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## Picking the Correct Argument

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## Picking the Correct Argument

BY STEPHEN A. SALTZBURG

Probably no rule of thumb is more important to a trial lawyer than this: You need only one good theory of admissibility or objection to win a point, and in many instances the key is to pick the winner and avoid the losers. The rule is easy to state and widely acknowledged. It is more difficult, however, to apply than to acknowledge. A related rule is that a lawyer who has a powerful, potentially winning argument, may ultimately lose if that argument is lost in a flurry of less persuasive arguments.

### An Illustrative Case: The Government's Evidence

A case illustrating both rules and the difficulty lawyers sometimes have in clearly identifying and emphasizing the winning argument is *United States v. Skelton*, 514 F.3d 433 (5th Cir. 2008). John C. Skelton was indicted on one count of violating 18 U.S.C. § 875(b), which provides as follows: "Whoever, with intent to extort from any person, firm, association or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both." The government's evidence follows.

In February 2006, Skelton called the alleged victim, Terry Jacobs, on two occasions and told Jacobs that "Slim Gabriel wants his money." (*Id.* at 436.) Skelton accused Jacobs of stealing his partner's money and failing to pay his life insurance and claimed Gabriel was going to get a percentage of what Jacobs had stolen. Jacobs denied stealing anything and claimed not to know Slim Gabriel. Skelton responded that he had seen the books and Jacobs had indeed stolen money. He told Jacobs that Gabriel used to be a sheriff but was now head of the West Texas Mafia. Skelton threatened that Jacobs

would be murdered if Gabriel did not get the money. Skelton claimed to have connections with two sheriff departments whose deputies would take Jacobs and shoot him in the head. Skelton demanded two checks, in the amounts of \$250,000 and \$50,000, and suggested that if Jacobs did not produce the money Skelton would obtain it from Jacobs's wife.

There was an eyewitness to the second Skelton call. Victor Lujan, one of Jacobs's coworkers, was sitting next to Jacobs when he received the call. Lujan testified that Jacobs started shaking, his breathing patterns changed, and he became very nervous during the call. He said that Jacobs then handed the phone to Lujan who heard the caller state that if Jacobs "didn't pay the money, a city cop was actually going to pull him over [and] was going to handcuff him and shoot him." (*Id.*)

Within days of receiving the threat, Jacobs spoke with Special Agent Morales who referred the case to Texas Ranger Malone. Morales and Malone ascertained Skelton's identity through phone records. Jacobs told the law enforcement officers that he had once worked for a company called Jolt Corporation and became vice-president before the company dissolved in 1999. Jolt had failed to make payments on a life insurance policy on one of its co-owners who died in 1999. Jacobs suggested that the events referred to by Skelton may have related to Jolt.

Skelton called Jacobs a couple of weeks after the second threatening call and stated that he was aware that Jacobs maintained a double set of books, that Jacobs had stolen the insurance premiums when the Jolt co-owner was dying of cancer, and that Skelton would "call the income tax people showing you [Jacobs] stole the federal FICA." (*Id.* at 437.) The only threatening language during this call was Skelton's statement "[a]nd you're either gonna give that money back or I'm going to deal with your ass, boy." Jacobs had obtained a recording device at the suggestion of the agents, and the device indicated that, when he hung up the phone, he was nervous. At the suggestion of law enforcement, Jacobs called Skelton several times in the next several weeks in an effort to get Skelton to make further threats. But Skelton made none and on one occasion told Jacobs that he never wanted money for himself; he only wanted Skelton to repay the previous owners of Jolt.

### The Defense: Jacobs Was Lying

Skelton's defense was that Jacobs was lying about the telephone conversations. The defense was aware that the government's case turned heavily on Jacobs's credibility. No one but Jacobs heard the first



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alleged threatening call to Jacobs. Although Victor Lujan was next to Jacobs during the second call, Lujan heard only the end of the conversation. During the third conversation, Skelton appeared to try to persuade Jacobs to repay money Skelton claimed was stolen by Jacobs. And, thereafter, Jacobs repeatedly failed to induce additional threat evidence from Skelton. Instead, Skelton claimed that he was only trying to induce Jacobs to repay those from whom he stole.

The defense, through cross-examination of Jacobs, was able to show that Jolt's former co-owner's life insurance had lapsed because Jolt had not paid the premiums, and that one of the companies owned by Jolt suffered a financial decline after another co-owner stole money from the company.

Defense counsel asked Jacobs during cross-examination whether he was testifying to win favor from the government in the event that the IRS investigated Jolt's books. Defense counsel also cross-examined Jacobs with respect to the third phone call from Skelton to Jacobs. Defense counsel asked Jacobs, "Isn't it a fact that you hung up within a second of [Skelton] mentioning the federal FICA so that the agents that were going to hear this tape wouldn't learn about that?" Jacobs said "no" and denied that he sounded more nervous at the time because of the reference to FICA. (*Id.*)

The trial judge denied defense counsel's request to present extrinsic evidence that Jacobs was lying about stealing money from Jolt.

