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Criminal Procedure--Striking Testimony of Witnesses Who Refuse to Answer on Cross-Examination--State v. Carlos; State v. Brown

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seems unlikely that the Missouri courts would enter the school financing controversy on a deficiency clause theory for any reason short of a financially compelled school shutdown.[74]

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CRIMINAL PROCEDURE—STRIKING TESTIMONY OF WITNESSES WHO REFUSE TO ANSWER ON CROSS-EXAMINATION

State v. Carlos[1]

State v. Brown[2]

William Carlos was prosecuted for first degree murder, charged with hiring one Patrick McGuire to kill the victim. McGuire testified for the state in return for a reduced charge of second degree murder; he was serving his sentence at the time of Carlos' trial. McGuire testified as to the murder contract allegedly made with Carlos and as to his own activities the night of the killing. McGuire stated that a man had accompanied him on the night of the murder, but that the other man had waited outside and had not participated.

On cross-examination, Carlos' attorney attempted to elicit the name of McGuire's companion in order to pursue the defense theory that McGuire's only motive in killing the victim was robbery. McGuire refused to answer, and the trial court held him in contempt. Because McGuire was already in prison, that sanction had no effect. The defendant's motions for a mistrial or a continuance were denied by the trial court, and Carlos was convicted of murder.

On appeal Carlos claimed that McGuire's refusal to answer on cross-examination had deprived him of his right to confront the wit-

74. In Concerned Parents v. Caruthersville School Dist., 548 S.W.2d 554 (Mo. En Banc 1977), the Missouri Supreme Court held that a suit challenging the charging of tuition by the Caruthersville public school district properly stated a cause of action under the Missouri Constitution, art. 9, § 1(a) (establishing *free* public schools). The court declined to rule on the state equal protection claim raised by the appellants but noted that it would be considered if on remand the circuit court determined that article 9, § 1(a) permits public schools to require its pupils to furnish their own materials and equipment. 548 S.W.2d at 563.

1. 549 S.W.2d 330 (Mo. En Banc 1977).
2. 549 S.W.2d 336 (Mo. En Banc 1977).

nesses against him, as guaranteed in both the United States and Missouri Constitutions. The Missouri Supreme Court affirmed the conviction. The court found that as to the murder contract, Carlos had had full exercise of his right to cross-examine McGuire. The court also found that because both the state and the defendant knew the probable identity of the man who accompanied McGuire, the witness' refusal to answer did not substantially limit the defendant's right of cross-examination. The court suggested that had the defendant so moved, striking that part of McGuire's testimony which concerned the actual commission of the murder might have been a proper remedy.

Irvin Brown was prosecuted for armed robbery. One of the three men allegedly involved in the hold-up, James Moore, had already pleaded guilty to the charge. Moore was the defendant Brown's sole witness. On direct examination Moore testified that he was one of the men involved in the robbery and that the defendant did not participate. On cross-examination, the prosecutor asked Moore for the names of the other men who had committed the robbery. Moore replied that he had committed the robbery with John Green, who was deceased, and another man. The prosecutor repeatedly asked him to name the third man, but Moore refused for fear of reprisal against his family. As a sanction for his refusal to answer on cross-examination, the trial court ordered Moore's entire testimony stricken from the record.

On appeal Brown contended that by striking the testimony of his only witness the trial court had deprived him of his constitutional right to present witnesses in his favor. The Missouri Supreme Court held that striking Moore's testimony was an abuse of discretion by the trial court and remanded the case for a new trial. The court stated that the prosecution already knew the identity of the third man and that therefore the only purpose of the state's cross-examination was to test Moore's credibility. It was not within the discretion of the trial court to deprive the defendant of his only witness under these circumstances.

The Missouri Supreme Court adopted the suggestions of the Third Circuit Court of Appeals for dealing with witnesses who refuse to answer material questions on cross-examination. In *United States v. Cardillo*[3] the Third Circuit offered three alternatives for dealing with such witnesses depending on the degree of harm likely to result from the witness' refusal. First, if the testimony sought is so closely related to the issues in the trial as to deny the opposing party his right of cross-examination, the witness' entire testimony should be excised from the record. If, however, the testimony refused concerns only one aspect of the case, the court should strike only that part of the witness' direct testimony which deals with that subject. Finally, if the cross-examiner's questions deal with matters collateral to the issues in the trial, such as the witness' credibility,

3. 316 F.2d 606 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963).

the court should not strike the witness' testimony on direct and instead should instruct the jury to consider the witness' refusal to answer in assessing his credibility.

