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CRIMINAL LAW AND PROCEDURE-WHETHER REVERSIBLE ERROR FOR JUDGE TO GIVE INSTRUCTIONS RELATING TO CREDIBILITY OF DEFENDANT WITNESS

Edwin Boos
University of Michigan Law School

CRIMINAL LAW AND PROCEDURE—WHETHER REVERSIBLE ERROR FOR JUDGE TO GIVE INSTRUCTIONS RELATING TO CREDIBILITY OF DEFENDANT WITNESS—Appellant who was convicted of committing a criminal abortion, moved for a new trial alleging as error an instruction given by the judge to the jury. The instruction singled out the defendant from the other witnesses, pointing to his high degree of interest in a verdict of not guilty, as reason for scrutinizing his testimony. The judge also warned the jury that it need not accept blindly the testimony of the accused.[1] *Held*, reversed, new trial ordered. *Swanson v. State*, (Ind. 1944) 52 N.E. (2d) 616.

The court felt that singling out the appellant for special consideration was error because it made it appear to the jury that the judge [2] was inclined to disbelieve the appellant. The court thought that all instructions pertaining to the credibility of witnesses and the weight to be given evidence should be general and apply to all of the witnesses alike whether testifying for the state or for the appellant. It was held that only by following this rule would impartiality be secured and the appellant saved all the rights given by the statute which made him a competent witness.[3] Most courts in the United States hold contrary [4] to the Indiana case under discussion. That case, however, does follow a long line of Indiana decisions.[5] The courts of Texas [6] and Oklahoma [7] have also held that an

[1] State v. McKinnon, 223 N.C. 160, 25 S.E. (2d) 606 (1943).

The common law regarded the testimony of the defendant in a criminal action as incompetent because his great interest in the outcome would ordinarily induce him to lie.

[2] At common law the judge was free to comment on the weight of the evidence so long as he made it clear that his opinion did not have to be accepted by the jury. HALE, HISTORY OF THE COMMON LAW OF ENGLAND, 4th ed., 291 (1792). The federal courts still retain the practice. State v. Bartlett, 50 Ore. 440, 93 P. 243 (1908). Also see note in 6 So. CAL. L. REV. 56 (1932) for additional states that follow the old common-law rule.

[3] "The following persons are competent witnesses. . . . The defendant, to testify in his own behalf." Ind. Acts, 1905, c. 169, § 235, p. 584.

[4] "Although there is authority to the contrary, as a general rule, it is proper to give an instruction calling the attention of the jury to defendant's interest in the result, as affecting his credibility." 16 CORPUS JURIS § 2445c, p. 1021. Also see Lucius v. State, 116 Ark. 260, 170 S.W. 1016 (1914); State v. Mannion, 82 N.H. 518, 136 A. 358 (1927); State v. Ray, 195 N.C. 619, 143 S.E. 143 (1928). See also note 22, infra.

[5] Hartford v. State, 96 Ind. 461 (1884). Scheerer v. State, 197 Ind. 155, 149 N.E. 892 (1925) and Davis v. State, 210 Ind. 550, 2 N.E. (2d) 983 (1936), with strong dissenting opinion.

[6] Salamy v. State, (Tex. Cr. App. 1931) 37 S.W. (2d) 1028, reversed lower court though the instruction given was very fair. Also see Shields v. State, (Tex. Cr. App. 1898) 44 S.W. 844.

[7] Hendrix v. United States, (Okla. Cr. App. 1909) 101 P. 125 said that it was error to point out defendant's interest, but because the evidence was so overwhelmingly against the defendant, a new trial was not given. Later Oklahoma decisions stated em-

instruction is reversible error merely because it singles out the defendant from the other witnesses and warns the jury of his special interest in the trial. Louisiana [8] and Idaho [9] follow this rule. In Mississippi [10] it is error to point out the defendant's special interest when the outcome of the trial depends upon whether the jury believes the defendant or the witnesses for the prosecution. In cases where there is a great deal of evidence introduced for both sides, that court has sustained an instruction calling attention to the peculiar interest of the defendant.[11] Other courts [12] have held that instructions singling out the defendant for special comment are undesirable because they tend to discredit defendant in the eyes of the jury, but they do not consider them grounds for a new trial. Although courts agree in condemning an instruction that defendant's testimony should be given less weight than that of others,[13] there is a great deal of confusion as to what language will amount to a violation of this rule. The Iowa court appears to allow judges to comment freely for in *State v. Walker* the judge told the jury, "you are not required to receive blindly the testimony of such accused persons as true, but you are to consider whether it is true, as made in good faith or only for the purpose of avoiding conviction." [14] The Arizona court [15] condemned a similar instruction, but refused to reverse on that ground. North Carolina [16] and Alabama [17] also allow their courts to go a long way in singling

phatically that an instruction like that in the Hendrix case would constitute reversible error no matter what the circumstances of the evidence were. Fletcher v. State, (Okla. Cr. App. 1909) 101 P. 599.

