

Till Death Do Us Part?

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On December 13, 2008, Christine Novak's body was found severely charred after a fire at her home in Narrowsburg, New York. There was no identifiable forensic evidence due to the intensity of the fire. Paul Novak, her husband, was a likely suspect. He was working as an EMT in New York City and was recently separated from Christine. But without forensic evidence, there was no way to connect Paul to the crime. During the investigation, Paul's girlfriend, Michelle LaFrance, provided him with an alibi.

In April 2012, Michelle, now estranged from Paul, called New York State Police and recanted her alibi and described details of Paul's murder of Christine, including her role. Michelle also informed police of another participant in the murder, Scott Sherwood, also a New York City EMT employee.

On October 24, 2012, Paul was indicted for murder in the first and second degree of his wife, arson, burglary, larceny and insurance fraud. Scott was also indicted and charged with murder in the second degree, arson and burglary, arising out of the same events. Without Scott's testimony, it would be difficult to persuade a jury to convict Paul. In exchange for his testimony against Paul, the prosecutor offered Scott to plead guilty to conspiracy to commit murder with a sentence of three to twelve years and a favorable letter to the Department of Corrections in support of early release. The day before Paul's trial, Scott pled. Obtaining Scott's testimony was not the only obstacle for the prosecutors. Scott was a licensed, working paramedic. He also had a long history of mental illness including depression, anxiety and bipolar disorder. Scott was taking psychotropic medications to treat his mental illness. Paul's best defense was to discredit Scott's testimony. Paul's counsel requested the Court to allow an expert psychiatrist to observe Scott's testimony and assist the defense in cross-examination of Scott and to testify as to Scott's veracity and vulnerability in light of his mental illness and medication regime. The defense argued that the jury had a right to know and understand Scott's mental illnesses and the effect it might have on his testimony and recorded confession[1].

The Law of Evidence

As will be discussed, the concept of excluding one wit-

ness during the testimony of another witness, often referred to as sequestration, has a long history dating back to biblical times. Its purpose is to prevent a witness from shaping his or her own testimony around the testimony of other witnesses, which would taint the truth-seeking process. The Book of Daniel tells the story of Susanna, a beautiful woman who was falsely accused of adultery by two elders who desired her. The elders agreed to recant their accusations if Susanna would have sex with them. She refused. Daniel proposed that the elders be questioned separately. Each one provided a different description of the tree where the event occurred. Susanna was found innocent and the two elders with the inconsistent stories were put to death.

Before turning to the Novak case, it is useful to see how the issue of witness sequestration is addressed in federal court. Rule 615, Fed. R. Civ. P., provides that a Court "must" exclude witnesses at a party's request. The exceptions to the Rule cover a party or a corporate representative and the broad category of other persons "whose presence a party shows to be essential to presenting the party's claim or defense. . . ." Rule 615(c). Federal courts have held that it may be reversible error for a trial court to exclude one side's expert while the other side's expert is testifying where the expert's assistance is needed to develop cross-examination [2].

In New York, a jury found a mother's boyfriend guilty of brutally murdering her twenty month old child. On appeal, the boyfriend claimed *inter alia* that the trial court violated his Sixth Amendment right to a public trial by excluding his new [i.e. not the mother of the murdered child] girlfriend from the courtroom where there was no certainty that she would be called as a witness. Both New York's intermediate appellate court and the highest court unanimously affirmed the trial court's decision. The boyfriend brought a federal habeas petition attacking the conviction on the ground that the exclusion of the new girlfriend violated the Sixth Amendment's promise of a public trial. Federal habeas relief requires a showing that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"[3]. The federal court found the New York's exclusion of the girlfriend who was a potential witness did not contravene Sixth Amendment courtroom-closure jurisprudence[4].

One could argue that in criminal cases a defendant's testimony could be tailored by observing the testimony of the prosecution witnesses but no court has sanctioned the exclusion of the accused from his own trial[5].