The right to cross-examine an opposing party's witnesses has always been a fundamental tool for testing the truth of testimony. When a witness denies a party this right by refusing to answer relevant questions, the traditional solution has been to excise all of that witness' testimony from the record.[4] The application of this rule to civil cases has been relatively free from controversy. The right to cross-examine the opponent's witnesses is absolute, and a denial or undue restriction of it is reversible error.[5]

Carlos and *Brown* demonstrate that a trial court in a criminal case must exercise extreme caution in deciding whether to strike the testimony of an uncooperative witness. The problem involves two distinct sixth amendment rights: when the uncooperative witness testifies for the state, failure to impose sanctions for his refusal to answer on cross-examination may constitute a denial of the defendant's right to confront the witnesses against him; on the other hand, striking the testimony of a defense witness who refuses to answer the prosecutor's questions may deny the defendant his right to present witnesses in his favor. The problem is further complicated by the status of the uncooperative witness, *i.e.*, whether the witness is the defendant himself or a nonparty witness testifying for the state or for the defendant. The use of sanctions in each of these situations will be discussed below.

A prosecution witness who refuses to answer the defendant's questions may prejudice the defendant's constitutional right of confrontation.[6] The United States Supreme Court has held that the right of confrontation includes the right to cross-examine opposing witnesses[7] and that the rights of confrontation and of cross-examination are binding on state courts through the fourteenth amendment.[8] In *Smith v. Illinois*[9] the sole witness in a prosecution for a narcotics sale refused to disclose his real name on cross-examination. The Supreme Court held that the trial court's failure to impose sanctions on the witness was an unconstitutional denial of the right of confrontation.

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4. C. McCORMICK, EVIDENCE § 19, at 43 (2d ed. 1972); 5 J. WIGMORE, EVIDENCE § 1371, at 55 (Chadbourn Rev. 1974).

5. Kroger Grocery & Baking Co. v. Stewart, 164 F.2d 841 (8th Cir. 1947); Pettus v. Casey, 358 S.W.2d 41 (Mo. 1962).

6. "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...." U.S. CONST. amend. VI; "[T]he accused shall have the right ... to meet the witnesses against him face to face ...." MO. CONST. art. 1, § 18(a).

7. Douglas v. Alabama, 380 U.S. 415 (1965); Greene v. McElroy, 360 U.S. 474 (1959); Alford v. United States, 282 U.S. 687 (1931); Kirby v. United States, 174 U.S. 47 (1899); Mattox v. United States, 156 U.S. 237 (1895).

8. Pointer v. Texas, 380 U.S. 400 (1965).

9. 390 U.S. 129 (1968).

The Court has not attempted to establish guidelines for trial judges in dealing with witnesses who refuse to answer questions on cross-examination, but most federal courts[10] and a few state courts[11] have joined Missouri in following the suggestions of the Third Circuit in *United States v. Cardillo.* In that case several co-defendants were convicted of receiving goods with knowledge that they were stolen from interstate commerce. Two government witnesses refused to answer questions on cross-examination, and the defendants asserted on appeal that the failure of the court to strike the entire testimony of these witnesses violated their right of confrontation. One pleaded the fifth amendment when the defendants attempted to impeach his testimony with evidence of prior crimes. The Third Circuit found no error in the trial court's refusal to strike this witness' testimony on direct and held that the refused questions concerned only the witness' credibility and were collateral to the issues at trial. The government's other witness refused to disclose the source of money used to buy the allegedly stolen goods. The court found that the failure to strike this witness' direct testimony was reversible error, because the source of the money was central to the issues in the case and such inquiries "might have established untruthfulness with respect to specific events of the crime charged."[12] The *Cardillo* opinion is written in terms of the defendant's remedies when a prosecution witness fails to answer questions on cross-examination. A trial judge in this situation is under great pressure to impose sanctions because failure to do so might amount to a denial of the defendant's confrontation right under the sixth amendment, as in *Smith v. Illinois.*

A major concern of a trial court when confronted with an uncooperative witness is deciding which of the three situations and related sanctions suggested in *Cardillo* apply. The court must attempt to weigh the possible probative value of the defendant's questions in deciding whether to strike all, part, or none of the witness' direct testimony or to merely instruct the jury on the witness' credibility. The difficult problem in the *Cardillo* analysis is separating material issues from those that are merely collateral; the application of one of these labels will guide the court in deciding which sanction is proper in a given situation.

