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State v. Lamb: North Carolina Rejects Luce

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State v. Lamb: North Carolina Rejects *Luce*

In *Luce v. United States*[1] the United States Supreme Court considered whether a defendant who declines to testify after a judge refuses to exclude his criminal convictions under Federal Rule of Evidence 609(a)[2] forfeits his right to challenge that ruling on appeal. The Court unanimously held that in order to preserve for review the claim of improper impeachment with a prior conviction, the defendant must testify.[3] In *State v. Lamb*[4] the North Carolina Supreme Court addressed the similar question whether a defendant must testify to preserve appellate review of a judge's refusal to exclude impeachment evidence of bad acts under North Carolina Rule of Evidence 608(b).[5] Disavowing the need to determine the applicability of *Luce*,[6] the court held that in the rule 608(b) context, the defendant's testimony is unnecessary to preserve her appellate right.[7]

This Note examines *Lamb* and the applicability of the *Luce* rule to *Lamb*'s facts. It argues that North Carolina has implicitly rejected *Luce* and its rationale. The Note concludes that the supreme court's decision is sound, although its opinion offers little guidance to North Carolina appellate courts or to attorneys debating whether to put their clients on the stand. Finally, this Note offers some suggestions for dealing with the problem of appellate review of motions *in limine*.[8]

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1. 469 U.S. 38 (1984).

2. Federal Rule of Evidence 609(a) provides:

> GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

FED. R. EVID. 609(a).

3. *Luce*, 469 U.S. at 41.

4. 321 N.C. 633, 365 S.E.2d 600 (1988).

5. North Carolina Rule of Evidence 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

N.C. R. EVID. 608(b).

6. *Lamb*, 321 N.C. at 646, 365 S.E.2d at 607 ("We express no opinion on the applicability of *Luce*.").

7. *Id.* at 649, 365 S.E.2d at 609.

8. A motion *in limine* is a motion made "[o]n or at the threshold; at the very beginning; preliminarily." State v. Tate, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980) (quoting BLACK'S LAW DICTIONARY 708 (5th ed. 1979)). This Note uses the term to refer to motions made before or during

In July 1985 defendant Ruby Lawless Lamb was indicted for the murder of her husband. In pretrial discovery defendant learned that several of her relatives had informed police that defendant told them she had participated in four other murders. Three of the murder victims were Mrs. Lamb's family members. Mrs. Lamb was never indicted for those killings. Fearing potential damage from this evidence, defendant filed a pretrial motion *in limine* to exclude any testimony relating to Mrs. Lamb's alleged statements about the killings. The trial court deferred ruling on this motion.[9]

The trial began without a ruling on defendant's motion. The State did not attempt to use any evidence of the other killings during its case in chief.[10] Near the close of defendant's evidence, defendant renewed her motion *in limine*, and the judge denied it. Defendant then declined to take the stand to avoid possible impeachment by the State. She was convicted of second-degree murder and sentenced to fifteen years in prison.[11]

The North Carolina Court of Appeals reversed, holding that the trial judge's denial of defendant's motion *in limine* constituted reversible error.[12] The appeals court ruled that the United States Supreme Court's holding in *Luce* did not bind North Carolina courts.[13] Even if *Luce* were binding, the court of appeals stated, *Lamb* was distinguishable from *Luce* on two grounds. First, appellate review of the challenged evidence did not require balancing probative value against prejudice to the defendant. Second, defendant's intention to testify

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trial to exclude prejudicial evidence before the evidence is actually offered. *See Luce*, 469 U.S. at 40 n.2 (same usage).

9. *Lamb*, 321 N.C. at 636, 365 S.E.2d at 601. The court noted that the trial judge was correct to defer his ruling on defendant's pretrial motion. At the time of the motion hearing, the statements made by defendant's relatives were not before the judge. Therefore, the court had no factual context in which to make a decision: "The Rules of Evidence are not to be applied in a vacuum; they are to be applied in a factual context." *Id.* at 648, 365 S.E.2d at 608. In light of the court's ultimate holding—that the motion ruling was appealable despite the absence of a reviewable context—this statement seems ironic. *See infra* notes 46-52 and accompanying text.

