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## PERJURY AND WRONGFUL WITNESS TESTIMONY IN CRIMINAL PROCEEDINGS

**Abstract:** *Execution of evidence using witnesses consists of hearing (examining) witnesses, i.e. taking testimonies from witnesses. Witnesses represent the most commonly used evidence and their testimony, regardless of all shortcomings that follow this evidence, is very important and still irreplaceable evidence in criminal proceedings.*

*The court can only base its decision on true testimony. The witness is obliged to make a true testimony. Giving false testimony (perjury) is a criminal offense. However, certain shortcomings and errors in processes that make a testimony, as well as the way “taking” testimony from witnesses, can lead to perjury. The wrongful testimony is not perjury, nor is the wrongful testimony a criminal offense.*

*In order to make the difference between perjury and wrongful testimony even clearer, the author will first define what is testimony and explain its structure from the judicial-psychological aspect, and then point to the difference between perjury and wrongful witness testimony in criminal proceedings.*

**Keywords:** *criminal proceedings, witness, perjury, wrongful testimony.*

### THE CONCEPT AND THE STRUCTURE OF TESTIMONY

The testimony, in the judicial-psychological sense, is a unique psychological phenomenon consisting of four interconnected and functionally conditioned psych processes: perception, memorizing, thinking, and expressions.

Perception, in the shortest, represents direct knowledge of the subject and occurrence through the senses. Perception is a very complex process consisting of several different processes, primarily choices or selection between a large number

of sensations acting on a person's senses, and then organizing them in units and interpretations of those units. A person is always exposed to a large number of sensations, but perceives only a limited number of them, binds them into certain units, and gives them a certain meaning based on his/her experience. Not only the experience but also needs, wishes, and expectations, affect the perception of a person. Motivation also affects the contents of perception.<sup>1</sup> When it comes to witnesses, the specific situation in which they perceive the situation also affects their perception. „A high degree of stress which is a common side effect of attending criminogenic situations affects the reduction of perception reliability. The extremely fast increase in the amount of adrenaline in the blood, which is a characteristic body reaction to a stressful situation, can make someone run faster, or fight better, making them feel they have enough strength to withstand the situation, but it does not them to notice and remember more detail. Research has shown that people under stress remember less detail, are less accurate in reading numbers, and are less confident when detecting signals from the environment. In such circumstances, they pay more attention to their well-being and security than some, for them – irrelevant, environmental details.“<sup>2</sup> It is important to mention that perception can be disturbed for some people. Perception disorders are categorized as agnosia, illusions, and hallucinations. Agnosia is the inability to recognize with preserved senses, illusions are misinterpreting (most commonly occurring in special affective conditions or due to non-facility observations (man sees, hears, or feels something that does not exist)).<sup>3</sup>

Perception is important in the testimony process because the subjectivity of perception exists in its very definition (“subjective reflection of objective reality”). “When the witness starts interpreting, then the subjectivity of the act of interpretation is emphasized. Therefore, examining witnesses is usually asking to only describe, but not to interpret the facts he perceived “.<sup>4</sup>

Memorizing, as an elementary learning function, is another integral part of the testimony and consists of several mental processes: reminiscing, retaining or retention, and remembering (recognition and reproduction). „Human memory is a storage and extraction system of information, information that, of course, our

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<sup>1</sup> See more in: Никола Рот, *Опшћна психологија*, Завод за уџбенике и наставна средства, Београд 1990, 66-93.

<sup>2</sup> Марина Ајдуковић, *Одабране теме из судске психологије – Психологија свједочења и исказа*, Правни факултет Свеучилишта у Загребу, Загреб 2007, 48.

<sup>3</sup> “Fear is not only a motive for conscious perjury but also a common cause of unintentional misconduct of the benevolent witness. Intense fear can cause real illusions or hallucinations during event perceptions.“ Снежана Бркић, „Зашто нам је потребна заштита сведока“, *Правни животи – часопис за правну теорију и праксу* 9/2005, 837.

