STRATEGY | **Joseph W. Varela**

USING THE ENEMY'S WEAPONS

GUERRILLAS MUST NOT DEPEND TOO MUCH ON AN ARMORY. THE ENEMY IS THE PRINCIPAL SOURCE OF THEIR SUPPLY.

— MAO ZEDONG, "ON GUERRILLA WARFARE" (1937)

The law of evidence governing the admissibility of expert witness testimony in criminal cases would appear to be neutral; on its face, the law makes no distinction between experts offered by the prosecution and those offered by the defense.[1] But the prosecutor has real-world advantages over the defense in getting expert testimony before the jury. First, the prosecution has almost unlimited money for experts,[2] and many of its experts are salaried government employees available at no marginal cost. Then there is the issue of "court's discretion": trial and appellate courts allow the prosecutor to qualify "experts" as needed to obtain convictions, while the defense, regardless of the qualifications of its witnesses, faces an uphill battle.[3] Finally, there may simply be no one available for hire who can testify to what the defense needs. So for all these reasons and more, the defense lawyer can expect to come to court outgunned by the prosecution's experts.

Successful guerrillas, inferior in material to conventional armies, have historically relied on their enemies to furnish them with arms. Mao's Communists fought the better-equipped Nationalist army using Nationalist weapons, many of which were made in the USA. The Vietcong, unable to manufacture their own armaments, and only irregularly supplied by their Chinese and Soviet sponsors, famously used weapons captured from South Vietnamese or American regular armies. There is abundant evidence that al-Qaeda, too, is using captured arms and munitions in Iraq,[4] often improvising ingeniously. These guerrilla organizations were able to close the armament gap with better-equipped adversaries by using captured weapons they could not have obtained otherwise.

Abu Musab al-Zarqawi with a captured weapon.

There is a lesson here for the defense lawyer. What do you do if you don't have an expert witness? Use the prosecutor's expert.

One situation exists where the "expert" is only marginally competent, but still can give useful testimony. Police officers are "experts" on everything. Gang organization and symbols, skid marks, physiology, blood spatters, accident reconstruction, firearms, law, medicine, signs of drug intoxication, and psychology, to name a few. Trial courts routinely allow them to be qualified and appellate courts agree, although they typically know little more than any other informed member of the public.[5] Defense lawyers gain nothing by complaining about this state of affairs. The officer will be allowed to testify. The task is to take advantage of it.

"Experts" who are marginally competent are loath to admit to lack of knowledge and so are sometimes open to suggestion. Officers will testify as experts on firearms, every time, although most of them know only how to load them, clean them, and fire 50 rounds to qualify on their birthdays. On direct they will make a good presentation to the jury testifying to whatever the prosecutor wants them to say about firearms. On cross they can be led. I tried a case in which a lawyer left an empty handgun and a box of ammunition in his briefcase, and was arrested at the courthouse metal detector. A constable testified on direct that full metal jacketed handgun bullets were "anti-personnel" rounds. The prosecution felt that eliciting this opinion would make my client appear more dangerous. On cross it was no effort to get him to admit that the rounds were non-expanding and much less lethal than hollow-points, and that militaries used them to comply with international treaties outlawing bullets that could cause unnecessary suffering.[6] Then I made him read the label on the box that recommended their use "for target and range." Having qualified him as an expert, the State couldn't suddenly "de-qualify" him when the going got rougher on cross. I was able to elicit helpful facts, and perhaps also show bias. I am certain that this cross in itself did not cause the acquittal. But it might have helped.

The expert who is obviously erudite presents a different problem. A direct attack can prove worse than no cross at all. It is also unlikely that he will surrender to defense suggestions. In this situation, it can pay to prepare a cross which concedes his expertise and enlists his help.

Several years ago I tried a case in which a father was alleged to have used an electric "stun-gun" to discipline his children. The State gave notice of an expert who was on his face qualified. He held a B.S. in electrical

engineering, an M.D., and a Ph.D. in biomedical engineering. He was a nationally known consultant to law enforcement in the use of Tasers and other electric non-lethal force. Clearly I had no chance of trading on his incompetence. Instead I read up on him and on electric weapons, and prepared a cross showing, among other things, that electric weapons in general, and my client's stun-gun in particular, were designed not to cause death or any of the injuries that might make them a deadly weapon under the statute.[7] This evidence prompted the jury to reject the State's deadly weapon special instruction and perhaps contributed to their decision to probate the sentence.

Both these situations demonstrate how the defense lawyer, outgunned by the prosecutor's "conventional forces," can nevertheless use the guerrilla stratagem of capturing the enemy's weapons to help equalize the struggle. When confronted by a prosecutor's expert, ask not "How can I defeat him?" but "How can I use him?"

[1] Texas Rules of Evidence, Rule 702 et seq.; **Kelly v. State,** 824 S.W.2d 568 (Tex.Crim.App. 1992); *see also* **Daubert v. Merrel Dow Pharmaceuticals, Inc.,** 509 U.S. 579 (1993); **E.I. du Pont de Nemours & Co. v. Robinson,** 923 S.W.2d 549 (Tex. 1995).

[2] The Houston Chronicle reported that in the Andrea Yates case, State expert Park Dietz was paid $105,000 in the first trial, which was reversed because of his false testimony, **Yates v. State,** 171 S.W.3d 215 (Tex. App.-Houston [1st Dist.] 2005, pet. ref'd). Notwithstanding this debacle, he testified in the retrial and collected an additional $37,000. In the retrial, the State also used a new expert, Michael Welner. Welner was paid almost a quarter of a million dollars for his efforts. The retrial resulted in an acquittal. *Houston Chronicle*, Sept. 30, 2006.

[3] *See, e.g.*, **Yarborough v. State,** ___ S.W.3d ___, NOS. 01-04-01076-CR, 01-04-01077-CR (Tex. App. – Houston [1st Dist.] delivered January 26, 2006, pet. ref'd).

[4] The late master terrorist Abu Musab al-Zarqawi released a videotape showing that he needed assistance from a hooded comrade in operating an automatic weapon. He was widely jeered for incompetence at arms. Those in the know laughed neither as loudly nor as long: The video clearly showed that the weapon was an American M249 light machine gun, captured or stolen.

[5] **Gates v. State,** 24 S.W.3d 439 (Tex.App. – Houston [1st Dist.] 2000, pet. ref'd) (police officer qualified to give opinion whether shooting was suicide); **Sabedra v. State,** 838 S.W.2d 761 (Tex. App. – Corpus Christi 1992, pet. ref'd) (officer with no medical training qualified to testify to effects of stab wound).

[6] Hague Convention of 1899, Declaration III. I believed then, and believe now, that the constable knew nothing about bullets and international agreements. But by sounding as if I did, he was made reticent to publicly confess ignorance, and so was easily led.

[7] Tex. Penal Code § 1.07 (a) (17), (46).

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