CO-DEFENDANTS, ACCOMPLICES, AND CO-CONSPIRATORS:

COMMON EVIDENCE ISSUES AND SELECTED CASES

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CO-DEFENDANTS, ACCOMPLICES, AND CO-CONSPIRATORS: COMMON EVIDENCE ISSUES AND SELECTED CASES

I. When the Co-defendant Testifies for the State

A. Terms of any Plea Agreement

1. Cross-Examining the Co-Defendant

Constitutional, statutory, and case law requirements impose a duty on the prosecutor to inform defendants of plea agreements with testifying co-defendants, and allow defendants to cross-examine testifying co-defendants about the terms of the plea agreements.

The constitutional right to cross-examine a witness includes the right to examine a witness about any pending criminal charges or any criminal convictions for which he or she is currently on probation. State v. Prevatte, 346 N.C. 162 (1997) (holding that the trial court erred by refusing to let the defendant ask a prosecution witness about pending criminal charges and 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; *accord*, State v. Ferguson, 140 N.C.App. 699 (2000); *see* State v. Jordan, 120 N.C. App. 364, 370 (the possibility criminal charges can be reinstated against a witness is within proper scope of cross-examination) *disc. review denied*, 342 N.C. 416 (1995).

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to confront the witnesses against him or her. Davis v. Alaska, 415 U.S. 308 (1974). In Davis**,** the defendant sought to cross-examine the witness concerning his juvenile court probation and the possibility that the State of Alaska had some power over him as a result of his probationary status. The United States Supreme Court held that the trial court violated the defendant's confrontation rights by refusing to allow the cross-examination.

In State v. Atkins, 349 N.C. 62, 80-81 (1998), the Court held that the trial court did not err in sustaining an objection to a question to a testifying co-defendant concerning the maximum possible punishment for the crime charged. The trial court did allow inquiry into any potential arrangement the witness had with the State. "The trial court properly sustained an objection to a question that required [the co-defendant] to reach a legal conclusion. The trial court specifically allowed inquiry into any potential arrangement, and [the co-defendant] responded that no such arrangement existed. 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."

State v. Lowery, 318 N.C. 54 (1986): The Court rejected the defendant's argument that the State failed to disclose a plea agreement with a testifying co-defendant when all the evidence was that at the time the co-defendant testified, there was no agreement, just a hope, or possibly an expectation based on the DA's past practices, of leniency. This was so even though the testifying co-defendant pled later guilty to a lesser charge pursuant to a plea agreement.

In State v. Mason, 295 N.C. 584 (1978), *cert. denied,* 440 U.S. 984 (1979), defense counsel cross-examined a co-defendant testifying for the State as to the maximum punishment for the crimes charged. When co-defendant answered "Life imprisonment," counsel asked about the possibility of sentences in addition to life imprisonment. "[T]he question apparently asks of the witness his understanding of the laws concerning parole in this State. Since such question calls for the legal knowledge of a lay witness, it was proper for the trial judge, in his discretion, to sustain the State's objection to the question." *Accord*, State v. Westbrooks, 345 N.C. 43, 67-68 (1996)(no abuse of discretion to preclude cross-examination on parole eligibility).

State v. Chance, 279 N.C. 643, 654 (1971) *sentence vacated in part on other grounds*, 408 U.S. 940 (1972): Defense counsel asked the 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. "Here the question was directed to a conversation with defendant's attorney. There is nothing to indicate that he 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.

State v. Hoffman, 349 N.C. 167 (1998) held that a defendant has a constitutional right to cross-examine witness about fact that witness has other charges pending.

In State v Rankins, 133 N.C.App. 607 (1999), the defendant was on trial for armed robbery. A co-defendant testified for the State. On cross-examination the co-defendant denied he had a deal with the State for a lesser sentence. The trial court committed reversible error when it precluded the defense from calling a witness who would have testified that the co-defendant told the witness that he did have a deal with the State for a lesser sentence.

State v. McCord, 140 N.C.App. 634 (2000): The Court held that the trial court did not err in admitting the plea transcript signed by a testifying co-defendant and the prosecutor in which the co-defendant pled guilty to reduced charges and agreed to testify pursuant to a plea agreement. "The fact that Sigmon entered into a plea agreement with the State, in which she agreed to testify against Defendant, was relevant to Sigmon's credibility. Accordingly, the trial court properly admitted the plea agreement and plea transcript into evidence."

By statute a prosecutor who enters into a plea agreement with a co-defendant in exchange for truthful testimony must disclose that agreement. NCGS § 15A-1054(c): "Written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the court must grant a recess." NCGS § 15A-1055 provides that "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. A party may argue to the jury with respect to the impact of a grant of immunity or an arrangement under GS 15A-1054 upon the credibility of a witness."

2. Calling the Co-Defendant's Attorney as a Witness

In State v. Westbrooks, 345 N.C. 43 (1996), the defendant sought to call co-defendant Cashwell's attorney 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. The Court held that the trial court did not abuse its discretion in prohibiting this testimony, since Cashwell had testified in some detail about the nature and extent of her plea agreement with the State.

