Examination, Cross-Examination, and Redirect Examination

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May 2015

I. Learning Objectives for this Session:

Following this session, participants will be able to:

1. Exercise appropriate control over the presentation of evidence in the courtroom;
2. Appreciate the scope and limitations of witness examination;
3. Determine the permissible use of the refreshing recollection technique and the recorded recollection hearsay exception;
4. Fairly apply the concept of opening the door;
5. Embrace the extent and limitations of the constitutional right to present a defense.

II. Resources

Refreshed Recollection *in* NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith, Ed.) (referred to herein as BENCHBOOK) (available at http://benchbook.sog.unc.edu/)

Kenneth S. Broun, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §§ 150 - 178 (referred to herein as Broun, at §__)

III. Introduction

Rule 611 is the starting point for analyzing issues related to direct, cross, and redirect examination. The rule is complimented by fundamental fairness concerns, embraced by the Due Process Clause, and is supplemented by statutes that establish procedure for the order and presentation of evidence.

Rule 611 requires a trial judge to "exercise reasonable control over the mode and order" of witness interrogation and evidence presentation. Like the overriding purpose of the rules of evidence, the purpose of the exercise of control is to further the interests of truth and justice in a fair and efficient proceeding. Thus, control is to be exerted "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." Case law offers numerous examples of trial judge's exercising appropriate control to accomplish these three purposes.[1]

[1] *See e.g., State v. Johnston*, 344 N.C. 596 (1996)(disallowing repetitive questions); *State v. Jaynes*, 342 N.C. 249 (1995) (limiting repetitious questions); *State v. Cook*, 280 N.C. 642 (1972) (prohibiting repetitious answer).

The broad duty to exercise control requires the judge to decide numerous questions that arise during the course of a trial "which can only be solved only by the judge's common sense and fairness in view of the particular circumstances." Advisory Committee Notes, Fed. R. Evid. 611 (identical to N.C. R. Evid. 611). The manner by which the trial judges exercises control over the presentation of evidence rests primarily within the judge's discretion. These decisions will not be "disturbed absent a manifest abuse of discretion." *State v. Harris*, 315 N.C. 556, 562 (1986).

Thus, a judge, exercising sound discretion, may, among other things, control the order in which witnesses are called and depart from the regular order of proof to allow witnesses to be recalled and cases to be reopened. *See Huddleston v. United States*, 485 U.S. 681, 690 (1988) ("the trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial . . . "). However, a party has no right to these departures.

IV. Witness Examination

The examination of witnesses involves a number of issues in addition to the appropriate exercise of judicial control, including: (1) the methods of and limitations on eliciting testimony on direct examination; (2) the scope of cross-examination; and (3) the purpose of and limitations on redirect and recross examinations.

A. Direct Examination – Scope and Limitations

A trial judge's duty to exercise reasonable control over witness interrogation and evidence presentation covers issues related to the form of the question asked on direct. Testimony may be elicited through specific, generally nonleading questions, or by means of a "free narrative." Testimony elicited through a narrative has the advantage of being more natural, but the disadvantage of hindering objections. Judges, therefore, have discretion to preclude questions that call for a narrative on direct examination. Judges may also limit leading questions on direct examination except to the extent the questions are used to develop the testimony. The use of leading questions is discussed below.

B. Cross-Examination – Scope and Limitations

Subsections (b) and (c) of Rule 611 specifically addresses two issues related to the presentation of evidence – the scope of cross-examination and the use of leading questions. Both subsections establish limits within which a trial judge should exercise the broader discretion of maintaining control and order.

The scope of cross-examination is intentionally broad. Rule 611(b) allows cross-examination **"on any matter relevant to any issue in the case, including credibility."** When an objection is made that a question exceeds the permissible scope of cross-examination, the trial judge must overrule the objection if the question is "relevant to any issue in the case, including credibility." The North Carolina courts have consistently

held that cross-examination may serve four purposes: to expand on the details offered on direct examination; to develop new or different facts relevant to the case; to impeach the witness; or to raise issues about a witness' credibility.

Many decisions illustrate the breadth of the rule, but perhaps few better than the decision of *State v. Whaley*, 362 N.C. 156 (2008) in which the North Carolina Supreme court reversed a conviction based upon limitations imposed on cross-examination of the victim. The defense sought to cross-examine the victim about her answers to a questionnaire completed during a visit to a counseling center. The defense argued that the evidence was relevant to the issue of the victim's credibility. The trial court excluded the evidence based on the absence of proof that the victim suffered from a mental defect and under Rule 403.

