PROSECUTORIAL BURDEN SHIFTING: "CAN THE PROSECUTOR SAY THAT?"

(AND WHAT TO DO IF HE DOES)

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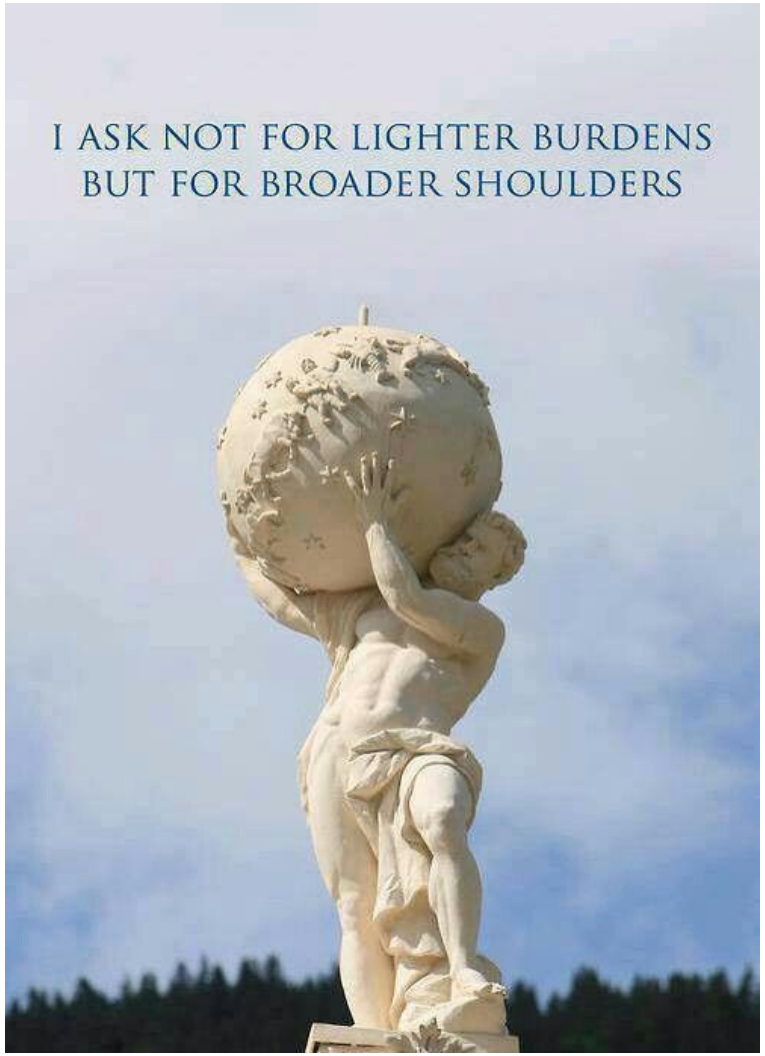
Overview of Presentation

- **I Underlying Legal Basis of "Burden Shifting"**
- **II Cases/Examples**
- **III Remedies**

Can The Prosecutor Say:

- "Any innocent man would want to tell you his side of the story."
- "*If* the defense presents a case they have the same obligations as state to present a *compelling* case."
- "If the defense attorney had any evidence he would have presented it."
- The defendant could have subpoenaed the witnesses who did not testify.
- The defendant has the right to have the evidence checked for DNA/fingerprints…
- The evidence is "undisputed" (when the defendant does not testify).

The State Has The Burden (& Should)



- "…it is axiomatic in the law that the state bears the burden of proving all elements of a crime beyond a reasonable doubt. This burden of persuasion remains with the state throughout the trial, and as to any element the burden cannot be shifted to the defendant."
- *State v. Schulz, 102 Wis. 2d 423, 427 (1981)*

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- “The burden of establishing every fact necessary to constitute guilt is upon the State.”

Assures the Public

- "…use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. **It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned**. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."
- In re Winship, 397 US 358, 364 (1970)

“How Can The State Meet Its Burden?”

