"THE FEDERAL CORNER"

Judge Delgado-Colon "Skirted Near the Line" But Didn't Cross It

Buck Files

More than forty years ago, United States District Judge William Wayne Justice appointed me to represent a *pro se* petitioner who was seeking habeas relief in his court. This petitioner had also appeared *pro se* in a divorce proceeding and had been called to the stand by his wife's lawyer. While testifying, he admitted to many acts of sexual intercourse with his young daughter. After that case was concluded, the trial judge had a statement of facts prepared and sent it to the local district attorney.

The petitioner was indicted, and he and the State entered into a plea agreement that resolved his case for a 25 year sentence. I do not remember the issue upon which petitioner was seeking relief but it was obvious that he did a poor job representing himself in his divorce case.

At the habeas hearing, the State of Texas was represented by an assistant attorney general. I remember that the law and the facts were against me; however, I had a blessing. My opposing counsel was either inept or totally unprepared and could not ask a pertinent question without my objecting to it and having Judge Justice sustain the objection.

For a brief moment, I thought that a miracle had occurred and that I might actually prevail. And then Judge Justice dropped the bomb. He simply took over the case. Not surprisingly, he was able to ask the witnesses appropriate questions without giving me any basis for an evidentiary objection. He denied relief and remanded my client back into State custody. That was my introduction to judicial participation in the trial of a criminal or habeas proceeding -- and I remember it well.

I was reminded of that experience when I read the opinion of a panel of the United States Court of Appeals for the First Circuit in *United States v. Lanza-Vazquez*, ___F.3d___, 2015 WL 5042806 (1st Cir. 2015) [Panel: Chief Judge Howard and Circuit Judges Torruella and Kayatta (opinion by Howard)].

In *Lanza-Vazquez*, the Court held that the judge's alleged interceding on the prosecution's behalf was not judicial bias; that the judge's alleged association with the prosecution was not bias; that the judge's alleged badgering of defense counsel was not bias; and, that the defendants were not prejudiced by this alleged bias.

A Brief Synopsis of the Facts

In January, 2006, the leader of a drug trafficking operation in Puerto Rico was murdered. A number of different individuals attempted to take over the operation and one

was successful. As he consolidated power, a number of rival drug dealers and his own subordinates were either seriously injured or killed. Federal authorities began an investigation into the activities of this new drug ring and, in 2007, indictments were returned against 121 defendants who were charged with various drug and firearms violations.

For those defendants who chose to have a jury trial, the case took 18 days to try and resulted in numerous convictions. Two of the defendants, Lanza and Galan, raised issues on appeal as to conduct of United States District Judge Aida M. Delgado-Colon during the trial of the case. The Court found no reversible error.

Chief Judge Howard's opinion reads, in part, as follows:

[Appellant's Challenge to the Judge's Conduct During Trial]

> Lanza and Galán… assert two, interrelated challenges to the judge's conduct during trial: (1) the judge purportedly intervened exclusively on behalf of, and associated herself with, the prosecution; and (2) the judge allegedly made improper comments about Galán's attorney. The parties dispute whether these claims were preserved or whether plain error review applies. Given that the defendants cannot succeed under either standard, we need not dither. Under the usual framework for judicial bias claims, a party must still show (1) that "the [judge's] comments were improper" and (2) that there was "serious prejudice." *United States v. Ayala–Vázquez,* 751 F.3d 1, 24 (1st Cir.2014); *see also United States v. Laureano–Pérez,* —— F.3d ——, ——, 2015 WL 4577763 at (1st Cir. July 30, 2015).

[The Defendant's First Contention]

> The defendants' first contention is that the judge excessively interfered on behalf of, and associated herself with, the prosecution. They begin this argument by focusing on the instances when the court allegedly assisted the government. The defendants cite nearly twenty examples where defense counsel objected to the prosecution's question, and the court, rather than merely ruling on the objection, responded by asking the witness a question in a non-objectionable way or by instructing the government on how to properly phrase the question. *E.g.,* ("So counsel, what you want to ask is ... how [the list] comports to what he used to prepare."); ("[Y]ou stated that at the police headquarters you actually saw what was seized, is that correct?"); ("[A]sk him if he was the arresting agent he will say no and then you will ask him if he knows who arrested them. [A]nd then he testified he alerted the other agents."); ("He wants to know how did you get the latent print to look at from the object.") In doing so, the defendants say, the trial judge essentially doffed her judicial robe and joined the prosecution.