The Fifth Circuit has recognized that the distinction between material and collateral issues is not always clear. That court stated that "the question in each case must finally be whether the defendant's inability to make the inquiry created a substantial danger of prejudice by depriving

10. *See, e.g.,* United States v. Newman, 490 F.2d 139 (3d Cir. 1974); Coil v. United States, 343 F.2d 573 (8th Cir. 1965), *cert. denied,* 382 U.S. 821 (1966); Dixon v. United States, 333 F.2d 348 (5th Cir. 1964).

11. *See, e.g.,* Board of Trustees v. Hartman, 246 Cal. App. 2d 756, 55 Cal. Rptr. 144 (1966); State v. Montanez, 215 Kan. 67, 523 P.2d 410 (1974); People v. Schneider, 44 App. Div. 2d 845, 356 N.Y.S.2d 214 (1974); Commonwealth v. Lopinson, 427 Pa. 284, 234 A.2d 552 (1967).

12. 316 F.2d at 613.

him of the ability to test the truth of the witness's direct testimony."[13] This statement is misleading because it suggests that questions which bear on the general credibility of a witness, such as inquiries about prior crimes and bad character commonly used to impeach, are material. On the contrary, most confrontation cases have held such lines of questioning to be collateral.[14] Hence, the proper focus of the *Cardillo* analysis is the defendant's ability to test the specific damning statements made on direct examination, rather than the witness' credibility or character in general. In addition the Supreme Court has held that certain basic facts which enable the defendant to probe the witness' background, such as the witness' true name[15] and residence,[16] are to be considered material for purposes of cross-examination. Obviously questions of materiality vary widely with the facts of each case; Missouri appellate courts generally have upheld the discretion of the trial court in this area.[17]

Besides the distinction between collateral and material issues, trial courts may face other problems in deciding whether to impose sanctions on an uncooperative witness. When a prosecution witness fails to answer the defendant's questions because of an alleged lapse of memory, at least one court has held that it is not necessary to impose sanctions.[18] Because the practical effect of a failure to answer is the same regardless of the witness' motive, this result may be an unconstitutional denial of cross-examination. Striking all or part of that witness' direct testimony would not punish the witness if he honestly cannot remember some material fact, but it would remove the potential prejudicial effect of his

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13. Fountain v. United States, 384 F.2d 624, 628 (5th Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968).

14. United States v. Stephens, 492 F.2d 1367 (6th Cir.), *cert. denied*, 419 U.S. 852 (1974); United States v. Dono, 428 F.2d 204 (2d Cir.), *cert. denied*, 400 U.S. 829 (1970); Coil v. United States, 343 F.2d 573 (8th Cir. 1965), *cert. denied*, 382 U.S. 821 (1966); United States v. Smith, 342 F.2d 525 (4th Cir.), *cert. denied*, 381 U.S. 913 (1965); United States v. Cardillo, 316 F.2d 606 (3d Cir.), *cert. denied*, 375 U.S. 822 (1963); State v. Hill, 434 S.W.2d 529 (Mo. 1968); State v. Messley, 366 S.W.2d 390 (Mo. 1963); State v. Cox, 360 S.W.2d 668 (Mo. 1962). *Contra*, United States v. Garrett, 542 F.2d 23 (6th Cir. 1976); United States v. Newman, 490 F.2d 139 (3d Cir. 1974); State v. Summers, 506 S.W.2d 67 (Mo. App., D.K.C. 1974).

