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# Rule 611(c): Where You Lead, I Will Follow

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Rule 611(c)

# Where you lead, I will follow

**By Cynthia Ford**

*"Where you lead, I will follow*
*Anywhere that you tell me to*
*If you need, you need me to be with you*
*I will follow where you lead…"*

— Carole King, "Where You Lead"

The tendency of the led to follow the leader is exactly the point of MRE 611(c), which provides:

> Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

This rule is identical in substance to FRE 611(c), which in its restyled version reads:

> Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's [NOTE THE DIFFERENCE IN APOSTROPHE PLACEMENT FROM MRE VERSION] testimony. Ordinarily, the court should allow leading questions:
> (1) on cross-examination; and
> (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

The objection which enforces this rule is, of course, familiar to all of us: "Objection, Your Honor, Leading." An inquisitive reader of an earlier column suggested this subject, with a particular emphasis on two specific issues: the purpose behind the "no leading on direct" rule and how to tell a leading from a non-leading question. My experience teaching Evidence and coaching the University of Montana Trial Team, as well as my own trial experience, confirms that these are valid concerns worthy of our attention this month.

## THE PURPOSE BEHIND THE "NO-LEADING ON DIRECT" RULE

The Federal Advisory Committee Note to FRE 611(c) explains that:

> The rule continues the traditional view that **the suggestive powers of the leading question are as a general proposition undesirable.** [Emphasis added]

The Montana Commission Comment to MRE 611(c) notes that the Montana version is identical to the then-current FRE 611(c), and expresses Montana's agreement with the purpose of the rule:

> It recognizes the traditional view that leading questions, that is, **questions which suggest the desired answer, are generally undesirable on direct examination, for the witness " ... may acquiesce in a false suggestion**". McCormick, Handbook on the Law of Evidence 8 (2d ed. 1972). [Emphasis added]

The U.S. Supreme Court, affirming a decision in an admiralty case which disregarded the thrust of one of the key witnesses, noted:

> A refusal to credit the uncorroborated testimony of the director-partner, who obviously was not disinterested in the outcome of the litigation, would not be considered clearly erroneous. … This is especially so when such testimony is prompted by leading questions as was the case here.[5] [FN 5: "At one point the judge interrupted the direct examination of the witness to point out he could not 'give any credit to a witness answering leading questions.']
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> *Guzman v. Pichirilo*, 369 U.S. 698, 702-03, 82 S. Ct. 1095, 1098, 8 L. Ed. 2d 205 (1962).

My own explanation is that when you have a witness "friendly" to your side of the case, that witness will necessarily be like Carole King, happy to go anywhere you suggest. The lawyer is providing the information, and the witness is just replying "Yes" or "Exactly" or "That's right." It is certainly true that this method of examination is the quickest, most efficient, and easiest for both the lawyer and the agreeable witness. It is equally true that the lawyer cannot testify. First, the Montana Rules of Professional Conduct forbid an attorney from testifying at trial.[1] Moreover, because the lawyer did

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1 Rule 3.4(e) states that a lawyer "shall not … assert personal knowledge of facts in issue except when testifying as a witness…" Rule 3.7 is entitled "Lawyer as Witness" and generally provides that "a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness" although there are some limited exceptions to this prohibition.

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not herself perceive the event at issue, she cannot provide the proper information to the court. MRE 602 requires that every non-expert witness have "personal knowledge of the matter." The witness on the stand, not the lawyer at the podium, has personal knowledge and must communicate it to the jury as his own memory and wording dictate.