[Judges May Actively Participate in a Trial]

Of course, the mere fact that the judge intervened is not enough for us to find error. It is well-established that a judge "is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia v. United States*, 289 U.S. 466, 469, 53 S.Ct. 698, 77 L.Ed. 1321 (1933). He or she thus "has a perfect right—albeit a right that should be exercised with care—to participate actively in the trial proper." *Logue v. Dore*, 103 F.3d 1040, 1045 (1st Cir.1997). We do not examine a single comment by a judge on its own but, instead, must view it in the context of the entire transcript. *United States v. Espinal–Almeida*, 699 F.3d 588, 607 (1st Cir.2012).

["Skirting Near the Line but Not Crossing It"]

As a comprehensive review of this transcript establishes, the judge skirted near the line on discrete occasions but, on the whole, never crossed it. Broadly, the trial lasted 18 days and was a massive, multi-defendant conspiracy case which the court had the authority to move through expeditiously. *Cf. Deary v. City of Gloucester*, 9 F.3d 191, 194 (1st Cir.1993) ("The trial judge has discretion to maintain the pace of trial.") Indeed, the judge was quite explicit that this was the court's goal. *See, e.g.*, ("I ask that the government use the time [a 15 minute break] to identify the specific spots where they need to go because we need to move faster.").

[The Judge's Pattern of Participation]

More concretely, a pattern emerges with respect to the judge's participation. The court generally intervened after a party made a consistent (sometimes repetitive) string of objections, or when an objection was lodged immediately after the parties completed a lengthy bench conference discussing that very same evidentiary issue. In other words, the judge interrupted when the case was unnecessarily slowing down. While it is true that this was generally done to the benefit of the prosecution—though, contrary to what the defendants insinuate, not exclusively so—the interactions were largely driven by defense counsels' own conduct. Defense counsel asserted a plethora of objections (often repeatedly so or after the judge had made her rulings clear), while the prosecution exhibited more restraint. Diligent defense of a client is certainly encouraged, but technical and repetitive interruptions may properly prompt the trial judge to intervene to proceed the trial. Indeed, the judge indicated this on several occasions by saying, for example, "Stop basically, you should stop objecting on the same

grounds it is clear ... You can further inquire on cross." The judge was not, despite the defendants' insistence, gratuitously interfering.

[Examples of When the Judge Allegedly Identified Herself with the Government]

With respect to this initial claim, Lanza and Galán also invoke instances where they allege that the judge affirmatively identified herself with the government and thus, in their view, turned the jury against the defendants. Three statements, at first blush, could appear fairly damaging. For example, at one point the judge said, "Then you get the name in, just to avoid the hearsay that you got ... [b]ecause the jury is able to compare, corroborate or discredit whatever the informant said. *We need that in.*" (emphasis added). On another occasion, the judge alluded to the defendants' guilt, stating that, the "proper time" for an argument "would be at the sentence." Finally, in response to a defendant's objection, the judge said "the government does not have any interest to portraying something that is not and it is clear that the pictures were taken after the search was executed."

[The Judge's Statements Were Made Outside of the Jury's Presence]

These statements in which the judge allegedly "associated" herself with the prosecution are ultimately not concerning. In a vacuum, each conceivably could be deemed problematic. In context, however, they were not inappropriate for the simple reason that the targeted statements were made outside of the jury's presence. Since our focus centers on whether the statements affected the jury (or whether they are so egregious on their own as to demand significant scrutiny—which was not the case here) statements that occur outside of the jury's presence are generally kosher. *United States v. Rivera–Rodríguez,* 761 F.3d 105, 111 (1st Cir.2014) (citing cases emphasizing that the analytical question for us is whether the jury perceived bias). Thus, this first claim respecting the judge's intervention falls flat.

