**Limiting Instructions- EPISODE NOTES**

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I am still Tain Kell.*

Tain, we have talked about how we come up with ideas for our episodes.

*Sometimes, our ideas come from things we experienced as trial court judges. Other times, we get ideas from our loyal listeners who occasionally e-mail us with good episode ideas at goodjugepod@gmail.com.*

So true! Today, I wanted to record an episode that references something that I experienced in one of my last jury trials as a Superior Court judge.

*Well, you have been gone from the Superior Court bench for a few months now. Glad you didn’t rush to get to this topic.*

Anyway – today I wanted to discuss limiting instructions – when to use them and how to use them.

*Ok – limiting instructions – let’s jump in*

To set the scene – evidence is coming in to a jury trial (usually a criminal trial but not always)

(Limiting instructions only apply to jury trials – wouldn’t make sense for them to apply to a bench trial)

And the court decides it would be best to provide the jury with a limiting instruction – telling the jury that the evidence they are about to consider should be considered only in a limited manner – or otherwise telling the jury not to consider the evidence for anything other than one specific purpose

This episode is NOT dealing with *curative instructions* – they are a close cousin but are not the same thing as *limiting instructions*

***What* is a limiting instruction?**

It is a jury instruction that informs the jury that evidence that is admissible for a limited purpose is about to be presented and reminding the jury that they should consider the evidence only for the admissible purpose – and not for any other purpose

Honestly, the judge is attempting to tell the jury not to do something that is really a part of human nature – to compartmentalize the evidence they are about to hear and only consider it for the legitimate purpose

**Rule 404(b)**

 The most common example is 404(b) evidence

As a quick refresher, O.C.G.A. § 24-4-404(b) is the evidence rule that allows for other bad acts (formerly known as similar transactions) to be admitted only if the court determines the evidence proves something other than general bad character

Not to get too far off of our topic – we do not allow criminal defendants to be tried “on their criminal record” – because we know that jurors (like most humans) would be more inclined to convict if they know the defendant previously committed a similar crime in the past

This is what Professor Milich refers to the “propensity use” of character evidence – a defendant who previously committed a crime like the one on trial has the propensity to commit that sort of crime – he did it before so he probably did it this time

Our rules of evidence do not allow for that – but they do allow other bad acts for specific purposes – and only for those specific purposes

Limiting instructions attempt to tell the jury that we are going to tell you about some other bad act and you can consider it to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”

But you cannot use that information for any other reason – including the prohibited “propensity use”

**Character evidence of accused**

Assume the defendant takes the stand and has previously been convicted of a felony or crime of moral turpitude

(note there are lots of other requirements associated with admission of such evidence (such as age of conviction, etc.) that we are not getting into here)

Consider giving a limiting instruction here – not the same as a 404(b) instruction – but ensuring the jury is told to consider it only for impeachment.

See Pattern Charge 1.34.30

**Prior difficulties between the parties**

See Pattern Charge 1.34.20:

Evidence of prior difficulties (or lack thereof) between the defendant and (the alleged victim) (a witness) has been admitted for the sole purpose of illustrating, if it does, the state of feeling between the defendant and the (alleged victim) (witness); (the reasonableness of any alleged fears by defendant or alleged victim).
Whether this evidence illustrates such matters is a matter solely for you, the jury, to determine, but you are not to consider such evidence for any other purpose

**Statements of accused, flight, silence**

Sometimes, evidence is admitted conditionally – that is that the jury must find certain facts before they can consider the evidence. Take, for example, a custodial statement made by the accused

The jury needs to understand that before they can consider the evidence, they must find things like *Miranda* warnings, lack of coercion, etc.

(This is true even if you conducted a *Jackson v. Denno* hearing pretrial – the jury must be given the option to reject the statement, despite any court ruling)

Consider making Pattern Charge 1.34.50 a preamble to the charges relating to the admissibility of the statement

 This would also apply to any evidence of flight or silence.