## HOW TO TELL LEADING FROM NON-LEADING QUESTIONS: "YES OR NO" IS NOT ENOUGH

If the questioning is on direct examination of a witness friendly to the proponent, the objection should be sustained if the question is, in fact, leading. A bit mysteriously, neither the state nor federal version of Rule 611(C) provides any definition of either type of question. Luckily for Montanans, our legislature has enacted a statute which defines evidentiary terms:

> 26-1-101. General definitions. (1) "Direct examination" is the first examination of a witness on a particular matter. "Cross-examination" is the examination of a witness by a party other than the direct examiner.
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> (3) A "leading question" is a question which suggests to the witness the answer which the examining party desires.[2]

The Montana Supreme Court recently elaborated on the statutory definition, looking to California for guidance, and concluded that the fact that a question can be answered simply "Yes" or "No" does not make it leading. The touchstone, instead, is whether the examiner indicates to the witness how she is to answer, suggesting that "yes" is the correct answer or that "no" is not.

In *State v. Lindberg*, 347 Mont. 76, 196 P.3d 1252, 2008 MT 389, the defendant was convicted of several illegal sexual activities with young members of his girlfriend's household. One of these was a sexual intercourse without consent charge involving alleged victim H.B. who was 20 at the time of trial. After he was convicted, Lindberg claimed ineffective assistance of counsel for failure to object to leading questions posed on direct to H.B.:

> ¶ 12 … During her first testimony, H.B., then approximately twenty years of age, struggled when recounting Lindberg's alleged acts and repeatedly broke down in tears. The District Court recessed for the day, and resumed the next morning with her testimony. However, H.B. continued to have difficulty completing her testimony. The District Court allowed her to be excused and received testimony from A.T. and B.B. before again having H.B. return to the stand. At this point, the State began using leading questions to elicit testimony from her. Lindberg's counsel objected twice throughout the examination. On the first occasion, Lindberg's counsel objected on the grounds that all the questions used were leading questions. The District Court overruled the objection. Later in H.B.'s testimony, Lindberg's counsel again objected stating "Your honor, I would[3] object. Continuing leading—a lot of leading questions here." The District Court denied the objection stating: "This one's not." At the very end of her direct examination, the State asked H.B. the following question: **"At any time during the 1995 through 1998 incidents did the defendant penetrate your vagina?" H.B. responded "Yes."** Lindberg's counsel did not object to this question.
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> ¶ 13 After H.B. concluded her testimony, Lindberg's trial counsel moved to strike it completely on the grounds that it had been developed through the use of leading questions. The motion was denied. Lindberg's counsel also moved for a mistrial on the same grounds. However, when the District Court requested authority in support of Lindberg's motion, Lindberg's trial counsel could not provide any. The District Court denied the motion for a mistrial.
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> Lindberg asserts that the only evidence that he penetrated H.B. came in response to a leading question from the prosecution to which his trial counsel did not object. (*See* ¶ 12). Without this leading question and H.B.'s response, Lindberg argues he would have been entitled to a directed verdict on the sexual intercourse without consent charge because penetration is a necessary element of that offense, and, aside from H.B.'s answer to the leading question, no other evidence was provided. Lindberg also notes that the jury seemingly recognized the State's difficulty in proving the elements of sexual intercourse without consent. During its deliberations, the jury sent a question to the court asking "Did [H.B.] actually speak the word 'penetration' or was it posed as a yes or no question?" Additionally, the jury asked if it would be possible to have a transcript of H.B.'s testimony. However, the District Court declined to provide an answer or a transcript, requiring the jury to rely on its own memory and notes. (Emphasis added.)
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> 347 Mont. at 80- 89.

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2 At the time the MRE were written, the Commission noted that 611(c) was consistent with existing Montana law: "Section 93-1901-5, R.C.M. 1947 [26-1-101], provides:
A question which suggests to the witness by the answer which the examining party desires is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interest of justice requires it."

3 My own grammatical view is that when someone says, "I would like to object" the judge should respond, "Then do so." The use of the subjunctive does not technically indicate that the speaker is objecting. Perhaps I am getting old and cranky? At any rate, I recommend that you stick with the clearer and more direct "Objection" or, at most, "I object."