15. Smith v. Illinois, 390 U.S. 129 (1968).

16. Alford v. United States, 282 U.S. 687 (1931). *But see* United States v. Saletko, 452 F.2d 193 (7th Cir. 1971), *cert. denied*, 405 U.S. 1040 (1972) (where the disclosure of the witness' address may endanger his life, such disclosure is not necessary); United States v. Battaglia, 432 F.2d 1115 (7th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).

17. *See, e.g.*, State v. Hill, 434 S.W.2d 529 (Mo. 1968); State v. Messley, 366 S.W.2d 390 (Mo. 1963); State v. Cox, 360 S.W.2d 668 (Mo. 1962); State v. Winn, 324 S.W.2d 637 (Mo. 1959).

18. United States v. Infelice, 506 F.2d 1358, 1363 (7th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975) (the defendant "was not deprived of the right to test the knowledgeability and credibility" of the witness).

testifying fully on direct while failing to answer relevant questions on cross-examination.

Another problem can arise when a witness asserts his fifth amendment right to refuse to answer potentially incriminating questions on cross-examination. When the witness' privilege against self incrimination conflicts with the defendant's right of confrontation, the court first should ascertain whether the witness is within his rights in refusing to answer.[19] If not, the court should direct the witness to answer and impose sanctions if he refuses. If the witness has properly invoked his rights, the trial judge must consider the prejudicial effect of the failure to answer in deciding whether the witness' direct testimony should go to the jury. The ultimate question is still whether the testimony sought pertains to material or collateral issues. If the witness is within his rights and the answers refused would be collateral or cumulative, the proper remedy under *Cardillo* is to call the jury's attention to the refusal to answer as bearing on credibility. If the testimony would concern some material issue, the witness' direct testimony should be partially or completely stricken.[20]

The uncooperative prosecution witness poses a complex problem in light of the defendant's right of confrontation. The converse problem, where a defense witness refuses to submit to cross-examination by the state, is even more difficult and fraught with potential error, as illustrated by *State v. Brown*. The prosecution has a right to cross-examine defense witnesses.[21] Considerations of mutuality seem to dictate that a defense witness who withholds relevant testimony on cross-examination should be subject to the same sanctions as a prosecution witness in a similar situation. However, the imposition of sanctions on a defense witness may interfere with the defendant's right to produce witnesses in his favor, a right guaranteed in both the Missouri and the United States Constitutions.[22] The United States Supreme Court has long recognized that the right of a defendant "to have compulsory process for obtaining

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19. Fountain v. United States, 384 F.2d 624, 627 (5th Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968).

20. *See, e.g.*, United States v. Brierly, 501 F.2d 1024 (8th Cir.), *cert. denied*, 419 U.S. 1052 (1974) (source of gun used in other robberies held collateral); United States v. Newman, 490 F.2d 139 (3d Cir. 1974) (where the defendant was charged with conspiring with the government's witness to place wiretaps, the failure to impose sanctions when witness refused to answer questions about wiretaps placed by witness alone was reversible error); Fountain v. United States, 384 F.2d 624 (5th Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968) (source of money witness used in buying drugs from the defendant held collateral).

21. Brown v. Walker, 161 U.S. 591 (1896); Reagan v. United States, 157 U.S. 301 (1895); Brown v. United States, 234 F.2d 140 (6th Cir. 1956).

22. "[T]he accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI. "[T]he accused shall have the right . . . to have process to compel the attendance of witnesses in his behalf . . . ." MO. CONST. art. 1, § 18(a).

witnesses in his favor" means that the defendant must be allowed to present his witnesses and evidence without undue restriction by the state.[23] The sixth amendment right to present witnesses is binding on the states through the fourteenth amendment.[24]

Instances where a trial court strikes the testimony of a defense witness are extremely rare; the question in *Brown* was one of first impression in Missouri.[25] A leading federal case is *Wisconsin ex rel. Monsoor v. Gagnon*,[26] a habeas corpus review of a state prosecution for the sale of marijuana. Monsoor's roommate testified for the defense but invoked the fifth amendment when the state attempted to impeach his testimony by asking about his own use of drugs. The trial court struck the roommate's entire testimony, and the state supreme court affirmed on the ground that the striking was not prejudicial error.[27] The Seventh Circuit reversed and stated: "[I]t is constitutionally impermissible to strike relevant and competent direct examination testimony where a defense witness on cross-examination invokes the privilege against self-incrimination with respect to collateral questions which relate only to his credibility and do not concern the subject matter of his direct examination."[28]

