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The Judge as Gatekeeper: Preventing the Jury from Being Misled

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by

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Abstract

The famous Miranda warnings include the phrase “anything you say can and will be used against you in a court of law”. The warning provides transparency and protects constitutional rights. Rules of evidence that govern trials permit adversaries to use statements made by the other side against their adversary. It would be more transparent to add “anything you say may be used to mislead the jury”. Under the rules of evidence, the government may offer only part of defendants’ statements into evidence. On the other hand, defendants often prefer to offer partial statements of government witnesses to help cases. The Federal Rules of Evidence and evidence rules in most states allow admission of evidence to repair misleading impressions under Rules of Completeness (“Completion Evidence”). Scientific research on jury decision-making demonstrates juries construct stories to understand evidence. A problem arises when only partial statements of witnesses are introduced by the adversaries. The jury may hear only part of the story. A particular problem arises when defendants exercise the constitutional right not to testify and the government has offered only part of a defendant’s statement. The problem is more readily addressed if defendants offer only parts of statements made by government witnesses. Government witnesses typically do not exercise their right not to testify. When defendants have exercised the right not to testify there may be no witness available to repair a misleading impression. This study analyzes law review articles, court cases and rules of evidence to determine when completion evidence is admissible in criminal cases. This study reveals a way forward to avoid distortions of evidence that may mislead juries.

Dedication

To my wife Susan who enthusiastically supports and encourages my efforts to be a student again and complete the Judicial Studies Master's Degree program.

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Table of Contents

Introduction

Statement of the Problem

Federal circuit courts and state laws are split regarding how to apply the rule of completeness. Completion evidence is often inadmissible hearsay. Hearsay is generally inadmissible because it is a statement made out of court, not subject to the oath to tell the truth, to cross examination or to scrutiny by the jury. The circuit split results in different treatment of completion evidence. A case tried in federal court in Georgia allows for admission of completion evidence even though it is hearsay. A case tried in federal court in Tennessee does not allow admission of completion evidence if it is hearsay. The state split also results in different treatment of completion evidence depending on where the case is tried. A case tried in state court in Connecticut allows for admission of completion evidence even though it is hearsay. A case tried in state court in Virginia does not allow for admission of completion evidence if it is hearsay.

Such contradictions arise in many cases because the government is allowed under evidence rules to introduce only part of a statement or confession of a defendant in a criminal case. A statement of a defendant offered by the government is not classified as hearsay because it is offered against the defendant, a party to the case who is present in the courtroom. The rule is that a party can present the adversary's words into evidence at trial. However, a party cannot present its own words into evidence. The rule is designed to prevent parties from making statements out of court they believe would benefit them at trial then presenting the evidence at trial without testifying, essentially effectuating an end run around the oath to tell the truth, cross-examination by the other side or scrutiny of the jury. Federal Rule of

Evidence 106 and similar state rules were developed to allow parties to introduce evidence the other party is not required to present and otherwise cannot be presented by parties on their own behalf.

The rule provides an opportunity for parties to complete the story for the jury as a matter of fairness. This evidence is often referred to as “completion evidence”. Such evidence is often hearsay. Most of the rules of completeness do not specifically address whether hearsay is admissible as completion evidence. The problem is that admissibility of completion evidence depends upon the federal circuit or the state where the case is tried, and the jury may be left with a misleading impression where completion evidence is not allowed.

The adversary system of justice in America evolved along with our constitution. Parties in the American adversarial criminal trial present cases to juries by telling stories. The adversaries compete to convince the fact-finder to accept their versions of the story. The decision maker in the adversarial system is expected to make an impartial decision based upon the evidence presented by the parties. Party control of evidence presentation is one of the main characteristics of the adversary system of justice. In an adversary system, evidence is presented by those with a stake in the dispute. The major alternative to the adversarial system is the inquisitorial system of justice, dominant in continental Europe. In an inquisitorial system the parties do not control the presentation of evidence. Evidence is gathered under the supervision of the judge. In the adversarial system parties present facts believed to favor them and are not expected to present facts believed to be unfavorable. As a result, the jury may be shielded from part of the story. The rule of completeness is available to either side to repair misleading impressions left by the other side. The government may seek to correct a misleading impression created by the defendant’s presentation of evidence to the jury. If

defendants present incomplete evidence to the jury the government is allowed to repair a misleading impression by calling witnesses to provide complete testimony. A unique problem arises in criminal cases if defendants have exercised their Fifth Amendment right not to testify. The possibility arises that no witness is available to repair a misleading impression created by the government's partial presentation of evidence.

This study reviews the current literature and contradictions in application of the rule of completeness. The goal is to discover whether the contradictions may be reconciled through integration of jury decision-making research, case law and current rules of evidence.

Research Question Number 1

How have courts in federal circuits reasoned when they found completion evidence inadmissible because it is hearsay?

Research Question Number 2

Which states have rules of evidence similar to the federal rule, and which specify whether completion evidence is admissible whether or not it would otherwise be inadmissible?

Rationale for Why the Research is Important

Social Science studies have shown that jurors construct stories as they hear evidence presented at trial. "…[C]onfessions provide such powerful evidence of guilt that they can radically transform a juror's evaluation of evidence and decision-making processes" (Bornstein & Greene, 2017, pg. 121). Studies indicate that allowing a jury to hear pieces of a

confession and excluding other parts of the confession could leave the jury with only part of the story and, potentially, the wrong impression with regard to one of the most influential forms of evidence. Preventing a jury from hearing evidence could infringe on the right to trial by jury. The criminal jury trial is a fundamental component of the American system of justice. It is firmly rooted in our history, our traditions, and our state and federal constitutions. The right to a trial by jury was at the forefront of the issues in the founding documents. It was mentioned as a grievance in the Declaration of Independence and enshrined in the Constitution and Bill of Rights. The Supreme Court has applied the right to a jury trial in criminal cases to the states. In addition, every state has guaranteed criminal defendants the right to a jury trial in their respective state constitutions. Given the foundational basis of the criminal jury trial and its importance in the criminal justice system it is imperative that judges constantly seek to improve the judge's and the juror's ability to deliver fair and accurate decisions.

