

Chapter X

Voir Dire in Computer-Facilitated Crimes Against Children

by Susan S. Kreston

I. Introduction

Selecting the right jurors is critical in the process of securing a conviction for online crimes against children. The following are some considerations prosecutors might take into account when conducting voir dire, and a list of sample questions.

It must be noted that not all of these questions will be permitted in every jurisdiction. The complete list is offered as an initial point of reference, and should be adapted to local rules and practice.

II. General Considerations

A. Keep in Mind the Nature of the Underlying Crime—Online Child Exploitation Cases Are Child Abuse Cases First and Computer Cases Second

While these cases do involve computers, at their core they are child abuse cases and must address all the traditional components of such a case.

In luring cases, the first questions should determine whether the potential juror has children or grandchildren, if those children use the Internet, and what type of supervision is provided during those sessions. Possible stereotypes surrounding offenders should also be delved into, such as “Does anyone think they would recognize the type of person who engages in sexual conduct with children on sight? Does everyone agree that this type of crime, like most crimes, can be committed by people from all walks of life?”

B. Prepare the Jury for the Victim’s Age, Background, and Gender

In most online luring cases, the victim is a teenager and may have some emotional difficulties in testifying. The jury must be made aware that the victim is an older child, and any problematic issues, such as recantation or behavioral troubles of the victim, must be dealt with as early as possible.

If the victim is a boy, that should also be brought out immediately, as many jurors will automatically assume the victim is a girl.

C. Juror Types and Computer Savvy

In a computer-facilitated sexual exploitation case, voir dire must include the evaluation of a potential juror's computer knowledge. This does not mean that traditional voir dire topics—such as the juror's prior jury service and criminal history—should be ignored. But, in a case based largely on computer-based evidence, the most misunderstood and controversial aspects will center on the computer itself. Time and effort can be saved by addressing each juror's level of computer experience early in the questioning. This can best be done by conceptually dividing a panel of potential jurors into four categories of computer users: experts, enthusiasts, users, and non-users.

1. Experts

A computer “expert” can be defined as someone who works on computers. Web page designers, network administrators, information services managers, computer technicians, programmers, and database managers are typical experts. An expert is a person who will view a case not necessarily as a crime, but as another problem to be solved by applying specialized skill. Generally speaking, an expert will make an undesirable juror. Just as any juror with specialized knowledge will tend to become a deliberation room expert, a computer expert will affect a jury's deliberations by offering opinions on the evidence over which the prosecutor has no control. In any computer-based exploitation case, a prosecutor should avoid seating an expert as a juror.

2. Enthusiasts

The second category is that of “enthusiast.” An enthusiast has computers as a hobby and will present most of the same deliberation room dangers of an expert. Indeed, the enthusiast may have even less predictable or discernible views about the Internet or child pornography. Of course, each enthusiast will have a specific area of interest, and an Internet enthusiast is perhaps more likely to be a bad juror than a computer-games enthusiast. Either type of enthusiast juror, however, may know things about computers that neither the prosecutor nor the witnesses know, placing the prosecution at a disadvantage in the jury room. An enthusiast is a poor risk as a juror.

3. Users

Of potential jurors who know anything about computers, the majority will be in the third category, “users.” These people use a computer at home or at work as a tool to accomplish a given task. A user depends on computer information (not its manipulation) to achieve a goal, and thus is someone who daily views computer data and communications as reliable. Users, of course, will themselves fall into many categories, from Web-surfer to administrative assistant to occasional e-mailer. Almost any office worker will be a user.

Of course, each different type of user may perform a different type of work on a computer, requiring the prosecutor to examine that work to see what potential biases the juror may have. For example, a graphic designer may use a computer to manipulate photographic images, and a legal secretary may type correspondence having to do with a company's liability for Internet

communications. These users may have a work background that will color their perception of a case and should therefore be avoided. Assuming no other obvious disqualifying characteristics, however, the user is the most desirable juror. The user's familiarity with computers will make the prosecutor's task less tedious, and the user's comfort with computers as tools will make his or her own decision much simpler.

