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Shelly Kim Kritz

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EVIDENCE—INCIDENTS OF SHOPLIFTING NOT PROBATIVE OF TRUTHFULNESS UNDER RULE 608(b). *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982).

Chester Earl Rhodes was convicted in Washington County Circuit Court of capital felony murder.¹ The evidence at trial established that Rhodes and an accomplice, Juanita Carr, went to Roland Kelley's house to collect money which Kelley owed Carr. Earlier that day, Carr, then a prostitute, had engaged in sexual relations with Kelley, for which he had failed to pay. Carr testified for the prosecution saying that while she and Rhodes were at Kelley's home, Rhodes beat Kelley to death with a board and took sixty-five dollars and his wallet.

Rhodes' attorney sought to impeach Carr's credibility by inquiring about prior instances of shoplifting for which she had not been convicted. He asserted that the jury should be informed about Carr's course of conduct, including the shoplifting incidents, so they could accurately assess her credibility. The trial court disagreed and ruled that Rhodes' attorney could not inquire about prior instances of shoplifting. Appellant contended that the trial court's ruling improperly limited his cross-examination under Rule 608(b) of the Arkansas Uniform Rules of Evidence.²

The Arkansas Supreme Court agreed with the appellant that, under existing case law,³ the trial court committed prejudicial error by improperly limiting the scope of the appellant's cross-examination. The court remanded the case for a new trial but also an-

1. Rhodes was charged with violation of ARK. STAT. ANN. § 41-1501 (1977), which provides in pertinent part: "A person commits capital murder if . . . he commits or attempts to commit . . . robbery . . . and in the course of and in furtherance of the felony . . . he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. . . ."

2. ARK. UNIF. R. EVID. 608(b) provides in pertinent part:
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.

3. *Gustafson v. State*, 267 Ark. 278, 590 S.W.2d 853 (1979) (holding that inquiry could be made into the act of theft under Rule 608(b)).

nounced a prospective modification of its previous interpretation of Rule 608(b). In the future a cross-examiner will not be permitted to inquire into specific instances of misconduct which are not clearly probative of dishonesty. Specifically, a cross-examiner will not be permitted to inquire into acts of shoplifting for which there has been no conviction. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982).

In early English trial procedure, a witness' credibility could not be impeached through inquiry into prior acts of misconduct.⁴ During the 1700's, however, English courts took the opposite approach and gave cross-examiners virtually unrestricted freedom in questioning, allowing inquiry into any act for the purpose of discrediting the witness.⁵ Courts invested counsel with the responsibility of using their own discretion in formulating questions. When a court did intervene, the admonition was to ask relevant questions more probative of the trait of veracity.⁶ Today, the rule in England remains liberal. Cross-examiners are allowed to ask about any prior misconduct in order to discredit the witness' character for truthfulness.⁷

In the United States, the rules differed from jurisdiction to jurisdiction. The majority rule in the federal courts was that a witness could not be asked about prior bad acts which had not resulted in convictions.⁸ A minority of federal courts permitted cross-examiners to inquire about prior bad acts but extrinsic evidence could not be introduced to prove the act.⁹ Unlike the majority of federal courts, most state courts, including Arkansas, allowed some form of

4. *Onbie's Case*, March 83, pl. 136 (K.B. 1643) as cited in 3A J. WIGMORE, EVIDENCE § 986 (Chadborn rev. 1970).

5. 3A J. WIGMORE, *supra* note 4.

6. *Thomas Hardy's Trial*, 24 How. St. Tr. 199, 719 (1794) as cited in 3A J. WIGMORE, *supra* note 4.

7. 3A J. WIGMORE, *supra* note 4, § 983; C. MCCORMICK, EVIDENCE § 42 (2d ed. Cleary 1972).

8. *See, e.g.*, *United States v. Davenport*, 449 F.2d 696 (5th Cir. 1971); *United States v. Randolph*, 403 F.2d 805 (6th Cir. 1968); *Tafoya v. United States*, 386 F.2d 537 (10th Cir. 1967), *cert. denied*, 390 U.S. 1034 (1968); *Ramirez v. United States*, 294 F.2d 277 (9th Cir. 1961); *United States v. Provo*, 215 F.2d 531 (2d Cir. 1954); *Campion v. Brooks Transportation Co.*, 135 F.2d 652 (D.C. Cir. 1943); *Scaffidi v. United States*, 37 F.2d 203 (1st Cir. 1930); *Lennon v. United States*, 20 F.2d 490 (8th Cir. 1927); *Terzo v. United States*, 9 F.2d 357 (8th Cir. 1925); *Glover v. United States*, 147 F. 426 (8th Cir. 1906). *See generally* K. REDDEN AND S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 312 (2d ed. 1977).

