1978

Credibility of Witnesses

Paul C. Giannelli
Case Western University School of Law, paul.giannelli@case.edu

PUBLIC DEFENDER REPORTER

Vol. 1, No. 5 December, 1978

CREDIBILITY OF WITNESSES

Paul C. Giannelli
Associate Professor of Law, Case Western Reserve University

The witnesses' credibility or worthiness of belief is an important factor in most criminal trials. In some trials, it is the only issue; once the jury has decided which witnesses are credible and which are not, the question of guilt or innocence is easily reached. The common law, supplemented by various statutory enactments, has spawned numerous rules regulating the introduction of evidence of credibility. This article examines those rules.

Typically, lawyers associate "credibility" with "impeachment" — attempts to *diminish* credibility. There are, however, important evidentiary rules regulating attempts to *support* credibility. For example, Ohio has rules governing "bolstering," attempts to support credibility prior to attack, as well as rules governing "rehabilitation," attempts to support credibility after attack. Thus, credibility may be viewed in three stages: bolstering, impeachment, and rehabilitation.

BOLSTERING

Generally, a party may not bolster or support the credibility of its witness until that credibility has been impeached. For example, a witness' favorable reputation for truth and veracity is not admissible in the absence of an attack.

> It is the general rule that a party cannot bolster his witnesses by proving either specific instances of good character relative to truth and veracity or by demonstrating the witness' good general character and reputation for truth and veracity in the community before the witness is affirmatively impeached by the opposing party. *State v. Schecter,* 47 Ohio App. 2d 113, 120-21, 352 N.E. 2d 617, 624 (1974), *aff'd,* 44 Ohio St. 2d 188, 339 N.E. 2d 654 (1975).

Similarly, prior consistent statements are inadmissible prior to attack. *Cf. Cincinnati Traction Co. v. Stephens,* 75 Ohio St. 171, 79 N.E. 235 (1906). (Even after attack such statements are not automatically admissible.)

Two exceptions to the bolstering prohibition are especially important in criminal cases. First, a witness' in-court identification may be bolstered or corroborated by evidence of a prior out-of-court identification, whether it be a lineup, show up, or photographic display. *State v. Lancaster,* 25 Ohio St. 2d 83, 267 N.E. 2d 291 (1971). Such corroborating testimony may be elicited from the eyewitness or from a third party who observed the identification. The prior identification is admissible only for bolstering purposes. The hearsay rule prohibits the substantive use of this evidence. Thus, a third party cannot testify about an out-of-court identification unless an in-court identification has first been made by the eyewitness. This evidentiary rule does not, of course, affect the constitutional requirements relating to the admissibility of pretrial identifications. *See Kirby v. Illinois,* 406 U.S. 682 (1972) (right to counsel); *Manson v. Brathwaite,* 432 U.S. 98 (1977) (due process).

The second exception concerns evidence of fresh complaint in rape and other sex offense trials. In an early case, *Dunn v. State,* 45 Ohio St. 249, 12 N.E. 826 (1887), the Court held that once the alleged victim

> has been sworn and has testified, her declarations in relation to the injury, made immediately after it was inflicted, would be competent in corroboration of her statements made in court . . . [Such complaints] are assumed to be the natural outburst of outraged feelings, and, if made at all, would naturally be made at the first opportunity, while the injury is yet fresh and aggravating. *Id.* at 250-52, 12 N.E. at 828.

Accord, McCombs v. State, 8 Ohio St. 643 (1858); *Johnson v. State,* 17 Ohio 593 (1848). Again, evidence of fresh complaint is admitted to bolster credibility and is otherwise hearsay. *Id.* There are few recent cases on fresh complaint, probably because most fresh complaints would also fall within a hearsay exception, either spontaneous exclamations or res

Public Defender: Hyman Friedman Telephone: (216) 623-7223
Cuyahoga County Public Defender Office, 1200 Ontario Street, Cleveland, Ohio 44113
Editor: Paul C. Giannelli, Associate Professor of Law, Case Western Reserve University
Associate Editors: William Rice, Gloria Rice

Publication of the Public Defender Reporter is made possible by a grant from the Cleveland Foundation. The views expressed herein are those of the author and do not necessarily reflect those of the Public Defender or the Cleveland Foundation.

gestae, and would thus be admitted substantively. Nevertheless, there may be situations in which the complaint is delayed and thus would not fall within the hearsay exception, but would qualify under the bolstering rule because a "sufficient explanation" for the delay is offered. *See State v. Crissman,* 31 Ohio App. 2d 170, 287 N.E. 2d 642 (1971).

IMPEACHMENT: THE VOUCHER RULE

Ohio follows the traditional view of prohibiting a party from impeaching its own witnesses. *State v. Minneker,* 27 Ohio St. 2d 155, 271 N.E. 2d 821 (1971). The rule is based upon the theory that "[w]here a party calls a witness for examination he presents such witness to the court and jury as one whose testimony is to be relied upon . . ." *Thompson v. Kerr,* 39 Ohio L. Abs. 113, 120, 51 N.E. 2d 742, 747 (1942). This rationale is not persuasive because "except in a few instances such as character witnesses or expert witnesses, the party has little or no choice of witnesses. He calls only those who happen to have observed the particular facts in controversy." C. McCormick, Evidence 75 (2d ed. 1972).