In State v. Morston, 336 N.C. 381 (1994). In murder case, co-defendant testified for the State. The State then called co-defendant's first lawyer, who testified as to what the co-defendant had told him happened, in order to corroborate the co-defendant's testimony. On cross-examination, the attorney invoked the attorney-client privilege as to any conversations he had with the co-defendant concerning "the benefits of making a deal" with the State. The trial court did not require the attorney to answer these questions. Assuming this was error, the court found it to be harmless because the co-defendant was fully cross-examined about his motives for talking to the prosecutor early on and the terms of his plea agreement with the State.

In State v. Miles, 2003 N.C.App. Lexis 1581 (2003)(Rule 30e), the co-defendant testified for the State but denied a plea agreement. The Court noted in passing that the trial court properly allowed the co-defendant to be cross-examined using his written and signed plea transcript and also noted that the co-defendant's lawyer was allowed to testify about the plea agreement.

State v. Chapman, 359 N.C. 328 (2005). Co-defendant pled guilty to second degree murder as part of a plea agreement and testified that he drove the car from which defendant fired the shots that killed the victim. On cross-examination, co-defendant stated he did not believe he was guilty of murder because he did not shoot anyone, that he had to plead guilty because "if I took it to trial I would lose," and that in his plea transcript he admitted his guilt. No error to allow the State to call co-defendant's attorney to testify about his advice and discussions with his client. The co-defendant waived any privilege and this was relevant in light of the extensive cross-examination of the co-defendant. "Because we conclude that [the lawyer's] testimony *substantially* corroborates [the co-defendant's] testimony by explaining why [co-defendant] pled guilty to second-degree murder, we affirm the trial court's ruling admitting [the lawyer's] statements."

State v. Norman, 76 N.C.App. 623, *review denied* 315 N.C. 188 (1985). Error to admit testimony from co-defendant's lawyer concerning co-defendant's statements to lawyer. While admitted for the purpose of corroborating the co-defendant's in-court testimony, the version the co-defendant gave to his lawyer was substantially different and thus the evidence was not corroborative.

B. Extent of Direct Examination & Corroboration: Character Evidence Issues

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." The Court acknowledged that "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 noted that evidence relevant for some purpose other than proving character may be introduced although it incidentally bears on defendant's 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 plausible defendant's coming to the witness for help to bury the body.

State v. Wilson, 322 N.C. 117, 129 (1988). The defendant was on trial for murder. He moved in limine to exclude all evidence of a prior kidnapping conviction and incarceration; the motion was granted. When a co-defendant was testifying, he was asked how long he had known the defendant and he answered "We done time together." The trial judge immediately sustained the defendant's objection and instructed the jury to disregard the evidence. No error in denying defendant's motion for mistrial.

State v. Wilson, 108 N.C.App. 117 (1992). Defendant charged with robbery of Schrift's Market on December 28. No error in admitting evidence through co-defendant that (1) three weeks earlier defendant and co-defendant witness attempted to break into the same Market, as that tended to show plan; (2) immediately before the robbery of Schrift's, defendant suggested to the co-defendant witness that they rob a different business because defendant had no money, as that tended to show motive; (3) on December 8, they robbed a lady's home and stole a gun which they later used to rob Schrift's, as that tends to show the source of the weapon used during the robbery; and (4) after stealing the gun, they were chased by the police, threw the gun out of the car, later retrieved the gun which had been damaged by the stock coming off, and the victim testified that the firearm used during the robbery had no stock, as this tended to corroborate the source of the weapon and how it came to have no stock. In this case, the trial court also excluded evidence about several other robberies that the co-defendant was prepared to testify he and the defendant committed.

State v. Hunt, 325 N.C. 187 (1989): Defendant on trial for murder. Co-defendant One testifies about the murder, and on redirect testifies that while he was in jail, he was threatened by Co-defendant Two. The Court did not err in admitting this evidence, because it explained why Co-Defendant One did not mention Co-Defendant Two in his first statement to police, a matter about which the defendant vigorously cross-examined Co-Defendant One.

C. Extent of Cross-Examination & Impeachment: Character Evidence Issues

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); State v. Adams, 103 N.C. App. 158 (1991)(same). Under N.C.R.Evid. 611, however, a witness may be impeached by a showing of mental deficiency caused by drug use as it bears upon his or her ability to observe, remember accurately or to communicate effectively. E.g., State v. Fields, 315 N.C. 191 (1985).

Where the co-defendant is the key witness for the State, however, and there is substantial evidence that the co-defendant has mental problems, cross-examination about the

witness' past mental problems or defects is allowed. In State v. Williams, 330 N.C. 711, 719 (1992), testimony of a co-defendant was the primary evidence for the State. The Court held that "while specific instances of drug use or mental instability are not directly probative of truthfulness, they may bear upon credibility in other ways, such as to 'cast doubt upon the capacity of a witness to observe, recollect, and recount,' and if so they are properly the subject not only of cross-examination but of extrinsic evidence . . . ." The Court agreed that under N.C.R.Evid. 608(b), evidence of drug use is not admissible, but holds that where the witness is "crucial to the prosecution and evidence about witness' "troubled past was considerable," cross-examination should be allowed under Rule 611.

