



How to: The art of mixing witnesses and alcohol

By: Nancy Crotti August 7, 2014 0

What if one of your key witnesses to an alleged violent incident had consumed 15 to 20 alcoholic beverages before the incident even occurred?

One defense witness in the Jesse Ventura defamation trial admitted on the stand to drinking that much before his friend allegedly punched the former governor in the face. Other witnesses, too, acknowledged consuming alcohol.

The friend, former Navy SEAL Chris Kyle, wrote in his 2012 autobiography that he had knocked out someone he

called "Scruff Face" in a Colorado bar six years earlier for badmouthing SEALs.

Kyle later told interviewers that "Scruff Face" was Ventura; Ventura sued Kyle for defamation, insisting incident never occurred. The jury sided with him on a rare 8-2 split verdict.

An unnamed juror interviewed by the Star Tribune days later noted the role alcohol may have played in testimony by multiple defense witnesses that the juror was quoted describing as "all over the place."

A judge will tell a jury that they can determine the credibility of witnesses, said criminal defense attorney Barry S. Edwards of Minneapolis. Among the factors they may consider are the witness' level of intoxication, how far away the witness was from the incident, the lighting conditions, and whether there was racial cross-identification.

"They take that all into account according to instruction," Edwards said. "The courts, in my experience, accept the testimony of someone who was intoxicated at the time that they observed or did the thing they're testifying about if the testimony is incriminating, and not if it's exculpatory."

Other defense attorneys and a prosecutor – none of whom were involved with Ventura's suit – say that persuading a jury to believe a witness who has had several drinks or was otherwise impaired takes skill and perseverance, but it can be done.

Hennepin County prosecutor and training coordinator Judy Johnston did it. So did criminal defense attorney Ryan Garry.

Johnston prosecuted a case in which the victim of an attempted sexual assault had consumed LSD and alcohol before the incident took place. Johnston said she asked the victim to give as many details as possible. She also said an expert witness for the defense made mathematical errors about the victim's blood alcohol level.

"It was a very, very difficult case," Johnston said. "Everything rested on her speech."

Sometimes that is all an attorney has to go on, said Garry, a partner in the Minneapolis firm Sicoli & Garry.

"As a lawyer, whether it's prosecution or defense or civil, you have to choose the best evidence you have," he said. "Sometimes there really isn't much of a choice."

Attorneys in such situations must convince the jury that their witness had the opportunity to know what happened, could recall it and persuasively talk about it later, according to Johnston.

"It is very challenging, because of course, it goes against the credibility of the witness, especially if we're talking about someone who's had too much to drink," she said.

It's very important for an attorney who is doing direct examination of such a witness to bring that information to light, according to Johnston. She advised asking the witness if he or she had been drinking and if the witness had a clear recollection of what he or she observed.

"If I could use one word to help the lawyer on direct, it's context," Johnston said. "Just build context."

An attorney who is cross-examining such a witness would view the impairment as an opportunity, Johnston said, especially if the witness is a chronic alcoholic. Alcoholism does not sit well with juries and impairment casts doubt on the witness' ability to recall information, she explained.

Criminal defense attorney Ryan Garry said he deals with impaired witnesses "all the time."

In one case, he defended an alcoholic accused of assaulting three police officers while they were responding to a call to the defendant's home. The defendant had been in prison for much of his life and would return if he pleaded guilty. Garry took the case to trial and won.

"My guy had to testify to tell his story," Garry said. "He testified that he had about 12 Jack and Cokes — alcoholic drinks — and that he remembered everything that went on and he remembered it because he was scared and was hit over the head with a night stick and the butt of a gun."

On cross-examination, Garry said, he pointed out inconsistencies in the officers' testimony.

"I think the jury thought they were fabricating parts of their stories," he added. "My client, although he was drunk, he remembered everything that happened. He didn't waver on cross-examination. I just thought he was telling the truth."

So did the jury, who found the man not guilty of all charges after about a half-hour of deliberations, according to Garry.

"It was a surprising verdict and it just goes to show you that you never, ever know what juries are going to do," he said.
