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§1.7 Evidence Errors—Harmless

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§1.7 Evidence Errors—Harmless

The harmless error principle holds that on appellate review (and posttrial motions to set aside a verdict or judgment), the critical point is not the mere occurrence of error, but the effect of error on substantial rights.¹ Long ago a distinguished commentator characterized the problem of harmless error as one of “professional psychology,”² and this observation seems true in two respects. First, the profession must be aware that its tools (including evidence rules) are not perfect enough to make perfect trials a reasonable goal. Second, the profession must bear in mind that the process of review is imperfect, particularly in jury-tried cases, since a reviewing court has no sure way to assess the actual effect of error on the mind or minds of jurors and their collective judgment.

Kotteakos guidelines

A good starting point for looking at harmless error is the opinion by Justice Rutledge in *Kotteakos v. United States*, which discussed the matter at length and adopted five guidelines: First, “technicality” should be avoided unless it affects the rights of the parties, meaning the outcome of the trial. The message is not to insist on applying rules for their own sake, but to see them as tools that can help achieve a fair and just result. Second, the reviewing court should appraise error by examining the proceedings in their entirety. Mistakes should be viewed in the context of the whole trial. Third (perhaps most important), the problem is not to assess the sufficiency of evidence to support the result reached, but to decide whether error affected outcome.³ Fourth, precedent is not very helpful, and the judgment of the court should be “tempered but not governed in any rigid sense” by what has been done in similar situations. Fifth, the task of review is not to decide what the outcome should be or speculate on the outcome of a new trial, but to decide whether the error affected the judgment.⁴

Competing standards

§1.7 1. See FRE 103(a) (error “may not be predicated” on ruling admitting or excluding evidence “unless a substantial right of the party is affected”); 28 U.S.C. §2111 (reviewing court to ignore “errors or defects which do not affect the substantial rights of the parties”).

2. Sunderland, *The Problem of Appellate Review*, 5 *Tex. L. Rev.* 126, 146-148 (1927). See also *Kotteakos v. United States*, 328 U.S. 750 (1946) (judging error involves “the play of impression and conviction along with intelligence” and “varies with judges and also with circumstance”).

3. *Kotteakos v. United States*, 328 U.S. 750, 764-765 (1946) (if “the conviction is sure that the error did not influence the jury, or had but very slight effect,” verdict and judgment should stand, but “if one cannot say, with fair assurance” that the judgment was not substantially swayed by the error, one cannot conclude that substantial rights were not affected; question is not “merely whether there was enough to support the result,” but whether the error had substantial influence).

4. *Kotteakos v. United States*, 328 U.S. 750, 764 (1946) (while question is not how next trial will come out or court’s opinion on the merits, “the outcome does count” and the error must be appraised “against the entire setting of the record”).

In cases where an error might have affected the judgment, the process of describing reasons to reverse or affirm is likely to generate language implying a standard of some sort. Three have some current support: One is a likelihood standard similar to the one usually applied in civil trials. Under it, error generates reversal or correction unless it “probably” did not affect the judgment.⁵ Another involves a “high probability” standard proposed by a distinguished jurist under which a judgment is reversed unless the court “believes it highly probable that the error” had no effect. This standard seems to fall midway between the standards of proof applied in civil and criminal trials, and some modern decisions endorse this view.⁶ Finally, it has been suggested that an error hurting the defense in criminal cases should lead to reversal of convictions unless it appears beyond a reasonable doubt that it did not affect the judgment, and some modern authority endorses this approach.⁷

Appellants bear the burden of showing that error was committed, in civil and criminal cases alike. Inevitably the task connects closely with arguments that error affected the judgment, and both sides have substantially similar burdens in briefing and arguing this point. While all three standards indicate that uncertainty over effect leads to reversal, appellants can take little comfort. They do and must approach an appeal as if they bear the burden of establishing the effect of error.⁸

Assessing error

Reviewing courts follow certain strategies for assessing errors in admitting or excluding evidence. In two polar circumstances, the question whether error was harmless and the question of sufficiency intersect. An error in admitting an item of evidence is not harmless if all the evidence is sufficient only when that item is counted. An error in excluding an item is not harmless if what is left is insufficient and the item would have made it sufficient.⁹ In two other situations, other evidence has great impact in assessing error. Sometimes other evidence strongly favors one side or the other, or is barely adequate. If the evidence favoring the prevailing party seems

5. *See* *United States v. Crosby*, 75 F.3d 1343, 1349 (9th Cir. 1996).