There are several limitations on the voucher rule. The rule does not apply when the method of impeachment is specific contradiction; that is, when a second witness contradicts the testimony of a prior witness. *State Auto Mut. Ins. Ass'n v. Friedman,* 34 Ohio App. 551, 171 N.E. 419 (1929), *aff'd,* 122 Ohio St. 334, 171 N.E. 591 (1930).

The rule also does not apply if a party is "surprised" by the witness' testimony. *See State v. Springer,* 165 Ohio St. 182, 134 N.E. 2d 150 (1956); *Hurley v. State,* 46 Ohio St. 320, 21 N.E. 645 (1888); *State v. Johnson,* 112 Ohio App. 124, 165 N.E. 2d 814 (1960). Apparently there is a limitation on the surprise rule. If surprised, a party may use a prior inconsistent statement only to refresh the witness' recollection. *State v. Minneker,* 27 Ohio St. 2d 155, 271 N.E. 2d 821 (1971). Thus, while technically not permitting impeachment, the effect of the surprise rule is impeachment (not refreshment), if the witness refuses to repudiate the in-court testimony.

The voucher rule also does not apply to court-called witnesses. Since the court, and not the parties, calls the witness, neither party has "vouched" for the witness' credibility. The Supreme Court has recently recognized the trial judge's power to call witnesses. *See State v. Weind,* 50 Ohio St. 2d 224, 235-36, 364 N.E. 2d 224, 233 (1977).

The validity of the voucher rule operating to prevent a criminal defendant from impeaching a witness is constitutionally suspect. In *Chambers v. Mississippi,* 410 U.S. 284 (1973), the U.S. Supreme Court held that the combined effect of the state's voucher rule and hearsay exception on declarations against penal interests precluded the admission of critical and reliable defense evidence and thus violated due process. The Court's language leaves little doubt that in the appropriate case the voucher rule itself would violate due process: "The 'voucher' rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges." *Id.* at 298.

Furthermore, proposed Ohio Rule of Evidence 607 would abolish the voucher rule. 51 Ohio B. 191 (1978). Even if the Rules are never accepted by the General Assembly, the Court retains the power to modify the common law by decision, and proposed Rule 607 is evidence of the Court's inclination to do so.

IMPEACHMENT: LINES OF ATTACK

There are generally four lines of attack available to impeach:

1. Bias or interest.
2. Contradiction, either specific contradiction or self-contradiction. The former involves the use of another witness to contradict, while the latter involves the use of the witness' own statements to contradict (prior inconsistent statements).
3. Character for truth and veracity. There are several ways to prove character, not all of which are recognized in Ohio: reputation, opinion, prior conviction, and specific acts not resulting in a conviction.
4. Sensory or mental defects.

At common law, a person's lack of belief in a Supreme Being disqualified the person as a witness. Article I, Section 7 of the Ohio Constitution prohibits the use of religious beliefs as a grounds for disqualification. The use of religious beliefs as an impeachment method is also improper. *See State v. Barger,* 111 Ohio St. 448, 453, 145 N.E. 857, 858 (1924); proposed Ohio R. of Evid. 610; Fed. R. Evid. 610; C. McCormick, Evidence § 48 (2d ed. 1972); 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 610[01] (1977).

Impeachment evidence may be developed either (1) on cross-examination or (2) through extrinsic evidence, testimonial or documentary. Some impeachment techniques condition the admissibility of extrinsic evidence on the laying of a proper foundation during cross-examination. Other techniques prohibit the use of extrinsic evidence. Courts typically address this issue in terms of "collateral matters," although the term is rarely defined. Extrinsic evidence on collateral matters is not permitted.

BIAS OR INTEREST

Bias as an impeachment technique has long been recognized in Ohio. R.C. 2945.42 provides: "Such interest, . . . or relationship may be shown for the purpose of affecting the credibility of such witness." *See also Powell v. Powell,* 78 Ohio St. 331, 85 N.E. 541 (1908); *Allen v. State,* 10 Ohio St. 287 (1859).

There are two broad categories of bias: (1) relationships between a witness and one of the parties, and (2) relationships between a witness and the litigation. A witness' relationship with one of the parties may be favorable, such as family, employment, business, and sexual relationships, or it may be hostile, thus creating a motive for revenge. The most important relationship between a witness and the litigation is a case in which a prosecution witness is offered immunity or a reduced charge in exchange for his testimony against the defendant. Such arrangements are always admis-

sible to show bias. *See State v. Hector,* 19 Ohio St. 2d 167, 249 N.E. 2d 912 (1969); *Keveney v. State,* 109 Ohio St. 64, 141 N.E. 845 (1923).

Evidence of bias or interest is never "collateral;" therefore extrinsic evidence is always admissible to show bias. *See Harper v. State,* 106 Ohio St. 481, 140 N.E. 364 (1922). Moreover, curtailment of a defendant's efforts to establish bias is unconstitutional. In *Davis v. Alaska,* 415 U.S. 308 (1974), the defense attempted to show that a key prosecution witness was a juvenile probationer and therefore had a motive — retention of his probationary status — to testify in a way favorable to the prosecution. The trial judge, based on a state statute, excluded the evidence. The U.S. Supreme Court reversed, finding a violation of the defendant's right to confrontation. Chief Justice Burger observed:

> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. *Id.* at 320.