10. *Lamb*, 321 N.C. at 646, 365 S.E.2d at 607. The State contended at the pretrial motion hearing that the evidence of defendant's statements regarding the other killings would be substantively admissible under North Carolina Rule 404(b). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. R. EVID. 404(b). The appellate court ruled that the evidence was inadmissible under rule 404(b) to prove motive, because there was "not the slightest hint that the three allegedly professed killings provided a motive for killing David Lamb." *Lamb*, 84 N.C. App. 569, 584, 353 S.E.2d 857, 865 (1987), *aff'd*, 321 N.C. 633, 365 S.E.2d 600 (1988). The list of purposes for which evidence can be admitted, however, is only illustrative. It is at least arguable that evidence of the other killings would have been substantively admissible to prove a pattern, especially because the victims in three of the four alleged killings were also family members. *See* Brief for State at 19, *Lamb* (No. 8611SC818). The State rendered the question of substantive admissibility moot by not using the evidence during its case in chief, and the point was not raised on appeal.

11. *Lamb*, 321 N.C. at 636, 365 S.E.2d at 602.

12. *Lamb*, 84 N.C. App. at 580, 353 S.E.2d at 863.

13. *Id.* In the discussion following its dismissal of *Luce* as non-binding, the court of appeals pointed out in a footnote: "The North Carolina Rules of Evidence mirror almost completely the Federal Rules of Evidence. Thus rulings on the Federal Rules of Evidence are often helpful." *Id.* at 580 n.3, 353 S.E.2d at 863 n.3.

but for the trial court's ruling was clear from the record.[14] The court reasoned that the strong policy favoring a witness' right to testify without fear of impeachment by inadmissible evidence outweighed any dangers addressed by *Luce* and mandated reviewability in this case.[15] The State renewed its *Luce* argument in its petition to the North Carolina Supreme Court.[16]

The supreme court affirmed the court of appeals. Its opinion in large part mirrored the reasoning of the court of appeals. The court based its holding on two factors. First, evidence of violence to others is generally irrelevant to the issue of a defendant's veracity and therefore is inadmissible as impeachment evidence.[17] Second, defendant's intention to testify but for the denial of her motion was abundantly clear from the record.[18] Because of the high probability that the challenged evidence was inadmissible and defendant's clear intention to testify if this evidence was excluded, the supreme court concluded that the trial court impermissibly chilled defendant's right to testify in her own behalf, entitling her to a new trial.[19]

The question of appellate review of motions *in limine* in the absence of defendant's testimony arises primarily in the context of rule 609(a), when the issue is the admissibility of defendant's prior convictions for impeachment purposes. Prior to the *Luce* decision in 1984, opinions in nine federal circuits held that the accused could obtain review even though he did not testify.[20]

Luce emphatically rejected this conclusion. In his opinion for a unanimous court[21] Chief Justice Burger offered three reasons for the Court's rejection of appellate review when a defendant does not testify. First, "[a] reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context."[22] Burger observed that this handicap is particularly troublesome in the rule 609(a) context, where the judge must balance the probative value of a

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14. *Id.* at 581, 353 S.E.2d at 864.

15. *Id.* at 583, 353 S.E.2d at 865. The court of appeals stated:

> If the threatened use of inadmissible evidence can prevent the defendant from testifying altogether and also deny her the opportunity to appeal an erroneous ruling on the admissibility of the evidence, the State would have multiple opportunities to silence defendants, and the very purpose of the motion *in limine* would be lost.

Id.

16. New Brief for State at 5-10, *Lamb* (No. 136PA87).

17. *Lamb*, 321 N.C. at 647, 365 S.E.2d at 608.

18. *Id.* at 648, 365 S.E.2d at 608.

19. *Id.* at 649, 365 S.E.2d at 609.

20. *See* United States v. Washington, 746 F.2d 104, 105-06 (2d Cir. 1984); United States v. Kuecker, 740 F.2d 496, 499 n.1 (7th Cir. 1984); United States v. Lipscomb, 702 F.2d 1049, 1069 (D.C. Cir. 1983) (en banc); United States v. Halbert, 668 F.2d 489, 493-94 (10th Cir. 1982), *cert. denied*, 456 U.S. 934 (1983); United States v. Kiendra, 663 F.2d 349, 352-53 (1st Cir. 1981); United States v. Burkhead, 646 F.2d 1283, 1285 (8th Cir. 1981), *cert. denied*, 454 U.S. 898 (1982); United States v. Williams, 642 F.2d 136, 140 n.4 (5th Cir. 1981); United States v. Whitehead, 618 F.2d 523, 528 (4th Cir. 1980); United States v. Cook, 608 F.2d 1175, 1187 (9th Cir. 1979) (en banc), *cert. denied*, 444 U.S. 1034 (1980).

21. Justices Brennan and Marshall joined the opinion of the Court and concurred in a separate opinion. *Luce*, 469 U.S. at 43 (Brennan, J., joined by Marshall, J., concurring).

