

UNITED STATES v. BEDONIE
913 F.2d 782 (10th Cir. 1990)

BRORBY, CIRCUIT JUDGE:

Defendants-appellants appeal their convictions on two counts of first degree murder in violation of 18 U.S.C. §§ 1111(a), 1153 and 2, and on two counts of using and carrying a firearm in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c), 1153 and 2.

On the morning of December 5, 1987, passers-by discovered two burned-out and still smoldering Navajo police vehicles ("the panels") in a remote area ("Copper Canyon") of the Navajo Indian Reservation in the southeast corner of Utah. The charred remains of two men, later identified as Navajo police officers Roy Lee Stanley and Andy Begay, were found inside one of the panels.

On April 28, 1988, four Navajo Indians — Thomas Cly, Vinton Bedonie, Ben Atene, Jr. and Marques Atene — were each indicted on two counts of first degree murder in the deaths of Stanley and Begay (counts I and II) and two counts of using a firearm in connection therewith (counts III and IV).

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Trial to a jury commenced July 18, 1988. Dr. Thomas Henry, the government's expert in forensic pathology who performed the postmortem examination of the victims' remains, testified as to the results of his examinations and, based upon those results, expressed his opinion that "Mr. Stanley * * * died of smoke inhalation and thermal burns" and that "Mr. Begay died of smoke inhalation and thermal burns."

The testimony of the government's key witnesses to the events leading up to the deaths of Begay and Stanley — Marie Haycock, Martha Chee, Boyd Atene, Raymond Fatt and Julius Crank — revealed that a bonfire party had taken place the night of December 4, 1987. The witnesses saw both appellants at the bonfire. According to Haycock, Chee and Boyd Atene, Officer Stanley arrived at the scene of the bonfire, got out of his police panel, was confronted by appellant Cly, and then was ultimately subdued and handcuffed after a fight involving Cly, appellant Bedonie and Ben Atene, Jr. Haycock, Chee and Boyd Atene each testified that they heard either one or two gunshots after the fight and both Haycock and Boyd Atene saw Bedonie carrying a gun. Boyd Atene testified that, after Stanley had been overcome, Bedonie told Boyd to walk with Bedonie to Stanley's panel. Boyd complied and, after Bedonie opened the driver's side door for him, Boyd got in the panel and Bedonie closed the door.

Haycock, Chee and Boyd Atene testified that Andy Begay arrived shortly thereafter at the bonfire in his police panel. They then heard one or two more gunshots. Haycock testified that she saw Bedonie come up behind Begay, point a gun at him and walk Begay behind his vehicle before she heard the gunshot. Haycock and Chee then left the bonfire scene. Boyd Atene testified that Cly then got into his own pickup truck, and Bedonie got in on the passenger side

of the panel in which Boyd was seated. Bedonie then directed Boyd to drive Stanley's panel away from the bonfire scene and to follow Ben Atene, Jr.'s truck. Boyd and Bedonie were followed in the caravan by Begay's panel.

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Appellants' argument as to competency suggests that at a certain point — when a witness has produced a certain number of prior inconsistent statements, and when those prior statements are even inconsistent with each other — the task of evaluating the credibility of the witness should be removed from the province of the jury and considered by the trial court under a competency analysis. Appellants base their argument in part on our discussion of the incompetency standard in *United States v. Gomez*, 807 F.2d 1523, 1527 (10th Cir. 1986). However, as *Gomez* makes clear: "The credibility of the witness * * * [is] for the jury to determine." However, even if credibility considerations can properly be fit under a competency rubric, the district court has "broad discretion in determining the competency of a witness to testify, and [its] decision will not be reversed in the absence of an abuse of discretion."

In that vein, we cannot conclude the district court abused its discretion in refusing to conduct a further hearing on the incompetency — or more accurately, incredibility — of the government's witnesses or in determining that the jury should properly weigh issues of credibility.

