TRIAL PRACTICE

Trial Practice: Cross-Examination—Expert Witnesses

AT&T Wireless Services, Inc. v. Castro,
896 So. 2d 828 (Fla. 1st Dist. App. 2005)

During cross-examination of an expert, counsel may properly ask the expert to speculate on alternative theories and possibilities contrary to the expert's own conclusions. However, counsel is not required to ask the expert to testify that his or her conclusions are within a reasonable degree of medical certainty or probability.

FACTS AND PROCEDURAL HISTORY

The claimant, Elizabeth Castro, sustained injuries while on the job and subsequently filed petitions seeking permanent total disability benefits. As a result of her injuries, Castro sought attendant care services. Castro's employer and insurance carrier disputed her entitlement to such benefits, arguing that she was malingering. When cross-examining Castro's independent medical expert (IME) regarding the possibility of malingering, Castro's counsel objected each time the carrier's counsel asked a question using the word "possible." Castro's counsel argued that all of the questions asked the expert to testify to possibilities, which was not the proper standard—within a reasonable degree of medical probability or certainty. The Judge of Compensation Claims (JCC) sustained each of these objections and directed the carrier's counsel to rephrase the questions. Subsequently, the JCC awarded Castro benefits. The carrier appealed the JCC's award of workers' compensation benefits.

ANALYSIS

In a workers' compensation suit, the claimant must present competent, substantial evidence to establish the nature of the injury, its causal relation to the claimant's employment, and any disability resulting from it to a "reasonable degree of medical certainty." Fla. Stat. § 440.09(1) (2004). There is no statutory requirement that questions asked on cross-examination contain the "reasonable degree" language. Rather, the fact-finder must de-

termine whether the totality of the evidence proves the causal relationship between a claimant's employment and the injury.

The purpose of cross-examination is to allow opposing counsel to explore theories different from the one put forward by the witness. *Butts v. State*, 733 So. 2d 1097, 1101 (Fla. 1st Dist. App. 1999). In *AT&T Wireless*, the First District Court of Appeal held that the requirement Castro's counsel advocated—that questions asked of an IME during cross examination must contain the "reasonable degree" language—would effectively prevent the carrier's counsel from exploring and testing the IME's conclusions. A full and fair cross-examination is important because it may lead to the fact-finder's decision that the IME's conclusions are incomplete or unreliable. When the carrier claimed that Castro was malingering, the carrier had a right on cross-examination to discover whether Castro's IME had considered such a possibility in forming his or her opinion. Accordingly, the court found that the JCC abused her discretion when she sustained Castro's counsel's objections to the questions asked during cross-examination.

SIGNIFICANCE

AT&T Wireless signifies that practitioners should utilize the wide latitude afforded in cross-examination to challenge expert opinions. This latitude allows practitioners to explore the possibility of contrary findings with the witness. It is harmful error for the fact-finder to limit the scope of cross-examination, because a thorough cross-examination is necessary to allow the fact-finder to consider the IME's responses to such questions and to ultimately determine the thoroughness and credibility of the IME's testimony.

RESEARCH REFERENCES

- 58 Fla. Jur. 2d *Workers' Compensation* § 92 (2006).
- 58A Fla. Jur. 2d *Workers' Compensation* § 623 (2006).

Mary Ellen Pullum

Trial Practice: Cross-Examination—Improper Questioning

***Wilson v. State*,**
880 So. 2d 1287 (Fla. 3d Dist. App. 2004)

During cross-examination, it is improper for attorneys to ask the witness whether previously testifying witnesses are lying or conspiring against his or her witness. However, this action constitutes reversible error only if the queried witness responds in a manner that makes the two opposing testimonies irreconcilable, thereby forcing the jury to conclude that one of the witnesses has lied. Moreover, reversal is proper only as to the specific charges that the improper questions addressed.

