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SUPREME COURT OF THE UNITED STATES

No. 98–9828

MARIA SUZUKI OHLER, PETITIONER
v. UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 22, 2000]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner, Maria Ohler, was arrested and charged with importation of marijuana and possession of marijuana with the intent to distribute. The District Court granted the Government's motion *in limine* seeking to admit evidence of her prior felony conviction as impeachment evidence under Federal Rule of Evidence 609(a)(1). Ohler testified at trial and admitted on direct examination that she had been convicted of possession of methamphetamine in 1993. The jury convicted her of both counts, and the Court of Appeals for the Ninth Circuit affirmed. We agree with the Court of Appeals that Ohler may not challenge the *in limine* ruling of the District Court on appeal.

Maria Ohler drove a van from Mexico to California in July 1997. As she passed through the San Ysidro Port of Entry, a customs inspector noticed that someone had tampered with one of the van's interior panels. Inspectors searched the van and discovered approximately 81 pounds of marijuana. Ohler was arrested and charged with importation of marijuana and possession of marijuana with the intent to distribute. Before trial, the Government filed

motions *in limine* seeking to admit Ohler's prior felony conviction as character evidence under Federal Rule of Evidence 404(b) and as impeachment evidence under Rule 609(a)(1). The District Court denied the motion to admit the conviction as character evidence, but reserved ruling on whether the conviction could be used for impeachment purposes. On the first day of trial, the District Court ruled that if Ohler testified, evidence of her prior conviction would be admissible under Rule 609(a)(1). App. 97–98. She testified in her own defense, denying any knowledge of the marijuana. She also admitted on direct examination that she had been convicted of possession of methamphetamine in 1993. The jury found Ohler guilty of both counts, and she was sentenced to 30 months in prison and 3 years' supervised release. *Id.*, at 140–141.

On appeal, Ohler challenged the District Court's *in limine* ruling allowing the Government to use her prior conviction for impeachment purposes. The Court of Appeals for the Ninth Circuit affirmed, holding that Ohler waived her objection by introducing evidence of the conviction during her direct examination. 169 F.3d 1200 (1999). We granted certiorari to resolve a conflict among the Circuits regarding whether appellate review of an *in limine* ruling is available in this situation. 528 U. S. ___ (1999). See *United States* v. *Fisher*, 106 F. 3d 622 (CA5 1997) (allowing review); *United States* v. *Smiley*, 997 F. 2d 475 (CA8 1993) (holding objection waived). We affirm.

Generally, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted. See 1 J. Weinstein & M. Berger, Weinstein's Federal Evidence §103.14, 103-30 (2d ed. 2000). Cf. 1 J. Strong, McCormick on Evidence §55, p. 246 (5th ed. 1999) ("If a party who has objected to evidence of a certain fact himself produces evidence from his own witness of the same fact, he has waived his objection."). Ohler seeks to avoid the consequences of this well-established commonsense prin-

ciple by invoking Rules 103 and 609 of the Federal Rules of Evidence. But neither of these Rules addresses the question at issue here. Rule 103 sets forth the unremarkable propositions that a party must make a timely objection to a ruling admitting evidence and that a party cannot challenge an evidentiary ruling unless it affects a substantial right.[1] The Rule does not purport to determine when a party waives a prior objection, and it is silent with respect to the effect of introducing evidence on direct examination, and later assigning its admission as error on appeal.

Rule 609(a) is equally unavailing for Ohler; it merely identifies the situations in which a witness' prior conviction may be admitted for impeachment purposes.[2] The Rule originally provided that admissible prior conviction evidence could be elicited from the defendant or established by public record during cross-examination, but it was amended in 1990 to clarify that the evidence could also be introduced on direct examination. According to Ohler, it follows from this amendment that a party does not waive her objection to the *in limine* ruling by introducing the evidence herself. However, like Rule 103, Rule

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[1] Federal Rule of Evidence 103(a): "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) . . . In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . ."

[2] Rule 609(a): "For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused . . . ."

609(a) simply does not address this issue. There is no question that the Rule authorizes the eliciting of a prior conviction on direct examination, but it does no more than that.

