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HEARSAY: PART 1

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This is the first of a series of articles on the hearsay rule. The first article discusses the definition of hearsay. The subsequent articles will examine the exceptions.

supports the exclusion of hearsay. See McCormick, Evidence § 245 (3d ed. 1984); 5 Wigmore, Evidence § 1362 (Chadbourn rev. 1974).

INTRODUCTION

Ohio Evidence Rule 801 defines hearsay. The first part of the rule sets forth a traditional definition of hearsay. Hearsay is defined as a written or oral statement, including conduct intended to be an assertion, made by a declarant out-of-court and offered for the truth of the assertions contained in the statement. In contrast, subdivision (D) represents an important change in Ohio law; it provides that certain declarations — prior statements and admissions — that would otherwise fall within the definition of subdivisions (A) to (C) are not hearsay and, consequently, are not excludable as hearsay.

Res gestae

The Rules of Evidence avoid the use of the term *res gestae*, a confusing phrase which encompasses both evidence that is not hearsay and evidence that is hearsay but may fall within one of the exceptions to the hearsay rule. See generally 6 Wigmore, Evidence § 1767, at 255 (Chadbourn rev. 1976) ("The phrase *res gestae* has long been not only entirely useless, but even positively harmful"). As the Supreme Court has remarked, "For the sake of clarity, it is better to avoid the use of the generalized phrase *res gestae* when referring to a distinct exception. . . ." State v. Wallace, 37 Ohio St.3d 87, 89 n.3, 524 N.E.2d 466 (1988).

Underlying theory

Hearsay evidence is excluded because it is considered unreliable. The accuracy of a witness' testimony depends on the witness' perception, memory, narration, and sincerity. When a witness testifies at trial these four factors are subject to cross-examination. In addition, the witness is required to take an oath, and the jury has an opportunity to observe the demeanor of the witness on the stand. These conditions — cross-examination, oath, and presence at trial — are usually lacking when hearsay evidence is presented. The absence of these safeguards

DEFINITION OF STATEMENT

Rule 801(A) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." The first part of this definition is not controversial. Oral and written assertions clearly present the hearsay dangers — lack of cross-examination concerning the declarant's perception, memory, narration, and sincerity. See Hallworth v. Republic Steel Corp., 153 Ohio St. 349, 354-56, 91 N.E.2d 690, 693-94 (1950) (learned treatise hearsay); Geller v. Geller, 115 Ohio St. 468, 154 N.E. 727 (1926) (letter hearsay); Lambert v. State, 105 Ohio St. 219, 136 N.E. 921 (1922) (information supplied by a third party hearsay); Smith v. Young, 109 Ohio App. 463, 168 N.E.2d 3 (1958) (conversation hearsay).

Assertive conduct

Rule 801 also treats nonverbal conduct intended as an assertion (assertive conduct) as hearsay. McCormick provides the following commentary and illustration:

[I]t must be observed that the line of cleavage between conduct and statements is one that must be drawn in the light of substance, rather than form. No one would contend, if, in response to a question "Who did it?", one of the auditors held up his hand, that this gesture could be treated as different from an oral or written statement, in the application of the hearsay rule. Obviously, though described in terms of conduct, the actions are as much a part of the speaker's effort at expression as his words are. . . McCormick, Evidence 596 (2d ed. 1972).

The Advisory Committee's Note to Federal Rule 801 provides another illustration: "Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement."

The above examples of assertive conduct illustrate why such conduct is considered hearsay. They present the hearsay dangers inherent in perception, memory,

narration, and sincerity untested by cross-examination.

Nonassertive conduct—implied assertions

Conduct that is not intended by the declarant to be an assertion is not encompassed by the definition of “statement” in Rule 801(A). Accordingly, the hearsay rule is not a bar to the admissibility of evidence of nonassertive conduct. Nonassertive conduct is sometimes referred to as “implied assertions.” The leading case of *Wright v. Doe D’Tatham*, 112 Eng. Rep. 488 (1837), held implied assertions to be hearsay. See *McCormick*, Evidence § 250 (3d ed. 1984). Rule 801(A) rejects this position. Thus, for example, evidence of flight from the scene of a crime is not hearsay under Rule 801 because such conduct is not intended to be an assertion. See generally *State v. Strub*, 48 Ohio App.2d 57, 35 N.E.2d 819 (1975); *State v. Fields*, 35 Ohio App.2d 140, 300 N.E.2d 207 (1973); *State v. Whitley*, 17 Ohio App.2d 159, 245 N.E.2d 232 (1969).

Although the federal drafters recognized that nonassertive conduct may present some of the hearsay dangers, they believed that such conduct did not present a significant risk of insincerity and should, therefore, not be classified as hearsay.

Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the non-verbal conduct are such as virtually to eliminate questions of sincerity.

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. . . . Advisory Committee’s Note, Fed. R. Evid. 801.

OUT-OF-COURT STATEMENTS

Rule 801(C) defines hearsay as a “statement, other than one made by the declarant while testifying at the trial or hearing. . . .” Hence, an out-of-court statement does not lose its hearsay character simply because the declarant later becomes a witness at trial and testifies about the statement. For example, if an eyewitness to a crime makes a statement at the time of the crime and later testifies at trial, the prior statement is hearsay if offered for the truth of the assertion; to be admissible, it must fall within an exception. See Rules 803 and 804.