State v. Dickens, 346 N.C. 26 (1997): Trial court correctly sustained objections to defense testimony about previous violent acts of testifying co-defendant, because extrinsic instances of assaultive behavior, standing alone, are not in any way probative of a witness' character for truthfulness or untruthfulness per Rule 608(b).

State v. Grace, 341 N.C. 640 (1995): Accomplice in murder/robbery of pizza delivery person testified for State that defendant was the one with the gun who shot the victim. Trial court did not allow the defendant to offer testimony from accomplice's co-defendant in another robbery that in that other case the accomplice had held the gun. No error. Not admissible under Rule 404(b), as evidence did not tend to show that accomplice held the gun in this case, or Rule 608, as it did not show bias of the accomplice

D. Prior Inconsistent Statements

State v. Mickey, 347 N.C. 508, 519 (1998). Witness testified that defendant, on trial for hiring someone else to kill his wife, tried to hire the witness to kill his wife. Court admitted witness' prior statement to law enforcement for corroboration, after redacting certain parts that were either additional to or inconsistent with witness's trial testimony. Defendant contended that the redaction inhibited his ability to argue that the witness was not credible. Court noted no error in redacting the parts that were additional to the witness's trial testimony, especially since those parts were more prejudicial to the defendant than the witness's testimony had been. As to one part which was inconsistent with the witness's in-court testimony, that should not have been redacted upon defendant's objection, but error not prejudicial.

State v. Hunt, 324, N.C. 343 (1989): While generally a party can impeach its own witness, 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 a co-defendant it calls as a witness if there is no improper purpose and a limiting instruction is given. *E.g.*, State v. Martinez, 149 N.C.App. 553 (2002)

State v. Minter, 111 N.C.App. 40 (1993): Where co-defendant testifying for State denied truth of previous testimony implicating defendant, court properly allowed State to impeach the co-defendant with his previous testimony, as there was no indication prosecutor acted in bad faith and where co-defendant admitted giving the testimony to the grand jury

State v Greene, 324 N.C. 1 (1989), *vacated on other grounds*, 494 U.S. 1022 (1990) and 329 NC. 771(1991)(McKoy error): In murder case, defendant's girlfriend initially provided an alibi

for defendant to law enforcement, but a few days later implicated him in the murder. At trial, the girlfriend testified for the State, and the State was allowed to ask her to explain why she initially gave false information to police. She was properly allowed to tell the jury that she was afraid defendant would kill her if she didn't lie for him, as the witness is entitled to explain why the inconsistent statement was made.

E. Prior Consistent Statements

On redirect after the co-defendant/witness's credibility has been challenged, the State may ask a co-defendant about the co-defendant's guilty plea to the same or related charges, because the guilty plea is in essence a prior consistent statement. State v. Marlow, 310 N.C. 507 (1984); State v. Potter, 295 N.C. 126 (1978). However, the co-defendant's guilty plea may not be admitted for "an improper purpose," such as proving that the defendant is guilty. Id.

State v. Chapman, 359 N.C. 328 (2005). Co-defendant testifies for State. When initially interviewed by LEO, co-defendant gave version inconsistent with what he later told the LEO and with what he testified to. Not error to allow LEO to testify about overhearing co-defendant on phone with his mother between first interview and second interview, saying to his mother "I'm tired of lying, I'm going to tell them the truth." This was not admitted for substantive purposes but rather to corroborate the co-defendant's testimony.

State v. Gell, 351 N.C. 192 (2000). Prior statement with "slight variations" from co-defendant/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. [citations omitted] However, 'in order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony.' [citations omitted] However, the State may not introduce as corroboration prior statements that actually, directly contradict trial testimony." *Cf.*, 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.)

State v. Walters, 357 N.C. 68, 89 (2003): Trial court properly allowed LEO to testify about co-defendant's out of court statement where it was generally consistent with co-defendant's in-court testimony. "In order to be admissible as corroborative evidence, a witness' prior consistent statements merely must tend to add weight or credibility to the witness' testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates. Moreover, if the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations . . . affect [only] the credibility of the statement." [citations omitted]

State v. Norman, 76 N.C.App. 623 (1985): The trial court erroneously admitted investigator's testimony that co-conspirator's statement to investigator was consistent with the co-conspirator's trial testimony, where contents of statement not presented to jury

F. Sufficiency of the Evidence

State v. Brewton, __ N.C.App. ___ (September 20, 2005): Even though co-defendant testified that he and the defendant did not expressly agree to kill the victim, other circumstantial evidence was sufficient to support conviction for conspiracy to commit murder.