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On appeal, the Supreme Court discussed the definition of a "leading question" and then applied it to the penetration question asked of H.B.:

> A review of the trial transcripts demonstrates that the prosecutor did indeed employ some leading questions in his examination of H.B. Lindberg's ineffective assistance of counsel claim as to the leading question matter centers solely, however, on the notion that the specific question **"At any time during the 1995 through 1998 incidents did the defendant penetrate your vagina?"** is a leading question, and that his counsel's performance was deficient in failing to object to it. **We are unconvinced that, from an objective standpoint, this is in fact a leading question** which would have been disallowed by the District Court upon proper objection.
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> ¶ 45 Section 26–1–101(3), MCA, defines a "leading question" as "a question which suggests to the witness the answer which the examining party desires." M.R. Evid. 611 provides: "Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness' testimony." … whether or not leading questions will be allowed is a matter within the trial court's discretion.
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> ¶ 46 *In People v. Williams*, 16 Cal.4th 635, 66 Cal.Rptr.2d 573, 941 P.2d 752 (1997), the California Supreme Court stated that **"[a] question calling for a 'yes' or 'no' answer is a leading question only if, under the circumstances, it is obvious that the examiner is suggesting that the witness answer the question one way only, whether it be 'yes' or 'no.' "** Williams, 66 Cal.Rptr.2d 573, 941 P.2d at 774 (quotations omitted). **The fact that the specific question to which Lindberg now objects on appeal is one which could be answered with a "yes" or "no" does not, ipso facto, make the question a leading question.** In order to establish deficient performance and prejudice, **Lindberg must show that the prosecution instructed or suggested to H.B. how the question should be answered,** and further that, had the objection been timely made, the District Court would have concluded that the question was leading and would be disallowed. Lindberg has failed to establish either matter. **Because the question was arguably not leading and because the allowance of leading questions is in any event a matter within the trial court's discretion**, we cannot say from a standpoint of objective reasonableness that counsel's performance in failing to object to this question was deficient, or that Lindberg was prejudiced by counsel's failure to object.
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> (Emphasis added)
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> 347 Mont. at 90-91.

In an earlier case, before the adoption of Rule 611(c), the Montana Supreme Court also held an objected-to question to be non-leading and thus allowable. The defendant was charged with assault with a pistol during a mining altercation in Jefferson County. The prosecutor called the victim:

> Defendant's first assignment of error is based upon the ruling of the court upon the question propounded by the county attorney to the prosecuting witness: **"Q. Were you afraid he might shoot you if you didn't?"** Appellant insists that the question propounded to the witness was leading and suggested the answer desired. One of the ingredients of the crime of assault in the second degree is as to whether the complaining witness was actually put in fear of immediate bodily injury, and that the circumstances of the case were such as ordinarily will induce such fear in the mind of a reasonable man. We do not see how a question could be framed to elicit the answer of the witness as to his fear of immediate bodily injury, which would be less objectionable than the question propounded to the witness in this case. If the question had been put in the alternative, as to whether or not the witness was actually afraid of the defendant doing him bodily harm if he did not obey the orders of the defendant, the courts generally would approve such a question. The question propounded could be answered "Yes" or "No," but the witness said, in answer to the question, "That is what I thought, if I didn't." **The question was not leading**. (Emphasis added)
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> *State v. Karri*, 84 Mont. 130, 276 P. 427, 428-29 (1929).

So, "You were at the scene, yes or no?" is not leading. "You were at the scene, weren't you?" is leading. But both forms of this question seek preliminary information, so even the leading version should probably go without objection, because it helps develop the witness's testimony.

When you get to the guts of the case, though, you have to be much more careful and your opponent should be alert to, and make, the objection "Leading." Both of these questions are leading and the objection should be sustained:

"You saw the defendant, David Dastardly, there, didn't you?"

"And he raised the gun and shot Vanessa Victim?"

The lawyer here is clearly not just suggesting the answer, but in fact giving it.

The non-leading way to get the information is much slower and less efficient, but complies with the personal knowledge requirement of Rule 602:

"Did you see anyone at the scene?" "Yes."

"Whom did you see?" "A guy named David Dastardly, who

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was talking to a woman."

