1

- Prior inconsistent statements as substantive proof, non-hearsay by definition, if:
  - Inconsistent with current testimony;
  - Made in another proceeding; and
  - Made under oath.
- FRE 801(d)(1)(A).
- Notes:
  - This rule requires that the witness is testifying at trial. Thus, the issues of jury perception of the witness and test by cross-examination are of less importance. The jury can assess which of the statements is more likely true.
  - This rule can be quite important because the prior statement might be the only substantive evidence available at trial.

2 **State v. Smith, Wash. 1982**

- Smith charged with assaulting Conlin. Prosecutor offers Conlin's affidavit, made at station house, naming Smith as her assailant. At trial, Conlin identifies Gomez as the assailant, saying she blamed Smith previously because she was mad at him. Prior aff. admitted as substantive evidence of Smith's guilt – convicted. Later, trial court grants new trial, state appeals.
- Does Conlin's affidavit meet requirements as substantive evidence under FRE 801(d)(1)?
- Is the stationhouse interview a "proceeding"?
-

3

- Prob. 4-A. Breen testifies before grand jury, identifying Barlow as participant in armed robbery. At trial, Breen feigns loss of memory.
- Is lack of memory at trial "inconsistent" with prior testimony? Is there an implied intent to deceive requirement in 801(d)(1)?
- What if the witness legitimately claims he does not remember the statement or the circumstances of same. Is the right to cross-examine him at trial meaningful?
-

4

- Notes:
- Under Texas Rules of Evidence, "matter asserted" is expressly defined to include: "any matter explicity asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from defendant's belief as to the matter." *See,* Tex. R. Evid. 801©.
- Unlike FRE 801(d)(1)(A), Texas Rules of Evidence specifically *exclude* testimony from a grand jury proceeding, even if inconsistent with trial testimony. *See,* Tex. R. Evid. 801(e)(1)(A).

5

- Prior *consistent* statements as substantive proof, non-hearsay by definition, if offered during live cross-exam at trial to rebut *an express or implied* charge of recent fabrication, improper influence or motive.
- FRE 801(d)(1)(B).
- Notes:
  - This rule is usually far less meaningful than 801(d)(1)(A) (substantive admissibility of prior *inconsistent* statement), because a prior *consistent* statement would always be cumulative of other substantive testimony, *i.e.*, the testimony which prompted the admission of the prior consistent statement.
  - However, improper admission of evid. under 801(d)(1)(B) might still require reversal. Why?

6 ***Tome v. U.S.,* 1995**

- Tome convicted of sexually assaulting his 4 year old daughter. Girl 6 ½ at trial. In

response to leading questions, she testifies (weakly), that Tome assaulted her. Defense suggests in cross-exam that she was motivated by her desire to live with her mother. Invoking FRE 801(d)(1)(B), prosecution then offers testimony of 6 highly credible witnesses as to what the girl told them.

- Is there a requirement that the prior consistent statements be made before the motive to change the story arose?
- Note that *Tome* was not reversed and rendered, but remanded for further consideration. Why?
-

7

- Prior out-of-court identification of a person as substantive proof, non-hearsay by definition, if made by a testifying witness after perceiving the person.
- FRE 801(d)(1)(C).
- Note: This requires that the witness is testifying at trial. Thus, the issues of jury perception of the witness and test by cross-examination are of less importance. The jury can assess which of the statements is more likely true.

8

***State v. Motta*, Hawaii 1983**

- Barmaid helps police sketch artist draw composite picture of robber. At trial, barmaid identifies the defendant. Prosecution admits the drawing, which resembles defendant.
- Is the drawing hearsay? If so, is it hearsay of the witness or the artist?
- Does the drawing meet the requirements of 801(d)(1)(C)?
- If the witness cannot (or will not) identify the defendant at trial, can this rule be used to identify the defendant substantively and support a conviction?
-

9

A statement is not hearsay if—

- (2) *Admission by party-opponent.* The statement is offered against a party and is
  - (A) the party's own statement, in either an individual or a representative capacity or
  - (B) a statement of which the party has manifested an adoption or belief in its truth, or
  - (C) a statement by a person authorized by the party to make a statement concerning the subject, or
  - (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
  - (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

  The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

FRE 801(d)(2)

10

- Prob. 4-B. Fire at auto garage. Owner tells his own casualty insurance adjuster that fire caused when employee negligently set a welding torch on the ground too close to paint fumes. Owner of vehicle destroyed in fire sues garage owner, and offers statements to adjuster as admissions. Admissible under 801(d)(2)(A) [one's own statement]?
- What of fact no personal knowledge?
- What of lack of qualifications to render opinions?
- What of fact that statement was self-serving?
- What of fact that speaker did not intend to create binding admission?

11

- Prob. 4-C. Ski resort, Brixton hooks up with waitress, Flynn, at his hotel room. Flynn later

claims sexual assault. Charges filed. Flynn also files civil lawsuit. In criminal case, Brixton offered opportunity to plead guilty to lesser charge of sexual contact.