State v. Martinez, 150 N.C.App. 364 (2002): "It is well-established that the 'uncorroborated testimony of an accomplice will sustain a conviction so long as the testimony *tends to establish* every element of the offense charged.'" *Accord*, State v. Keller, 297 N.C. 674, 679 (1979); State v. Holland, 161 N.C.App. 326 (2003). The fact that an accomplice "may have lied earlier bears only on the credibility, not the sufficiency, of his testimony. The credibility of witnesses is a matter for the jury rather than the court. Contradictions and discrepancies in the State's [sic] evidence do not warrant dismissal of the case. . . .It is well settled in this jurisdiction that although the jury should receive and act upon such testimony with caution, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused." *Accord*, State v. Lowery, 318 N.C. 54, 71 (1986)

State v. Martin, 309 N.C. 465 (1983). It is well established in North Carolina that the testimony of a co-conspirator is competent to establish the conspiracy. *E.g.*, State v. Carey, 285 N.C. 497 (1974); State v. Miley, 291 N.C. 431 (1976). Further, a conspirator's unsupported testimony is sufficient to sustain a verdict although the jury should receive and act upon such testimony with caution. *E.g.*, State v. Carey, 285 N.C. 497; State v. Tilley, 239 N.C. 245 (1954).

G. Perjured Testimony

In State v. Galloway, 145 N.C.App. 555 (2001), the victim testified that she was forced into the vehicle with the defendant and his testifying co-defendant and then forced to perform oral sex; the co-defendant testified that the victim voluntarily got into the car to perform acts of prostitution, but later the defendant held a gun to the victim's head. The defendant contended that as one of these versions had to be false, the State had knowingly offered perjured testimony and his due process rights were thus violated. The court found no violation: "A prosecutor's presentation of known false evidence, allowed to go uncorrected, is a violation of a defendant's right to due process. The State has a duty to correct any false evidence which in any reasonable likelihood could affect the jury's decision. However, if the evidence is inconsistent or contradictory, rather than a knowing falsehood, such contradictions in the State's evidence are for the jury to consider and resolve." *See* Napue v. Illinois, 360 U.S. 264 (1959); State v. Williams, 341 N.C. 1 (1995)

State v. Rowsey, 343 N.C. 603 (1996). Co-defendant pled guilty to second degree murder and RWDW, admitting his guilt in a plea transcript which specifically stated "It is understood that I, by pleading guilty, am not admitting that I actually killed the victim or took money. . . I acknowledge that there is evidence from which the jury could find me guilty . . on the theory of acting in concert." At defendant's trial for first degree murder and robbery, co-defendant testified over defendant's objection. He was cross-examined extensively about his plea of guilty and whether he was actually guilty. No error in allowing co-defendant to testify,

as there was no showing that co-defendant's testimony was false and the defendant was allowed to fully cross-examine the co-defendant.

H. Other Miscellaneous issues

State v. Colvin, 90 N.C.App. 50, 57, *cert denied*, 322 N.C. 608 (1988): Co-defendant testified that during a conversation leading up to a bank robbery, the defendant said he "was gonna do it, 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).

State v. Braxton, 344 N.C. 702 (1996): One co-defendant was allowed to testify that immediately after the murder, another co-defendant said to the defendant "I didn't believe you would shoot him." Admissible as an Excited Utterance under the facts of that case.

State v. Lynn, 157 N.C.App. 217 (2003). Defendant files a motion to require the State to identify any mental health professionals who treated the testifying co-defendant. The Court held, relying on State v. Chavis, 141 N.C.App. 553 (2000) and State v. Smith, 337 N.C. 658, 664 (1994), that while impeaching information about a witness's mental health history might be exculpatory and if it is the State can be required to turn it over to the defense if it is in possession of such evidence, the State is not required to conduct an independent investigation to determine possible deficiencies in the State's evidence or to identify impeaching information. Before the defense is entitled to a witness's medical records, the trial court should review the records *in camera* to weigh the witness's privacy rights against the existence of exculpatory evidence.

State v. Belfield, 144 N.C.App. 320 (2001). In prosecution for aiding and abetting armed robbery and murder, defendant cross-examined his testifying co-defendant/girlfriend about their children and whether she trusted him enough to leave the children with him. On redirect, no error to allow prosecutor to bring out that the co-defendant/girlfriend would not leave the children with the defendant because the defendant smoked cocaine in front of them. Defendant opened the door to this testimony.

II. When the Co-defendant Testifies for the Defense

In State v. Jordan, 120 N.C.App. 364 (1995), a co-defendant who had already been sentenced testified for the defendant; another person who had originally been charged but against whom the charges had been dropped also testified for the defendant. The trial court instructed the jury on accomplice testimony and on interested witnesses. The court found no error. "The status of these two witnesses with regard to this case does not mean that they were no longer 'interested witnesses' such that the accomplice instruction was no longer necessary."

State v Graham 118 N.C.App. 231, *review denied*, 340 N.C. 262 (1995). Error to allow prosecutor to ask Defense witness if he has pending charges to show bias. The pending charge is

nothing more than an unproven accusation, and the rationale for allowing such evidence where the witness testifies for the State is inapplicable.

The prosecutor may not question the co-defendant/accomplice about his or her general drug or alcohol use, as that is not relevant, but may ask about whether any substances were 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); State v. Adams, 103 N.C. App. 158 (1991)(same). In an appropriate case the State may attempt to impeach the witness by a showing of mental deficiency caused by drug use as it bears upon his or her ability to observe, remember accurately or to communicate effectively. E.g., State v. Fields, 315 N.C. 191 (1985).