"How did you know who he was?" "We used to play city league softball on the same team."

"Are you sure of your identification of David?" "Absolutely."

"What happened next?" "David pulled out a gun and shot the woman."

## TIPS FOR LEADING AND NON-LEADING QUESTIONS

The easiest way to comply with both the statutory definition and the purpose of Rule 611(c), is to get from the witness his or her own recollection of the matter in his or her own words. You should use journalistic wording in your questions to do just that:

"Who…."
"What…."
"When…"
"Where…."
"Why…."
"How…"

If we were making a movie, on direct the spotlight should be on the witness. The lawyer's only role is a short question, out of the view of the camera. The jury's attention is on the witness, who is the person who knows "Who [did] What When, Where and Why." If we were to graph out the Q and A, it should be like this:

Q. _____

A. _____

_____

_____

The questions are short, just enough to get the witness to understand what part of the story she should tell now. The answers explain to the jury what the witness saw or heard or tasted or felt or smelt (personal knowledge). Therefore, the witness answers at length, describing what she knows to the jury.

One of my favorite trial-teaching scenes is from the pilot episode of the (sadly discontinued) TV series "Conviction." A budding prosecutor is sent to court on her first solo trial. Within her first few questions of her first witness, the judge says "Sustained." She turns to him and says "Your Honor, there was no objection." He responds that he objected, and then instructs the bailiff: "Tell her." The bailiff says "No leading on direct." She says "Of course" and immediately resumes leading. The judge interrupts again, and the bailiff says, "Just ask 'What happened next'". The lawyer tries that, and it works. She is stumped for her next question, quiet for a minute, and then tries again: "What happened next?" It works every time, for her and for us.

The opposite is true when we can lead, either because we are doing a true cross-examination or because we have a special circumstance direct: the witness is having trouble communicating the basics, or the witness is an adverse party or associated with the adverse party (his mom), or the witness manifests hostility. Now, the lawyer is on center stage, and the witness is relegated to agreeing (or not) with the substantive statements the lawyer makes as part of the question. Cross should graph out like this:

Q. _____, right?[4]
A. Yes.
Q. And you agree that _____?
A. Yes.
Q. _____, correct?
A. Yes.

The cardinal rule when leading is to LEAD! Don't turn the reins over to the witness, who is by definition the friend of your opponent. As soon as she can disagree with you, she will. Worse, as soon as you give her a chance to run, she will. The predicates of the questions which you can and should ask on direct can be fatal on cross.

Example:

Q. You weren't there at Joan's house that night, were you?

A. No.

Q. You were across the river, right?

A. Yes.

Q. Your own house is across the river from Joan's?

A. Yes.

Q. About one hundred feet away?

A. Yes.

Q. And it was dark?

A. It was.

Q. How could you see Joan shoot Vivian? [Ouch! Here it comes!]

A. Well, I had just finished serving in the SEALS, and I had bought my own night-vision binoculars. I was outside trying them out. I am not proud of this, but I was kind of spying on Joan because I thought she was pretty attractive. I had crept right up to the riverbank on my side and climbed a tree so I was looking right at her dock. I could see what happened clear as a bell.

Don't you wish you had just left it at "It was dark?"

## WHY CAN WE LEAD ON CROSS?

Rule 611(c), both in Montana and the federal system, explicitly allows leading questions on cross-examination: "Ordinarily leading questions should be permitted on cross-examination." The federal drafters explained that this simply

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4 The questions on cross can be longer, because they are actually assertions. Even so, beware the temptation to make them too long and/or complex. Every part you add to a single question raises the chance the witness could disagree. More importantly, if you have several good points, it is more persuasive to make them one at a time than to pile them all together.

