Evidence

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EVIDENCE

I. LEADING QUESTIONS PERMITTED DURING DIRECT EXAMINATION OF CHILD WITNESS

In *State v. Hale* the South Carolina Court of Appeals recognized the validity of the use of leading questions during direct examination of a child witness. The court also recognized the effectiveness of a curative instruction given to a jury after the prosecution commented on the postarrest silence of the defendant.

Hale was convicted of two counts of first degree criminal conduct and two counts of committing a lewd act upon a child. His convictions were affirmed. On appeal Hale urged a number of grounds for reversal. He first contended that the trial judge erred in allowing the prosecution, over continuing objection, to ask leading questions of two witnesses who were eight and nine years old. The court rejected this contention, observing that a trial judge is vested with wide discretion in ruling on an objection that a question is leading and that reversal on the grounds of abuse of such discretion is rare. The court further noted that leading questions may be asked of a child witness, particularly when matters of a sexual nature are involved.

The reasoning of the court on this issue is well considered and timely. The use of children as witnesses is generally recognized as necessitating a different method of questioning from that used for adults. In the context of sexually oriented cases, the problems of the child witness are even more pronounced. As of May 1985, eleven states had passed legislation adopting special hearsay exceptions for a child's out-of-court statement re-

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4. Id.
5. Id.
garding sexual abuse.\textsuperscript{7} Even more states allow for the videotaping of a child's testimony.\textsuperscript{8} Therefore, by accepting the use of leading questions when addressing children, the court of appeals recognized one of the numerous methods that have been approved in coping with the special problems posed by the child witness.

Hale also argued that the lower court erred in not granting a mistrial after the solicitor commented on the defendant's post-arrest silence.\textsuperscript{9} Rather than grant a mistrial, the trial judge immediately gave the jury a curative instruction that they were not to consider the defendant's silence in their deliberations.\textsuperscript{10} The court of appeals held that in the circumstances of this case, the curative instruction was adequate to cure any potential prejudice to Hale.\textsuperscript{11} Since curative instructions are commonly used and upheld in South Carolina, the court's decision is consistent with previous South Carolina law.\textsuperscript{12} Thus, Hale should alert the practitioner to object quickly to any line of questioning or attempted introduction of evidence that appears to be improper since a curative instruction will probably preclude any

\textsuperscript{8} Id. at 666.
\textsuperscript{9} The comment arose during the cross-examination of Hale by the solicitor. The following dialogue took place after Hale testified that he had been arrested and taken to the county jail:

Q. And you didn't tell any police officer anything about this charge; did you?

A. They asked me whether I wanted to make a statement, and I said that I did not until after I had seen an attorney.

Q. And you never did; did you?

A. No, I did not.

Q. You never told anybody until today, you never told any police officer until today that—

284 S.C. at 354, 326 S.E.2d at 421-22. The defense counsel immediately objected to this line of questioning. \textit{Id.}

\textsuperscript{10} The instruction read as follows:

Ladies and gentlemen, a few minutes ago the question was asked about this defendant making a statement, and an objection was made. The objection was sustained, and I instruct you that you are to give that no consideration whatsoever, to the question and any answer. I have ruled that that question and the answer, if there was one, is inadmissible.

284 S.C. at 354, 326 S.E.2d at 422.

\textsuperscript{11} \textit{Id.} at 355, 326 S.E.2d at 422.

chance of reversal on appeal.

Alec Bramlett

II. TESTIMONY OF DEFENDANT'S PRIOR ACTS OF BAD FAITH IS ADMISSIBLE

In United States v. Smith Grading and Paving, Inc.\(^\text{13}\) the Fourth Circuit Court of Appeals examined a direct conflict between rules 404(b)\(^\text{14}\) and 608(b)\(^\text{15}\) of the Federal Rules of Evidence. The court held that rule 404(b) controlled and, consequently, affirmed as proper the trial court's decision to allow the prosecution to admit testimony of the defendant's prior acts of bad faith in rebuttal to the defendant's denial of the acts during cross-examination.\(^\text{16}\)