III. When the Co-Defendant Does Not or Will Not Testify

A. Does the Co-Defendant have a Fifth Amendment Privilege?

In State v. Pickens, 346 N.C. 628 (1997), the defendant and his half-brother were both charged with first degree murder. The half-brother pled guilty to second degree murder. At defendant's trial, he subpoenaed his half-brother to testify. The half-brother asserted his Fifth Amendment privilege and refused to answer questions. "When a witness invokes the Fifth Amendment privilege, the trial court is to 'determine whether the question is such that it may reasonably be inferred that the answer may be self-incriminating,' . . . and the claim of privilege 'should be liberally construed' . . . The privilege applies not only to 'evidence which an individual reasonably believes could be used against him in a criminal prosecution,' . . . but also encompasses evidence that 'would furnish a link in the chain of evidence needed to prosecute the claimant' . . . . However, the privilege only 'protects against real dangers, not remote and speculative possibilities.' . . . It is for the trial court to determine, 'from the implications of the question and in the setting in which it is asked,' whether that real danger exists, and the trial court should deny the claim only if there is no such possibility. . . ."

In Pickens, when it became apparent that defendant intended to call his half-brother as a witness, the trial court conducted a *voir dire* in the absence of the jury. At the *voir dire*, the trial court confirmed with the witness that he intended to assert his Fifth Amendment privilege. The trial court gave counsel for the parties and the half-brother's counsel an opportunity to argue their positions regarding the claim of privilege. The possibility of perjury charges or other federal charges was put forth as grounds upon which the privilege was asserted. Based on *voir dire* and arguments of counsel, the trial court concluded that the "possibility of perjury charges or federal prosecution" constituted sufficient fear of future prosecution to justify the half-brother's assertion of his Fifth Amendment privilege. The Supreme Court held that, under the circumstances, the trial court's ruling allowing the witness to refuse to testify on Fifth Amendment grounds was proper. The Court held that the half-brother did not completely waive his right to invoke his Fifth Amendment privilege because of his guilty plea; waiver of the privilege against compulsory self-incrimination by a plea is applicable only to the criminal act for which a plea of guilty is entered, not to other criminal acts. Because there was an asserted fear of future prosecution for other crimes, the plea of guilty did not act as a complete waiver of his privilege against self-incrimination. *Accord*, State v. Nolen, 144 N.C.App. 172 (2001).

B. If yes, Allowing the State or the Defendant to Call the Co-Defendant to the Stand

In State v. Thompson, 332 N.C. 204 (1992), the Court held that the trial court did not err by allowing the prosecutor to call a co-defendant/witness to the stand, knowing that the witness would invoke his Fifth Amendment privilege. There, the Court quoted from a federal Sixth Circuit Court of Appeals decision in stating that, "We believe that this was permissible because the prosecutor's case would be 'seriously prejudiced' by failure to offer [the codefendant] as a witness in light of [the codefendant's] role in the murder." Putting the witness on the stand was significantly probative for its value in identifying the person hired by the defendant to kill the victim in a contract killing case.

In State v. Pickens, 346 N.C. 628, discussed *supra*, the defendant contended that he should have been able to compel his half-brother and co-defendant in the murder case to take the witness stand and assert his Fifth Amendment privilege in front of the jury. The purpose of doing so would be to raise the inference that someone else pled guilty to or was responsible for this crime, thereby bolstering defendant's claim that he was not involved in the shooting. The trial court did not allow this, and the Supreme Court affirmed, finding that the probative value was minimal under the particular circumstances there present and because the trial court did allow the defendant to present his half-brother's plea transcript into evidence. The court quoted a federal case with approval which held that calling a witness to the stand in front of the jury when it is known the witness will assert his Fifth Amendment rights "is a practice so imbued with the 'potential for unfair prejudice' that a trial judge should closely scrutinize any such request." *Accord*, State v. Stanfield, 134 N.C.App. 685 (1999).

C. Adoptive Admissions

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."

State v. Thompson, 332 N.C. 204 (1992). Defendant was charged with murder based on his hiring of co-defendant Sanchez to kill the victim. State offers, through a law enforcement officer who overheard the conversation, a tape recording of a telephone call Sanchez made to the defendant after Sanchez's arrest, in which Sanchez several times asked for "my money for killing Raymond," and in which defendant never denied hiring Sanchez to kill Raymond. The Court found the tape to be admissible as an adoptive admission, since an innocent person would be expected to respond with either a denial or at least surprise and confusion; any ambiguities about defendant's response were for the jury.

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." The Court found no error in admitting this testimony. The defendant's silence was an adoptive

admission and his nonverbal conduct ('looked at the co-defendant like he better shut up") was a shorthand statement of facts and rationally based on the witness's perception.