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continued a long-standing tradition:

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

Advisory Committee Note to F.R.E. 611(c) (1972). The Montana Commission Comment is slightly more helpful on the question of why leading is allowed on cross:

> The subdivision also recognizes that leading questions should ordinarily be allowed on cross-examination **because the purpose of cross-examination is to discredit testimony and this is where leading questions are most effective**. The use of the word "ordinarily" in the second sentence is intended to allow a court to deny use of leading questions when cross-examination is in form only, such as cross-examination of a party by his counsel after being called as an adverse witness or of a friendly witness. The use of leading questions is ultimately a question for the trial court under Rule 611(a). (Emphasis added)

My own explanation is that when you are doing cross-examination, you "ordinarily" have not called the witness in your own case, probably because her testimony is not helpful at the least, and harmful in the worst case scenario, to your case. The witness has given her story, and knows that you are trying to poke holes in it. Even if she isn't particularly associated with your opponent (she's not his mom, sister, wife, friend etc.), she has some pride in the accuracy of her version of the facts. She will naturally be wary of any suggestion you, her enemy, make. If the information in your leading question is not strictly true, she will not be inclined to agree. In essence, she is sitting on the witness stand with her arms crossed, waiting for a chance to disagree with you. Instead of being the compliant Carole King, your witness is Alanis Morissette, singing "Narcissus:"

> Dear narcissus boy,
> I know you've never really apologized for anything.
> I know you've never really taken responsibility.
> I know you've never really listened to a woman.

Better not ask her a non-leading question, allowing her to launch. Even if you lead, of course, you had better be absolutely accurate in every part of your question so you can make her agree with you, because for sure she won't if she doesn't have to. Therein lies the guarantee of accuracy in her answers, based on her own personal knowledge and not the suggestion of the questioner.

Thus, one of the very easiest objections to overcome is when you are on cross and your opponent objects to your question as "Leading, Your Honor." You only have to observe: "I'm on cross-examination" and the judge should overrule the objection.

## HOW STRICT IS THE RULE?

The Rule itself is rife with possibilities for escape: "except as necessary to develop the witness' testimony;" on cross-examination; when the party calls a hostile witness, an adverse party, or a witness associated with an adverse party. The FRE Advisory Committee Note to the original version submitted by the Supreme Court to Congress acknowledged the laxness of the rule and specifically allowed leading questions to adverse parties and witnesses associated with them:

> Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774–778. **An almost total unwillingness to reverse for infractions has been manifested by appellate courts**. See cases cited in 3 Wigmore §770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of **suggestion rather than command**. [Emphasis added]

When the Court's version got to Congress, the House Judiciary Committee extended the Court's permissive language further, to clarify that the ability to use leading questions applied in both civil and criminal cases, and to "hostile witnesses" as well as to adverse parties and those associated with them. (On the other hand, the House added language to ensure that leading questions could not be used when a witness was friendly to the questioner, even if the examination itself was technically a "cross-examination," such as where one party had been called on "direct" by her opponent). The Senate Judiciary Committee was skeptical that the House changes improved the Court's proposed rule, but in the end concluded that the changes were acceptable:

> However, concluding that it was not intended to affect the meaning of the first sentence of the subsection and was I, intended solely to clarify the fact that leading questions are permissible in the interrogation of a witness, who is hostile in fact, the committee accepts that House amendment.

Long before the FRE and, in particular, Rule 611(c) were adopted, the U.S. Supreme Court considered the effect of leading questions in a case arising in Montana. Alfred J. Urlin sued the Northern Pacific Railroad for personal injuries he suffered in a derailment. The jury returned a verdict for $7500 (which in 2013 dollars would be $208,350). The railroad appealed, partly because of allegedly leading questions put to one of the medical witnesses at trial. Without deciding whether

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in fact the question was leading (I don't think it was), the Court overruled the error, saying:

