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Cross-Examining the Defendant about Other Witnesses

BY STEPHEN A. SALTZBURG

A number of federal and state courts have addressed the question of whether it is permissible for the prosecution to cross-examine a defendant on the stand as to whether or not the defendant believes that the government's witnesses are lying. As a result of the common practice of sequestering witnesses, the defendant is often the only potential witness to hear all other witnesses in the case, and, thus, is the only witness who can opine about the testimony of other witnesses. Since the government has completed its case-in-chief before any defense witness testifies, there is no opportunity for a defense lawyer to ask a government witness, even one who is exempt from sequestration (a representative of the government under Federal Rule of Evidence 615, for example), about the testimony of defense witnesses—unless the witness is recalled during rebuttal and questioning about the witness's beliefs concerning the credibility of defense witnesses is within the scope of redirect examination. Thus, those courts that have addressed the question have asked whether or not it is fair to single out the testifying defendant for this type of cross-examination.

United States v. Schmitz: The Charges

United States v. Schmitz, 634 F.3d 1247 (11th Cir. 2011), is one of the cases to have addressed the question most recently. Suzanne L. Schmitz was a former Alabama state legislator who was charged with and convicted of three counts of mail fraud and four counts of theft concerning a program receiving federal funds. The prosecution alleged and



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proved that Schmitz abused her position as a state legislator to obtain employment with the federally funded Community Intensive Treatment for Youth Program for at-risk youth where she collected over \$177,000 in salary and other benefits. The government's case rested on proof that she performed little or no work and rarely even showed up at the office. Schmitz took the salary but generated virtually no services or work product.

During the first month of her employment, for example, a computer technician set up her work computer and left a note with her username and password in a sealed envelope in her desk drawer. Approximately a month later, the technician found the sealed envelope was still in the drawer—Schmitz had not used the computer. Despite the almost complete failure to perform, she managed to obtain a flexible work schedule, which made it more difficult to track her performance, and submitted false and fraudulent statements regarding both how many hours she worked and what and how much she produced.

The Defendant Testified

Schmitz took the stand in her own defense and testified on direct examination. Her testimony contradicted that of government witnesses, and the prosecution cross-examined by asking her whether she contended that the government witnesses were lying:

Q (prosecutor): [L]et's get a list going of everybody you say is lying, okay? Seth Hammett. He's a liar?

A (defendant): I said I—what I answered was my answer is different from his. I never called him a liar.

Q: Did he tell the truth when he said that you came to him and asked him to put money in the budget to fund your job?

A: No, he did not.

Q: He lied?

A: I never used the word "lie."

Q: Why not?

A: I just don't like the word.

Q: So he didn't tell the truth. Does that make you feel better?
(*Id.* at 1267.)

The prosecutor named 12 witnesses who had testified in the case and asked Schmitz if they should be added to the “list” of purported liars. Schmitz responded each time much as she did in the exchange above. According to the court of appeals, the prosecutor repeatedly questioned her until he was able to force her to say whether a previous witness was telling the truth or should be added to the “liar list.” The prosecutor referred during closing arguments to the list of purported lying witnesses and argued that the jury should reject the notion that 17 people lied and only the defendant told the truth.

Defense counsel did not object to the prosecutor’s cross-examination or to the closing argument. Thus, on appeal Schmitz could obtain only plain error review.

The Impropriety of the Cross-Examination

The court of appeals noted that most federal courts that have examined the issue have found that it is improper for a prosecutor to question a defendant about the credibility of other witnesses because determining credibility is the province of the jury rather than the parties. The court went on to offer four reasons why this type of cross-examination should be prohibited.

First, the court found that the questions put by the prosecutor were barred by the Federal Rules of Evidence:

While Rule 608(a) permits a witness to testify, in the form of opinion or reputation evidence, that another witness has a general character for truthfulness or untruthfulness, that rule does not permit a witness to testify that another witness was truthful or not on a specific occasion. Moreover, the were-they-lying questions have little or no probative value because they seek an answer beyond the personal knowledge of the witness. . . . The were-they-lying questions are also not relevant because one witness’s opinion that another person has or has not lied does not make it more or less likely that the person actually lied. Fed. R. Evid. 401. And, the were-they-lying questions distract the jury from the central task of determining what version of events is accurate in order to determine a defendant’s guilt or innocence.

(*Id.* at 1268–69.)

Second, the court agreed with other federal ap-

peals courts that such cross-examination invaded the province of the jury. Only the jury is to determine whether or not witnesses are lying.

