

Anchorage Daily News (Alaska, USA)

June 14, 1992

UNORTHODOX DEFENSE IS LAWYER'S TRADEMARK

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Article Text:

The state's case against Xi Van Ha looked pretty clear-cut in the beginning. A half-dozen witnesses watched the 36-year-old Vietnamese fisherman shoot and kill Buu Van Truong in a Dillingham boat yard just after noon on June 8, 1991.

Buu was unarmed, carrying a plastic bag of groceries in each hand. Ha rushed up from behind and emptied a .22-caliber rifle into his back.

By nightfall, state troopers had collected just about all the elements of a successful prosecution:

- * Reliable eyewitnesses, including two men who were walking on either side of Buu and watched from point-blank range as Ha shot him.

- * Buu's body, with five bullets in his back.

- * The murder weapon.

- * A confession.

Murder defendant Xi Van Ha, meet defense attorney Michael Karnavas.

By the time the state's case against Ha reached Judge Milton Souter's Anchorage courtroom in April, it was not so clear-cut. A murder that took seconds to execute and four hours to solve consumed five weeks of trial time.

Karnavas argued that Ha was acting in self-defense when he shot an unarmed man in the back. Difficult stretch. But Karnavas, a scrappy, 38-year-old assistant public defender, is a pretty nimble lawyer. He likes long odds, high stakes,

breaking new ground. That is the main reason he quit a job as the public defender in Kodiak and returned to Anchorage last fall.

"I wasn't getting to try any big cases," Karnavas said. "I volunteered for Quick and Ha, and it was too disruptive trying Anchorage cases from Kodiak."

Quick is Julie Quick, an Anchorage woman formerly accused of attempted murder for shooting her husband. Prosecutors reduced the charge to assault on the eve of trial, after Karnavas produced experts who were ready to testify that Quick, whose husband had beaten her for years, shot in self-defense. He had used a similar defense a month earlier to win an acquittal for Kathryn Charliaga, a 35-year-old Kodiak teacher who was tried for the murder of her husband.

Both defenses were based on what psychologists call "the battered woman syndrome." They say the years of beatings and threats can create a kind of psychological terror; when battered women strike back, they may be acting in self-defense even if their abuser is not attacking at that moment.

Karnavas said he recognized the threads of a similar argument in his first interview with Xi Van Ha.

"As soon as I heard him describe the events, it was clear to me that we had a variation of the battered woman syndrome," Karnavas said.

The defense attorney heard fear in Ha's voice. Buu, Ha told Karnavas, and later testified at trial, was a cruel man and a brutal fighter. The night before the shooting, a drunken Buu attacked Ha, hit him in the head with a hammer and threatened to kill him.

He said he had spent a sleepless night after the fight; he heard Buu's voice over and over in his mind, repeating the threat to kill him. Ha said he heard the voice all night and right through the shooting.

To Karnavas, that sounded a lot like the kind of "psychological terror" psychologists say motivates battered women to lash out at their abusers.

"I'd never heard of it being used to defend a man before," Karnavas said. "But if we could apply it to women, why couldn't we apply it to men?"

Karnavas has had luck with other unorthodox defenses. In February, he represented a man named John Rogers, accused of attempted murder for shooting an unarmed man three times in the parking lot of a Spenard apartment building. Karnavas contended that Rogers, who had injured an arm in a fight with someone else, shot Shane Cross in self-defense as Cross charged toward him. He said Rogers pulled his gun to warn Cross to stop, and fired in a blind panic when he did not. Rogers was guilty, Karnavas agreed, but of second-degree assault, not attempted murder.

Most of the jurors evidently agreed. They were hung 11-1 for acquittal on the attempted murder charge, after puzzling for hours over legal definitions of words like "conscious" and "intent."

"We agreed there was a conscious attempt to shoot him," jury foreman Douglas Lottridge said later. "The difficult part was, was it a conscious attempt to kill?"

The state plans to try Rogers a second time for attempted murder.

