

A defendant was charged with stealing fur coats from a van. At trial, a witness testified she saw the defendant take the furs.

The jurisdiction in which the defendant is being tried does not allow in evidence lie-detector results. On cross-examination by the defendant's attorney, the witness was asked, "The light was too dim to identify the defendant, wasn't it?" She responded, "I'm sure enough that it was the defendant that I passed a lie-detector test administered by the police." The defendant's attorney immediately objects and moves to strike.

Should the trial court grant the motion?

- A. No, because it is proper rehabilitation of an impeached witness.
- B. No, because the defendant's attorney "opened the door" by asking the question.
- C. Yes, because the probative value of the unresponsive testimony is substantially outweighed by the danger of unfair prejudice.
- D. Yes, because the question was leading.

Explanation:

A **motion to strike** is a request for the court to order that (1) inadmissible evidence (eg, testimony) be removed from the trial record and (2) the jury disregard that evidence. Even **relevant evidence** may be stricken if it is inadmissible under a specific rule, law, or constitutional provision. For example, relevant evidence is **inadmissible** if its **probative value** is **substantially outweighed** by a danger of **unfair prejudice** to the opposing party. This danger exists when the evidence would encourage the jury to decide the case on an improper basis.

Here, when the witness was asked if the light was too dim to identify the defendant, she responded, "I'm sure enough that it was the defendant that I passed a lie-detector test." Although that nonresponsive testimony is relevant, its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. That is because the testimony referenced inadmissible lie-detector test results—an improper basis on which the jury might base its decision. Therefore, the court should grant the defendant's motion to strike.

(Choice A) A witness's truthful character may only be rehabilitated if it has been impeached (ie, discredited). But here, the defendant's attorney questioned the witness's ability to *perceive* the defendant in the dim light, not her *truthfulness*.

(Choice B) A party "opens the door" when it refers to evidence that has previously been ruled inadmissible. The opposing party may then introduce that evidence. But here, the attorney's question did not "open the door" to the witness's statement since he did not ask her about the inadmissible lie-detector test.

(Choice D) A party generally may not ask **leading questions**—ie, questions that suggest the desired response—during *direct* examination of a witness. But leading questions are allowed on *cross-examination* (as seen here).

Educational objective:

Relevant evidence should be excluded if its probative value is substantially outweighed by a risk of unfair prejudice to the opposing party. Unfair prejudice arises when evidence would encourage the jury to decide the case on an improper basis.

References

Fed. R. Evid. 401 (test for relevant evidence).

Fed. R. Evid. 403 (excluding relevant evidence).

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**Excluding relevant evidence
(FRE 403)**