- If Brixton pleads guilty to sexual contact, is guilty plea admissible in civil suit?
- What if Brixton pleads nolo contendre?
- Can Brixton buy dropping of criminal charges?
- What if Brixton apologizes?
- What effect of paying a traffic citation in a civil lawsuit arising from the accident that gave rise to the ticket?
- Tex. Code Crim. Proc. Art. 27.02. A plea of nolo contendere (to a misdemeanor)… may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.
- In Texas, a plea of guilty must be made in open court to be admissible in later civil suit.
-

12

- The *Bruton* Doctrine. Is it constitutionally acceptable to admit, in a trial against defendant 1, a confession of defendant 2, with limiting instructions that the jury cannot consider the confession against defendant 2?
- What about editing or redacting the confession?

13

- Prob. 4-D. Vehicle driven by Napton hits O'Brien. Napton later fired by his employer, Ace. Six months later, Napton tells O'Brien that the brakes failed and he was speeding at the time of the wreck. O'Brien sues Napton and Ace.
- Is statement that the brakes failed admissible against Napton? Ace?
- Is statement that Napton was speeding admissible against Napton? Ace?
-

14

- U.S. v. Hoosier, 6th Cir. 1976. Hoosier charged with bank robbery. At trial, witness is allowed to testify that
  - defendant told witness he planned to rob a bank; and
  - when witness saw defendant and his girlfriend with money, the girlfriend said "that's nothing, you should have seen the money we had in the hotel room."
  - Under what theory is the statement admissible at trial?
    - Admission by adoption (tacit), pursuant to FRE 801(d)(2)(B).
    - Generally, for tacit admission, must demonstrate to judge's satisfaction by preponderance standard that:
      - Defendant understood and appreciated the admission; and
      - Circumstances were such that defendant would ordinarily be expected to respond, deny, etc.
-

15

- The *Doyle* Doctrine. If a criminal defendant does not speak up to deny an admission after being arrested and Mirandized, can his failure to do so be construed as an admission by adoption pursuant to FRE 801(d)(2)(B)?
- Why not change Miranda to say: "What you say, or what you decline to say, may be used against you at the time of trial"?

16

- Prob. 4-F. Parents sue bus driver for running over son. Add bus mfr., claiming placement of mirrors made it impossible for driver to see. Bus mfr. gets summary judgment, on basis it did not manufacture this bus. Parents' attorney amends complaint/petition to delete claims with respect to mirror placement.
- Are superseded statements regarding mirror placement admissible against parents in trial

against bus driver?
- Yes, as statements by authorized agent, attorney, FRE 801(d)(2)(C).
- But not always. Keep in mind right to alternative pleading under federal and state rules and Rule 403 (confusion).
- Also, keep in mind that the statements are generally not conclusive, unless deemed "judicial admissions."

17

- Mahlandt v. Wild Canid Center, 8th Cir. 1978. Wolf-bite case. Question whether wolf actually bit child or injuries caused when child climbed under fence. Wolf-keeper, Poos, told Pres. of Canid Center, that wolf bit a child. Then, BOD of Canid in minutes discuss wolf-biting of child. Child sues Poos and Canid, defense verdict. Plaintiffs appeal, contending that statements should have been admitted.
- Are Poos' statements to Pres. Admissible against Poos?
  - Clearly, under 801(d)(2)(A), individual admission.
- Against Canid?
  - Yes, because made by agent during and in course of his agency. 801(d)(2)(D). Might be different if Poos said someone told me…
- Are Canid's minutes admissible against Poos?
  - No, agency admission rule does not work in reveerse.
- Against Canid?
  - Clearly.
  -

18

- Prob. 4-G. Driver of branded truck hits plaintiff's vehicle. Branded truck driver says that he was on an errand for his employer and was distracted. Plaintiff sues only employer; employer denies driver was in course and scope. Are statements of truck driver admissible against employer?
- Qualified "yes" under 801(d)(2)(D). Keep in mind last sentence of the rule: "The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E)." So what else must be proved?
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19

- Bourjaily v. US 1987. Greathouse, informant, speaks with Lonardo about making bulk cocaine sale for resale. Lonardo says he has a friend who is interested. Friend calls Greathouse and inquires about cocaine. Greathouse and Lonardo then agree to a delivery of the cocaine to friend's car, at particular time, place, and location. Friend, Bourjaily, convicted of conspiracy to distribute cocaine. Bourjaily appeals admissibility of Lonardo's statements against him.
- First issue, what standard must court apply under 104(a), to determine whether statements fit 801(d)(2)(E) [coconspirator statements].
  - Preponderance of the evidence.
- Can the statement itself be used by the court to determine whether it fits 801(d)(2)(E)?
  - Yes.
- Is the statement alone enough to uphold conviction?
  - No. See final sentence of 801(d)(2).
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