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**PRIVILEGE OF COUNSEL TO EXPLAIN
TRAVERSER'S FAILURE TO TESTIFY**

*Wilkerson v. State*¹

At the trial of traverser-appellant for obstructing justice, the traverser did not take the witness stand. His counsel in argument made the statement that no presumption of guilt arose from that fact. The trial court sustained the State's Attorney's objection to that statement and ruled that traverser's counsel could not in any way comment on his client's failure to take the witness stand. On appeal, *held*: Reversed and new trial awarded. The trial court's action prevented the traverser's counsel from stating to the jury the law applicable to the situation, which right is guaranteed by the constitutional provision² making the jurors the judges of the law as well as of the facts in criminal cases. The statute³ making criminal defendants competent witnesses at their own request, but not otherwise, provides that the failure so to testify shall create no presumption of guilt.

Two questions are presented by the case: First, whether the specific ruling accords with the trend of authority on the point in states not allowing jurors to judge of the law; and, second, whether under the Maryland practice whereby jurors do judge the law, the ramifications of the privilege against self-incrimination properly come within the scope of the juror's functions?

The privilege against self-incrimination exists fairly generally throughout Anglo-American jurisdictions. It not only protects a criminal defendant from being forced to take the witness stand in his own trial but also protects any witness, in any case, from being compelled to answer a question, any relevant answer to which might subject him to criminal prosecution. Only the former aspect of the privilege is here involved. One aspect of that is the extent to which either prosecution or defense may comment, adversely or favorably, on the defendant's claim of the privilege. Practically all jurisdictions which have the privilege forbid the court or prosecution to comment adversely upon the exercise of the privilege, and many cases (not here collected) have ruled on borderline questions of what amounts to improper comment. The converse question is: May the

¹ 188 Atl. 813 (Md., 1937).

² Md. Const., Art. XV, Sec. 5.

³ Md. Code, Art. 35, Sec. 4. Md. Declaration of Rights, Sec. 22, is the source of the privilege against self-incrimination in Maryland.

traverser's counsel attempt to explain, by way of comment, his client's failure to testify?

While there are many cases on the rule that neither trial court nor prosecuting attorney may comment adversely on the defendant's failure to testify, there is an apparent dearth of rulings whether his counsel may attempt to explain such action away.⁴ The inference from this might be that other jurisdictions are in line with the Maryland rule as reflected in the principal case to the effect that traverser's counsel does have such a privilege. And yet it might be argued that the rule is wrong because it is unfair to allow defendant the privilege of pointing out the favorable aspects of his refusal to testify without allowing the prosecution that of emphasizing the unfavorable ones.⁵ It might be pointed out that the significance of the statutory rule that no presumption shall arise from the claim of the privilege is that the subject of defendant's failure to testify shall be severely left alone in evidence and argument.

A distinction might be suggested between the traverser's counsel merely stating the legal rule as to failure to testify (as he did in the principal case) and his attempt to explain the failure away on the facts. The latter situation would hardly arise as there would be little likelihood of evidence being in the case (other than defendant's own, which is not) capable of explaining away his failure, and counsel cannot furnish evidence in argument.

Some jurisdictions (where trial judges must grant prayers in criminal cases) in effect permit the former type of comment by requiring the trial judges to instruct (at the request of the defendant) that no presumption of guilt shall arise from the claim of the privilege. But this still leaves unanswered the second question whether defendant's counsel may attempt to explain away the failure to testify, on the facts of the case. Other jurisdictions forbid adverse comment but do not require the court to warn the jury against any unfavorable inference.

An interesting question which could arise in Maryland and in any other jurisdiction having the privilege is this: Would it be reversible error for the trial judge or the prose-

⁴ See Annotation, 84 A. L. R. 784, 794. In *Collins v. State*, 143 Ark. 604, 221 S. W. 455 (1920), and *Meador v. State*, 113 Tex. Crim. 357, 23 S. W. (2d) 382 (1929), it was indicated that the defendant would not be permitted, as a matter of right, to comment on his failure to testify, but the cases went off on the point of the prosecution being permitted to comment adversely after the defendants had first, without objection, explained the failure to testify.

