Campbell Law Review

Volume 3
Issue 1 *1981*

Article 3

February 2012

When Should a Trial Judge Intervene to Question a Witness?

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COMMENTARY FROM THE BENCH

WHEN SHOULD A TRIAL JUDGE INTERVENE TO QUESTION A WITNESS?

THE HON. HAMILTON H. HOBGOOD*

The simplistic answer is: rarely and sparingly; however, such answer does not quite hit the mark.

I. INTRODUCTION

North Carolina Appellate Courts on several occasions have ordered new trials in cases due to the improper questioning of witnesses by the trial judge. Nonetheless, other Appellate Court opinions hold that limited questioning by the trial judge is appropriate and even necessary to promote clarity and to expedite the trial. We should all agree that the underlying purpose of every trial is to arrive at truth in the case and thus attempt to do justice. Clarity promotes justice. If the judge recognizes confusion at trial, limited intervention and questioning is allowed. The question becomes how far and under what circumstances may the trial judge intervene? A trial judge may intervene in the situations listed below, as well as others, without being subject to reversal on appeal. As I discuss the problems and possible solutions to the question presented, one must keep in mind that, under North Carolina trial procedure, no judge is allowed to voice any opinion as to whether any fact is fully or sufficiently proven as that invades the province of the jury.

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II. PROBLEM SITUATIONS

A. COURT DELAYS

Time is a priceless commodity in court. When a trial judge perceives that the examining lawyer is thinking about one thing in his questioning and the witness is obviously talking about something else, the judge should intervene and ask a few simple questions to save time and prevent delay.

One must be aware however, that often the lawyer will intentionally ask complex questions. Even when the lawyer asks simple, direct questions the witness often gives an indirect, confusing answer. Prospective damaging testimony is sometimes evaded by the lawyer and witness. In such a situation, the trial judge should admonish the lawyer to restate the question in more understandable language or require the witness to answer the question before embarking on a long, rambling explanation.

B. OMISSION OF ELEMENTS OF CASE

A problem I have often faced is when the attorney is so preoccupied with various details of his case that he overlooks some essential fact which, if not proven, subjects the case to dismissal. Should the trial judge say nothing, look the attorney in the eye and blandly dismiss the case upon proper motion from opposing counsel for this fatal omission of proof? "Yes" and "no" depending upon the circumstances of the particular case. Under no circumstances, however, should the trial judge ask questions to establish essential facts.

The judge should utilize another technique to solve this problem before the attorney rests his case. He should call a well-timed ten minute recess and invite counsel on both sides into chambers and advise the plaintiff's lawyer that if certain facts are not proven, the case will be dismissed. Upon hearing the judge's advice, plaintiff's counsel is usually red-faced, apologetic and thankful. These situations often move defense counsel to say, "judge, I had him and you let him off the hook!", to which I would always reply, "well, I would do the same for you under similar circumstances."

C. WITNESSES

1. MINOR WITNESS

Another problem is that of a young boy or girl, often a sex

victim and an absolutely necessary witness, who is so traumatized by the court scene, and the predicament of giving such personal and distasteful testimony, that he or she simply will not speak. Justice demands that the trial judge intervene with some quiet questions and try to allay the fears of the child, at least to the extent that the child can attempt to identify the defendant and give basic testimony. This situation tests the ingenuity of the judge. Some questioning is needed, but restraint must be utilized. The judge should never be cast in the mold of prosecuting or defending.

On the other hand, justice may suffer if the judge fails to intervene. I recall a rape case in Columbus County in which a ten year old girl would "sing like a canary" when talking to the district attorney in the conference room, but would not speak on the witness stand. When this happened, I cleared the court with the exception of the jury, court officials, defendant, counsel, mother of the victim and two members of the news media. She still would not testify. Even after an overnight recess, she would not speak. The case against the defendant was finally dismissed even though evidence tended to show he was guilty of a heinous crime.

The judge should intervene when the minor child will not testify. Most of the time, a judge can put a terrified child sufficiently at ease to enable the child to testify. If the judge does nothing, the entire trial becomes snafued.

2. DEAF WITNESS

Another problem area which requires intervention and questioning by the judge is the testimony of a deaf witness. How can the judge determine when such a witness is faking deafness? One clue is when the witness has no difficulty hearing questions put to him by the lawyer on direct examination, but cannot hear or comprehend any questions asked by the cross-examiner. Such a situation is frustrating and requires intervention and questioning by the judge. I recall that one defendant, who was wearing a hearing aid, could understand every question posed by his attorney, but could not hear any question posed by opposing counsel or even by me as judge, even though I was only five feet away. In exasperation, I suggested to his lawyer, in the presence of the jury, that his client had a good cause of action against the company that sold him the hearing aid he was wearing. The jury laughed while the attorney for the defendant blushed. The case was settled during the next recess. Was my statement in the presence of the jury error? I

would say that such a statement is improper, but probably appellate court would hold it to be harmless error.