22. *Luce*, 469 U.S. at 41.

prior conviction against its prejudicial effect on the defendant.[23] Second, "[a]ny possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative."[24] Harm to the defendant is speculative because (1) the trial judge is not bound by his *in limine* ruling and might have changed it during defendant's testimony if it became necessary,[25] and (2) the appeals court has no way of knowing if the prosecution would have used the prior conviction at all.[26] Third, if these motion rulings were reviewable, "almost any error would result in the windfall of automatic reversal; the appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying."[27] Requiring the defendant to testify will discourage defense attorneys from "making such motions solely to 'plant' reversible error in the event of conviction."[28]

Justice Brennan limited his concurrence to the nonappealability of *in limine* rulings under rule 609(a).[29] The lack of a similar limitation in Chief Justice Burger's opinion opened the door to allow state and federal courts to apply *Luce* beyond the rule 609(a) context. Federal circuit courts have applied *Luce* to rules 403,[30] 404(b),[31] and 608(b).[32] State courts have extended *Luce* to cases involving impeachment by bad acts[33] and prior statements.[34] If any discernible difference regarding the need for a reviewable factual context on appeal between motion rulings under rule 609(a) and rulings under other rules exists, the courts following *Luce* have failed to point it out.

Two federal cases have held that *Luce* is applicable to federal 608(b) rulings.[35] In *United States v. Weichert*[36] defendant, a former attorney, had been disbarred twelve years before his trial for fraud. The trial court denied defendant's motion to exclude his disbarment as impeachment evidence, and defendant then declined to testify. On appeal, the Second Circuit held that because defend-

23. *Id.* The same difficulty inherently exists, however, in *any* appeal lacking a reviewable factual context, according to the Court. *Id.*

24. *Id.*

25. *Id.* at 41-42.

26. *Id.* at 42.

27. *Id.*

28. *Id.*

29. *Id.* at 43-44 (Brennan, J., concurring) ("I do not understand the Court to be deciding broader questions of appealability *vel non* of *in limine* rulings that do not involve Rule 609(a)."). Justice Brennan's concern centered not so much on limiting nonappealability to the rule 609(a) context as on limiting it to cases in which a concrete factual context was necessary for adequate appellate review. He stated, for example, that he would not favor the nonappealability of an *in limine* ruling admitting immunized testimony for impeachment purposes, because admissibility of such testimony turns on legal, not factual, considerations. *Id.* at 44 (Brennan, J., concurring).

30. United States v. Griffin, 818 F.2d 97, 105 (1st Cir.), *cert. denied*, 108 S. Ct. 137 (1987).

31. United States v. Johnson, 767 F.2d 1259, 1270 (8th Cir. 1985).

32. United States v. Weichert, 783 F.2d 23, 25 (2d Cir.), *cert. denied*, 479 U.S. 831 (1986); United States v. Dimatteo, 759 F.2d 831, 833 (11th Cir.), *cert. denied*, 474 U.S. 860 (1985).

33. State v. Wilson, 509 So. 2d 1281, 1282 (Fla. Dist. Ct. App. 1987); State v. Chapman, 496 A.2d 297, 302-03 (Me. 1985).

34. People v. Henne, 165 Ill. App. 3d 315, 326, 518 N.E.2d 1276, 1283-84 (1988).

35. *Weichert*, 783 F.2d at 25; *Dimatteo*, 759 F.2d at 833.

36. 783 F.2d 23 (2d Cir. 1985).

ant failed to testify, he could not appeal the trial court's motion ruling.[37] The court stated that at the heart of *Luce*'s logic lies the inability of an appellate court to review a trial court's balancing of probative value and prejudice without reference to the defendant witness' actual testimony.[38] That difficulty, according to the *Weichert* court, is no different under rule 608(b): "If impeaching questions are permitted under Rule 608(b), the trial court is still required to balance probative value against prejudice under [rule] 403, and this balancing is as dependent on the specific factual context as it is in Rule 609 cases."[39]

In *State v. Wilson*,[40] a case factually similar to *Lamb*, a Florida court followed *Luce* to deny the defendant's appeal of a motion to exclude evidence of prior bad acts.[41] In that case defendant was on trial for the murder of his brother-in-law. Defendant moved to exclude evidence of his prior violent acts which might be used to impeach the testimony of his character witnesses. The motion was denied. Defendant then elected not to present his character witnesses and appealed the denial of his motion *in limine*. The Florida court, citing *Luce*, held that the motion was unreviewable because the witnesses did not testify.[42]

As these cases suggest, acceptance of the reasoning in *Luce* in the rule 609(a) context leads logically to a similar acceptance in a rule 608(b) context. The same lack of factual context handicaps the reviewing court in each case, and balancing probative value against prejudice to the defendant under rule 609(a) does not differ from the rule 403 balancing necessary to every rule 608(b) determination.[43] Rule 608(b) rulings also contain the same dangers identified in *Luce*, speculative harm to the defendant and the possibility of the defendant's "planting" reversible error in the event of conviction.