Hypothesis

Research Question Number 1: Federal Rule of Evidence 106, cases discussing the concept of hearsay and the need for context for admitted evidence are dependent variables to be utilized to avoid the independent variable of "misleading the jury".

Research Question Number 2: State rules of evidence are dependent variables that will not reveal whether the independent variable of "admission of otherwise inadmissible evidence as completion evidence" applies in the state because most state rules of completeness are modeled on the federal rule of completeness.

Review of Literature

Jury Decision-Making

Old Chief

"There is one instance-to the best of my knowledge the only one-in which the Supreme Court overtly recognizes what one might call the legal stakes of narrative in adjudication" (Brooks, 2006, pg. 21). In Old Chief v. United States, 519 U.S. 172 (1997) Justice Souter wrote the opinion for the Supreme Court recognizing the importance of narrative in jury decision-making. Justice Souter stated "A syllogism is not a story...[p]eople who hear a story interrupted by gaps of abstraction may be puzzled by the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more that second best" (Old Chief, 1997 pg. 189). The Court goes on to discuss the importance of narrative in trial and recognizes that as the pieces of evidence come together a narrative gains momentum and the concrete and particular have persuasive power.

Theoretical Models of Jury Decision-Making

Research into jurors' decision-making process is crucial to understand how such decisions are reached (Groscup & Tallon 2016). The judge's decision-making process in determining what evidence the jury will consider can be improved if judges understand the results of such research. Theoretical analysis of jury decision-making focuses on cognitive processing, integration and application of trial evidence and provides clues into the mysterious

and complex jury decision-making process (Groscup & Tallon, 2016). No one theory explains the whole process (Groscup & Tallon, 2016).

The Story Model for Juror Decision-Making

Pennington & Hastie (1993) proposed that a juror uses narrative story structures to organize and interpret evidence in criminal trials. This is now widely known as the Story Model. Two models of jury decision-making: explanation-based models and mathematical models, are often discussed in the literature. The Story Model is explanation-based. In an explanation-based model, a decision maker creates a cause-and-effect explanation of the available information, and the decision is based on the explanation. (Groscup & Tallon 2016). The Story Model proposes that story construction enables comprehension and organization of the evidence by jurors so that evidence can be meaningfully evaluated against the verdict categories in a case (Pennington & Hastie, 1993). Jurors create one or more narratives about the trial and the stories may be developed from any combination of trial facts, pre-existing knowledge, and expectations (Groscup & Tallon, 2016). The stories may be based only on the trial evidence. However, when a crucial element of the story is not presented as evidence the decision may be based on a juror's inferences about the trial, the crime, and the defendant (Groscup & Tallon, 2016).

The Story Model provides a psychological explanation for assignment of relevance to information (Pennington & Hastie, 1993). The study indicates that a jury will view one story as more acceptable than the others. Pennington and Hastie (1993) identified three principles, termed certainty principles, that determine the acceptability and resulting confidence

in the story chosen by the juror. The first two are coverage and coherence. These govern acceptance. The third is uniqueness, which contributes to confidence.

If a crucial piece of evidence is not integrated into the story, coverage decreases (Groscup & Tallon, 2016). The concept of coherence has three components: consistency, completeness, and plausibility. These three components combine to provide coherence to the story. Uncertainty will result if more than one story is seen by a juror as coherent (Pennington & Hastie, 1993). The best story developed by the juror will be accepted (Groscup & Tallon, 2016). Complete evidence will contribute to coverage and coherence which will result in more juror confidence. Theoretically, complete information will lead to decisions that are based on the trial evidence. Devine (2012) says "…the Story Model has emerged as the juror-level model of choice in part because it is so psychologically plausible" (Devine, 2012, pg. 185).

In a trial, evidence is presented over several days, one witness at a time. This presentation will, at times, be based on the availability of witnesses, not on chronological order. Numerous studies indicate this presents a complex task for a decision maker. This research project will focus on the Story Model, the most plausible of juror decision-making theories. Studies, utilizing mock juries, have found that a juror's first step is to construct a narrative summary of the evidence (Pennington & Hastie, 1993). In this process stories appear to be organized into units called episodes. The studies indicate the story constructed by the juror will be based on events in the presentation of evidence (Pennington & Hastie, 1993). Knowledge about the structure of stories allows the juror to determine when important pieces of the explanation are missing. This knowledge allows the juror to form an opinion concerning the completeness of the evidence, in essence, to determine whether the story

has all its parts. Jurors have an automatic index of the importance of different pieces of evidence (Pennington & Hastie, 1993). Completeness is one of the components of the theory. Completeness refers to the extent to which a story has all of its parts. "The amassed research on various aspects of the evidence leads to one fairly straightforward conclusion: strong evidence is that which makes for a good story" (Devine, 2012 pg. 150).

However, not every story may be presented in court. The law of evidence regulates how stories are told at trial. Gewirtz (1996) classifies this as a law of narrative and goes on to say that it includes various constitutional principles such as admissibility of confessions, among others (Gewirtz, 1996). Expectations about the kind of information that make a story tell jurors when pieces of the story are missing, and inferences must be made. Knowledge about story structure allows jurors to form an opinion about the completeness of the evidence, the extent to which a story has all its parts. Missing information will decrease confidence in the explanation (Pennington & Hastie, 1993).

