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Cross-Examination of Defendant's Character Witnesses

Stanley H. Levin

Cross-Examination of Defendant's Character Witnesses

In *Michelson v. United States*,[1] which involved a trial for bribing a federal revenue agent, the prosecution, knowing of defendant's prior arrests and convictions, cross-examined the defendant's character witnesses to determine whether they had taken into account rumors or reports of the defendant's involvement in these prior matters in evaluating his character. The character witnesses were asked whether they had ever heard that on a specified date the defendant had been arrested[2] for receiving stolen goods.[3] The United States Supreme Court upheld the defendant's conviction in the face of a claim by defense counsel that the question asked in cross-examining the character witnesses was improper and prejudicial to the defendant. In very comprehensive majority and dissenting opinions the problem of the proper scope of cross-examination of defense character witnesses was presented.

There appears to be three different views as to the extent that a defense character witness may be cross-examined in an attempt to show the basis of his evaluation of the defendant's character.[4] First, and most liberal, is the rule applied in the federal courts and a large majority of the state courts[5] that the prosecution may test the character witness' qualifications to give testimony as to the community opinion by asking about reports of any acts of misconduct which tend to disprove a defendant's claim of "being a law-abiding citizen."[6] The second view is the so-called "Illinois rule" which places a further limitation on the scope of the questions, namely, that they "must relate to offenses similar to those for which the

1 325 U.S. 469 (1948).

2 According to the overwhelming weight of authority a character witness may be cross-examined as to an arrest whether or not it culminated in a conviction; *see* Mannix v. United States, 140 F. (2d) 250 (C.C.A. 4th, 1944); Josey v. United States, 135 F. (2d) 809 (App. D. C., 1943); Spalitto v. United States, 39 F. (2d) 782 (C.C.A. 8th, 1930). This rule should not be confused with the one which prohibits cross-examination as to credibility by asking a witness whether he himself has been arrested.

3 It is to be noted that the trial court asked the prosecutor, out of the presence of the jury, "Is it a fact according to the best information in your possession that Michelson was arrested for receiving stolen goods?" Counsel replied that it was, and to support his good faith exhibited a paper record which defendant's counsel did not challenge. 69 S. Ct. 213, 216. It is held to be improper, on cross-examination of the defendant's character witnesses, to propound a hypothetical question which assumes that the defendant has been guilty of certain other misconduct, where there is no evidence therof. Filippelli v. United States, 6 F. (2d) 121 (C.C.A. 9th, 1925) (question assumed prior arrests); *see* State v. Shull, 131 Ore., 224, 282 Pac. 237, 71 A. L. R. 1498 (1929).

4 This does not include the North Carolina view that while questioning of character witnesses, both in chief and on cross-examination, must be limited to the general character of the accused and not extended to specific acts (State v. Hairston, 121 N. C. 579, 28 S. E. 492 (1897); State v. Nance, 195 N. C. 47, 141 S. E. 468 (1928)), it is proper to permit character witnesses to answer in what respect the character is good or bad, since one or two instances of misconduct do not give a person a totally bad character. State v. Hairston, 121 N. C. 579, 28 S. E. 492 (1897); State v. Daniel, 87 N. C. 507 (1882).

5 See cases collected in 71 A. L. R. 1504 (where decisions of the federal courts and some 32 state courts show agreement with the ruling in the Michelson case).

6 The rule against questioning a defense character witness about prior acts of misconduct of the defendant must be distinguished from the one which permits evidence of prior convictions of infamous crimes to be introduced to discredit a witness. Ill. Rev. Stat. (1947) c. 38, §734. Wigmore Evidence (3rd ed., 1940) §987 (indicating the various rules in American jurisdictions on the introduction of prior convictions to discredit witnesses).

defendant is on trial."[7] The third and strictest rule is the one championed by Justice Rutledge in his dissent in the *Michelson* case,[8] the "fair-play rule" which would place the same limits upon the cross-examination by the prosecution as are placed upon the defense in the direct examination of a character witness.[9] According to this view the entire line of inquiry concerning specific acts in the defendant's past would be foreclosed, both on cross-examination of witnesses to good character and on new evidence introduced in rebuttal.