9. *See, e.g.*, *United States v. Kirk*, 496 F.2d 947 (8th Cir. 1974); *United States v. Butler*, 481 F.2d 531 (D.C. Cir. 1973); *Simon v. United States*, 123 F.2d 80 (4th Cir. 1941); *Coulston v. United States*, 51 F.2d 178 (10th Cir. 1931). *See generally* K. REDDEN AND S. SALTZBURG, *supra* note 8, at 312.

cross-examination about acts relevant to veracity.¹⁰ Acts such as larceny,¹¹ embezzlement,¹² and stealing money,¹³ *inter alia*, were held to indicate a lack of veracity and, thus, inquiry about them was permissible.

The adoption in 1975 of Rule 608(b) of the Federal Rules of Evidence codified the federal minority view by allowing cross-examination into a witness' specific instances of misconduct which are probative of truthfulness or untruthfulness.¹⁴ However, under Rule 608(b), inquiry into prior acts of misconduct probative of truthfulness is not an absolute right. The advisory committee report accompanying Rule 608 indicates that judicial discretion is to be exercised by balancing prejudice against probative value of the particular act.¹⁵ Rule 608 is subject to Rules 403¹⁶ and 611,¹⁷ although they are not expressly mentioned in the language of Rule 608. Rule 403 states that relevant evidence may be excluded if the prejudice that may accompany the admission of the evidence substantially outweighs the probative value of the evidence.¹⁸ Rule 611 states, *inter*

10. See *McAlister v. State*, 99 Ark. 604, 139 S.W. 684 (1911); *Territory v. Chavez*, 8 N.M. 528, 45 P. 1107 (1896); *Buel v. State*, 104 Wis. 132, 80 N.W. 78 (1899). See also K. REDDEN AND S. SALTZBURG, *supra* note 8.

11. *Oxier v. United States*, 1 Indian Terr. 85, 38 S.W. 331 (1896).

12. *People v. Arnold*, 40 Mich. 710 (1879).

13. *Hawaii v. Luning*, 11 Hawaii 390 (1898).

14. Although the minority view was adopted in Rule 608(b), it was done with little discussion because the attention of the legislature was focused on Rule 609, which provides for impeachment with evidence of certain types of criminal convictions. Rule 609 provoked much controversy because there was support for two opposing views on the rule, which tended to overshadow any controversy over Rule 608(b). K. REDDEN & S. SALTZBURG, *supra* note 8. See also 3 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 303 (1979 & Supp. 1982).

Rule 608(b), in essence, followed one of three approaches recognized by commentators on evidence on the issue of what type of acts may be inquired about on cross-examination. That approach allows inquiry into only that misconduct which indicates a lack of veracity such as fraud, forgery and perjury. Another approach allows inquiry into any kind of misconduct, including such acts as robbery, assault, or adultery even though none of these directly indicate a lack of truthfulness. 3 D. LOUISELL & C. MUELLER, *supra* at § 305; 3A J. WIGMORE, *supra* note 4, § 982. The third and middle-ground approach, allows inquiry into acts showing a disregard for the property rights of others, but disallows inquiry into acts showing only a vicious dispositions. Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 180 (1940).

15. FED. R. EVID. 608 advisory committee note.

16. FED. R. EVID. 403.

17. FED. R. EVID. 611.

18. A question may be permissible under Rule 608(b) and still be excluded under Rule 403 which reads:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or mislead-

alia, that the courts shall have control over the interrogation of witnesses.¹⁹

Federal courts interpreting Rule 608(b) have decided on a case by case basis which specific acts bear upon the issue of veracity.²⁰ For example, the federal courts have specifically held the following acts probative of truthfulness under Rule 608(b): submission of a false excuse for being absent from work,²¹ an attempted swindle,²² and false statements on an employment application²³ or in a letter to a government agency.²⁴ In *United States v. Leake*,²⁵ the Fourth Circuit Court of Appeals said, "Rule 608 authorizes inquiry only into instances of misconduct that are 'clearly probative of truthfulness or untruthfulness,' such as perjury, fraud, swindling, forgery, bribery, and embezzlement."²⁶ The court went on to hold that the witness' activities, including obtaining money under false pretenses, defrauding an innkeeper, having numerous default judgments against him in civil actions seeking repayment of loans, and fraudulent contracting, had a bearing upon his credibility.²⁷ On the other hand, federal courts have held that the following acts are *not* probative of truthfulness under Rule 608(b): drug transactions,²⁸ sodomy,²⁹ offering to pay money to have a person killed,³⁰ issuance of checks

ing the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

19. Under Rule 611 the court is given control over cross-examinations conducted pursuant to Rule 608. Rule 611 reads in pertinent part:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment . . . Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

20. The courts have had to make their determinations on a case by case basis because the circumstances and characteristics of each act have been of vital importance in their decisions.

