Mercer Law Review

Volume 28
Number 1 *Annual Survey of Georgia Law*

Article 26

12-1976

A Party Need Not Show Prejudice or Surprise to Impeach Its Own Witness

Robert R. Gunn II

A Party Need Not Show Prejudice or Surprise to Impeach Its Own Witness

In *Wilson v. State*,[1] the Supreme Court of Georgia unanimously held that a party may impeach the credibility of its own witness with that witness' prior inconsistent statement without showing that the testimony is a total surprise or affirmatively damaging to the party's case.[2]

Bill Ray Wilson was convicted of murder and armed robbery on the basis of testimony from three prosecution witnesses. His case consisted solely of his sworn denial.[3] The testimony of one prosecution witness was inconsistent with a previous written, sworn statement in which the witness had said Wilson had confessed to the murder in his presence several days after the crime.[4] The district attorney, claiming that he had been "entrapped" by the witness' testimony, sought to impeach the witness under §38-1801 of the Georgia Code by introducing the prior inconsistent statement.[5] The district attorney admitted knowing that the witness had been waivering from his original statement but said that he had called the witness anyway with the hope that he would be faithful to his earlier, more colorful version of the story. The trial court eventually was persuaded that the prosecution had been adequately entrapped and allowed the district attorney to impeach the witness with his earlier contradictory statement.[6]

On appeal to the Georgia Supreme Court, Wilson enumerated several errors allegedly made by the lower court, including its allowing the prosecution to impeach its own witness with the prior inconsistent statement.[7]

---

1. 235 Ga. 470, 219 S.E.2d 756 (1975).
2. *Id.* at 475, 219 S.E.2d at 760.
3. *Id.* at 471, 219 S.E.2d at 757.
4. The witness' pre-trial statement contained the following account: "[Wilson] told me he had taken a boy named James Olin up in some woods and killed him, he said he hit him in the head with a hammer and then he put a stick in his head . . . He was laughing and telling all about it." At trial, the witness said Wilson had told him "that someone had got killed or he had killed somebody. I don't know to be exact." *Id.* at 471, 219 S.E.2d at 758.
5. GA. CODE ANN. §38-1801 (1974) provides that "[a] party may not impeach a witness voluntarily called by him, except where he has been entrapped by a previous contradictory statement."
6. Upon further examination, the witness admitted making the written statement but said that the facts contained therein had been told to him by someone other than Wilson. *Id.* at 417, 219 S.E.2d at 758.
7. The supreme court held it was not error to allow another witness, whose name had not been furnished to Wilson and who had not been seated in the courtroom after the rule of sequestration had been invoked, to testify for the prosecution. The court based its ruling on the fact that the prosecution had discovered the witness only the night before he testified, so allowing him to testify was proper under GA. CODE ANN. §27-1403 (1972) (witness whose name is not on defendant's list cannot testify for state unless the evidence is newly-discovered and not known to state at time of furnishing the defendant its list). *Id.* at 476, 219 S.E.2d at 760. *See also* Mitchell v. State, 226 Ga. 450, 175 S.E.2d 545 (1970).

The defense argued that the prosecution had been neither surprised nor damaged by the witness' testimony and thus it was error to allow the witness to be impeached by the party who called him. Justice Hall, writing for the supreme court, noted that the Georgia cases had previously required showings of both prejudice and surprise before a party was recognized to be entrapped by its own witness,[8] but he said the court would no longer follow that rule. The court affirmed the trial judge's ruling and said it would no longer require a party to show surprise or prejudice before it would be allowed to impeach the credibility of its own witness by use of a prior inconsistent statement.[9]

At common law, a party could not impeach its own witness, but authorities disagree on the origin of the rule. One theory is that it evolved from the early Roman decisory oath, under which a party could prove a difficult case by compelling his adversary to prove his claim or defense by making a statement under oath. Once this was done, the statement could not be contradicted.[10] A second theory about the origin of the rule is that it developed during the period of transition from the inquisitorial method of trial to the adversary system in the late 17th century.[11] One of the most frequently cited theories is that the rule originated in the practice of trial by compurgation or wager-at-law in medieval England.[12] Under this method of trial, the only witnesses whom a party could offer on his behalf were "oath-helpers," who would support the party's case by swearing their belief in his version of the story. As such, they were really only character witnesses, and the party offering them was understandably forbidden from contradicting them.[13] It was many years after the practice of trial by compurgation ended before a statute was passed in England allowing a party to impeach the testimony of his witness under certain circumstances.[14]

Several reasons traditionally have been offered for the rule against impeaching one's own witness. One reason commonly given is that the party guarantees the credibility of his witnesses when he places them on the stand; having vouched for the witnesses' veracity, the party cannot seek to discredit them should they prove adverse.[15] Another explanation fre-

8. 235 Ga. at 472, 219 S.E.2d at 758.

9. *Id.* at 475, 219 S.E.2d at 760.

10. *See* Crago v. State, 28 Wyo. 215, 220, 202 P. 1099, 1100-01 (1922).