Karnavas introduced a different kind of defense for John Dewar, who is awaiting trial on robbery charges for what police and prosecutors say was the attempted holdup of a grocery store. In Dewar's case, cold, paralyzing fear was not clouding his mind, Karnavas says, but a rare brain disease was. Dewar had been accused of shoplifting a bottle of Tylenol from a Safeway store earlier on the same evening he was arrested for trying to rob the place. Karnavas said Rogers, stewing and upset because of what he felt were unfair accusations about shoplifting, returned to the store to make a point, not to rob it.

He walked in, told a clerk he had a gun and demanded money and took \$200. Another customer and a store employee wrestled him to the floor and held him for police.

On the eve of trial in March, Karnavas told prosecutors that medical experts have discovered that Dewar has a condition called central pontine myelinolysis.

The disease causes memory lapses and affects one's ability to reason and think clearly, he said. The memory lapses explained the shoplifting, Karnavas said; Dewar had previous experiences in which he had forgotten he had picked up an item in a store, left without paying for it, and returned to pay when he found it in his pocket.

Dewar returned to the Safeway store on the night of his robbery arrest not to hold it up, but because he was embarrassed and angry and thought he could show Safeway employees what a real robbery was like. He planned to wait at the store for police to arrive and return the money; he was apprehended before he got the chance, the attorney said.

The malady was new to the forensic psychologists who regularly examine criminal defendants for Alaska courts. In medical texts, experts Francis Criswell and David Sperbeck said at a March hearing, central pontine myelinolysis is a rapidly progressing, fatal disease whose victims are often paralyzed and eventually lapse into comas.

Dewar's trial was postponed to allow prosecutors to have him examined.

Viewed outside the courtroom, Karnavas' defense theories may sound wacky. But, while they may be unusual in Alaska courts, they are not unprecedented.

Lawyers across the country have tried to draw new kinds of defendants into the self-defense shelter of the battered woman syndrome. Attorneys for a male high school valedictorian in Niagara Falls, N.Y., argued that their client was reacting to years of physical abuse and emotional browbeating when he beat his mother to death with a baseball bat.

In Riverside, N.Y., a murder charge against a high school student was reduced to manslaughter; she said she hired a classmate to kill a father who had sexually and physically abused her for two years.

And in California, attorneys for Barry Minkow attempted perhaps the furthest stretch of all. They claimed that fear of mafia loan sharks and leg-breakers caused Minkow, a 22-year-old self-made millionaire, to bilk investors out of more than \$26 million. Unfortunately for Minkow, the jury

did not see it that way. He was convicted on 57 counts of fraud at a 1988 Los Angeles trial.

When Xi Van Ha was arrested for the murder of Buu Van Truong, Karnavas was already familiar with the battered woman syndrome through his preparation for the Charliaga trial. And he had used another kind of stress self-defense to defend a Vietnam veteran who was accused in a double homicide in Kodiak.

After interviewing Ha and picking up what he thought might be the threads of a variation of a battered woman syndrome, Karnavas turned to the telephone.

"I came across a lawyer who had used it in New York, in a case where a Chinese businessman had shot a gang member 18 times, but couldn't remember shooting more than twice," he said.

"I started learning about Vietnamese culture. I contacted all the major universities that had departments on Southeast Asia and Indochina. I learned about this very specialized mental health hospital in the Portland area for Indo-Chinese people."

Other calls turned up other experts. By the time trial rolled around, Karnavas produced witnesses who testified that Ha was both terrified of Buu and still dazed from the beating of the night before when he opened fire.

Each new theory brought a groan from Louis Menendez, the prosecutor, and more often than not prompted scoldings from Judge Souter, who generally took a dim view of Karnavas' plan to attach the battered woman syndrome to a fit, strong, adult fisherman accustomed to the rigors of the Bering Sea.

By design or coincidence, Souter has presided at the trials and pretrial proceedings of a series of Karnavas' clients. The judge and the defense attorney have different ideas about just where the kind of stress and duress defenses Karnavas likes fall in the Alaska legal continuum.

Souter's rulings indicate he believes most all defenses that depend on evidence that the defendant was unable to think normally at the time of the offense trigger the provisions of Alaska's insanity statute, which requires the

defense to give advance notice if it plans to use "evidence of mental disease or defect."