See also Smith v. Illinois, 390 U.S. 129 (1968); *Alford v. United States,* 282 U.S. 687 (1931).

PRIOR INCONSISTENT STATEMENTS

Substantive Evidence. Ohio follows the traditional view in admitting prior inconsistent statements only for impeachment. Under this view, the prior statement is offered to show the inconsistency between the witness' trial and pretrial statements, and not to show the truth of the assertions contained in the pretrial statement. If offered for the latter purpose, the statement would be hearsay. *McKelvey Co. v. General Casualty Co.,* 166 Ohio St. 401, 142 N.E. 2d 854 (1957); *Kroger Grocery & Baking Co. v. McCune,* 46 Ohio App. 291, 188 N.E. 568 (1933).

Inconsistency Requirement. To be admissible the prior statement must be inconsistent with the witness' trial testimony. The Ohio cases have adopted a liberal view of the inconsistency requirement. If the prior statement can be interpreted in either of two ways, only one of which is inconsistent with the trial testimony, the statement is admissible.

> [If the prior statement] is susceptible of different meanings, one of which would be inconsistent with the truth of such testimony, it is admissible in evidence, leaving the jury to determine which is the true meaning . . . *Dilcher v. State,* 39 Ohio St. 130 (1883).

If the witness' testimony includes material facts that were omitted in the prior statement, the statement is inconsistent. *Spaulding v. Toledo Consolidated St. Ry. Co.,* 20 Ohio Cir. Ct. 99 (1900). Moreover, if the witness claims a lack of memory or knowledge at trial, the prior statement is inconsistent. *Blackford v. Kaplan,* 135 Ohio St. 268, 20 N.E. 2d 522 (1939) (exclusion of prior statement when witness testified "I don't know," "I don't remember," or "I don't believe so" is erroneous). Criminal Rule 16 provides for the inspection of prior statements after the witness has testified on direct examination.

Foundation Requirement. Ohio also follows the traditional view of requiring a foundation as a prerequisite for admitting the prior statement.

> Before a witness can be contradicted by proving statements out of court at variance with his testimony, he must first be inquired of, upon cross-examination, as to such statements, and the time, place and person involved in the supposed contradiction. *King v. Wicks,* 20 Ohio 87 (1851) (syllabus).

Accord, Kent v. State, 42 Ohio St. 426 (1884); *Radke v. State,* 107 Ohio St. 399, 140 N.E. 586 (1923). In *State v. Osborne,* 50 Ohio St. 2d 211, 364 N.E. 2d 216 (1977), the Ohio Supreme Court recently held that a sufficient foundation had been laid by questions attempting to refresh the witness' recollection about the prior statement. Whether Ohio follows the rule in Queen Caroline's case is a matter of dispute. *Compare* R. Markus, Trial Handbook for Ohio Lawyers 124 (1973), *with* Staff Notes, Proposed Ohio R. Evid. 613. Queen Caroline's rule requires a prior written statement to be shown to the witness as part of the foundation. Proposed Ohio Rule 613 would abolish this rule. *See* 51 Ohio B. 195 (1978).

Procedural Aspects. Once an inconsistent statement is introduced, the witness is entitled to an opportunity to explain the apparent inconsistency, *Runyan v. Price,* 15 Ohio St. 1 (1864), and the opposing counsel has the right to inspect the writing, *Bluestein v. Thompson,* 102 Ohio App. 157, 139 N.E. 2d 668 (1957). If the witness admits making the prior statement, it is not error for the trial court to refuse to admit the statement into evidence. *Babbitt v. Say,* 120 Ohio St. 177, 165 N.E. 721 (1929); *Dietsch v. Mayberry,* 70 Ohio App. 527, 47 N.E. 2d 404 (1942). It is also probably not error for the trial court to admit the statement. In *Dorsten v. Lawrence,* 20 Ohio App. 2d 297, 253 N.E. 2d 804 (1969), the court held that "after a proper foundation for impeachment has been laid for the introduction of inconsistent statements of a witness, it becomes necessary to prove them." *Id.* at 305, 253 N.E. 2d at 810.

Collateral Matters. In addition to a proper foundation, the prior statement must *not* relate to a "collateral matter." If the statement does relate to a collateral matter, extrinsic evidence is not permitted. *Byomin v. Alvis,* 169 Ohio St. 395, 159 N.E. 2d 897 (1959); *Kent v. State,* 42 Ohio St. 426 (1884); *Clinton v. State,* 33 Ohio St. 27 (1877). The collateral matter rule only applies to extrinsic evidence; it does not preclude inquiry on cross-examination so long as the inquiry is relevant to impeachment. The tests for collateral matters and relevancy are not synonymous. Although the early cases cite *Attorney-General v. Hitchcock,* 154 Eng. Rep. 38 (1847), as the test for collateral matters, it is probably accurate to say that the test for collateral matters in Ohio is not well-defined. For a discussion of this issue, see C. McCormick, Evidence § 36 (2d ed. 1972); 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 607[06] (1977).

Constitutional Issues. In *Harris v. New York,* 401 U.S. 222 (1971), the U.S. Supreme Court held that statements obtained in violation of the *Miranda* requirements could nevertheless be used for im-

peachment. The Court reaffirmed and perhaps extended *Harris* in *Oregon v. Haas*, 420 U.S. 714 (1975). *See also State v. Lancaster*, 25 Ohio St. 2d 83, 267 N.E. 2d 291 (1971).

