CO-DEFENDANTS, ACCOMPLICES, AND CO-CONSPIRATORS:

COMMON EVIDENCE ISSUES & SELECTED CASES

Catherine C. Eagles

"We'd been at Polk together for awhile, and when we got out we hung together in the neighborhood."

- In State v. Letterlough, 53 N.C.App. 693 (1981), the prosecutor asked the testifying co-defendant how he met the defendant; the witness answered that he met the defendant when he (the witness) was "on the chain gang."

“We’d been at Polk together for awhile, and when we got out we hung together in the neighborhood.”

- “Unless the accused produces evidence of good character to repel the charges against him, the state may not introduce evidence of defendant's bad character.”
- But evidence relevant for some purpose may be introduced although it incidentally bears on character.
- In this case, it was not error to admit this evidence because it was relevant to establish the existence of a relationship which would make it plausible that defendant would come to the witness for help to bury the body. State v. Letterlough, 53 N.C.App. 693.

". . . .how broke we were now that the money we stole from that old lady was used up and how we needed to do another lick."

- Rule 404(b): 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,** . . . **plan**, . . .

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- State v. Al-Bayinnah, ___ NC ___ (8/19/05)
- “D's statement (to co-D) that he was expected to make a living now that he was out of prison clearly shows a motive for the robbery of the grocery” and was admissible under Rule 404(b).
- State v. Stevenson, 136 NCApp 235 (1999) (evidence of drug purchase along with other evidence, supported state’s theory that defendant committed the robbery to get money for drugs)

“how broke we were now that the money we stole from that old lady was used up and how we needed to do another lick.”

- Evidence of a criminal defendant's prior bad acts is admissible if it constitutes part of the history of the event or enhances the natural development of the facts.
- State v. Agee, 326 N.C. 542 (1990)*

“Objection, your Honor. The State has no deal with Mr. Malloy.”

- The constitutional right to cross-examine a witness includes the right to examine that witness about any agreements with the state.
- State v. Prevatte, 346 N.C. 162 (1997). Held: the trial court erred by refusing to let the defendant ask a witness for the State about whether the witness expected or was promised anything in regard to the charges in exchange for his testimony.
- This is so because the jury is entitled to consider, in evaluating a witness's credibility, the fact the State has a "weapon to control the witness." Id. at 164.*

“I object to Mr. Tough’s testifying before this jury. He is not under oath.”

- “A lawyer shall not . . .assert personal knowledge of facts except when testifying as a witness.” Rule Prof. Conduct 3.4(e)
- State v. Jones, 355 NC 117 (2002) (inappropriate for prosecutor to assert personal knowledge of facts before jury.)*

"Well, my lawyer told me. . ."

- State v. Chance, 279 N.C. 643 (1971): Defense counsel asked co-defendant witness if his attorney told him that he would probably get help on parole if he testified for the State. The trial judge sustained the State's objection.
- "There is nothing to indicate that [the defense lawyer] was in any way connected with the State so as to be able to promise or deliver parole relief." No error, relying on trial judge's **discretion.***

“Don’t you have a pending charge of violating your probation on your conviction for B&E?”

- Davis v. Alaska, 415 US 308 (1974).
- The defendant sought to cross-examine the witness concerning his juvenile court probation.
- The Supreme Court held that the trial court denied the defendant's right to confront witnesses by refusing to allow the cross-examination.*

"Haven't you been addicted to cocaine for 5 years and in and out of Butner and other drug programs?"

- Generally speaking, testimony about a witness's drug or alcohol use is not relevant, unless the substance was consumed near the time of the events about which the witness is testifying.
- E.g., State v. Clark, 324 N.C. 146 (1989): Drug or alcohol addiction or use is irrelevant unless it may have impaired the witness's ability to observe, remember or narrate

“Haven’t you been addicted to cocaine for 5 years and in and out of Butner and other drug programs?”

- Where the co-defendant is the key witness for the State, however, and there is substantial evidence that the co-defendant has longstanding mental problems, cross-examination about the witness' past mental problems or defects is allowed.
- In State v. Williams, 330 N.C. 711 (1992), where co-defendant was the only witness against the defendant, error not to allow such cross-examination.*

“And had you ever robbed anyone before to get money to buy crack?”

- Rule 404(b): Other bad acts not admissible to show bad character or propensity, only to show “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident,” or other similarly relevant purpose.
- What is the purpose of the question?*

"What is the maximum sentence for two armed robberies?"