11. *See* Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. CHI. L. REV. 69 (1936).

12. *See* 3A J. WIGMORE, EVIDENCE §896 (Chadbourn rev. 1970) [hereinafter cited as WIGMORE]; Comment, *Impeaching One's Own Witness*, 49 VA. L. REV. 996 (1963).

13. WIGMORE, *supra* note 12, at §896.

14. This early statute reads: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony." Common Law Procedure Act of 1854, 17 & 18 Vict., c. 125, §22.

15. Murray v. New York R. R., 332 Mich. 159, 50 N.W.2d 748 (1952).

quently advanced is that a party should not be able to use the threat of impeachment as a tool to coerce favorable testimony from a witness.[16] If a party could hold such a threat of impeachment over the head of his anxious witness, he might be able to blackmail him into testifying favorably, even to the point of perjury.[17]

In the United States, the rule against impeaching one's own witness is applied with varying degrees of severity, depending on the jurisdiction.[18] In a number of jurisdictions, the rule has been modified by statute or decision to allow impeachment of one's own witness when the party has been prejudiced and surprised by his testimony.[19] Moreover, the recently adopted Federal Rules of Evidence have done away with the rule entirely and allow unrestricted impeachment of a witness by any party.[20]

The Georgia statute on impeachment of a party's own witness requires that the party show the court that he has been entrapped by the witness' testimony because of a prior inconsistent statement made by the witness.[21] *McDaniel v. State*,[22] laying down a two-pronged test, was one of the first cases to hold that "entrapment" meant that the party must have been surprised and damaged (or prejudiced) by the testimony.[23] The supreme court held that since the solicitor had not talked to the witness before trial, he could not have been entrapped by any prior inconsistent statement.[24] Later decisions further restricted the operation of Georgia Code §38-1801. In *Jeens v. Wrightsville & Tennille R. R.*,[25] the court held that the defen-

16. Slough, *Impeachment of Witnesses: Common Law Principles and Modern Trends*, 34 IND. L. J. 1 (1958).

17. 3 WEINSTEIN'S EVIDENCE §607(01) (1975).

18. *See* 4 JONES ON EVIDENCE §26:12 (6th ed. 1972) for a comparison of the different approaches various jurisdictions in the United States take in dealing with the rule.

19. *See* E. CLEARY, MCCORMICK ON EVIDENCE §38 at 76 (2d ed. 1972).

20. FED. R. EV. 607 states: "The credibility of a witness may be attacked by any party, including the party calling him." The Advisory Committee's comment following the rule states: "The substantial inroads into the old rule made over years by decisions, rules, and statutes are evidence of the doubts as to its basic soundness and workability." 56 F.R.D. 183, 267 (1975).

21. GA. CODE ANN. §38-1801 (1974). The statute appeared in the original state code; *see* GA. CODE OF 1861 §3793. Even before this statute was adopted, it was held that a party could attack the testimony, if not the general credibility, of his witness if he was entrapped by a previous contradictory statement: "A party is not to be sacrificed by his witness; and he ought not to be entrapped by the arts of a designing man, perhaps in the interest of his adversary. He ought, therefore, to be permitted to relieve himself from the effect of testimony which has taken him by surprise, not by showing that the witness, from his general character for truth, is not entitled to credit, but by showing that the fact is different." Burkhalter v. Edwards, 16 Ga. 593 (1855).

22. 53 Ga. 254 (1874).

23. "It is not sufficient that [the witness] shall have made contradictory statements; such statements must have deceived, and led the party complaining to introduce him, and thus, unwittingly, to have been damaged by statements different from what he expected." *Id.* at 255.

24. *Id.* at 254-55.

25. 144 Ga. 48, 85 S.E. 1055 (1915).

dant could not rely on contradictory testimony of a witness given in another trial as the basis for impeachment.[26] The court said that the party or his counsel should have exercised "the least diligence" and interrogated the witness personally as to his knowledge of the transaction before offering him to testify.[27] In apparent agreement with *Jeens* is the court of appeals decision in *Smith v. State*,[28] where it was held that the solicitor-general could not impeach a witness called by him on the basis of the witness' prior inconsistent statement because the statement was not made directly to the solicitor-general or to a third person to be conveyed to the solicitor-general.[29] The supreme court later rejected this requirement in *Sparks v. State*,[30] holding that "when a written statement has been given to one who has authority in law to make criminal investigations for the State, the solicitor-general may rely upon it as fully as if it had been made directly to him."[31] In addition to these restrictions, the Georgia courts have made it clear that the prior inconsistent statement may not be used as substantive evidence[32] or as evidence of general bad character of the witness[33] and that even if the party is entrapped, it cannot introduce the statement for impeachment purposes if the witness avails himself of the Fifth Amendment.[34]

In *Wilson v. State*, the Georgia Supreme Court concluded that the prosecution had shown "adequate" surprise to satisfy the first prong of the test of entrapment.[35] Dispensing with this question in a single paragraph, the court noted that while the witness had been "backing up" on the details of his story to the district attorney, he had never actually repudiated his allegation that Wilson had confessed to the crime.[36] The court did not further elaborate on the issue but simply said it was satisfied that the prosecution had been adequately surprised.[37]