Ohio also recognizes impeachment by prior inconsistent acts. *See Dilcher v. State*, 39 Ohio St. 130, 136 (1883) ("Conduct inconsistent with the testimony of a witness, may be shown as well as former statements thus inconsistent.") The U.S. Supreme Court has also had occasion to consider the application of *Miranda* and *Harris* to this method of impeachment. In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Court held that the impeachment use of a defendant's post-arrest silence (conduct) after receiving *Miranda* warnings violated due process.

Character Evidence

The Ohio cases have recognized that a witness' character is relevant for impeachment purposes. *See Bucklin v. State*, 20 Ohio 18 (1851); *French v. Millard*, 2 Ohio St. 45 (1853); *Cowan v. Kinney*, 33 Ohio St. 422 (1878). Only the witness' character for truth and veracity, and not his general character, is relevant. *Schueler v. Lynam*, 80 Ohio App. 325, 75 N.E. 2d 464 (1947). In this context, character is used circumstantially:

> The theory underlying the use of evidence of character or conduct for impeachment purposes is that a person who possesses certain inadequate character traits — as evidenced in a variety of ways including that he acted in a particular way — is more prone than a person whose character, in these respects, is good, to testify untruthfully. It follows from this hypothesis that evidence of his bad character, or conduct is relevant to prove that he is lying. 3 J. Weinstein & M. Berger, Weinstein's Evidence 608-8 (1977).

Character and reputation are not synonymous. "Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait . . ." C. McCormick, Evidence 462 (2d ed. 1972). Reputation, on the other hand, is what a community collectively thinks about a person's character. Thus, reputation, along with opinion and specific acts, is a way of proving character.

Character: Proof by Reputation and Opinion Evidence

A witness' poor reputation for truth and veracity is admissible for impeachment purposes. *Cowan v. Kenney*, 33 Ohio St. 422 (1878); *Bucklin v. State*, 20 Ohio 18 (1851). The witness' reputation at the time of trial is the critical period. *Radke v. State*, 107 Ohio St. 399, 140 N.E. 586 (1923). The offering party must lay a foundation establishing the impeaching witness' qualifications to express an opinion about the reputation in the community. *Radke v. State, supra; State v. Rivers*, 50 Ohio App. 2d 129, 361 N.E. 2d 1363 (1977). The impeaching witness may also state whether he would believe the witness sought to be impeached under oath. *Hillis v. Wylie*, 26 Ohio St. 574 (1875).

The use of *opinion* evidence to prove character, on the other hand, is prohibited. *Bucklin v. State, supra; Cowan v. Kinney, supra*. The general prohibition of opinion evidence has been criticized by the commentators. *See* 7 J. Wigmore, Evidence § 1986 (3d ed. 1940); C. McCormick, Evidence § 44 (2d ed. 1972). Proposed Ohio Rule 608(A), following the Federal Rules of Evidence, would permit opinion evidence to prove character. *See* 51 Ohio B. 191 (1978).

Character: Proof by Prior Conviction

Prior convictions are admitted to impeach on the theory that a conviction evidences a defect of character and a person with such a character defect is more likely to be untruthful than a person without such a character defect. The theory has obvious flaws. A conviction for "driving while under the influence" reveals very little about a person's character for veracity, although it may reveal other things about that person's character. Nevertheless, the Ohio Supreme Court in interpreting R.C. 2945.42, has held that any conviction, misdemeanor or felony, is admissible for impeachment purposes. *State v. Murdock*, 172 Ohio St. 221, 174 N.E. 2d 543 (1961). The Court has also held, however, that an ordinance violation is not a "crime" within the meaning of R.C. 2945.42 and thus cannot be used to impeach. *State v. Arrington*, 42 Ohio St. 2d 114, 326 N.E. 2d 667 (1975); *Harper v. State*, 106 Ohio St. 481, 140 N.E. 364 (1922); *Coble v. State*, 31 Ohio St. 100 (1876). Proposed Ohio Rule of Evidence 609 suggests that the Court may be willing to limit *Murdock*. Under Rule 609(A) misdemeanors would only be admissible if they involve "dishonesty or false statements." In addition, Rule 609(B) would generally preclude the use of convictions over 10 years old. *See* 51 Ohio B. 192 (1978). Although Ohio has several expungement provisions, R.C. 2953.31-36, an expunged conviction may nevertheless be used for impeachment. R.C. 2953.32(E).

Juvenile Adjudications. The use of juvenile adjudications as impeachment evidence is controlled by R.C. 2151.358. It provides:

> The disposition of a child under the judgment rendered or any evidence given in court is not admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of such child may be considered by any court only as to the matter of sentence or to the granting of probation.

Thus, juvenile adjudications are generally inadmissible for impeachment. There is, however, one important exception. In *State v. Cox*, 42 Ohio St. 2d 200, 327 N.E. 2d 639 (1975), the Supreme Court held that the statute could not prevent a defendant from impeaching a key government witness.

> Although the General Assembly may enact legislation to effectuate its policy of protecting the confidentiality of juvenile records, such enactment may not impinge upon the right of a defendant in a criminal case to present all available, relevant and probative evidence

which is pertinent to a specific and material aspect of his defense. *Id.* at 204, 327 N.E. 2d at 642.