Third, such questions “ignore other possible explanations for inconsistent testimony” that “can conflict for many reasons that do not involve a deliberate intent to deceive. There may be lapses in memory, differences in perception, or a genuine misunderstanding.” These “questions ignore all of these innocent explanations, and put the testifying defendant in a ‘no-win’ situation: The defendant must either accuse another witness of lying or undermine his or her own version of events.” (*Id.* at 1269.)

Fourth, such questions,

are argumentative, and often their primary purpose is to make the defendant appear accusatory. . . . The very structure of the question is designed to pit the testifying witness against every other adverse witness, suggesting to the jury that someone is deliberately deceiving the court and the jury must choose the culprit. While the jury must make credibility assessments in determining guilt or innocence, the were-they-lying questions do not serve this function but prejudicially force the testifying defendant to accuse or not. Even worse, the defendant’s answer often does not matter because the predominate purpose of such questions is to make the defendant look bad.

(*Id.* (citations omitted).)

The court expressed no concern that its ruling, and those of the other courts that had barred similar cross-examination, would unduly restrict prosecutors. The court agreed that “it is often necessary on cross-examination to focus a witness on the differences and similarities between his testimony and that of another witness” and had no difficulty concluding that “[t]his is permissible provided he is not asked to testify as to the veracity of the other witness.” (*Id.* (quoting *United States v. Harris*, 471 F.3d 507, 512 (3d Cir. 2006)).) The court also recognized that in a particular case a defendant might open the door to questions about other witnesses possibly lying.

The *Schmitz* court also held that the prosecutor’s comments during closing argument were improper but presented a closer question because “an attorney’s statements that indicate his opinion or knowl-

edge of the case as theretofore presented before the court and jury are permissible if the attorney makes it clear that the conclusions he is urging are conclusions to be drawn from the evidence.” (*Id.* at 1270 (quoting *United States v. Johns*, 734 F.2d 657, 663 (11th Cir. 1984)).) Although the court recognized that a prosecutor may be justified in arguing during closing argument that a particular witness is lying where such an inference is supported by the evidence in the cases, the court concluded that the argument as to Schmitz was improper because “they were a clear continuation of the improper questions posed previously during Schmitz’s cross-examination.” (*Id.*) The court observed that the prosecutor emphasized in closing argument the concept of a “liar list” that had been improperly developed during Schmitz’s cross-examination.

The Result on Appeal

Although the *Schmitz* opinion puts prosecutors on notice of the general impermissibility of questioning a testifying defendant about whether other witnesses are truthful or untruthful, the opinion is also a reminder to defense counsel of the importance of raising timely and specific objections because the court ultimately found that there was no plain error in *Schmitz*. The court observed that neither the Supreme Court nor the Eleventh Circuit had opined on the propriety of the type of questions at issue prior to the decision in *Schmitz*.

Ultimately the court affirmed the mail fraud convictions, but held, 2–1 that defects in the indictment required reversal of the convictions for theft relating to a program receiving federal funds.

Lessons

1. Even where the law is not well established, it is

important for counsel to object to questions that appear to violate applicable evidence rules. In *Schmitz*, for example, the court pointed out that Federal Rule of Evidence 608(a) limits the type of testimony that may be admitted with respect to a witness’s character for truthfulness or untruthfulness. An objection that the prosecutor’s questions violated Rule 608 might well have caused the trial judge to consider carefully whether such questions could legitimately be asked.

2. It is now clear that prosecutors in the normal case in the Eleventh Circuit (and probably in most other places) may not ask a testifying defendant to opine on the credibility of other witnesses. The overwhelming majority of federal and state courts have reached the same conclusion not only because of rules like Federal Rule of Evidence 608(a), but also because it seems very clear that courts would not permit the defense to have the defendant offer an opinion that defense witnesses were testifying truthfully. Although the Supreme Court and the Eleventh Circuit may not have spoken to the precise question prior to *Schmitz*, the law throughout the United States was clear enough that one witness in a trial could not go beyond offering opinion or reputation testimony and opine as to whether another witness was telling the truth on a particular occasion. It is just a little clearer as a result of the *Schmitz* decision.

3. Like most general rules, the prohibition on the questions asked in *Schmitz* is always subject to an exception when a defendant opens the door by voluntary testimony on direct examination. A defendant who volunteers testimony that other witnesses are lying is subject to cross-examination that may address the defendant’s opinion about these other witnesses. ■

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