OFFERED FOR THE TRUTH

Rule 801(C) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” This definition is consistent with the prior Ohio cases. In *Potter v. Baker*, 162 Ohio St. 488,

124 N.E.2d 140 (1955), the Supreme Court held: “Testimony of a witness as to a statement or declaration by another person is hearsay testimony where that statement or declaration is offered or used only to prove the truth of the matters asserted therein.” *Id.* (syllabus, para. 1); accord, *State v. Nabozny*, 54 Ohio St.2d 195, 375 N.E.2d 784 (1978), vacated on other grounds, 439 U.S. 811 (1978) (tape recording not offered for truth of assertions); *State v. Lane*, 49 Ohio St.2d 77, 83-84, 358 N.E.2d 1081, 1087 (1976), vacated on other grounds, 438 U.S. 911 (1978) (telephone conversation not offered for truth of assertion).

If the relevance of an out-of-court statement is that the statement was made, rather than for the truth of the assertion contained in the statement, the statement is not hearsay. *State v. Williams*, 38 Ohio St.3d 346, 348, 528 N.E.2d 910 (1988) (“A statement is not hearsay if it is admitted to prove that the declarant made it, rather than to prove the truth of its contents.”). In such a case, the hearsay dangers are not present. The declarant’s perception, memory, narration, and sincerity are not critical because the relevance of the statement does not depend on the veracity of the declarant. See *McCormick*, Evidence § 249 (3d ed. 1984); 6 *Wigmore*, Evidence § 1766 (Chadbourn rev. 1976).

Courts and commentators have recognized a number of examples of statements not offered for the truth of the matter asserted. Several are discussed below.

Verbal acts

The verbal acts rule involves verbal conduct “to which the law attaches duties and liabilities.” *McCormick*, Evidence § 249 (3d ed. 1984). In other words, the uttering of certain words has independent legal significance under the substantive law. See 6 *Wigmore*, Evidence § 1770 (Chadbourn rev. 1976). For example, words constituting the offer and acceptance of a contract are verbal acts. These statements are not offered to prove the truth of the assertion; they are offered in evidence only to show that the words were uttered. *Cf. Leggett v. State*, 15 Ohio 283 (1846). Statements constituting an offer of a bribe, an illegal solicitation, or entrapment are other examples. See also Staff Note (“Words constituting conduct are not hearsay, e.g., words of a contract, libel, slander, threats and the like.”).

Statements offered to show effect on hearer

In many cases a person’s state of mind — his knowledge, belief, good faith, reasonableness — is an issue. See *McCormick*, Evidence § 249 (3d ed. 1984); 6 *Wigmore*, Evidence § 1789 (Chadbourn rev. 1976). For example, if an accused claims self-defense, his reasonable fear of the victim becomes an issue. Accordingly, statements made to the defendant regarding the victim’s dangerous or violent character are relevant to show the accused’s subjective state of mind. These statements are offered not to show that the victim was, in fact, a dangerous or violent person, but only to show that such information was communicated to the defendant. See *McGraw v. State*, 123 Ohio St. 196, 174 N.E. 741 (1931); *State v. Roderick*, 77 Ohio St. 301, 82 N.E. 1082 (1907); *Uphergrove v. State*, 37 Ohio St. 662 (1882); *Marts v. State*, 26 Ohio St. 162 (1875).

Declarant's state of mind

A person's mental state is often a consequential or material issue. If that person makes a statement that manifests his state of mind, the statement is relevant. Frequently, such statements are hearsay, but fall within the exception for presently existing state of mind. See Rule 803(3). In other cases, the statements show the declarant's state of mind only circumstantially. In these cases the statement is not offered to prove the truth of the assertion and thus does not implicate the hearsay rule. See 6 Wigmore, Evidence § 1790 (Chadbourn rev. 1976). One of the more difficult examples involves statements offered by a defendant to establish insanity. Evidence that the defendant has stated "I am the Emperor of Africa" is offered not to prove that the defendant is the Emperor of Africa, but rather as evidence of the defendant's insane delusions. As such, it would appear not to invoke the hearsay prohibition. This analysis, however, is not free from criticism. See 6 Wigmore, Evidence § 1766, at 250 and n. 1 (Chadbourn rev. 1976); Hinton, *State of Mind and the Hearsay Rule*, 1 U. Chi. L. Rev. 394, 397-98 (1934).

PRIOR INCONSISTENT STATEMENTS

Rule 801(D)(1)(a) provides that certain types of prior inconsistent statements are admissible as substantive evidence. The rule accomplishes this result by defining such statements as nonhearsay. Five conditions must be satisfied before a prior statement is admissible under the rule: (1) the declarant must testify, subject to cross-examination, at the trial or hearing; (2) the prior statement must be inconsistent with the witness' trial testimony; (3) the prior statement must have been given under oath; (4) the prior statement must have been "subject to cross-examination by the party against whom the statement is offered"; and (5) the prior statement must have been "subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. . . ."