- In State v. Atkins, 349 N.C. 62, 80-81 (1998), the Court found no error when the trial court sustained an objection to a question to a testifying co-defendant concerning the maximum possible punishment for the crime charged.
- "The trial court properly sustained an objection to a question that required Ms. Shank to reach a legal conclusion. The trial court specifically allowed inquiry into any potential arrangement . . . . It is entirely proper for a trial court, **in the exercise of its discretion**, to sustain an objection calling for the legal knowledge of a lay witness." *

"Well Bubba was saying. .we oughta just rob him . . .Money in his mattress"

- Is this offered for the truth?*
- State v. Morston, 336 NC 381: In murder case, Witness testifies she drove various participants in the murder from one place to another after the murder, and that various statements were made in the car by the various participants about their plans.
- The Court found no error, ruling that these statements were not admitted for their truth, but rather to show that the statements were made and to explain future conduct.

“We oughta just rob him. . .”

- Rule 803(3) – state of mind exception –
  - A statement is admissible if it applies to a "declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, **plan,** motive, design, mental feeling, pain, and bodily health)." State v. Carroll, 356 NC 526.*

"Meaning did the Moneybags have anything?"

State v. Colvin, 90 N.C.App. 50, (1988): Co-defendant testified that during a conversation leading up to a bank robbery, the defendant said he "was going to do it, to help his brother out." The state asked the witness what his understanding was to be done when the defendant said that he would "do it", and the Witness over objection answered "Go to Tarheel Bank and rob it."

- This was not error, as it was admissible under Rule 701 as lay opinion testimony rationally based on the perception of the witness. *Accord*, State v. Martin, 309 N.C. 465 (1983). *

“Man can you believe how much money we got? . . .kinda sarcastic like, Too bad we had to cut him.”

- Co-Conspirator Exception
  - N.C.R.Evid. 801(d)(E): A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy.
- Adoptive Admission
  - N.C.R.Evid. 801(d)(B): A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . .(B) a statement of which he has manifested his adoption or belief in its truth.

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- Co-Conspirator Exception
- State v. Valentine, 357 N.C. 512 (2003).
- Admission of a conspirator's statement into evidence against a co-conspirator requires the State to establish that: "(1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended."

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- Co-conspirator Exception
- Proponents of a hearsay statement under the co-conspirator exception must establish a *prima facie* case of conspiracy, without reliance on the statement at issue. State v. Williams, 345 N.C. 137 (1996).
- But "the trial court may use such statements in establishing the times when the conspiracy was entered and terminated." State v. Mahaley, 332 N.C. 583 (1992).

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- Co-conspirator exception
- State v. Gary, 78 N.C.App. 29 (1985)
- Once the conspiracy is over, statements made by one co-conspirator are not admissible under this exception.*

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- Adoptive Admission
- Adoptive Admissions “generally fall into one of two categories: (1) those adopted through an affirmative act of a party; and (2) those inferred from silence or a failure to respond in circumstances that call for a response.”
- State v. Weaver, 160 NCApp 61*

"Man can you believe how much money we got? . . .kinda sarcastic like, Too bad we had to cut him."

- State v. Hunt, 325 N.C. 187 (1989): In murder trial, co-defendant testified that several days after the murder he was with the defendant, another co-defendant, and another person. The other co-defendant told the other person about the murders, implicating himself and the defendant, and the defendant "looked at [the co-defendant] like he had better shut up."
- No error.The defendant's silence was an adoptive admission and his nonverbal conduct (cf. 'looked at the co-defendant like he better shut up" with "kinda sarcastic like") was a shorthand statement of facts and rationally based on the witness's perception.*

“And what did the jury do in Bubba’s trial?”

- The "clear rule" is that evidence of convictions, guilty pleas, and pleas of nolo contendere of non-testifying co-defendants is inadmissible unless introduced for a legitimate purpose, i.e., used for a purpose other than evidence of the guilt of the defendant on trial.
- E.g., State v. Rothwell, 308 N.C. 782 (1983); State v. Batchelor, 157 NCApp 421 (2003).*

"Did you tell Hardnose that you drove D to Florida after he and Bubba had been at Moneybags' house?"

- State v. Gell, 351 N.C. 192 (2000). Prior statement with "slight variations" from witness's trial testimony is admissible to corroborate. "It is well established that a witness' prior consistent statements may be admitted to corroborate the witness' sworn trial testimony but prior statements admitted for corroborative purposes may not be used as substantive evidence."
- State v. Frogge, 345 N.C. 614 (1997). Prior statement of witness erroneously admitted as corroboration where it contained inconsistencies going to "the heart of the prosecution's case for felony murder" and "manifestly contradictory" to witness's testimony at trial.*

"Did you tell Hardnose that you drove Defendant to Florida after he and Bubba had been at Moneybags's house?"