> The first assignment avers error in permitting the medical witnesses who testified in behalf of the plaintiff to be asked **whether the examinations made by them 'were made in a superficial, or in a careful and thorough, manner.**' It is urged that this question was objectionable,… as leading, … It cannot be safely said that in no case can a court of errors take notice of an exception to the conduct of the trial court in permitting leading questions. But such conduct must appear to be a plain case of abuse of discretion.' **We are not aware of any case in which a new trial has ever been granted for the reason that leading questions, though objected to, have been allowed to be put to a witness.**' Green v. Gould, 3 Allen, 466. 'The allowance of a leading question is within the discretion of the court, and is not ground for reversal.' *Insurance Co. v. Groff*, 87 Pa. St. 124. 'Circuit courts must be allowed the exercise of a large discretion on the subject of leading questions.' Parmelee v. Austin, 20 Ill. 35. (Emphasis added)
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> N. Pac. R. Co. v. Urlin, 158 U.S. 271, 273, 15 S. Ct. 840, 841, 39 L. Ed. 977 (1895).

The Montana jurisprudence is similar. MRE 611(c) contains language generally prohibiting leading questions on direct, but with specific exceptions for hostile witnesses and those identified with adverse parties, as well as when "necessary" to develop the testimony. The Montana cases, discussed more specifically below, show the same inclination as the federal courts to support the trial judge in her discretion on this point. The Montana Commission Comment to 611(c) acknowledged this:

> The cases have also indicated that allowing leading questions where improper is a technical error and will only rarely be grounds for a new trial. Hefferlin v. Karlman, supra; State v. Kanakaris, 54 Mont. 180, 183, 169 P 482 (1917); and State v. Collett, supra. The cases have also recognized some of the exceptions to the rule generally disallowing leading questions on direct examination. In State v. Spotted Hawk, supra, the Supreme Court found that when witnesses were illiterate or unable to speak English, examination should be allowed by leading questions, a view affirmed in State v. Collett, supra at 478. In Hefferlin v. Karlman, supra, the court held it was within the sound discretion of the trial court to permit leading questions to establish a foundation, for it was a preliminary matter. Finally, in State v. Karri, 84 Mont. 130, 136, 276 P 247 (1929), the court held it was proper for the prosecution to ask a leading question which contained specific words which established an element of the crime.

Thus, both state and federal courts recognize the rule against leading on direct, but trial courts' rulings on leading objections are almost always affirmed on appeal.

## MONTANA CASES ON 611(C)

In *City of Kalispell v. Miller*, 2010 MT 62, the City charged Miller with obstructing a police officer. Miller had called the City police dispatcher and reported that her lover, Benware, was with her at the bar. In fact, Benware had left the bar after an argument and only 12 minutes before Miller made the call, had been in an automobile accident. Miller allegedly called to prevent the police department from responding to a call from another friend asking for a welfare check on Benware. (Benware was a city employee and Miller was afraid the welfare check might cause Benware to lose her job).

At trial, the City prosecutor called Benware as a witness and asked the Court for permission to treat her as a "hostile" witness under M.R.E. 611(c). The Court granted the request. On appeal, Miller argued that Benware was not hostile to the City and the prosecutor should not have been allowed to use leading questions to examine her. The Supreme Court affirmed the trial judge's decision as within its discretion, commenting:

> ¶ 27 There is no question that Miller and Benware had a close association at the time of this trial however the relationship might have been characterized for the jury[5]. Accordingly, under the text of the rule, interrogation by leading questions would be permitted because Benware was clearly "identified with an adverse party." While the better course on remand would be for the State to establish hostility on direct examination before seeking to treat Benware as hostile, we cannot conclude under the text of the rule that the court's preliminary ruling in this regard was an abuse of discretion….
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> ¶ 28 …we affirm … the Trial Court's decision allowing Benware to be treated as a hostile witness.

In the *Miller* case, the Court distinguished *State v. Anderson*, 211 Mont. 272, 686 P.2d 193 (1984). Anderson was charged with sexually assaulting three young girls, one of whom was his stepdaughter. The State listed the stepdaughter as a witness, but did not call her at trial. Anderson then called her in his defense case, and asked that she be treated as "hostile." The trial judge denied the motion until the girl's testimony revealed hostility. When she did testify, without leading questions, she absolved Anderson. The Supreme Court affirmed the trial judge's decision to require non-leading questions as within his discretion.