As to a jury charge relating to flight – I would ***never, ever*** give such a charge UNLESS it is requested by the defendant. See notes from Pattern Charge 1.36.10:

The Supreme Court has repeatedly held it is error to charge the jury on flight. *Rawls v. State*, 310 Ga. 209, 217-220 (2020) (court committed clear and obvious error by instructing jury on flight); *Renner v. State*, 260 Ga. 515, 517-518 (1990) (while State may offer evidence of and argue flight, it is error for court to charge on flight).
This instruction should be given only if requested by the Defendant as a limiting instruction.

Let’s take a moment and be honest with ourselves – is a limiting instruction going to change human nature? Will the jury understand (and follow) such an instruction?

 Probably not

But there really is no other way to admit evidence that is being admitted for a limited reason – you have to tell the jury to only consider the evidence for the proper, limited use and not to consider it for any other reason

And, as we will discuss, there are other times when you should give a limiting instruction – but it just arises with the most frequency when dealing with Rule 404(b)

***Where* can I find a pattern limiting instruction?**

Superior Court Pattern Jury Instruction 1.34.00 gives you a basic pattern which MUST be conformed to the evidence in your case

The pattern charge is followed by 1.34.10 – 1.34.50 You need to consider all of those pattern charges and develop the charge that addresses your particular situation

These pattern charges are somewhat long and we are not going to recite them in this episode – just understand that you cannot simply cut and paste one of those charges – you will need to adapt them to your situation. But we did include a sample in the endnotes to these episode notes – found at goodjudgepod.com.[[1]](#endnote-1)

**So, *when* should a trial court give a limiting instruction to the jury?**

First – a limiting instruction should be given just before the evidence in question is presented – and again as part of the final jury instructions

Judges mistakenly believe that giving a limiting instruction is discretionary – that the judge gives it only when they think it is necessary

That is simply wrong

Start with **O.C.G.A. § 24-1-105** which says:

“When evidence which is admissible as to one party or for one purpose but which is not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”

* Frequently when 404(b) evidence is being admitted (other bad acts)
* Prior convictions are being admitted for impeachment (especially when the prior conviction relates to the defendant on trial)
* Possession of firearm by convicted felon

As you can see, it is not purely discretionary to give or not give a limiting instruction - it is a statutory requirement ***when requested***

The notes to the pattern charge provide ““[A]lthough a trial judge is not required in the absence of a request to give a limiting instruction when . . . evidence [or related acts] is admitted, it would be better for the trial judge to do so.” *State v. Belt*, 269 Ga. 763 (1998). Charge should be given prior to
admission of such evidence and repeated in final charge. Chisholm v. State, 231 Ga. App. 835 (1998).)
(Note: NEW code section requires the judge to give limiting instructions, when applicable, ON REQUEST. Probably better to give, if applicable, whether requested or not)

**Note to Pattern Charge Committee at CSCJ** – The pattern charges cite the cases of *Belt* and *Chisholm* as authority for giving a limiting instruction when requested and considering giving one even where it is not requested.

Trial court is not required to give limiting instruction in the absence of an affirmative request to charge being made by parties. *Murphy v. State*, 270 Ga. 72 (1998). “To the extent the appellate decisions in *Belt v. State,* 227 Ga.App. 425, 428, 489 S.E.2d 157 (1997) and *Chisholm v. State,* 231 Ga.App. 835(2), 500 S.E.2d 14 (1998), hold that a trial court is required to instruct the jury *sua sponte* that the jury must decide whether the defendant actually committed the extrinsic act before it could consider it during deliberations, they are overruled.”

The Committee may want to check those case citations in light of the decision in *Murphy*. We do not think the principles are wrong or misguided – only that the decision in *Murphy* specifically overruled those two cases.