Devine (2012) says that jurors can be viewed as being in one of four cognitive states when the trial concludes: (1) favoring the prosecution/plaintiff's theory (a believer), (2) favoring an alternative story offered or implied by the defense (a doubter), (3) trying to choose between two or more stories seen as equally plausible (a muller), or (4) unable to formulate any story that provides a satisfactory account of the evidence (a puzzler).

Mathematical Models of Juror Decision-Making

Mathematical models based on probability have also been utilized to study jury decision-making (Groscup & Tallon, 2016). Mathematical approaches include: Bayesian modeling, algebraic approaches, and stochastic process models (Groscup & Tallon, 2016). These

models assume that verdicts are ultimately determined through mathematical judgments about the evidence (Groscup & Tallon, 2016). The two models specifically addressed by Groscup & Tallon (2016), Bayesian and information integration, both utilize two underlying assumptions. First, pieces of evidence are examined independent of one another. Second, the order of presentation of the evidence is irrelevant (Groscup & Tallon, 2016). Groscup & Tallon (2016) determined there is evidence of a weighted average approach to juror integration of evidence, however, there is little empirical evidence in favor of the Bayesian model.

The Bayesian model appeared repeatedly in the review of the literature leading to this study. Therefore, it is used as the contrast to the Story Model in this study. The Bayesian model is at odds with the notion of sifting through the evidence and creating a narrative explanation of the evidence (Devine, 2012). Jurors clearly do not decide according to the Bayesian model (Devine, 2012). The Story Model is seen as more plausible because people are not Bayesians, mathematically deriving probabilities of the various possible outcomes, guilty or not guilty, on the basis of the value of the various pieces of evidence (Devine, 2012). Most jurors do not use statistical information as well as it could be utilized. Jurors tend to underweight statistical information relative to the impact it should have according to the Bayesian model. In addition, they fail to combine probabilities ideally (Devine, 2012).

The History of the Federal Rules of Evidence

Constitutional rules assure reliability of evidence and accurate fact finding in trials (Findley, 2013). Rules of evidence enacted through the legislative process also apply in federal

courts and state courts. The stated purpose of the rules of evidence is that the object of all legal investigation is the discovery of truth, and the rules of evidence should be construed to the end that the truth may be ascertained, and proceedings justly determined (Risinger, 2013). Rules of evidence have evolved over centuries in common law jurisdictions. Originally, common law judges created the rules on a case-by-case basis. Today the rules are determined by judicial committees, legislatures, special commissions, and judges in their role as interpreters of the rules. The rules that became the Federal Rules of Evidence, and are now the template for rules of evidence in most states, were the result of a lengthy process culminating in an advisory committee that drafted proposed rules of evidence. The proposed rules were eventually submitted to Congress. Congress approved the rules in 1974. The rules became effective July 1, 1975.

The rules of evidence developed to protect the jury from misleading information. Ultimately, the key questions in assessing jury performance are: do juries properly consider evidence they are supposed to consider and decide cases as the law intends? Do they ignore factors they are not supposed to consider (Bornstein & Greene, 2017)? Extralegal factors such as the manner of presenting evidence and jurors' emotional responses matter in assessing jury performance (Bornstein & Greene, 2017). Strength of the evidence is the major determinant of jury verdicts, but when the evidence is not clear or is ambiguous, the potential for biasing factors to operate increases (Bornstein & Greene, 2017). "The Federal Rules of Evidence are intended to signify reason's triumph over emotion in the courtroom" (Teter, 2008 pp. 153). The rules of evidence are also purposefully concise and designed to be nimble for instant deployment in the quick-draw contest of the American trial (Capra & Richter, 2019).

Psychological Basis of Rules of Evidence

Rules of evidence deeply involve psychology (Saks & Spellman, 2016). The judge often acts as an applied psychologist when deciding what evidence to allow the jury to hear and what evidence not to allow the jury to hear. This determination involves understanding how jurors may think and feel about evidence presented in court (Saks & Spellman, 2016). The rules place judges in the position of utilizing metacognition in deciding what evidence to admit and what to exclude based on a prediction of how jurors will feel about the evidence (Saks & Spellman, 2016). Research on juror decision-making has established that despite many factors that may influence jurors the major factor is the evidence presented at trial (Devine, 2012). Therefore, the most important consideration for judges at trial is how jurors process the evidence judges allow them to hear. The courtroom trial is a social setting that emphasizes neutrality and fairness. This implies a duty for decision makers to set aside bias and confusion and focus on the evidence. The judge must try to predict how the evidence will inform, mislead, or otherwise influence the juror. A mindful and deliberate decision-making process creates conditions for less emotional decision-making.

The Judge as Gatekeeper

A jury trial is a mixed tribunal of lay people and professional judges. Judges play a role in shaping the contours of the narrative in a trial through the power to determine the admissibility of evidence. Judges are the directors of the real-life drama taking place in the courtroom. Judges must recognize the impact evidence decisions have on the lives and fortunes

of those involved in the drama (Leonard, 1990). Wisdom and reflection are required (Leonard, 1990). Rule 102 of the Federal Rules of Evidence, the basic philosophical provision in the evidence rules, states four principles that a trial court must seek to satisfy when ruling on evidentiary issues: (1) ascertainment of truth (2) achievement of justice (3) fairness, and (4) avoidance of undue cost and delay (Leonard, 1990). Rules of evidence involve rule governed storytelling (Brooks, 2006). Judges are the gatekeepers and determine admissibility of evidence. "The judge must know and enforce these rules" (Brooks, 2006, pg. 21). Rule 102 is the reference point when application of the rule is unclear (Leonard, 1990). Judges' gatekeeping role protects the integrity of the trial and important social and legal policies, particularly determination of the truth (Leonard, 1990). Judges play a powerful role in determining evidence the jury will hear (Thompson, 2012). Judges' proper use of procedural rules for determining admissibility of evidence protects the constitutional right to jury trial and the quality of information for juries, thereby facilitating the search for truth. Judges can make trials better by being the gatekeeper and protecting trials from biases of parties, their witnesses, and their lawyers and, therefore, reduce bias in the justice system as a whole (Burns, 2013; Klein, 2016).