See also Davis v. Alaska, 415 U.S. 308 (1974) (juvenile probationary status admissible to show bias notwithstanding state statute). In addition to the impeachment exception recognized in *Cox,* the courts have permitted evidence of juvenile adjudications to be introduced to rebut evidence of good character. *See State v. Marinski,* 139 Ohio St. 559, 41 N.E. 2d 387 (1942); *State v. Hale,* 21 Ohio App. 2d 207, 256 N.E. 2d 239 (1969).

Unconstitutional Convictions. In *Loper v. Beto,* 405 U.S. 473 (1972), the U.S. Supreme Court held that the impeachment use of a conviction in which the defendant was denied the right to counsel violated due process. The right to counsel violation in *Loper* was based upon *Gideon v. Wainwright,* 372 U.S. 335 (1963). *Gideon* was subsequently extended in *Argersinger v. Hamlin,* 407 U.S. 25 (1972), to any criminal trial in which imprisonment is imposed. This is an important development for a jurisdiction such as Ohio which permits the use of misdemeanor convictions. Once the validity of the prior conviction is raised, the prosecution has the burden of establishing that the right to counsel requirements were met. *U.S. v. Lewis,* 486 F. 2d 217 (5th Cir. 1973).

Indictments and Arrests. Evidence that a witness has been indicted or arrested may not be used to impeach if that evidence is offered only to show the witness' bad character. If, however, the impeachment theory is bias, such evidence would be admissible. *See State v. Hector,* 19 Ohio St. 2d 167, 249 N.E. 2d 912 (1969); *Keveney v. State,* 109 Ohio St. 64, 141 N.E. 845 (1923).

Character: Specific Acts Not Resulting in a Conviction

A person's conduct will reveal many aspects of that person's character. For example, a person who intentionally falsifies an income tax return, a welfare application, or some other document, has revealed something about his or her character for truth and veracity. If they are convicted for these acts, the conviction may be used for impeachment. But may the act still be used to show the witness' character for truth and veracity in the absence of a conviction? The Ohio cases are unclear. In a 1950 case, *Fawick Airflex Co. v. United Elec., Radio & Machine Workers,* 56 Ohio L. Abs. 419, 92 N.E. 2d 431 (1950), the Court of Appeals for the Eighth District observed:

> It has long been the law of this state that a witness on cross-examination may be asked questions tending to disclose his own character and may be interrogated on specific acts . . . in his past life if they have a legitimate bearing upon his credit as a witness. *Id.* at 421, 92 N.E. 2d at 433.

In 1974, however, the same court declared in *State v. Schecter,* 47 Ohio App. 2d 113, 352 N.E. 2d 617 (1974), *aff'd,* 44 Ohio St. 2d 188, 339 N.E. 2d 654 (1975):

> A witness can never be impeached through evidence of specific instances of bad character whether related to truthfulness or otherwise. *Id.* at 121, 352 N.E. 2d at 624.

Its 1950 decision was not mentioned, instead the court relied on *Brice v. Samuels,* 59 Ohio App. 9, 17 N.E. 2d 280 (1938), a 1938 decision by the Court of Appeals for the First District. *Brice* held impeachment by specific instances of conduct on cross-examination improper:

> [W]e know of no rule under which specific acts of wrongdoing may be admitted to affect the credibility of a witness. *Id.* at 14, 17 N.E. 2d at 282.

Authority for a different rule from the First District, however, could have been found in *State v. Browning,* 98 Ohio App. 8, 128 N.E. 2d 173 (1954), decided in 1954. In *Browning* the First District overturned a conviction because the defense was not permitted to impeach a prosecution witness through instances of misconduct — episodes of drunkeness and false accusations:

> Evidence of . . . habits of sobriety . . . associations in life, similar accusations, and general habits in general could be quite pertinent as reflecting on [the witness'] credibility . . . *Id.* at 14, 128 N.E. 2d at 176.

Moreover, the impeachment technique in *Browning* involved proof by extrinsic evidence as well as evidence developed on cross-examination. Thus, there may be three different rules in Ohio: (1) specific instances of conduct are inadmissible — *Brice* and *Schecter;* (2) specific instances of conduct may be raised on cross-examination — *Fawick Airflex Co.;* and (3) specific instances may be proved by extrinsic evidence as well as raised on cross-examination — *Browning.* Proposed Ohio Rule of Evidence 608(B) would permit specific instances to be raised on cross-examination under certain circumstances. *See* 51 Ohio B. 191-92 (1978).

The impeachment rule on specific acts not resulting in a conviction should be distinguished from the rule governing the use of character evidence on the merits. A criminal defendant may introduce evidence of his good character in order to show that a person with such a character is unlikely to have committed the charged offense. Once the defendant has "opened the door," the prosecution may rebut by offering evidence of the defendant's bad character. The prosecution, however, must generally use reputation evidence to prove character. Specific instances of conduct not resulting in a conviction are prohibited. *State v. Cochrane,* 151 Ohio St. 128, 84 N.E. 2d 742 (1949). Prohibiting the use of specific acts in this context does not necessarily mean that they are prohibited in the impeachment context. *Compare* proposed Ohio R. Evid. 405(A), *with* proposed Ohio R. Evid. 608(B).