The supreme court found more difficult the question whether there was sufficient prejudice to satisfy the entrapment requirement. The court said on that point decisions in the state were in conflict.[38] On the one hand were cases requiring that the witness' testimony do more than simply fail to support the party's case; the testimony had to affirmatively damage it.[39]

---

26. *Id.* at 52, 85 S.E. at 1056.
27. *Id.* at 52, 85 S.E. at 1056.
28. 74 Ga. App. 685, 41 S.E.2d 179 (1947).
29. *Id.* at 686, 41 S.E.2d at 180.
30. 209 Ga. 250, 71 S.E.2d at 608 (1952).
31. *Id.* at 251, 71 S.E.2d at 609.
32. Rogers v. Saye, 106 Ga. App. 453, 127 S.E.2d 161 (1962).
33. Kitchens v. Hall, 116 Ga. App. 41, 156 S.E.2d 920 (1967).
34. Jenkins v. State, 73 Ga. App. 515, 37 S.E.2d 230 (1946).
35. 235 Ga. at 473, 219 S.E.2d at 759.
36. *Id.*
37. *Id.*
38. *Id.* at 473-74, 219 S.E.2d at 759-60.
39. *Id.* at 473, 219 S.E.2d at 759. *See, e.g.*, Rickerson v. State, 106 Ga. 391, 33 S.E. 639

There was agreement that *Wilson* fell into this category, but the court chose to follow another line of cases that allowed impeachment even when the testimony was not affirmatively damaging but merely inconsistent.[40] In support of its decision, the court in *Wilson* pointed to the "palpable falseness" of the rationale for the rule against impeaching one's own witness.[41] The court agreed with Wigmore[42] that the reasons usually given for the rule do not justify its continuance:[43] (1) that a party should be morally bound by the statements of his witness (2) that a party guarantees the credibility of his witness and (3) that a party should not be allowed to hold the threat of impeachment over a witness.[44] The court saw no validity in the first two reasons, stating that it is illogical to hold a party as guarantor of his witnesses, when he usually has no choice over whom they will be but rather is stuck with the ones he has. Only the third reason was credited as being of any substance. The court then noted the approach of the Federal Rules of Evidence and, while not expressly adopting that view, concluded "that the ends of justice are far better served by full exposure of whatever previous statements a witness might have made if his testimony conflicts with them."[45] Summarizing, the court stated: "Henceforth, for 'entrapment' under that [*sic*] Code Ann. §38-1801 to exist, we will not require that the witness' testimony be a total 'surprise' nor that it be affirmatively damaging."[46]

It is possible that the statement from the supreme court's opinion in *Wilson* could be narrowly construed by some trial judges because of the qualifiers "total surprise" and "affirmatively damaging." By using this dangerous qualifying language, the court may have left room for some semantic jousting over the question of when a surprise is "total" or when damage is "affirmative." However, this debate could only occur if those words were taken out of the context of the court's opinion. Reading the opinion as a whole, it is apparent that the supreme court has completely rejected the old rule requiring prejudice or surprise before a party may impeach its own witness. By choosing to follow the line of cases allowing impeachment whenever a statement is inconsistent and by citing Federal Rule of Evidence 607 with obvious approval, the supreme court made it clear that the old requirements for entrapment have been laid to rest.

(1898): "The mere failure of a witness to testify to facts supposed to be beneficial to the party introducing him and which were expected to be proved by him does not come within the reason or policy of the rule [allowing impeachment]." *Id.* at 392, 33 S.E. at 640.

40. 235 Ga. at 474, 219 S.E.2d at 759. *See, e.g.*, Wisdom v. State, 234 Ga. 650, 217 S.E.2d 244 (1975); Young v. State, 220 Ga. 75, 137 S.E.2d 34 (1964).

41. 235 Ga. at 474, 219 S.E.2d at 759.

42. *See* WIGMORE, *supra* note 12, at §896 *et seq.*

43. 235 Ga. at 475, 219 S.E.2d at 760.

44. *Id.* at 474-75, 219 S.E.2d at 760.

45. *Id.* at 475, 219 S.E.2d at 760.

46. *Id.*

The holding in *Wilson* should be applauded by all trial lawyers. It means that the lawyer and his client will no longer be at the mercy of an unscrupulous witness or adversary. There are those who may say that such a holding risks confusing the trier of fact by offering for impeachment purposes evidence that might be viewed as substantive evidence by jurors. Of course, that confusion can be remedied by careful jury instructions from the trial judge. The best response to this type of criticism is in the *Wilson* opinion: "Should anyone object that the introduction of earlier out-of-court statements could occasion confusion, we answer that it is the function of a thorough and sifting cross-examination to explore the circumstances of each witness' pronouncements, in the ultimate quest for truth."[47]

ROBERT R. GUNN, II

47. *Id.* at 476, 219 S.E.2d at 760.