Judges play a major role in the narrative told at trial; however, jurors are the ultimate fact finders in a jury trial. Rules of evidence ensure reliability of evidence in trials. Rules of evidence protect social and legal policies. Judges primarily decide preliminary facts that underlie rules designed to protect social and legal policies. Rulings on admissibility of evidence often require a decision on a question of fact. These facts are termed "preliminary facts". Preliminary facts are distinguished in the literature and the rules from historical facts ultimately be decided by the jury. Judges are fact finders with regard to preliminary

facts. Judges could encroach upon the jury's role and pose a threat to the constitutional right to trial by jury. In a jury trial the role of fact finder is mostly for the jury (Faigman, et al., 2016). Judges fulfill the role of gatekeeper by considering facts not yet admitted into evidence when ruling on admissibility (Maguire & Epstein, 1927). Judges essentially conduct a trial within a trial. This framework for the procedural implementation of the rules of evidence has sparked plenty of controversy in scholarly articles and courtrooms because of the potential to infringe on the right to have juries decide facts.

Preliminary Fact-Finding Procedure

Rules of evidence facilitate conscious decision-making by judges through purposeful deliberation in determining whether evidentiary rules have been satisfied before evidence is heard by the jury. The preliminary fact-finding procedure is one of the most misunderstood, and conceptually difficult, subjects in evidence law (Imwinkelried, 2020). As a result, many litigators and some judges are under misconceptions about the topic. The preliminary fact-finding procedure under Rule 104 requires an understanding of the difference between the historical facts of the case and preliminary facts. Preliminary facts often determine admissibility of evidence. Judges should proceed methodically, thereby assuring the judge touches all deliberative bases in order to avoid intuitive decisions on evidence rulings (Guthrie, et al, 2007).

Rule 104(a) and (b)

The Rule 104 procedure is described in an article written by Edward J. Imwinkelried (Imwinkelried, 2020). Rule 104 of the Federal Rules of Evidence provides a methodical procedure for evidence rulings by separating them into two primary considerations as described in sections (a) and (b) of Rule 104. Rule 104 specifies the procedure judges should follow in determining whether evidence is admissible or not (Thompson, 2012). Judges are fact-finders on preliminary matters, even in jury trials, and should ask questions to gather facts in order to make findings and use discretion to ensure a careful decision-making process. The preliminary fact-finding procedure provides for a purposeful, deliberate focus on a decision-making process and results in a strategy for ensuring fairness in the administration of criminal trials. The applicability of a particular rule of evidence often depends on whether certain circumstances exist. Judges act as triers of fact when this inquiry is factual. However, in the American jury trial, the democratic ideal is that juries determine facts. The literature characterizes facts juries decide as historical facts. Preliminary facts indicate whether historical facts meet standards of reliability before being heard by the jury (Imwinkelried, 2020). Historical facts become part of the story juries hear once judges determines whether preliminary facts exist. For example, statements made out of court are hearsay. However, there is an exception for an excited utterance. Judges must consider preliminary facts regarding whether a statement was made under exciting circumstances in order to determine if the jury will hear the historical facts contained in the statement.

Under Rule 104(a) judges hear preliminary facts from both sides and decide whether the jury will hear the evidence. Under Rule 104(b) judges need only hear preliminary facts

from one side because the inquiry is whether there is sufficient evidence for the jury to make the ultimate decision. This dichotomy is based on the technical nature of many of the rules of evidence, such as the hearsay rule. The literature and the rules recognize the difficulty of jurors setting aside knowledge of preliminary facts needed to apply technical rules of evidence under Rule 104(a). If jurors hear facts under Rule 104(b) the risk to the integrity of deliberations is minimized. The 104(b) inquiry is based more on common sense than technical rules of evidence. For example, whether a witness is testifying based on personal knowledge is naturally a common sense determination. The Rule 104 evidence procedure has its origin in Professor Morgan's 1929 law review article (Morgan,1929). Other articles have elaborated on this concept (Maguire & Epstein, 1927; Saltzburg, 1975). Morgan's theory bifurcated the preliminary fact-finding procedure, now codified at Rule 104(a) and (b).

Rule 104 Checklist

Judges' success often depends on reflexive rulings on objections during trial. (Conrad & Clements, 2018). Ruling on objections takes practice and repetition. However, very few cases go to trial, therefore, judges don't get the repetition and experience to keep their skills at an optimal level (Conrad & Clemens, 2018). Better decisions and procedural fairness result if judges follow the preliminary fact-finding procedure under Rule 104. This procedure could act as a checklist or script of sorts as recommended in (Guthrie, et. al, 2007). It is critical to determine whether Rule 104(a) or (b) applies. Under Rule 104(a) the question is described as competence of evidence: a legal decision entrusted to judges. Under Rule

104(b) the question is described as conditional relevance: facts under consideration that become relevant only when connected with other facts.

The adversary system elevates the role of procedure and, therefore, makes utilizing the right procedure that much more important. The right procedure will likely produce a fair result. Procedure can be analogized to science: a methodology that, if done right, will enable the court to arrive at the right answer whether the dispute is one of fact or law. Virtually every evidentiary doctrine is reducible to a set of preliminary facts, and therefore should be analyzed under the Rule 104 procedure (Imwinkelried, 2000). The trial judge's power to determine definitively the existence of preliminary facts is a primary role of the judge. Rule 104 provides a disciplined procedure for analysis.