While the decisions give an overwhelming numerical superiority to the federal rule, an inquiry into the reasoning behind each of the three theories should provide a basis for understanding the wide divergence in their scope of permissible questioning. However, certain basic rules of evidence must be kept in mind before such an understanding is possible. First, the universal rule is that the prosecution may not initially attack the defendant's character, but the defendant alone may put his character in issue.[10] As a corollary to this rule the prosecution, in argument to the jury, may not comment on the failure of the accused to produce evidence of his good character.[11] Secondly, evidence of good character or reputation of one charged with a crime always is admissible,[12] since a defendant's character is essentially relevant as indicating the probability of his doing or not doing the act charged.[13] However, the principle of relevancy has led to the rule that the character or disposition offered, whether for or against the accused, must have some reasonable similarity to the trait of character in question.[14]

Since reputation is looked to merely as evidence of the character reputed, it follows that the reputation is hearsay testimony, and is receivable as an exception to the Hearsay Rule. Not only is the character witness permitted to testify from hearsay, but indeed, such a witness is not allowed to base his testimony on anything but hearsay.[15] Finally, from this requirement that the witness testify as to hearsay and not from his own knowledge of the defendant has been evolved the rule that the proper form of inquiry is "Have you heard?" while "Do you know?" is not allowed.[16]

With the above rules and distinctions in mind the basis of permitting such questioning of a character witness, by the prosecution, becomes

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7 *See* note 8 to opinion of Court of Appeals in United States v. Michelson, 165 F. (2d) 732 (C.C.A. 2d, 1948) at 735.

8 325 U.S. 469, 495 (1948).

9 State v. Viola, ___ Ohio App. ___, 82 N.E. (2d) 306 (1947) (stating that testimony of good character "is limited entirely to a summation of the total character of the defendant," and it was not error for the trial court to exclude testimony offered by defendant that he had cooperated in preventing a jail break. *Appeal dismissed* 148 Ohio St. 712, 76 N.E. (2d) 715 (1947).

10 Mackreth v. United States, 103 F. (2d) 495 (C.C.A. 5th, 1939); Martin v. People, 114 Colo. 120, 162 P. (2d) 597 (1945) (challenging the defendant on cross-examination to put his general reputation in issue, held error).

11 State v. Markowitz, 138 Ohio St. 106, 33 N. E. (2d) 1 (1941).

12 Hawley v. United States, 133 F. (2d) 966 (C.C.A. 10th, 1943).

13 Wigmore, Evidence (3rd ed., 1940) §55.

14 Harper v. United States, 170 Fed. 385 (C.C.A. 8th, 1909) (false entry in a bank report; the defendant's reputation for "morality and sobriety" excluded).

15 Wigmore, Evidence (3rd ed., 1940) §1609; Underhill, Criminal Evidence (4th ed., 1935) §170; Wharton, Criminal Evidence, (11th ed., 1935) §333.

16 *See* Stewart v. United States, 104 F. (2d) 234 (App. D.C., 1939); Little v. United States, 93 F. (2d) 401 (C.C.A. 8th, 1937); Filippelli v. United States, 6 F. (2d) 121 (C.C.A. 9th, 1925) (also involving hypothetical question regarding witness' standard of judging character).

clearer. Since the testimony given on direct examination is confined to hearsay, it is necessary to determine whether the witness is sufficiently well acquainted with the reputation in question to make an evaluation of it. In other words, has the witness heard enough hearsay about the defendant to be a qualified character witness? This procedure usually results in most effective cross-examination. If the witness to good character admits having heard of the particular acts of misconduct, his standard of judging character and reputation is greatly shaken; and if he has not heard of such acts, this is an indication that he has based his judgment on incomplete information. It is this testing quality of the cross-examination that is the basis of the federal rule that questions concerning particular acts of misconduct, only somewhat related to the trait in question, are proper.

The *Michelson* case involved bribery, and the question asked concerned receiving stolen goods. It was this dissimilarity of offenses which prompted the Court of Appeals to seek adoption by the Supreme Court of the "Illinois rule" that the scope of cross-examination must be limited to questions which "relate to offenses similar to those for which the defendant is on trial."[17] It is the opinion of this writer that the Illinois cases appear to adopt a stricter rule than the one sought by the Court of Appeals, although many of the Illinois cases involve questions phrased in the objectionable terms of "Do you know?"[18]

The Illinois court frequently has held that the prosecution may not cross-examine a character witness by asking about specific acts of misconduct.[19] A close examination of the cases, however, indicates a confusion of the problem involved.[20] The rule against questioning as to specific acts was laid down in a case where the prosecution was attempting to rebut the defendant's showing of good character by bringing in witnesses to testify to particular acts of misconduct.[21] The second point of confusion on this problem is a failure to recognize that questions seeking to bring forth the witness' own knowledge of the particular acts of misconduct, rather than his familiarity with the defendant's reputation, are improper. Recognition of the fact that hearsay testimony and nothing more is to be sought on cross-examination of a character witness, and then only for the purpose of testing the witness' basis of evaluating character, would do a great deal toward clearing up the confusion which appears in the Illinois decisions and which makes Illinois the only jurisdiction ostensibly laying down so strict a rule.

