

Should a Defendant Testify?

By David Zapp, Esq.

A current study was conducted “to better understand how jurors perceive and act toward criminal defendants who do not take the stand in their own defense and under what conditions taking the stand was disadvantageous. The results were clear: jurors do not appear to be influenced by whether or not a defendant testifies.

“While there was some indication that failure to testify affected some jurors, this influence did not lead to any more adverse outcomes in terms of guilty verdicts. Nor did we find that testifying with a criminal record was particularly disadvantageous. Moreover, and surprisingly, there were no differences in perceptions of defendant aggressiveness even with a previous conviction for assault and battery, the ‘offense’ for which the defendant was theoretically on ‘trial’ for [in the experiment].

“Specifically, the findings suggest that jurors are not overly influenced by extralegal factors, [nature of crime or character, of defendant] and they do not make assumptions about the defendant that are not based on the evidence presented. This study confirms a plethora of jury decision-making research that shows, namely, that jurors perform their duties

diligently and in accord with the law.” Shayne Jones & Melissa Harrison, *To Testify or Not to Testify-That is the Question: Comparing the Advantages and Disadvantages of Testifying across Situations*, 5 Applied.

Commentary

That said I still wonder why a lawyer would not put a client on the stand that makes a good appearance, has no criminal record and has a believable story to tell. I am not talking about a defendant who just simply protests his innocence. That point is made by going to trial. I am talking about a defendant that can fill gaps in the evidence, answer questions raised by the Government’s proof, offer alternative interpretations of conversations or e-mails and simply let a jury know he is a real human being with similar concerns and problems.

Just once I would like to see some poor truck driver from a small town in Colombia, down on his luck, a peripheral figure in a drug trafficking case who is just trying to make a buck with no idea where the drugs he knew he was transporting were going. I would like to hear from the truck driver about his hard scrabble life, his need to support his family, about his family, his kids, his parents and the specific reasons he got involved in the crime. I would like a jury to see more than just a “defendant.”

The big lie that people perpetrate is that jurors cannot be fair, and that is not true, and the research shows it. If you can be fair, why can’t jurors be fair? If you go to trial and you do not

testify, it is a shame. If you go to trial and you could have testified, it is a tragedy. Often the best witness is you. Not every defendant can testify. But defendants and their lawyers should not discard the possibility.

And if a defendant loses at trial he can always get the safety valve. Indeed the judge himself may find the testimony sufficient for that purpose. Safety valve testimony can be made “at any time” before sentence. The Holder memo, with its policy of not charging a mandatory minimum sentence charge on peripheral figures, makes that option even more attractive.

- David Zapp

Former MMA fighter found not guilty in road rage incident

By Ihosvani Rodriguez, Sun Sentinel
October 24, 2013

A Broward jury on Thursday issued a not-guilty verdict for Fernando Rodrigues, a former mixed martial arts fighter who was arrested last year after a road rage incident in Coral Springs.

Rodrigues, 32, a former U.S. Marine and a Brazilian jiu-jitsu competitor, claimed during the four-day trial that he was acting in self-defense when he single-handedly managed to beat up two pool service workers by the side of the road on March 5, 2012.

Rodrigues was facing a mandatory minimum of at least 10 years in prison if convicted and turned down a deal for probation, said his attorneys **David O. Markus** and Bill Barzee.

“He’s a Marine and one of the most

courageous clients I've ever had," Markus said. Markus said his client had insisted from day one he was not guilty.

The six-man jury took a little more than an hour to deliver the verdict, Markus said. Rodrigues took the stand in his own defense.

The two pool men, Michael Caccavella and Juan Uribe, told the Sun Sentinel last year that Rodrigues had honked at them when they didn't move quickly enough after a light turned green. Caccavella said Rodrigues followed him before both drivers pulled over.

After angry words were exchanged, Rodrigues pistol-whipped Caccavella and Uribe, they claimed. Uribe claimed he was later placed in a wrestling hold. While all three men were handcuffed, only Rodrigues was arrested.

The charges against Rodrigues included three counts of aggravated battery with a deadly weapon — his hands.

Attorney Markus said Thursday that his client was only trying to write down the men's license number when he was accosted with a gun. "He knew how to react. He could've killed them, but all he wanted to do was de-escalate the situation until the police arrived," Markus said.

Reached by phone, Caccavella expressed dismay when told of the jury's verdict. "I am stunned. I am shocked," he said. "Well, hopefully [Rodrigues] can put this behind him and we can put this behind us."

Commentary

I usually don't give unsolicited referrals, but I happen to know this defense lawyer. If you want a genuine criminal defense lawyer in Miami who does not just plead defendants, **David Markus** is the guy. A Harvard

trained lawyer, young enough (40) to have the passion and competitiveness yet mature enough to know when to hold or when to fold. I have no economic stake in his future, but I am telling you that this is a solid lawyer. He doesn't come cheap, but he comes reasonable.

- David Zapp

A reader asks:

How do the parties arrive at the point where at the moment of sentence the Judge asks: "What is the Government's recommendation?" And the answer could be, "the government recommends the low end of the Guidelines, Your Honor" Now the judge may or may not follow the recommendation. This is in the day-to-day federal case.

Answer:

That is correct in the "day to day" federal case."

At sentence the judge will turn to the defense attorney and ask if he is ready to proceed, and the defense lawyer will say yes. And the judge will tell him, "I will hear from you and I will hear from your client." And the defense lawyer then says what he wants to say on behalf of the defendant even suggest a specific sentence well below the guideline. The defendant will then say his piece, and then the judge will turn to the prosecutor and ask if there is anything he wishes to say and the prosecutor will rely on the memo that has been written to the judge advising the judge of the crime, the defendant's part in it and what the guidelines are. He will say that the guidelines are reasonable and the defendant should be sentenced within the guidelines often at the lower end. **In the case**

of cooperation, the prosecutor will advise the court of the crime, the defendant's part in it and the nature, quality and quantity of the defendant's cooperation in what is known as a five k letter named after the guideline provision that provides for this letter. **HE WILL NOT MAKE ANY SPECIFIC RECOMMENDATION**, at least not in New York federal courts. In other jurisdictions prosecutors do it all the time. Miami is famous or infamous for that. I say infamous because they are so stingy with their reductions. For all the cocaine cowboys and sexy salsa, Miami is a very conservative federal district as is Tampa. Quieren ser mas gringos que gringos. (they want to be more American than Americans.)

- David Zapp

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