State v. Weaver, 160 N.C.App. 61 (2003). Defendant was convicted of offering a bribe to a police officer. The evidence was that while co-defendant Blakely's apartment was being searched, drugs were found. Blakely, in the presence of defendant, offered the officer money to forget about the drugs. Blakely did not testify and the offer of money was put before the jury through the testimony of the officer. The Court of Appeals found no error, ruling that the statements of Blakely were not hearsay, both because they were "verbal acts" and also because they were adoptive admissions of the defendant: "Rule 801(d)(B) . . . provides that a statement is admissible if offered against a party and it is 'a statement of which he has manifested his adoption or belief in its truth.' N.C. Gen. Stat. § 8C-1, Rule 801(d)(B) (2001). 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. Workman, 344 N.C. 482 (1996). At trial of two co-defendants, witness testifies that she overheard a conversation between the two defendants in which one defendant said "Who do you know up the road that has some money?" The other defendant replied, "I don't know anybody. I guess we'll just have to rob somebody." The witness either could not tell or did not remember which defendant made which statement. The Court held there was no error in admitting this evidence, as one statement was obviously an admission and the other was an adoptive admission, regardless of which person made which statement

D. The Co-Conspirator Exception to the Hearsay Rule

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."

State v. Valentine, 357 N.C. 512 (2003). Under Rule 801(d)(E) of the Rules of Evidence, a statement by a co-conspirator during the course of the conspiracy is not considered to be hearsay; rather it is considered an admission and thus is admissible against anyone involved in the conspiracy. 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." *See also* State v. Mahaley, 332 N.C. 583 (1992), *cert. denied* 513 U.S. 1089 (1995). 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). 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. Id. However, as a general rule, the acts and declarations of a conspirator are not admissible when they come in the form of narratives or descriptions. Narrative declarations are admissible only when admitted against the defendant who made them or in whose presence the statements were made.

State v. Barnes, 345 N.C. 184 (1997) *cert denied,* 522 U.S. 876 (1998). Defendants Barnes, Blakney and Chambers were tried jointly for murder, robbery, and other related felonies.

State offered evidence that immediately after the murder, the 3 defendants went to Witness Valerie Mason's apartment. Blakney gave Valerie a ring and in response to an inquiry about where the ring came from, stated "We f-ed up a police and it's a 3 person secret." The Court found this to be both a statement against penal interest and a statement made by co-conspirator during the course of the conspiracy; it is thus not hearsay. The Court implied that because the three defendants asked Mason for a car in which to escape, the conspiracy had not yet ended.

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.

State v. Withers, 111 N.C.App. 340 (1993): While the burden is on the State to offer evidence of a conspiracy before a co-conspirator's statement can be admitted, the conspiracy can be implied and the conspiracy doesn't have to be express; the evidence that a conspiracy exists should be evaluated in the light most favorable to the proponent.

It appears that generally speaking statements admitted into evidence via this exception are not affected by the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), because generally speaking these statements are not testimonial. *See* Crawford, *citing* Bourjaily v. United States, 483 U.S. 171 (1987) with approval.

E. Against Penal Interest

N.C.R.Evid. 804(b)(3): "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (3) Statement Against Interest. – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement."

State v. Wilson, 322 N.C. 117, 130-134 (1988): Victim came to sheriff and confessed to a larceny, implicating defendant and his brother; defendant's brother was accused of the larceny and victim was murdered shortly thereafter. Defendant on trial for murdering victim. Victim's statements to sheriff were admissible under rule 804(b)(3). "Rule 804(b)(3) requires a two-pronged analysis. Once a statement is deemed to be against the declarant's penal interest, the trial judge must be satisfied that corroborating circumstances clearly indicate the trustworthiness of the statement if it exposes the declarant to criminal liability." If the statement generally is inculpatory, neutral or non-inculpatory statements do not need to be redacted. "[C]ollateral statements are admissible even though they are themselves neutral as to the declarant's interest if they are integral to a larger statement which is against the declarant's penal interest."

Note that Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), the recent watershed case on the defendant's right to confront witnesses, arose in the context of evidence offered by the state pursuant to the "against penal interest" exception. In any case wherein the

State propounds evidence under this exception, proceed very carefully and only after reading Crawford. *See, e.g*., State v. Morton, 166 N.C.App. 477 (2004).

See discussion, State v. Barnes, 345 N.C. 184 (1997) *cert denied,* 522 U.S. 876 (1998), supra, page13.

F. Not Offered For the Truth

State v. Cardenas, ___ N.C.App. ___ (April 5, 2005). Torres was arrested during execution of a search warrant where drugs were located. He agreed to set up a deal with his supplier, defendant. At trial, Torres did not testify. The defendant contended that the trial court erred in allowing the law enforcement officer to testify about his conversations with Torres about setting up the deal with the defendant. Most of this evidence was offered by the State on redirect. The Court of Appeals found no error; "First, defendant 'opened the door' to this line of questioning by cross-examining Detective Spain concerning Torres's credibility and evidence that led the detectives to defendant. Second, the testimony was not 'offered for the truth of the matter asserted.' Rather, it was intended to explain the detectives' subsequent conduct. Third, the trial court provided a limiting instruction both prior to the admission of the evidence and during its charge to the jury. Fourth, evidence pertaining to Torres's interview was discussed during both direct and cross-examination of Detective Alamillo without objection by defendant."