North Carolina rule 608(b) is identical to its federal counterpart. Moreover, the commentary to North Carolina rule 608(b) includes the portion of the federal advisory committee's note which states that "the overriding protection of Rule 403 requires that the probative value not be outweighed by the danger of unfair prejudice."[44] Chief Justice Burger referred to exactly this sort of balancing when he wrote: "To perform this balancing, the court must know the precise nature of the defendant's testimony, which is unknowable when . . . the defendant does not testify."[45] There is, then, no significant distinction between the types of appellate review at issue in *Luce* and *Lamb*.

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37. *Id.* at 25.
38. *Id.* at 25.
39. *Id.*
40. 509 So. 2d 1281 (Fla. Dist. Ct. App. 1987).
41. *Wilson*, 509 So. 2d at 1282.
42. *Id.*
43. *Weichert*, 783 F.2d at 25. North Carolina Rule of Evidence 609(a) does not have the balancing provision of the corresponding federal rule. The omission in no way affects this Note's analysis, however. North Carolina rule 608(b) does provide for balancing implicitly through its inclusion of rule 403. *See* N.C. R. EVID. 608(b) commentary. This balancing element is the subject of comparison between *Lamb*, decided under rule 608(b), and *Luce*, decided under federal rule 609(a). North Carolina rule 609(a) in no way enters into this comparison.
44. N.C. R. EVID. 608(b) commentary.
45. Luce v. United States, 469 U.S. 38, 41 (1984).

Given the virtually identical difficulties of appellate review in *Luce* and *Lamb* and the North Carolina Supreme Court's ruling in *Lamb* permitting appeal from the denial of motions *in limine* under rule 608(b) in the absence of defendant's testimony, one may infer that North Carolina has rejected *Luce*. The only uncertainty in this conclusion lies in the court's failure to give a clear indication of the principles it used to determine appealability. Other state courts that have rejected *Luce* have either replaced it with procedures to safeguard against the dangers it addressed[46] or have explained in detail the rationale for their decision.[47]

Further examination of the *Lamb* opinion demonstrates the confusion it may create. The court began its discussion by noting that "[u]nder Rule 608(b), evidence of a specific instance of conduct is not admissible for impeachment purposes unless it '*is in fact probative* of truthfulness.' "[48] Evidence of violence is "routinely disapproved of as irrelevant to the question of a witness' . . . veracity."[49] Therefore, the court reasoned, "the evidence appears to be inadmissible."[50] This logic appears unassailable. If a certain type of evidence is inadmissible to impeach a witness, it seems such evidence should be excluded regardless of whether the defendant testifies. The court, however, undermined its own reasoning. Near the end of the opinion, the court speculated on the possible results if the defendant had testified. The court first pointed out, in support of its ruling, that had Mrs. Lamb taken the stand and been subjected to prejudicial cross-examination, the judge could have reversed his denial of her motion and excluded questions regarding the other alleged killings because the trial court is free to alter an *in limine* ruling as the circumstances warrant.[51] Chief Justice Burger made this same argument in *Luce* to demonstrate that any harm to the defendant would be speculative in the absence of his testimony.[52] For this reason, the *Lamb* court's conclusion that the judge's right to change his mind contributes to the certainty of appellate review of motions *in limine* is difficult to understand. Because the judge may exclude previously admitted impeachment evidence during defendant's testimony, it is a matter of conjecture in the absence of defendant's testimony whether the judge ultimately would have allowed the State to impeach the defendant. Appellate review, therefore, would be less certain because of the changeable nature of *in limine* rulings.

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46. *E.g.*, State v. McClure, 298 Or. 336, 341, 692 P.2d 579, 583 (1984) (en banc) (requires defendant to establish on the record her intent to testify if the challenged evidence is excluded and to outline her testimony so that the court can do the required balancing); Commonwealth v. Richardson, 347 Pa. Super. 564, 571, 500 A.2d 1200, 1204 (1985) (extensive hearing by trial court on motions to exclude prior convictions). For a discussion of the Pennsylvania procedure for ruling on motions to exclude prior convictions, see Commonwealth v. Bighum, 452 Pa. 554, 562-67, 307 A.2d 255, 260-63 (1973).

