The Defendant as a Witness

by Alex Zipperer*

Few tactical decisions facing the criminal defense lawyer are as problematic as the decision whether to present evidence on behalf of the defense, and particularly whether to have the defendant testify. Trial lawyering cannot be practiced effectively by simply "going by the book." There are no definitive studies, nor can there be, to tell us what the general rule should be in deciding whether the defendant should testify, or otherwise present evidence in any given case. The nature of the criminal trial does not lend itself to a neat set of rules one pulls out of the hip pocket and mechanically applies. The decision to present evidence in defense, or to have the defendant testify, requires a careful weighing of the potential risks and advantages, together with due consideration of the significant risks inherent in presenting evidence of any kind on behalf of a defendant in a criminal case.

It is conceded that the defendant's failure to testify in his own defense is potentially detrimental to his case. The conventional wisdom says that the jury expects an innocent defendant to take the witness stand to deny his guilt and that it is nearly impossible to gain an acquittal without such testimony. This maxim, however, which seems to be cherished by courthouse personnel throughout the country, has never been shown to have any basis in practice. Its genesis probably lies in the fact that, whenever a nontestifying defendant is convicted, the defendant, his family and friends, and often his lawyer as well, tend to assign the cause of the conviction to the decision not to testify. This reaction is not unexpected. The decision whether the defendant should testify is the most important tactical decision in which the defendant himself participates. But the truth is that it is difficult to identify cases which have resulted in convictions of defendants who chose not to testify in the face of weak prosecution evidence. On the other hand, the converse situation is acknowledged to be

* Partner in the firm of Zipperer & Lorberbaum, Savannah, Georgia. Faculty Member, National Criminal Defense College, Mercer University, Macon, Georgia. Furman University (B.A., 1968); University of Georgia (J.D., 1971). Member, State Bar of Georgia.

common. Courthouse stories abound of defendants who, confronted with a weak prosecution case, and seemingly assured of acquittal, took the stand and, in effect, convicted themselves.

While there are cases in which it is essential that the defendant testify, such situations are not always easy to identify. In many cases, the decision must be made on short notice. The relative positions of the parties during the trial is subject to change at any time. Often, one cannot accurately assess the situation until the prosecution has rested. The prosecution may rest its case earlier than the defense anticipated, or the final witnesses may offer unexpected testimony. In jurisdictions where discovery in criminal cases is severely limited, surprises at trial are the rule rather than the exception. Therefore, defense counsel must remain flexible and able to change tactics quickly. He must always be prepared to modify his strategy when unforeseen events occur or to abandon it altogether when the situation warrants.

Many experienced criminal trial lawyers tend to avoid putting the defendant on the stand whenever feasible. They have found that acquittals seem to be more common when the defendant does not testify. While there are no scientific studies available to prove this hypothesis, it is not difficult to support logically or experientially. The basic risk involved in presenting evidence is the natural tendency of the jury to weigh the evidence of one side against that of the other, rather than focusing upon whether the prosecution has carried its burden of proof. By putting up evidence, the defendant may unknowingly participate in a de facto shifting of the burden of proof to himself.

Beyond incurring the risk of effectively shifting the burden of proof to himself, the defendant who presents evidence on his own behalf may lose other significant tactical advantages as well. In Georgia, for instance, a defendant who elects not to present evidence is rewarded with the right to make the opening and concluding arguments.[1] He retains this right even if he testifies, provided that the defense introduces no other evidence.[2] Therefore, in such a jurisdiction, it is particularly important for the defense lawyer to weigh carefully the potential advantages of not putting up a defense beyond the defendant's own testimony. In some ways, this procedure may make it somewhat less risky to have the defendant testify. If defense counsel introduces no other evidence, he will have the opportunity, in summation, to counter the prosecutor's tacit argument to the jury that the defendant should be convicted because his testimony was insufficient to disprove the prosecution's evidence.