Testimony

Confession

DNA

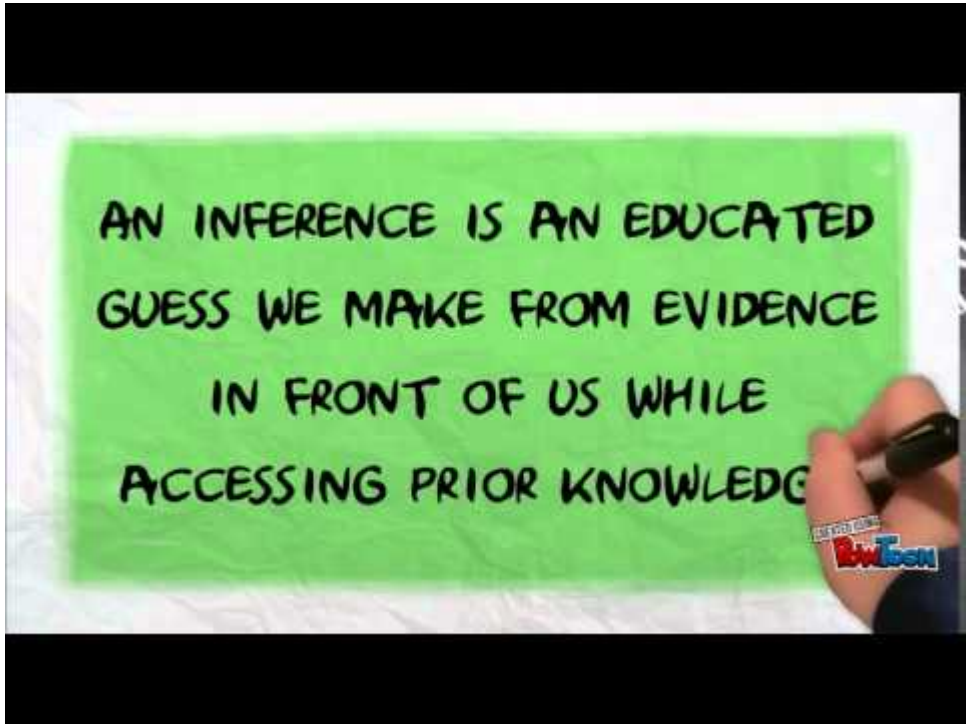
Fingerprints

Inferences?

“Well, I was bitten by a radioactive lawyer and ended up with the power of attorney.”

Inferences (The Reason for the Argument)

- Most "Burden Shifting" arguments will come in context of prosecutor commenting on something the defense/defendant did NOT do.
- *e.g:* call witness, test for DNA…
- "**An inference is a way to carry the burden, and no more changes it than does damning testimony.**" *US v. Splendorio, 830 F.2d 1382, 1391 (7th Cir. 1987).*



Types of ALLEGED “Burden Shifting”

- Prosecutor comments on DEFENSE Failure to Subpoena Witnesses.
- Prosecutor tells jury DEFENSE has subpoena power.
- Prosecutor comments on DEFENSE FAILING TO PRODUCE Evidence.
- Prosecutor tells jury the evidence is “undisputed” or “unrebutted.”
- Prosecutor tells jury the DEFENSE has right to have evidence DNA tested and did not.
- Prosecutor cross examines the testifying defendant on why he did not produce evidence.

COMMENTS ON THE DEFENDANT NOT TESTIFYING

5th Amendment

- *Griffin v. California,* *380 US 609 (1965).*
- *Prosecutor cannot invite a jury to infer guilt from defendant's refusal to testify.*
- *May not "solemnize the silence of the accused into evidence against him."*
- *Burden Shifting case law arises out of this case!*

Almost Always Burden Shifting

- Not even indirect comments.
- "We extend *Griffin* to hold that an indirect comment on the defendant's failure to testify also violates the Fifth Amendment if the remark was 'manifestly intended or of such a character that the jury would naturally take it to be a comment on the failure of the accused to testify." US v. Miller, 276 F.3d 370, 374 (7th Cir. 2002).

COMMENTS ON DEFENSE NOT CALLING WITNESSES

US v. Splendorio,

830 F.2d 1382 (7th Cir. 1987)

- Medicaid Fraud case.
- 149 counts.
- 11 defendants stood trial.
- Appeal based on comments of prosecutor in closing arguments.
- Prosecutor's rebuttal closing was 122 pages of transcript.