<sup>4</sup> Михаило Лукић, Самуило Пејаковић, Јован Марић, *Правна медицина – судска медицина и психологопсихологија*, Научна књига, Београд 1990, 288-289.

senses occurred.<sup>5</sup> Memory is influenced by numerous factors: conserved consciousness, undamaged attention, repetition of perceptions, will to remember something, current mood, and emotions. They are all very significant and must be taken into account when assessing witnesses and their statements. For example, if the witness is not related to the event and is not interested in it, there is a possibility to remember a minimum of what happened. Or, if it is influenced by great fear or anger, if emotional tension is present, they will not remember the details.<sup>6</sup> Also, special psychological conditions such as alcoholism, drug intoxication, fatigue, etc., reduce memory function. The length of perception of an event is important for memorizing it.<sup>7</sup> We must also have in mind the process of forgetting, which is a regular phenomenon. "For the psychology of testimony, it is especially important to remember that details of an event can be lost, i.e. forgotten, but that what we remember changes, i.e. there is a systematic distortion of memory traces. So what is stored in our memory is often not an accurate reflection of the original information."<sup>8</sup> Regarding memory disorders, amnesias have the greatest forensic significance.<sup>9</sup> Considering the fact that persons who have memory disorders also have a capacity for common judgment compromised, this must be taken into account when dealing with witnesses and their statements.

„Thinking is a psychological function that man uses to fulfill its biological, social, and learning needs.“<sup>10</sup> It is said to be a complex activity characteristic of humans. „A man rarely remains on what is given to him by senses, but regularly evaluates what he perceives “.<sup>11</sup> In clinical practice, we differentiate concrete and

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<sup>5</sup> Алан Бедли, *Људско памћење-теорија и пракса*, Завод за уџбенике и наставна средства, Београд 2004, 9.

<sup>6</sup> „For the credibility of testimony, it is important to remember extremely significant or highlighted events very lively. Unfortunately, such alive and detailed memory isn't always true. The thing is that the liveliness of the memory is one of the most important factors of the subjective safety of eyewitnesses in what they claim, and is important in order to assess their testimony as credible by judges and jurors.“ М. Ајдуковић, 38.

<sup>7</sup> „It is known that the longer time interval eyewitness has had to perceive some face or evidence, it is more likely that this information will „process“ and store in long-term memory. The question is how much the minimum viewing duration is needed to remember a certain happening, i.e. the face of the perpetrator of some crime Experimental research has shown that for remembering the face, 10 seconds of watching is enough“. М. Ајдуковић, 47.

<sup>8</sup> М. Ајдуковић, 40.

<sup>9</sup> There is posttraumatic, retrograde, and anterograde amnesia. Posttraumatic amnesia occurs after a severe injury to the head and represents the state of relative confusion during which patients can have a problem following current activities, to understand where they are or remember what they are shown. Retrograde amnesia is characterized by difficulty recalling events before the accident, with recent memory being affected the strongest. Contrary to retrograde amnesia, anterograde amnesia deals with problems in current memory and learning new skills. See more: А. Бедли, 296–297.

<sup>10</sup> Р. Ковачевић, 51.

<sup>11</sup> Н. Рот, 131.

abstract thinking. Concrete thinking or, as it is also called primitive, archaic thinking, is seen in uneducated people. It is characterized by poverty in concepts and by mysticism, i.e. attributing supernatural powers to certain things and phenomena. Abstract thinking is characterized by a wealth of concepts, easy and quick expression of feelings, description of events, and quick assessment of the situation. The thinking process is closely related to motives and emotional processes.<sup>12</sup> Although motives and feelings drive thinking, they can very often lead to wrong solutions and conclusions, e.g. we describe and evaluate the qualities and actions of the people we love differently and more positively than the qualities of other people. That's why this fact should be taken into account when evaluating the testimony of a witness, especially if the testimony refers to a witness of a close person. Thinking, as a psychological function, can also be deranged. Thought disorders (or thinking disorders) differ in form (morbid extensiveness, slowness of thought flow, flood of ideas, and dissociated thinking) and in content (delusional ideas and overestimated ideas).<sup>13</sup> Disorder in the witness's opinion certainly affects his testimony. Delusional ideas have the greatest forensic significance. Considering that thinking is an integral part of reasoning, it is very important to correctly determine the thought process of a person.