Karnavas believes the notice is not required unless the defense intends to argue the defendant is insane. He points out that another Anchorage judge, John Reese, ruled in the Andy Nelson murder trial that the statute does not preclude the defense from arguing, without notice, that the defendant's inability to think clearly at the time of the incident affected his ability to understand his actions.

"Our side of the argument is, a PTSD (post-traumatic stress disorder) does not give the state the right to have the client examined because we're not saying the client is insane or suffering from a mental disease or defect. The primary defense is self-defense," Karnavas said.

"In Ha, our own psychiatrists said on the record that Ha did not suffer from a mental disease or defect, but that he was in such terror that it paralyzed him. He was incapable of thinking through what his options would be."

The two points of view guarantee collisions. Add Karnavas' pugnacious style and reluctance to surrender a point, and Souter's insistence on tidy, orderly, efficient trials, and sparks are bound to fly. In Souter's courtroom, sparks usually take the form of \$50 fines or the promise of them, payable by 4 p.m., thank you.

Karnavas won some, lost some and paid some in the Ha trial. After the lawyer laid the groundwork for a self-defense argument, the judge refused to give the jury a self-defense instruction.

What did the jury make of all this? "It played with some a lot more strongly than others," jury foreman Joseph Dubler said a couple of weeks after the trial concluded.

The jury deliberated more than 12 hours, pausing twice to ask for clarifications of the legal definitions of concepts like mental disease or defect, intent, state of mind.

At least a few of the jurors were receptive to Karnavas' arguments, Dubler said. "I think these jurors were looking for a reason to convict this person of something less than a murder charge, manslaughter or something. . . . Since

self-defense couldn't be considered, the word self-preservation was thrown around."

Karnavas had provided a lot of grist for that mill. Dubler said he was surprised that the jury took so long to grind it.

"Just based on the facts, and without the expert testimony, Karnavas didn't even have a case," he said.

"I mean, the guy said on the witness stand that he left the boat intending to kill Buu. You don't get any better intent than that."

Should the Ha case have been tried "just on the facts" as Menendez and prosecutors in general tend to argue?

No way, said Karnavas, adding that police and prosecutors do not hesitate to turn to psychology when it suits their ends.

"It's terribly ironic that, when it comes to medicine, we're willing to use the latest technology . . . but when it comes to the law, sometimes the courts seem to feel civilization stopped 50 years ago.

"Twenty years ago, we didn't know anything about post-traumatic stress disorder. Today we do. Does that mean we shouldn't use it? Of course not.

"The FBI doesn't hesitate to use behavioral scientists to come up with profiles of serial killers. Why shouldn't defense attorneys use behavioral scientists?"

Karnavas admits that he relishes the chance to have a part in redrawing the playing field for state-of-mind criminal defenses in Alaska.

"I particularly enjoy interjecting this sort of new theory," he said. "I'm always looking for new ways to explain someone's behavior.

"By and large, with 90 percent of our clients, the crimes are situational. Someone like Ha. For 36 years, not a single incident. Then all of a sudden, he commits this crime in front of everyone and just walks away.

"What happened? My responsibility is to get the court to look at this sort of information."

Courts will be looking at a lot more such information as the years unfold and as society, and the law, grows more complicated, Karnavas said.

"These crack babies," he said. "In the next few years, we're going to have to deal with these crack babies. A portion of their brain has never developed, and they're aggressive, they can't control themselves, they're going to commit crimes."

"Who's going to be responsible for their actions? Clearly, they didn't want to come into this world with part of their brain missing."

"The role of the defense lawyer is to challenge the court, the lawmakers, to take this into consideration. Who gets punished? It may be not so much to completely absolve responsibility, but to consider that as a mitigating factor in sentencing, to lessen a charge or lessen a sentence."

It remains to be seen exactly how much Karnavas' late hours and bulldog drive helped Xi Van Ha. The jury found him guilty, all right, but were unable to agree that he possessed the conscious intent necessary for a first-degree murder conviction. Instead, they found Ha guilty of second-degree murder. That drops the sentencing range from the 20 to 99 years for first-degree murder to five to 99. Judge Souter will sentence him in August.

But even Dubler, the juror who did not buy much of Karnavas' defense theory in the Ha case, came away with one conviction of his own.

"If I was ever in a jam, I'd want someone like that defending me."