The Witnesses: Is That a Crime (or What)?

Judge Jerry Buchmeyer

By Judge Jerry Buchmeyer

We're into the hard stuff now: criminal trials.

The defendant won't enter a plea. You have only limited discovery, if any, because you're *merely* dealing with someone's life or liberty — and not money or property, as in a civil lawsuit. But you have no choice — didn't someone say "Fools rush in where fools have been before" — because you must, whatever the cost, confront **The Witnesses**.[1]

Did I Really Hear That?

In an armed robbery trial in Anchorage, the arresting officer testified:

> "I advised the suspect of his Miranda rights, told him I wished to ask him some questions concerning the armed robbery, and he stated *he would rather have an attorney present before he incriminated himself.*"

. . . . .

In an Ontario murder trial, the policeman testified, "When I arrived, the victim was still alive and he said..."

At this point, the witness was abruptly interrupted by the judge, with a stern warning that the witness should not say anything else until it was determined whether the evidence was admissible. The jury was excused and, for the next several hours, the attorneys argued subtle legal points as to whether or not the victim's statements were within the "dying declaration" exception to the hearsay rule. The prosecution, of course, contended that they clearly were; however, the defense argued that there was no showing that the deceased victim actually knew he was dying when he spoke to the policeman. Finally, the trial was recessed and, after hours of his own research, the judge announced the next morning that the testimony *was* admissible as a dying declaration. So, the policeman returned to the stand for this exchange:

Q. Now officer, yesterday you were about to tell us what the deceased said when you arrived on the scene. Please tell His Lordship and the jury what he said.

A. *Well, he just said "Ugh!" and died.*

Richard Henderson of Fort Worth (Henderson & Snell) was court-appointed to represent the defendant in an ear biting case. His client, Grace Marie Jones, was accused "of biting off a piece of her step-mother's ear while having a fit under the influence of some type of inhalant." During the plea for probation, the testimony was:

Q. You are Grace Marie Jones, the defendant in this case?

A. Uh-huh.

Q. Is that *Miss* Jones?

A. Uh, you can call me Grace.[2]

Feeling Remorse

Peter V. McDonald, Q.C., who collected the witness stories in *Court Jesters* (footnote 1), observes: "There's nothing funny about the act of rape, There are, however, many humorous things said at rape trials, most of them unintentional." He then recounts the Ontario trial in which the victim testified that "He tried to have *annual* intercourse with me" — and in which the defendant testified that "It took me a long time to get erected."

. . . . .

Judge David V. Wilson of Lufkin (217th Judicial District) sent me this excerpt from the cross-examination of a defense witness in a rape case tried in his court a few years ago:

Q. She had begged him or she said, "Stop, quit, don't." And this guy was holding her down.

A. Yes.

Q. And the other one was pulling his shenanigans right there, and they drug her off in the woods.

A. *I hadn't seen him pull his privates out.*

Q. *Who is that?*

A. *Roderick.*

Q. But you saw that man didn't you?

A. Yes, sir.

. . . . .

This actually happened in an Australian rape trial, "at the court of petty sessions in Yogg." It is not aprocryphal — even though, since you probably heard it before, it no doubt happens with Some Degree of Frequency in rape trials throughout this land.

COUNSEL: Did he use any force at all on you?

GIRL: No.

COUNSEL: Did you try to push him away?

GIRL: No.

COUNSEL: Did you say at any time "please don't?"

GIRL: No.

COUNSEL: Then what is your explanation for saying that you were raped by him?

GIRL: Well, I guess the explanation is that I rapes easy.

. . . . .