21. *United States v. Cole*, 617 F.2d 151 (5th Cir. 1980).

22. *United States v. McClintic*, 570 F.2d 685 (8th Cir. 1978).

23. *Lewis v. Baker*, 526 F.2d 470 (2d Cir. 1975).

24. *United States v. Reid*, 634 F.2d 469 (9th Cir. 1980).

25. 642 F.2d 715 (4th Cir. 1981).

26. *Id.* at 718.

27. *Id.* at 719.

28. *United States v. Fortes*, 619 F.2d 108 (1st Cir. 1980); *United States v. Hastings*, 577 F.2d 38 (8th Cir. 1978).

29. *United States v. Rabinowitz*, 578 F.2d 910 (2d Cir. 1978).

30. *United States v. Young*, 567 F.2d 799 (8th Cir. 1977), *cert. denied*, 434 U.S. 1079 (1978).

checks with insufficient funds in the bank,³¹ assault,³² and arrest for civil tax problems.³³

The majority of states which have adopted the Uniform Rules of Evidence³⁴ follow Rule 608 verbatim or with only minor changes.³⁵ These states basically interpret the rule in the same way as the federal courts.³⁶

Prior to the adoption of the Uniform Rules of Evidence in 1976, Arkansas, like most state courts, allowed cross-examination upon the subject of prior bad acts.³⁷ Among the acts into which inquiry could be made were acts that today would be classified as theft under the Arkansas Criminal Code.³⁸ For example, in *Bank of Hatfield v. Chatham*,³⁹ the witness was asked on cross-examination if he had taken money from another man's bank account. The supreme court held that the question was admissible stating:

The honesty of the witness was in question, and the fact, if true, that he had been guilty of taking other people's money out of the bank without their consent and using it, during the period of time involved in this case, would tend to impeach his character and

31. *United States v. Byrne*, 422 F. Supp. 147 (E.D. Pa. 1976), *modified*, 560 F.2d 601 (3d Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978).

32. *United States v. Alberti*, 470 F.2d 878 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973).

33. *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980).

34. The Federal Rules of Evidence have been enacted, with modifications, in twenty-two states. *See infra* note 35.

35. The states following the rule verbatim include Arizona, Arkansas, Colorado, Minnesota, Nebraska, New Mexico and Wyoming. The states that have adopted the rule with minor changes are Maine, Montana, Ohio, North Dakota, Oklahoma and South Dakota. The states that have adopted the rule with more substantial changes are Alaska, Delaware, Florida, Hawaii, Michigan, Nevada, Oregon, Washington and Wisconsin. 3 D. LOISELL & C. MUELLER, *supra* note 14; J. WEINSTEIN & M. BERGER, *EVIDENCE* §§ 608-09 (1981).

36. For a comprehensive discussion of the way these states and others with significantly different versions of Rule 608 have interpreted the rule, see J. WEINSTEIN & M. BERGER, *supra* note 35, at § 608[09].

37. *See, e.g.*, *Butler v. State*, 255 Ark. 1028, 504 S.W.2d 747 (1974) (permissible to ask the witness if he had shot a man); *Polk v. State*, 252 Ark. 320, 478 S.W.2d 738 (1972) (permissible to ask the witness about the act of robbery); *Black v. State*, 250 Ark. 604, 466 S.W.2d 463 (1971) (permissible to ask the witness about the act of rape); *Hughes v. State*, 249 Ark. 805, 461 S.W.2d 940 (1971) (permissible to ask the witness if he had taken some money from another man); *McAlister v. State*, 99 Ark. 604, 139 S.W. 684 (1911) (permissible to ask the witness about the act of assassination).

38. The statutory definitions of the act of theft are found in ARK. STAT. ANN. §§ 41-2201 to -2209 (1977). Section 41-2202 consolidates various separate offenses into the one offense of theft. Sections 41-2203 through 41-2209 define theft of property, theft of services, theft by receiving, and theft of trade secrets.