US v. Splendorio,

830 F.2d 1382, 1390 (7th Cir. 1987)

- Defense Attorney: "They never brought [witness X] in. I can bet you this. If [witness X] had told Dr. F [to prescribe these drugs], he would have been her to testify about that, but he wasn't."
- Prosecutor turns tables!
- AUSA: "You heard every defense attorney ask about 'where is this witness, where is that witness?' The defendants don't have the burden of proof, ladies and gentlemen. They don't have to prove anything, but they have subpoena power just like the government…" Goes on to say that if the missing witnesses would have had something good to say the DEFENSE would have called them.

US v. Splendorio,

830 F.2d 1382, 1391 (7th Cir. 1987)

- Prosecutor who comments on defense failure to call witness can mean 1 of 3 things:
- 1) The case stands unrebutted which should influence the weight jurors should give the evidence;
- 2) Each side can call witnesses implying **n**either sides failure to call a witness supports an adverse *inference*;
- 3) The defendant's failure to call a witness supports an adverse *inference* that the witness would not have supported the defense version of the events.

US v. Splendorio,

830 F.2d 1382, 1391 (7th Cir. 1987)

- "None of these meanings actually changes the burden."
- "An inference is a way to carry the burden, and no more changes it than does damning testimony."
- The "defendant's real complaint is that a given argument may adversely affect the exercise (or value of) a constitutional right, such as the privilege against self incrimination. Thus the defendant's arguments about burden shifting are offshoots of *Griffin v. California."*

US v. Splendorio,

830 F.2d 1382, 1391 (7th Cir. 1987)

- "We have taken *Griffin* to forbid comment on the defendant's failure to call witnesses when the only potential witness is the defendant himself."
- "Unless the prosecutor's comment uses the defendant's privilege as evidence against him it is not objectionable."
- Court can even do it.

"Objection, Your Honor! Alleged killer whale."

US v. Splendorio,

830 F.2d 1382, 1392-94 (7th Cir. 1987)

- 1) Prosecutor may imply that the failure of the defense to present available evidence (other than the defendant's testimony) in opposition to the government's witnesses supports conclusion that the government's witnesses are reliable.
- 2) Prosecutor may reply to argument of defense that absence of some witnesses counts against the prosecution when defense could also have called them. Proper even if defense does not invite the comment!
- 3) Prosecutor free to ask jury to draw its own conclusions from defense *choices in how conduct trial*.

EXISTENCE OF SUBPOENA POWER

"Jury is entitled to know"

- "…the prosecutor's observation that the defense could produce a certain witness or witnesses if it wished neither alters the burden of proof nor penalizes the exercise of a constitutional right. Rather, the argument merely conveys information the jury is entitled to know." *US v. King, 150 F.3d 644, 650 (7th Cir. 1998)*
- "We hold that it was not improper for the prosecutor to make clear to the jury that the defendant, like the government, has the power to subpoena any witness or witnesses relevant to the case after Aldaco's counsel had opened the door…" US v. Aldaco, 201 F.3d 979, 988 (7th Cir. 2000)
- "Open the door" comment seems to contradict *Splendorio*.

DEFENSE FAILURE TO PRODUCE EVIDENCE

US v. Butler,

71 F.3d 243, 249 (7th Cir. 1995)

- Defendant charged with being a felon in possession of a firearm.
- Defense was officer planted gun on defendant.
- During closing AUSA says: "Now the government has the burden of proof. The government has the burden of presenting evidence. That said, there is nothing preventing Mr. Murphy [defense attorney] from presenting any evidence in this case. It is a trial. And if **he** had any evidence that supports his view he would have submitted it to you."

US v. Butler,

71 F.3d 243, 255 (7th Cir. 1995)

- Defense objects.
- Court sustains, strikes comment from record and denies mistrial motion.
- Upon reconsideration court finds comment "was not improper" and if it was it was harmless.
- KEY: Comment was NOT about defendant's failure to testify.
- Comment made in context of defense failure to present evidence to support their theory of case.
- Proper comment so long as defendant is not the only one who could have supported defense theory.

US v. Vandering,

50 F.3d 696, 701 (9th Cir. 1995)

- In closing AUSA comments on lack of evidence. Begins comments by noting government has burden of proof.
- "We have held that the prosecutor may comment on the defendant's failure to present exculpatory evidence, provided that the comments do not call attention to the defendant's failure to testify."

THE TESTIMONY IS "UNDISPUTED" OR "UNREFUTED"

US v. Butler,

71 F.3d 243, 255 (7th Cir. 1995)

- Statements that evidence is uncontradicted do not shift burden to defense to produce evidence.
- Key: "who was available to contradict the testimony?"