The criminal proceeding consisted of a six-count indictment against two corporate defendants and the individuals responsible for the company's bid on a sewer project funded by the Farmer's Home Administration. The government alleged a violation of section 1 of the Sherman Act\(^\text{17}\) and contended that the

\begin{footnotes}
\item[14] Rule 404(b) provides:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
\textit{FED. R. EVID.} 404(b).
\item[15] Rule 608(b) provides:
Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
\textit{FED. R. EVID.} 608(b).
\item[16] 760 F.2d at 531.
\end{footnotes}
defendants conspired to rig bids on the project. During cross-examination, one of the individual defendants denied bid-rigging on a project not included in the indictment. The trial court then allowed the prosecution to introduce testimony by a rebuttal witness implicating the defendant in the earlier scheme.\(^{18}\)

On appeal to the Fourth Circuit, the defendants claimed the admission of the prior bid-rigging evidence constituted a violation of rule 608(b), while the government contended the testimony was admissible pursuant to rule 404(b). Initially, the court recognized the applicability of both rules to the situation.\(^{19}\) Rule 608(b) would have rendered the testimony inadmissible because the testimony was extrinsic evidence attacking the defendant's credibility. The testimony would be admissible under rule 404(b) because it was relevant to the defendant's intent and knowledge and was found to be more probative than prejudicial. Confronted squarely with the inherent conflict between the two rules, the court held that the goals and purposes of the rules of evidence would be better served by giving rule 404(b) priority.\(^ {20}\) Thus, the court rejected the defendant's argument.\(^ {21}\)

The court, however, sought to limit the consequence of its holding, recognizing the potential impact of allowing the prosecution to submit evidence of other wrongs through rebuttal testimony. The court firmly stated that rule 404(b) evidence generally should be included in the government's case-in-chief and warned that the burden of inclusion may be greater when the testimony is offered on cross-examination or rebuttal and if the evidence was cumulative or necessary to prove an essential element of the crime charged.\(^ {22}\) Furthermore, the court viewed rule 611(b)\(^ {23}\) as an additional safeguard because it allows a defendant to object when the cross-examination exceeds the scope of the direct examination.\(^ {24}\)

Despite the strict warnings by the court, the impact of *Smith Grading and Paving* cannot be minimized. Admission of evidence of other wrongs, even when accompanied with instruc-

\(^{18}\) 760 F.2d at 530.
\(^{19}\) Id.
\(^{20}\) Id. at 531.
\(^{21}\) Id.
\(^{22}\) Id.
\(^{23}\) FED. R. EVID. 611(b).
\(^{24}\) 760 F.2d at 531.
tions to the jury, greatly increases the risk of conviction because jurors may determine the defendant to be a person of poor character. Another risk is that the jury may convict based on the impression that since the defendant participated in a similar crime, he must also have been involved in the crime in question. These notions are further complicated when the government is allowed the final say through rebuttal testimony.

The Fourth Circuit found that its ruling was consonant with the decisions of the majority of federal circuit courts of appeal that have addressed the conflict. Despite this consensus, a close examination of rule 404(b) illustrates that impeachment is not one of the purposes of the section. This is the result, however, when the government is allowed to utilize rebuttal testimony after the defendant has denied his involvement on cross-examination.

*Smith Grading and Paving* may be far-reaching despite the court’s guidelines. Many courts, in determining whether to admit evidence of uncharged crimes under rule 404(b), have required the prosecution to present “clear and convincing” evidence of the prior act. This burden was not recognized by the Fourth Circuit, but is probably warranted given the inherent difficulties with admitting such evidence during rebuttal testimony.

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25. *Id.* at 530 (citing United States v. Jacobson, 578 F.2d 863 (10th Cir. 1978)); United States v. Batts, 558 F.2d 513 (9th Cir. 1977), vacated, 573 F.2d 599 (9th Cir. 1978), *cert. denied*, 439 U.S. 859 (1978); United States v. Herzberg, 558 F.2d 1219 (5th Cir. 1977).

26. *See, e.g.*, United States v. Wilford, 710 F.2d 439 (8th Cir. 1983); United States v. Wormick, 709 F.2d 454 (7th Cir. 1983); Manning v. Rose, 507 F.2d 889 (6th Cir. 1974).