Under Rule 104(a) judges decide whether evidence will be admitted. If not applied correctly the judge could usurp the role of the jury, impacting the constitutional right to a jury trial. Judges should safeguard the jury's fact-finding role. Judges should develop a checklist of evidence rules to be decided under Rule 104(a) and those to be decided under Rule 104(b). The preservation of the role of the jury as a democratic institution is one of the major stakes in the emerging controversies over the proper scope of decisions under Rule 104(a) (Imwinkelried, 2020). Under Rule 104(b) the judge screens the evidence to determine if there is sufficient evidence for the jury to hear the issue. Rule 104(b) involves common sense reasoning, not legal reasoning. Rule 104 is important because it protects both the proponent and opponent from potentially inadmissible evidence.

Rule 104(c)

Rule 104(c) allows, or requires in some cases, judges to hear evidence outside of the presence of the jury to determine admissibility. This creates a shield between the judge and counsel and the jury affording an opportunity for potentially inadmissible evidence to be discussed in depth. This is a very purposeful deliberative process to assure the rules are followed. In addition, this process can facilitate rational decision-making. The rules of evidence, except with respect to privileges, do not apply to this preliminary determination. Judges evaluate evidence that is the subject of the objection. Otherwise, the judge has ceded this determination of admissibility to the lawyer, inhibiting the judge's and jury's role. (Ohlbaum, 2001).

In addition, Rule 104(c) addresses the procedure for admissibility of a defendant's statement or confession. The procedure requires that hearings on the admissibility of a defendant's statement be conducted outside the presence of the jury.

Confessions/Admissions

"Confessions are very powerful because they offer a ready-made story with little need for any other information" (Devine, 2012, pg. 150). Confessions are custodial statements resulting from law enforcement interrogation. A confession is subject to the standards of Miranda v. Arizona, which requires that a confession be voluntarily made to be used in evidence. The statement need not be inculpatory to be admissible. This is why the Miranda warning includes the instruction that anything you say can and will be used against you in a court of law.

Relatively little attention has been paid to the effect of confession evidence on jurors by researchers (Devine, 2012). The reason may be that a confession is presumed conclusive (Devine, 2012). Some of the studies show that confession evidence influenced jurors even when they were aware that it should not (Devine, 2012). These results are consistent with the Story Model (Devine, 2012). If the jury learns the defendant confessed it makes for a "…story that is short, sweet and ultimately difficult to dismiss" (Devine, 2012, p. 147). Jurors are likely to pay attention to and remember details of the confession and other consistent evidence and discount evidence that is inconsistent with the narrative (Bornstein & Greene, 2017).

The vast majority of confessions are accurate, or partially so, and serve to expedite cases through the criminal justice process, promote public safety and provide a sense that justice has been done (Bornstein & Greene, 2017). On the other hand, this seemingly conclusive evidence is not entirely foolproof (Bornstein & Greene, 2017). In addition, the admission of confession evidence is so powerful that it can radically transform jurors' evaluation of other evidence in the case (Bornstein & Greene, 2017). "Confessions are very powerful because they offer a ready-made story with little need for any other information" (Bornstein & Greene, 2017, pg. 150). This study involved the evidentiary aspects of confessions as opposed to the determination of the voluntariness of a confession under the Miranda analysis. This study assumes the judge has decided the confession or any statement by the defendant is admissible and the question is: how will it be used at trial?

Rule 106

Rule 106, appropriately named the Rule of Completeness, allows for introduction of evidence needed to complete the evidence introduced by the adversary. Studies have shown that mock jurors who watch an entire interrogation and not just the final confession were more likely than those who saw only a part to reach a correct verdict (Bornstein & Greene, 2017, p.123). The Story Model of juror decision-making indicates what comes first has more influence on the story ultimately created (Bornstein & Greene, 2017). Bornstein & Greene (2017) indicate that of all the reforms surrounding confessions the principle of transparency is most essential. If the government introduces part of a confession judges may allow the defense to introduce any other part at that time. Federal circuit courts and state laws are inconsistent about whether completion evidence may include otherwise inadmissible evidence. This research project seeks to determine the extent that completion evidence may be admitted amidst the inconsistencies.

Devine (2012) established four cognitive states of jurors, believer, doubter, muzzler and puzzler. Completion evidence can shift jurors to a more favorable cognitive state for decision-making. For example, from a doubter to a believer or a believer to a doubter or from a muller or puzzler to either a believer or doubter.

Method

The first step in this study was to compile law review articles that address Rule 106. The articles were gathered by conducting an internet search using the search terms “Rule 106”, “Federal Rule of Evidence 106” and “rule of completeness scholarly articles”. The study involved a search of Westlaw using the same key terms to determine if the same articles appeared in the Westlaw search. The articles were analyzed to determine which ones addressed the different decisions, and reasons for those decisions, from the federal circuit courts of appeal interpreting Rule 106. (“The Circuit Split”). The articles and cases analyzed are listed in the appendix. The study methodology utilized the categories by federal circuit established by Hills (2019) as follows: A. Rule of Admissibility 1) First Circuit 2) Tenth Circuit 3) Eleventh Circuit 4) D.C. Circuit; B. Rule of Timing Only 1) Fourth Circuit 2) Sixth Circuit 3) Eight Circuit 4) Ninth Circuit; C. Discretionary Admissibility 1) Second Circuit, 2) Seventh Circuit; D. Unaddressed; 1) Third Circuit 2) Fifth Circuit. The sample of cases was narrowed to those in the categories Hills (2019) classified as Rule of Timing Only, Discretionary Admissibility or Unaddressed. It was unnecessary for this study to analyze cases classified as “Admissibility” because hearsay is admissible as completion evidence in those circuits. The independent variable is the idea of the completion evidence being “necessary to correct a misleading impression”. If the evidence does not mislead the jury, there is no need to determine whether the defendant variables of Rule 106, providing context or the admission of hearsay is necessary. The dependent variables are, “Rule 106”, “hearsay” and “context”.