The rule represents a change in Ohio law. Under prior law, prior inconsistent statements were admissible only for impeachment; such statements were offered not for the truth of the assertion contained therein, but only to show that the statement was made and is inconsistent with the witness' trial testimony. Prior inconsistent statements that do not satisfy the requirements of Rule 801(D)(1)(a) are still admissible for impeachment; Rule 613 sets forth the foundational requirements for admissibility of these statements.

Rule 801(D)(1)(a) differs from its federal counterpart. Federal Rule 801(d)(1)(A) does not require that the prior statement had been subject to cross-examination at the time it was made. The Ohio rule is based on the version of the federal rule that was proposed by the House Judiciary Committee. The Judiciary Committee Report contains the following commentary:

The Rule as amended draws a distinction between types of prior inconsistent statements. . . and allows only those made while the declarant was subject to cross-examination at a trial or hearing or in a deposition, to be admissible for their truth. . . . The rationale for the Committee's decision is that (1) unlike in most other situations involving unsworn or oral statement

there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statement. H.R. Rep. No. 650, 93d Cong., 1st Sess., (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News, 7075, 7086-87.

Statements made at a prior trial, a suppression hearing, a preliminary hearing, or any other proceeding at which testimony is taken under oath, subject to penalty of perjury, and subject to cross-examination qualify under Rule 801(D)(1)(a). In contrast to the federal rule, statements made before a grand jury do not qualify because such statements are not subject to cross-examination at the time they are made. Grand jury statements, however, are admissible if inconsistent with the witness' trial testimony and offered for impeachment. See Rule 613.

PRIOR CONSISTENT STATEMENTS

Rule 801(D)(1)(b) provides that prior consistent statements of a witness are admissible as substantive evidence if "offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." For example, a statement made before the state's offer of leniency, the alleged motive for fabrication, is admissible. *State v. Mullins*, 34 Ohio App.3d 192, 196, 517 N.E.2d 945 (Fairfield 1986).

The rule represents a change in Ohio law. Under prior law, prior consistent statements were generally inadmissible, even if offered only for rehabilitation. Such statements were admissible, however, if offered to rebut a charge of recent fabrication, *Miller v. Piqua Transfer & Storage Co.*, 57 Ohio Abs. 325, 92 N.E.2d 452 (C.P. 1950), in which case the statement could be considered for rehabilitative purposes but not as substantive evidence. Under the rule, such statements are *substantively* admissible.

The rule is identical to Federal Rule 801(d)(1)(B), except for technical differences. In contrast to the rule on prior *inconsistent* statements, Rule 801(D)(1)(a), a prior consistent statement need not have been given under oath, subject to penalty of perjury, and subject to cross-examination.

In *Motorists Mutual Ins. Co. v. Vance*, 21 Ohio App.3d 205, 486 N.E.2d 1206 (Franklin 1985), the court wrote:

Because the result of exclusion of prior consistent statements, where they are sought to be used for rebuttal purposes, would be to permit an implication of fabrication or falsification to stand without challenge, their admission should be favored to the extent that a generous view should be taken of the entire trial setting in order to determine if there was sufficient impeachment of the witness to amount to a charge of fabrication or improper influence or motivation. *Id.* at 207.

STATEMENTS OF IDENTIFICATION

Rule 801(D)(1)(c) provides that a witness' prior statement "of identification of a person soon after perceiving" that person is admissible as substantive evidence "if the circumstances demonstrate the reliability of the prior identification." For example, an identification made at a

lineup, show-up, photographic display, or prior hearing, falls within the rule. Even though statements of identification are a type of prior consistent statement, the limitations of Rule 801(D)(1)(b) do not apply to such statements.

Prior law

The rule apparently changes Ohio law. RC 2945.44 provides: "When identification of the defendant is an issue, a witness who has on a previous occasion identified such person may testify to such previous identification. Such identification may be proved by other witnesses." On its face, this statute appears to permit the substantive use of prior identifications. In *State v. Lancaster*, 25 Ohio St.2d 83, 267 N.E.2d 291 (1971), however, the Supreme Court interpreted the statute as permitting the use of prior identifications only as corroborative, rather than substantive, evidence. *Id.* (syllabus, para. 5). Under the corroboration theory, the witness had to make an in-court identification before evidence of a prior identification could be admitted.

Under the rule, prior identifications are admissible as substantive evidence; thus, the rule applies whether or not the witness makes an identification at trial. So long as the witness who has made the prior identification is "subject to cross-examination concerning the statement" at trial, the statement regarding the prior identification, as well as the testimony of other witnesses who were present at the time of the identification, is admissible. See Staff Note.

Federal rule

The rule differs from its federal counterpart. Statements concerning prior identifications are admissible only upon a showing that the "circumstances demonstrate the reliability of the prior identification." The federal rule does not contain this requirement. The reliability requirement is patterned after Minnesota Rule of Evidence 801(d)(1)(C), which contains the phrase "if the court is satisfied that the circumstances of the prior identification demonstrate the reliability of the prior identification." The Committee Comment to the Minnesota rule states:

The rationale for the rule stems from the belief that if the original identification procedures were conducted fairly, the prior identification would tend to be more probative than an identification at trial. Obviously, if the prior identification did not occur under circumstances insuring its trustworthiness, the identification should not be admissible. The Court must be satisfied as to the trustworthiness of the out-of-court identification before allowing it to be introduced as substantive evidence.

