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Evidence: Gelhaar v. State: Prior Inconsistent Statements

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RECENT DECISIONS

Evidence: Gelhaar v. State—Prior Inconsistent Statements— In *Gelhaar v. State*,[1] the defendant appealed from a conviction for the first-degree stabbing murder of her husband. During investigation, the police had taken statements from the two Gelhaar children. In each case the officer made notes while the child spoke. These statements indicated that the defendant had made an unprovoked attack on her husband and had expressed an intent to kill him. However, at the trial the defendant called the children as her witnesses, and their testimony was that the husband had called the defendant names and had threatened her. Their testimony contained nothing which evidenced any intent of the defendant to commit the murder. But when the two statements which had been made by the children to the police were put into evidence by the state, no objections were made, and no limiting instructions were given by the court or requested by the defendant. On appeal, the defendant attacked the order denying her motion for a new trial, alleging that prior inconsistent statements of witnesses are not competent evidence and that the evidence was insufficient to justify a verdict of first degree murder.

The defendant's argument was based on the holding in *State v. Major*[2] that prior inconsistent statements of a non-party witness would be admitted into evidence for purposes of impeachment only. This had been the rule in Wisconsin[3] and is the rule in the majority of American jurisdictions.[4] Such statements were not competent as substantive evidence and a party failed if he relied on them to prove his case. The prior statement was admitted by the court, if admissible on other grounds, together with any contrary testimony given during the trial, and both were given to the jury. The jury was then instructed that the prior statement was to be disregarded for any purpose other than to test the witness' credibility.[5]

The effect of the testimony was to challenge credibility rather than to establish "contradiction" or, as it is sometimes termed, "specific error." Contradiction is based on the theory that one of the statements is false and the other true[6] and that the witness is lying. Credibility means that the witness "blows hot and cold." He is unreliable because he cannot make a definitive statement. Therefore, in deciding against

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[1] 41 Wis. 2d 230, 163 N.W.2d 609 (1969).
[2] 274 Wis. 110, 79 N.W.2d 75 (1956). *See also* 41 MARQ. L. REV. 317 (1958).
[3] Jaster v. Miller, 269 Wis. 223, 69 N.W.2d 265 (1955); Hamilton v. Reinemann, 233 Wis. 572, 290 N.W. 194 (1940); Hilton v. Hayes, 154 Wis. 27, 141 N.W. 1015 (1913).
[4] Annot., 133 A.L.R. 1454 (1941). *See also* Annot., 74 A.L.R. 1042 (1931); Annot., 117 A.L.R. 326 (1938); 58 AM. JUR. WITNESSES § 770 (1948).
[5] State v. Major, 274 Wis. 110, 79 N.W.2d 75 (1956).
[6] C. MCCORMICK, EVIDENCE § 47, at 100 (1954) [hereinafter cited as MCCORMICK].

the witness' credibility, the trier of fact does not first decide whether either of the inconsistent statements is true, but only whether the witness is unreliable and whether or not his testimony is to be completely discounted. The office of the prior statement under the majority rule is only to negative or neutralize the testimony to which it is directed.[7]

Prior inconsistent statements by a witness who was a party to the action and by a hostile witness are not covered by this rule. The prior statement of a witness who is a party to the action has long been given substantive value under the exception to the hearsay rule allowing admissions and declarations against interest.[8] The hostile witness, on the other hand, was protected from any use of the prior statement by the common law rule against impeaching one's own witness, so that the prior statement was not admissible at all.[9] The legislature, however, abrogated the ancient proscription against impeaching one's own witness in criminal cases by enacting what is now Wisconsin Statute section 885.35 (1969).[10] The statute allows the impeachment of the hostile witness, at the discretion of the court. *Malone v. State*[11] indicates that the test for invocation of the statute is that surprise be shown.