Thinking and testifying are closely connected.<sup>14</sup> Testifying comes down to "restoring earlier impressions in the form of representations and expressing previously perceived and remembered".<sup>15</sup> Witnesses, thanks to the communicative function of speech, convey what they have seen, heard, or otherwise learned. However, communication between people is not always simple and successful. The reason for difficulties is that many words have multiple meanings, so it very often happens that "people use the same words but mean different things".<sup>16</sup> That is why, when communicating with the witness, it is necessary to determine what exactly he meant by what he said in his testimony.

In criminal proceedings, the judge evaluates the testimony of the witness, and the main problem in the evaluation is to determine whether the testimony of

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<sup>12</sup> „Emotions affect thinking (a strong emotion such as fear can make it difficult to think clearly), and thinking affects emotions (thoughts about the consequences of being caught in a lie or being inconclusive increase fear. P. Ekman, *Razotkrivene emocije*, Zavod za udžbenike, Beograd, 2011, 274.

<sup>13</sup> P. Ковачевић, 52.

<sup>14</sup> Some authors even reduce thinking to speech, stating that thinking is internal and voiceless speech and calling thinking verbal behavior. However, as Roth states, the connection between thinking and speaking does not mean that they are one and the same and that thinking can be reduced to speaking. This is confirmed by a series of facts, e.g. opinion also exists in living beings that do not possess speech (the case of small children) or e.g. the fact that the same thought can be expressed in different words. See more: Н. Рот, *Ойцїя психологїя*; Завод за уџбенике и наставна средства, Београд, 1990, 138–139.

<sup>15</sup> Н. Делић, *Појам и стїрукїура исказа – судскоїсихолошки аспекти*, Годишњак Правног факултета, година II, 2/2011, 25.

<sup>16</sup> Н. Рот, 139.

the witness matches the actual situation. There are truthful and accurate (or rightful) statements or testimonies in which the situation witness declares matches what happened in reality, and there are perjuries and wrongful testimony. The judge first determines whether the testimony is truthful or is perjury, and then whether it is rightful or wrongful.

## A PERJURY AND WRONGFUL WITNESS TESTIMONY

When we think about testimony in the procedural-legal sense, it is determined as a means of proof, as a statement that someone gives as a participant in the process, as a result of hearing and establishing the facts.<sup>17</sup> Thus, we say that the testimony of a witness is “the statement of a person, who is not a procedural subject, given to the court about the sensory perception of some fact from the past important for the subject of the trial, with the aim of proving it”.<sup>18</sup> From this definition, several basic properties of witness testimony emerge. First, witness testimony is a statement that the witness gives, as a rule, in oral form. Second, witness testimony is a reproduction of sensory perception of facts from the past.<sup>19</sup> And third, witness testimony is a statement given to the court during the proceedings. Any other statement given to another authority outside of criminal proceedings is not a witness statement.

Testifying in criminal proceedings is not voluntary. It is an obligation that cannot be refused and applies to all persons, regardless of position, function, education, intelligence, age, etc. „A competent witness is a person who: understands the duty to tell the true and can narrate the events in question.“<sup>20</sup> The law does not prescribe any conditions when it comes to a person’s mental or physical condition either. The age limit is determined by the ability of the witness to reason and testify. This means that children, the elderly, the deaf, the mentally ill, and the drunk can all be witnesses...<sup>21</sup>

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<sup>17</sup> See more: *Одабране теме из судске психологије – Психологија свједочења и исказа*, Правни факултет Свеучилишта у Загребу; Загреб, 2007, 29-44.