In reversing the decision, the Supreme Court emphasized the scope of cross-examination, the importance of the testimony on the key issue in the case, and the presence of contradictory evidence. Although there was no evidence that the witness suffered from a mental defect, the questions nonetheless might "bear upon credibility in other ways, such as to cast doubt upon the capacity of a witness to observe, recollect, and recount." *Id*. at 161 (quoting *State v. Williams*, 330 N.C. 711, 719 (1992). "Excluding the cross-examination here had 'the effect of largely depriving defendant of [her] major defense." *Id*. (quoting *Williams*, 330 N.C. at 721-22).

C. Use of Leading Questions

A leading question is "generally defined as one which suggests the desired response and may frequently be answered yes or no." *State v. Britt*, 291 N.C. 528, 539 (1977) (citations omitted). Questions that "direct a witness towards a specific topic of discussion without suggesting any particular answer are not leading." *State v. White*, 349 N.C. 535, 557 (1998).

Rule 611(c) addresses the use of leading questions. As Professor Broun notes, leading questions is generally "one that suggests the answer." BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §169. The prohibition is based on fairness and the desire that the witness, not counsel, supply the answer to a question.

The subsection provides that leading questions **"should not be used on the direct examination of a witness except as may be necessary to develop [the] testimony."** Examples of situations in which leading questions are allowed because they are necessary to develop a witness' testimony include (1) questions that direct or redirect a witness' attention to a specific matter; (2) questions posed to a witness who demonstrates difficulty in understanding; (3) questions about sensitive or delicate matters; (4) questions that assist a witness in recollecting; (5) questions asked to contradict another witness' testimony; (6) questions regarding preliminary matters; and (7) questions about matters that are not in dispute.

The subsection also provides that leading questions **"ordinarily . . . should be permitted on cross-examination."** While this rule is consistent with the general trial practice principle that all questions on cross-examination should be leading, the rule preserves some discretion for the trial judge to limit leading questions in extraordinary situations consistent with the trial judge's general duty under Rule 611 (a), but a trial judge should not limit cross-examination. The North Carolina Supreme Court has recognized that the right to cross-examine is "absolute and not merely a privilege," and that its denial is "prejudicial and fatal error." *See State v. Short*, 322 N.C. 783, 791(1988) (quoting *Citizens Bank & Trust v. Reid Motor Co*., 216 N.C. 432, 434 (1939)). In addition, the right to cross-examination is an essential element of a defendant's constitutional right under the Sixth Amendment of the United States Constitution.

In addition to the general provision regarding the use of leading questions on cross-examination, Rule 611(c) allows the use of leading questions **"[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party."** Whether a witness is "hostile" or "identified with an adverse party" is a threshold matter for the trial judge.

D. Redirect and Recross Examination

Redirect and recross examination are also subject to control by the trial judge. Redirect is for the purpose of clarifying the direct examination and addressing issues raised on cross-examination. Counsel is not entitled to repeat matters or bring out new matters on redirect examination. The trial judge may allow exceptions to this limitation if the circumstances require. If the trial judge allows counsel to elicit new matters on redirect, recross should be allowed, but otherwise the trial judge, in the exercise of reasonable discretion, may disallow a second cross-examination. *See generally State v. Cummings*, 352 N.C. 600 (2000); *see also United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991) (suggesting that denying recross if new matters are raised on redirect would violate Confrontation Clause).

Fairness may necessitate an opportunity for redirect or recross examination. As explained by the North Carolina Supreme Court more than a century ago:

> A party cannot be allowed to impeach a witness on the cross-examination by calling out evidence culpatory of himself and there stop, leaving the opposing party without opportunity to have the witness explain his conduct, and thus place it in an unobjectionable light if he can. In such case the opposing party has the right to such explanation, even though it may affect adversely the party who cross examined. Upon the examination in chief, the evidence may not be competent, but the cross-examination may make it so.

State v. Glenn, 95 N.C. 677, 679 (1886).

E. Rebuttal and Surrebuttal Evidence

In North Carolina, the "presentation of additional evidence, rebuttal, and surrebuttal evidence in a criminal trial is governed by Subsection 1226 of Chapter 15A of North Carolina's Criminal Procedures Act." *State v. Clark*, 128 N.C. App. 87, 97 (1997) That section provides that:

> [e]ach party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if evidence is allowed, the other party must be permitted further rebuttal.