Confrontation

In *United States v. Owens*, 484 U.S. 554 (1988), the U.S. Supreme Court considered the applicability of Federal Rule 801(d)(1)(c). John Foster, a correctional counselor, was assaulted in a federal prison. He suffered a fractured skull, which resulted in an impaired memory. While hospitalized, he identified Owens as his attacker and picked his picture from an array of photographs. At trial, Foster testified about the attack, including his identification of Owens while in the hospital. On cross-examination, however, he admitted that he could not remember seeing his assailant. Owens was convicted and appealed on hearsay and confrontation grounds.

On review, the Supreme Court concluded that the Confrontation Clause did not bar testimony concerning a prior out-of-court identification when the identifying witness is unable, because of memory loss, to explain the basis for the identification. According to the Court, the Clause guarantees only an opportunity for effective cross-examination. This right is satisfied when the defendant has the opportunity to bring out such matters as a bad memory.

The Court also considered a hearsay objection. Federal Evidence Rule 801(d)(1)(C) excludes from the hearsay rule a prior statement "of identification of a person made after perceiving the person," if the declarant "testifies at the trial or hearing and is subject to cross-examination concerning the statement." The Court ruled that the requirements of this provision had been satisfied. The witness had been subjected to cross-examination "concerning the statement." He was placed on the stand, took the oath, and responded willingly to questions.

Constitutional requirements

As the Staff Note indicates, the rule does not "obviate constitutional requirements relating to lineups and the like. . ." The rule covers only the hearsay aspects of pretrial identifications. In criminal cases identification evidence also must satisfy Sixth Amendment and due process requirements. The Sixth Amendment requires the presence of counsel at some types of identification procedures. See *Moore v. Illinois*, 434 U.S. 220 (1977) (preliminary hearings); *United States v. Ash*, 413 U.S. 300 (1973) (right to counsel not applicable at photographic display); *Kirby v. Illinois*, 406 U.S. 682 (1972) (right to counsel attaches at commencement of judicial adversary proceedings); *United States v. Wade*, 388 U.S. 218 (1967).

Due process requires that identification evidence be reliable. See *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972). The Ohio cases are discussed in *Katz, Ohio Arrest, Search and Seizure* ch. 33 (2d ed. 1987).

Mug shots

An in-court identification cannot be bolstered by the use of photographs that reveal the defendant's prior criminal record. In *State v. Breedlove*, 26 Ohio St.2d 178, 271 N.E.2d 238 (1971), the Supreme Court stated, "Under the circumstances in the case at bar, we believe it unjustifiable for the state, on direct examination, to present police mug shots, bearing police identification numbers, from which a reasonable inference can be drawn that the defendant, at some indefinite time in the past had had trouble with the law." *Id.* at 184. See also *State v. Wilkinson*, 26 Ohio St.2d 185, 271 N.E.2d 242 (1971), cert. denied, 404 U.S. 968 (1971). In effect, evidence indicating a prior criminal record violates Rule 404(A), which generally prohibits the introduction of character evidence.

ADMISSIONS OF A PARTY-OPPONENT

Rule 801(D)(2) exempts admissions of a party-opponent from the scope of the hearsay rule. The Rule recognizes several different types of admissions, three of which are often encountered in criminal cases: (1)

individual admissions; (2) adoptive admissions; and (3) co-conspirator admissions.

According to the Staff Note "[u]nder prior Ohio law, an admission was characterized as an exception to the hearsay rule." Instead of treating admissions as an exception, the Evidence Rules exempt admissions from the definition of hearsay.

According to the Advisory Committee's Note to Federal Rule 801, admissions of party-opponents "are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule." In other words, the adversary system imposes upon a party the burden of explaining his prior statements that are inconsistent with his current position. In any event, although the theory of admissibility is changed by the Rules of Evidence, the result is generally the same as under prior law.

Declarations against interest distinguished

Admissions are often confused with the hearsay exception relating to declarations against interest, which is governed by Rule 804(b)(3). See *Goz v. Tenney*, 104 Ohio St. 500, 505, 136 N.E. 215, 216 (1922). There are several differences between the two rules. First, the first-hand knowledge and competency rules do not apply to admissions; these rules do apply to declarations against interest. Second, to qualify as an admission, a statement need not have been against the interest of the declarant when made; the declaration against interest exception turns on the adverse nature of the statement when it was made. Third, the declarant need not be unavailable in order for an admission to be introduced. In contrast, a declaration against interest is not admissible unless the declarant is unavailable at the time of trial. Finally, declarations against interest need not be made by a party. See *Ferrebee v. Boggs*, 24 Ohio App.2d 18, 24-25, 263 N.E.2d 574, 579 (1970); McCormick, *Evidence* § 262 (3d ed. 1984); Note, *Admissions "Against Interest" in Ohio*, 15 Ohio St. L.J. 187 (1954).

INDIVIDUAL ADMISSIONS

Rule 801(D)(2)(a) provides that statements of a party, in either his individual or representative capacity, are admissible as substantive evidence if offered against that party. However, a party cannot introduce his own statements under this rule. *State v. Gatewood*, 15 Ohio App.3d 14, 472 N.E.2d 63 (Hamilton 1984).