Sensory or Mental Defects.

This last impeachment category is extremely broad.

Any deficiency of the senses, such as deaf-

> ness, or color blindness or defect of other senses which would substantially lessen the ability to perceive the facts which the witness purports to have observed, should of course be provable to attack the credibility of the witness, either upon cross-examination or by producing other witnesses to prove the defect. C. McCormick, Evidence 93 (2d ed. 1972).

The following Ohio cases are illustrative: *Morgan v. State,* 48 Ohio St. 371, 27 N.E. 710 (1891) (opportunity to observe); *Village of Shelby v. Clagett,* 46 Ohio St. 549, 22 N.E. 407 (1889) (intelligence); *Lee v. State,* 21 Ohio St. 151 (1871) (recollection); *Stewart v. State,* 19 Ohio 302 (1850) (opportunity to observe); *Johnson v. Knipp,* 36 Ohio App. 2d 218, 304 N.E. 2d 914 (1973) (intoxication); *State v. Snell,* 2 Ohio NP 55, 5 Ohio Dec. 670 (1893) (age).

Impeachment: Expert Witnesses

An expert witness may be impeached by the same methods used to impeach lay witnesses. *E.g., Hoover v. State,* 91 Ohio St. 41, 109 N.E. 626 (1914) (expert impeached with prior inconsistent statement.) There is, however, one method of impeachment that applies only to expert witnesses. A treatise recognized as a standard authority may be used for impeachment purposes. *See Piotrowski v. Corey Hospital,* 172 Ohio St. 61, 173 N.E. 2d 355 (1961); *Hallworth v. Republic Steel Corp.,* 153 Ohio St. 349, 91 N.E. 2d 690 (1950); *Lambert v. Dally,* 30 Ohio App. 2d 36, 281 N.E. 2d 857 (1972). The treatise is admissible only to test credibility, and it cannot be used substantively. In addition, there is language in the *Hallworth* opinion which would limit the use of learned treatises, even for impeachment purposes, to treatises acknowledged as standard works *by the witness:*

> If Dr. Kramer denied that he had known about this particular book, it is difficult to see how his further cross-examination with regard to the book would be proper at all. *Id.* at 356, 91 N.E. 2d at 694.

Proposed Ohio Rule of Evidence 803(18), on the other hand, carves out a hearsay exception for learned treatises as well as permits the reliability of the treatise to be established "by the testimony or admission of the witness or by other expert testimony or by judicial notice." 51 Ohio B. 200 (1978).

Rehabilitation

Once impeachment evidence has been introduced, rebuttal evidence tending to rehabilitate the witness' credibility may be admitted. The rebuttal evidence must respond to the impeaching evidence.

> The rehabilitating facts must meet a particular method of impeachment with relative directness. The wall, attacked at one point, may not be fortified at another and distinct point. C. McCormick, Evidence 103 (2d ed. 1972).

Once a witness' character for truth and veracity has been attacked, evidence tending to show that the witness enjoys a good reputation for truth and veracity is admissible. *Webb v. State,* 29 Ohio St. 351 (1876).

If the method of attack involves evidence of a prior inconsistent statement, evidence of prior *consistent* statements are generally inadmissible. The theory underlying this rule is stated in *Cincinnati Traction Co. v. Stephens,* 75 Ohio St. 171, 79 N.E. 235 (1906):

> [Prior consistent statements] could not tend to rehabilitate the damaged reputation of the witness for veracity, in any degree, to show that the witness had repeated a hundred times the later story which she now gave on the trial. The contradiction still would remain, and it would remain unexplained, notwithstanding the fact of repetition. *Id.* at 182, 79 N.E. at 237.

If, however, the prior statement is offered to rebut a charge of recent fabrication or improper influence, it may be admissible. *See* C. McCormick, Evidence 105 (2d ed. 1972); *cf.* proposed Ohio R. Evid. 801(D)(1)(b). *See also Shellock v. Klempay,* 167 Ohio St. 279, 148 N.E. 2d 57 (1958).

References

C. McCormick, Evidence 66-108 (2d ed. 1972); 3 J. Weinstein & M. Berger, Weinstein's Evidence 607-1 to 609-04 (1977); R. Markus, Trial Handbook for Ohio Lawyers 97-101, 123-27, 130 (1973); J. Hurd & B. Long, Ohio Trial Evidence 418-20,427-31, 435-44 (1957); Ohio Legal Center Institute, Pub. No. 105, Evidence in Ohio, ch. 6 (1978).

RECENT DEVELOPMENTS

Motions in Limine

The growing importance of motions in limine is highlighted by the addition of a new section on the subject in the 1978 pocket supplement to McCormick on Evidence. C. McCormick, Evidence 17 (1978 Supp. 2d ed. 1972). *See also State v. Spahr,* 47 Ohio App. 2d 221, 353 N.E. 2d 624 (1976); Rothblatt & Leroy, The Motion in Limine in Criminal Trials, 60 Ky. L.J. 611 (1972); Davis, Motions in Limine, 16 Clev-Marshall L. Rev. 255 (1966).

