

5/21/2024

Credibility of Witnesses

PART 59 MAY 22 2024

Introduction

As judges of the facts, you alone determine the truthfulness and accuracy of the testimony of each witness.

[Note: Add if the defendant testified:

*And you should evaluate the testimony of the defendant in the same way as you would any other witness.]*¹

You must decide whether a witness told the truth and was accurate, or instead, testified falsely or was mistaken. You must also decide what importance to give to the testimony you accept as truthful and accurate. It is the quality of the testimony that is controlling, not the number of witnesses who testify.²

Accept in Whole or in Part (Falsus in Uno)

If you find that any witness has intentionally testified falsely as to any material fact, you may disregard that witness's entire testimony. Or you may disregard so much of it as you find was untruthful, and accept so much of it as you find to have been truthful and accurate.³

Credibility factors

There is no particular formula for evaluating the truthfulness and accuracy of another person's statements or testimony. You bring to this process all of your varied experiences. In life, you frequently decide the truthfulness and accuracy of statements made to you by other people. The same factors used to make those decisions, should be used in this case when evaluating the testimony.

-In General

Some of the factors that you may wish to consider in evaluating the testimony of a witness are as follows:

Did the witness have an opportunity to see or hear the events about which he or she testified?

Did the witness have the ability to recall those events accurately?

Was the testimony of the witness plausible and likely to be true, or was it implausible and not likely to be true?

Was the testimony of the witness consistent or inconsistent with other testimony or evidence in the case?

Did the manner in which the witness testified reflect upon the truthfulness of that witness's testimony?

To what extent, if any, did the witness's background, training, education, or experience affect the believability of that witness's testimony?

Did the witness have a conscious bias, hostility or some other attitude that affected the truthfulness of the witness's testimony?⁴

Did the witness show an "unconscious bias," that is, a bias that the witness may have even unknowingly acquired from stereotypes and attitudes about people or groups of people, and if so, did that unconscious bias impact that witness's ability to be truthful and accurate.⁵

-Motive

You may consider whether a witness had, or did not have, a motive to lie.

If a witness had a motive to lie, you may consider whether and to what extent, if any, that motive affected the truthfulness of that witness's testimony.

If a witness did not have a motive to lie, you may consider that as well in evaluating the witness's truthfulness.⁶

[Add if appropriate:

-Benefit

You may consider whether a witness hopes for or expects to receive a benefit for testifying. If so, you may consider whether and to what extent it affected the truthfulness of the witness's testimony.⁷]

-Interest/Lack of Interest⁸

You may consider whether a witness has any interest in the outcome of the case, or instead, whether the witness has no such interest.

[Note: Add if appropriate:

~~A defendant who testifies is a person who has an interest in the outcome of the case.⁹]~~

You are not required to reject the testimony of an interested witness, or to accept the testimony of a witness who has no

interest in the outcome of the case.

You may, however, consider whether an interest in the outcome, or the lack of such interest, affected the truthfulness of the witness's testimony.

-Previous Criminal Conduct ¹⁰

You may consider whether a witness has been convicted of a crime or has engaged in criminal conduct, and if so, whether and to what extent it affects your evaluation of¹¹ the truthfulness of that witness's testimony.

You are not required to reject the testimony of a witness who has been convicted of a crime or has engaged in criminal conduct, or to accept the testimony of a witness who has not.

You may, however, consider whether a witness's criminal conviction or conduct has affected the truthfulness of the witness's testimony.

[Note: Add if appropriate:

~~With respect to the defendant, such prior convictions or criminal conduct are not evidence of defendant's guilt in this case, or evidence that defendant is a person who is disposed to commit crimes. You are permitted to consider such convictions or conduct only to evaluate the defendant's truthfulness.]~~

-Inconsistent Statements¹²

You may consider whether a witness made statements at this trial that are inconsistent with each other.

You may also consider whether a witness made previous statements that are inconsistent with his or her testimony at trial.

[Add if appropriate: The People believe this paragraph is appropriate in this case.]

You may consider whether a witness testified to a fact here at trial that the witness omitted to state, at a prior time, when it would have been reasonable and logical for the witness to have stated the fact. In determining whether it would have been reasonable and logical for the witness to have stated the omitted fact, you may consider whether the witness' attention was called to the matter and whether the witness was specifically asked about it.^{13]}

If a witness has made such inconsistent statements [or omissions], you may consider whether and to what extent they affect the truthfulness or accuracy of that witness's testimony here at this trial.

The contents of a prior inconsistent statement are not proof of what happened. You may use evidence of a prior inconsistent statement only to evaluate the truthfulness or accuracy of the witness's testimony here at trial.¹⁴

-Consistency

You may consider whether a witness's testimony is consistent with the testimony of other witnesses or with other evidence in the case.