⁵ Consider the Arkansas and Texas cases cited in the preceding footnote.

cutor to remind the jury, against the wishes of the defendant, that the rule was that they should not draw any unfavorable inferences from the latter's failure to testify?⁶ With proper intonations, such a reminder could well, in fact, put the defendant in an unfavorable light by reminding the jury of the fact that defendant had not taken the stand when, otherwise, they might have minimized its effect.

The ruling in the principal case cannot be taken as a square decision that the import of the constitutional guaranty against self-incrimination is that defendant's counsel may attempt to explain away his client's failure to testify. This is because the court chose to put it on the right of traverser to advance his theory of the law of the case to the jury, right or wrong, rather than on a square decision that the privilege against self-incrimination includes the right to explain away the exercise of it.

While it so happens that the statement made by traverser's counsel in the instant case was a correct statement of law, practically quoted from the applicable statute, yet the language of the court's opinion would permit counsel for a defendant to make a broader statement, not so certain as to its intrinsic correctness.

The Maryland rule that the jurors shall be the judges of the law as well as the facts in criminal cases has as one of its ramifications the proposition that lawyers at the trial may read law books to the jury and argue questions of law in their presence. This privilege has been held not to extend to arguing the constitutionality of the statute proceeded under,⁷ nor to the question of the repeal of the statute, once that had been settled by ruling on the demurrer,⁸ nor to matters of the admissibility of evidence.⁹ On the other hand, the local rule does permit counsel to disagree with a voluntary instruction already given by the trial court, before the close of the argument.¹⁰ The rule of the principal case permitting his counsel to comment on traverser's failure to testify is another consequence of the local rule permitting argument on the law to the jury.

Accepting, for the sake of the argument, that it is desirable to permit defense counsel to explain away the traverser's failure to testify, the question arises whether the court's putting it on the rule that jurors judge the law,

⁶ See Annotation, 68 A. L. R. 1108, 1158.

⁷ Franklin v. State, 12 Md. 236 (1858).

⁸ Nolan v. State, 157 Md. 332, 146 Atl. 268 (1929).

⁹ Bell v. State, 57 Md. 108 (1881); Jules v. State, 85 Md. 305, 313, 36 Atl. 1027 (1897).

¹⁰ Vogel v. State 163 Md. 267, 162 Atl. 705 (1932).

rather than on its being a consequence of the privilege against self-incrimination itself, was desirable.

The usual significance of the rule that the jurors judge the law is that they interpret the legal rules involved in the definition of the crime proceeded under and decide their applicability to the facts of the case. As we have seen, they are denied the privilege of judging of the constitutionality or repeal of a statute, or of matters of the admissibility of evidence. It might be argued that the privilege against self-incrimination, itself a rule of evidence, is one that does not concern the jury in its function to determine the "law of the case", and so that the power of counsel to comment on client's failure to testify must be found from some other source than the power of the jurors to judge of the law. It would have been better to have made a square ruling that an implication of the privilege against self-incrimination is that counsel may explain client's availing of the privilege, rather than to leave it a matter of counsel's right to argue law to the jury. It would be equally appropriate to say that defense counsel could argue that the trial judge was in error in excluding some of his evidence. This just as much involves a presentation of the defendant's view of the law of the case to the jury, and yet the court has in an earlier case forbidden that as not being within the scope of the privilege of arguing the law.

Even if one can accept the unfairness of permitting defendant to argue that no unfavorable inference should be drawn, while the prosecution is forbidden to argue in favor of one, yet the case leaves unanswered whether defendant can go farther and make a factual explanation of his failure to testify. Then, too, it would have been better to have put the rule squarely on its being a privilege itself guaranteed by the constitutional and statutory privilege against self-incrimination, rather than on the dubious point of its being an incident of arguing the law of the case to the jurors. As long as the court continues to put it on that point it will be impossible to get a square ruling as to how far counsel may go in justifying a client's failure to testify. One might well say that in the principal case the correct result was reached, but by a wrong route.