Id. Thus, it is within the court's discretion to allow new evidence to be presented in rebuttal, but "it is an abuse of discretion for a trial court to disallow surrebuttal evidence when the State's rebuttal evidence presents new issues not raised in the defendant's case in chief. *Id.* (citing *United States v. King*, 879 F.2d 137 (4th Cir. 1989)).

F. Reopening the Proof

A party does not have a constitutional right to reopen its case after the party has rested its case. The decision whether to allow the party to reopen the case, therefore, is "strictly within the trial court's discretion." *State v. Hoover*, 174 N.C. App. 596, 599 (2005). The authority to allow a part to reopen the case stems from the trial court's "inherent authority to supervise and control trial proceedings." *State v. Davis*, 317 N.C. 315, 318 (1986). *See State v. McClaude*, 765 S.E.2d 104 (N.C. App. 2014)(finding no error in denying defense additional time to locate witness, who was not under subpoena, and in denying motion to reopen case once witness reappeared in the courtroom after charge had been delivered and jury had begun deliberations).

V. Specific Applications

A. Refreshing Recollection vs. Past Recollection Recorded

1. Refreshing Recollection – A technique

Refreshing recollection, a technique for prompting a witness' memory, varies substantially from past recollection recorded, an exception to the hearsay rule. Though completely different, the two are often confused; this is probably because when efforts to refresh fail, counsel will often seek to introduce the refreshing device through the recorded recollection exception to the hearsay rule.

The practice of refreshing recollection emerged at common law as a way of prompting a witness' memory. The foundation required for refreshing recollection is simply that the witness has a lapse in memory that might be revived by consulting some writing or object. If a witness is questioned about a matter that the witness is unable to

recall, the practice allows counsel to show the witness a writing or object that might stimulate the memory. The witness is allowed to review the writing or object in order to refresh memory. The object or writing is then taken from the witness and the witness is again asked the question. If the witness' memory has been refreshed, the witness' testimony, not the writing or object, is the evidence. The trial court, in its discretion, may allow the witness to reconsult the memory device, but when the witness' testimony is "*clearly* a mere recitation of the refreshing memorandum," it is not admissible. *See State v. Smith*, 291 N.C. 505, 518 (1977) (emphasis in original).

Counsel is generally allowed to use leading questions to lay the foundation for refreshing recollection. Thus, for example, counsel may ask, "If I showed you X, would it help to refresh your memory?" and "Having shown you X, is your memory now refreshed?" even though both questions are leading.

Rule 612(a) of the Rules of Evidence requires that an adverse party is entitled to have **"the writing or object [used to refresh memory] produced at the trial, hearing, or deposition in which the witness is testifying."** If the writing or object is used to refresh the witness' memory before the witness testifies and **"if the court in its discretion determines that the interests of justice so require, [then] an adverse party is entitled to have those portions of any writing or of the object which relate to the testimony produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying."** N.C.R. Evid. 612(b). The rule also provides that the court may order that the writing or object be "made available for inspection" if production is impracticable. Id.

Counsel may argue that parts of the writing or object are privileged or irrelevant and should be excluded from production. In this situation, the rule provides that the court **"shall examine the writing or object *in camera,* excise any such portions, and order delivery of the remainder of the party entitled thereto."** N.C.R. Evid. 612(c). Other portions **"shall be preserved and made available to the appellate court in the event of an appeal."** Id.

Some courts have analyzed what factors should affect the trial judge's exercise of discretion to require production under Rule 612. The relevant factors include the degree or extent of the witness' reliance on the writing or object, the significance of the information recalled, the effect or burden on the adverse party, and the potential disruption that production might cause. *See generally* MCCORMICK ON EVIDENCE §9 (5th ed. 1999).

Once a writing or object is used to refresh, and produced for the adverse party, the adverse party may seek to admit the writing or object into evidence. Rule 612(c) sets out the procedure which the trial court must follow in admitting the writing or object. The rule provides that the adverse party is entitled **"to inspect it, cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony at trial."** N.C.R. Evid. 612 (c). This provision creates a safeguard because it allows the

factfinder to inspect the writing or object and evaluate the witness' claim that it refreshed the witness' memory.

Thus the portions of a writing or object used to refresh a witness' memory which have been produced to the adverse party may be introduced into evidence by the adverse party. The writing or object may not be introduced by the party utilizing them to refresh unless they are independently admissible. This is consistent with the underlying theory that the writing or object used to refresh recollection is not evidence but a memory aid.