Pleas of guilty

A plea of guilty in a criminal case is an admission and thus may be admissible against a party-opponent in a subsequent case. See *Clinger v. Duncan*, 166 Ohio St. 216, 141 N.E.2d 156 (1957); *Freas v. Sullivan*, 130 Ohio St. 486, 200 N.E. 639 (1936); *Clark v. Irvin*, 9 Ohio 131 (1839). Rule 410, however, precludes the admissibility of guilty pleas that are subsequently withdrawn, pleas of no contest, pleas of guilty in a violations bureau, offers to plead guilty and no contest, and statements made in connection with and relevant to such pleas and offers. Pleas of guilty that do not fall within the exclusion of Rule 410 are admissible as admissions.

Confessions

The confession of a criminal defendant is an admission of a party-opponent. Some Ohio cases attempt to distinguish confessions and admissions, characterizing confessions as a complete acknowledgment of guilt and admissions as something less. See *State v. Klumpp*, 15 O.O.2d 461, 175 N.E.2d 767 (App. 1960). The distinction is usually not important. Both confessions and admissions are admissible under Rule 801(D)(2)(A). *State v. Byrd*, 32 Ohio St.3d 79, 89, 512 N.E.2d 611 (1987), cert. denied 108 S.Ct. 763 (1988). Moreover, the U.S. Supreme Court has held the distinction irrelevant when a statement obtained from a defendant by the police is challenged on constitutional grounds. See *Miranda v. Arizona*, 384 U.S. 436, 476-77 (1966).

Rule 801(D)(2)(A) governs only the hearsay aspects of admissions. It is not concerned with the constitutional requirements surrounding the obtaining of statements from defendants by the police. See *Miranda v. Arizona*, *supra* (5th Amendment requirements); *Brewer v. Williams*, 430 U.S. 387 (1977) (6th Amendment requirements). See *generally* *Katz*, *Ohio Arrest, Search and Seizure* ch. 31 (2d ed. 1987).

Like many jurisdictions, Ohio imposes a corroboration requirement on the admissibility of confessions. Under this rule, there must be *some* independent evidence of the *corpus delicti* before a confession is admissible. See *State v. Black*, 54 Ohio St.2d 304, 376 N.E.2d 948 (1978); *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), vacated on other grounds, 438 U.S. 911 (1978); *State v. Maranda*, 94 Ohio St. 364, 114 N.E. 1038 (1916); *State v. King*, 10 Ohio App.3d 161, 460 N.E.2d 383 (Hamilton 1983); *State v. Duerr*, 8 Ohio App.3d 396, 457 N.E.2d 834 (Hamilton 1982), cert. denied, 464 U.S. 816 (1983); *State v. Falston*, 67 Ohio App.2d 81, 425 N.E.2d 916 (1979). See *generally* McCormick, *Evidence* § 158 (3d ed. 1984); 7 Wigmore, *Evidence* § 2070-75 (Chadbourn rev. 1978).

ADOPTIVE ADMISSIONS

Rule 801(D)(2)(b) provides that a statement about which a party "has manifested his adoption or belief in its truth" is admissible as substantive evidence if offered against that party. The Advisory Committee's Note to Federal Rule 801 contains the following commentary:

Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: "X is a reliable person and knows what he is talking about." See McCormick § 246, p. 527, n. 15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization

that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved.

A party may expressly adopt the statement of a third person or he may acquiesce by failing to deny or correct the statement of a third person under circumstances in which it would be natural to deny or correct the truth of the statement (adoption by silence). See *State v. Swiger*, 5 Ohio St.2d 151, 160, 214 N.E.2d 417, 424, cert. denied, 385 U.S. 874 (1966) (express adoption); *Price v. Cleveland Clinic Foundation*, 33 Ohio App.3d 301, 307, 515 N.E.2d 931 (Cuyahoga 1986) (adoption by conduct); *State v. Poole*, 50 Ohio App.2d 204, 362 N.E.2d 678 (1976) (express adoption).

Adoption by silence

The Ohio cases have recognized the admission-by-silence rule. See *Hoover v. State*, 91 Ohio St. 41, 47, 109 N.E. 626, 628 (1914); *Murphy v. State*, 36 Ohio St. 628 (1881); *Accurate Employment Service v. Rowell*, 69 Ohio Abs. 452, 455, 126 N.E.2d 81, 84 (C.P. 1954). In *Zeller v. State*, 123 Ohio St. 519, 176 N.E. 81 (1931), the Supreme Court stated: "The only theory upon which any confession by silence is admissible is that the statement of the third person, in the presence of the accused, is made under such circumstances that the silence of the accused gives rise to a natural and reasonable inference of assent thereto. . ." *Id.* at 523.