**Is it ineffective assistance of counsel for defense counsel to choose not to request a limiting instruction?**

There are also several cases which hold that the failure to request a limiting instruction does not constitute ineffective assistance of counsel:

 *Cook v. State*, 338 Ga. App. 489, 494 (2016)

*Jaasik v. State*, 323 Ga. App. 545, 549 (2013) (important note that the trial court gave the limiting instruction even without a request by defense counsel); same result in *Sims v. State*, 317 Ga. App. 420, 422 (2012); *Breazeale v. State*, 290 Ga. App. 632, 633 (2008); *Brewner v. State*, 302 Ga. 6 (2017)

**Limiting instructions in other situations that are less obvious**

Those are the common occasions when limiting instructions should be given – but there are others which are less common or happen with less frequency (AND THIS IS WHAT SPARKED BY DESIRE TO RECORD THIS EPISODE)

 When a transcript is being submitted.

In the case which motivated me to suggest this as a topic, the defendant gave a recorded statement – and the acoustics in the holding room at the jail were terrible.

The defendant mumbled, used slang, spoke under his breath a good deal, and insisted on talking about prior times he had been arrested for unrelated offenses.

(This is a pretty common scenario, huh? We never seem to get quality recordings like they have on the First 48 or other “real crime” television shows)

When I was a prosecutor, we would frequently have transcripts of recorded undercover drug deals or recorded telephone calls – did not see that too often while I was on the bench but it was pretty common when I was a prosecutor

I never thought about the need to give a limiting instruction in connection with a transcript being used in a trial

But I had a good, experienced prosecutor handling that case and he came into court with the transcript and with a proposed limiting instruction for me

 (Prosecutors, please take note)

The prosecutor in my case cited *Slakman v. State*, 272 Ga. 662, 665-666 (2000) and that decision included this language:

[T]his Court has held that where a tape recording of the defendant's conversation or statement is played to the jury, it is not error to allow the jury to also view a transcript of that tape recording if particularized safeguards are met. The most critical of these safeguards includes an instruction to the jury that it is the tape recording and not the transcript which constitutes evidence of the defendant's statement; that the jury must determine for itself what was said on the tape recording; that if the jurors cannot understand the content of the tapes, they are to ignore the corresponding transcripted portion of the recording;and that any discrepancies between the tape recording and transcript are to be resolved in favor of the audiotape.

The case cited a number of prior decisions to support these findings.

(*Slakman* reversed a murder conviction, in no small part because the trial court did not give a limiting instruction)

In my case, I honestly had not considered the need to give a limiting instruction in this context when the prosecutor tendered the transcripts – I received the draft limiting instruction simultaneously with the transcripts being “offered”

This was the limiting instruction I gave:

“Ladies and gentlemen of the jury, a recording has been admitted into evidence, and a transcript of that recording will be made available to assist you while you listen to that recording. It is the recording and not the transcript which constitutes evidence and you must decide for yourself what was said on the recording. If you cannot understand the content of the recording, you are to ignore the corresponding transcripted portion of the recording. Any discrepancies between the recording and the transcript are to be resolved in favor of the recording that has been admitted into evidence.

Furthermore, the recording that has been admitted into evidence has portions that have been redacted by agreement of the parties to comply with the rules of evidence and the Court’s pretrial rulings. You may not draw any inferences for or against either party from the existence of any such redactions, particularly as to the authenticity of the recording.”

As you can see, this limiting instruction dealt with the issue of the transcript but it also dealt with the issue of redactions – where the defendant voluntarily went into topics that were not admissible and which I had ruled prior to trial were not admissible.

Even if the parties have not agreed to redact portions of the recording, it might be a really good idea to consider giving a limiting instruction to explain why the recorded conversation clearly “jumps”

(Not sure it would be a “limiting instruction” per se – but telling the jury that they do not need to worry about whether the recording was authentic when it contains clear edits that might cause someone uninformed to think that monkey business has occurred with the recording is probably a good idea)

So that’s all for today’s discussion of limiting instructions

*We have summarized the discussion already – but know that if you want this outline, it is available on goodjudgepod.com.*

As always, we want to discuss topics that are relevant to you, our listener(s). Shoot us your thoughts at our e-mail address, goodjudgepod@gmail.com

We come now to the often discussed but rarely duplicated section of our show – the “Tain talks music” section of the show. Tain, take it away.