2. Recorded Recollection – A Hearsay Exception

In some situations, a witness' memory is not revived by viewing a writing or object. Counsel must then offer independent evidence to prove the matter. Often, counsel will attempt to introduce the attempted memory device. If the memory device is a writing, counsel will need to establish that the writing is admissible as an exception to the hearsay rule since the writing is being offered for its truth. If the memory device is a writing by the witness, counsel will frequently rely upon the recorded recollection hearsay exception.

To admit the memory device as a recorded recollection, counsel must lay a foundation that satisfies all of the elements of that exception. The elements are that the writing is a **(1)** "**memorandum or record" (2) "concerning a matter about which a witness once had knowledge but now has insufficient recollection to allow [the witness] to testify fully and accurately" (3) "shown to have been made or adopted by [the witness] when the matter was fresh in [the witness'] memory" and (4) shown "to have reflected that knowledge correctly.**" N.C.R. Evid. 803(5). Each of the foundational elements is a preliminary issue for the trial judge which must be established by the proponent of the evidence.

The critical differences between the refreshing recollection technique and the recorded recollection hearsay exception was the topic of a recent Court of Appeals decision. *State v. Harrison*, 218 N.C. App. 546 (2012). Because trial counsel failed to object, the appellate court's plain error analysis resulting in an affirmance.

B. Use of Prior Inconsistent Statements to Impeach

Following a witness' testimony, the witness will often be cross-examined concerning previous statements that are contradictory or inconsistent with the witness' in-court testimony. The foundational requirements are that the witness made the prior statement and that the statement may be seen as inconsistent with the present testimony.

This impeachment use of the prior statement does not depend upon the truthfulness of the statement's content. Rather, it is actually the inconsistent content that makes the prior statement relevant. The prior statement is being used to demonstrate that, on another occasion, the witness made inconsistent statements about the subject matter. Thus, the prior statement is not offered to prove the truth of its content, but is offered for

its impact on the witness credibility. Rule 612 provides that a witness may be asked about a prior written or oral statement without having the statement's content first disclosed. However, on request, the prior statement must be disclosed to opposing counsel. N.C.R. Evid. 612.

The admissibility of the prior inconsistent statement depends on other factors. Because when offered to prove the truth of its content, the prior inconsistent statement is classic hearsay (an out of court statement offered in court to prove the truth of the matter asserted, N.C.R. Evid. 801), the prior inconsistent statement is only admissible as substantive evidence if the proponent establishes that it fits within an exception to the hearsay rule.

If the prior inconsistent statement is used for impeachment purposes only, the factfinder should be instructed as to its limited use. North Carolina Pattern Jury Instructions Crim. 105.20 provides a general instruction as to the use of a prior inconsistent statement as impeachment evidence.

> When evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent or may conflict with his testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made, and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this, together with all other facts and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve the witness's testimony at this trial.

In addition to instructing the jury, the court must also be cautious in the actual use of the evidence. For example, the content of a prior inconsistent statement used to impeach may not be considered by the court in weighing the sufficiency of the evidence and may not be argued to the jury by counsel.

C. Concept of Opening the Door

As Justice Cardozo noted "[m]etaphors in the law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey v. Third Ave. Railway Co*, 244 N.Y. 84, 94 (1926). Such is surely the case with the often used, and more often confused principle of "opening the door." A party opens the door to evidence when that party "introduces evidence or takes some action that makes admissible evidence that would have previously been inadmissible." 21 Charles Alan Wright et al., FEDERAL PRACTICE & PROCEDURE EVIDENCE § 5039 (2d ed.1987).

The North Carolina Supreme Court has offered this general explanation: "Opening the door refers to the principle that where one party introduces evidence of a

particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal." *State v. Baymon*, 336 N.C. 748, 753 (1994) (quoting *State v. Sexton* 336 N.C. 321, 360 (1994)). Even if the evidence is otherwise inadmissible, it may be introduced to rebut or explain. *State v. Johnson*, 344 N.C. 596 (1996).

The analytical foundation for the opening the door principle at common law was that by raising a subject at trial, a party "expand[s] the realm of relevance" entitling the opposing party to introduce evidence on the subject. *Id.* Thus, the doctrine functions as a "a rule of expanded relevancy." *Clark v. State*, 629 A.2d 1239, 1242 (1993).

Although opening the door is a common-law concept, several Rules of Evidence provide for the admission of otherwise inadmissible evidence because of the action of a party. Rule 404(a)(1) and (2) allow the defendant to admit otherwise inadmissible propensity evidence concerning a trait of the defendant or victim's character, but once such evidence is introduced, the State has the right to rebut the evidence. Similarly, a party opens the door to admission of evidence of a witness' reputation for truthfulness by offering evidence that the witness has a reputation for untruthfulness. N.C. R. Evid. 608(a). A related concept, the Rule of Completeness, is discussed in the Introduction materials.