[The Appellant's Second Contention]

In addition to claiming that the judge unduly assisted the prosecution, Lanza and Galán advance a second argument respecting the judge's actions; they point to instances when the judge allegedly badgered Galán's trial counsel. For example, the judge said "I'm losing my patience with you," and "I want you to pay attention because I don't want you to open the door, and you are quite capable." She further stated that he was "mumbling," "exhausting her," and was a "very hyper person and how should I say,

extroverted." These statements, they assert, poisoned the jury against the defendants.

[The Judge's Comments were Justifiable and
Most were Made Outside the Presence of the Jury]

Here, the court's comments, again, were largely prompted by trial counsel's conduct. Counsel regularly attempted to re-litigate matters despite the judge's firm rulings or, at other times, simply lacked traditional courtroom decorum. For instance, he arrived late to court (on more than one occasion), spoke too loudly at counsel table or during bench conferences and, at least once, simply walked out of the courtroom while the judge was speaking. It is understandable that the judge responded as she did. Equally relevant, the bulk of the statements that the defendants point to either occurred at sidebar or were made before the jury even entered the courtroom. Since the jury never heard most of these statements, and since the comments were justifiable, we find no error.

[Appellants' Position that Any Error Would be Structural Error]

Even if we were to conclude that the judge's interventions and comments were improper, *and* that the jury heard all of them, the defendants still cannot succeed. Rather than really engaging on the question of prejudice, they attempt to argue that we should view any error here as structural. In other words, the argument runs, the judicial interventions *per se* require reversal. The defendants thus posit that we can bypass any evaluation of prejudice.

[Circuit Precedent Requires Proof of "Serious Prejudice"]

That position, however, runs head first into our precedent which has consistently required proof of "serious prejudice." We have recently defined that term as requiring "a reasonable probability that, but for the claimed error, the result of the proceeding would have been different." *Rivera–Rodríguez,* 761 F.3d at 112. We have found such prejudice in the past where the judicial interventions related to an essential piece of evidence, bolstered a key witnesses's testimony, or constituted a decree on an issue more properly reserved for a jury. *See, e.g., Rivera–Rodríguez,* 761 F.3d at 111–12; *Espinal–Almeida,* 699 F.3d at 606; *United States v. Ofray–Campos,* 534 F.3d 1, 33 (1st Cir.2008).

[Conclusion]

> As noted, the defendants have not offered much that might show serious prejudice.
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> …Further, even if we were to strip away the judicial interventions highlighted in the fact section of the defendants' briefs, there remains enough evidence (when viewing that evidence in a neutral way) to sustain the convictions.

My Thoughts

- Judicial participation cases are rare -- and thankfully so because the odds are so stacked in the judge's favor.

- A judicial participation case from the United States Court of Appeals for the Fifth Circuit is *United States v. Bustamante,* 207 F.3d 659, 2000 WL 122502, (5th Cir. 2000)[Panel: Circuit Judges Wiener and Stewart (*per curium*)]. The opinion is quite similar to that in *Lanza-Vazquez* and contains, in part, the following:

> A trial judge may "interrogate witnesses, whether called by itself or by a party." Fed.R.Evid. 614(b). The questions must be geared to aiding the jury's understanding and must be strictly impartial. *United States v. Saenz,* 134 F.3d 697, 702 (5th Cir.1998). We review such questioning for abuse of discretion. *United States v. Zepeda-Santana,* 569 F.2d 1386, 1389 (5th Cir.1978).
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> We find that the trial judge did not take a partisan stance, and observe that many questions at issue were open ended and could have elicited an answer favoring either side. We believe the questions were appropriate as seeking " 'only to clarify a witness's testimony either for the court, for the jury, or for counsel.' " *United States v. Williams,* 809 F.2d 1072, 1087 (5th Cir.1987) (quoting *United States v. Borchardt,* 690 F.2d 697, 700 (5th Cir.1983)). The court may ask questions to clarify a witness's testimony, "even if the questions elicit facts harmful to the defendant." *Saenz,* 134 F.3d at 708.Viewing the trial judge's actions as a whole, we conclude that his questioning did not deny Bustamante a fair trial.