Who Would Be Expected to Contradict?

- A prosecutor's comment that the evidence is uncontradicted or the failure of the defense to present evidence is IMPROPER where the DEFENDANT is the ONLY one who could do this.
- A prosecutor's comment that the evidence is "unrefuted [] is not improper and does not tax the self-incrimination privilege where there are other witnesses who could provide the rebuttal evidence." US v. Butler, 71 F.3d 243, 254 (7th Cir. 1995)
- Not a universal rule. Minnesota says is burden shifting. State v. Bailey, 677 N.W.2d 380 (Minn. 2004) .

DEFENDANT CAN TEST THE EVIDENCE (DNA)

US v. Gee,

54 A.3d 1249 (DC App. 2012)

- Violent sex assault case. Attacker leaves a trail of blood on a variety of objects.
- Prosecutor files MIL asking court to rule that if the defense engages in cross examination that suggests DNA or fingerprint testing flawed, asking jury to speculate about untested items, ineffective quality assurance in lab or unreliable testing procedures that its expert could inform the jury that "the defendant had the right to independently test all items…"
- Trial Court rules more narrowly: that if defense tries to show government analysts "acted in a biased fashion or acted inappropriately" this would open the door.

US v. Gee,

54 A.3d 1249 (DC App. 2012)

- During trial defense argues items selectively tested.
- Court took judicial notice that in DC defense has a right to have items tested.
- Appellate court affirmed trial court's decision to allow jury to be told that defense could have items tested.
- Not burden shifting.

Wis. Stat. § 165.79

- "Upon request of a defendant in a felony action, approved by the presiding judge, the laboratories shall conduct analyses of evidence on behalf of the defendant."
- Court can take "judicial notice" of this statute.

DEFENDANT TESTIFIES

Cross of Defendant

White v. US,

2007 WL 1022001 (S. D. IL 2007)

- "If the defendant testifies, a prosecutor may impugn the defendant's credibility by commenting on his failure to produce corroborating evidence."
- AUSA asked defendant on stand about "the one person" who could corroborate his story and mentioned she was not here to testify. Defense objected and court sustained the objection.
- Later found to be ok.

DEFENSE NEED TO “EXPLAIN”

The Defense Has NO Duty To "Explain"

- "If the defense goes forward they have same responsibility as the government to present a compelling case."
- "If the defense counsel can stand up and explain…"
- "How does the defendant explain…"
- U.S. v. Salley, 651 F.3d 159 (1st Cir 2011) (lists examples).

- "Prosecutor should not argue that the defendant's failure to adequately explain the weakness in his case requires a guilty verdict as it may impermissibly shift the burden of proof to the defendant." U.S. v. Maras, 940 F.2d 91, 98 (2nd Cir. 1990).

We Have Cases Too!

STATE V. PATINO

177 Wis. 2d 348 (App. 1993)

Adopts *Splendorio*

- Court says "We deem the Seventh Circuit's approach sensible and expressly adopt it." *Splendorio* discussed above.
- Since defendant testified "prosecution was permitted to cross-examine him with the same latitude as would be exercised in the case of an ordinary witness."

STATE V. JAIMES

292 Wis. 2d 656 (App. 2006)

State v. Jaimes

- Drug delivery case.
- State did not call other "collaborators" involved in delivery.
- Defense attorney raises issue that they were not called by state.
- ADA rebuttal: says the collaborators "Isn't going to walk into court…and waive his Fifth Amendment right and …implicate himself in a crime" and then "My God, they have the same rights he [defendant] does."
- ADA tells jury: "And if he was interested in presenting testimony exonerating him, he's got subpoena power the same way I do to ask people to come here…if these guys are so critical, but no."

State v. Jaimes – Appeal: Improper Comment on Defendant's Right to Remain Silent

- To constitute improper reference to defendant's failure to testify three element:
- 1) Comment must be a reference to defendant's failure to testify;
- 2) Comment must propose that failure to testify demonstrates guilt;
- 3) Comment must not be a fair response to a defense argument.
- *United States v. Robinson*, 485 US 25, 34 (1988)

State v. Jaimes – Appeal: Subpoena comment

- "…it is not improper for a prosecutor to note that the defendant has the same subpoena powers as the government, particularly when done in response to a defendant's argument about the prosecutors failure to call a specific witness."