3. EXPERT WITNESS

Another trial situation which requires intervention and questioning by the judge is during the examination of an expert witness. I find that experienced expert witnesses usually testify in simple language which the jury understands. For example, a medical doctor usually will describe the upper bone of a victim's leg as the "thigh bone or the upper leg bone" instead of "femur". At times, however, some experts must be questioned by the judge to insure that the jury understands the professional terminology used by the expert witness.

4. ILLITERATE WITNESS

Despite compulsory education laws in North Carolina, many illiterate witnesses still testify in court. The trial judge is often required to question, answer and interpret witnesses' testimony in order to preserve some continuity at trial. Let me illustrate, through two examples, when a trial judge may have to intervene to interpret the testimony of an illiterate witness.

I was presiding over a civil session of court in Robeson County, hearing a civil case resulting from an automobile collision. A young attorney from Charlotte was questioning an elderly illiterate witness.

Question: When did you first observe the motor vehicle collision?

Witness to the judge: What air he talking about? [*sic*]

Judge: The lawyer wants to know when you first saw the car wreck?

Witness: I fust zarned it at the curve at the simmon tree. [*sic*]

Lawyer: I beg your pardon, would you repeat your answer?

The identical answer was repeated.

Lawyer to the judge: What does the witness mean?

Judge: The witness said he first discerned the collision at the curve at the persimmon tree.

Question: Was that prior or subsequent to the time you heard the noise of the collision?

Witness to the judge: What do he mean by prior and subsequent? [*sic*]

Judge: He wants to know was that before or after you heard

the noise of the wreck?

Witness to judge: Why don't he say what he means? [*sic*]

I have concluded that a lawyer should receive ten lashes every time he uses the words "prior and subsequent" in lieu of "before and after" when questioning an illiterate witness. "Before and after" are easily understood by any witness and should be used whenever possible.

Usually a character witness giving an opinion as to a person's character is limited to such terms as "good", "excellent", "bad" or "not good". In one particular case, a character witness stated that, in his opinion, the defendant's character was "fair to middling." Although the lawyers did not understand what he meant, I learned, through my farm background, that "fair to middling" was a grade of cotton which meant "average." So, I turned to the witness and asked, "fair to middling means average, doesn't it?" He answered, "that's right, Judge." A simple question by the judge often saves time and eliminates misunderstanding. I recommend that the judge should always intervene to clarify and interpret the testimony of an illiterate witness when the situation requires.

5. EXPLANATORY WITNESS

Another troublesome problem is the witness who insists on explaining his answer before he gives it. Many witnesses literally cannot testify to an observed event without beginning "I said to myself." The attorney has a difficult job when he attempts to get an answer from a witness who observed the event without the witness saying, for example, "I said to myself there is going to be a wreck." In such instances, the judge must intervene to admonish the witness to answer without revealing his thoughts.

III. PRACTICAL SOLUTIONS TO THE PROBLEM

A. LIMITED QUESTIONING

Questioning by the judge is sometimes the only effective manner of obtaining testimony from a witness who is reluctant or unwilling to testify. In my opinion, the judge should not question the witness under any circumstances unless it is apparent that the witness is terrified, apprehensive or misunderstands. Even then, the judge should ask only preliminary questions to put the witness at ease or to clear up a lack of communication. The manner and tone of voice of the judge is most important in this respect.

Any question put to the witness by the judge should be simple

and technically correct. Moreover, the judge should be very careful to refrain from indicating in any manner his opinion as to the credibility of the witness.

B. TIMING SAVING DEVICE

The judge should intervene to help counsel save time. For example, when counsel propounds a long and complicated hypothetical question to a witness and leaves out an essential element, the judge, in order to save time and to not wear thin the patience of the jury, should privately advise counsel in a bench conference of the missing link so that only one repetition of the hypothetical question is necessary. Otherwise, counsel will flounder around trying to figure out what is wrong. A good, experienced, lawyer will write out his hypothetical question in advance to be absolutely certain it has the necessary substance to be legally sufficient. An unwritten hypothetical is subject to sustainable objection from opposing counsel for legal insufficiency.

C. PREVENTING PREJUDICIAL ERROR

The judge should refrain from intervention in certain instances since such action would insure that the Appellate Court would grant a new trial. First, the judge should never ask questions favorable to the prosecution. Second, the judge should never take the witness out of the hands of counsel and start extensive cross-examination. If a judge feels it imperative to cross-examine a witness it should be done in the absence of the jury.