In many cases, however, the courts have found that the circumstances did not require a response and thus, silence was not equivalent to assent. *E.g.*, *Zeller v. State*, *supra*; *Geiger v. State*, 70 Ohio St. 400, 71 N.E. 721 (1904); *Griffith v. Zipperwick and Lodge*, 28 Ohio St. 388, 409 (1876); *Walker v. State*, 37 Ohio App. 540, 175 N.E. 29 (1930). See also *United States v. Hale*, 422 U.S. 71 (1975). In *Geiger, supra* the Court commented on the admissibility of "a confession by silence": "We cannot refrain from the observation, that before a court admits this class of confessions, great caution should be exercised. . . It is not every instance of silence in the hearing of accusation that renders it admissible, as admitting guilt." *Id.* at 413.

These cases are consistent with McCormick's position that "the essential inquiry in each case is whether a reasonable person would have denied under the circumstances. . ." McCormick, *Evidence* § 270, at 801 (3d ed. 1984). It is *not* sufficient that the statement was made in the presence of a party. McCormick lists several factors that should be considered in determining admissibility:

- (1) The statement must have been heard by the party claimed to have acquiesced.
- (2) It must have been understood by him.
- (3) The subject matter must have been within his knowledge. . .
- (4) Physical or emotional impediments to responding must not be present.
- (5) The personal makeup of the speaker, *e.g.*, young child, or his relationship to the party or the event, *e.g.*, bystander, may be such as to make it unreasonable to expect a denial.
- (6) Probably most important of all, the statement itself must be such as would, if untrue, call for a denial under the circumstances. *Id.*

The adoption-by-silence rule also may apply to correspondence, that is, the failure to answer or correct

statements in a letter may be considered to be an adoption if under the circumstances it would have been natural to answer or object to the contents of the letter. See *Akron Milk Producers, Inc. v. Isaly Dairy Co.*, 109 Ohio App. 155, 164 N.E.2d 579 (1959) (adoption); *Wolfson v. Horn*, 94 Ohio App. 530, 116 N.E.2d 751 (1953) (adoption); *Aftel v. Cound*, 32 Ohio App. 270, 167 N.E. 402 (1928) (no adoption); McCormick, *Evidence* § 270 (3d ed. 1984). As in all cases of adoption by silence, the surrounding circumstances are critical. In *A. B. Leach & Co., Inc. v. Peirson*, 275 U.S. 120 (1927), Justice Holmes wrote:

A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts. He no more can impose a duty to answer a charge than he can impose a duty to pay by sending goods. Therefore a failure to answer such adverse assertions in the absence of further circumstances making an answer requisite or natural has no effect as an admission. *Id.* at 128.

Criminal cases

The application of the adoption-by-silence rule in criminal cases is limited by constitutional principle. In *State v. Stephens*, 24 Ohio St.2d 76, 263 N.E.2d 773 (1970), the Supreme Court commented on the admissibility of a defendant's silence following arrest:

In the first detention of a suspect it is not uncommon to react by refusing to discuss the charges until a lawyer can be retained. Desire for friendly counsel and advice can be a major motivation at the time in the mind of one completely innocent of the charges, as well as one who subsequently may admit his guilt. His privilege [against self-incrimination] at that time is silence. . . he should not thereafter be penalized for his original refusal. *Id.* at 81.

See also *State v. Kidder*, 32 Ohio St. 3d 279, 284, 513 N.E.2d 311 (1987) (conclusory statements of deputies not adoptive admissions); *State v. Perryman*, 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976), vacated on other grounds, 438 U.S. 911 (1978); *State v. Young*, 27 Ohio St.2d 310, 272 N.E.2d 353 (1971), vacated on other grounds, 408 U.S. 940 (1972) (waiver of the privilege). In *Doyle v. Ohio*, 426 U.S. 610 (1976), the U.S. Supreme Court held that the examination of a defendant at trial concerning his post-arrest silence after receiving *Miranda* warnings violated due process. Consequently, a defendant's silence in face of an accusation by the police cannot be admitted in evidence if *Miranda* warnings were given.

CO-CONSPIRATOR ADMISSIONS

Rule 801(D)(2)(e) provides that a statement made by a co-conspirator of a party during and in furtherance of the conspiracy is admissible as substantive evidence if offered against that party. The rule applies in civil as well as in criminal cases. See *Preston v. Bowers*, 13 Ohio St. 1 (1861).

The theory underlying the co-conspirator rule is unclear. In an early Ohio case, the Supreme Court stated that "the act and declaration of each [co-conspirator] in prosecution of the enterprise, and while engaged in

accomplishing the common design, is to be considered the act and declaration of all, each being deemed the agent of all." *Patton v. State*, 6 Ohio St. 467, 470 (1856). The Advisory Committee's Note to Federal Rule 801, however, rejects the agency theory. "[T]he agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." The Note, however, fails to provide an alternative theory to justify admissibility. See generally 4 Louisell & Mueller, *Federal Evidence* 362-67 (1980); 4 Weinstein & Berger, *Weinstein's Evidence* § 801(d)(2)(E)[01] (1988).

The co-conspirator rule applies if five conditions are established: (1) the existence of a conspiracy; (2) the defendant's participation in the conspiracy; (3) the declarant's participation in the conspiracy; (4) the statement was made during the course of the conspiracy; and (5) the statement was in furtherance of the conspiracy. These conditions are discussed below. If the statement was part of the agreement (the *actus reus* of conspiracy), the statement may be admissible under the verbal acts doctrine, and resort to this rule is unnecessary. See 4 Louisell & Mueller, *Federal Evidence* 357-61 (1980).