4. Non-Users

Finally, a prosecutor will undoubtedly question several "non-users," people who have somehow managed to avoid learning about and using computers. A non-user's lack of basic knowledge of computers may make him or her an easy target for the defense's attempt to paint computers as unreliable and indecipherable. This may result in the juror accepting far-fetched defense theories regarding a computer's vulnerability to being hacked, and all defenses based around the defendant's alleged ignorance of computers. As such, the prosecutor should be reluctant to permit a non-user to sit as a juror on a computer-based case.

D. Ability to View Disturbing Images and Sexual Explicit Documents

The prosecutor in a computer-facilitated exploitation case will have to present evidence of some form of sexual activity. Whether the evidence is a chat transcript, an e-mail message, or an explicit photograph, some prospective jurors will have difficulty examining anything explicitly sexual. Especially in a child pornography case, a given juror may simply refuse to look at the material. This possibility should be addressed in voir dire, and any juror unwilling (or, of course, excessively eager) to view sexual materials should be excused. The balance must be struck between someone who is on the one hand deeply offended by the image or document, but simultaneously prepared to examine it as part of his or her jury service.

III. Defusing Common Defenses

There are a relatively small number of consistently raised potential defenses in these cases.

A. "I'm a Victim of Overzealous Law Enforcement"

1. Examine jurors' attitudes towards proactive law enforcement

The first type of defense is actually an attack on the police and their investigatory methods. Potential bias against undercover, proactive "sting" tactics should be examined.

2. Educate the jurors about the lawfulness of undercover "stings" and their value in protecting children

After asking about the jurors' comfort level with these methods, it must be made clear to jurors that not only are these methods legal, but that they are used to put the officers in harm's way in order to block offenders from successfully targeting real children.

The fact that there is no "real" victim in a luring case should be addressed, stressing that simply because the police took on the persona of a child, does not mean that no crime

occurred. For example, in child pornography cases, the fact that an image of a child being sexually violated was sent to a police officer rather than someone else does not mean that the defendant is not guilty

B. “It Wasn’t Me”—Mistaken Identity Defenses

The second type of defense is mistaken identity. This is simply a variation on the traditional defenses of “I’ve been framed” or “some other dude did it (SODDI).” As such, voir dire will cover what types of evidence or factors a potential juror would look to in order to determine identity in any case and then in a computer-facilitated case.

C. Elements of Intent Are Missing: Defendant Lacked Intent

The third defense occurs when the defendant claims that the necessary element of intent is not present in his case. This may arise in any of the following forms:

- the fantasy defense;
- the Good Samaritan; and
- the accident defense: mistake of age or deleted images.

Regarding the accident defense (mistake of age or deleted images), questions along the following lines may help identify the jurors best suited to see through these types of untrue defenses:

- “If two people agreed to the same set of facts or actions as being true (provide an example), but offered irreconcilably different explanations for these facts or actions, how would you go about deciding who was telling the truth?”
- “Intent is not a tangible thing, not something you can hold in your hand or put up to the light to examine. How do you go about deciding what someone’s intent is? For example ...”
- “Have you ever been on the Internet and had any sort of a pop-up appear? What sort of a pop-up was it? What did you do?”
- “If an individual claimed that something came into his or her possession accidentally, how would you decide whether that was true or not? For example ...”

D. The “First Amendment” or “Privilege” Defense

The fourth defense is loosely termed the “First Amendment” or “privilege” defense. This occurs where defendants admit to possession of child pornography, but claim they possess it in the furtherance of an activity protected by the Constitution or a legally viable reason. These include the reporter working on a story about child pornography, the medical practitioner who needs it for a book on child sexual abuse, or a “photographer” who claims the image is not child pornography but “nude art.”

In these cases, the prosecutor must stress, if applicable, the lack of any such exemption from the child pornography laws for people of the defendant’s profession. If the defendant might have

a legitimate purpose for the contraband and the law allows for such possession, the state may still contend that the defendant was using it for purposes outside the prescribed exemption. The prosecutor must inquire how the juror would go about deciding if the defendant had a legitimate purpose.