The objections to the admission of the prior inconsistent statement have arisen chiefly from its hearsay nature. The witness' original statement is uttered free from the sanctions of any oath and is not given for the record in the solemnity of a judicial proceeding.[12] The cross-examination does not take place at the time of the statement, and the judge and the jury do not have the opportunity of observing the demeanor of the witness when he makes the statement.[13] Fears have also been expressed that to give prior self-contradictions probative value would increase the temptation and opportunity for the manufacture of evidence.[14]

In *Gelhaar,* the Wisconsin Supreme Court expressly overruled previous cases to the contrary and adopted the rule that the jury should be able to consider prior inconsistent statements of an adverse witness as

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[7] *Id.* § 34.
[8] 98 C.J.S. WITNESSES § 628 (1957).
[9] *Id.* § 477. *See also* J. WIGMORE, EVIDENCE § 896 (3d ed. 1940) [hereinafter cited as WIGMORE].
[10] WIS. STAT. § 885.35 (1967): "HOSTILE WITNESS IN CRIMINAL CASES. Where the testimony of a witness on the trial in a criminal action is inconsistent with a statement previously made by him and reduced to writing and approved by him or taken by a phonographic reporter, he may, in the discretion of the court, be regarded as a hostile witness and examined as an adverse witness, and the party producing him may impeach by evidence of such prior contradictory statement."
[11] 192 Wis. 379, 212 N.W. 879 (1927). *But see* Rice v. State, 37 Wis. 2d 392, 155 N.W.2d 116 (1967), in which the state was not required to show surprise.
[12] State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939); Annot., 133 A.L.R. 1466 (1941).
[13] 41 MARQ. L. REV. 320 (1958).
[14] State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939); 41 MARQ. L. REV. 320 (1958). This problem is further discussed in J. MAGUIRE, COMMON SENSE AND COMMON LAW 59-62 (1947).

substantive evidence.[15] The court upheld the use of the prior inconsistent statements of the children as proof of intent.

The court felt that the rule should not be adopted without limitation and modified it in accord with the version suggested by McCormick:

> A statement made on a former occasion by a declarant having an opportunity to observe the facts stated, will be received as evidence of such facts, notwithstanding the rule against hearsay if
> (1) the statement is proved to have been written or signed by declarant, or to have been given by him as testimony in a judicial or official hearing, or the making of the statement is acknowledged by the declarant in his testimony in the present proceeding, and
> (2) the party against whom the statement is offered is afforded an opportunity to cross-examine the declarant.[16]

A third condition was added by the court: that the witness has testified to the same events in a contrary manner in the present proceedings.[17]

The court further stated that the new rule applies only to the impeachment of an opposing party's witness. It was stated that Wisconsin Statute section 885.35 (1969), as interpreted by the court in *State v. Major,* does not permit the introduction of a hostile witness' statement as substantive evidence in a criminal case and, while no statute forbids it in civil cases, the court declined at this time to extend the new rule to cover that situation.[18] The rule was also limited to prior inconsistent statements. The court stated that it felt prior *consistent,* or self-serving, statements do not have the same evidentiary value as prior consistent statements and that such evidence is already before the jury as substantive evidence.[19] The first reason, however, appears to be rather arbitrary and merely a statement of personal preference. The second does not take into account the effect of a repetition on the weight ascribed to the evidence by the jury, especially when a prior inconsistent statement has already been introduced to call a witness' testimony into question.

The court, in deciding on the new rule, was influenced by the reasoning of McCormick[20] and Wigmore.[21] This reasoning proceeds from the premise that the only ground for denying to prior self-contradictions any affirmative testimonial value is the hearsay rule. An extrajudicial

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[15] 41 Wis. 2d 230, 163 N.W.2d 609 (1969), *citing* State v. Major, 274 Wis. 110, 79 N.W.2d 75 (1956); Jaster v. Miller, 269 Wis. 223, 69 N.W.2d 265 (1955); Hamilton v. Reinemann, 233 Wis. 572, 290 N.W. 194 (1940). Strictly speaking, *State v. Major* was not overruled in *Gelhaar* since the witness in *Major* was a hostile one. It is likely that the *Gelhaar* result would have been reached in *Major,* had the rules enunciated in *Gelhaar* been applied.

[16] McCormick § 39, at 82.