IV. NORTH CAROLINA LAW

A large number of cases before the North Carolina Appellate Courts have addressed the problem involving a trial judge questioning a witness. A representative group of these cases are listed in the *North Carolina Judges Bench Book* at III-15.2, as follows:

II. INTERFERENCE WITH EXAMINATION OF WITNESSES

A. GENERAL RULE

A judge is entitled to ask clarifying questions, but must not cross-examine, impeach, badger, harass, humiliate or belittle the witness. Examples of intervention going beyond clarification and into prejudicial error follow:

1. The judge asked over a hundred questions, some tending to

belittle and humiliate defense counsel, and made sustained objections on his own to defense testimony. *State v. Steele,* 23 N.C. App. 524, 209 S.E.2d 372 (1974).

2. The judge asked impeaching questions of the defendant and his witnesses. *State v. McCormick,* 36 N.C. App. 521, 244 S.E.2d 433 (1978); *State v. Pinkham,* 18 N.C. App. 130, 196 S.E.2d 290 (1973); *State v. Bond,* 20 N.C. App. 128, 201 S.E.2d 71 (1973); *State v. Sharpe,* 18 N.C. App. 136, 196 S.E.2d 371 (1973); *State v. Battle,* 18 N.C. App. 256, 196 S.E.2d 536 (1973).

3. The judge departed from the "cold neutrality of the law" in objecting to legitimate defense questions and in bolstering the testimony of a breathalyzer operator in a drunk driving case. *State v. Medlin,* 15 N.C. App. 434, 190 S.E.2d 425 (1972).

4. The judge went too far in sustaining his own objections to questions asked by defense counsel, even though entitled to exclude inadmissible evidence on his own motion, and also reprimanded counsel in front of the jury, indicating an antagonistic attitude toward the defense. *State v. Lemmond,* 12 N.C. App. 128, 182 S.E.2d 636 (1971); *Worrell v. Hennis Credit Union,* 12 N.C. App. 275, 182 S.E.2d 874 (1971).

5. The judge entered into prolonged examination of the plaintiff and his witness. *Southwire Co. v. Long Manufacturing Co.,* 12 N.C. App. 335, 183 S.E.2d 253 (1971).

6. The judge asked a question of the defendant that assumed he was the trigger man in a manslaughter case. *State v. Lowery,* 12 N.C. App. 538, 183 S.E.2d 797 (1971).

7. The judge supplemented the District Attorney's cross-examination as to defendant's previous convictions. *State v. Dickerson,* 6 N.C. App. 131, 169 S.E.2d 510 (1969).

8. The judge asked a single question of prosecutrix: "you were in the car when you were raped?" *State v. McEachern,* 283 N.C. 57, 194 S.E.2d 787 (1973). *See, State v. Oakley,* 210 N.C. 206, 186 S.E.2d 244 (1936).

9. The judge ordered the court reporter to enter the word "overruled" in the record after every objection made by the defense counsel; the judge did not rule on objections individually. *State v. Lynch,* 279 N.C. 1, 181 S.E.2d 561 (1971).

10. The judge interrupted the District Attorney and defense counsel about ten times to propound about fifty questions to various witnesses. *State v. Lea,* 259 N.C. 298, 130 S.E.2d 688 (1963).

B. HARMLESS ERROR

1. Questioning by the judge has been held to be merely *clarifying* and *harmless* in a large number of cases. Some examples are: *State v. Freeman,* 280 N.C. 622, 187 S.E.2d 59 (1972); *State v.*

Colson, 274 N.C. 295, 163 S.E.2d 376 (1968); *State v. Tennyson*, 17 N.C. App. 349, 194 S.E.2d 224 (1973); *State v. Williams*, 17 N.C. App. 31, 193 S.E.2d 478 (1972); *State v. Case*, 11 N.C. App. 203, 180 S.E.2d 460 (1971).

An additional excellent summary of North Carolina cases on this subject is set forth in *Strong's North Carolina Index, 3d*, Volume 4, Criminal Law, Section 99 through 99.11.

V. CONCLUSION

You can visualize from these examples that numerous situations arise during a trial which require the judge to untangle the presentation of evidence by questions, interpretations and answers. As long as such intervention by the judge is to clarify, the judge is free of reversible error for such appropriate interventions.

Trial judges are individuals. Some intervene more frequently than others; however, I have noticed a common element among judges who intervene frequently. I have observed that the more experience the trial judge had as a trial lawyer and the less experience he had had as a judge, the greater the temptation for him to intervene and pose questions to witnesses. I advise that this almost irresistible impulse be rigidly controlled by the judge or else he usually commits reversible error.