39. 160 Ark. 530, 255 S.W. 31 (1923).

discredit him as a witness.⁴⁰

The adoption of Rule 608(b) by the Arkansas legislature in 1976, brought about a major change in Arkansas law. Rule 608(b) operated to restrict the type of instances of misconduct which could be inquired into during cross-examination. Under the rule, only prior bad acts probative of truthfulness or untruthfulness may be the subject of cross-examination.

The rule was first applied in Arkansas in *Cox v. State*.⁴¹ The Supreme court in *Cox* stated that inquiry about the prior bad act of robbery was clearly impermissible under Rules 608 and 609, and that decisions to the contrary, decided prior to the adoption of the Uniform Rules of Evidence, were no longer applicable.⁴² The court did not state its reasoning nor discuss the relevancy issue in connection with the prior bad act of robbery.

The supreme court faced the issue again in *Gustafson v. State*,⁴³ and the court interpreted Rule 608 for the first time. The court overturned *Cox* and held that it is unequivocally permissible to ask in good faith about the act of robbery because robbery is "an act of dishonesty."⁴⁴ The court went on to state:

[M]isconduct relating to truthfulness would include forgery, perjury, bribery, false pretense and embezzlement. Obviously, some misconduct would not bear on truthfulness. For example, murder, manslaughter or assault do not *per se* relate to dishonesty. Burglary and breaking and entering would not be such misconduct unless the crime involved the element of theft. [Citation omitted.] We believe that theft, as it is defined in the Arkansas Criminal Code, involves dishonesty.⁴⁵

In *Rhodes v. State*,⁴⁶ the Arkansas Supreme Court held that cross-examination into the witness' shoplifting incidents should have been allowed because appellant's attorney had relied on the

40. *Id.* at 541, 255 S.W. at 35.

41. 264 Ark. 608, 573 S.W.2d 906 (1978).

42. *Id.* at 610, 573 S.W.2d at 907.

43. 267 Ark. 278, 590 S.W.2d 853 (1979).

44. *Id.* at 291, 590 S.W.2d at 860.

45. *Id.* at 288-89, 590 S.W.2d at 859, citing ARK. STAT. ANN. §§ 41-2201 to -2253 (1977). The statutes cited by the court denominate the various separate offenses which are consolidated into one offense—theft. The separate offenses expressly mentioned by the statute are larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, shoplifting, and "other similar offenses." Theft of property is subsequently defined in § 41-2203 as containing the element of deception. Theft of services is also defined as containing the element of deception in § 41-2204.

46. 276 Ark. 203, 634 S.W.2d 107 (1982).

court's previous interpretation of Rule 608(b) in *Gustafson*. The court, however, prospectively modified that interpretation of Rule 608(b) by distinguishing acts probative of truthfulness from those probative of dishonesty.⁴⁷ Specific instances of misconduct clearly probative of truthfulness or untruthfulness may be the subject of inquiry on cross-examination, whereas specific instances of misconduct probative only of dishonesty may not.⁴⁸ The court cited leading commentators on evidence, including McCormick⁴⁹ and Weinstein,⁵⁰ to support the view that cross-examination into prior bad acts should be limited to inquiries concerning specific instances of conduct which indicate a lack of truthfulness as opposed to conduct merely indicative of an "absence of respect for the property rights of others."⁵¹

The court gave three policy reasons for its decision. The first was the risk that the defendant would be convicted merely because of a reputation for bad acts which had no relevance to veracity.⁵² The second was the fear that the *Gustafson* ruling circumvented the basic aim of Rules 608 and 609 which is to induce defendants to take the stand.⁵³ The third was the court's desire to interpret the Uniform Rules as other states have interpreted them and as federal jurisdictions have interpreted the Federal Rules of Evidence. The court stated that "[n]o other jurisdiction has interpreted the Uniform Rules or Federal Rules to allow cross-examination on specific acts of shoplifting."⁵⁴

47. *Id.* at 207, 634 S.W.2d at 110.

48. *Id.*

49. C. MCCORMICK, EVIDENCE § 42, at 82 (1954). The court stated: "McCormick views misconduct, 'such as false swearing, fraud and swindling' as relevant to truthfulness." 276 Ark. at 207, 634 S.W.2d at 110.

50. J. WEINSTEIN & M. BERGER, *supra* note 35, at § 608[05]. The court quoted various passages from WEINSTEIN. 276 Ark. at 207-09, 634 S.W.2d at 110-11.

