own case to be called. He confirmed that Jake had been in the bar at the time of the shooting, and admitted that he had covered for Jake by leading the police to another man named Jake. He would not say why Jake needed to be covered for, nor would he back off his identification of Smokes as the shooter; nonetheless the case was starting to smell, and Jake began to take form as a more realistic perpetrator. We moved on to Rashon Howell.

Rashon Howell was very small - he looked the part of a hoodlum who might slip barely noticed from one petty crime to the next. And had he stayed in Philadelphia he might have gone unnoticed entirely - he had walked away from his car theft arrest when the owner of the car failed to show up in court. But he instead ventured to Williamsport, home of the Little League World Series and, coincidentally, the locus of an unusual number of drug rehabilitation centers. It

was this highly concentrated population of drug abusers that drew a small time drug dealer like Howell, and the vigilant Williamsport police department that incarcerated him in the county jail. He needed some encouragement to talk, and was extremely cautious when he did. He told us there was no doubt Smokes punched John Jackson after he was shot, then took his gun and walked up the street with it; but he may have exaggerated a bit when he told the police Smokes shot the men. Arnold Newcombe told him that Jake did the shooting by pulling out his own gun and reaching around Smokes; and then told him to say it was Smokes instead. Did he see Jake do the shooting, we asked. Rashon wouldn't say - we had to understand that Jake was not the sort of man you incriminated in any way. But if we looked to Jake as the doer, would we be right? Imperceptibly, he nodded. A fleeting vision of Victor Byrd running down the street chased by our investigator crossed my mind. So, I said, let's just get this down on paper and we'll be out of your hair. But Rashon Howell was nobody's fool - he was no more likely to put ink to paper than he was to win the lottery. No hard feelings, but what he had said was informational only.

Next was Jake. Jake Powers, who had been out celebrating his birthday. Who had engendered fear in Rashon Howell and loyalty in Arnold Newcombe and flight in Victor Byrd. We found him in a suburban jail doing county time for an inconsequential forgery. He spoke to us like a man who had nothing to hide and nothing to fear. Yes, he had been a big shot in that neighborhood, but not in years; in fact, Arnold Newcombe used to work for him. What did he mean by big shot, and what did Arnold do for him? He preferred not to say, but surely we knew how people became big shots in that neighborhood, and surely we knew that a man like him would need men like Arnold Newcombe, because you couldn't expect him to be involved in day to day activities. Why would people say he did this shooting? That was just talk, Jake said. No one had actually *said* he did it. And no one would. Except he didn't say that last sentence, because he didn't have to.

We had no choice but to go back to Rashon. For fifteen minutes we talked at him. This could be you instead of Rafiq, I said. How would you feel if he did what you're doing, Schwartz said. You're saving a man's life, I said. We'll make sure you're protected, Schwartz said. It would be a good thing for you to do, Dana Cook said. She had been silent until then. It's a good thing you brought her, Rashon said. And then he signed. As we were leaving, I turned back and said, "so why did Lyle Tyson say Smoke shot him?" He was confused, Rashon said. But I couldn't tell from his inflection if it was an answer, or a question.

VII. THE MEETING

We were ready to speak to the prosecutor. We had two distinct arguments to make, both of which addressed the capital nature of the crime. First, our client was very far from the worst of the worst - aside from his tortured background, the fact that he had been involuntarily committed only days before the crime made it clear he wasn't in his right mind. And while we recognized that with a dying declaration pointing to our client the Commonwealth might feel duty

bound to proceed to trial, the facts raised enough questions to make the case non-capital. The violence and provocation of the victims, the huge shadow over Jake Powers, the inability of either side to track down Victor Byrd, the recantation of Rashon Howell, these facts and many more suggested that a lingering doubt would always remain about guilt.

The hearsay facts, the prosecutor said.

Which are given a lot more weight when you consider the distance Byrd has put between himself and a courtroom.

You know we don't put much stock in recantations, the prosecutor said.

Yes, we knew that. This wasn't just any recantation, however; it happened to fit many of the facts of the case.

But remember that Jackson had a broken bone in his face. That's exactly what Howell said, that your guy punched him after shooting him.

And only at that moment, after the hundreds of hours I had spent on the Rafiq Fields case, did it occur to me what had been wrong with it all along. I quickly added the experience in the room. Between us, I said, there are seventy-five years of trying homicides. Has any of us ever seen a case where somebody shoots somebody else *and then* punches him? The room went silent. And in that silence the case finally came to me: two hotheads outside a bar, causing trouble, waving a gun, threatening Smokes. Jake coming out of the bar angry, because this is his neighborhood and who are these loudmouths disrespecting his birthday? And after he reaches around Smokes and shoots them, there's Smokes, fuming from alcohol and mental illness and maybe just who he is. So he bends down and punches Jackson in the face, then takes the gun he was threatened with and walks off with it. Of course.

The prosecutor said he would get back to us. As we were gathering our things, he tapped me on the elbow. So why did Tyson say Smoke shot him, he asked. He was confused, I said.

VIII. THE INVESTIGATION

But how does a guy get that confused? The whole presumption of a dying declaration is that no one would lie if they thought they were actually dying; and besides, the evidence provided no motive for him to lie. Was it really possible that he did not see Jake reach around our client and shoot him? Something was missing.

Days went by. We pored through the police paperwork, re-examined every statement, revisited the crime scene, which by now had changed its name for the third time. The men had spent several hours there that night, and John Jackson was very drunk according to the toxicology report prepared by the Medical Examiner. But Tyson, who had made it around the corner, was only barely over the limit according to the same Examiner. And that's when it occurred to us that he had not gotten to the morgue until hours after Jackson; the police had taken him to the hospital instead. Sure enough, medical personnel had drawn blood before he passed. A quick call to the hospital told us what we had missed – Tyson's alcohol level was almost four times the legal limit. He had, in fact, been confused.

Five days later the prosecutor walked into a Common Pleas courtroom in Philadelphia and dismissed all charges.

IX. AFTERMATH

I was certain that Rafiq Fields would come into my office on his first day of freedom, give each of the team members a hug, and then spend a pleasant hour or so allowing us to bask in his hard-won freedom. I don't know why I thought this — nothing we had done had remedied his deep-seated mental illness, his fundamental distrust of authority, or his bitterness at being kept in prison for a crime he had not committed. And in fact he did not show up that first day, or ever. But four months later I received a call from a public defender in Delaware County that Rafiq had been arrested, and was tangentially involved in a drug deal. He called me for bail purposes, because the double murder, although dismissed, still loomed large in the judge's eyes. I explained the circumstances of the murder charge, and several weeks later Rafiq made bail. I never learned what happened to the drug case, because a month later Dana Cook advised me she had heard from another client that Rafiq had been murdered. To this day I have made no effort to confirm whether it is true or not. And of course you cannot confirm it either. Rafiq Fields is not my client's name — in fact no names, other than Schwartz and Cook, are real. The story is not to be confirmed, the truth not to be completely known. The imperfections of our criminal justice system merely amplify the imperfections of our lives. That much is for sure, that much is for certain.