47. *E.g.*, State v. Whitehead, 104 N.J. 353, 360-61, 517 A.2d 373, 376-77 (1986) (*Luce* concerns illusory in light of court's experience with appeals of *in limine* rulings).

48. *Lamb*, 321 N.C. at 647, 365 S.E.2d at 607 (quoting State v. Morgan, 315 N.C. 626, 634, 340 S.E.2d 84, 89 (1986).

49. *Id.* (quoting State v. Morgan, 315 N.C. 626, 635, 340 S.E.2d 84, 90 (1986)).

50. *Id.* at 647, 365 S.E.2d at 608.

51. *Id.* at 648, 365 S.E.2d at 608.

52. *Luce*, 469 U.S. at 41-42.

The court further dismantled its reasoning with the doctrine of "opening the door." The court stated that

> had defendant taken the stand and testified that she had never made such statements or had never been involved in any prior acts of violence to the person, she would have "opened the door." Although the statements *appeared* inadmissible under Rule 608(b), had defendant thus opened the door, the prosecutor would have been at liberty to use the statements to impeach defendant.[53]

Not only would the State have been able to impeach the defendant had she opened the door, but it actually might have been able to put her relatives on the stand to rebut her testimony.[54] Taken to their logical conclusion, the court's statements conceivably suggest that an offhand response on direct examination such as, "I've never hurt anyone in my life," could give rise to a small parade of terribly damaging witnesses.

Considering the possibility that defendant could open the door to admission of the evidence, the court's holding that the impeachment evidence was per se inadmissible is tenuous. The court itself admitted that the evidence could have become admissible, but *only* if defendant had testified. The only conclusion from the court's reasoning is that, despite its holding otherwise, a reviewing court simply cannot rule with certainty on the issue of admissibility in the absence of defendant's testimony.

Lamb lacks the clarity necessary to guide defense lawyers in deciding whether to put their clients on the stand. On the one hand, the court clearly favors the appealability of motions *in limine* absent defendant's testimony. On the other hand, the court itself recognizes that an appellate court cannot adequately review such a motion ruling without that testimony. The uncertainty of the opinion is due in part to the court's refusal expressly to adopt or reject *Luce*. Had the court adopted *Luce*, it would have gained a very simple procedure with proven broad applicability.[55] Rejecting *Luce* explicitly would have all but forced the court to develop an alternate rationale, because rejection of the Supreme Court is not to be taken lightly, even when its decisions are non-binding.[56] Without *Luce* as a point of departure, the court was left to traverse uncharted ground alone.

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53. *Lamb*, 321 N.C. at 649, 365 S.E.2d at 608-09 (emphasis added).

54. *See* State v. Avery, 315 N.C. 1, 28, 337 S.E.2d 786, 801 (1985) (quoting State v. Albert, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)) ("Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.").

A statement such as "I've never hurt anyone in my life" arguably is collateral and therefore does not open the door to extrinsic evidence. Even if the State could not have presented the witnesses themselves, however, it still could have asked the pregnant question: "Didn't you tell your relatives that you have killed four other people?" *See* State v. Burgin, 313 N.C. 404, 406, 329 S.E.2d 653, 656 (1985) (quoting Maddox v. Brown, 233 N.C. 519, 524, 64 S.E.2d 864, 867 (1951)) (" 'On cross-examination much latitude is given counsel in testing for consistency and probability matters related by a witness on direct examination.' "); 3A J. WIGMORE, EVIDENCE § 1023 (Chadbourn rev. 1970).

55. *See supra* notes 21 & 30-34 and accompanying text.

56. The truth of this statement can be seen in the opinions of the courts that have expressly

Despite these problems in *Lamb*, there is a thread of policy running through the opinion that indicates the court's posture toward the general appealability of motions *in limine* when defendant does not testify. The court emphasized the certainty of both defendant's intention to testify and the State's intention to use the damaging evidence to impeach her.[57] Moreover, the importance to defendant of the opportunity to testify was increased by the State's reliance on the testimony of defendant's relatives,[58] which made the case a swearing contest before the jury. In light of these circumstances, the court held that "any undue discouragement of defendant's right to take the stand in her own defense was fraught with prejudice."[59]

The court's conclusion that the ruling was "fraught with prejudice" is puzzling. Any denial of a defendant's motion to exclude damaging impeachment evidence inevitably will discourage him in some degree from testifying. Taking the stand is simply a less attractive proposition when one faces impeachment. An appellate court should not reverse a trial court's refusal to exclude impeachment evidence merely because the defendant was thereby discouraged from testifying. The court, however, claimed that the trial court's ruling in this case resulted in "undue discouragement."[60] Why is the discouragement in this case "undue"? The court gave no answer. The apparent reason is that defendant was discouraged from testifying by the trial court's erroneous refusal to exclude the impeachment evidence, thus returning to the question whether an appellate court can adequately determine error in the absence of defendant's testimony. Even if the court had framed the issue in terms of undue discouragement of defendant's right to testify, the case would have turned on the *Luce* question of the appealability of motions *in limine* in the absence of defendant's testimony.