[8] State v. King, 135 La. 117, 64 S. 1007 (1914).

[9] See Chatman v. State, 102 Miss. 179, 59 S. 8 (1912). Also State v. Foyte, 43 Idaho 459, 252 P. 673 (1927).

[10] Jones v. State, 154 Miss. 640, 122 S. 760 (1929). For the contrary result see State v. Brown, 216 Mo. 351, 115 S.W. 967 (1909).

[11] Poole v. State, 100 Miss. 158, 56 S. 184 (1911).

[12] State v. Snyder, 146 Wash. 391, 263 P. 180 (1927). People v. Will (Cal. App. 1926) 248 P. 1078 severely criticizes such instructions, but a constitutional provision allows reversals only when it is certain that an injustice has been done.

[13] REID'S BRANSON, INSTRUCTION TO JURIES, 3d ed., § 41, p. 123 (1936); 6 So. CAL. L. REV. 56 (1932). See also People v. Gerdvine, 210 N.Y. 184, 104 N.E. 129 (1914); Hartford v. State, 96 Ind. 461 (1884).

[14] State v. Walker, 133 Iowa 489 at 497, 110 N.W. 925 (1907) is very strongly worded and would probably be reversed in other jurisdictions. Also see State v. Bird, 207 Iowa 212 at 216, 220 N.W. 110 (1928) where the court said that the "defense of alibi is easily manufactured [and difficult to disprove], and that juries are advised by the courts to scan the proofs of it with care and caution."

[15] Robertson v. Territory, 13 Ariz. 10 (1910), affirmed, 188 F. 783, 108 P. 217 (1910).

[16] State v. McKinnon, 223 N.C. 160, 25 S.E. (2d) 606 (1943). Testimony should be received "with caution and scrutiny." State v. Williams, 185 N.C. 643 at 666, 116 S.E. 570 (1922). Defendant's testimony is to be regarded with suspicion. State v. Lee, 121 N.C. 544, 28 S.E. 552 (1898).

[17] Mosely v. State, 241 Ala. 132, 1 S. (2d) 593 (1941). Instruction not great enough error to cause reversal when standing alone, but it may combine with other small errors to cause reversal.

out the defendant for special treatment. They recognize that such a procedure is unfair, but the doctrine of stare decisis prevents a change.[18] The Nebraska [19] and Illinois [20] courts allow instructions that point out the special interest of the defendant, but such instructions must not discredit the testimony of the defendant in the slightest degree. The warning of the judge that the jury need not accept blindly the testimony of the accused, given in the principal case, would for example, be held reversible error by the Illinois and Nebraska courts.[21] Another troublesome question is whether the jury should be instructed that it "must" [22] consider the interest of the defendant when evaluating his testimony, or only that it "may" [23] do so. The consensus of opinion [24] appears to be that the instruction be in the latter form.

Edwin Boòs

[18] See notes 16 and 17.

[19] Donner v. State, 72 Neb. 263, 100 N.W. 305 (1904). Reversed because instruction said jury need not receive defendant's testimony blindly.

[20] In People v. Arnold, 248 Ill. 169, 93 N.E. 786 (1910) instructions questioned whether defendant's testimony was made because true, or to avoid conviction. Reversed.

[21] See notes 19 and 20.

[22] Miller v. State, (Ala. App. 1926) 107 S. 721. The judge cannot command the jury to take into consideration defendant's interest in the outcome of the trial.

[23] The judge can instruct the jury that it may take into consideration the natural bias of the defendant when weighing his testimony. Kyle v. State, (Ala. App. 1926) 107 S. 222; State v. Taylor, 105 W. Va. 298, 142 S.E. 254 (1927); Callas v. State, 151 Miss. 617, 118 S. 447 (1928); State v. Mannion, 82 N.H. 518, 136 A. 358 (1927); State v. Quartier, 118 Ore. 637, 247 P. 783 (1926); State v. Greenier, 53 N.D. 558, 207 N.W. 226 (1926).

[24] Id.