[17] 41 Wis. 2d at 241, 163 N.W.2d at 614.

[18] *Id.* at 242 n.4, 163 N.W.2d at 615.

[19] *Id.* at 242, 163 N.W.2d at 614.

[20] McCormick § 39, at 75-76.

[21] Wigmore § 1018, at 687-88.

statement must be rejected under Wigmore's hearsay theory because it is made outside the courtroom by an absent person not subject to cross-examination. But in the case of a prior statement by a witness, however, the purpose of the hearsay rule is satisfied; if the witness is present and subject to cross-examination, an ample opportunity exists to test the witness as to the basis of former statements. A second argument given for admission of a witness' prior inconsistent statement is that the statement is nearer in time to the event than is the testimony. The greater the lapse of time between the event and the trial, the greater the chance of the witness' exposure to the dangers of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy. "[T]he time-element plays an important part, always favoring the earlier statement, in respect to all of these hazards."[22] The court's final reason for its change was that the attempt to instruct the jury to consider the evidence solely as bearing on the credibility of the witness is simply ineffectual and a "mere verbal ritual."[23]

The new rule is consistent with changes long advocated by scholars. However, it is much more restricted in application than most of the scholastic approaches and is limited in effect to the exact situation found in *Gelhaar*. The ALI suggested a fairly unrestricted rule[24] and this rule was adopted in rule 63(1) of the Uniform Rules of Evidence.[25] Both rules advocate that all prior statements be accorded full value as an exception to the hearsay rule if the witness is subject to cross-examination. The Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates takes a slightly different approach in achieving substantially the same end by excluding such statements from its initial definition of hearsay.[26] It does limit the rule

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[22] McCORMICK § 39, at 75.

[23] *Id.* at 77.

[24] MODEL CODE OF EVIDENCE rule 503 (1942): "Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination."

[25] UNIFORM RULES OF EVIDENCE rule 63(1) (1954): "HEARSAY EVIDENCE EXCLUDED—EXCEPTIONS. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: (1) *Previous statements of a person subject to cross-examination.* A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness . . . ."

[26] COMM. ON RULES OF PRACTICE AND PROCEDURES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 8-01(c)(2)(i) and (ii) (1959) [hereinafter cited as PRELIMINARY DRAFT]:

8-01 DEFINITIONS.

. . . .

(c) HEARSAY. "Hearsay" is a statement, offered in evidence to prove the truth of the matter asserted, unless

. . . .

(2) PRIOR STATEMENT BY WITNESS. The declarant testifies at

by narrowing its application of the prior consistent statement to rehabilitation. The McCormick rule is even narrower in its requirement of adoption by the witness: the statement must be written or signed by the witness, given in a prior judicial proceeding, or acknowledged by him. The Wisconsin Court requires further that the statement be offered to contradict present testimony.[27]

It might be said that, under the new Wisconsin rule, the evidence involved is now offered under the theory of "contradiction" rather than a testing of "credibility". Before *Gelhaar,* the jury purportedly used such evidence to decide whether the witness' testimony on the stand was reliable or unreliable; now such evidence has a dual role, and the jury can also decide which of the two stories is true.

While there has been widespread support among academic writers for this enlargement of the exceptions to the hearsay rule to give a probative effect to prior inconsistent statements of a witness,[28] the courts have largely rejected such a stand.[29] With the exceptions of the United States Court of Appeals for the Second Circuit[30] and Wisconsin, no American court has approved such a rule. The California legislature enacted a similar rule in its Evidence Code,[31] and Kansas,[32] in adopting a modified version of the Uniform Rules, also endorsed such usage.

California, in applying its statute[33] which allowed substantive value to prior inconsistent statements, experienced some problems which were not considered by the Wisconsin court in its discussion of *Gelhaar.* In *People v. Johnson,*[34] it was decided that, in criminal cases, the California statute was a violation of the defendant's constitutional rights. The court held the right to confrontation guaranteed by the Sixth Amendment was not satisfied unless the accused was given the opportunity to cross-examine at the time the statement was made and before

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> the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

[27] McCORMICK § 39, at 82.