### Character Witnesses

After the government rested and Skelton's motion for judgment of acquittal was denied, Skelton called eight character witnesses. All either had worked for or were associated with Jolt. All offered both opinion and reputation testimony. They testified that in their opinion Jacobs was not a truthful person and he had the reputation of being untruthful.

The government called five rebuttal witnesses, all of whom testified that they knew Jacobs and in their opinion he was an honest man. Skelton was barred by the trial judge from asking these witnesses "did you know" or "have you heard" questions about specific acts of dishonesty by Jacobs.

### The Jury's Inquiry

The importance of the particulars of Jacobs's testimony was underscored when the jury sent a note to the trial judge after two hours of deliberation. The note asked: "According to 18 U.S.C. Section 875(b),

does 'threat to injure a person' mean we have to believe beyond a reasonable doubt that there was a threat to shoot or physical injury in general?" The trial judge referred the jury back to the instructions previously given, and the jury returned a verdict of guilty. (*Id.* at 438.)

### Specific Act Evidence: Intrinsic?

On appeal, Skelton complained that the trial judge had abused discretion and denied him his right to confront Jacobs by restricting his scope of cross-examination and barring evidence regarding Jacobs's stealing from Jolt and lying to the IRS. Appellate defense counsel made one losing argument before hitting on one that was a partial winner (although a partial win on appeal usually, and here, is an ultimate loss).

The first argument defense counsel made was that evidence that Jacobs stole funds from Jolt and lied to the IRS was "intrinsic" other act evidence admissible pursuant to Fed. R. Evid. 404(b). The court of appeals rejected this argument after explaining the intrinsic evidence concept as follows:

"Other act" evidence is "intrinsic" when the evidence of the other act and evidence of the crime charged are "inextricably intertwined" or both acts are part of a "single criminal episode" or the other acts were "necessary preliminaries" to the crime charged. *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996) (quoting *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990).) This evidence is admissible to complete the story of the crime by proving the immediate context of events in time and place. *Id.* (citing *United States v. Kloock*, 652 F.2d 492, 494-95 (5th Cir. 1981); *United States v. Royal*, 972 F.2d 643, 647 (5th Cir. 1992)). Intrinsic "other act" evidence does not implicate Rule 404(b) of the Federal Rules of Evidence and "consideration of its admissibility pursuant to Rule 404(b) is unnecessary." *United States v. Garcia*, 27 F.3d 1009, 1014 (5th Cir. 1994). (514 F.3d at 440.)

The court concluded that "whether Jacobs stole money from Jolt and lied to the IRS is irrelevant to the question of whether Skelton threatened Jacobs, especially given that the Government need not establish a motive for the alleged threat." (*Id.*) Thus, defense counsel lost round 1.

## Rounds 2 and 3: The Government Loses

The government argued that the extrinsic evidence that Skelton wished to offer was inadmissible under Rule 404(b) and Rule 608(b). It lost both arguments.

The court of appeals found that Skelton was not offering evidence regarding Jacobs's theft of funds and lying to the IRS to show that Jacobs had a propensity to lie generally. Evidence offered for this purpose would be inadmissible propensity evidence. But the court recognized that Skelton was offering the evidence to show that Jacobs had a motive to lie about the alleged threat made by Skelton, because by lying he could divert attention from his own misdeeds and curry favor with the government.

Similarly, the court rejected the government's argument that Rule 608(b) barred Skelton's evidence. The court quoted from its opinion in *United States v. Opager*, 589 F.2d 799, 802-03 (5th Cir. 1979), (quoting *United States v. Batts*, 558 F.2d 513, 517 (9th Cir. 1977), *opinion withdrawn and aff'd on other grounds*, 573 F.2d 599 (1978)), in explaining that the extrinsic evidence bar of Rule 608(b) is limited to circumstances where the evidence is introduced to show a witness's general character for truthfulness:

Individual rules of evidence, in this instance Rule 608(b), should not be read in isolation, when to do so destroys the purpose of ascertaining the truth. This is especially so when a witness directly contradicts the relevant evidence which Rule 608(b) seeks to exclude. . . . Similarly, we believe that Rule 608(b) should not stand as a bar to the admission of evidence introduced to contradict, and which the jury might find disproves, a witness's testimony as to a material issue of the case.

(514 F.3d at 442.)

Thus, the court rejected the government's reliance on Rules 404(b) and 608(b). The government lost rounds 2 and 3.