51. 276 Ark. at 209, 634 S.W.2d at 111.

52. 276 Ark. at 210, 634 S.W.2d at 111. When the defendant is the witness, there is the risk that he will be convicted for being a "bad person" or because the jury becomes convinced that he has a propensity for crime. *See generally* D. LOUISELL & C. MUELLER, *supra* note 14, at § 305. This policy reason is only applicable if the witness being cross-examined is also the defendant.

53. 276 Ark. at 210, 634 S.W.2d at 111. The argument is made that if counsel is allowed to delve into prior bad acts without restrictions then the defendant as well as other witnesses will be less likely to cooperate with the fact-finding process by testifying for fear of being harassed or embarrassed on the witness stand. *See generally* D. LOUISELL & C. MUELLER, *supra* note 14, at § 305.

54. 276 Ark. at 210, 634 S.W.2d at 111. Yet the court failed to cite decisions which had refused to allow questions pertaining to prior acts of shoplifting in interpreting Rule 608(b). The court did cite *United States v. Ortega*, 561 F.2d 803 (9th Cir. 1977), which held that acts of shoplifting or petty larceny are "not an indicium of a propensity toward testimonial dis-

The dissent⁵⁵ in *Rhodes* interpreted the majority's decision to hold that, in an effort to impeach a witness, acts of theft may not be inquired into upon the basis that theft has no relevance to the character trait of truthfulness.⁵⁶ The majority had used the word "shoplifting"⁵⁷ but the dissent pointed out that, in Arkansas, shoplifting is just one of several categories of theft.⁵⁸ Therefore, in holding that incidents of shoplifting may not be inquired into, the majority is essentially holding that incidents of theft may not be inquired into. The dissent argued that a relationship exists between stealing and untruthfulness,⁵⁹ and that evidence that a witness has stolen before should be admissible to give the jury all relevant information necessary to assess the witness' credibility.⁶⁰

In prospectively modifying its prior interpretation of Rule 608(b), the *Rhodes* court has limited the scope of a cross-examiner's impeachment of witnesses and has created a precedent which leaves many questions unanswered. One important question is the effect of *Rhodes* with respect to inquiry into other enumerated acts of theft in the Arkansas Statutes.⁶¹ Although the majority mentioned only shoplifting, they also made the broad statement that "we would hold that while an absence of respect for the property rights of others is an undesirable trait, it does not directly indicate an impairment of the trait of truthfulness. . . ."⁶² The statement may be true, but in Arkansas some acts of theft are statutorily defined to include the element of deception.⁶³ It is conceivable that one who would deceive might also tend to be untruthful. If a person will use deceit to steal another man's property, then he might be expected to give false testimony when it is to his advantage.

Under *Gustafson*, a trial court had discretion to determine if a

honesty," however, that case was discussing the interpretation of Rule 609 rather than 608(b). 561 F.2d at 806.

55. Justice Hickman and Justice Hays dissented in part. Justice Hickman also wrote the *en banc* opinion in *Gustafson*.

56. 276 Ark. at 212-13, 634 S.W.2d at 113.

57. The majority in *Rhodes* said "cross-examination would not be allowed on specific acts of shoplifting for which there was no conviction." *Id.* at 210, 634 S.W.2d at 111.

58. ARK. STAT. ANN. § 41-2202 (1977).

59. "[T]hieves tend to lie." 276 Ark. at 216, 634 S.W.2d at 114.

60. *Id.*

61. ARK. STAT. ANN. §§ 41-2201 to -2253 (1977). The enumerated acts of theft are set out in note 45.

62. 276 Ark. at 215, 634 S.W.2d at 111.

63. *E.g.*, ARK. STAT. ANN. § 41-2203 (1977), reads in pertinent part: "A person commits theft of property if he . . . (b) knowingly obtains the property of another person, by deception . . . with the purpose of depriving the owner thereof."

particular act of theft was probative of truthfulness. Now, after *Rhodes*, a trial court may be divested of this discretionary role if the act involved is one of theft. Different individuals have differing views of the type of behavior that shows a propensity to lie. Some believe a person who commits an act of theft will tend to lie while others believe he will not. Is there a middle ground? Do some acts of theft, specifically those involving the element of deception, indicate an impaired ability to tell the truth while others do not? Although that question could well be answered in the affirmative, in Arkansas a line has been drawn that purports to prevent inquiry into all prior acts of theft.

Shelly Kim Kritz