6. Traynor, *The Riddle of Harmless Error* 35 (1970) (anything more lenient “entails too great a risk of affirming a judgment that was influenced by an error” and would fail to deter appellate judges from focusing improperly on correctness of result, and anything more stringent risks returning to the automatic reversal practice, which the harmless error doctrine was designed to avoid). *See* *United States v. Madden*, 38 F.3d 747, 753 (4th Cir. 1994), *cert. denied*, 519 U.S. 898; *United States v. Casoni*, 950 F.2d 893, 917-918 (3d Cir. 1991).

7. *See* Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988, 991-997 (1973). *See also* *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1458-1459 (9th Cir. 1983) (standard should “reflect the burden of proof” at trial).

8. *See* *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995), *cert. denied*, 516 U.S. 1045; *K-B Trucking Co. v. Riss Intl. Corp.*, 763 F.2d 1148, 1155-1156 (10th Cir. 1985).

9. *Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Peak*, 856 F.2d 825, 834-835 (7th Cir. 1988), *cert. denied*, 488 U.S. 969.

overwhelming, even a serious mistake usually seems harmless.¹⁰ If evidence favoring the prevailing party seems barely adequate or closely balanced, even a small mistake might have affected outcome and is not harmless.¹¹

Cumulative evidence

Appellate courts routinely describe cases as falling into an intermediate and less clearcut category where other evidence seems more closely in balance. Here the presence of other evidence is harder to assess, but reviewing courts routinely conclude that errors were harmless because the proof affected by them was or would have been “cumulative.” This idea is helpful if it is understood to mean that other evidence on the issue affected by the error is really quite strong, so it is hard to imagine that proof erroneously admitted or excluded made or could have made a difference in outcome. Here it is often plausible to conclude that an error in admitting evidence was harmless because it was merely “cumulative” of abundant other evidence properly admitted,¹² and that an error in excluding evidence was likewise harmless because it would have been merely cumulative of other evidence admitted on the point.¹³

Judicial discretion

One difficulty in predicating a claim of error on rulings admitting or excluding evidence lies in the fact that the trial judge has broad discretion. In the first instance, she decides whether probative worth is outweighed by the dangers and considerations described in FRE 403 (unfair prejudice, confusion of issues, waste of time), and she has considerable discretion to strike the balance. She has less discretion where specific rules come into play, such as the hearsay doctrine and the principles in FRE 404-412. But applying these specific rules often requires the judge to make preliminary findings of fact under FRE 104(a), and here too she has leeway, since these are normally reviewed under the “clear error” doctrine.

Curing error at trial

Often prejudice from error in admitting evidence can be cured at trial, and sometimes error in

10. *See* *Lutwak v. United States*, 344 U.S. 604 (1953) (error in admitting hearsay was not prejudicial since record “fairly shrieks the guilt of the parties”); *United States v. Robinson*, 8 F.3d 398, 411 (7th Cir. 1993) (error in asking defendant about prior conviction was harmless, since evidence of guilt was “simply overwhelming”).

11. Traynor, *The Riddle of Harmless Error* 70-71 (1970) (when proof “is closely balanced or affords minimal support for judgment,” error in admitting cannot be harmless).

12. *See* *Doty v. Sewall*, 908 F.2d 1053, 1057 (1st Cir. 1990) (since testimony was cumulative, court needed not decide whether admitting it was error).

13. *City of Long Beach v. Standard Oil of Cal.*, 46 F.3d 929, 937 (9th Cir. 1995) (error in excluding handwritten notes was harmless; little probative value, cumulative); *Agristor Leasing v. Meuli*, 865 F.2d 1150, 1153 (10th Cir. 1988) (in light of other evidence, rulings excluding evidence did not affect substantial right).

excluding evidence. One common curative step is to instruct the jury by limiting the purposes for which evidence may be considered, directing that it be disregarded, or explaining it in other ways. Usually reviewing courts conclude that such instructions make any error in admitting evidence harmless.