IV. The Virtual Pornography Defense

Finally, we address the virtual child pornography defense. The decision in *Ashcroft v. Free Speech Coalition*¹ has resulted in the requirement that the prosecution prove that the image of child pornography is of a real child. The prosecution does not, however, have to prove the identity of the child. Questions regarding jurors' awareness of that case and their understanding of it should be scrutinized. Questions that might be asked might include;

- “Are you familiar with any court decisions regarding pornography? Child pornography? What do you understand those decisions to say? What do you think of those decisions?”
- “Have any of you ever heard the term “virtual child pornography?” What does that term mean to you?”
- “As part of its case, the state must prove that the images the defendant is charged with possessing/distributing/producing are images of real children. The state does not have to prove the identity of any particular child, only that the image is of a real child. Does everyone understand the state's burden on this point?”

If the defense is planning on calling an expert to testify that the images are completely computer generated, and the state will call its own expert to testify to the contrary, additional questions should be asked. These might include the following:

- “If you hear conflicting testimony from two experts, do you feel comfortable in the role of the decision maker who will resolve this? Do you understand that if there is a conflict among experts, this conflict is not the same thing as reasonable doubt? You, as the finder of fact, decide what weight to give each expert's testimony?”
- “Do you understand that the testimony of an expert can be accepted or rejected, just like any other witness?”

V. Conclusion

In addition to the substantive issues and areas noted above, prosecutors should consider their own personality and courtroom style when conducting voir dire, as opposed to standing in front of a group of strangers and simply asking them questions.

Not only is voir dire an opportunity to educate the jury, it is just as importantly an opportunity to gauge potential jurors' attitudes and beliefs about key aspects of these cases.

One of the best techniques to get this information is to ask open-ended questions that ask for a juror to give more than a “yes” or “no” answer. The best voir dire incorporates personal style with

the specific case, the potential jurors, the judge, local rules and practice, and other external factors, bringing all these factors together to yield a truly effective and dynamic voir dire.

ENDNOTE

1. *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234.

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Appendix A

Sample Voir Dire for Use in Cases Involving Computer-Facilitated Crimes Against Children

Comfort Level with Computers

1. I would like to start by asking some questions about your familiarity with computers. On a scale of 1 to 5, with 1 being no usage or familiarity and 5 being an expert, where would you rank your knowledge of computers? How many of you consider yourself to be completely computer illiterate—absolutely no computer experience at all?
2. How many of you consider yourself to be a computer expert—based on your work experience, education, or simply self-taught by the time you spend using the computer?
3. How many of you feel comfortable enough with your computer knowledge that you can help other people if they have trouble?
4. Are you more likely to ask for help with a computer question, or to be asked to help out with a computer question?
5. Do you use a computer at either your home or work?
6. At home, what do you use your computer for?
7. At home, what sorts of accessories do you have on your computer (scanner, zip drive, CD-ROM, camera, color printer, laser printer, etc.)?
8. At work, what is the nature of your computer use—e-mail? Spreadsheets? Internet? Word processing?
9. Have you ever “password protected” any of your files?
10. Have you ever used or tried to use encryption?
11. Do you rely on computers or computer-based information to get your job done?
12. How reliable do you find computers to be?
13. Do you consider information that comes from a computer more reliable or less reliable than information you get from other sources? Why?
14. Does anyone **not** own a home computer?

