

A defendant was charged with possession of a prohibited firearm after a sawed-off shotgun was found in his vehicle during a routine traffic stop. At trial, the prosecutor called the officer who stopped the defendant's vehicle and questioned him about the basis for the traffic stop and the subsequent discovery of the shotgun. Thereafter, the defendant's attorney cross-examined the officer. To clarify the officer's testimony, the court then asked the officer several questions about the discovery of the shotgun that had not been asked by either party. The court excused the officer after giving each attorney a chance for further examination.

Later, while the jury was on its lunch break, the defendant's attorney objected to the court's questioning of the officer. The attorney requested that the court's examination be stricken from the record and that the jury be instructed to disregard it. The court overruled the objection and denied the request. The defendant was subsequently convicted. On appeal, the defendant argues that the court's questioning of the officer was improper.

Is the court of appeals likely to overturn the defendant's conviction on this basis?

- A. No, because a trial court may examine a witness for the purpose of clarifying the witness's testimony.
- B. No, because the defendant's attorney failed to timely object to the court's questioning of the officer.
- C. Yes, because in order to maintain neutrality, a trial judge may not examine a witness.
- D. Yes, because the court did not give the defendant notice of its intent to examine the officer.

## Explanation:

### Court's authority over proceedings

(FRE 611, 614)

Court has reasonable control over mode/order of examining witnesses & presenting evidence to:

effectively determine truth

avoid wasting time

protect witnesses from harassment or undue embarrassment

This allows court to:

call witness upon its own motion or party's suggestion

examine witness, regardless of who called witness

**FRE** = Federal Rules of Evidence.

Federal Rule of Evidence (FRE) 611 grants the trial court control over the **mode and order** of presenting evidence and examining witnesses. This promotes the court's overarching duty to seek the truth. In furtherance of that duty, FRE 614 **authorizes the court** to develop or clarify testimony by:

**calling a witness** sua sponte or at the suggestion of a party *and/or*

**examining a witness**, regardless of who called the witness.

However, the court **abuses this authority** when it **fails to grant** all of the parties an **opportunity to examine** the witness or assume the **role of an advocate**.

Here, the officer was called by the prosecution and examined by both parties. The trial court then questioned the officer about the discovery of the shotgun to clarify his testimony, and the parties were given the opportunity to further examine him. There is no indication that the trial court assumed the role of an advocate, so the appellate court is *not* likely to overturn the defendant's conviction on this basis **(Choice C)**.

**(Choice B)** An objection is generally timely if it is made at the earliest opportunity. But this rule is relaxed when a party seeks to object to the court's examination of a witness, and the objection may be postponed until the next opportunity that the jury is no longer present (as the defendant did here).\*

\*This saves the parties from any discomfort that may result from objecting to the court's questioning of a witness before the jury, while ensuring that the objection is raised in time for the court to implement corrective measures.

**(Choice D)** The court need not provide notice of its intent to examine a witness called by a party (as seen here). But notice should be given when the court intends to call a witness whom neither party intended to call so the parties can prepare to examine the

witness. However, a conviction would only be overturned for failure to provide notice if it amounted to reversible error.

**Educational objective:**

A court may both call a witness sua sponte or at the suggestion of a party *and* examine a witness to clarify or develop testimony. In doing so, the court may not deprive a party of the opportunity to examine the witness or assume the role of an advocate.

**References**

Fed. R. Evid. 611 (mode and order of examining witnesses and presenting evidence).

Fed. R. Evid. 614 (court's calling or examining of a witness).

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