Law Reviews

Comment, Shifting the Burden of Proving Self-Defense — With Analysis of Related Ohio Law, 11 Akron L. Rev. 717 (1978); Liability of an Aider and Abettor for Aggravated Murder in Ohio; *State v. Lockett,* 39 Ohio St. L.J. 214 (1978); Note, the Sixth Amendment Right To Have Use Immunity Granted to Defense Witnesses, 91 Harv. L. Rev. 1266 (1978); Note, Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communication Privileges, 30 Stan. L. Rev. 935 (1978).

Silence as Impeachment

After being read his rights upon arrest, the defendant made several statements to the police; he then refused to say more until he could talk to an attorney. At the defendant's trial for attempted murder, the prosecutor commented repeatedly on the defendant's post-arrest silence. A strong curative instruction to the jury was not given by the trial judge. The Court of Ap-

peals held that "[a]n accused cannot be held to waive his *Miranda* rights by beginning to speak." The prosecutor's questions and comments were improper and constituted plain error. *State v. Bailey,* No. 37534, Cuyahoga Cty. Ct. App. (1978).

Theft Statute — Recidivist Provision

Defendant was convicted of grand theft under R.C. 2913.02 (B). That statute provides that a second theft conviction may be treated as grand theft, regardless of the value of the stolen property. At the time of trial, the defendant was awaiting sentencing for a prior theft offense. The Court of Appeals held that without a judgment of conviction setting forth the plea, the verdict, and the sentence, signed by the judge and entered upon the journal of the court, there had been no conviction within the meaning of the statute. Since there was no prior theft conviction, defendant's motion to reduce the charge against him to petty theft should be granted. *State v. Henderson,* No. 37316, Cuyahoga Cty. Ct. App. (1978).

Waiver of Pre-sentence Psychiatric Examination

During plea-bargaining, the defendant waived his right to a pre-sentence psychiatric examination under R.C. 2947.25. He was subsequently sentenced to the penitentiary. The purpose of R.C. 2947.25, according to the Court of Appeals, is to assist the trial court in determining whether to sentence an offender to a penal institution or to a hospital for treatment. "Neither the defendant, his trial counsel, nor the court is competent to determine whether the accused is mentally ill or deficient. . . . [T]he examination is part of the sentencing process and may not be waived by the defendant or his counsel." Thus, the lack of psychiatric examination invalidated the sentence. *State v. Lee,* 56 Ohio App. 2d 57 (1977).

Validity of Guilty Plea

Under Ohio Crim. R. 11(c)(2) a trial court must inquire as to whether a defendant voluntarily entered a plea of guilty with an understanding of the nature of the charge and of the consequences of his plea. Failure of the trial court to make these inquiries in full compliance with Crim. R. 11(c)(2) is reversible error. *State v. Hawk,* 55 Ohio App. 2d 231 (1977).

Motion for Acquittal

When a jury is unable to reach a verdict in a criminal trial, the court may grant a motion of acquittal. In doing so, it should exercise judicial discretion, considering all matters which transpired during the trial and any other factors which may have influenced the jury. The court should also consider the probability that other juries would also be unable to agree. *State v. Norwood,* 55 Ohio Misc. 19 (1977).

Breaking and Entering for Eavesdropping

The Sixth Circuit disagreed with other federal circuits' interpretation of Title III. The Court rejected the arguments that Title III impliedly authorizes break-ins to install eavesdropping equipment, or that federal judges have inherent power to authorize such break-ins. Breaking and entering affects property and personal interests, and "so aggravate the circumstances of the search and go so far beyond what is encompassed in the scope of the eavesdrop statute, that an eavesdrop executed in this manner is an unreasonable search." The Court held that no statute authorizes such conduct, and Article III of the Constitution and the reasonableness clause of the Fourth Amendment "prevent federal judicial and law enforcement officers from authorizing or engaging in such conduct in the absence of statutory authority." *U.S. v. Finazzo,* 23 Crim. L. Rep. 2501 (6th Cir. 1978).

Warrantless Search of Suitcase

A warrantless search of the defendants' suitcase, located on the floor of their automobile, was made at the time of arrest. The Eighth Circuit held that "an individual's expectation of privacy in the contents of luggage — which was established by the Supreme Court in [*U.S. v. Chadwick,* 433 U.S. 1 (1977] — is entitled to the protection of the Fourth Amendment whether the luggage is located inside or outside the automobile." The automobile exception to the warrant requirement does not apply to the facts of this case. Since the defendants were under arrest, a warrant was required for a search of their luggage. No exigent circumstances existed to waive this requirement. Therefore, marijuana found in the suitcase must be suppressed. *U.S. v. Stevie,* 23 Crim L. Rep. 2489 (8th Cir. 1978).

Pretext Arrests

Police used outstanding traffic warrants as a pretext to arrest a drug suspect. A subsequent search of his car turned up a bag of marijuana. The Court stated that "since a pretext arrest is per se illegal, evidence obtained as a result of that arrest is inadmissible." Thus, the marijuana should have been suppressed as the fruit of an illegal arrest. *State v. Hoven,* 23 Crim. L. Rep. 2464 (Minn. Sup. Ct. 1978).

Warrantless Electronic Eavesdropping

Although the warrantless electronic recording of a conversation in which one party has agreed to be "bugged" is proper under the Fourth Amendment, *U.S. v. White,* 401 U.S. 745 (1971), it violates the Montana Constitution. "A state is free as a matter of its own law to impose greater restrictions on police activity than those that the United States Supreme Court holds to be necessary upon federal constitutional standards." Article II, section 10, of the Montana Constitution provides that the right of individual privacy "shall not be infringed without the showing of a compelling state interest." Absent such showing, evidence acquired through electronic monitoring must be suppressed. *State v. Brackman,* 23 Crim. L. Rev. 2487 (Mont. Sup. Ct. 1978).

