

Prior Testimony Admitted in Retrial

By: Wayne C. Fricke; Jan 2006

Recently, in Pierce County Superior Court, I was involved in a retrial of an attempted first-degree murder wherein the victim was rendered a quadriplegic from an assault with the issue revolving on the identity of the attacker. The initial trial resulted in a split of 9-3 for acquittal but the prosecution exercised its right to have a second trial, after my client rejected a proposed plea to fourth degree assault with no time.

At the outset, the prosecution indicated that it would use a transcript of my client's testimony from the first trial read to the jury. After researching the law it appeared that this was a proper procedure. See Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2000, 20 L.Ed.2d 1047 (1960); United States v. Grunewald, 164 F.Supp. 644 (1958).

The Grunewald case does speak to the principal of "verbal completeness," meaning that if part of the testimony is to be admitted, then the entire transcript (at the defendant's request) should be admitted minus any material that was improperly admitted in the first trial. The next question then is how to have the prior testimony presented to the jury. The prosecution called one of its colleagues to have the actual testimony read as if he were my client testifying on the stand. Also, the defense was given the option of reading the questions it had asked in the first trial as opposed to having another individual from the prosecutor's office read the question. After deliberating a considerable amount on the best method in which to do this, the defense decided to read the questions it had asked in the first trial.

I remain conflicted as to whether this was the best procedure, but ultimately we decided it was better to control the verbalization of the question. If others have encountered this situation I would welcome suggestions as to other options. Additionally, because we wanted the jury to hear our client's voice, he testified (again) in our case-in-chief, although the breadth of his testimony was lessened because the jury had already "heard" his rendition.

After a two-week trial, the jury took four hours to acquit my client in the second trial. Now, the only thing that remains is the civil case.

End

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