Affirmed and Majority and Concurring Opinions filed March 30, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00027-CR

WILLIAM EDWARD DREYER, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Court Cause No. 08-04-03478 CR

CONCURRING OPINION

The Court today reaches the correct result. I write separately only to note my concern about what should have been, but apparently was not, a threshold issue – whether the prosecutor should have testified at all in this case. This issue is neither novel nor unique; instead, courts have over time consistently expressed serious concerns about prosecutors as witnesses.[1] *See, e.g., United States v. Birdman*, 602 F.2d 547, 551–55 (3d

[1] The Texas Disciplinary Rules of Professional Conduct also generally discourage the use of lawyers as witnesses. *See* Tex. Disciplinary R. Prof'l Conduct 3.08(a), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9). Those rules also acknowledge the

Cir. 1979) (echoing disapproval, stated repeatedly by other courts, of the practice of serving as both prosecutor and witness). Generally, when the practice has been allowed elsewhere, it has been only for compelling reasons in extraordinary circumstances. *See id.* at 553. This case clearly does not fit within that category because the record does not suggest *any* compelling reason for one of the prosecutors, who had served as an advocate in the case, to testify on a subject about which she had no personal knowledge.

I.

In this case, appellant testified that he sincerely sought treatment and rehabilitation, in lieu of incarceration, for an admitted drug addiction. The State, in opposition to this request, sought to admit evidence of a contradictory statement allegedly uttered by appellant while in the custody and presence of sheriff's deputy Steve Thompson.

The State presumably could have avoided the hearsay and Confrontation Clause issues raised in this appeal simply by calling Deputy Thompson to repeat the remarks he allegedly overheard. That is, the record does not suggest Thompson was unavailable to testify.[2] Instead, the State decided to call two other witnesses who had no personal knowledge about appellant's alleged statement, including a prosecutor who had served as an advocate for the State throughout the case. The State recognized that calling one of its prosecutors to the stand was "out of the ordinary" but promised its advocate-witness, Barry Rienstra, would only "set[] up for [sic] a predicate" and would not "testify to the specifics about the case."

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special obligations of prosecutors to ensure not only that justice is served but also that the appearance of justice is maintained. *See* Tex. Disciplinary R. Prof'l Conduct 3.08, 3.09 & cmt. 1 ("A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate."); *see also* Model Rules of Prof'l Conduct R. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

[2] Counsel for the State implied, at one point, that Thompson may not have been employed by the sheriff's department as of the time of trial, but his status and whereabouts were never made clear. Whatever his job status at the time, however, there was no suggestion that he was unavailable to testify.

It never became clear what, if any, evidentiary predicate was to be uniquely achieved by using Rienstra as a witness. Instead, despite the absence of personal knowledge, the prosecutor-witness did testify about the specifics of the alleged statement in which, according to Thompson, appellant indicated his intent to continue with illegal drug activity if given probation.

Even if that hearsay testimony could be considered vital to the State's case for punishment, however, the State failed to prove Rienstra was an appropriate witness – much less the *only* one – who could offer it. Thus, the record does not justify the decision to allow one of the prosecutors to testify as a witness.

II.

Moreover, there are multiple reasons why prosecutors should not serve in the dual role of advocate and witness. First, the tasks are inherently inconsistent because "the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." Model Code of Prof'l Responsibility EC 5-9 (1978), *quoted in Birdman*, 602 F.2d at 551. Thus, serving in both roles in the same case could confuse the trier of fact[3] as to whether (and when) the prosecutor is acting in the capacity of advocate, as opposed to witness. *See Birdman*, 602 F.2d at 554; Tex. Disciplinary R. Prof'l Conduct 3.08 cmt. 4, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9) ("It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.").

Second, a prosecutor may be unable to participate as a fully objective witness to the extent his interests are aligned with only one of the parties – the State. *See Birdman*, 602 F.2d at 553. And this is a concern coupled with serious risk. An experienced prosecutor

[3] Presumably, this concern is somewhat diminished in cases, as here, tried to the judge rather than a jury.

with an interest in the outcome would be both poised and motivated to wreak maximum strategic damage to the opposition, if permitted to testify. This concern is magnified not only by the serious liberty interests at stake, but also the widely-held perception that a prosecutor, not unlike other law-enforcement officials, may have enhanced credibility with the public. *Id*. at 553–54. Thus, the adverse consequences of a prosecutor's testimony can be significant.