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1. O.C.G.A. § 17-8-71 (1990).
2. *Id.*

The prosecution's ability to capitalize upon the weakness of the defendant's testimony is an important consideration in deciding whether the defendant should testify. Such prosecutorial tactics are effective because the defendant's testimony tends to take on a disproportionate importance in the eyes of the jury. If the defendant makes a mistake out of nervousness, or if he just does not make a good impression on the jury, this will be overemphasized. Most criminal practitioners can describe examples of a defendant losing his case through his own performance on the witness stand. In fact, experienced lawyers have been heard to describe their role in counselling their clients to remain silent at trial, perhaps tongue-in-cheek, as protecting the defendant from his own subconscious desire to be found guilty.

Because of the complexity of the decision whether the defendant should testify, and because of the need to reassess continually the situation during the trial, no general rule can be postulated. Each case and each defendant is unique, and no set of guidelines or checklist will be sufficient to enable a defense lawyer to make this kind of tactical decision mechanically. Nevertheless, the following factors are presented as examples of considerations which might enter into the decision-making process:

1. Is the defendant's testimony necessary?

If your theory of the case depends upon the defendant's version of the facts, or upon facts as to which you have no other witness, then obviously the defendant must testify. But if the gist of the defense is that the prosecution has failed to carry its burden of proof, or if there are other witnesses available to testify regarding facts essential to the defense theory, then the defendant's testimony is optional.

The point here is that many defense lawyers believe that the defendant should take the stand for the sole purpose of denying the charges and professing his innocence. It is suggested that this tactic entails far more risk than reward, and that in cases in which the defendant's testimony is not essential to his theory of the case, counsel should be extremely cautious in deciding whether to encourage him to testify.

2. Will the jury perceive the defendant as being in a position to supply important factual information?

If the evidence is such that the jury will sense that the defendant is in a position to provide important information, his failure to testify is likely to be viewed by the jury as a tacit admission of guilt. But jurors are less likely to draw such an inference from the defendant's silence at trial when it is obvious that he is unable to provide any significant factual

information about the transaction or incident forming the basis of the charges.

Defense counsel should also consider whether, in closing argument, he will be able to explain the defendant's decision not to testify in terms which will appear sensible to the jury. The closing, of course, must take into account the court's jury charges. If the defense files a request to instruct the jury that the defendant's silence at trial may not be held against him in any way, the court is required to give the instruction. While some lawyers find it preferable to avoid such an instruction (on the theory that it calls too much attention to the absence of the defendant's testimony) it is suggested that, if the defendant does not testify, defense counsel should request the instruction and should deal with the matter frankly in closing argument.

Generally, counsel will have little trouble persuading a jury that, by pleading not guilty, the defendant has effectively denied guilt, and that there is no reason for him to testify since he obviously does not have any relevant knowledge about the purported crime. In many cases, the prosecution will put the defendant's statements to the police into evidence, even when the statements are, arguably, not incriminating. In such cases, the prosecution gratuitously provides a substitute for the defendant's testimony. If the defendant's explanation has been put before the jury in this fashion, there is much less reason for him to testify since the jury is not likely to be greatly affected by his silence at trial.

3. What impression is the defendant likely to make upon the jury?

If a juror identifies with the defendant, he is unlikely to vote for conviction. The defendant may appear so pitiable or likable that the impression he leaves with the jury will be sufficient in itself to raise a reasonable doubt. On the other hand, some people are virtually incapable of making a favorable impression on the witness stand. While pretrial preparation can usually compensate for a witness's nervousness or inability to articulate, an abrasive personality is difficult to camouflage, especially where cross-examination is skillful or lengthy. In assessing the impression the defendant is likely to leave with the jury if he testifies, the defense lawyer should consider how vulnerable his client is likely to be to the prosecutor's cross-examination. The prosecutor may have substantial ammunition in the form of prior inconsistent statements or other evidence with which to confront the defendant on cross. He may be holding evidence of bad character to utilize in the event the defendant "opens the door" by injecting the issue of his own character into his testimony. Defense counsel should subject the defendant to rigorous cross-examination before trial in order to assess his effectiveness in responding. Often, one can train a defendant to respond to cross-examination in a manner that will

not be damaging. On the other hand, there are people who naturally give such an appearance of arrogance or self-righteousness that no amount of pretrial preparation is likely to be effective.

