

Examination, Cross-Examination, and Redirect Examination Problems Worksheet

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1. Witness Examination Problems

A. Direct Examination

Are the following questions leading?

1. Do you feel you have an expectation of privacy in that bathroom?
2. Did you ever give permission to anyone to place a camera in that room?
3. Did you consent to being filmed while visiting in that house?

Assume that the defense objects to these questions posed by the prosecution to the key adult witness in a felony secret peeping case.¹ How do you rule?

B. Cross-Examination

1. Defendant is charged with robbery with a dangerous weapon, which was alleged to have occurred in conjunction with a drug deal. Defendant and three others agreed in advance that they would rob the drug sellers, rather than purchase the drugs. Following arrest, two of the defendant's associates agreed to testify against defendant at trial. Both witnesses had criminal charges pending against them in other districts. Defendant seeks to cross-examine the witnesses about the pending charges in order to show bias, interest, and motive in testifying in favor of the state.² Do you allow the cross-examination?

Assume additionally that one of the witnesses has negotiated a plea agreement for probation that included consideration of the charges in the other prosecutorial district. Do you allow the cross-examination?

2. During cross-examination of an accomplice, counsel asks: "Hasn't your lawyer told you that the State won't press charges against you if you testify here today?" Assume that the witness' lawyer is present in court.³ May the witness's lawyer object based upon the attorney-client privilege? Assume that the witness's lawyer does not object, may the State object based on the attorney-client privilege? Assume that you allow an objection and the defense argues that the privilege has been waived by the act of testifying and that the privilege must "give way" when it is in derogation to the search for the truth. How do you rule?

¹ See *State v. Mann*, 768 S.E.2d 138 (N.C. App. 2014).

² See *State v. Alston*, __ N.C. App. ___, 756 S.E.2d 70 (2014).

³ See *State v. Lowery*, 219 N.C. App. 151 (2012).

3. Defendant testifies in his own behalf and denies involvement in the alleged offense of assault with a deadly weapon. On cross-examination, the prosecutor asks the following questions of defendant:

When the police officers came to the hospital to talk to you, you did not tell them that they were focusing on the wrong person, did you?

And today, you have sat through the entire trial and heard all of the witnesses testify, right?

And you heard your own witnesses, right?

And today is the very first time that you have given a statement in this case, isn't it?

Everyone else involved, everyone but you gave the police a statement, isn't that right?

And you've had almost three years to think about it, haven't you?

And, before you were arrested, this officer explained to you that she'd like to hear your side of the story, that there's two sides to every story and she wanted to hear yours, didn't she?

She offered to tape record you, she tried to get your side of the story on tape, didn't she?

And, you didn't give her your side of the story, did you?⁴

Do you allow all or part of the cross-examination?

Assume instead that during the officer's testimony in the State's case in chief, the officer testifies that "the defendant provided me – he denied any involvement, but provided me with no statement, written or verbal to that effect? He waived his rights but he provided no statement, written or verbal." Do you sustain a defense objection and motion to strike to this testimony? If so, how do you instruct the jury? Do you grant a mistrial?

C. Rebuttal Testimony

Defendant is charged with aggravated assault of a prison guard. The guard testifies that defendant punched, kicked, and slapped him, without provocation. The defense presents the testimony of several inmates who witnessed the interaction between the guard and defendant. All of the inmates testified that the guard attacked defendant and that they did not see defendant punch, kick, or slap the guard. Defendant does not testify.

After the defense rests its case in chief, the State calls an investigating officer who interviewed defendant following the interaction as a rebuttal witness. Through the investigating

⁴ See *State v. Richardson*, 741 S.E.2d 434 (N.C. App. 2013); *State v. Harrison*, 218 N.C. App. 546 (2012); *State v. Mendoza*, 206 N.C. App. 391 (2010).

officer, the State offers a copy of defendant's statement, in which defendant denies that he punched or kicked the guard, but admits that he "slapped his hands" but claims that he did so to keep from being tazed. Defendant objects to the rebuttal testimony arguing that the testimony does not address directly evidence offered in the defense case, merely reiterates the State's case in chief, and had to be presented, if at all, in the State's case in chief.⁵ How do you rule?

- a. Sustain the defense objection.
- b. Overrule the defense objection.

2. Specific Application Problems

A. Refreshing Recollection

1. Following a witness's unresponsive answer to a question concerning what she told the police about a stolen dog, the prosecution handed the witness her statement and asked her to read it to herself. After the witness read the statement, the prosecution asked the witness if the statement was "true and accurate" and if it helped refresh her recollection about the statement she gave to the officer. When the witness answered yes, the prosecution again asked about the source of the stolen dog. When the witness answered, "he didn't exactly say who it was from," the prosecution asked "would you just read your statement to the jury, if you would please."⁶ Assuming objection, how do you rule?

Assume further that during jury deliberations, the jury announces that it is deadlocked and asks to see the witness' written statement. How do you proceed?