Fed. R. Evid. 601 provides that "[e]very person is competent to be a witness except as otherwise provided." "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that [he] has personal knowledge of the matter." Fed. R. Evid. 602. However, "[e]vidence to prove personal knowledge may * * * consist of the witness' own testimony." *Id.* Finally, Fed. R. Evid. 603 requires every witness "to declare that [he] will testify truthfully, by oath or affirmation."

Each of the government's key witnesses took the required oath. Haycock, Chee, Julius Crank, Fatt and Boyd Atene each testified that he or she had been at the bonfire party, and Boyd Atene testified to being present at the Copper Canyon scene when the panels were set on fire. All of these witnesses were exhaustively cross-examined in the presence of the jury both as to the substance of their prior inconsistent statements and their explanations therefor.

We consider appellants' suggested fusion of competency and credibility analysis to be regressive rather than progressive in relation to the evolution of the law in this area. The advisory committee's notes to Rule 601 state:

No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application.* * * Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. Standards of moral qualification in practice consist essentially of evaluating a person's truthfulness in terms of his own answers about it.

* * * Even the most traditional bases for excluding a witness as incompetent — such as insanity or immaturity — are no longer specifically preserved by a particular federal rule:

There is no rule which excludes an insane person as such, or a child of any specified age, from testifying, but in each case the traditional test is whether the witness has intelligence enough to make it worthwhile to hear him at all and whether he feels a duty to tell the truth.* * * The major reason for disqualification of the persons mentioned in this section to take the stand is the judges' distrust of a jury's ability to assay the words of a small child or of a deranged person. Conceding the jury's deficiencies, the remedy of excluding such a witness, who may be the only person available who knows the facts, seems inept and primitive. Though the tribunal is unskilled, and the testimony difficult to weigh, it is still better to let the evidence come in for what it is worth, with cautionary instructions. Revised Uniform Rule of Evidence 601 and the first sentence of Federal Rule of Evidence 601 reflect the above and additional reasoning by providing every person is competent to be a witness unless otherwise provided in the rules. No exception is made for mental incapacity or immaturity. As already indicated, mental derangement, where it affects the ability of the witness to observe, remember, and recount, may always be proved to attack credibility.

McCormick § 62, at 156–57 (footnotes omitted).

Appellants' argument, in asserting that a witness can be so untrustworthy as to lack the fundamental capacity of a witness, is reminiscent of another era when "moral depravity" could form the basis for excluding a witness.

There are two objections to any attempt to establish such an incapacity. The first is that in rational experience no class of persons can safely be asserted to be so thoroughly lacking in the sense of moral responsibility or so callous to the ordinary motives of veracity as not to tell the truth (as they see it) in a large or the larger proportion of instances; or, in more accurate analysis, no such defect, if it exists, can be so well ascertainable as to justify us in predicating it for the purpose of exclusion. The second reason is that, even if such a defect existed and were ascertainable, its operation would be so uncertain and elusive that any general rule of exclusion would be as likely in a given instance to exclude the truth as to exclude falsities. It is therefore not a proper foundation for a rule of exclusion.

2 Wigmore, Evidence § 515, at 721–22 (Chadbourn rev. 1979).

This court is confident that the Federal Rules of Evidence provide sufficient avenues by which a witness's credibility can be fully explored and tested in front of the jury, and we agree with the district court that the jury is still the best arbiter for such determinations. The court gave the jurors guidelines for assessing the credibility of witnesses, instructed them as to the purpose of the prior inconsistent statement testimony, and instructed that, based on

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the inconsistencies or discrepancies in a witness's testimony, they could "reject all the testimony of that witness or give it such credibility as you may think it deserves."

We are not inclined to resurrect judicial notions of moral capacity as a means for disqualifying a witness. The jury system has served us well. We would not serve it well by holding that jurors are incapable of making credibility determinations. Accordingly, we conclude that the district court did not abuse its discretion in allowing the government's principal witnesses to testify at trial.

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