Defense counsel should also consider whether the defendant's testimony will be consistent with the nondamaging testimony of other witnesses. For example, if the defendant, in testifying about some innocuous fact, happens to contradict the testimony of a favorable witness, he may unnecessarily create an issue that could prove damaging to the defense. If he contradicts prosecution witnesses whose testimony, standing alone, was not harmful, he may destroy his own credibility.

Of course, it is important to "humanize" the defendant so that the jury will view him as something other than a target. Nevertheless, jurors are generally very skeptical of the defendant's testimony and are certain to penalize him heavily if he does not appear credible. Standing alone, the desire to humanize the defendant is seldom a sufficient reason to subject the defense to the risk of having him testify.

4. Consideration of the defendant's right to testify

The criminal defense lawyer should bear in mind that his client has a constitutional right to testify which cannot be unilaterally waived by his counsel.[3] But unlike the right to trial by jury, the right to counsel, and other fundamental rights, the right to testify involves a decision based on trial strategy that the layman is not equipped to make.

Some theorists are of the opinion that people have a right to commit suicide; but that does not mean that, as a general rule, suicide is to be preferred over continued life. Similarly, the existence of a right to testify does not import that it is either necessary or desirable to exercise that right. Criminal defendants often exhibit a fascination with the witness stand, which seems to draw them like the proverbial moth to the flame. When necessary, the defense lawyer should not hesitate to pull his client's defense away from the fire by keeping the defendant at the counsel table. Of course, the defendant must be consulted and it is important not only that he understand the reasons supporting his lawyer's suggested tactics, but also that he agree with the ultimate decision.[4] The lawyer must be able to explain his strategy in clear terms. Hopefully, a meaningful dia-

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3. Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring); United States v. Martinez, 883 F.2d 750 (9th Cir. 1989); United States v. Scott, No. 89-8520 (11th Cir. Aug. 21, 1990).

4. In at least one jurisdiction, it has been held that if a defendant chooses not to testify at trial, the trial court has a duty to advise the defendant, outside the presence of the jury, that he has a right to testify and that "if he wants to testify then no one can prevent him from doing so . . . ." People v. Curtis, 681 P.2d 504, 514 (Colo. 1984).

logue will help to nurture the kind of trust necessary for the defendant to heed his counsel's advice to resist the urge to "tell his side of the story."

5. Has the prosecution presented a strong case against the defendant?

The most important question governing the decision whether to present evidence for the defense is whether the prosecution's evidence has convinced the jury that the defendant is guilty. If one could know the answer to that question, further considerations would be unnecessary. Unfortunately, this information is unavailable to the trial lawyer. We can only try to gauge the probabilities and identify some reasons for doubt that remain after the prosecution has rested. Therefore, the strength of the prosecution's case ordinarily is only one of the factors to be considered.

The defense will usually be better able to direct the jury's attention to the failure of the prosecution to carry its burden of proof when the defendant does not testify. Prosecutors are often able to salvage a weak case by being able to attack the testimony presented by the defense. This tactic is unavailable when the defendant decides not to offer evidence. But, when the prosecution's case has been strongly persuasive, counsel may be well-advised to put the defendant on the stand, even when his testimony may be weak and vulnerable to attack by the prosecutor.

The actual and apparent necessity of the defendant's testimony, the impression he will likely make upon the jury, and the defendant's right to testify are factors to be weighed the same regardless of the prosecution's evidence. If the question is a close one, however, the strength of the prosecution's case should tip the balance in favor of having the defendant testify. The defendant simply has more to gain and less to lose by testifying when the evidence presented by the prosecution is very strong. In conclusion, if there must be a general rule, then it should be that no defense is better than a weak defense. And the decision to present evidence in defense should be made only after a careful consideration of these factors.