15. Does anyone **not** know how to use e-mail?
16. Is there anyone who does **not** know how to send or open an attachment to e-mail?
17. Does anyone **not** know how to access and use the Internet?
18. Which operating system(s) do you use or are you familiar with (Linux, Mac, Windows, UNIX, etc.)?
19. Do you use a commercial online service, such as America Online, Yahoo, or People PC?
20. Do you use the Internet? For approximately how much time on a weekly basis? Doing what? (Browsing, e-mail, etc.)
21. What software programs do you use for: e-mail, Internet, newsgroups, discussion groups?
22. Do you visit chat rooms on either the Internet or an online service? If so,
 - a. Which chat rooms do you frequent?
 - b. How often do you visit chat rooms?
 - c. When in chat rooms, do you participate in the discussions?
 - d. Do you ever visit “unmonitored” chat rooms?
23. Have you ever been contacted online by someone you did not know? How did you respond?
24. Are you familiar with IRC (Internet Relay Chat)?
25. If so, have you ever used a fileserver (or fserve)?
26. Are you familiar with UseNet?
27. Do you ever read the news online?
28. Do you own a digital camera?
29. If so, do you store your digital photographs on your computer?
30. Did your camera come with image-correction software? Have you ever used it?
31. Have you ever used any type of image-correction software?
32. Do you have any experience with digital video?
33. If so, have you ever created a digital video clip?
34. How many of you know how to download something off the Internet?
35. How many of you know how to find it and open it once you download it?

36. How many of you would know how to retrieve it and rename or refile it in another file or directory—or on a floppy disk or CD-ROM or zip drive?
37. How many of you think that if you delete a file from your computer by hitting the “delete” button, it is gone? What about after you empty the trash or recycle bin? How many of you think a trained computer examiner could not find the deleted file?
38. Depending on the facts of the case and the defense(s) raised, the following may be asked:
 - a. Have you ever heard of the term “Trojan Horse?” What is your understanding of that term?
 - b. Have you ever heard of the term “e-mail spoofing?” What is your understanding of that term?
 - c. Have you ever heard of the phrase “wiping” a hard drive? What is your understanding of that term?

Computer Forensic Examiner/Expert Testimony/Computer Evidence

39. Have you ever heard of Computer Forensic Examiners? If so, what does that term mean to you?
40. Do any of you have any education or background experience in computer forensics? Do any of you know anyone with such a background?
41. If you hear conflicting testimony from two experts, do you feel comfortable in the role of the decision maker who will resolve this? Do you understand that if there is a conflict among experts, this conflict is not the same thing as reasonable doubt? You, as the finder of fact, decide what weight to give each expert’s testimony?
42. Do you understand that the testimony of an expert can be accepted or rejected, just like any other witness?
43. On a scale of 1 to 5, how would you rate your ability to follow computer-based evidence and testimony?
44. On a scale from 1 to 5, how would you rate your comfort level in discussing computer-based evidence or testimony?
45. Are you able to rely on computer evidence to find someone guilty?
46. What sort of factors would you look to in determining whether to believe one expert rather than another?
 - Profession and position
 - Education (both formal [degrees] and informal [seminars and trainings])
 - Work experience
 - Teaching experience
 - Publications
 - Honors and awards
 - Memberships and associations
 - Prior testimony and qualification recognition

- Potential bias, motive for testifying or personal agenda
- Whether what the expert is saying makes sense

Government Regulation of the Internet

47. Do you have any opinions or feelings about government regulation of the Internet or commercial online services?
48. There are people who believe that the government has no business regulating what people do or say online. How do you feel about that?
49. Are your feelings about free speech the same when what is being sent over the Internet is a picture of a child being sexually violated?
50. Would you agree that it is acceptable for the government to block some types of communications, but not others?
51. Do you have any opinions or feelings about whether law enforcement officers should police the Internet or commercial online services?

Bias Regarding “Sting” Tactics

52. Sometimes police officers conduct undercover investigations, sometimes called “stings,” in which an officer makes people believe he or she is not a police officer. Do you have any opinions or feelings about undercover investigations, where an officer assumes or creates another identity?
53. Some people believe it is wrong for a police officer to impersonate someone else. How do you feel about that?
54. In this state, it is not against the law for police officers to conceal their identity during the course of an investigation. How do you feel about that?