The next step was to conduct a Weslaw search of the evidence laws for all states to determine if the state has a Rule of Completion modeled on Federal Rule 106 or a similar rule.

Code Book Construction

A code book was created to allow the author to measure any variables in the reasoning in the cases. The author read the law review articles and cases cited in the articles to identify the possible reasonings for admitting or excluding completion evidence. A code book was created to record relevant information about each case in the sample. The types of reasonings given were listed in the code book. Operational definitions were created during the first phase of coding to measure the variables of interest. The cases were then coded based on whether "Rule 106", "hearsay", "misleading the jury" or "context" were mentioned in the courts' analysis. Cases that mentioned any of these concepts were listed under each concept. The cases were then added to arrive at a total of times they were mentioned in the courts' analysis. The total revealed the frequency with which the courts mentioned these operational definitions in their reasonings.

In addition, a code book was created to measure which states have a rule of completeness based on, or similar to, the federal rule of completeness. Those with a similar rule were analyzed to determine whether hearsay is allowed as completion evidence or whether hearsay is not allowed or whether the rule specifies if hearsay is allowed or not. Three categories were created to measure the number of states in each category. The three categories are: "Does not specify", "specifies that hearsay is admissible", and "specifies that hearsay is not admissible".

Results

Research Question Number 1

The cases analyzed with regard to research question number 1 are listed in the appendix. Research question number 1 asks: In which of the court opinions analyzed did the court mention the independent variable of avoidance of a "misleading impression"? In addition, did the court mention the dependent variables of "rule 106", "hearsay", or "context" in the court's reasoning? A total of thirty-five cases were analyzed. Twenty-four mentioned avoidance of a "misleading impression" being given the jury. Thirty-one mentioned "Rule 106". Twenty-five mentioned "hearsay" in analyzing whether to admit completion evidence. Twenty-six mentioned providing "context" in analyzing whether to admit completion evidence. In thirty-one of the cases analyzed the court determined completion evidence was not admissible. In four cases the court determined completion evidence should have been admitted. The cases identified in the articles frequently analyzed the independent variable and the dependent variables of interest indicating the articles accurately provided cases highly relevant to the variables of interest.

The findings specifically revealed two cases that illustrate contrasting treatment of the problem. In United States v. Adams (2013) the court found that rightly, or wrongly, there was nothing it could do about the unfair presentation of evidence because of the hearsay rule. This case proved the hypothesis wrong and indicates the dependent variables are of no help. In United States v. Williams (2019) the court found that when an omitted portion of a statement is properly introduced to correct a misleading impression or place in context the admitted evidence it is admissible for a valid non-hearsay purpose. This case indicates the dependent variables may prevent the jury from being misled. This case, and all the other

cases that mention the independent variable and the dependent variables proved the hypothesis to be true.

Research Question Number 2

Research question number 2 asks: Which states have a rule of evidence modeled on Federal Rule of Evidence 106 that specifically mentions whether completion evidence is admissible even though it is hearsay or specifically exclude completion evidence if it is hearsay. Forty-two states have a rule modeled on the federal rule. Of those forty-two states, one, Connecticut, specifically clarifies in the text of its rule that completion evidence includes inadmissible evidence. Three states, Ohio, Oregon, and Virginia have a rule that specifically excludes hearsay as completion evidence. Thirty-eight of the states with rules modeled on, or similar to, the federal rule leave the issue unaddressed, as does the federal rule. This can be seen in the State Rule of Evidence section in the appendix. The four states that specify whether completion evidence is admissible or inadmissible reveal the hypothesis to be false. In the thirty-eight states that do not specify whether completion evidence is admissible or not the hypothesis was shown to be true.

Analysis

The first step with regard to question one of this study involved research to identify recent law review articles discussing how legal cases were decided under the Rule of Completeness. The articles compiled as the foundation of the study are listed in the appendix. A list of federal circuit court of appeals cases cited in the articles was compiled for analysis. The cases selected are listed in the appendix. The categories utilized in the first article listed in in the Cases Analyzed section of the appendix were used in the study to classify the cases. The categories are: A. Rule of Admissibility, B. Rule of Timing Only, C. Discretionary Admissibility, and D. Unaddressed. Cases listed under Category A were not analyzed in this study because in those circuits the problem that is the focus of this study does not exist. Cases listed under Categories B., C. and D were analyzed because the problem this study seeks to address exists in all circuits in those categories. The cases selected were analyzed in order to identify the court's reasoning in each case. The reasonings were coded as "misleading impression", "rule 106", "hearsay" and "context".

The findings revealed common themes in the cases analyzed that will be present when completion evidence is at issue. Those common themes were prevalent throughout all cases regardless of which category under which they were considered. The study revealed the reasons coded in this study were common in a large majority of the cases.

The first step in researching question number two was to conduct a Westlaw search of the table of contents of each state's rules of evidence by clicking on "Statutes and court rules". The next step was to click on each state listed and go through the table of contents of its statutes to determine if the state has a statutory Rule of Completeness. If the research revealed a statutory rule the text was analyzed to determine whether language was included

specifying whether completion evidence is admissible or inadmissible. The results are provided in the State Rule of Evidence section of the appendix. One state, Connecticut, specifies that inadmissible evidence is admissible under its Rule of Completeness. Three states, Ohio, Oregon, and Virginia, specifically provide that inadmissible evidence is not admissible under the rule. Forty-one states have a Rule of Completeness that does not specify whether inadmissible evidence can be used in court under the rule.

The implication is that in most federal circuit courts and the vast majority of states there is no rule specifying whether inadmissible evidence is admissible as completion evidence. Utilization of the findings in this study by trial courts may prevent an unfair presentation of evidence that "rightly or wrongly" the court was unable to repair in United States v. Adams (2013).

