

CARLSONS' corner

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The Right to Open and Conclude Final Arguments: When Is Evidence Introduced?

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As seemed to happen so often, freshman prosecutor Elwood returned from court with his head hanging low. Earl, a seasoned veteran of the office, gingerly inquired: "Tough day in trial?"

"Judge Barnstable did it to me again," Elwood confided, "This time it was during final argument."

From there, Elwood recounted how he had saved his best points for rebuttal, but when he rose to deliver his followup, the judge told him argument was over and to have a seat while he charged the jury.

"'Sit down and shut up', is what he told me," Elwood confided.

"Did you say anything else?" Earl inquired.

"I told the judge that I had a right to a rebuttal argument, and that is what I learned in law school," Elwood said dejectedly.

"How did that go over?" Earl asked, expecting the worst.

"The judge told me that the defendant didn't put up any evidence, so he had the right to go last and I couldn't rebut. Then I pointed out that the defense did introduce evidence because the defendant testified and that had nothing to do with a rebuttal argument anyway."

"And then he put you in jail?" said Earl, now getting a little sarcastic.

"No, he just screamed, 'Where do you think you are, New York?'" and went on with charging the jury." Elwood despondently admitted.

Introduction

Georgia trials are marked by uncertainty when a criminal case nears its conclusion. In giving their closing arguments, which lawyer goes first? Who speaks last? Confusion often abounds. So does gamesmanship.

Defense attorneys and prosecutors regularly spar over these questions. They are important ones. Nobody who has seen a courtroom drama on television doubts the power and influence of a moving closing

argument on a trial jury. And everybody likes to get the last word in during any argument. Trials are no different.

A working knowledge of when and how Georgia courts make the determination of which party has "the right to open and conclude the arguments" is critical for prosecutors in our state.

The Legal Standard

Georgia statutory law establishes that "...the prosecuting attorney shall open and conclude the argument to the jury. If the defendant introduces no evidence, his counsel shall open and conclude the argument...."¹ Prosecutors frequently urge that an accused person has put in evidence, because under the law that act defeats any defense claim to argue last. An exception to this rule exists for the defendant's own testimony.² In multiple defendant cases, if one defendant "introduces evidence," then the ability to make the final, concluding argument is lost to all of them.³

Significantly, there is no requirement for counsel with the right to make the last argument to also make a preliminary argument. As such, the practice of "sandbagging" or only making a concluding argument is allowed. Georgia prosecutors (and defense attorneys who present no evidence) are not confined to rebuttal and can "waive opening" and make one sweeping, wide-ranging, concluding argument.⁴

Given this construct, the question remains, "When is evidence introduced?" Of course, where a defense witness is called or exhibit entered, the situation is easy. But what about the gray areas?

As will be demonstrated herein, there is not always a bright line distinction. Some situations are clear, and counsel needs to be aware of the scenarios which supply clarity. Then there are the aberrant cases. The variants are legion due to sporadic and piecemeal decision making. Many of the decisions involve cross-examination of state witnesses. The one constant seems to be that if a cross examining defense lawyer goes beyond the confines of attacking the direct, evidence might well have been introduced. The defense attorney may have lost his ability to close.

Cross Examination And Impeachment Generally

Does impeaching a witness mean that evidence was introduced? At one time, Georgia courts suggested that any cross-examination translated into the introduction of evidence for purposes of determining which party had the right to concluding argument.⁵ Subsequently, this concept was severely modified.⁶ What has followed is a Byzantine labyrinth of opaque decisions.

One Word Too Many

Suppose defense counsel is impeaching a prosecution witness. The witness is confronted with a document. It is a signed statement which the witness gave an investigator. When the cross-examiner sticks to points related to those made by the prosecutor on direct, no problem. No evidence has been introduced. But what if the cross-examiner goes further and explores a part of the prior statement which is helpful to him but not germane to impeaching the direct?

