

FILED

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**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

Serial: **95185**

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99002-SCT

***RE: MISSISSIPPI RULES OF
EVIDENCE***

ORDER

This matter has come before the Court en banc on Motion to Amend Certain Rules of Evidence and Comments filed by the Supreme Court Advisory Committee on Rules, and the Court, having considered the petition, finds that it should be granted and that such amendments will promote the fair and efficient administration of justice.

IT IS THEREFORE ORDERED that the Motion to Amend Certain Rules of Evidence and Comments filed by the Supreme Court Advisory Committee on Rules is granted; that Rule 504 of the Mississippi Rules of Evidence is amended as set forth in Exhibit "A" hereto, and that Rule 609 thereof is amended as set forth in Exhibit "B" hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order on the minutes of this Court and that it be submitted to West Publishing Company for

publication in the *Southern Reporter (Mississippi Edition)* and in the *Mississippi Rules of Court*.

SO ORDERED, this the 15th day of April, 2002.

A handwritten signature in black ink, reading "William L. Waller, Jr.", written over a horizontal line.

WILLIAM L. WALLER, JR., JUSTICE
FOR THE COURT

EASLEY, J., NOT PARTICIPATING

EXHIBIT "A" TO ORDER

MISSISSIPPI RULES OF EVIDENCE

RULE 504. HUSBAND-WIFE PRIVILEGE

(a) Definition. A communication is confidential if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person.

(b) General Rule of Privilege. In any proceeding, civil or criminal, a person has a privilege to prevent his spouse, or former spouse, from testifying as to any confidential communication between himself and his spouse.

(c) Who May Claim the Privilege. The privilege may be claimed by either spouse in his or her own right or on behalf of the other.

(d) Exceptions. There is no privilege under this rule in civil actions between the spouses or in a proceeding in which one spouse is charged with a crime against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either, or (4) a third person committed in the course of committing a crime against any of the persons described in (d)(1), (2) or (3) of this Rule.

[Rule 504(d) amended in *Fisher v. State*, 690 So. 2d 268, 272 (Miss. 1996) to "apply prospectively upon publication in West's *Southern Reporter*" (published in *Southern Reporter 2d* advance sheet issue of May 1, 1997; amended April 18, 2002.)]

Comment

There are two areas of law which govern if and when one spouse may testify against the other, spousal competency and marital privilege. M.C.A. § 13-1-15 governs matters of spousal competency. On the other hand, marital privilege protects certain communications made during the marriage. The privilege extends only to communications which were intended to be confidential. Thus, the presence of another person, even a family member, is deemed to mean that the communication was not intended to be confidential. Likewise, if the intent was that the communication would be confidential, a third party may not testify regarding the communication, even if he learned it from one of the spouses directly. Rule 504(a) is in accord with existing Mississippi practice.

Rule 504 (b) states the general rule. One spouse can prevent the other from testifying regarding the confidential communication in either a civil or criminal proceeding.

The privilege does not extend to cases in which one is charged with a crime against the person or the property of (1) the other spouse, (2) a child of either of them, (3) a person, familial or non-familial, residing in the household of either, or (4) another person when in the act of committing a crime against any of them.

Rule 504(c) was amended in 2002 to make the spousal privilege rule consistent with Rule 601(a)(1) which makes spouses competent witnesses against each other in civil actions between them. The policy of preserving marital harmony which supports both rules is not applicable in cases in which they are adversary parties.

[Amended March 20, 1995; amended April 18, 2002.]

EXHIBIT "B" TO ORDER

MISSISSIPPI RULES OF EVIDENCE

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect on a party or (2) involved dishonesty or false statement, regardless of the punishment:

(1) evidence that (A) a nonparty witness has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and (B) a party has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the party; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, Expungement or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, expungement, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

[Amended April 18, 2002.]

Comment

~~Under Rule 609(a) crimes are divided into two categories for purposes of impeachment. The first category, 609(a)(1), contains felony-grade convictions. Felony-grade convictions may be used for impeachment purposes, provided the court first determines that the probative value of admitting evidence of the crime outweighs its prejudicial effect. Under Rule 609(a)(1) the trial judge must make an on-the-record determination that the probative value of the prior conviction outweighs the prejudicial effects before the witness may be impeached. See *Peterson v. State*, 518 So.2d 632 (Miss.1987) for appropriate guidelines. The second category, 609(a)(2), contains crimes involving dishonesty or a false statement, whether felonies or misdemeanors. This is a change from pre-rule Mississippi practice which allowed impeachment by any prior conviction, felony or misdemeanor, other than misdemeanor traffic offense.~~

~~Provable convictions under 609(a) include convictions from any jurisdiction, federal or state:~~

~~The phrase "dishonesty or false statement" in 609(a)(2) means crimes such as perjury, subornation of perjury, false statement, fraud, embezzlement, false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.~~

~~The admission of prior convictions involving dishonesty or false statement is not within the discretion of the court. Such convictions are peculiarly probative of credibility and are always to be admitted.~~

~~The discretionary standard established in 609(a)(1) differs from that in Federal Rule of Evidence 609(a)(1). The Federal standard defines "prejudicial effect" as being that which may injure the defendant in a criminal case. Mississippi Rule 609(a)(1) recognizes that~~

impeachment occurs in civil as well as criminal cases and accordingly defines "prejudicial effect" in broader terms, i.e., as affecting a "party."