The policy underlying the court's discussion is the high valuation of defendant's right to testify in her own defense and the protection which should be afforded that right. If the appellate court cannot rule with certainty on the admissibility of impeachment evidence, it nevertheless should be allowed to do so in order to uphold a criminal defendant's right to testify. The importance of the criminal defendant's right to testify simply outweighs the need for certainty on appellate review. In other words, the cost of *Luce* is a price North Carolina courts are unwilling to pay. In order to gain certainty on appellate review and to avoid the risk of automatic reversal on appeal, *Luce* offers the criminal defendant a Hobson's choice: refrain from testifying and give up the right to appeal one's motion *in limine* or testify in the teeth of potentially inadmissible

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rejected *Luce*. *See, e.g.*, State v. McClure, 298 Or. 336, 340-41, 692 P.2d 579, 583-84 (1984); State v. Whitehead, 104 N.J. 353, 360-61, 517 A.2d 373, 376-77 (1986).

57. *Lamb*, 321 N.C. at 648, 365 S.E.2d at 608 ("[I]t is abundantly clear . . . that defendant intended to testify unless her motion *in limine* was denied"; "defendant was justified in believing that if she took the stand" the district attorney would cross-examine her with the impeaching statements).

58. During the State's case in chief defendant's relatives had testified as to her guilt in the murder of David Lamb, the victim in this case. Defendant's motion challenged only evidence of prior killings. *Id.* at 635, 365 S.E.2d at 601.

59. *Id.* at 649, 365 S.E.2d at 608.

60. *Id.*

impeachment evidence only to preserve the appellate right. *Lamb*'s holding, on the other hand, protects the defendant from impermissible impeachment and allows her to testify without fear of such evidence in a new trial.

Lamb's holding favoring a defendant's uninhibited right to testify in her own defense over the concerns of *Luce* is sound. Two important considerations support this conclusion. First, the defendant's testimony on her own behalf is often crucial to an adequate defense. In *Lamb* itself the defendant greatly needed to substantiate her alibi against the conflicting claims of her relatives.[61] Second, North Carolina courts traditionally have held a criminal defendant's right to testify in high regard.[62] Both the practical need in this case and North Carolina's concern for a defendant's testimony support *Lamb*'s holding.

Lamb's policy of preserving the defendant's right to testify probably means that *Luce* will receive equally unfavorable treatment in North Carolina in the rule 609(a) context, particularly because North Carolina rule 609(a) lacks the balancing provision of its corresponding federal rule.[63] Indeed, the trial judge has no discretion in ruling on the admissibility of a prior conviction under the North Carolina rule.[64] The judge need only plug the offered evidence into the rule's criteria.[65] Because the North Carolina rule requires only a purely legal, non-factual determination, a reviewing court does not need defendant's testimony in order to determine error.[66]

Although *Lamb*'s policy of upholding defendant's right to testify is sound, the decision suggests no procedure to guide future courts in dealing with the question of appealability of motions *in limine* when defendant does not testify. Decisions from other jurisdictions that have rejected *Luce* may aid North Carolina courts in this respect. In *State v. McClure*[67] the Oregon Supreme Court

61. *Lamb*, 321 N.C. at 635-36, 365 S.E.2d at 601. Defendant maintained she had been in South Carolina at the time of her husband's murder.

62. *See* State v. Bovender, 233 N.C. 683, 689, 65 S.E.2d 323, 329 (1951) (defendant guaranteed the right to testify in his own behalf); State v. Luker, 65 N.C. App. 644, 650, 310 S.E.2d 63, 66 (1983) (defendant has the right to testify under the sixth amendment of the United States Constitution), *rev'd on other grounds*, 311 N.C. 301, 316 S.E.2d 309 (1984). North Carolina preceded the United States Supreme Court by over three decades in recognizing defendant's right to testify. Two years ago the Supreme Court held for the first time that criminal defendants have a right to testify in their own behalf. *See* Rock v. Arkansas, 107 S. Ct. 2704, 2709-10 (1987). That right stemmed from three sources: (1) the guarantee of due process, (2) the sixth amendment's compulsory process clause, and (3) the fifth amendment's guarantee against compulsory self-incrimination. *Id.* The Court's holding bolsters the long-standing policy in North Carolina and provides further reason to reject any procedure impinging on the criminal defendant's right to testify.