Asking a witness to read from non-impeaching portions of statements constitutes introduction of evidence in criminal cases.⁷ Accordingly, the posture of the law can be summarized as follows. Defense introduction of affirmative points which are not germane to the direct introduces evidence. However, the same lawyer's impeachment of a witness with the inconsistent portion of a prior statement, the part that impacts the witness' direct, does not constitute the introduction of evidence.⁸

Actual introduction of an impeaching document also changes the formula. Even though a document is confined to discrediting the direct, when the defense insists upon its introduction into evidence, the right to close the summation is lost. In one case, even though the paper was introduced for "impeachment only," the defense lost its right to open and close the argument.⁹

Let's Roll Tape

Sometimes the defense attorney possesses a tape recording of the witness. Does playing the tape to impeach the person on the stand change the dynamics? The answer is no. Using a taped statement does not lead to a differing result. Playing portions of an audio tape that were not specifically related to impeaching a witness in one Georgia case constituted the introduction of evidence.¹⁰

Photos And Exhibits

Exhibits provide additional nuances. Flashing one to the jury is fatal to defendant's effort to speak last. This is so even if the defense lawyer does not formally offer the exhibit into evidence.¹¹ Official reception into evidence is not the test to determine whether evidence has been introduced. Simply displaying a photograph to the jury has been considered the introduction of evidence.¹²

Where a document is the exhibit, care must also be exercised by the defense. Mishandling easily leads to the loss of the last argument. In one case, a codefendant read from the victim's medical records to contradict a testifying physician. The effort was not so much to impeach the physician but to present evidence regarding the victim's intoxication and emotional state at the time of the incident. As a result of this procedure, all defendants lost the ability to make the concluding argument.¹³

What if the defense has an exhibit marked, but does not display or offer it into evidence? It has been held that merely identifying documents without showing or exhibiting them does not, for argument purposes, inject the introduction of evidence.¹⁴

Prior Convictions, Defense Theory, And Hand Signals

Can a defendant impeach via a prior conviction without "losing close?" The answer is "No." This mode of impeachment is evidence introduction.¹⁵ In another case, the appellate court even went so far as to rule that mention of the defendant's theory of the case under guise of cross-examination constituted introduction of evidence for final argument purposes.¹⁶ Finally, during a robbery trial the State was arguing and referred to the defendant's hand. The defendant had claimed that he was beaten by deputy sheriffs who broke his hand. The prosecutor urged jurors to look at pictures of the hand to decide that no such breaking occurred. After the hand was referenced by the State, during the prosecutor's argument the defense attorney held up his client's hand. The Court strongly suggested that physically holding up the defendant's hand during the State's final argument was ground for the defense to lose the last argument.¹⁷

Appellate Review

In addition to its tactical importance at trial, the issue covered in this article has considerable post-conviction import. Improper denial of the concluding argument is held to be ground for reversal.¹⁸ Also, sometimes a defense lawyer refuses to investigate a case or to call defense witnesses because, as he tells his client, he wants to argue last. This decision is often the object of a defendant's post-verdict attack on the competency of his own lawyer. The decision of defense counsel to introduce evidence or withhold it in favor of "preserving the right to argue," is fertile ground for ineffective assistance of counsel claims.¹⁹

The Federal Approach

Under the Federal Rule, the uncertainty of current Georgia practice is all but eliminated. Federal trials are governed by a provision that simply states that, "Closing arguments proceed in the following order: (1) the government argues; (2) the defense argues; and (3) the government rebuts."²⁰ The practice of sandbagging is specifically prohibited and precluded by the federal methodology. In fact, the House Judiciary Committee which approved the federal rule opined that an attorney who waives her first argument has thereby also waived her last.²¹

In terms of the content of a rebuttal argument, federal prosecutors are limited to a "fair response"-- something that speaks directly or specifically to Defendant's argument.²² However, under the doctrine of a fair response, new information can be argued, as long as it is responsive to the defense's close.²³ In addition, the leeway allowed a prosecutor to bolster her case in rebuttal is broad.²⁴ In one extreme decision, a fair response even included pillorying a defendant for failing to take the stand in his own defense, after the defense raised the issue.²⁵

Conclusion

For decades, commentators have decried the unpredictability of

Georgia's final argument rules.²⁶ The practice of sandbagging is encouraged by the Georgia approach. This sort of abuse of good process has been deemed to be an ethical violation by the American College of Trial Lawyers.²⁷ In the 2004 session of the Georgia General Assembly, the Senate passed legislation designed to put procedures in place for Georgia criminal lawyers to conduct closing arguments in an orderly, predictable form. The measure, cast in terms much like the federal pattern, was virtually unanimously approved.²⁸ While it did not reach a vote in the House, the measure will be presented anew in the 2005 legislative session.