- State v. Hunt, 324 NC 343
- The State cannot impeach its own witness, a co-defendant, for the PRIMARY purpose of placing before the jury substantive evidence which is not otherwise admissible.
- However, the state can impeach if there is no improper purpose and a limiting instruction is given.*

“Has an agreement been reached between Ms. Woodenmelt & the DA?”

“Have any promises been made to you by anyone in the DA’s Office?”

Questions to Attorney re: plea

- State v. Westbrooks, 345 N.C. 43 (1996).
- Defendant sought to call the attorney for co-defendant Cashwell to ask about the advantages of the plea agreement Cashwell had with the state. The attorney asserted Cashwell's attorney-client privilege, and the trial court did not allow the defense to ask these questions.
- No abuse of discretion in prohibiting this testimony, since Cashwell had testified in some detail about the nature and extent of her plea agreement with the state. . . . BUT

Questions to Attorney re: plea

- NCGS § 15A-1055:
- "Notwithstanding any other rule of evidence to the contrary, any party may examine a witness testifying under a grant of immunity or pursuant to an arrangement under GS 15A-1054 with respect to that grant of immunity or arrangement."
- " A party may also introduce evidence or examine *other witnesses* in corroboration or contradiction of testimony or evidence previously elicited by himself or another party concerning the grant of immunity or arrangement." *

“Ms. Woodenmelt tell Detective Hardnose the same thing she told the jury?”

- State v. Norman, 76 N.C.App. 623 (1985):

  The trial court erroneously admitted an investigator's testimony that the co-conspirator's statement to the investigator was consistent with the co-conspirator's trial testimony, where the contents of the statement were not presented to jury.*

"Jack filled out the paperwork indicating he owned the tvs, showed ID & took his money"

- State v. Paige, 316 N.C. 630 (1986): Defendant and co-defendant tried jointly for robbery and rape. Some evidence admissible against only the co-defendant was admitted at trial. Defendant convicted and appeals. No error.
- "It would be unusual for all evidence at a joint trial to be admissible against both defendants, and we often rely on the common sense of the jury, aided by appropriate instructions of the trial judge, not to convict one defendant on the basis of evidence which relates only to the other." Id. at 643.

"Jack filled out the paperwork indicating he owned the tvs, showed ID & took his money."

- State v. Wilson, 108 N.C.App. 575, *disc. rev. denied*, 333 N.C. 541 (1993): "Limiting instructions ordinarily eliminate any risk that the jury might have considered evidence competent against one defendant as evidence against the other."
- However, if overwhelming evidence is admissible against only one defendant and very little evidence concerns the other defendant, severance should be allowed.*

“Jill told me that Jack and Pale O’Water broke into 3 houses on Oct. 4 and took 3 TVs .”

- “Objection, Your honor. Irrelevant as to Jack, and unfairly prejudicial.”

- “Objection Your Honor, hearsay and the testimony violates my client’s Sixth Amendment rights to confront the witnesses against him.”

“Jill said Jack and Pale O’Water broke into 3 houses on October 4 and took 3 televisions.”

- It is a violation of a criminal defendant's confrontation rights to introduce into evidence the statement of a non-testifying co-defendant implicating the defendant, if that statement is inadmissible as to the defendant.

- Bruton v. United States, 391 US 123 (1968). *

"Jill said Jack and Pale O'Water broke into 3 houses on October 4 and took 3 televisions."

- "In joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant.
- If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately." State v. Fox, 274 N.C. 277.

“Jill said Jack and Pale O’Water broke into 3 houses on October 4 and took 3 televisions.”

- NCGS 15A-927(c): (1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:
  - a. A joint trial at which the statement is not admitted into evidence; or
  - b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or
  - c. A separate trial of the objecting defendant.*

Co-Defendants, Accessories, and Co-Conspirators

“The big thieves hang the little ones.”

Czech proverb

Co-Defendants, Accessories, and Co-Conspirators

Luke: "Your overconfidence is your weakness."

Emperor Palpatine: "Your faith in your friends is yours."

Return of the Jedi (1983)

Co-Defendants, Accessories, and Co-Conspirators

“True Friends Stab You in the Front.”

Oscar Wilde