Hearsay Exceptions: Admissions by Party-Opponents

November 12, 2013 Jessica Smith

Evidence Rule 801(d) sets out a hearsay exception for "Admissions by a Party-Opponent." If you're not clear on that rule, read on.

The rule says that a statement is admissible under this exception if it is "offered against a party" and is

A. his or her own statement, in an individual or representative capacity;
B. a statement that the party has manifested an adoption of or a belief in its truth;
C. a statement by someone authorized by the party to make it;
D. a statement by the party's agent or servant about a matter within the scope of agency or employment, made during the existence of the relationship; or
E. a statement by the party's co-conspirator during and in furtherance of the conspiracy.

N.C. R. Evid. 801(d). The exception is understood to apply to admissions, defined as "statement[s] of pertinent facts which, in light of other evidence, [are] incriminating." State v. Al-Bayyinah, 359 N.C. 741, 748 (2005) (quotation omitted). In the criminal context, the Rule 801(d)(C) and (D) exceptions rarely apply and aren't addressed here.

Defendant's Own Statement. In criminal cases, Rule 801(d) typically arises with regard to the first category of statements—when the defendant himself or herself made the statement at issue. *See, e.g.,* State v. Al-Bayyinah, 359 N.C. 741, 747-48 (2005); State v. Lambert, 341 N.C. 36, 49-50 (1995); State v. Graham, __ N.C. App. __, 733 S.E.2d 100, 106 (2012); State v. Smith, 157 N.C. App. 493, 496 (2003). However, this aspect of the rule is self-explanatory and requires no extended discussion.

Adopted Admissions. Rule 801(d)(B) provides that a hearsay statement is admissible if it is offered against a party and is a statement that he or she has manifested an adoption of or a belief in its truth. This is sometimes referred to as the "adoptive admission" rule. As a general matter, adoptive admissions fall into two categories:

> (1) those adopted through an affirmative act or statement and (2) those inferred from silence or a failure to respond in circumstances that call for a response.

State v. Weaver, 160 N.C. App. 61, 65 (2003). However, an adoptive admission "may be manifested in any appropriate manner." State v. Marecek, 152 N.C. App. 479, 502-04 (2002) (quotation omitted) (the defendant's failure to deny that he killed the victim in the face of another's statements to that effect and his comments that the evidence could not be found because he burned the body and that he was too smart to be caught constituted an implied admission).

An example of the first category of adoption—through affirmative act or statement—occurred in *State v. Thompson*, 332 N.C. 204 (1992). In that murder case, Sanchez, a hit man hired by the defendant called the defendant asking for his money. Sanchez stated, in part, "You told me, me go to North Carolina kill a Raymond, I kill him, now I need . . . my money for me leave." Sanchez continued, asking the defendant whether he had his money "for killing Raymond." The defendant responded: "Yeah." The North Carolina Supreme Court found that the conversation constituted an admission by the defendant. *Id.* at 217-18.

Sometimes a party will argue that a person's silence constitutes an implied admission. The cases hold that if the statement is made in a person's presence by a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in a position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission.

State v. Williams, 333 N.C. 719, 725-26 (1993) (adopted admission; the defendant was silent in the face of accomplice's statements that

"both of them shot both men" and "one shot one and one shot the other") (quotation omitted).

Co-Conspirator's Statement. Finally, Rule 801(d)(E) provides that a statement is admissible as an exception to the hearsay rule if it is offered against a party and is "a statement by a coconspirator of such party during the course and in furtherance of the conspiracy." In order for the statements or acts of a co-conspirator to be admissible, there must be a prima facie showing that

- a conspiracy existed,
- the acts or declarations were made by a party to the conspiracy and in pursuance of its objectives, and
- the statement was made while the conspiracy was active, that is, after it was formed and before it ended.

See, e.g., State v. Williams, 345 N.C. 137, 141 (1996) (State made the required showing).

In order to prove a conspiracy, the State must show that the defendant entered into an agreement with at least one other person to commit an unlawful act with intent that the agreement be carried out. Jessica Smith, North Carolina Crimes: A Guidebook on the Elements of Crime 72 (7th ed. 2012). The State must establish a prima facie case that a conspiracy existed independently of the statement sought to be admitted. *See, e.g.,* State v. Valentine, 357 N.C. 512, 521-23 (2003) (State made showing). However, in establishing the prima facie case, the State is granted wide latitude and the evidence is viewed in a light most favorable to the State. *See, e.g.*, *Valentine*, 357 N.C. at 521; *Williams*, 345 N.C. at 142.

Statements made prior to or subsequent to the conspiracy are not admissible under this exception. *Compare* State v. Stephens, 175 N.C. App. 328, 334 (2006) (statements made prior to the conspiracy were inadmissible), *and* State v. Gary, 78 N.C. App. 29, 36 (1985) (trial court erred by admitting statements made after the conspiracy ended), *with* State v. Collins, 81 N.C. App. 346, 351-52 (1986) (trial court did not err by finding that statements were made during the conspiracy). It is generally understood that a conspiracy ends when the co-conspirators either achieve or fail in obtaining their primary objective.