<sup>18</sup> Момчило Грубач, *Кривично процесно право – четврто измењено и допуњено издање*, Правни факултет Универзитета Унион у Београду, ЈП „Службени гласник“, 2006, 267.

<sup>19</sup> The witness testimony is a reproduction of the sensory perception of the facts, it is not the judgment of the witness about them. The sensory perception of witnesses can be direct or indirect. The facts about which the witness testifies are from the past and relate to the criminal offense, the perpetrator, or some other important circumstances of the case.

<sup>20</sup> Judy Hails, *Criminal Evidence*, 2013, 145.

<sup>21</sup> Although testifying is the obligation of all persons and although the law does not exclude any category as absolutely incapable of testifying, there are still persons who have the right to refuse to testify, as well as persons who are not capable of testifying and whose statements cannot be taken even when they wish to give them.

The duty of the witness is to give a testimony, not just any, but a truthful testimony. Before testifying, the witness is reminded that his testimony must be truthful and that he must not keep anything silent. Giving a false testimony – perjury is a criminal offense.<sup>22</sup> A criminal offense has several forms and the act of execution in all forms consists of giving perjury.<sup>23</sup>

„False testimony is not uncommon in practice; it hinders the establishment of the truth in a case, makes it difficult to collect evidence and expose those responsible in a criminal case. The essence of false testimony lies in its negative social and legal colouring and requires law enforcement agencies to react appropriately, namely, to apply knowledge of both psychology and criminal tactics.“<sup>24</sup>

The question arises, what exactly is perjury?<sup>25</sup> First, it should be noted that there are several types of lies. Direct or outright lying is such in which a person gives information that is completely different from what he believes to be true. A slightly milder form of lying is an exaggeration. And, finally, there is subtle lying, in which the person tries to mislead the listener.<sup>26</sup> In each of these cases, lying is knowingly and intentionally providing false information.

When it comes to perjury, there are two theories. According to the subjective theory, perjury is a statement that does not correspond to the representation of the one giving the statement, that is, when there is a discrepancy between his statement and what he considers to be true. “If someone offers an inaccurate description of what actually happened, that does not necessarily mean that that person intended to deceive us and, if there is no intent to deceive us, such an inaccurate description should not be regarded as a lie.”<sup>27</sup> „If someone really believes that he experienced something – saw, heard, felt – even if it does not correspond to reality, that person is not lying. He gives wrongful testimony, but not perjury.“<sup>28</sup> Perjury, according to the objective theory, is a statement whose content does not correspond to reality, a statement that contradicts the factual situation.

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<sup>22</sup> The punishment for false testimony was foreseen even in the first criminal code by Prota Mateja Nenadovic: “Whoever swears falsely and testifies falsely, he must pay for all the damage for which he testified, be punished with sticks, and never be trusted again, he always has to be declared a liar.” Тома Живановић, *Оцијети део основа кривичној права*, Београд 1921, 38.

<sup>23</sup> Perjury given in a criminal proceeding is a serious form of this criminal offense. The reason is the fact that this kind of statement, as a rule, can cause significantly more serious consequences than is the case with other proceedings.

<sup>24</sup> Igor Olegovich Antonov, Guzel Vilsurovna Burganova, Yulia Mukhametdinovna Nasyrova. (2021). The Concept of Lie and Its Identification in Criminal Proceedings. *Propósitos y Representaciones*, 9(SPE2), e1005. <http://dx.doi.org/10.20511/pyr2021.v9nSPE2.1005>

<sup>25</sup> „A lie is a statement that is 1. false, 2. insincere (a statement that the speaker believes is false), and is intended to deceive others“. Laurence R. Horn, *From Lying to Perjury, Linguistic and Legal Perspectives on Lies and Other Falsehoods*, Walter de Gruyter GmbH & Co KG, 2022, 16.

<sup>26</sup> М. Ајдуковић, 58.

<sup>27</sup> Pol Ekman, *Laganje*, Mediterran publishing, Novi Sad, 2010, 305.

<sup>28</sup> М. Ајдуковић, 57.

