

Tuesday, July 29. 2008

**Persuading in the first person.**

Photo from website of U.S. District Court (W.D. Mi.).  
 The National Criminal Defense College and Trial Lawyers College focus on persuasion through storytelling. What to do, though, when a judge tries to stop the lawyer from first-person storytelling ("I was sitting there minding my own business, when he rushed at me with a meat cleaver. I had no choice but to shoot him, or else I would have been dead")? A trial lawyer listerv recently discussed the foregoing matter. In addition to arguments to present to the judge (e.g., "Judge, we all know that lawyer arguments are not facts" and "my client will testify, anyway" (not all parties testify)) to keep doing first person storytelling, two related cases were mentioned: In *People v. Richmond*, 341 Ill. App. 3d 39, 791 N.E.2d 1132, 1138 (2003), the prosecution "delivered its entire opening statement in the first-person from [the complainant's] perspective. The State began with, 'Hi. My name is RJ, and I'm 8 years old \*\*\* I'm going to tell you about something that happened a couple of years ago when I was just a little kid.' Not long into the opening statement, the State also said, still in the first-person and from R.J.'s perspective, 'Now, my State's Attorneys, Miss Roseanne McDonnell and Theo Jamison then, they're going to present this evidence to you today.'" The court found: "Although the use of a first-person delivery may not be error under other circumstances, in this case it improperly bolstered the credibility of the State's star witness, an eight-year old." Id. at 1139. To what extent will a lawyer convince a judge to permit first-person opening and argument on the theory that it is no different than if a pro se party were giving the opening, of course, in the first person? Not, not all courts will give even pro se parties wide first person leeway, as confirmed by *U.S. v. West*, 877 F.2d 281, 286 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1989), where the trial court found the pro se criminal defendant incompetent to represent himself, based on his following remarks in opening statement: "Although I am not a professional, I will do the best that my ability will allow, and I hope you will bear with me. I hope you will believe in our country's motto, innocent until proven guilty, not the complete opposite of guilty until proven innocent, which both the Court and the Government appear to have forced upon me. "At last, with all my respect to Mr. Hirschhorn, Mr. Michael, Mr. Gossett, Mr. Yannerella, for all the work they have done and all the ability they have, gentlemen, I feel we are somewhat at a disadvantage due to all that we have said, all that we have tried, and mostly, all our motions we have filed which have been denied. Men, I definitely feel we are not the home team. "I ask of you and pray to you, the jury, treat us not like the visitors. Thank you." The Fourth Circuit upheld the trial court's ordering defendant West to have counsel represent him. Do you have caselaw and arguments to support giving first-person opening and closing? If so, please send the items my way, preferably by a comment to this blog entry. ADDENDUM (August 20, 2008) Thanks to a fellow listserv member for the following case: *Malicoat v. State*, 2000 OK CR 1, 992 P.2d 383, (Okla. Crim. App. 2000): "Malicoat first complains of the first stage closing argument in which the prosecutor delivered a two-page first-person account of Tessa Leadford's final hours. He made timely objection to this argument, preserving the issue for trial. While theatrical, we do not find this argument overly prejudicial. The prosecutor occasionally speculated as to Tessa's feelings and thoughts. The argument very nearly constitutes an improper solicitation of sympathy for the victim, but is largely based on the evidence presented. The medical examiner testified as to the type and severity of pain probably caused by Tessa's injuries and several witnesses testified about Malicoat's account of Tessa's abdominal injuries and death, including her screams of pain. Taken as a whole, the argument does not manipulate or misstate the evidence and we find no error." Jon Katz.

Posted by Jon Katz in Persuasion at 00:00