FACTS AND PROCEDURAL HISTORY

The defendant, Wilson, was convicted of attempted first-degree murder, as well as burglary with a battery while armed with a knife. Wilson was acquitted, however, of stalking the victim and the victim's girlfriend with whom the defendant had previously been romantically involved. During the State's case-in-chief, the prosecutor called several witnesses. Each witness testified that he or she saw the defendant harass his former girlfriend, heard him state that he wanted her back, and heard him threaten the victim and his former girlfriend. On cross-examination, the defendant denied the allegations of threats and harassment. In response, the prosecutor reminded the defendant of the prior testifying witnesses' statements and asked, "But they're all lying?" *Wilson*, 880 So. 2d at 1288. Defense counsel objected to this question, but did not state the legal grounds for the objection. The trial judge then cut off the defense counsel for making a speaking objection and denied defense counsel's subsequent request for a sidebar. Accordingly, the prosecutor again asked the defendant if he believed that all of the witnesses were lying or engaging in a conspiracy against him, to which he replied, "Yes." The Third District Court of Appeal, on rehearing, affirmed the defendant's conviction.

ANALYSIS

In considering whether the prosecution's questions were improper, the Third District relied upon *Whitfield v. State*, 549

So. 2d 1202 (Fla. 3d Dist. App. 1989), for the proposition that it is impermissible to ask a witness if another previously testifying witness was lying. Further, the court rejected the State's argument that there is a distinction between asking whether a witness was lying or conspiring. Instead, the court concluded that the prosecution asked an impermissible question and that the trial court committed an error by allowing the defendant to answer the State's question.

Because the court concluded that the trial court erred, the Third District then considered whether this error was harmless. It relied on *Knowles v. State*, 632 So. 2d 62 (Fla. 1993), to answer this question, which explained that if a defendant responds to a question of whether previously testifying witnesses are lying in a manner that requires the jury to decide which witness (not necessarily a party) is truthful, the error is reversible.

In *Wilson*, the defendant answered in the affirmative when asked whether the other witnesses were lying or conspiring against him. Although the improper question constituted reversible error under the *Knowles* standard, the Third District provided two reasons why, in this instance, the improper question was not reversible error. First, the court reasoned that the error was harmless because the isolated improper questioning could not vitiate (1) the cumulative effect of an eight-day trial; (2) the fact that the prosecutors did not emphasize this line of questioning to the jury by referring to it in the State's closing argument; and (3) the physical evidence of the victim's multiple stab wounds. Accordingly, even though the defendant's response required the jury to make a credibility decision regarding the prior testifying witnesses, credibility was not a critical issue in the case, and thus, the error could only be harmless. Additionally, even if the improper questions would merit reversal, the defendant's convictions were for attempted murder and burglary, while the improper questions concerned whether the defendant had stalked the victim and the defendant's former girlfriend. The improper questions were therefore irrelevant because the defendant was acquitted of stalking. Therefore, the Third District held that the trial court committed harmless error beyond a reasonable doubt.

SIGNIFICANCE

Wilson is significant because it explains when an improper question soliciting a witness' opinion as to the veracity of previously testifying witnesses' statements constitutes reversible error. When witnesses' responses require the jury to decide which witness is truthful, the error is reversible. Additionally, the Third District refused to distinguish between a question that asks whether the other witnesses are lying or whether the other witnesses are conspiring, finding that the questions are both improper.

Additionally, even though an improper question requires the jury to make a credibility judgment, reversible error must be assigned with care. When a defendant faces multiple charges, the improper question and response are only reversible as to the charges to which the question and response were addressed, not all charges in a case. Moreover, *Wilson* likely stands for the proposition that even if the improper question and response relate to a charge for which the defendant was convicted, unless the credibility of the witnesses was critical to a determination of guilt in that charge, the error is still harmless.

RESEARCH REFERENCE

- Fla. Stat. § 90.701 (2006).

Philip McCormick

Trial Practice: Ethics—Attorney's Duty to Disclose

Florida Bar Ethics Opinion 04-1,
2005 WL 3985348 (Fla. Bar Assn. 2005)

An attorney must disclose to the court a criminal defendant-client's intent to commit perjury when the attorney definitely knows, as opposed to merely suspects, that the client intends to testify falsely at his upcoming trial.