A witness can lie by making an untrue statement (active lie) when he knows that his statement is contrary to the truth, which is what he wants. Also, a witness can lie by intentionally keeping silent (passive lying) about certain facts. In the literature, you can also find the so-called blind testimony. A blind statement “is considered such a statement when the interrogator himself does not know whether what he is saying is a lie or the truth. A witness, for example, is ashamed of an incomplete statement and lies to cover up his lack of knowledge.”<sup>29</sup>

The concept of a false statement in terms of the criminal offense of perjury includes both components. First of all, the statement should be objectively false, that is, the statement should not agree with the real state of facts. In addition to this, a false statement in the concept of perjury must include the witness’s intention to give an untrue statement, that is, the awareness that he is giving a statement that is not objectively true. “Perjury is a statement that contains the affirmation of untrue facts or the denial of true ones.”<sup>30</sup> The statement does not have to be completely false for the existence of a criminal offense – it is enough that the part of the statement is false for it to be a criminal offense. The obligation of the witness is to give a complete statement, he or she must not keep silent about the facts that are known to them and about which they are being questioned. As for the concealment of relevant facts, in the sense of whether the concealment also constitutes the criminal offense of perjury or not, there is no unified position. However, the duty of the procedural authority is to warn the witness that he (or she) is obliged to tell the truth and that he (or she) must not keep anything silent, as well as to inform the witness that perjury is a criminal offense. This incrimination seeks to suppress behavior that jeopardizes the correct determination of facts in court proceedings.<sup>31</sup>

There are various reasons why a witness makes perjury. “Mentally healthy people lie for rational reasons”<sup>32</sup>. The most common motives are love, friendship, hatred and revenge, frivolity, venality, and fear. Perjury can happen for any form of interest of the witness in the outcome of the procedure, due to e.g. family ties, acquaintances, personal or business interest, involvement in a criminal offense, etc.

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<sup>29</sup> Vladimir Vodinelić, *Kriminalistika*, Prosveta, Beograd, 1970, 133.

<sup>30</sup> Зоран Стојановић, *Коментар кривичној законика – шреће доуђуњено издање*; ЈП „Службени гласник“; 2009, 722.

<sup>31</sup> The means used to ensure a true and complete witness testimony is the witness’s oath. The oath is intended to contribute to the credibility of the testimony. An oath can be promissory or affirmative. A permissive oath is a promise that the witness will tell the truth, while an affirmative oath confirms the truthfulness of his testimony. The oath is taken before the judge, that is, the president of the council. The text of the oath is prescribed by the corresponding law and, as a rule, the oath is taken at the main trial, by the oral reading of its text by a witness or by confirmation of the witness after the authority of the procedure has read it, although it can exceptionally happen before the main trial. Special rules for taking an oath apply to certain categories of persons (mute, deaf-mute, blind witnesses). Also, there are certain categories that cannot take an oath.

<sup>32</sup> V. Vodinelić, 133.

If the testimony of the witness does not match what actually happened, it does not mean that it is perjury. In addition to truthful testimony and perjury, a witness can also give wrongful testimony. The wrongful testimony of a witness is the result of various circumstances.

First, the psychological characteristics of the witness should be taken into account, starting with his abilities to perceive, remember (or memorize), think, and express himself. These abilities are developed differently in everyone, and they can also be deranged, which certainly affects the accuracy of statements. Furthermore, witnesses' interests, previous knowledge, and experience can also have an impact on what and to what extent the witness will perceive and remember. Prejudices and stereotypes can also affect the accuracy of perception. Furthermore, the situation in which the witness has to testify, as a rule, is not something that the witness expected and planned. Initial surprise, fear, or lack of interest in the event leads to a wrong perception, that is, to a failure in perception. The high level of stress that witnesses are in at the time of the commission of a criminal offense also affects their perception.