Existence of the conspiracy

The rule applies only if the prosecution has established the existence of a conspiracy. Conspiracy has been defined as requiring "(1) an agreement between two or more persons. . . and (2) an intent to thereby achieve a certain objective which, under the common law definition, is the doing of either an unlawful act or a lawful act by unlawful means." LaFave & Scott, *Criminal Law* 525 (2d ed. 1986).

The crime of conspiracy, however, need not be charged in the indictment or information in order to invoke the rule. The Senate Judiciary Committee Report comments: "While the rule refers to a co-conspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a co-conspirator for the purposes of this rule even though no conspiracy has been charged." S. Rep. No. 1277, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. Ad. News 7051, 7073. This position is consistent with prior Ohio law. See *State v. Nevius*, 147 Ohio St. 263, 71 N.E.2d 258 (1947), cert. denied, 331 U.S. 839 (1947); *Goins v. State*, 46 Ohio St. 457 (1889).

Declarant's and defendant's participation

With one exception, the statement must have been made while both the declarant and the defendant were members of the conspiracy. The exception involves the defendant who joins an on-going conspiracy, in which case the defendant is deemed to have adopted all prior statements made by the other co-conspirators. See *United States v. United States Gypsum Co.*, 333 U.S. 364, 393 (1948).

Hence, if the defendant withdraws from the conspiracy before the objectives are achieved or abandoned, statements made by other co-conspirators after his withdrawal are not admissible against him. Moreover, the arrest of the declarant terminates his participation in the conspiracy and makes his post-arrest statements inadmissible against the defendant. See *Wong Sun v. United States*,

371 U.S. 471 (1963); *Fiswick v. United States*, 329 U.S. 211 (1946). Similarly, the defendant's arrest usually terminates his participation in the conspiracy and makes subsequent statements by co-conspirators inadmissible against him.

During the course of the conspiracy

The rule requires that the statement be made "during the course" of the conspiracy. The prior Ohio cases had recognized this requirement. In *Patton v. State*, 6 Ohio St. 467 (1856), the Supreme Court held that one of the limitations on the admissibility of co-conspirator statements was that the statement must be made "during the pendency of the criminal enterprise. . ." *Id.* (syllabus); *accord*, *Sharpe v. State*, 29 Ohio St. 263 (1876); *Rufer v. State*, 25 Ohio St. 464 (1874); *Fouts v. State*, 7 Ohio St. 471 (1857).

A conspiracy commences when the agreement is reached and terminates when the objectives have been achieved or abandoned. Statements of co-conspirators made after the conspiracy ends are not admissible. See *Sharpe v. State*, *supra*. Determining the time when the conspiracy terminates, however, has proven troublesome. The majority view is that statements made after the objectives have been achieved, but while the conspirators are attempting to avoid detection (the concealment phase) are inadmissible. See McCormick, *Evidence* 793 (3d ed. 1984).

The Ohio Supreme Court has not always followed this rule. In *State v. Shelton*, 51 Ohio St.2d 1152 (1977), vacated on other grounds, 438 U.S. 909 (1978), the Court held: "A declaration of a conspirator, made subsequent to the actual commission of the crime, may be admissible against any co-conspirator if it was made while the conspirators were still concerned with the concealment of their criminal conduct or their identity." *Id.* (syllabus, para. 2); *accord*, *State v. Liberatore*, 69 Ohio St.2d 583, 587, 433 N.E.2d 561 (1982) (during conspiracy or "resulting coverup"); *State v. DeRighter*, 145 Ohio St. 552, 558-59, 62 N.E.2d 332, 335-36 (1945).

Concealment phase statements, however, may not be admissible under Rule 801(D)(2)(e). The Advisory Committee's Note to Federal Rule 801 reads: "The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitch v. United States*, 336 U.S. 440 (1949); *Wong Sun v. United States*, 371 U.S. 471, 490 (1963)." The federal rule, as stated in *Krulewitch* and *Wong Sun*, has consistently excluded concealment phase statements. See *Anderson v. United States*, 417 U.S. 211, 218 (1974); *Dutton v. Evans*, 400 U.S. 74, 81 (1970); McCormick, *Evidence* 646 (2d ed. 1971) ("attempts to expand the so-called 'concealment phase' to include all efforts to avoid detection have generally failed, as in *Krulewitch v. United States*. . .").

Although the rule may be inconsistent with the syllabus statement in *Shelton*, *supra*, it is not necessarily inconsistent with the facts of *Shelton*. The statement in that case was made just an hour after the crime, while the co-conspirator was attempting to dispose of the murder weapon. Such close proximity between the crime and statement may be sufficient to warrant admission of

the statement.

Under some circumstances, extending the duration of the conspiracy beyond the commission of the principal crime to include concomitant and closely connected disposition of its fruits or concealment of its traces appears justifiable, as in the case of police officers engaged in writing up a false report to conceal police participation in a burglary or disposal of the body after a murder. McCormick, Evidence 793 (3d ed. 1984).

One recent case, however, has ruled that "concealment phase" statements are admissible under Ohio Rule 801. State v. Duerr, 8 Ohio App.3d 396, 401, 457 N.E.2d 834 (1982).