Next, Ohler argues that it would be unfair to apply such a waiver rule in this situation because it compels a defendant to forgo the tactical advantage of preemptively introducing the conviction in order to appeal the *in limine* ruling. She argues that if a defendant is forced to wait for evidence of the conviction to be introduced on cross-examination, the jury will believe that the defendant is less credible because she was trying to conceal the conviction. The Government disputes that the defendant is unduly disadvantaged by waiting for the prosecution to introduce the conviction on cross-examination. First, the Government argues that it is debatable whether jurors actually perceive a defendant to be more credible if she introduces a conviction herself. Brief for United States 28. Second, even if jurors do consider the defendant more credible, the Government suggests that it is an unwarranted advantage because the jury does not realize that the defendant disclosed the conviction only after failing to persuade the court to exclude it. *Ibid.*

Whatever the merits of these contentions, they tend to obscure the fact that both the Government and the defendant in a criminal trial must make choices as the trial progresses. For example, the defendant must decide whether or not to take the stand in her own behalf. If she has an innocent or mitigating explanation for evidence that might otherwise incriminate, acquittal may be more likely if she takes the stand. Here, for example, petitioner testified that she had no knowledge of the marijuana discovered in the van, that the van had been taken to Mexico without her permission, and that she had gone there simply to retrieve the van. But once the defendant testifies, she is subject to cross-examination, including

impeachment by prior convictions, and the decision to take the stand may prove damaging instead of helpful. A defendant has a further choice to make if she decides to testify, notwithstanding a prior conviction. The defendant must choose whether to introduce the conviction on direct examination and remove the sting or to take her chances with the prosecutor's possible elicitation of the conviction on cross-examination.

The Government, too, in a case such as this, must make a choice. If the defendant testifies, it must choose whether or not to impeach her by use of her prior conviction. Here the trial judge had indicated he would allow its use,[3] but the Government still had to consider whether its use might be deemed reversible error on appeal. This choice is often based on the Government's appraisal of the apparent effect of the defendant's testimony. If she has offered a plausible, innocent explanation of the evidence against her, it will be inclined to use the prior conviction; if not, it may decide not to risk possible reversal on appeal from its use.

Due to the structure of trial, the Government has one inherent advantage in these competing trial strategies. Cross-examination comes after direct examination, and therefore the Government need not make its choice until the defendant has elected whether or not to take the stand in her own behalf and after the Government has heard the defendant testify.

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[3]The District Court ruled on the first day of trial that Ohler's prior conviction would be admissible for impeachment purposes, and the court likely would have abided by that ruling at trial. However, *in limine* rulings are not binding on the trial judge, and the judge may always change his mind during the course of a trial. See *Luce* v. *United States*, 469 U. S. 38, 41–42 (1984). Ohler's position, therefore, would deprive the trial court of the opportunity to change its mind after hearing all of the defendant's testimony.

Petitioner's submission would deny to the Government its usual right to decide, after she testifies, whether or not to use her prior conviction against her. She seeks to short-circuit that decisional process by offering the conviction herself (and thereby removing the sting) and still preserve its admission as a claim of error on appeal.

But here petitioner runs into the position taken by the Court in a similar, but not identical, situation in *Luce* v. *United States*, 469 U. S. 38 (1984), that "[a]ny possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative." *Id.*, at 41. Only when the government exercises its option to elicit the testimony is an appellate court confronted with a case where, under the normal rules of trial, the defendant can claim the denial of a substantial right if in fact the district court's *in limine* ruling proved to be erroneous. In our view, there is nothing "unfair," as petitioner puts it, about putting petitioner to her choice in accordance with the normal rules of trial.

Finally, Ohler argues that applying this rule to her situation unconstitutionally burdens her right to testify. She relies on *Rock* v. *Arkansas*, 483 U. S. 44 (1987), where we held that a prohibition of hypnotically refreshed testimony interfered with the defendant's right to testify. But here the rule in question does not prevent Ohler from taking the stand and presenting any admissible testimony which she chooses. She is of course subject to cross-examination and subject to impeachment by the use of a prior conviction. In a sense, the use of these tactics by the Government may deter a defendant from taking the stand. But, as we said in *McGautha* v. *California*, 402 U. S. 183, 215 (1971):

> "It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct ex-

> amination. . . . It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. . . . Again, it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify."

For these reasons, we conclude that a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error.

The judgment of the Court of Appeals for the Ninth Circuit is therefore affirmed.

It is so ordered.