The *Miller* court acknowledged, "the well-known exception to the general provision against leading questions exists when the witness is a child (see *State v. Eiler*, 234 Mont. 38, 46, 762 P.2d 210, 215 (1988) and *Bailey v. Bailey*, 184 Mont. 418, 421,

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5 Another issue in this case is whether the City should have been allowed to introduce evidence that the relationship between the two women, Miller and Benware, was an intimate one. The Court divided sharply on this point, holding 4-3 that this was error and remanding the case for a new trial.

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603 P.2d 259, 261 (1979)),” but distinguished those cases from *Anderson* and found that *Anderson* supported its affirmance of the trial court decision in *Miller:*

> ¶ 26 …In *Anderson*, despite clear precedent that a demonstration of hostility was not required before a child witness could be interrogated with leading questions, we nonetheless acknowledged a trial court’s broad discretion to issue such a ruling and deferred to it. We do so here as well.

In *State v. Eiler*, 234 Mont. 38, 762 P.2d 210 (1988), the victim/witness of the alleged sexual abuse was an 8 year old. The trial judge allowed the prosecution to use leading questions to examine her, and the Supreme Court affirmed:

> In the case on appeal, Dr. Jarvis testified that S.A. and other children who are involved in sexual abuse cases, do not want to talk about the incident. S.A.’s videotaped deposition clearly corroborates Dr. Jarvis’ expert opinion that child victims of sexual abuse are reticent witnesses. The trial court also noted in its memorandum on the competency issue, “it is noticeably difficult for her to testify about her experiences, a circumstance which is understandable and not unusual for a child witness in this type of case.” We find that there was no abuse of discretion by the District Court for allowing leading questions by the prosecution.
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> 234 Mont. at 46.

*State v. Hibbs*, 239 Mont. 308, 780 P.2d 182 (1989), involved two child witnesses who were 6 and 7 years old. The Court here held that leading questions by the prosecutor were within the trial court’s discretion, even without the sort of express findings the trial judge made in *Eiler*:

> Hibbs objected to the leading nature of the prosecution’s direct examination of two child victims and argues that the prosecution failed to establish that leading questions were necessary to develop the witnesses’ testimony. However, in *Bailey v. Bailey* (1979), 184 Mont. 418, 603 P.2d 259, 261, this Court set forth an exception to the general rule against leading questions on direct examination where a child witness is involved. **The rationale behind the exception is that questioning a child is a difficult task**. See *State v. Eiler* (Mont.1988), 762 P.2d 210, 45 St.Rep. 1710; *State v. Howie* (Mont.1987), 744 P.2d 156, 44 St.Rep. 1711. As this Court stated in *Eiler*, 762 P.2d at 215, whether or not leading questions will be allowed is a matter for the trial court’s discretion. See also *Bailey*, 603 P.2d at 261. The District Court need not make express findings that leading questions are necessary. We hold that the questioning was proper.
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> 239 Mont. at 312.

*Bailey v. Bailey*, supra, was a divorce case, in which custody was disputed. The judge interviewed the parties’ children in chambers and then awarded custody to their mother. The father argued on appeal that the judge erred in asking the youngest child leading questions (the case does not give the age of that child). In affirming the award and the procedure, the Supreme Court quoted from both the Montana Commission Comment and the Federal Advisory Committee note:

> **Leading questions may be asked if necessary to develop testimony**, Rule 611(c), Mont.R.Evid., and whether or not they will be allowed is a **matter for the trial court’s discretion**. See Commission Comment to Rule 611(c). **One of the well known exceptions to the general provision against leading questions is when the witness is a child**. Advisory Committee’s Note to Federal Rule 611(c), (1972), 56 F.R.D. 183, 275. **Here, where counsel noted at oral argument that the youngest child was rather withdrawn**, the asking of leading questions is not an abuse of discretion. (Emphasis added).
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> 184 Mont. 421.

## CONCLUSION

That was interesting, wasn’t it?

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