FACTS AND PROCEDURAL HISTORY

A member of The Florida Bar represented a criminal defendant who had repeatedly expressed his intent to commit perjury at his upcoming trial. Despite numerous warnings to his client

that the lawyer would in fact notify the court if false testimony was given, the client still insisted upon his fraudulent course of action. The lawyer requested a written opinion from the Professional Ethics Committee (PEC) regarding his ethical obligations in this situation. In response, the PEC issued Proposed Advisory Opinion 04-1, outlining the appropriate course of action when a lawyer represents a client who the lawyer definitely knows intends to commit perjury.

ANALYSIS

The PEC referred to several Rules Regulating the Florida Bar as the foundation for its opinion. First, Rule 4-1.2(d) generally forbids an attorney from assisting a client in "conduct that the lawyer knows or reasonably should know is criminal or fraudulent." Second, Rule 4-1.6(b)(1) provides an exception to the attorney's duty of confidentiality by requiring an attorney to disclose information to the extent necessary "to prevent a client from committing a crime." Since Florida Statutes Sections 837.02 and 777.011 make it a crime for a lawyer to assist or allow a client to give false testimony, the PEC believed that these ethics rules applied to the current inquiry. Third, Rule 4-3.3 was pertinent because it prohibits a lawyer from knowingly permitting a criminal defendant to offer false testimony, and it requires the lawyer to disclose material facts to the court when "necessary to avoid assisting a criminal or fraudulent act by the client." The PEC opinion stated that a lawyer becomes obligated to disclose such information to the court once the lawyer knows that a client "will make material false statements to a tribunal." 2005 WL 3985348 at *2.

Under the proposed factual situation, the lawyer possessed the knowledge necessary to trigger disclosure because the client repeatedly told the lawyer that he intended to commit perjury. The PEC stressed that this situation differs from one in which a lawyer merely suspects a client may testify falsely. When the attorney knows the client will commit perjury, merely withdrawing from representation is not sufficient to satisfy ethical rules because it does not prevent the perjury from occurring. Instead, the lawyer is obligated to disclose to the court the client's intent. It is within the court's discretion to determine the method and timing of the disclosure. Once disclosure is made, the resulting conflict of

interest between lawyer and client then demands that the lawyer move for withdrawal from representation. R. Regulating Fla. Bar 4-1.7, 4-1.16(a). The court may, however, order the lawyer to continue representation in spite of the good cause to withdraw. R. Regulating Fla. Bar 4-1.16(c). In the event that representation continues, the lawyer may offer narrative testimony by the client only if it is ordered by the court. R. Regulating Fla. Bar 4-3.3(a)(4).

The PEC also addressed the situation presented when a client offers false testimony without the lawyer's prior knowledge. In that case, under Rule 4-3.3(a)(2) and the corresponding commentary, the lawyer must attempt to persuade the client to disclose the perjury, and if that fails, the lawyer must take it upon himself or herself to make the disclosure. If the client's refusal forces the lawyer to disclose the false testimony, this will create a conflict of interest that again requires the lawyer to move to withdraw from representation of the client.

SIGNIFICANCE

This opinion provides significant guidance for the practitioner faced with a criminal defendant-client who expresses the intent to lie to the court. Because disclosure is only required when the lawyer "knows" that the client will commit perjury, the difficulty lies in determining when a client will actually follow through with the stated intent. It must be remembered that an attorney's first duty is always to attempt to convince the client to testify truthfully. Disclosure should be made only after a client has been fully advised of the consequences of committing perjury, including the lawyer's disclosure, and the client has been given ample opportunity to change his or her mind.

RESEARCH REFERENCES

- Dag E. Ytreberg, *Rights and Duties of Attorney in a Criminal Prosecution Where Client Informs Him of Intention to Present Perjured Testimony*, 64 A.L.R.3d 385 (Westlaw database updated Dec. 2003).
- 4 Fla. Jur. 2d *Attorneys at Law* §§ 115, 267 (West 2004).

Paula P. Bentley