Where the defendant has been deprived of his sixth amendment right to present witnesses, the courts usually have limited the defendant's presentation of evidence by some method other than striking testimony.[29] The state's right to cross-examine the defendant's witnesses is based on a notion of fair play rather than on any constitutional provision, and courts have been aware of the great potential for error in striking defense testimony.[30]

The decision to strike testimony also may hinge in part on whether the witness is the defendant himself or a nonparty. The imposition of

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23. Washington v. Texas, 388 U.S. 14 (1967) (codefendant blocked by statute from testifying as to the innocence of the other in a prosecution for murder; statute held unconstitutional); *In re* Oliver, 333 U.S. 257 (1948) (defendant convicted summarily of contempt by a one man secret grand jury, with no opportunity to present a defense).

24. Washington v. Texas, 388 U.S. 14 (1967).

25. 549 S.W.2d at 342.

26. 497 F.2d 1126 (7th Cir. 1974).

27. State v. Monsoor, 56 Wis. 2d 689, 203 N.W.2d 20 (1973).

28. 497 F.2d at 1129-30.

29. *See, e.g.*, Webb v. Texas, 409 U.S. 95 (1972) (trial judge repeatedly threatened defendant's witness with dire consequences for perjury before he began testimony, the witness subsequently refused to testify); Bray v. Peyton, 429 F.2d 500 (4th Cir. 1970) (where the defendant in a statutory rape prosecution offered witnesses to show that complainant was a "lewd and consenting" female, which would reduce the charge to a misdemeanor, the prosecutor had one of the defendant's witnesses arrested for statutory rape as he sat in court; the other witnesses then refused to testify).

30. State v. Brown, 549 S.W.2d at 346.

sanctions for refusal to answer on a defendant testifying for himself is more common and justifiable than the use of sanctions against a nonparty defense witness.[31] When the defendant elects to testify on his own behalf, the decision to refuse to answer on cross-examination is his own. This is not true of a nonparty defense witness. Although punishment of the defendant is not the rationale behind the sanction of striking testimony,[32] the practical effect is almost inevitably harmful to the defendant's case. Striking the testimony of a nonparty defense witness is therefore a sanction against the defendant for the offense of the witness.[33] Except where the testimony is cumulative or otherwise unimportant to the defendant's case, the total striking of a defense witness' testimony is difficult to justify.

With the adoption of the sanctions suggested in *Cardillo*, trial judges in Missouri have four methods of dealing with a witness who refuses to give relevant testimony on cross-examination. The first is immediate imprisonment for contempt until the witness agrees to testify.[34] This sanction is ineffective where the witness already is serving a long prison term, as in *Brown* and *Carlos*.

If imprisonment is ineffective, and the testimony refused is essential to the opponent's case, or the witness completely refuses to submit to any cross-examination, the trial judge may excise from the record all of the witness' direct testimony. Where the effect of total striking would be too severe in light of the nature and scope of the testimony refused, the court has the option of striking part of the witness' direct testimony. This sanction would be particularly useful in a situation like *Carlos*, where the witness testified about two distinct transactions, the making of the murder contract and the commission of the crime. The witness refused testimony on only one of these subjects, the actual murder. The trial judge could strike that portion of the witness' direct testimony that related to the subjects which the witness refused to discuss on cross-examination.

Finally, the trial judge has the alternative of refusing to strike direct testimony but instructing the jury that they may consider the refusal in determining credibility where the witness refuses to testify only as to collateral matters or the testimony refused would be cumulative. This may be the only permissible sanction in a case like *Brown*, where the testimony covered only one transaction and was not susceptible to partial striking, and total striking would be an unconstitutional denial of the right to present witnesses. The Missouri Supreme Court noted in *Brown* that a jury instruction on the witness'

31. People v. Barthel, 231 Cal. App. 2d 827, 42 Cal. Rptr. 290 (1965).
32. People v. McGowan, 80 Cal. App. 293, 295, 251 P. 643 (1926).
33. 549 S.W.2d at 343.
34. *See* § 491.020, RSMo 1969.