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Evidence - Character Testimony - Impeachment Through Reference to Prior Specific Acts of Defendant

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EVIDENCE—CHARACTER TESTIMONY—IMPEACHMENT THROUGH REFERENCE TO PRIOR SPECIFIC ACTS OF DEFENDANT—Defendant, on trial for arson, presented a character witness who testified that defendant's reputation in the community was good. During cross-examination the prosecutor asked if the witness had heard that defendant had been arrested for or convicted of various specific crimes in other states.[1] No objection was made by the defense, and the trial judge took no action. The witness answered no to each question, and subsequently a jury verdict of guilty was returned. On appeal, *held,* reversed and remanded, three judges dissenting. Failure of the trial judge, before allowing such cross-examination, to ascertain on his own motion and out of the presence of the jury the actuality of the arrests or convictions,[2] the time of their occurrence and their relevance to the question of reputation, and the failure of the trial judge properly to instruct the jury to limit its consideration of the prosecutor's questions solely to the weight of the character testimony deprived defendant of a fair trial. *People v. Dorrikas,* 354 Mich. 303, 92 N.W. (2d) 305 (1958).

Generally in a criminal trial the prosecution may not initially attack

[1] Although no distinction is ordinarily drawn between convictions and charges which resulted in acquittal, a line is sharply drawn between general community opinion regarding the defendant and the personal knowledge of the witness. Thus the form of inquiry "Have you heard?" is generally allowed, while "Do you know?" is not. See, e.g., Comi v. State, 202 Md. 472, 97 A. (2d) 129 (1953); Stewart v. United States, (D.C. Cir. 1939) 104 F. (2d) 234.

[2] The determination as to the truth of the arrests or convictions would seem to be directed at preventing the prosecution from casting aspersions on the defendant's reputation by the use of hypothetical questions. See State v. Cyr, 40 Wash. (2d) 840, 246 P. (2d) 480 (1952); Gallagher v. State, 81 Okla. Crim. 15, 159 P. (2d) 562 (1945).

the defendant's character or reputation,[3] although the defendant may introduce evidence of his good character.[4] If the defendant thus chooses to place his reputation in issue, the prosecution may cross-examine the character witness to determine whether he is sufficiently well acquainted with the defendant's reputation to make an evaluation of it and to assess the witness' standard of evaluation. The great weight of authority allows the prosecution in so doing to refer to reports of particular acts of past misconduct by the defendant.[5] The principal case well illustrates the inextricable position in which such questions place a character witness. By denying that he has heard of the previous misconduct, the witness indicates that the extent of his knowledge is insufficient to make him a reliable reporter of community opinion. On the other hand, an admission that he has heard such rumors suggests that his notion of good reputation is so peculiar that his testimony is not entitled to much weight. Confronting the witness with this dilemma would seem reasonable so long as the currency of the rumors in the community is likely. The existence of this likelihood might be revealed through an examination by the trial judge into the time, place, and nature of the derogatory incidents. But this precaution does not solve the more vital problem of restraining the jury from considering these references as substantive proof of the defendant's guilt. The need for such a check is supposedly fulfilled by the kind of limiting instruction required in the principal case. Yet Wigmore has taken the position that such an instruction fails to accomplish its intended purpose.[6] Indeed, it is difficult to imagine that cautionary words from the trial judge would dispel the impression that has most likely become imbedded in the jurors' minds. Moreover, it seems unrealistic to suppose that the average juror will not be influenced by the disparaging

[3] A discussion of the rule appears in the leading case of State v. LaPage, 57 N.H. 245 at 299 (1876). See also 1 WIGMORE, EVIDENCE, 3d ed., §§55, 57 (1940).

[4] 1 WIGMORE, EVIDENCE, 3d ed., §56 (1940).