STATE V. GREER

Unpublished 2017AP1396-CR, Oct. 30, 2018

(Not Citable for persuasive value)

State v. Greer

- Homicide case.
- No one calls a witness who might have been able to ID shooter.
- Defense closing points out state did not call that witness.
- After a sidebar, trial court: "it is permissible for the prosecutor to imply that the failure of the defendant to present available evidence in opposition to the government's witnesses supports an inference that the government's witnesses were reliable."
- "the jury is entitled to know that the defendant may compel people to testify; and so if the State wishes to comment on the process that is available to either party to compel the appearance of a witness in court, that being the subpoena process, they may do so."
- "it is permissible for the prosecutor to imply that the failure of the defendant to present available evidence in opposition to the government's witnesses supports an inference that the government's witnesses were reliable."

State v. Greer

- ADA Closing:
- “There was one thing that was clear during this trial, you can force people to come to court and testify. It was plain Mr. Sanders didn't want to testify, it was plain Mr. Harwell didn't want to testify. There are subpoena powers, the State has them and the State had to give people immunity.
- The defense has subpoena powers to force people to come to court. There is a witness named Courtney Thomas who didn't come to court. The inference can be drawn that her failure to come to court shows that Mr. Sanders and Mr. Harwell are telling the truth when they say that is Mr. Greer. It is the State's burden to prove, he doesn't have to prove he was somewhere else. But it is a reasonable inference that when you don't use powers to force somebody, the State believes they are telling the truth.”

State v. Greer

- The sole issue on appeal is whether "the [trial] court erred when it allowed the prosecutor to comment on the defense failure to subpoena witnesses and to argue the inference that the State's witnesses were telling the truth." Greer contends that such line of argument by the State "should be allowed only in those rare cases where a defense attorney has unequivocally opened the door" …
- "No error."
- Relies on *Patino* and *Splendorio.*
- Jury advised multiple times by court, defense and ADA burden on state.

INFERENCES

Defendant's Choices in “Conduct at Trial” Are Relevant

Inferences Are Allowed

- Inferences are a way to carry a burden and do not alter it. US v. Splendorio, 830 F.2d 1382, 1391, 1394 (7th Cir. 1987)
- "To the extent that the prosecutor in this case may have intimated that the jury could draw an adverse inference from the defendant's failure to call [a witness] that to would be a proper argument under *Splendorio*…" US v. King, 150 F.3d 644, 649 (7th Cir. 1998).
- "Asking the jury to draw adverse inferences in that circumstance does not alter the burden of proof as King asserts, but merely requests the jury to draw its own conclusions from the defendant's choices in the conduct of a trial." US v. King, 150 F.3d 644, 650 (7th Cir. 1998)

PRACTICAL POINTERS

Remedies

Defense Closing

- Emphasize the STATE has the burden.
- Be prepared to respond.
- Incorporate in closing WHY things were done as were done.

Mistrial

- Move for mistrial as soon as can.
- Problem is if defense moves for mistrial you waive double jeopardy (**but not always**).

Double Jeopardy And Burden Shifting

- **General rule**: If defense requests a mistrial it waives "double jeopardy." State v. Quinn, 169 Wis. 2d 620, 624 (App. 1992).
- **Exception**: If (1) The prosecutor actions were "intentional" with a "culpable state of mind in the nature of an awareness that his activity would be prejudicial to the defendant" AND (2) the prosecutor's actions were designed to "provoke a mistrial" to get "another kick at the cat" because the trial was going poorly. State v. Jaimes, 292 Wis. 2d 656, 663 (App. 2006).
- "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial *absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.* A defendant's motion for a mistrial constitutes 'a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.'" State v. Lettice, 221 Wis. 2d 69, 81 (App1998).

Summary – Commenting On

• Subpoena Power:	WI: Yes, 7th Cir: Yes
• Defendant not calling Witness:	WI: Yes, 7th Cir: Yes
• Defendant not producing evidence:	WI: ??, 7th Cir: Yes
• Evidence "undisputed":	WI: ??, 7th Cir: Yes
• Comment on Testing Evidence:	WI: Yes?, 7th Cir: Yes?
• "Inferences":	WI: Yes, 7th Cir: Yes

The End