 *Today’s music trivia excursion takes us to the 1990’s – frankly, an interesting era of pop music. Hip hop grew into its own genre. While there had been some sub-genres in the 1980’s (i.e. New Wave, hair metal), the 1990’s brought us new sounds like grunge and other alt rock. We learned about bands such as Smash Mouth, the Red Hot Chili Peppers, Hootie and the Blowfish, and artists such as Alanis Morissette, Sheryl Crow, Whitney Houston and Janet Jackson became household names. Both Tupac and The Notorious B.I.G. were murdered in the 1990’s. There was a lot happening so let’s dive in to some music trivia from that amazing decade.*

 *Fair warning, some of these are easier than others:*

 *What harmonizing group recorded the 1991 hit “End of the Road?”*

***ANSWER: Boyz II Men***

*What trio of brothers went to #1 on the Billboard Hot 100 with the 1997 song that will be an ear worm for everyone listening for the rest of the day. The song’s title was “MMMBop.”*

***ANSWER: Hanson***

*The lyric “I wish I was special” is from what song with a single-word title by Radiohead that was a hit in 1992?*

***ANSWER: Creep***

 *There was a Swedish band in the 1990’s that had two pretty big hits, “The Sign” and “All That She Wants.” You know that last one, ♫”All that she wants is another baby, she’s gone tomorrow, boy” Name the band – hint: 3 words – and the last word is a homophone*

***ANSWER: Ace of Bass***

 *Snoop Dog’s first solo album was released in 1993 and it debuted at #1 album on the Billboard charts. The album contained many chart-topping songs such as “What’s My Name?” and “Gin and Juice.” Multiple choice – what was the name of the album?*

1. *The Last Meal*
2. *High*
3. *I Wanna Thank Me*
4. *Doggystyle*

***ANSWER: d-Doggystyle***

*Finally, finish this lyric from the unforgettable MC Hammer and the opening lyric from his iconic song, “U Can’t Touch This:”*

*“My, my, my, my*

*Music hits me so hard,*

*Makes me say, “Oh my Lord*

*Thank you for blessing me*

*\_\_ \_ \_\_\_ \_\_ \_\_\_\_\_ \_\_\_ \_\_\_ \_\_\_\_\_ \_\_\_\_.”*

***ANSWER: With a mind to rhyme and two hyped feet.”***

*Have a great day everyone and thanks for listening.*

1. Here is one Wade gave during a trial:

 Sometimes evidence is admitted for a limited purpose. Such evidence may be considered by the jury for the sole issue or purpose for which the evidence is limited and not for any other purpose.

 In order to prove its case, the State must show evidence relating to intent and may show motive.

 To do so, the State has offered evidence of other acts allegedly committed by the accused. You are permitted to consider that evidence only insofar as it may relate to those issues and not for any other purpose.

 You may not infer from such evidence that the defendant is of a character that would commit such crimes.

 The evidence may be considered only to the extent that it may show the issues that the State is required or authorized to prove in the crimes charged in the case now on trial. Such evidence, if any, may not be considered by you for any other purpose.

 The defendant is on trial for the offenses charged in this bill of indictment only and not for any other acts.

 Before you may consider any other alleged acts for the limited purposes stated, you must first determine whether it is more likely than not that the accused committed the other alleged acts.

 If so, you must then determine whether the act(s) sheds any light on the issues for which the act was admitted relative to the crimes charged in the indictment in this trial. Remember to keep in mind the limited use and the prohibited use of this evidence about the other alleged acts of the defendant.

 By giving this instruction, the Court in no way suggests to you that the defendant has or has not committed any other acts, nor whether such acts, if committed, prove anything; this is solely a matter for your determination. [↑](#endnote-ref-1)