

CARLSONS' corner

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Impeaching the State's Own Witness

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No prosecutor relishes the thought of having a vital witness take the stand and head south. Just about the only thing worse is to be unprepared to deal with it. To be prepared, the potential manifestations must be considered. What if the witness directly conflicts a prior statement during direct testimony? Alternatively, what if the witness suffers from convenient memory loss? Or, what if the witness announces shortly prior to trial that he flatly refuses to cooperate?

Virtually every experienced prosecutor has had to face this sort of situation. Accordingly, a thorough review of the case law provides a useful and important guide to negotiate the labyrinth created when a State's witness does an about face.

Were You Entrapped?

Occasionally a misguided opponent will endeavor to block your effort to attack a turncoat witness by urging "counsel knew this was coming, she was not 'entrapped,' your honor." The short answer to the question of whether you were entrapped is that it doesn't really make any difference. Sure, the "entrapped" phrase is lodged in O.C.G.A. 24-9-81 which provides that "[a] party may not impeach a witness voluntarily called by him, except where he can show to the court that he has been entrapped by said witness." It has been on the books for decades. But also around for a long time have been the Georgia Supreme Court decisions which dismiss the requirement that one be "entrapped." Opinions like *Knight v. State*¹ remove any doubt from the issue: "The State was authorized to use the prior inconsistent statement to impeach the witness it had called *without a showing of surprise or entrapment.*"

Putting Your Statutes Together

Successful impeachment of one's own witness requires command of the law allowing impeachment of a party's own witness described in Part I, including the statute as well as the case law cited there, along with O.C.G.A. 24-9-83. The latter statute describes the mechanics for impeaching any witness with a prior inconsistent statement. Since most impeachment of one's own witness will be by means of the witness' earlier inconsistent statements, these mechanics are important.

Impeachment by prior inconsistent statement is allowed upon a showing that a previous statement of the witness is in variance with her trial testimony.² Under O.C.G.A. 24-9-83, before a witness can be impeached by a relevant prior inconsistent statement, the cross-examiner must lay a foundation by directing the witness to the time, place, person and circumstances attending the former statement.³ Interestingly, a witness may be recalled in order to lay this foundation.⁴ Once the statement is introduced, it can be considered not only for impeachment purposes, but also as substantive evidence.⁵ While the examiner must first display the document to the witness if it is in writing, an examiner is not usually required to offer the prior written statement into evidence prior to impeaching with it.⁶

Courtroom Applications and Leading Questions

In *Blackburn v. State*,⁷ the defendant's roommate in a murder trial took the stand and denied telling the police about certain statements the defendant made to her about the murder. To rebut this testimony, the State offered the witness' prior statement to law enforcement. The Georgia Supreme Court ruled that because the trial testimony was in direct contradiction to the prior statement, and related to the murder for which the defendant was on trial, the trial court did not abuse its discretion in allowing the prior statement into evidence.

A prosecutor faced with a turncoat witness who testifies inconsistently with a prior statement must also be able to cogently and effectively conduct the impeachment. This invariably leads to the issue, "are leading questions allowed?" O.C.G.A. 24-9-63 provides the trial court with discretion to allow leading questions on direct examination when, due to the conduct of the witness, justice requires it. In *Smith v. State*,⁸ a State's witness refused to cooperate on the witness stand and denied earlier statements. The prosecutor used leading questions to impeach him concerning a prior statement wherein the witness implicated the defendant in the crime. In affirming defendant's conviction, the Court of Appeals noted that the trial court found the witness to be hostile to the calling party, allowing the State to ask leading questions of its own witness during its impeachment by prior inconsistent statement.

The Enigma of Memory Loss

What if a witness takes the stand and does not engage in an outright contradiction. Rather, he cannot remember the events described in his earlier statement. Can you impeach? While appellate decisions have been less than unanimous, some authorities say yes. In *Spann v. State*,⁹ prior written statements of State's witnesses were introduced by the State at trial, after the witnesses testified that they could not remember certain facts that were fully described in their earlier statements. Those statements were then used to impeach. In affirming the convictions, the court noted that these witnesses had taken the stand and testified, and that there was, in fact, affirmative evidence that they had given the statements in question.¹⁰

If in writing, some judges might require the prosecutor to proceed to try to refresh the witness' recollection in this situation before going into a full-blown impeachment mode.¹¹

The Recalcitrant Witness

The witness who is dead set on a train wreck may take the stand, fold his arms, and refuse to say anything. Is a prosecutor entitled to introduce a prior statement here? On the other hand, a witness whom the prosecutor called may invoke a privilege. Can an impeaching statement be used against her? In *Quijano v. State*,¹² the court held that a prior statement was admissible in a murder case. The State called the defendant's wife. The police had secured Ms. Quijano's prior statement. When she was interviewed, she was not in custody and was not being interrogated as a suspect in the murder. Accordingly, the court felt she had no motive to lie in order to implicate her husband, and the court found that the statement had sufficient guarantees of trustworthiness. The statement was ruled admissible under the necessity hearsay exception.