[28] WIGMORE § 1018; McCORMICK § 39; Morgan, *The Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177. 192-96 (1948); UNIFORM RULES OF EVIDENCE rule 63(1) (1954); MODEL CODE OF EVIDENCE rule 503(b) (1942); PRELIMINARY DRAFT rule 8-01(c)(2)(i) and (ii); *see also* DiCarlo v. United States, 6 F.2d 364 (2d Cir. 1925), *cert. denied,* 268 U.S. 706 (1925).

[29] Annot., 133 A.L.R. 1454 (1941). *See also* Annot., 74 A.L.R. 1042 (1931); Annot., 117 A.L.R. 326 (1938); 58 AM. JUR. WITNESSES § 770 (1948).

[30] United States *ex rel.* Ng Kee Wong v. Corsi, 65 F.2d 564 (2d Cir. 1933); United States v. De Sisto, 329 F.2d 929, 932-34 (2d Cir. 1964).

[31] CAL. EVID. CODE § 1235 (West 1966).

[32] KAN. STAT. ANN. § 60-640 (1964).

[33] *See* Miller, *Beyond the Law of Evidence,* 40 S. CAL. L. REV. 1 (1967).

[34] 68 Cal. Rptr. 599, 441 P.2d 111 (Sup. Ct. 1968). *See also* People v. Graham, 78 Cal. Rptr. 217, 455 P.2d 153 (1969).

a contemporaneous trier of fact.[35] The United States Court of Appeals for the Eighth Circuit in a recent decision seems to agree:

> The Ellis case was decided in 1943. Almost a quarter of a century later the empirical judgment of all courts, both state and federal, still follows the orthodox view, contrary to the liberal suggestions early espoused by Dean Wigmore. (See Wigmore, section 1018 (3rd ed Supp 1964).) The right to confront the witness at the time the statements are made is paramount in a criminal trial. U.S. Const. Amend. VI.[36]

The Sixth Amendment occupies much of the same ground as the hearsay rule[37] and the right to cross-examination is a facet of the right to confrontation guaranteed by this amendment. The passage of time and the altered circumstances since the witness' prior declaration may make the subsequent cross-examination inadequate. The question of what constitutes a cross-examination adequate to give the defendant his constitutional right of confrontation presents a potential problem for Wisconsin in its application of the *Gelhaar* rule.

HERBERT V. ADAMS

Attorneys: Scrivener as Beneficiary of Will—"An attorney has a duty not to harm but to maintain the integrity of the legal profession, even though this may call for a personal sacrifice . . . ."[1] This duty to the profession may become onerous when a problem arises concerning a will in which the attorney-draftsman is named as a beneficiary. In such a situation, the attorney not only risks undermining public trust in the integrity of the legal profession but also chances a charge of conflict of interest. He may also render himself incompetent to testify about the will because of a "dead man's statute." The most serious risk is that the will will be invalidated if contested, an especially harsh result in jurisdictions, including Wisconsin, which do not follow the rule of partial will invalidity in undue influence cases.[2]

In *State v. Collentine*,[3] the Wisconsin Supreme Court addressed itself to the problem and, exercising its supervisory authority over the Bar, promulgated the following rule:

> In order to prevent future misunderstandings, we conclude and establish as a rule for prospective application that a lawyer

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[35] The California court pointed out that the United States Supreme Court has been zealous in protecting Sixth Amendment rights from erosion. Smith v. Illinois, 390 U.S. 129 (1967); Pointer v. Texas, 380 U.S. 400 (1965); Bridges v. Wixon, 326 U.S. 135 (1945).

[36] Goings v. United States, 377 F.2d 753, 762 n.12 (8th Cir. 1967).

[37] PRELIMINARY DRAFT Art. VIII [*Hearsay, Confrontation, and Due Process*], at pp. 156-58.

[1] State v. Horan, 21 Wis. 2d 66, 70, 123 N.W.2d 488, 490 (1963).

[2] *Id.*

[3] 39 Wis. 2d 325, 159 N.W.2d 50 (1968).