State v. Morston, 336 N.C. 381 (1994): In murder case, Witness One testifies she was present when the murder was planned but not present when the plan was carried out; Witness Two testifies she drove various participants in the murder from one place to another after the murder. Defendant objects to Witness One's testimony about statements made by another co-defendant in the defendant's presence that the co-defendant needed money and that the victim was interfering with the co-defendant's drug sales, and to testimony from Witness Two that "someone in the car" told her to let the participants out if there was a roadblock and to deny that she had seen the participants. 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.

State v. Weaver, 160 N.C.App. 61 (2003): Question by non-testifying co-defendant to police officer in defendant's presence concerning whether the officer would take money in exchange for not arresting anyone on drug charges was not hearsay; it was not offered for the truth of the matter but rather to prove that the question had been asked.

G. Evidence Non-Testifying Co-Defendant was Charged or Convicted

State v. Batchelor, 157 N.C.App. 421 (2003): 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. State v. Rothwell, 308 N.C. 782 (1983). This rule applies equally to evidence that co-defendants were charged and tried. State v. Gary, 78 N.C.App. 29 (1985). "[A]n individual defendant's guilt must be determined solely on the basis

of the evidence presented *against that defendant* and . . . the introduction of evidence of charges against co-defendants deprives a defendant of the right to cross examination and confrontation." Id. at 37. If the co-defendant testifies, however, the fact that the co-defendant pled guilty will usually be admissible to corroborate his testimony. See discussion State v. Marlow, 310 N.C. 507 (1984); State v. Potter, 295 N.C. 126 (1978), *supra*.

H. State of Mind Exception

N.C.R.Evid. 803(3) allows out of court statements to be admitted for their truth if they show the declarant's "then existing state of mind." Rule 803(3) allows the admission of a hearsay statement of a then-existing intent to engage in a future act. State v. Rivera, 350 N.C. 285 (1999); State v. Sneed, 327 N.C. 266 (1990).

In State v. Rivera, the defendant was charged with murder; there were three co-defendants, two of whom testified against the defendant. The defendant offered testimony from a witness who had a conversation with the non-testifying co-defendant in the jail in which the non-testifying co-defendant told the witness that if he got charged with the murder, he "got these two dudes here and if anything go down, they going to say it was this dude named [defendant.]" The Court held it was error to exclude this, as it showed the co-defendant's state of mind and then-existing intent to perform a future act.

IV. Joint Trials

A. Whether to Join Co-Defendants' Cases for Trial

When co-defendants have antagonistic or conflicting defenses and these positions make a joint trial unfair, the Court should deny a motion to join even if the joinder is allowable by statute. State v. Lowery, 318 N.C. 54 (1986); NCGS 15A-926.

In State v. Alford, 289 N.C. 372 (1976), the Court held that the defendant Alford was prejudiced by a joint trial with his co-defendant in a prosecution for first degree murder because he was not able to call his co-defendant as a witness to bolster his alibi defense. The co-defendant had given a signed statement to the police admitting his own involvement in the crime and naming a person other than Alford as the person who killed the victim. He did not implicate Alford. The State chose not to introduce the co-defendant's statement at the joint trial because it would have weakened the State's case against Alford. New trial for Alford.

State v. Tirado, 358 N.C. 551 (2004): In capital murder case, Defendant Queen argued that joinder prevented him from offering the portions of his confession that implicated his co-defendant, Tirado. Queen argued that the trial court's redacting the statement to avoid prejudice to Tirado caused prejudice to him by making him appear less than candid with law enforcement officers The Court recognized that "when joinder interferes with a defendant's opportunity to use a confession to his advantage because the defendants have antagonistic defenses, the trial court should grant severance," *citing* State v. Boykin, 307 N.C. 87 (1982) (where joint trial prevented defendant from explaining that he had given false and inculpatory statements to LEO in order to protect his co-defendant brother, cases should have been severed), but noted that if the confession has deletions and those deletions do not result in a "severely censored statement . . .

going to the heart of the accused's defense," severance is not necessarily require. See State v. Barnes, 345 N.C. 184, 223, *cert. denied*, 523 U.S. 1024 (1998).

State v. Johnson, 164 N.C. App. 1 (2004): Two co-defendants tried jointly for robbery with a dangerous weapon. Co-defendant Three testified against both. Good overview of some of the issues that can arise and the cases applicable to those issues.

> Defendant Whisonant next argues his defense was antagonistic to that of co-defendant Johnson, and that the defenses were so conflicting and irreconcilable as to result in an unfair trial. Defendant Whisonant admitted he was driving the vehicle during the robbery, but claimed he was unaware that a crime was going to occur. Defendant Johnson's defense was that he was not present during the robbery. "The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." State v. Lowery, 318 N.C. 54 (1986).
>
> After considering all of the evidence, we do not believe the defenses presented in this case were so antagonistic and irreconcilable that defendant was denied a fair trial. Defendant's defense . . . . never directly implicated co-defendant Johnson as a perpetrator of the crime. Likewise, Johnson's defense . . . in no way implicated defendant Whisonant as a willing participant during the crime. Thus, we cannot say the "codefendants' defenses are so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." State v. Nelson, 298 N.C. 573 (1979), *cert denied*, 446 U.S. 929 (1980).