63. North Carolina Rule of Evidence 609(a) provides: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter." N.C. R. EVID. 609(a).

64. *Id.* ("evidence . . . *shall* be admitted.") (emphasis added).

65. Rule 403 may apply to rule 609(a) determinations. This seems unlikely, however, because the legislature did not adopt the balancing provision of federal rule 609(a) in a set of rules based on the Federal Rules of Evidence. North Carolina courts have not ruled on the point.

66. *See Luce*, 469 U.S. 38, 44 (1984) (Brennan, J., concurring) ("[In cases] in which the determinative question turns on legal and not factual considerations, a requirement that the defendant actually testify at trial to preserve the admissibility issue for appeal might not necessarily be appropriate.").

67. 298 Or. 336, 692 P.2d 579 (1984).

placed two requirements on the criminal defendant in order to preserve the record for appeal. First, the defendant must "establish on the record that he will in fact take the stand and testify" if the challenged evidence should be excluded.[68] Second, he must "[s]ufficiently outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing."[69]

The first of these requirements, that defendant commit to testify, assures the appellate court that defendant actually faced cross-examination with the challenged evidence on the stand. Without the commitment, the reviewing court cannot determine whether the error would have been harmless, because defendant might not have taken the stand with or without the ruling on his motion *in limine*. The commitment to testify also ensures that the trial court will not waste its time rendering merely advisory opinions.[70]

The requirement of a commitment to testify, however, is not without difficulties. Despite good faith representations by defense counsel, a criminal defendant is always entitled to change his mind about taking the stand, making the commitment unenforceable.[71] One court has observed that such an impotent requirement "merely penalize[s] unsophisticated or ill-advised defendants who are unaware that they could later decide not to testify."[72]

In light of these problems, North Carolina should not require the defendant to commit to testify. The very fact that the defendant has made a motion to exclude damaging impeachment evidence should provide enough insurance that he would have testified if his motion had been granted.[73] In spite of the *Luce* Court's assertion that "an accused's decision to testify 'seldom turns on the resolution of one factor,' "[74] a court's refusal to exclude harmful impeachment evidence presumably is the primary motivating factor in defendant's decision not to testify. This is especially true in cases like *Lamb*, when defendant's case is highly dependent on her ability to present her side of the story without fear of impeachment.

A proffer of testimony by the defendant allows the appellate court to balance probative value and prejudice in a reviewable factual context, the main concern of the *Luce* Court.[75] The reviewing court then has a record against

68. *Id.* at 341, 692 P.2d at 583.

69. *Id.*

70. *See* D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 31, at 198 (Supp. 1988).

71. *McClure*, 298 Or. at 341 n.2, 692 P.2d at 579 n.2; *see Luce*, 469 U.S. at 42 ("[S]uch a commitment is virtually risk-free because of the difficulty of enforcing it."); *see also* United States v. Cook, 608 F.2d 1175, 1189 (9th Cir. 1979) (Kennedy, J., concurring in part and dissenting in part) ("[A] defendant cannot be bound to a pretrial statement of election; in fact, it would appear to be unconstitutional to do so."), *cert. denied*, 444 U.S. 1034 (1980).

72. State v. Whitehead, 104 N.J. 353, 360, 517 A.2d 373, 377 (1986).

73. *Id.* at 360-61, 517 A.2d at 377; *see* United States v. Lipscomb, 702 F.2d 1049, 1069 (D.C. Cir. 1983) (it is reasonable to presume that advance ruling on admissibility of prior convictions is an important factor in defendant's decision whether to testify); *Cook*, 608 F.2d at 1184 n.6 (court noted that the House Committee on the Judiciary "thought it safe to say, that more defendants will testify if prior convictions are kept from the jury than if the prior convictions are to be revealed").

74. *Luce*, 469 U.S. at 42 (quoting New Jersey v. Portash, 440 U.S. 450, 467 (1979) (Blackmun, J., dissenting)).

75. *Id.* at 41; *see* D. LOUISELL & C. MUELLER, *supra* note 70, at 197.

which it can assess the prosecution's need for the evidence and the harm caused to the defendant. The proffer thereby adds certainty of appellate review and removes the opportunity for defense counsel to plant error as sought by the *Luce* court.

