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Notes from the field: the trial of Elizabeth Holmes

By Kevin J. O'Brien

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Theranos founder Elizabeth Holmes is cross examined by prosecutor Robert Leach during her trial, in San Jose, California, U.S., in this courtroom sketch, November 30, 2021. REUTERS/Vicki Behringer



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December 15, 2021 - At the start of the Elizabeth Holmes trial, it was commonly said that the prosecution's chief obstacle — apart perhaps from the public's indifference at best to the plight of wealthy investors in a Silicon Valley start-up — would be proving Holmes' state of mind or fraudulent intent. The essence of the crimes charged (wire fraud and conspiracy to commit wire fraud) was that she had defrauded patients and investors by

misrepresenting the capabilities of Theranos' signature product, a finger-stick blood test performed by a portable device called "the Edison."

How, it was asked, would prosecutors be able to prove that the chief executive officer of a \$9 billion company, a non-scientist insulated by layers of staff from the lab work and testing procedures of medical professionals, knew that the Edison in fact was incapable of producing accurate and reliable results for many blood tests, contrary to Theranos' validation reports and marketing materials?

Fresh in people's minds was the aftermath of the 2008 financial crisis, when not a single high-level executive was successfully prosecuted for the disastrous performance of their companies, despite promises by the Department of Justice, state attorneys general, and elected officials that heads would roll. Would Holmes likewise escape accountability?

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The jury in the Holmes trial has not yet been charged, but there are many indications that its verdict could be an exception to the trend. From my perspective as a former Assistant U.S. Attorney for the Department of Justice who specializes in white-collar criminal defense, two reasons that argue for conviction stand out.

First, the government did a skillful and thorough job stitching the complex evidence, derived from no fewer than 29 witnesses, nearly all of whom had something important to say, into a coherent whole whose parts reinforced one another. This is no small feat when the focus of the case is a large organization over a nine-year period (from 2009, when the fraud schemes allegedly began, to 2018, when Theranos went under). In large white-collar cases, prosecutors often lose sight of the forest for the trees, and in the process lose the jurors.

Second, and surprisingly, Holmes proved to be her own worst enemy. She was a hands-on manager, spokesperson, and fundraiser who frequently interacted with staff, investors, and customers such as Walgreens, the company's largest customer and the only place where the Edison was actually rolled out. Holmes even had a hand in creating validation reports for the company's devices, ostensibly prepared by pharmaceutical giants like Pfizer and Schering-Plough but often (Holmes admitted) altered by her for marketing purposes.

The prosecutors in choosing their witnesses drew liberally from the various players in Holmes' professional world: Theranos board members, laboratory supervisors and staff, private equity and hedge fund investors, executives from corporate customers and partners, journalists, and patients. All of them except the last were able to recount conversations or communications with Holmes herself.

Holmes' overweening style also did not mesh with the much-anticipated defense that her conduct was attributable to the abuse she suffered from her former boyfriend, Ramesh "Sunny" Balwani, the company's chief operating officer at the time. The prosecutors took pains to seed their witnesses' testimony with observations of Holmes' command and independence.

For instance, Steven Burd, the former chief executive officer of Safeway, testified that in 2010 his team negotiated Safeway's \$55 million deal for blood-testing devices "almost exclusively with Holmes," who did not have counsel present, and that she appeared to be in charge even when Balwani was in the room.

"She never looked over at Sunny to see what he might be thinking," Burd remarked.

By 2012, though, Burd realized that the Edison, despite Holmes' claims, was "nowhere near" as accurate as laboratory testing, and that Theranos was not close to rolling out its devices in Safeway stores. A year later, when Burd retired, the deal was dead.

Holmes, with the aid of text messages and electronic notes, portrayed a romantic relationship that was troubled to say the least. But the jurors will not have to reject or discount her sympathetic account to convict her of the crimes with which she is charged. The two issues could pass each other like ships in the night.

Holmes admitted in her direct testimony that Balwani never forced her to say certain things to investors or journalists. Her explanation that "he impacted everything about who I was" is probably too vague to shift the blame to Balwani and might even backfire if the jurors perceive her to be looking for a scapegoat.

Another widely anticipated defense — namely, a fool and his money are easily parted — also seems to have been marginalized by the prosecution. To be sure, the standards for investments and partnerships with a Silicon Valley start-up were often shown to be lax.

One Walgreens executive confessed that "I wanted to believe that what [Holmes] said was true," even after the evidence suggested otherwise.

A wealthy investor who put millions into Theranos as late as 2016, after a Wall Street Journal exposé in late 2015 spelled the beginning of the end, testified defensively that "It did feel like a revolutionary technology." He also explained how the perpetual fear of "losing a competitive edge," or not being in on the next wave of innovation, drove investment in a product that some knowledgeable figures in the industry said simply could not work.

The defense sometimes dwelt on these foibles, but the government's answer was simple: Not even a rash investor deserves to be defrauded or misled about the essentials of his or her investment.

Holmes' decision to take the stand in her own defense, usually a difficult choice in a criminal case, was relatively straightforward here because the alternative was not attractive. Holmes' direct testimony, predictably, blamed most of Theranos' mistakes on

others. A Theranos scientist explained in 2010 that the Edison could do "any test," she claimed. Attorney David Boies counseled her not to disclose that Theranos had to test blood in a central lab after Walgreens decided in 2012 that the Edison could not be made available inside its stores. In 2013, Safeway pressured her to roll out Theranos devices before they were ready.

The government wisely took a restrained approach on cross-examination, no doubt with Sunny Balwani in mind. In an around-about way, Holmes admitted trying to quash the Wall Street Journal reporting ("we really messed up") and failing to correct the erroneous statements she had made to journalists ("I think I could have handled those communications differently").

At this point in the case, the quality and quantity of the government's evidence, rather than any clever trial strategy or outstanding courtroom performance, seem decisive. One key prosecution witness was Theranos' first laboratory director, Adam Rosendorff, who testified early in the trial and was cross-examined for five days. According to his statements, management was unwilling or unable to do the blood tests required by law and pushed him and his staff to rationalize inaccurate test results.

In 2013, Rosendorff went to Holmes and implored her to delay the launch of the Edison. She was "trembling" and "clearly upset," but she went ahead with the launch. By the following year, Rosendorff was convinced the tests performed by the device would not work but realized Holmes was intent on expanding its commercial use. He resigned that year.

The prosecution's final witness was journalist Roger Parloff, who topped off the government's case. Parloff testified Holmes told him in 2014 that the company used no third-party devices for blood testing, that the Edison could do anything a Quest Diagnostics lab could do, and that the Edison was being used in Afghanistan under a Department of Defense contract (which she instructed him not to mention in his story).

All these claims, according to the government's proof, were untrue.

While the verdict in this case has yet to be decided, the prosecution effectively inoculated itself against the defense's possible arguments by presenting a broad range of authoritative testimony to the contrary. By putting Holmes herself on the stand, the defense made an unorthodox choice that probably will not pay dividends in the face of these other accounts.

The prosecution's handling of Holmes' cross-examination likewise presents an object lesson on how to sidestep a trap from the defense. A jury's sympathy for a defendant can prove decisive in its verdict; in this case, the prosecution tactfully avoided eliciting it.

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