## The Right Argument: Bias

The court observed that evidence that is generally admissible under Rule 608(b) may be admitted to prove bias, as the U.S. Supreme Court held in *United States v. Abel*, 469 U.S. 45 (1984). The court agreed with appellate defense counsel that Skelton's evidence was admissible bias evidence:

In short, we find that the evidence relating to the allegations that Jacobs stole funds from Jolt and lied to the IRS tends to show that he has a motive to lie in this case and should have been considered and evaluated as evidence of bias. The Supreme Court has recognized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right to cross examination." *Davis [v. Alaska]*, 415 U.S. [308] at 316-17 [(1974)]. The Supreme Court has also recognized that "proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *Abel*, 469 U.S. at 52.

(514 F.3d at 442.)

This is the argument that trial defense counsel should have pressed with the trial judge. It is a winning argument, at least in part. It was not a complete winner, however, because the court of appeals concluded that Skelton was permitted to confront Jacobs adequately and that the trial judge did not abuse discretion in excluding additional evidence pursuant to Rule 403:

At trial, although Skelton was not permitted to introduce extrinsic evidence that Jacobs actually stole money from Jolt and lied to the IRS, he was permitted to explore Jacobs' dealings with Jolt and was specifically permitted to ask if he was only testifying because of the allegations concerning the IRS. He was also permitted to ask Jacobs if he was lying in order to protect himself and whether he had received any assurances from the Government that he would not be prosecuted for his alleged misdeeds. Thus, we conclude that the district court did not err in limiting Skelton's cross-examination because it still gave Skelton ample room to explore the issue of bias. Nor do we find that these limitations give rise to a Confrontation Clause violation given that Skelton was nonetheless "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." [*United States v. Restivo*, 8 F.3d [274] at 278 [(5th Cir. 1993)] (quoting *Davis*, 415 U.S. at 318.)] Even if we did find a Confrontation Clause violation, any such er-

ror was harmless beyond a reasonable doubt. Indeed, although Jacobs was a key witness, his testimony that Skelton threatened to shoot him was corroborated by Lujan and Skelton was given ample room to explore the issue of bias and otherwise attack the credibility of Jacobs. (514 F.3d at 442.)

The court's analysis ultimately leads to Skelton's loss on appeal, and is subject to question. Arguably, there is a big difference between asking questions of a key witness like Jacobs that suggest he might have a motive to lie, and actually demonstrating to the jury that there is a motive to lie. Jacobs denied the motive, and there was no evidence admitted to contradict him. Whether or not the court of appeals would have made the same ruling had the bias argument been the centerpiece of Skelton's attack in the trial court and if bias had been the principal argument made on appeal is impossible to know. It does seem, however, that a potentially winning argument loses force when it is combined with weaker arguments.

The defense won round 4, bias, but lost the critical round 5, Rule 403.

### Cross-Examination of Character Witnesses

It is important to recall that the trial judge not only excluded extrinsic evidence that Jacobs stole money from Jolt and lied to the IRS, but also barred Skelton from cross-examining the government's character witnesses as to whether they knew or had heard about Jacobs's alleged misdeeds. The trial judge mistakenly believed that the right to cross-examine character witnesses (long recognized in cases such as *Michelson v. United States*, 355 U.S. 469 (1948)) did not extend to character witnesses testifying about a third party as opposed to a defendant. The court of appeals rejected the distinction between a defendant

and a third party and found that there was no reason for the trial judge to have barred the cross-examination of the government's character witnesses. The court concluded, however, that the ban on cross-examination of these witnesses did not implicate the Confrontation Clause and did not deprive Skelton of his opportunity to put on a meaningful defense.

### The Importance of Choosing the Right Theory

The end result of the trial judge's rulings is that Skelton lost all opportunity to demonstrate that there was a factual basis for his attack on Jacobs's bias, and also lost the opportunity to demonstrate that the defense character witnesses were more credible than the government's by cross-examining the government's character witnesses to show that they were aware of the allegations leveled against Jacobs. The court of appeals concludes that the trial judge permitted an adequate opportunity for Skelton to test Jacobs's bias and that the error in barring cross-examination of the character witnesses was harmless. Both of the court's conclusions are debatable. What is less debatable is the point that a winning argument is less likely to produce victory when it is sandwiched between and among losing arguments. The bias argument appears to have been insufficiently emphasized or insufficiently clear in the trial court where it should have been at the heart of the defense claims. Had it been more powerfully argued at trial, the court of appeals might have had more difficulty in finding that the trial judge gave Skelton adequate opportunity to confront the key witness against him. Had the bias argument been more powerfully made at trial, the court of appeals also might have been more willing to find that the restriction on the cross-examination of character witnesses, considered together with the limitation on bias evidence, deprived Skelton of a fair trial—i.e., a fair chance for a full attack on Jacobs. ■