Recommendations

Practical Recommendations for Judges

This study reveals that trial courts have the ability to repair misleading impressions created for the jury by the adversaries. The repair work can be done in spite of the lack of specificity in the federal Rule of Completeness and in most state's Rules of Completeness. Trial courts should monitor the presentation of evidence. Trial courts should determine if one side is misleading the jury by offering only part of a written or recorded statement. Trial courts can repair the misleading impression if the other party objects. Trial courts can intervene without an objection, but should consider that it may be a strategic decision of the adversary not to object. Trial courts should repair a distorted impression in a criminal case even without an objection if the constitutional rights of the defendant are threatened.

Federal trial courts, and state trial courts that follow federal precedent on evidence rules, in the First, Tenth, Eleventh and D.C. Circuit may admit inadmissible evidence, including hearsay, to repair a misleading impression if the evidence is relevant. State courts in Connecticut are allowed to admit inadmissible evidence as completion evidence to repair a misleading impression. Trial courts in all other federal circuits and states can admit hearsay to repair a misleading impression. The judge should undertake a careful analysis of the potential completion evidence under Rule 104 outside the presence of the jury. The judge should require the party offering completion evidence to provide specific words or phrases for the court to analyze under Rule 104. The judge should consider hearsay and other inadmissible evidence under Rule 104. The judge should make the determination of whether the evidence is hearsay or otherwise inadmissible. If the evidence is not hearsay, or otherwise inadmissible, the judge is authorized to admit the evidence as long as it is relevant. The judge should evaluate closely the specific words, phrases, context, and number of statements to determine whether the words or phrases or any other statements explain the admitted evidence, provide context or are necessary to avoid a misleading impression. The judge should determine the purpose for which the evidence is being offered, the key to this analysis. If the judge determines the evidence is offered for the purpose of repairing a misleading impression it should admit the evidence for the non-hearsay purpose. The judge should admit completion evidence in a criminal case if a defendant's constitutional rights are threatened by a presentation of evidence that creates a distorted picture for the jury. When evidence is admissible for one purpose but not for another purpose the judge should instruct the jury to consider the evidence only for the purpose presented. Therefore, the judge should give a limiting instruction to the jury explaining that the evidence is admitted

for the limited purpose of providing context, not for its truth. This recommendation will often result in the need for the judge to read a limiting instruction to the jury. The judge would instruct the jury not to consider the evidence for its truth.

Policy Recommendations

Four states have shown it is possible to clarify the issue through legislation. Only one allows for admission of hearsay or other inadmissible evidence. The other three do not allow hearsay or inadmissible evidence as completion evidence. The other states with statutory rules of completeness should consider amending the law to clarify whether completion evidence should be admissible as a policy in the state. If studies reveal that jurors have difficulty following limiting instructions, states that have not clarified the issue should consider amending the law to allow otherwise inadmissible evidence as completion evidence. This research can also be instructive as the Advisory Committee on Evidence Rules considers whether to amend Federal Rule 106.

Limitations and Future Directions

This study only considers written or recorded statements. Often an issue arises about how to treat oral statements taken out of context. This study does not address that issue. The recommendation to resolve the problem addressed is limited to applying the law as is. This involves the challenge of wording an instruction in a way the jury understands. All evidence admitted in court under the federal rules, and the many state rules modeled on the federal rules, must be relevant to the case, and completion evidence is no different.

Studies on jury decision-making revealed in this study indicate limiting instructions can be difficult for juries to follow. Most of those studies address eyewitness identification or how jurors handle emotional evidence. Studies on limiting instructions were not the focus of this study, however, none were revealed that addressed whether jurors can consider evidence for purposes other than its truth. The study should specifically analyze whether jurors can consider evidence for a purpose other than its truth. The study should use the pattern of other studies on how limiting instructions impact juror decision-making. Most utilize mock juries because of the difficulty of using real juries and the study should be designed in a way that reveals how juries made a decision when they were instructed not to consider certain evidence for its truth. Determining whether jurors can consider evidence for a limited purpose, especially if they are instructed not to consider evidence for its truth, poses a challenge. Further research may reveal how to draft effective limiting instructions the jury is likely to understand.

Conclusion

Scientific research shows that jurors are constructing stories as evidence is presented in a trial. The research indicates if part of the story is missing jurors will make an effort to construct a story and may go beyond the evidence presented in court to construct a complete story. Evidence is presented to the jury by adversaries who have no obligation to give jurors a complete story. This often leaves jurors with a misleading impression. Trial judges can repair the misleading impression. In some cases, repairing a distorted presentation of evidence in a criminal case protects the constitutional right against self-incrimination and a fair trial.

Appendix

Articles Analyzed

1(A) Article Cite:

Blake R. Hills, Fairness by Omission: Rule 106 and the Doctrine of (In)completeness, 55 Tulsa L. Rev. 45 (2019).

(B) Article Reasoning:

The system in which interpretation of Rule 106 depends on location is a problem. There is a need for consistent rules for defendants and prosecutors with regard to an issue likely to present itself in every case in which a defendant has made an inculpatory statement.

(C) Article Recommendation:

The United States Supreme Court should resolve the circuit split.

2(A) Article Cite:

Harold F. Baker, Completing the Rule of Completeness: Amending Rule 106 of The Federal Rules of Evidence, 51 Creighton L. Rev. 281 (2018).

(B) Article Reasoning:

The circuit split signifies an issue worthy of correction, a more significant issue lurks beneath the surface. The only way for a criminal defendant to introduce exculpatory completion evidence in many circuits is to waive constitutional rights and take the stand.

(C) Article Recommendation:

Amend Rule 106 with an interim approach for the court.

3(A) Article Cite:

Daniel J. Capra and Liesa L. Richter, Evidentiary Irony and the Incomplete Rule of Completeness: A proposal to Amend Federal Rule of Evidence 106, 105 Minn. L. Rev. 901 (2021).