The second group of factors that can lead to wrongful testimony is related to the circumstances under which the witness observed the commission of the crime. The witness is asked to describe the situation, the perpetrator, from a period when he may not have been interested in what was happening. The length of observation of an event has an effect on memory. The longer he watched, the more likely he would remember. In addition, the execution of a criminal offense can be accompanied by speed, a lot of stimuli, a lot of information, the presence of a large number of people, poor visibility, and similar circumstances that make it difficult for the witness to see and hear what is really happening.

Finally, the interrogation (and the way it is conducted) can lead to wrongful testimony. „Criminal offense is a complex event about which an eyewitness acquires and retains a certain amount of information. Police interrogation of eyewitnesses, the process of identifying a suspect, the display of photo-robots, and similar real-world circumstances provide many opportunities for the introduction of information that is potentially misinforming.”<sup>33</sup> The witness is always first asked to say everything he knows about the case, and then he is asked questions for checking and clarification. This method of witness hearing is the most reliable. Witnesses, according to their memory, state what they remember best and what they are most sure of. Their statement contains less information and details, but what is presented this way is the most credible. After his statement, in order to clarify or add to it, the witness is asked questions. „In all attempts to learn something more from witnesses than they themselves stated, there is a great danger of getting less credible answers.”<sup>34</sup> When asking questions, a person should be very

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<sup>33</sup> *Ibid.*, 52.

<sup>34</sup> M. Ajduković, 53.



careful, it is not allowed to use deception or ask so-called suggestive questions. A wrongful testimony of a witness can also be a consequence of conformity. Witnesses can fall to the expectations, demands, or even pressure of other witnesses and give a statement that is closer to the statement of those other witnesses.

A wrongful statement, like perjury, does not reflect the real facts exactly as they happened, but a wrongful statement is not a reflection of the will and intent of the witness, therefore giving a wrongful statement does not constitute a criminal offense.

## CONCLUSION

Witness testimony is a unique psychological phenomenon in which the processes of perception, memory, thinking, and stating are closely related to each other. Most often, errors in these processes lead to wrongful testimony. A wrongful testimony can also be a consequence of the circumstances under which the witness perceived the event, as well as the way the witness was questioned. Perjury and wrongful testimony have a discrepancy with reality in common. The difference is that perjury is intentionally, knowingly, and willingly giving a false statement. This is exactly why, unlike giving a wrongful testimony, perjury is a criminal offense. A truthful testimony is also rightful testimony. An inaccurate or misleading statement in testimony is actually an unconsciously untrue statement.

First, the judge determines whether the testimony is truthful or is it perjury, and then whether it is rightful or wrongful. He can base his decision only on truthful testimony. The fact that the court accepted the testimony of a witness does not mean that the testimony is absolutely truthful, just as the fact that the court did not accept the testimony of a witness does not mean testimony was perjury. In criminal proceedings, one tries to find out the truth about the facts to the greatest extent possible. It is important to mention that the truth in criminal proceedings is relative because all the elements used to determine it are also relative.

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## Лажан и погрешан исказ свједока у кривичном поступку

**Сажетак:** *Извођење доказа свједоцима се састоји у слушавању (испитувању) свједока, односно узимању исказа од свједока. Свједоци представљају најчешће коришћено доказно средство и њихов исказ, без обзира на све мањкавости које праће ово доказно средство, веома је значајан и још увијек незамјенљив доказ у кривичном поступку.*

Суд своју одлуку може заснивати само на истинитом исказу. Свједок је дужан да да истинити исказ. Давање лажног исказа представља кривично дјело. Међутим, одређени недостаци и грешке у процесима који чине исказ, као и сам начин „узимања“ исказа од свједока, могу довести до погрешног исказа. Погрешан исказ није лажан исказ, него је давање погрешног исказа кривично дјело.

Како би се јасније направила разлика између лажног и погрешног исказа, аутор ће у раду прво дефинисати исказ и објаснити његову структуру са судскопсихолошког аспекта, а затим указати на разлику између лажног и погрешног исказа свједока у кривичном поступку.

**Кључне речи:** *кривични поступак, свједок, лажан исказ, погрешан исказ.*

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