Under Rule 609(a) crimes are divided into two categories for purposes of impeachment. 609(a)(1) deals with felony convictions and under the original version treated convictions of all witnesses the same. The second category, 609(a)(2), originally addressed crimes involving dishonesty or false statement, whether felonies or misdemeanors.

Rule 609(a)(1) was amended in 2002 to incorporate the rationale of decisions by the Mississippi Supreme Court which recognized the difference in the highly prejudicial effect of showing the convictions when the witness is the accused and the little prejudicial effect from such impeachment of other witnesses. It was reasoned that when the impeachment by convictions is of a witness other than the accused in a criminal case there is little or no unfair prejudice which can be caused to a party. Thus, the probative value on the credibility of the witness will almost always outweigh any prejudice. In *White v. State*, 785 So.2d 1059 (Miss.2001) it was held that the accused had the right, bolstered by his right of confrontation, to impeach a state's witness with his felony drug conviction. In *Moore v. State*, 787 So.2d 1282 (Miss.2001) the court held that the state was properly permitted to impeach a defense witness with his five prior convictions, noting that there was no prejudice against the accused.

The amendments here refer to parties instead of the accused to clearly apply to civil cases, as did the original rule. Under this amended rule, convictions offered under 609(a)(1) to impeach a party must be analyzed under the guidelines set forth in *Peterson v. State*, 518 So.2d 632 (Miss.1987) to determine if the probative value is great enough to overcome the presumed prejudicial effect to that party, and findings should be made on the record by the judge. Convictions offered to impeach any other witness are admissible unless the court is persuaded by the opponent that the probative value is substantially outweighed by negative factors included in Rule 403. A record of the findings on the issue is not required in that case. See *Moore*, above.

Convictions from any state or federal jurisdiction may be considered for admission under the rule.

The phrase "dishonesty or false statement" in 609(a)(2) means crimes such as perjury or subornation of perjury, false statement, fraud, forgery, embezzlement, false pretense or other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the witness' propensity to testify truthfully. Such convictions are peculiarly probative of credibility and are always to be admitted, not subject to the discretionary balancing by the judge.

The reference in former 609(a) to proving a conviction during cross-examination is eliminated because the conviction may have to be proved in rebuttal if the witness refuses to admit the prior conviction on cross-examination.

Subsection (b) imposes a time limitation on prior convictions. If the conviction occurred more than ten years earlier, it may not be used as impeachment evidence. The rationale underlying subsection (b) is based on fairness. A person's past should not be able to haunt him for the duration of his life. The judge may grant an exception in instances where the probativeness of the conviction substantially outweighs the prejudice. But, before the judge makes such a decision, the proponent must give the adversary sufficient notice so that the adversary may challenge the decision.

Prior to the rules Mississippi had no time limitation regarding prior convictions. The courts held only that the prior conviction should not be too remote in time from the case at bar. That principle obviously left a great deal of discretion with the trial judge in determining remoteness. Thus, the appellate court often upheld the use of prior convictions for impeachment which were far in excess of the ten-year limitation of Rule 609(b).

Subsection (c) expresses the public policy that a person who has been rehabilitated or whose conviction has been nullified based on a later finding of his innocence should not be tainted by this conviction. Subsection (c) does not apply to pardons which simply restore a person's civil rights. Rather, it is implicitly limited to cases in which rehabilitation has occurred or in which it can be shown that the person was innocent.

Subsection (d) prohibits impeachment based on juvenile adjudications. Reasons for this rule include the wish to free an adult from bearing the burden of a youthful mistake, the informality of youth court proceedings, and the confidential nature of those proceedings. *See* FRE 609, Advisory Committee's Notes.

In pre-rule Mississippi practice, the use of juvenile adjudications for impeachment purposes has been governed by M.C.A. § 43-21-561 which provides that no adjudication against a child shall be deemed a criminal conviction. Indeed, the juvenile offender is permitted by statute to deny the fact of the prior adjudication. However, the statute permits cross-examination by either the state or the defendant in a criminal action or the respondent in a juvenile adjudication proceeding regarding prior juvenile offenses for the limited purpose of showing bias and interest. In short, the evidence could be used in these limited circumstances but not to attack the general credibility of the witness.

Under Rule 609(d) the court has the discretion to allow impeachment of a witness, other than a criminal defendant, by a prior juvenile adjudication if the judge determines that it is necessary. The court's discretion extends only to witnesses other than the accused in a criminal case.

Subsection (e) reflects the presumption that exists in favor of a trial court's decision. Until overturned, that decision is deemed to be the correct decision. Once the prior conviction has been introduced, the adversary can present evidence that an appeal of that conviction is pending. In theory, this gives a sense of balance to the use of the prior conviction. However, in practice, evidence of a pending appeal has insufficient weight to balance the use of the prior conviction.

[Amended effective March 1, 1989.]

[Comment amended effective March 1, 1989; amended April 18, 2002.]