Cure by instruction

The first of these (limiting instruction) prevents or discourages improper use, reducing the likelihood of prejudice or jury confusion.¹⁴ The second (instruction to disregard) helps prevent mistakes in admitting evidence from affecting outcome, or at least improves the chance for an untainted verdict.¹⁵ Sometimes such instructions are described in terms of “striking the evidence,” and an after-stated objection is described as a “motion to strike,” these terms being dramatic ways of describing the intended effect of this curative measure. The third (explanatory instruction) is similar to the limiting instruction, but its purpose is to add context or perspective, so the jury can reach a true understanding.¹⁶

In oft-quoted and forceful language, Justice Jackson railed against this instruction to disregard, bemoaning the “naive assumption that prejudicial effects can be overcome by instructions to the jury” as one that “all practicing lawyers know to be unmitigated fiction,” and in some settings this point has carried the day: For instance, the *Bruton* doctrine holds that error in admitting a statement by one of several codefendants implicating another by name cannot be cured, as a matter of constitutional principle, by telling the jury to consider the statement as evidence only against the declarant.¹⁷ And sometimes instructions do not succeed in neutralizing error: Evidence erroneously admitted may be too explosive, or its effect may be made indelible by repetition, or curative instructions may come too late or fail to convey the necessary message.¹⁸

Cure by verdict

A second kind of cure occurs when a verdict shows the jury ruled in favor of appellant on the only claims or charges affected by any error. “Saved-by-the-outcome” cures can neutralize errors in

14. Paoletto v. Beech Aircraft Corp., 464 F.2d 976, 982 (3d Cir. 1972). Ordinarily courts only give such instructions on request. See §1.16, *infra*.

15. See United States v. Steele, 727 F.2d 580, 588 (6th Cir. 1984), *cert. denied*, 467 U.S. 1209; Worcester v. Pure Torpedo Co., 127 F.2d 945, 947 (7th Cir. 1942).

16. United States v. Corey, 566 F.2d 429, 433 (2d Cir. 1977); Duff v. Page, 249 F.2d 137, 141 (9th Cir. 1957).

17. See *Krulwitch v. United States*, 336 U.S. 440 (1949) (Jackson concurring); see also *Bruton v. United States*, 391 U.S. 123 (1968) (discussed in §8.28, *infra*).

18. *Tipton v. Socony Mobile Oil Co.*, 375 U.S. 34 (1963); *Aetna Casualty & Sur. Co. v. Gosdin*, 803 F.2d 1153, 1159-1160 (11th Cir. 1986).

both admitting and excluding evidence.¹⁹

Cure by other evidence

A third kind of cure involves admitting other evidence that has the effect of rebutting or explaining evidence erroneously admitted, thus keeping it from having unwanted effect.²⁰ It is of course the theory of the doctrine letting parties “fight fire with fire” that the effect of evidence improperly admitted can be neutralized in this way, and this doctrine has proved a reliable workhorse that often satisfies reviewing courts.²¹

Cure by mistrial

Finally, granting a mistrial can usually cure errors in admitting evidence. In criminal cases, the constitutional right against double jeopardy would foreclose a second prosecution unless defendant consents on the understanding that he will be tried again. For this reason alone, it is understandable that defense refusal of an offer of mistrial waives the right to seek reversal on account of error generating such an offer.²²

Error is usually considered harmless if it was invited by a party in eliciting a response from a witness²³ or exploring a particular subject, thereby opening the door for the other side to introduce rebuttal evidence.²⁴ But this doctrine may be applied unwisely, and a false step should not open the gate to evidence that is inappropriate in tenor or disproportionate in impact.²⁵

19. *United States v. Cammisano*, 917 F.2d 1057, 1060 (8th Cir. 1990); *Schneider v. Revici*, 817 F.2d 987, 991-992 (2d Cir. 1987).

20. *United States v. Hefler*, 159 F.2d 831, 834 (2d Cir. 1947), *cert. denied*, 331 U.S. 811.

21. *See* the discussion in §1.4, *supra*.

22. *Ladakis v. United States*, 283 F.2d 141, 143 (10th Cir. 1960) (court offered to strike testimony or declare mistrial; in choosing to proceed, defendant waived right to claim harm was not cured by instruction).

23. *See United States v. Schaff*, 948 F.2d 501, 505-506 (9th Cir. 1991); *United States v. Gonzales*, 606 F.2d 70, 76-77 (5th Cir. 1979); *Horibe v. Continental Baking Co.*, 298 F.2d 43, 45-46 (7th Cir. 1962).

24. *Neu v. Grant*, 548 F.2d 281, 287 (10th Cir. 1977) (appellant may not complain of errors he induced or invited); *United States v. Benson*, 495 F.2d 475, 478-479 (5th Cir. 1974) (defense may not create error by forcing the government to introduce evidence and then claim on appeal that evidence was prejudicial), *cert. denied*, 419 U.S. 1035.

25. *United States v. Marrero*, 486 F.2d 622, 626 (7th Cir. 1973) (attacking identification testimony did not justify proof that defendant’s name was in file of major violators).