Attempt and Factual Impossibility

55. In this case, the defendant is charged with attempted (fill in the charge). It is only an attempt because the minor in this case was actually a police officer. The law says a person can be convicted of an attempt when the victim is not actually a minor, assuming all the other elements are proven. How do you feel about that law?
56. Would the fact that it was a police officer, rather than a real child, who was sent the pictures in this case prevent you from finding the defendant guilty, provided that the evidence was sufficient to convict under the instruction that will be given to you by the judge?

Children on the Internet

57. Do you have children?

58. Do you have any opinions or feelings about whether children should be allowed to use the Internet or commercial online services?
59. Do you have children who use the Internet or online services?
60. Do you have any rules in your household that your children must follow when using the Internet or online services?
61. Do you have any friends or relatives whose children use the Internet or online services?
62. Have your children or any children you know ever gotten into “trouble” online?
63. Have they ever had contact online with anyone you were not comfortable with?

Problematic Victims

64. The law of this state prohibits adults having sex with children. Does anyone disagree with this law?
65. The evidence in this case will reveal that the victim is a troubled child/teenager. You may or may not like this victim, her conduct, attitudes, or behavior. In light of this, would you find it more difficult to fairly judge the evidence to determine if the defendant is responsible for his criminal conduct with this victim?
66. Would you excuse the defendant’s criminal conduct simply because of the victim he chose?
67. Does anyone feel that the state does not have an interest in protecting troubled children?
68. You may approve or disapprove of the victim’s background, lifestyle, conduct, or character. Regardless of your feeling do you accept the fact that your judgment or opinion of the victim cannot affect your decision regarding whether the defendant committed the offense(s) for which he is on trial?
69. Would you disbelieve the testimony of a witness solely because you did not like the witness’s appearance, attitude, background, or lifestyle?
70. The laws against child exploitation exist to protect children not only from adults, but also from themselves. The evidence in this case will reveal that
 - The child initiated contact with the defendant
 - The child did not fight back
 - The child did not say no
 - The child actively cooperated with the defendant
 - The child did not tell
 - The child accepted gifts/money
 - The child enjoyed the sexual activity and attention

The judge will instruct you that none of these acts or omissions by the child constitutes a defense because children cannot give consent to the types of acts that the defendant is charged with

committing. Can you evaluate and decide this case on the defendant's conduct and the defendant's conduct alone?

71. Does anyone here think that a child should be held to the same conduct and judgment standards as an adult, or that we should judge a child's conduct or behavior in the same way we judge an adult's?
72. Do all of you understand that this trial is about the defendant's criminal acts and culpability, not the child's, and that the child's conduct is not on trial alongside that of the defendant?
73. Does anyone think they would recognize the type of person who engages in sexual conduct with children if they saw him?
74. Does everyone agree that this type of crime, like most crimes, can be committed by people from all walks of life?
75. Do you think that sexual exploiters target popular, happy, self-confident, loved, and supported children?
76. Can you think of any reasons that an exploiter would target children with family problems, emotional difficulties, or low self-esteem?
77. Do you have any preconceived ideas about how a child might react to being abused or exploited?
78. Would you feel that the defendant should not be held accountable for his criminal conduct simply because the victim did not want him prosecuted, or did not want to come to court?
79. Do you believe that victims of abuse always promptly report their abuse?
80. Can you think of any reasons why a child might not promptly report?
81. Can you think of any reasons why a victim would deny that they had been abused or exploited, even if it were true?
82. Can you think of any reasons why a child would recant, or "take it back," that they had been abused or exploited, even if it were true?
83. Can anyone think of reasons that a child victim might want to protect the exploiter or abuser?
84. Do you have any ideas, expectations, or beliefs as to how a victim of sexual exploitation will act or react when she testifies in court?
85. Would you expect them to exhibit any particular emotion (e.g., fearful, tearful, angry, or withdrawn)?
86. Could you understand how two different victims could react completely differently to the same set of circumstances? For example, one victim of armed robbery could be terrified, another furious, and a third stunned at being the victim of a crime. Can you accept that there is no one, correct way for a person to react to being victimized?