2. Witness testifies to some of the events relevant to the crime which defendant is charged with committing. State then requests permission to show him a transcript of his police interview before continuing with the direct examination. When the witness is shown the transcript, he is equivocal about whether he remembered making the statements. The prosecution then requests permission to allow the witness to listen to the audio recording of his interview with the police.⁷ Do you allow the witness to listen to the audio recording? If so, what procedure do you use? How do you respond to defense objections that the State has not established that either the transcript or the audio recording are recorded recollections or that the witness is using the transcript as a "testimonial crutch for something beyond his recall."

B. Opening the Door

1. Mother and father were tried jointly in a felony murder case, based on allegations of aggravated child abuse resulting in their child's death. On direct examination, mother testified that she had not noticed any injuries to her child before child's hospitalization that preceded her death. She also testified that she had never seen father mistreat the victim and that if she had, she would have called the police, filed a complaint, and sought medical treatment for the child. On cross-examination by father's counsel, mother was asked: "Did you ever think [father] could

⁵ See *United States v. Moore*, 532 Fed. Appx. 336 (4th Cir. 2013).

⁶ See *State v. Harrison*, 218 N.C. App. 546 (2012).

⁷ See *State v. Black*, 197 N.C. App. 731 (2009); see *State v. York*, 347 N.C. 79, 89 (1997).

hurt his own daughter?” Mother responded, “No.” Mother was then asked, “Do you think that he could hurt her today at this moment in time?” Mother responded, “I don't know what to believe.” Neither mother’s counsel nor father’s counsel asked mother about incidents of violence between mother and father.

State wishes to cross-examine mother about her statements to the police in which she denied that father had ever hit her but, upon being confronted with documents, admitted that she had sought police assistance previously when father assaulted her. State argues that the cross-examination should be allowed in order to aid the jury in assessing mother’s credibility and because the prior cross-examination opened the door.⁸

Father’s counsel objects. Do you allow the State’s cross-examination? How do you instruct the jury?

Assume you allow the cross-examination and give an instruction limiting the use of the evidence as a basis for determining the mother’s credibility and not as a basis for finding facts against the father. In closing argument, the prosecution makes numerous references to mother’s inconsistent statements about the assaults and argues that “she took the witness stand and promised to the truth and she lied repeatedly about domestic violence episodes.” The State also argued that mother “knew the dangers and the risks of his behavior yet she put her child in harm’s way.” Mother’s counsel moves for mistrial. How do you rule?

2. Victim testifies. On cross-examination, defendant asks witness about the statement she made to detective and about a typed statement that she prepared for the detective. In particular, defendant cross-examines about the sequence of events that led to the witness’ discovery of a camera, which was recording her use of a bathroom, and the actions by the defendant’s wife once the camera was discovered. On redirect examination, the State offers the typed statement as an exhibit, arguing that the defense opened the door to the admission of the statements as corroborative testimony. The defense challenges the admission of the statement and also argues that the statement included additional information that was not raised during cross-examination.⁹ How do you rule?

3. Defendant testifies in a child sexual assault case. Over objection, the prosecutor cross-examines defendant with questions summarizing a psychological evaluation of defendant done in conjunction with a custody case. The psychologist did not testify and the report was not admitted. On cross-examination of defendant, reading from the report, the prosecutor asked questions, including:

Isn’t it true that you attempted to place yourself in an overly positive light by minimizing your faults and denying psychological problems?

Doesn’t it say that you have a prominent elevation on the psychopathic deviant scale?

⁸ See *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012).

⁹ See *State v. Mann*, 768 S.E.2d 138 (N.C. App. 2014).

These individuals may be risk takers who may do things others do not approve for the personal enjoyment. Doesn't it say that?

May show bad judgment and tend to be self-centered, pleasure oriented, narcissistic, and manipulative. It says that, doesn't it?

Assume that the defense objects to each question. The State argues that defendant opened the door to the cross-examination, by his testimony that he was required to undergo an evaluation as part of his custody battle and that, as a result of the evaluation, he was awarded custody. How do you rule? ¹⁰

C. Right to Present Defense Problems

1. Victim recants testimony in letter to judge. Victim then goes into hiding, but is eventually found and taken into custody as a material witness. At trial, victim testifies that defendant's associates threatened her and forced her to write the recantation letter. During cross-examination, defendant sought to introduce prior police reports filed by victim against defendant, which include details leading to police's inability to corroborate that the offenses alleged occurred. Defense also seeks to call the officers who investigated the prior charges to testify that following an investigation, the cases were closed. Defendant argues that the evidence is admissible to impeach the victim and that he is entitled to present the evidence under his constitutional right to present a defense.¹¹ Do you admit the reports? Do you allow the officers to testify?

¹⁰See *State v. Davis*, 222 N.C. App. 562 (2012).

¹¹ *Nevada v. Jackson*, ___ U.S. ___, 133 S.Ct. 1990 (2013).