Pretrial Incarceration Credit

Prior to his trial for murder and attempted armed robbery, the defendant was incarcerated for six months because of his inability to post bail. He was sentenced to consecutive life and fifteen year sentences. The Wisconsin Supreme Court held that the equal protection clause requires that time spent in pretrial incarceration be credited to the time served on a life sentence to determine eligibility for parole.

Wilson v. State, 264 N.W. 2d 234 (Wis. 1978).

Nondisclosure of Material Evidence

The defendant was tried and convicted of robbery. The prosecution failed to disclose, upon the defense's request, that two of the state's eyewitnesses had initially misidentified one of the robbers. The Court held that this information was material enough to raise a reasonable doubt in the jury's minds, as to both the witnesses' trial identification of the defendant and the strength of the state's case. This nondisclosure of material evidence denied defendant a fair trial. *State v. Falkins,* 356 So. 2d 415 (La. 1978).

Prejudicial Remarks by Prosecutor

In his closing summation to the jury, the prosecuting attorney expressed his own personal opinion about the defendant's guilt. These remarks were found to be prejudicial and may have denied the defendant a fair trial. The statements could have constituted grounds for a mistrial if defendant's counsel had objected. Defense counsel's failure to object amounted to ineffective assistance of counsel, and therefore a new trial was granted. *Commonwealth v. Evans,* 387 A.2d 854 (Pa. 1978).

Severance

The trial court had been notified of a potential conflict between the two defendants. The conflict developed as the defendants presented their cases, prejudicing both defendants. The Court of Appeals held that when the rights of at least one of the defendants will be prejudiced by a joint trial and the trial court has notice of the conflict, denial of a motion to sever is prejudicial error. *People v. Webb,* 266 N.W 2d 483 (Mich. Ct. App. 1978).

Speedy Trial

There was a twenty-two month delay between the defendant's arrest and the preliminary hearing, and another five-month delay between the hearing and trial. None of the delay was attributable to the defendant. Moreover, he objected to every continuance sought by the state, and made a timely assertion of his right to a speedy trial. The burden is on the state to show that any delay is justifiable. Defendant's failure to make an evidentiary showing of prejudice to his defense does not destroy his claim. "Finding that his claim was timely asserted, that the delay was inordinate, and that the delay was justified by no constitutionally sufficient reason, we hold that defendant was denied his constitutional right to a speedy trial." *Fowlkes v. Commonwealth,* 240 S.E. 2d 662 (Va. 1978).

False Affidavit

The U.S. Supreme Court has refused to suppress evidence obtained through a search warrant issued upon a false affidavit, unless the misstatements are intentional and would affect probable cause. *Franks v. Delaware,* 98 S. Ct. 2674 (1978). The California Supreme Court, interpreting its own constitution, has reached a different result. Evidence should be suppressed whenever a false statement is deliberately included in the affidavit, whether or not the statement was necessary to the finding of probable cause. *People v. Cook,* 24 Crim. L. Rep. 2004 (Cal. Sup. Ct. 1978).

Stipulation May Require Rule 11 Inquiry

The defendant originally pled guilty, but his plea was denied when the trial judge discovered that the defendant was not satisifed with his counsel. Later, after pleading not guilty, the defendant stipulated to facts which were "tantamount to a guilty plea." On appeal, the Court held that when a defendant stipulates to facts which are in effect an admission of guilt, the trial court must ensure that the defendant understands the consequences. However, since defendant had been carefully questioned in a Rule 11 procedure earlier in the trial, his appeal was denied. *Glenn v. U.S.,* 23 Crim. L. Rep. 2562 (D.C. Cir. 1978).

Illegal Stop Taints Consent

Police officers stopped and detained the defendant without probable cause. During his detention the defendant consented to a search of his car. As a result the police discovered a quantity of marijuana. The Court held that the marijuana should be suppressed because the illegal stop and detention fatally tainted the defendant's consent. *State v. Wrightson,* 23 Crim. L. Rep. 255 (Del. Sup. Ct. 1978).

Victim's Character

The Connecticut Supreme Court has adopted the majority rule that a homicide victim's violent character may be used to support a self-defense claim that the victim was the aggressor. The Court further held that prior convictions for violent crimes could be used to prove the victim's character. Such evidence may be used even if the defendant knew nothing of the victim's violent character at the time of the incident. *State v. Miranda,* 24 Crim. L. Rep. 2008 (Conn. Sup. Ct. 1978).

Right to Confrontation of Experts

Defendant was denied his right of confrontation when a medical report, in which five of six psychiatrists declared him "competent," was admitted into evidence. Only two of the five doctors subsequently testified at trial. "This was critical evidence of a testimonial nature, pertaining directly to appellant's ultimate 'guilt', that could, and should, have come viva voice — from the mouths of the witnesses in court, where, under the watchful eye of the jury, they could have been cross examined . . ." *Gregory v. State,* 24 Crim. L. Rep. 2014 (Md. Ct. Spec. App. 1978).