87. Do you understand that although the court will instruct you that the demeanor of a witness during testimony should be considered in evaluating his or her testimony, your expectations, beliefs, or ideas about how they should act on the witness stand may not be realistic or appropriate for this particular victim?
88. Do you understand that simply because a victim is gullible or “should have known better,” that does not mean that the perpetrator did not commit a crime. The law protects the savvy as well as the naïve. For example, if someone sends a cashier’s check for \$45,000 to an on-line seller for a car, but no car is delivered, that does not mean that the “seller” has not committed fraud.

Attitudes Toward Adult Pornography

89. Do you have any opinions or feelings about a person’s right to possess or distribute pornography?
90. Do you have any opinions or feelings about whether pornography should be available on the Internet or commercial online services?
91. Some types of pornography are legal, some are illegal. Do you believe all pornography should be illegal?
92. Do you believe children should be protected from pornography?

Attitudes Toward Child Pornography

93. Have you watched, read, or heard any media reports on the sexual exploitation of children? What were you told? What did you think of that?
94. The defendant has been charged with and pled not guilty to sending pictures of children who are being sexually exploited. Is there anything about these charges that will affect your ability to sit as a juror on this case?
95. Will you have any difficulty viewing pictures of sex acts?
96. Will you have any difficulty viewing pictures of children being sexually exploited?
97. Have you ever been exposed to child pornography?
98. Some people have the mistaken belief that possessing, transmitting, or trading child pornography, including possession in your own home or trading by computer, is an activity that is protected by the First Amendment to our Constitution, or may otherwise be constitutionally protected. The court will instruct you that—as a matter of law—this is not the case, that Congress and our own State Legislature have passed laws that make it a criminal offense to receive, transmit, and possess child pornography, and such activity is not protected by the First Amendment, or by any other Constitutional right.

Before I informed you just now that the receipt, possession, or transmission of child pornography was not constitutionally protected conduct, did any of you believe that it was?

99. Do you believe that child pornography should be protected by the First Amendment or by any other provision of the Constitution?
100. Would you have any difficulty accepting and following my instruction to you that such activity is not—as a matter of law—constitutionally protected?
101. Have any of you [or your relatives or close friends] ever been involved in any incident in which there was sexual contact, sexual abuse, sexual molestation, or sexual assault between an adult and a child?
 - Nature and circumstances of the situation (including ages of persons involved)
 - When and where
 - Outcome (police involved? go to court?)
 - Your feelings about it (satisfied with the outcome? Why or why not?)
 - Whether it affects in any way your ability to be fair to both sides
102. Have any of you [or your relatives or close friends] ever been involved in any way in any incident similar to the one charged in this case? Details regarding:
 - Nature and circumstances of the situation
 - When and where
 - Outcome (police involved? go to court?)
 - Your feelings about it (satisfied with the outcome? Why or why not?)
 - Whether it affects in any way your ability to be fair to both sides

Virtual Child Pornography

103. Are you familiar with any court decisions regarding pornography? Child pornography? What do you understand those decisions to say? What do you think of those decisions?
104. Have any of you ever heard the term “virtual child pornography?” What does that term mean to you?
105. As part of its case, the state must prove that the images the defendant is charged with possessing/distributing/producing are images, either in whole or in part, of real children. The state does not have to prove the identity of any particular child, only that the image or any part thereof, is of a real child. Does everyone understand the state’s burden on this point?

Fantasy/Good Samaritan/Cyber Vigilante/First Amendment Defenses

106. If two people agreed to the same set of facts or actions as being true (provide an example), but offered irreconcilably different explanations for these facts or actions, how would you go about deciding who was telling the truth?
107. Intent is not a tangible thing, something you can hold in your hand or put up to the light to examine. How do you go about deciding what someone’s intent is? For example ...

Accident

108. Have you ever been on the Internet and had any sort of a pop-up appear? What sort of a pop-up was it? What did you do?
109. If an individual claimed that something came into his or her possession accidentally, how would you decide whether that was true or not? For example ...

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