But, if the defendant elects to take the witness stand, may a prosecutor comment in summation on the defendant's ability to shape his testimony by hearing the testimony of others? In a 7-2 decision authored by Justice Scalia, the U.S. Supreme Court, held that it was not a denial of the defendant's Constitutional rights for the prosecutor to allude, during summation, to the possibility that the defendant's testimony was tainted after hearing the prosecutor's witness.

"In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate and indeed, given the inability to sequester the defendant, sometimes essential to the central function of the trial, which is to discover the truth"[6].

New York has not adopted the Federal Rules of Evidence, nor the principles embodied in Rule 615. However, New York's highest court agrees with the Federal Rules of Evidence that exclusion of expert witnesses is generally not appropriate and reversed a conviction where a defense counsel was not permitted to talk to his own witness about possible lines of cross-examination of the prosecutor's expert unless he agreed not to call his own expert in rebuttal[7].

The New York Court of Appeals has held that excluding a witness from the courtroom during the examination and testimony of other witnesses is at the discretion of the court but suggested that in a criminal case, particularly a capital case, the exclusion of fact witnesses ought to be as a matter of course [8]. There is, however, a possibility of abuse where, for example, a prosecutor or defense counsel loads up the names of potential witnesses with no intention of calling the individuals as witnesses but, instead, for the purpose of keeping them out of the courtroom.

In Paul Novak's case the question before Judge Rank J. LaBuda was whether the court should allow an expert psychiatrist to observe the testimony of a lay witness, Scott Sherwood, in order to assist counsel in cross-examination and then to testify discrediting Scott due to mental illness and the effects of his medication. The defense argued that the psychiatrist's testimony could make the difference between a jury finding the defendant guilty or not guilty.

In the trial of alleged cold war double agent Alger Hiss, the Court allowed a Harvard psychiatrist Carl Binger to testify as to the mental status and credibility of the government's principal witness based only on trial observations and writings [9]. Defense attorney Claude Cross asked "What is your opinion, Dr. Binger, of the mental condition of Mr. Chambers?" He replied "I think Mr. Chambers is suffering from a condition known as psychopathic personality, which is a disorder of character, of which the outstanding features are behavior of

what we call an amoral or an asocial and delinquent nature." [10].

The Court in Paul Novak's case allowed the psychiatrist to observe Scott's testimony for the purpose of assisting defense counsel with cross-examination and allowed the psychiatrist to testify as to generalities of the mental illnesses but not to determine Scott's mental status. Unlike the Alger Hiss trial, no testimony would be allowed as to Scott's mental condition or credibility. The Court in the Novak case stated that all credibility determinations would be solely for the jury to decide. While this author declines to weigh in on the outcome of any appeal in the Novak case, allowing an expert to be present during the testimony of another expert seems to be well within the mainstream. Because the credibility of witnesses is uniquely within the province of a jury, it is no surprise that a court would not allow an expert to opine on the subject. Further, a mental diagnosis from observations solely on a witness stand would appear to have a low probative value and a high danger of unfair prejudice.

References

- 1) People V Novak (2013) 41 Misc.3d 749, 971 N.Y.S.2d 853.
- 2) Before Oakes, Miner and McLaughlin (1993) Malek v. Federal Insurance Company. 994 F.2d 49.
- 3) 28 U.S.C. § 2254(d)(1).
- 4) Baker v. Fischer (2012) Commissioner, NYS Dept. of Correctional Services, No.11-CV6295(MAT).
- 5) Fifth and Sixth Amendment rights to be present at trial and confront accusers, and Fourteenth Amendment right to due process.
- 6) Portuondo v. Agard, 120 S.Ct. 1119 (March 6, 2000).
- 7) People v. Santana 80 N.Y.2d 92, 100, 600 N.E.2d 201, 205, 587 N.Y.S.2d 570, 574 (N.Y. 1992)
- 8) People v. Cooke, 292 N.Y. 185, 191 (1944). See Baker v. Fischer 2012 WL 1909286 (W.D.N.Y.,2012)(federal habeas review of New York state court conviction).
- 9) United States v. Hiss, 88 F.Supp 559 (SDNY, January 4, 1950)
- 10) Carl Binger (1950) Testimony of Dr. Carl Binger at the second Hiss trial dated January 4.

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