If there were inconsistencies by or among witnesses, you may consider whether they were significant inconsistencies related to important facts, or instead were the kind of minor inconsistencies that one might expect from multiple witnesses to the same event?

-Police Testimony

In this case you have heard the testimony of (a) police officer(s). The testimony of a witness should not be believed solely and simply because the witness is a police officer. At the same time, a witness's testimony should not be disbelieved solely and simply because the witness is a police officer. You must evaluate a police officer's testimony in the same way you would evaluate the testimony of any other witness.¹⁵

[Note: Add if appropriate:

-Judge Found Witness Testified Falsely

You have heard testimony that a judge found that (*specify*) testified falsely in an unrelated proceeding. That judge's determination is not binding on your determination of (*specify*)'s credibility in this case. You may, however, consider that determination, along with the other evidence in the case, in evaluating the truthfulness and accuracy of (*specify*)'s testimony before you.¹⁶

[Note: Add if appropriate:

-Witness Pre-trial Preparation ¹⁷

You have heard testimony about (specify: the prosecutor, defense lawyer, -and/or investigator) speaking to a witness about the case before the witness testified at this trial. The law permits a (specify) to speak to a witness about the case before the witness testifies, and permits a (specify) to review with the witness the questions that will or may be asked at trial, including the questions that may be asked on cross-examination.¹⁸

[You have also heard testimony that a witness read or reviewed certain materials pertaining to this case before the witness testified at trial. The law permits a witness to do so.]

Speaking to a witness about his or her testimony and permitting the witness to review materials pertaining to the case before the witness testifies is a normal part of preparing for trial. It is not improper as long as it is not suggested that the witness depart from the truth.

¹ Added in May 2021. See Fed. Jury Prac. & Instr. § 15:01 (6th ed.), [The testimony of a defendant should be judged in the same manner as the testimony of any other witness].

² See generally *People v Ward*, 282 A.D.2d 819 (3d Dept. 2001); *People v Love*, 244 A.D.2d 431 (2d Dept. 1997); *People v Turton*, 221 A.D.2d 671, 671-672 (2d Dept. 1995); *People v Jansen*, 130 A.D.2d 764 (2d Dept. 1987).

³ This portion of the charge was revised in January, 2008 to make it clear that the jury may accept so much of testimony as they find to have been truthful and accurate. @ See *People v Perry*, 277 N.Y. 460, 467-468 (1938); *People v Laudiero*, 192 N.Y. 304, 309 (1908); *Hoag v Wright*, 174 N.Y. 36, 43 (1903); *People v Petmecky*, 99 N.Y. 415, 422-423 (1885); *Moett v People*, 85 N.Y. 373 (1881); *People v Johnson*, 225 A.D.2d 464 (1st Dept. 1996). See also *People v. Santiago*, 13 A.D.3d 81, 82 (1st Dept. 2004) (noting that although

it not mandatory, a falsus in uno charge is routinely included in a standard jury charge, and holding it error to decline a defendant's request for a falsus in uno charge on the ground that there was no evidence that any witness lied about a material fact).

⁴. See *People v Jackson*, 74 N.Y.2d 787, 789-790 (1989); *People v. Hudy*, 73 N.Y.2d 40, 56 (1988).

⁵ This question (and the word "conscious" in the previous question) was added in June 2021.

⁶. See *People v Jackson*, 74 NY2d at 790; *People v Hudy*, 73 NY2d at 56.

⁷. See *People v Jackson*, 74 NY2d at 790. See also *Caldwell v Cablevision Sys. Corp.*, 20 NY3d 365, 372 (2013), holding as follows: "Supreme Court should have instructed the jury that fact witnesses may be compensated for their lost time but that the jury should assess whether the compensation was disproportionately more than what was reasonable for the loss of the witness's time from work or business. Should the jury find that the compensation is disproportionate, it should then consider whether it had the effect of influencing the witness's testimony (see PJI 1:90.4).@

⁸ *People v. Agosto*, 73 NY2d 963, 967 [1989], approving an interested witness instruction (see endnote 9).

⁹. *Reagan v. United States*, 157 U.S. 301, 310 [1895] (the trial court "may, and sometimes ought, to remind the jury . . . that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony"); *Portuondo v Agard*, 529 US 61, 72-73 [2000] [reaffirming *Regan* in a case where the trial court instructed the jury that "A defendant is of course an interested witness since he is interested in the outcome of the trial. You may as jurors wish to keep such interest in mind in determining the credibility and weight to be given to the defendant's testimony"]; *Compare United States v. Gaines*, 457 F3d 238, 249 [2d Cir 2006] [an interested witness charge errs when it states that the defendant has a "deep personal interest" or "a motive to lie"]; *People v. Agosto*, 73 NY2d 963, 967 [1989] ["we find no error in the court's interested witness charge. The court gave the standard instruction that the jury could consider whether any witness had an interest in the outcome of the case which might affect his or her testimony and that merely because a witness was interested did not mean that he or she was not telling the truth (see, 1 CJI[NY] 7.03). There is no question that defendant was an interested witness as a matter of law as the court appears to have charged"]; *People v. Boone*, 146 AD3d 458, 460 [1st Dept 2017] ["The court's interested witness charge, which followed the Criminal Jury Instructions, was not constitutionally deficient"]; *People v. Wilson*, 93 AD3d 483, 484 [1st Dept 2012] ["The court properly instructed the jury on defendant's status as an interested witness. The charge did not undermine the presumption of