Until that bill or a reasonable facsimile thereof passes, Georgia prosecutors will be required to negotiate the maze of cases controlling the issue of when evidence is and is not introduced. With this article in hand, some of the uncertainty should be obviated.

End Notes

¹ O.C.G.A. § 17-8-71.

² *Scott v. State*, 243 Ga. 233, 253 S.E.2d 698 (1979); *Thompson v. State*, 265 Ga. App. 696, 595 S.E.2d 377 (2004).

³ *Lackey v. State*, 246 Ga. 331, 271 S.E. 2d 478 (1980).

⁴ *Dixon v. State*, 196 Ga. App 15, 395 S.E. 2d 577 (1990).

⁵ *Steele v. State*, 216 Ga. App. 276, 454 S.E. 2d 590 (1995).

⁶ *Kennebrew v. State*, 267 Ga. 400, 480 S.E. 2d 1 (1996).

⁷ *Harrison v. State*, 251 Ga. App. 302, 553 S.E. 2d 343 (2001).

⁸ *Lane v. State*, 274 Ga. 751, 559 S.E. 2d 455 (2002).

⁹ *Smith v. State*, 272 Ga. 874, 536 S.E. 2d 514 (2000).

¹⁰ *Riddles v. State*, 251 Ga. App. 525, 554 S.E. 2d 737 (2001).

¹¹ *Aldridge v. State*, 237 Ga. App. 209, 515 S.E.2d 397 (1999).

¹² *Seavers v. State*, 208 Ga. App. 711, 431 S.E. 2d 717 (1993).

¹³ *Mc Farlin v. State*. 259 Ga. App. 838; 578 S.E.2d 546 (2003).

¹⁴ *Park v. State*, 224 Ga. 467, 162 S.E. 2d 359 (1968).

¹⁵ *Howard v. State*, 204 Ga. App. 743, 420 S.E.2d 594 (1992).

¹⁶ *Allen v. State*, 263 Ga. App. 350, 587 S.E. 2d 833 (2003).

¹⁷ *Richards v. State*, 232 Ga. App. 584, 502 S.E. 2d 519 (1998).

¹⁸ *Hubbard v. State*, 167 Ga. App. 32, 305 S.E. 2d 849 (1983).

¹⁹ *Quintanilla v. State*, 273 Ga. 20, 537 S.E. 2d 352 (2000); *Frazier v. State*, 261 Ga. App. 508, 583 S.E. 2d 188 (2003).

²⁰ F.R.C.P. 29.1

²¹ Notes of the Committee on the Judiciary, House Report No. 94-247.

²² *U.S. v. Sarmiento*, 744 F.2d 755 (11th Cir. 1984); *U.S. v. Smith*, 700 F.2d 627 (11th Cir. 1983).

²³ *U.S. v. Sanchez-Corcino*, 85 F. 3d 549 (11th Cir. 1996)

²⁴ *U. S. v. LeQuire*, 943 F. 2d 1554 (1991).

²⁵ *U.S. v. Robinson*, 485 U.S. 25, 108 S.Ct 864, 99 L.Ed.2d 23 (1988).

²⁶ Carlson, Trial Handbook for Georgia Lawyers § 34:3 (2003); Carlson, Competency and Professionalism in Modern Litigation, 23 Ga. L. Rev. 689, 717-19 (1989).

²⁷ Standard 22(c), Code of Trial Conduct, American College of Trial Lawyers (rev. 1987).

²⁸ SB 414 (2004), amending O.C.G.A. § 17-8-71.