Third, the prospect of a prosecutor testifying against the accused raises the appearance of impropriety:

> [T]he most frequently cited justification for the [advocate-witness] rule reflects a broader concern for public confidence in the process of justice. The chief fear which underlies the ethical rule . . . is not that the testifying prosecutor actually will overreach a hapless defendant, but that he will [a]ppear to a skeptical public to have done so. . . . Particularly where the lawyer in question represents the prosecuting arm of the Government, the ethical rule serves to implement the maxim that "justice must satisfy the appearance of justice."

Id. at 554 (citations omitted). It also places a prosecutor in the presumably very uncomfortable – and optically questionable – role of advocating her own credibility or that of a colleague.

III.

Perhaps the most troubling aspect of cases like this one, however, is that it can be difficult to gauge the full impact of the sudden transformation of a prosecutor from advocate into witness because some of the effects may be pervasive. Some are transparent, even in a case with a limited record like this one. Here, for example, the trial court and parties grappled with how to apply Texas Rule of Evidence 614, which requires the exclusion of witnesses from the courtroom "so that they cannot hear the testimony of

other witnesses," to a prosecutor who already sat through – and participated in – the entire trial.[4] *See* Tex. R. Evid. 614.

Some effects, however, are more difficult to quantify, such as the impact of the prosecutor's decision to testify on defense strategy. Here, although defense counsel voiced concerns, he did not formally object to Rienstra's testimony and made no effort to cross-examine her. To what extent, if any, should we attribute counsel's reticence to a concern that the advocate-witness might later participate in, and even *influence*, important prosecutorial decisions directly and adversely affecting his client? One can only speculate.

No guesswork is needed, however, to conclude that there was relatively little hesitation by the State in calling – or by the trial court in allowing – Rienstra to testify. The court made no inquiry as to the purpose or scope of the prosecutor's intended testimony.[5] No one asked about Deputy Thompson's availability – which could have obviated any need for the prosecutor's testimony – or otherwise questioned the wisdom or necessity of calling Rienstra as a witness.

In part, this may be due to the current Texas standard, which requires a defendant to show *actual prejudice* to obtain reversal of a conviction supported by the prosecutor's testimony. *See House v. State*, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997). Particularly where the effects of a prosecutor's testimony may be insidious and unquantifiable, this standard provides minimal prospective guidance to judges and lawyers

[4] Defense counsel was forced to concede the point: "I think it's too late for [the Rule] now. She's been in here the whole time [and already heard other witnesses testify]."

[5] Because this case was tried to the bench rather than a jury, there may have been fewer concerns about the potential for prejudice to the factfinder.

to set the outer limits of appropriate prosecutor testimony.[6] Further, the standard provides little disincentive for this unfortunate practice.

The scene of one prosecutor calling another as a witness on a material and disputed fact issue is not a pretty sight. At a minimum, it may leave the impression that the State has placed its thumb on the scales of justice. As such, absent a showing that the testimony is necessary and unavailable from another source, unlike here, we simply should not allow this practice.[7]

Accordingly, I respectfully concur.

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Frost, Boyce, and Sullivan. (Frost, J., majority)
Publish — TEX. R. APP. P. 47.2(b).

[6] We note that both the Texas Supreme Court and Texas Court of Criminal Appeals have struggled in the past to reach a consensus about the proper handling of this advocate-witness issue. *See Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416 (Tex. 1996) (5-4 decision); *Brown v. State*, 921 S.W.2d 227 (Tex. Crim. App. 1996) (5-4 decision); *see also House v. State*, 947 S.W.2d 251 (Tex. Crim. App. 1997) (6-3 decision).

[7] Even then, a prosecutor who must testify should withdraw from further participation in the trial. *See Birdman*, 602 F.2d at 553 & n. 18.