164 N.C.App. at 1-10.

B. Evidence Issues When Joint Trials Proceed

1. One Defendant's Out-of-Court Confession Inculpates the Other Defendant

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 U.S. 123 (1968). "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 (1968); see State v. Johnson, 164 N.C.App. 1, 15 (2004).

NCGS 15A-927(c)(1) provides: (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.

State v. Tirado, 358 N.C. 551, 580 (2004): "[W]hen a non-testifying co-defendant's post-arrest [out-of-court] statement is admitted into evidence at a joint trial in a manner that invites or permits the jury to use the statement against the non-declarant defendant, fundamental conflicts with the non-declarant defendant's state and federal right to confrontation may arise. . . . As a result, the United States Supreme Court has held that before a nontestifying co-defendant's post-arrest statement may be admitted in evidence, it must be redacted to remove all references to the non-declarant defendant, and the jury should be instructed that the statement was admitted as evidence only against the declarant co-defendant."

State v. Littlejohn, 340 N.C. 750 (1995). Defendants Littlejohn and Dayson were jointly tried for murder, robbery, and related charges. The Court held that the introduction of a nontestifying co-defendant's confession that does not mention the other defendant could still implicate the other defendant and violate the *Bruton* rule if it is clear that the confession is referring to the other defendant. Error to introduce the confession at issue here, but error was harmless under specific facts of the case.

However, if the statement of the non-testifying co-defendant is otherwise admissible against the defendant, then Bruton does not require redaction. State v. Sidden, 315 N.C. 539 (1986); State v. Fink, 92 N.C.App. 523 (1989).

State v. Barnes, 345 N.C. 184, summarized *supra* at page 13, held that when the statement of one defendant is admissible against another defendant because of the co-conspirator exception or the against penal interest exception, then Bruton is not implicated.

State v. Evans, 346 N.C. 221 (1997) *cert. denied*, 522 U.S. 1057 (1998). Defendant Evans and Defendant Gillis were tried jointly for murder. State offered a redacted confession from Gillis which as redacted did not implicate Evans. Later Gillis testified and offered an alibi. The trial court allowed the State to impeach Gillis with his unredacted confession, which implicated both Gillis and Evans in the murder. The Supreme Court found no error: "The principles set out in *Bruton* apply only to the extrajudicial statements of a declarant who is unavailable at trial for full and effective cross-examination. . . .Where the declarant takes the stand and is subject to full and effective cross-examination, a codefendant implicated by extrajudicial statements has not been deprived of his right to confrontation. . . .In the instant case Gillis took the stand, testified, and was subject to cross-examination."

State v. Gonzalez, 311 N.C. 80 (1984). Gonzalez, Crawford and Woods were tried jointly for robbery of a gas station. Over Woods' objection, Crawford's post-arrest statement to police was introduced. As redacted, Crawford's statement "contained the following: 'I told him I was with some guys, but that I didn't rob anyone, they did.' Since defendant Woods and codefendant Gonzalez were being tried jointly with codefendant Crawford, and since only two persons were seen in the service station at the time of the robbery, this statement clearly implicated defendant Woods." Woods did not testify. Admission of this statement violated the defendant's confrontation rights as set forth in Bruton and Fox.

2. Evidence Admissible Against One Defendant and not the Other

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 with a limiting instruction as to the defendant. 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.

State v. Wilson, 108 N.C.App. 575, *disc. rev. denied*, 333 N.C. 541 (1993): Two defendants tried jointly for conspiracy and robbery. "It is not uncommon where two defendants are joined for trial that some evidence will be admitted which is not admissible as against both defendants." The court noted that "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.

3. One Defendant Offers the Other Defendant's Statement

State v. Tucker, 331 N.C. 12 (1992). Defendants Tucker and Wray were tried jointly for the murder of Cecil. Co-defendant Donna Tucker (defendant Tucker's wife and Wray's sister) testified that she and Tucker were hired by Wray to kill the victim because Wray believed the victim would be a witness against him in a drug case. Wray sought to present evidence of numerous inconsistent statements by defendant Tucker concerning who had killed the victim, including some in which defendant Tucker said Wray had killed the victim, to support his theory that the Tuckers were changing their stories in an effort to get a good deal from the state. "Because Wray sought to introduce rather than to exclude statements by his codefendant, *Bruton* is inapposite. The more appropriate precedents are those in which joinder of charges against codefendants, one who testifies and one who does not, leads to deprivation of the right to a fair trial because the testifying defendant is precluded from presenting exculpatory evidence." The Court gave Wray a new trial. "Here, we hold that the trial court erred in precluding admission of the statements because they were either nonhearsay or admissible under a hearsay exception. The sole direct evidence against Wray was the testimony of Donna Tucker, an interested witness of highly questionable credibility. Wray's defense was that the Tuckers killed Cecil with no knowledge or involvement on his part, then sought to escape punishment by implicating him. The number of and inconsistencies in defendant Tucker's pretrial statements not only support this theory, but could well have fatally undermined the State's theory of the case contained in the testimony of Donna Tucker. We thus cannot conclude that the error was harmless."