A few courts have differentiated between the principle of "opening the door" and related principles of "curative admissibility" and "specific contradiction." *See State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012); *State v. Morrill*, 154 N. H. 547 (2006). "Curative admissibility permits the admission of inadmissible evidence by a party in response to the opposing party admitting inadmissible evidence." *State v. Gomez*, 367 S.W.3d at 248 (citing Charles Alan Wright et al., FEDERAL PRACTICE & PROCEDURE EVIDENCE § 5039.3. The doctrine, described as "fighting fire with fire," applies only when inadmissible prejudicial evidence has been allowed and when the proffered testimony counters the prejudice. Thus the doctrine is "triggered by the erroneous prior admission of inadmissible evidence." *Id.*

Thus, the two doctrines – opening the door and curative admissibility – apply to different circumstances and may require different responses. Judges may find it beneficial to require parties to be specific when claiming a right to introduce evidence in response to an opposing party's conduct or evidence. Identifying which doctrine a party is relying upon will inform the judge's decision as to the type of evidence that may be offered in response.

In determining whether a party has opened the door, triggering the right of the opposing party to offer evidence in response, the trial judge must, in the exercise of sound discretion, determine whether fairness requires that the responsive evidence be allowed. *See e.g., State v. Bishop*, 346 N.C. 365 (1997) (defendant's misleading testimony about prior conviction opened the door for state to cross-examine about details of prior conviction); *State v. Jefferies*, 333 N.C. 501 (1993) (state's direct exam of officer related to arrest of accomplice opened door for defendant's cross-exam that charges had been dismissed); *State v. Reavis*, 207 N.C. App. 218 (2010) (defense opened door to

cross-examination of expert about defendant's record, when expert reviewed defendant's mental health history and mentioned time in prison); *State v. Mason*, 159 N.C.App. 691 (2003)(defense cross-exam of officer about why other leads were not followed opened door for re-direct about other potential suspects and reasons they were not pursued).

D. Right to Present a Defense

A common claim of defense counsel is that an evidentiary ruling deprives the defendant of a right to present a defense. The claim may be raised when the court sustains an objection which limits the defense evidence in chief or which restricts defense cross-examination. While the claim is ambiguous, it is not necessarily without merit. The United States Supreme Court has recognized the constitutional right of a criminal defendant to present a defense, but has not tethered the right to any particular constitutional provision. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(holding that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.").

The Supreme Court illustrated the application of the ambiguous rule in *Holmes v. South Carolina*. A South Carolina court applied a state evidence rule precluding evidence of third-party guilt "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence." The Supreme Court noted that although "state and federal rulemakers have broad constitutional latitude to establish rules of evidence in criminal trials," this latitude is limited by the guarantee that criminal defendants have '"a meaningful opportunity to present a complete defense,' a right protected by both the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteeth Amendment. This right is violated by rules of evidence that 'infringe upon a weighty interest of the accused' and are arbitrary or 'disproportionate to the purposes they are designed to serve.'" 547 U.S. at 324, 326 (quoting numerous cases). Thus, the South Carolina rule violated the defendant's right to present a meaningful defense.

Rather than establishing an applicable standard for future cases, the Supreme Court reasoned by way of example, citing four cases in which the Court had previously overturned other rules of evidence found to be arbitrary and unconstitutional. The four cases were *Washington v. Texas*, 388 U.S. 14 (1967) (overturning Texas statute that prohibited coparticipant from testifying for defendant at trial); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (overturning Mississippi's common-law voucher rule); *Crane v. Kentucky*, 476 U.S. 683 (1986) (overturning Kentucky rule that prohibited defendant from introducing evidence of circumstances of confession); and *Rock v. Arkansas*, 483 U.S. 44 (1987) (overturning Arkansas per se rule that excluded all hypnotically induced testimony).

While these cases are the starting point for analyzing claims that evidentiary rulings violate the right to present a defense, the Supreme Court has also suggested that

the right is far from absolute. Generally, the Court has noted that "the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence," *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) and that the mere invocation of a right "cannot automatically and invariably outweigh countervailing public interests." *Taylor v. Illinois*, 484 U.S. 400, 414 (1988) But recently, in *Nevada v. Jackson*, 133 S.Ct. 1990 (2013), the Court found that a state rule that restricted the admission of extrinsic evidence of specific instances of conduct to impeach a key witness did not violate the right to present a defense. *Id.*