[5] E.g., Moulton v. State, 88 Ala. 116, 6 S. 758 (1889). See cases cited in 47 A.L.R. (2d) 1264-1270 (1956). For the few jurisdictions following the minority "Illinois" view, limiting the inquiry to offenses quite similar to the one of which defendant is accused, see cases cited in 47 A.L.R. (2d) 1270-1274 (1956). In view of the rule disallowing the prosecution initially to attack the defendant's reputation, this line of cross-examination has been challenged as unjustified. "But if the rule is sound which allows the accused to show his good repute . . . it not only is anomalous, it is highly unjust, to exact, as the price for his doing so, throwing open to the prosecution the opportunity not only to rebut his proof but to call in question almost any specific act of his life or to insinuate without proving that he has committed other acts, leaving him no chance to reply." Dissenting opinion of Justice Rutledge, Michelson v. United States, 335 U.S. 469 at 493 (1948).

[6] "The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct as a fact upon the other person, and thus . . . it violates the fundamental rule of fairness that prohibits the use of such facts." 3 WIGMORE, EVIDENCE, 3d ed., §988 (1940). See also Michelson v. United States, note 5 supra, at 481, n. 18.

references when determining guilt. The potential prejudice caused by these inquiries is not obviated by preventing the use of hypothetical questions or by any other method of testing the prosecution's good faith,[7] for it is the effect of these inquiries and not their purpose which is objectionable. Nor does leaving the admissibility of such questions to the discretion of each individual trial judge afford a complete solution.[8] It would seem that the only effective way to eliminate a source of prejudice which has been firmly rooted in the law for over a century[9] would be to foreclose in this setting the entire line of inquiry concerning specific incidents in the defendant's past. The principal case, in placing additional restrictions on the use of such questions, seems to indicate at least a partial retreat from the traditional view.[10]

An unwillingness to reject this practice completely is perhaps engendered by a fear of allowing the defendant to gain an unwarranted advantage in the use of character testimony. But forbidding the prosecution to mention details of derogatory incidents in the defendant's life would still leave adequate means for testing the credibility of character testimony: (1) the extent of the witness' knowledge of the defendant's reputation could be determined by probing the sources of his information;[11] (2) the purpose of the cross-examination would be as well served by asking the witness whether he has heard "any" rumors of misconduct as it would by making specific references to various crimes; and (3) the trial judge could exclude the character testimony if it is obviously unfounded. With these alternative

[7] The bad faith of the prosecution has received much discussion, but is rarely a ground for reversal. See cases cited in 71 A.L.R. 1541-1543 (1931). That establishing such bad faith may be an impossible task is suggested by State v. McDonald, (Mo. 1921) 231 S.W. 927.

[8] See Justice Frankfurter's concurring opinion in Michelson v. United States, note 5 supra, at 487, suggesting that the questions should be allowed in the discretion of the trial judge.

[9] Rex v. Wood, 5 Jur. 225 (1841) stands as the initial case in this area.

[10] Inasmuch as defendant raised no objection to the questions of the prosecutor on the trial of the principal case, it may appear that the Michigan court has in effect established a responsibility on the part of trial judges to interpose on their own motion a preliminary objection to this type questioning when none is made by counsel, in order to provide a sufficient basis for appeal. In previous decisions, however, this court has not hesitated to reverse a conviction because of improper examination of a witness even though no objection was made at the trial. See People v. Kelsey, 303 Mich. 715, 7 N.W. (2d) 120 (1942) (prosecutor made bad faith insinuations of prior crimes); People v. Holmes, 292 Mich. 212, 290 N.W. 384 (1940) (question suggesting prior offense similar to that charged against defendant). Some courts, however, seem to show no disposition to regard the admission of such questions as reversible error on appeal when no objection is raised at the trial. See, e.g., Williams v. United States, (4th Cir. 1954) 218 F. (2d) 276; Wright v. Commonwealth, 267 Ky. 441, 102 S.W. (2d) 376 (1937).

[11] In Viliborghi v. State, 45 Ariz. 275, 43 P. (2d) 210 (1935), it was held that the prosecution's questions must be confined to the sources of the witness' knowledge and what he has heard from such sources. References to details of particular rumors were not allowed.

modes of rebuttal available, the desirability of adhering to a customary rule of evidence would seem to be overborne by the need to insure fundamental fairness in criminal trials.[12]

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[12] See the discussion in the dissenting opinion of Justice Rutledge, Michelson v. United States, note 5 supra, beginning at 488.