innocence, suggest that defendant had a motive to lie, or intimate that defendant should not be believed. Instead, it simply referred to defendant as an interested witness and permitted the jury to consider whether any witness's interest or lack of interest in the outcome of the case affected the witness's truthfulness"]; *People v. Dixon*, 63 AD3d 854, 854-55 [2d Dept 2009] ["The defendant's contention that the County Court's charge to the jury concerning the defendant as an interested witness improperly shifted the burden of proof or undermined the presumption of innocence is without merit. The jury charge properly identified the defendant as an example of an interested witness and permitted the jury to consider whether any witness's interest or lack of interest in the outcome of the case affected the truthfulness of such witness's testimony"]; *People v. Blake*, 39 AD3d 402, 403 [1st Dept 2007] ["The court's interested witness charge did not shift the burden of proof or undermine the presumption of innocence. The court delivered the standard charge (see CJI2d[NY] Credibility-Interest/Lack of Interest . . .), which simply referred to defendant as an example of an interested witness and permitted the jury to consider whether any witness's interest or lack of interest in the outcome of the case affected the truthfulness of such witness's testimony. The charge contained no language about defendant having a motive to lie or deep personal interest in the case, and nothing in the charge assumed or suggested that he was guilty"].

¹⁰. See *People v Jackson*, *supra*; *People v Sherman*, 156 A.D.2d 889, 891 (3d Dept. 1989); *People v Smith*, 285 A.D. 590, 591 (4th Dept. 1955). Cf. *People v Coleman*, 70 A.D.2d 600 (2d Dept. 1979).

¹¹. The words: Ayour evaluation of@ were added in June of 2017.

¹². See *People v. Duncan*, 46 N.Y.2d 74, 80 (1978).

¹³. See *People v. Bornholdt*, 33 N.Y.2d 75, 88 (1973); *People v. Savage*, 50 N.Y.2d 673 (1980); *People v. Medina*, 249 A.D.2d 166 (1st Dept. 1998); *People v. Byrd*, 284 A.D.2d 201 (1st Dept. 2001).

¹⁴. CPL 60.35(2).

¹⁵. See *People v Freier*, 228 A.D.2d 520 (2d Dept. 1996); *People v Graham*, 196 A.D.2d 552, 552-53 (2d Dept. 1993); *People v Allan*, 192 A.D.2d 433, 435 (1st Dept. 1993); *People v McCain*, 177 A.D.2d 513, 514 (2d Dept. 1991). Cf. *People v Rawlins*, 166 A.D.2d 64, 67 [1st Dept. 1991].

¹⁶. In *People v Rouse*, 34 N.Y.3d 269 (2019), the Court of Appeals held that a police officer may be cross-examined with respect to prior judicial determinations that addressed the credibility of their prior testimony in judicial proceedings. The Court added that: AThe only countervailing prejudice articulated by the [trial] court in precluding defense counsel from this line of inquiry was concern that the jury m, a y, i v, o, j, e, i w the prior judicial determinations of credibility as binding. Such concern,

however, could be mitigated by providing the jury with clarifying or limiting instructions. @

17. Revised in February 2014 and the last sentence was revised for clarity, without substantive change, in September 2018.

17. See *People v Townsley*, 20 N.Y.3d 294, 300 (2012) (AThe [prosecutor=s] argument suggested to the jury that there was something improper in a lawyer=s interviewing a witness in the hope of getting favorable testimony. That is not in the least improper. It is what good lawyers do. @); *People v Liverpool*, 262 AD2d 425 (2d Dept 1999) (A[W]here the defense counsel argued in summation that the prosecutor improperly coached his witnesses to >clean ... up= problematic information in a police report, it was proper for the court to instruct the jury that there is nothing wrong with a prosecutor speaking to his or her witnesses before trial. @); *People v Fountain*, 170 AD2d 414, 415 (2d Dept 1991) (AThis court finds no error in the trial court's charge to the jury that it is usual, and not illegal, for a prosecutor to talk to his witnesses, in light of the clear and continued suggestion by the defense through cross-examination by defendant's counsel of the People's witnesses and summation, that the prosecutor improperly coached the People's witnesses to effect a >cover-up= of the mistaken arrest of defendant. @).