It should be noted that this rule does not govern the admissibility of evidence of acts engaged in during the concealment phase. Such acts may be admissible if relevant to prove the existence of the conspiracy. See Anderson v. United States, 417 U.S. 211, 219-22, (1974); Lutwak v. United States, 344 U.S. 604, 617 (1953).

In furtherance of the conspiracy

The rule requires that the statement be made "in furtherance of the conspiracy." Numerous prior Ohio cases had recognized this requirement without discussing its basis. See State v. Weind, 50 Ohio St.2d 224, 240-41, 364 N.E.2d 224, 235 (1977), vacated on other grounds, 438 U.S. 911 (1978); State v. Osborne, 49 Ohio St.2d 135, 143, 359 N.E.2d 78, 84 (1976), vacated on other grounds, 438 U.S. 911 (1978); State v. Carver, 30 Ohio St.2d 280, 285 N.E.2d 26 (1972), cert. denied, 409 U.S. 1044 (1972); State v. Nevius, 147 Ohio St. 263, 71 N.E.2d 258 (1947), cert. denied, 331 U.S. 839 (1947); Goins v. State, 46 Ohio St. 457, 21 N.E. 476 (1889); Kent v. State, 42 Ohio St. 426, 430 (1884); Rufer v. State, 25 Ohio St. 464 (1874); Preston v. Bowers, 13 Ohio St. 1 (1861); Fouts v. State, 7 Ohio St. 471 (1857); Patton v. State, 6 Ohio St. 467 (1856).

Statements that are only casual admissions or merely inform the listener of the declarant's activities are not made in furtherance of the conspiracy. Statements that provide assurance, serve to maintain trust and cohesiveness among the conspirators, or inform each conspirator of the current status of the conspiracy do further the ends of the conspiracy and are admissible. Similarly, statements that seek to induce someone into joining the conspiracy or assist the conspirators in meeting their objectives are admissible. See also 4 Louisell & Mueller, Federal Evidence 348 (1980) ("Idle chit-chat, mere bragging, descriptive comments, and statements deliberately inculcating other conspirators and knowingly made to law enforcement agents are clearly excluded by this requirement. . .").

Independent evidence; standard of proof

The Ohio rule expressly requires that the conspiracy, as well as the declarant's and defendant's participation, be established "upon independent proof of the conspiracy." In other words, the statement itself cannot be used to establish the existence of the conspiracy. Federal practice is different. Bourjaily v. United States, 483 U.S. , 107 S.Ct. 2775 (1987).

The independent proof requirement is based on Michigan Rule of Evidence 801(d)(2)(E) and is consistent with

prior Ohio cases. See State v. Weind, 50 Ohio St.2d 224, 240, 364 N.E.2d 224, 235 (1977); vacated on other grounds, 438 U.S. 911 (1978) (conspiracy established by "other evidence"); State v. Osborne, 49 Ohio St.2d 135, 143, 359 N.E.2d 78, 84 (1976), vacated on other grounds, 438 U.S. 911 (1978); State v. Carver, 30 Ohio St.2d 280, 287, 285 N.E.2d 26, 31 (1972), cert. denied, 409 U.S. 1044 (1972).

The defendant's own admissions, which are admissible under Rule 801(D)(2)(a), however, are independent evidence and thus may be used to establish the conspiracy. State v. Duerr, 8 Ohio App.3d 396, 401, 457 N.E.2d 834 (1983).

The standard of proof in determining admissibility may differ in federal and Ohio cases. In Bourjaily v. United States, 483 U.S. , 107 S.Ct. 2775 (1987), the U.S. Supreme Court ruled that the trial court in determining the admissibility of co-conspirator statements must use the "preponderance of evidence" standard of proof.

Prior to the adoption of the Rule of Evidence, the Ohio cases had used the prima facie case standard. See State v. Thomas, 61 Ohio St. 2d 223, 232, 400 N.E.2d 401, 407 (1980); State v. Weind, supra, 50 Ohio St.2d at 240; State v. Osborne, supra, at 143; State v. Nevius, 147 Ohio St. 263, 71 N.E.2d 258 (1947), cert. denied, 331 U.S. 839 (1947); State v. DeRichter, 145 Ohio St. 552, 558-59, 62 N.E.2d 332, 335-36 (1945); Goins v. State, 46 Ohio St. 457, 21 N.E. 476 (1889). Recent cases continue to use the prima facie case standard. State v. Martin, 9 Ohio App.3d 150, 151, 458 N.E.2d 898 (1983); State v. Milo, 6 Ohio App.3d 19, 22, 451 N.E.2d 1253 (1982).

Right of confrontation.

Generally, the Sixth Amendment requires the prosecution to demonstrate both the unavailability of the declarant and the reliability of the out-of-court declaration. In Bourjaily v. United States, 483 U.S. , 107 S.Ct. 2775, (1987), the U.S. Supreme Court ruled that co-conspirator statements automatically satisfied the reliability requirement imposed by the Confrontation Clause, because they fall within a "firmly rooted hearsay exception." In United States v. Inadi, 475 U.S. 387 (1986), the Court held that the unavailability of the declarant need not be established as condition for admitting co-conspirator statements.