The requirement of a proffer of testimony does, however, raise some problems. First, as noted in *Luce*, the defendant's "trial testimony could, for any number of reasons, differ from the proffer."[76] This concern is allayed somewhat by the fact that the problem is inherent in any proffer of testimony, not just those made pursuant to a judge's denial of a motion *in limine*. Courts routinely determine error in other contexts from proffers of testimony,[77] and there is no reason to set apart denials of motions *in limine* as a special case where the proffer is insufficient. Second, "the nature and scope of the proffer, as well as the prosecutor's use of defendant's proffered testimony, if he testifies, for impeachment purposes at trial raise thorny questions about the extent to which the state can cross-examine the defendant and use the defendant's testimony at trial."[78] For example, if the defendant makes the proffer and is subjected to cross-examination, the question arises: May the prosecutor use the proffered testimony for impeachment purposes if the defendant's actual testimony before the jury differs from the proffer?[79] No court has yet reached this question. Although these problems are real, they are not compelling. The proffer may be limited only to those matters relevant to the challenged evidence, thus reducing the scope of the matters the prosecution could use against the defendant on cross-examination. Moreover, the danger of cross-examination with the proffer actually offsets the first danger, that defendant's actual testimony will differ from the proffer. If the defendant knows that the prosecution can cross-examine him with inconsistent statements from his proffer of testimony, he will be careful to keep his actual testimony similar to the proffer to avoid impeachment.

Third, "requiring the defendant to make an offer of proof exposes him to the tactical disadvantage of prematurely disclosing his testimony."[80] Although a proffer does necessitate premature disclosure, again this is the nature of offers of proof in general. Further, the prosecution is likely to know much of the subject matter of the defendant's potential testimony already from the criminal investigation. The danger of premature disclosure could be further mitigated by restricting the scope of the proffer to those matters relating to the evidence sought to be excluded.

While these concerns should not be dismissed lightly, they do not outweigh the benefits of a proffer of testimony. Although *Luce* went too far and paid the price of chilling the criminal defendant's right to testify, its point that a reviewable factual context is needed by the appellate court is well taken. The proffer of testimony gives the court such a context by putting defendant's testimony in the

76. *Luce*, 469 U.S. at 41 n.2.

77. D. LOUISELL & C. MUELLER, *supra* note 70, § 31, at 198.

78. State v. Whitehead, 104 N.J. 353, 361, 517 A.2d 373, 377 (1986).

79. United States v. Toney, 615 F.2d 277, 282 (5th Cir.), *cert. denied*, 449 U.S. 985 (1980).

80. *Whitehead*, 104 N.J. at 361, 517 A.2d at 377.

record without forcing him to be subjected to potentially inadmissible impeachment evidence before the jury.

North Carolina should add to its commendable policy favoring a criminal defendant's right testify the worthwhile procedure of requiring a proffer of testimony from the defendant to preserve the record for appeal. Oregon, for example, which does not follow *Luce*, has found such a procedure helpful in ruling on motions *in limine* at both the trial and appellate levels.[81] Commentators also have stated that requiring a proffer, and not defendant's actual testimony, is the better means of preserving the record.[82] If North Carolina plans to reject *Luce*, it should do so by replacing *Luce* with the proffer of testimony, thus addressing *Luce*'s concerns without impinging on defendant's right to testify.

Although the *Lamb* court can be praised for its final holding, the opinion is confusing. The policy underlying the supreme court's reasoning and much of the language in the opinion indicate that North Carolina has rejected *Luce* and will never require defendant to testify to preserve the record for appeal. However, the court's unfortunate refusal to take a position on *Luce*, even though *Luce* was presented in the briefs of both parties in the case,[83] leaves some room for uncertainty. One can only hope that in a future case the court will unequivocally reject *Luce* and put in its place a requirement of a proffer of testimony from the defendant, thus bringing certainty to the substantive and procedural law on this point of North Carolina evidence.

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81. *E.g.*, State v. McClure, 298 Or. at 336, 340-41, 692 P.2d 579, 583 (1984). In fact, the Oregon legislature included the proffer of testimony in its commentary to Oregon Rule of Evidence 609(a). *See id.*

82. *E.g.*, D. LOUISELL & C. MUELLER, *supra* note 70, at 197-98.

83. *See* New Brief for the State at 5-10, *Lamb* (No. 136PA87); Defendant-Appellee's New Brief at 43-48, *Lamb* (No. 136PA87).