(B) Article Reasoning:

The fair operation of the Federal Rules of Evidence is a crucial component in a more equitable criminal justice system. However, there are certain rules that can lead to unfair results, particularly when the prosecution has dissected a defendant's statement in a manner that creates a misleading impression for a reasonable juror.

(C) Article Recommendation:

Amend Rule 106.

4(A) Article Cite:

Michael A. Hardin, This Space Intentionally Left Blank: What to do When Hearsay and Rule 106 Completeness Collide, 82 Fordham L. Rev. 1283 (2013).

(B) Article Reasoning:

Rule 106 leaves the court in a difficult position, should the court allow completion evidence in violation of some other rule that would exclude it? Or should the court exclude it and allow the misleading impression to stand uncorrected.

(C) Recommendation:

A proposed analysis for the judge to undertake.

5(A) Article Cite:

Wes Reber Porter, Re-examining The Admissibility of the Defendant's Non-Inculpatory Statements at Trial, 24 Suffolk J. Trial & App. Advocate. 1 (2018-2019), Copyright @ 2018-2019 by Suffolk University Law School; Wes Reber Porter.

(B) Article Reasoning:

In the rare criminal case that proceeds to trial, the government's evidence regularly includes a presentation of the defendant's pre-trial statement, or "confession". The government most certainly will use the defendant's own words against the defendant. The defendant, by contrast, may struggle to tell the defendant's side of the story at trial.

(C) Article Recommendation:

Urges a balancing test that weighs the government's interest against the defendant's constitutional protections, as well as evidentiary doctrine, in determining admissibility of a defendant's pre-trial statement.

Cases Analyzed

A. Rule of Admissibility:

Cases in the First, Tenth, Eleventh and D.C. Circuit were not analyzed as part of this study because completion evidence is admissible even if though it is hearsay in those circuits.

B. Rule of Timing Only:

United States v. Bollin, 264 F. 3d. 391 (4th Cir. 2001)
United States v, Adams, 722 F.3d. 788 (6th. Cir. 2013)
United States v. Dotson, 715 F. 3d. 576 (6th Cir. 2013)
United States v. Gravely, 840 F. 2d. 1156 (4th Cir. 1988)
United States v. Hassan, 742 F. 3d. 104 (4th Cir. 2014)
United States v. Costner, 684 F. 2d. 370 (6th Cir. 1982)
United States v. Wandahsega 924 F. 3d. 868 (6th Cir. 2019)
United States v. Hayat, 710 F. 3d. 875 (9th Cir. 2013)
United States v. Barragan, 871 F. 3d. 689 (9th. Cir. 2017)
United States v. Lentz, 524 F. 3d. 501 (4th Cir. 2008)
United States v. Oloyede, 933 F. 3d. 302 (4th Cir. 2019)
United States v. Ramos-Caraballo, 375 F. 3d. 797 (8th Cir. 2004)
United States v. Collicott, 92 F.3d. 973 (9th Cir. 1996)
United States v. Crosgrove, 637 F. 3d. 646 (6th Cir. 2011)
United States v. Wilkerson, 84 F.3d. 692 (4th Cir. 1996)
United States v. Woolbright, 831 F. 2d.1390 (8th Cir. 1987)
United States v. Beal, 940 F. 2d. 1159 (8th Cir. 1991)
United States v. McDaniel, 398 F. 3d. 540 (6th Cir. 2005)
United States v. McAllister, 693 F. 3d. 572 (6th Cir. 2012)

C. Discretionary Admissibility:

United States v. Johnson, 507 F. 3d. 793 (2d. Cir. 2007)
Unites States v. Kopp, 562 F.3d. 141 (2d. Cir. 2009)
United States v. Coplan, 703 F. 3d. 46 (2d. Cir. 2012)
United States v. Williams, 930 F. 3d. 44 (2d. Cir. 2019)
United States v. Marin, 669 F.2d. 73 (2d. Cir. 1982)
United States v. Walker, 652 F.2d. 708 (7th Cir. 1981)
United States v. Vargas, 689 F. 3d. 867 (7th. Cir. 2012)
United States v. LeFevour, 798 F. 2d. 977 (7th. Cir. 1986)
United States v. Velasco, 953 F. 2d. 1467 (7th Cir. 1992)
United States v. Sweiss, 814 F.2d. 1208 (7th Cir. 1987)
United States v. Lewis, 641 F. 3d. 773 (7th Cir. 2011)
United States v. Glover, 101 F. 3d. 1183 (7th Cir. 1996)

D. Unaddressed:

United States v. Soures, 736 F. 2d. 87 (3d. Cir. 1984)
United States v. Hird, 901 F. 3d. 196 (3d. Cir. 2018)
United States v. Branch, 91 F. 3d. 699 (5th Cir. 1996)
United States v. Sanjar, 876 F. 3d. 725 (5th Cir. 2017)
United States v. Branch, 91 F. 3d. 699 (5th Cir. 1996)

State Rule of Evidence

A. State rule of evidence modeled after, or similar to, Federal Rule 106 does not specify whether evidence is admissible as completion evidence even though otherwise inadmissible:

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming.

B. State rule of evidence modeled on Federal Rule 106 specifically allows for inclusion of inadmissible evidence as completion evidence:

Connecticut.

C. State rule of evidence modeled on Federal Rule 106 specifically requires completion evidence to be otherwise admissible:

Ohio, Oregon, Virginia.

* A review of evidence laws in Kansas, Louisiana, Missouri, and Idaho did not reveal a rule of evidence similar to Federal Rule 106. New York is the only state without any comprehensive consolidated form of its rules of evidence, but court precedent seems to place it in the category of states where completion evidence is not in itself testimony, but merely an aid that explains the utterance as a whole.

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