Note that the reviewing court in *Quijano* employed a hearsay exception rationale to decide the foregoing case. Impeachment rules may not work. Where a witness refuses to talk, the defense has a potent argument that there is nothing to impeach. Accordingly, where a witness takes the Fifth, invokes a common law privilege or simply becomes unavailable by stubbornly refusing to speak, counsel may have to seek relief in the necessity exception, and not the impeachment rules.

Other Modes of Impeachment

Commentators have debated whether one's own witness may be impeached by methods *other* than confronting him with his prior statement.¹³ When a witness pulls a fast one, can a prosecutor attack him with a prior conviction, for example? What about using proof of his bad character? At least one Georgia case seems to open this door. In *Jones v State*,¹⁴ once it was shown the witness gave trial testimony at odds with his prior statement, impeachment with a prior conviction might follow.

Ethical Considerations

Generally speaking, a witness may not be called simply for the purpose of impeaching him.¹⁵ If the State knows a witness will refuse to testify or will claim the Fifth Amendment, calling that witness to testify should be carefully considered. "It is impermissibly prejudicial for

the Government to attempt to influence the jury by calling a witness it knows will invoke the fifth amendment."¹⁶ It should be noted that by the same token; it is improper for the defense to deliberately call a witness simply to show the jury that the witness will rely on the fifth amendment privilege.¹⁷

Conclusion

No prosecutor likes it when his or her witness does an about face. A key witness developing convenient memory losses, conflicting with prior statements, or refusing to cooperate altogether is an uncomfortable situation for prosecutors to handle. Hopefully, this article has provided practical advice and useful case law in order to remedy those difficult situations.

Endnotes

¹ 266 Ga. 47, 464 S.E.2d 201 (1995)(emphasis added). See *Jones v. State*, 270 Ga 25, 505 S.E.2d 749, 753 (1998).

² *Woodward v. State*, 269 Ga. 317, 496 S.E.2d 896, 898-99 (1998); *Jones v. State*, 270 Ga. 25, 505 S.E.2d 749 (1998).

³ O.C.G.A. 24-9-83.

⁴ *Childress v. State*, 266 Ga. 425, 467 S.E.2d 865 (1996).

⁵ *Woodward*, 496 S.E.2d at 898-99; *Duckworth v. State*, 268 Ga. 566, 492 S.E.2d 201 (1997)(whether the witness admits or denies making the prior written statement, the written statement may be admitted in evidence because the inconsistent statement is substantive evidence). See *Speed v. State*, 270 Ga. 688, 512 S.E.2d 896, 905 (1999)(trial court did not err in allowing prior statement to be admitted in evidence).

⁶ *Duckworth*, 492 S.E.2d at 202.

⁷ 266 Ga. 541, 468 S.E.2d 381 (1996).

⁸ 243 Ga. App. 331, 533 S.E.2d 431 (2000).

⁹ 248 Ga. App. 419, 546 S.E.2d 368 (2001).

¹⁰ Statements of equivocal origin may supply a different result.

¹¹ *Hill v. State*, 250 Ga. App. 897, 553 S.E.2d 289 (2001).

¹² 271 Ga. 181, 516 S.E.2d 81 (1999).

¹³ R. Carlson, E. Imwinkelried, E. Kionka and K. Strachan, *Evidence: Teaching Materials for an Age of Science and Statutes*, 362 n.2 (5th ed. 2002).

¹⁴ 270 Ga. 25, 505 S.E.2d 749 (1998). While *Jones* suggests that prior conviction impeachment might be possible, the case also adverts to other authority which has restricted this form of impeachment when applied to one's own witness. 505 S.E.2d at 753.

¹⁵ *Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965).

¹⁶ *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978).

¹⁷ *Sweat v. State*, 226 Ga. App. 88, 485 S.E.2d 259 (1997)(forbidden to parade a witness in front of the jury for the sole purpose of having him invoke the Fifth); *United States v. Doddington*, 822 F.2d 818, 822 (8th Cir. 1987).