From the cross-examination of the accused in an Ontario rape trial:

Q. Did you feel her knee?
A. (reluctantly) Yes.
Q. Did you feel her thigh?
A. (reluctantly) Yes.
Q. (with indignation) Did you feel any area higher than that?
A. (reluctantly) Yes.
Q. (very indignantly) *Did you not feel remorse*?
Q. (most reluctantly) *Yes, I had my hand on that, too.*

Of Some Concern

Donald R. Scoggins of Dallas contributes this excerpt from a probation revocation hearing; the father of the defendant has just testified, and the assistant district attorney begins cross-examination:

Q. Has he ever told you that he doesn't understand what he's supposed to be doing on probation?
A. *He's been concerned about that.*
Q. Well, what have you and he talked about with regard to his felony probation conditions?
A. We didn't discuss the policy.
Q. Well, how did he express to you that he was concerned about his felony probation conditions?
A. He didn't say he was concerned about it.
Q. Well, you just got through saying he was concerned about it. I just wanted to know how you arrived at that conclusion.
A. When I said he was concerned about it?
Q. When did you find out he was concerned about it?
A. *I didn't find out he was concerned about it.*
Q. *All right. I have nothing further of this witness.*

MISSING HEIRS?
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A Small Problem

Tom Mills of Dallas (Baker, Smith & Mills) is entitled to Put the Record Straight Once And For All — because "some cynical courthouse types" still believe that it was part of his strategy, in a 1974 death penalty case, to present a rather dramatic insanity defense. As reported in the official transcript:

Reporter's Notes: "Whereupon, the Defendant, while seated at the counsel table and in the presence of the jury, produced from a hidden location on his person a small wooden sulphur headed incendiary device, to-wit: a kitchen match, setting on fire several sheets of paper, which burning sheets were then placed on top of the Defendant's head, which in turn resulted in the immediate ignition of the Defendant's hair.

"The Defendant thereupon left his chair amidst exclamations from his counsel, admonitions from the Court, the pervasive aroma of burning protein, and moved toward the Bench in a manner suggesting his intention to ascend thereto.

"Whereupon, the Defendant was thereupon sat upon by various Court officials (whom the Court relied upon) and was immediately (1) subdued (2) given warnings as to his constitutional and legal rights, which warnings complied in all respects with the Constitution and laws of this State and the United States, and (3) extinguished, following which a recess was taken and enjoyed by all.

The Judge (after conference with the lawyers):

"Now, Ladies and Gentlemen, *we have encountered a small problem*, as you have probably noticed, and we are not going to be able to continue the trial this afternoon. I am going to recess you for the afternoon and ask you to return in the morning at 9:00 o'clock."

Tom Mills adds that: "The transcript fails to reflect that the homicide detectives who were waiting in the witness room adjacent to the courtroom responded to the disturbance in the courtroom by swiftly beating the flames down from my client's hair with the butts of their service revolvers, making certain that there was not even the glimmer of a smoldering ash left on the top of Mr. Jones' head."

Gaining A Little In Translation

The main suspect in a Really Big Drug Case spoke only French. *All* of his activities were being secretly recorded, with the most sophisticated equipment, for use at trial — including some incriminating "bedroom" statements made while the defendant and his girlfriend[3] were engaged in sex. At trial, the interpreter translated *everything*, including the climactic moment in bed, which he said culminated in these words:

"I've arrived! I've arrived!"

[. . . **to be continued** . . .]

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1. Just as before, some of these witness stories come from *Court Jesters*, by Peter V. McDonald, Q.C. (Methven 1985); from *Great Legal Fiascos*, by Stephen Tumin (Arthur Barker Ltd. 1985); and from *It's Legal To Laugh*, by Milton Green (Vantage Press 1984).
2. Richard Henderson also shared "a very interesting police report" in which a field sobriety test was given on a DWI suspect. The report read: *"The subject was asked to stand and hold both legs out, but was unable to do so."*
3. Actually, I'm being polite. As others who were addicted to the old James Cagney-Edgar G. Robinson gangster movies well know, *the lady was his moll*. See, e.g., *Little Caesar* (Warner Bros. 1930) ("If anyone turns yellow and squeals, my gun's gonna speak its piece"); *White Heat* (Warner Bros. 1949) ("Made it, Ma. Top of the world!").