The so-called "Illinois rule" does not appear to have any basis in the Illinois cases except for dictum in *People v. Hannon,*[22] which indicated

17 *See* note 8 to opinion of Court of Appeals in United States v. Michelson, 165 F. (2d) 732 (C.C.A. 2d, 1948) at 735 (where, although affirming the conviction, Judge Frank writing for the court requests the Supreme Court to adopt the so-called "Illinois rule" for the federal courts, which request the Supreme Court rejected).

18 People v. Hannon, 381 Ill. 206, 44 N. E. (2d) 923 (1942); People v. Page, 365 Ill. 524, 6 N. E. (2d) 845 (1937); People v. Anderson, 337 Ill. 310, 169 N. E. 243 (1929); People v. Celmars, 332 Ill. 113, 163 N. E. 421 (1928).

19 People v. Page, 365 Ill. 524, 6 N. E. (2d) 845 (1937); People v. Anderson, 337 Ill. 310, 169 N. E. 243 (1929); People v. Celmars, 332 Ill. 113, 163 N. E. 421 (1928); Jennings v. People, 189 Ill. 320, 59 N. E. 515 (1901) (conviction affirmed because witness replied that he had not heard of the acts of misconduct inquired into and thus defendant was not prejudiced); Aiken v. People, 183 Ill. 215, 55 N. E. 695 (1899); McCarty v. People, 51 Ill. 231 (1869).

20 Wigmore, Evidence (3rd ed., 1940) §988, note 1.

21 McCarty v. People, 51 Ill. 231 (1869).

22 381 Ill. 206, 44 N. E. (2d) 923 (1942).

that the questions were additionally objectionable for the reason that the inquiries concerned offenses dissimilar to those for which the defendant was on trial. It is the view of Justice Rutledge that the rule limiting questions to prior similar offenses is subject to the same objections as the rule laid down by the majority of the Court in the principal case, except that it reduces the scope and volume of the allowable questions.

The "fair-play rule" urged by Justice Rutledge in his dissent in the *Michelson* case[23] is based on the proposition that the prosecution should not be given any greater freedom in rebutting a showing of good character or in cross-examining a defense witness than the defense has in presenting such evidence of good character. Thus, since the defendant is limited to showing his general reputation to be good, the prosecution's evidence of bad character likewise should be limited to general reputation.

On the surface such a co-extensive limitation would appear to be desirable for two reasons: it would prevent the natural prejudice which results to the defendant when information as to his prior acts of misconduct are brought forth, and it would reduce the possibility of irrelevant issues being brought into the trial proceedings.[24] However, when considered in the light of the purpose for which cross-examination of a defense witness to good character is permitted, namely to test the basis of the witness' evaluation of character, it appears that the "fair-play rule" would not achieve that purpose as fully as a rule allowing more extensive cross-examination. As Wigmore says, permitting such cross-examination is not a relaxation of the principle which precludes the prosecution from attacking the defendant's character initially, but a liberty to refute the defendant's claim of good character. Otherwise a defendant, secure from refutation, would have too clear a license unscrupulously to impose a false character upon the court.[25] This is the basis of the broad scope of the federal rule and as Justice Jackson states in the *Michelson* opinion, "while the law gives the defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans."[26]

So long as the scope of the cross-examination is limited to refuting the good character asserted, even though the prior acts of misconduct may be substantially different from that for which the defendant is on trial, there would appear to be no undue hardship or prejudice to the defendant. Thus, as in the *Michelson* case, where the defendant seeks to establish a good character which includes the traits of "honesty and truthfulness" and "being a law-abiding citizen", the prosecution should be entitled to cross-examine as to any prior acts inconsistent with the asserted good character. Since the good character which Michelson sought to establish was broader than the crime charged, it may be refuted by questions as to prior acts which are unlike the offense charged, but which proceed from the same defects of character which the witness said the defendant was reputed not to exhibit.

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23 335 U. S. 469, 495 (1948).

24 *See* Wigmore, Evidence (3rd ed., 1940) §988 for a discussion of the problems involved in handling the cross-examination of character witnesses.

25 Wigmore, Evidence (3rd ed., 1940) §58.

26 Michelson v. United States, 335 U. S. 469, 479 (1948).