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Colleen Gale Trembl

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***State v. Hunt*: Rekindling Requirements for Impeaching One's Own Witness**

North Carolina Rule of Evidence 607 permits any party to impeach¹ a witness, even the party calling that witness.² On its face, the rule allows a party to call a witness for no other reason than to impeach that witness with prior inconsistent statements that otherwise would not be admissible. A crafty attorney may do this in hopes that the jury will ignore the judge's limiting instructions which admitted these statements for credibility purposes only and not as substantive evidence.

Before Congress promulgated the Federal Rules of Evidence in 1975,³ an attorney could impeach his own witness only if that witness's testimony was both surprising and damaging.⁴ Both the Federal and North Carolina Rules of Evidence eliminated these requirements with rule 607.⁵ Yet courts gradually have reinstated requirements for impeaching one's own witness to prevent parties from misusing impeachment to get impermissible hearsay before the jury.⁶ In *State v. Hunt*⁷ the North Carolina Supreme Court joined other courts that have limited an attorney's ability to impeach his own witness. The court's holding prevents a party from using rule 607 to disguise inadmissible hearsay as impeachment.⁸ The court also held that prior conflicting statements that an impeached witness denied making could not be introduced to corroborate the testimony of a later witness.⁹

This Note provides an overview of federal and North Carolina evidence rules 607 and traces the requirements that courts have established for using prior inconsistent statements to impeach one's own witness. It examines why the *Hunt* court was correct in clarifying the issue for North Carolina courts and limiting the opportunity for impeaching one's own witness. The Note concludes, however, that the court's limitations on rule 607 are more stringent than necessary to accomplish the goal of preventing the misuse of impeachment and corroboration as pretexts for introducing impermissible hearsay. The Note suggests that a better remedy for subterfuge impeachment is to apply a good faith

1. Impeachment is an attack on the credibility of a witness. See BLACK'S LAW DICTIONARY 678 (5th ed. 1979). It is accomplished by "showing the existence of bias; a prior inconsistent statement; untruthful or dishonest character; or defective ability to observe, remember, or recount the matter about which the witness testifies." *State v. Anderson*, 88 N.C. App. 545, 548, 364 S.E.2d 163, 165 (1988) (citing E. CLEARY, MCCORMICK ON EVIDENCE § 33, at 72-73 (3d ed. 1984)).

2. Rule 607 states: "The credibility of a witness may be attacked by any party, including the party calling him." N.C.R. EVID. 607. This is identical to federal rule 607. See FED. R. EVID. 607.

3. Rules of Evidence, Pub. L. No. 93-595, § 1, 88 Stat. 1934 (1975) (codified at FED. R. EVID. 607).

4. D. LOUSELL & C. MUELLER, FEDERAL EVIDENCE § 297, at 186 (1979 & Supp. 1989).

5. See FED. R. EVID. 607; N.C.R. EVID. 607.

6. See *infra* text accompanying notes 77-87.

7. 324 N.C. 343, 378 S.E.2d 754 (1989).

8. *Id.* at 350, 378 S.E.2d at 758.

9. *Id.* at 352, 378 S.E.2d at 759.

standard on the attorney and to require the witness to testify to some important piece of evidence.

Deborah Sykes was a 26-year-old copy editor for the *Winston-Salem Journal and Sentinel*.¹⁰ At 6:45 a.m. on August 10, 1984, she was raped and stabbed to death in a grassy field a few blocks from the newspaper's offices.¹¹ Darryl Eugene Hunt was brought to trial on a felony murder charge for her death.¹² At trial, three witnesses for the State identified Hunt in incriminating circumstances the morning of the murder.¹³ Hunt testified that from about 11:00 p.m. to 8:30 a.m., he was with his friend Sammy Mitchell at the McKee household.¹⁴ Three residents of the McKee household corroborated this testimony.¹⁵

Along with its three eyewitnesses, the State called Marie Crawford, a fourteen-year-old prostitute, who is severely emotionally disturbed.¹⁶ At trial, a therapist and a psychologist testified that Marie "could not be trusted to tell the truth."¹⁷ The State, however, contended that Marie made written statements, which strongly contradicted the defendant's alibi, to the police detective investigating the homicide, Officer Daulton.¹⁸ After several preliminary questions, the prosecutor asked Marie directly whether she had come to his office and given a statement.¹⁹ She admitted that she had come to his office, but at first denied she

10. *Id.* at 356, 378 S.E.2d at 762 (Mitchell, J., dissenting).

11. Defendant-Appellant's Brief at 3, *Hunt* (No. 84 CRS 42263).

12. *Hunt*, 324 N.C. at 344, 378 S.E.2d at 754.

13. Thomas Murphy testified that on his way to work, he saw Hunt on the street corner near the field with his right arm clasped around the victim. *Id.* at 357, 378 S.E.2d at 762 (Mitchell, J., dissenting). Johnny Gray called the police immediately after seeing the person whom he identified as the defendant in the field beating the victim and then tucking his shirt into his pants as he ran from the scene. *Id.* (Mitchell, J., dissenting). Roger Weaver, a hotel employee, identified the defendant as the man who entered the hotel's restroom that morning. *Id.* at 358, 378 S.E.2d at 762-63 (Mitchell, J., dissenting). One half-hour later, he discovered bloody paper towels and red-tinted water in the sink after the defendant left. *Id.* (Mitchell, J., dissenting). A month later, when Hunt's picture appeared in the newspaper, Weaver identified him as a man who "resembled" the one he had seen. Defendant-Appellant's Brief at 16-19, *Hunt* (No. 84 CRS 42263). Weaver identified Hunt in a lineup seven months later. *Id.* Defendant introduced evidence at trial that the identifications by these witnesses were questionable. *Id.* at 5-19; see *infra* note 131.

14. *Hunt*, 324 N.C. at 344-45, 378 S.E.2d at 755.

15. *Id.* at 345, 378 S.E.2d at 755.

16. Marie Crawford began working as a prostitute at age 11. Defendant-Appellant's Brief at 19. She had been institutionalized in mental-health and juvenile-detention facilities several times. *Id.* She has learning disabilities, cannot read well, sees words backwards, and writes only a little. *Id.* at 25.

17. *Id.* at 22.

18. The State said Marie gave two signed statements to Officer Daulton, dated August 30, 1984, and September 11, 1984. The statements said:

[O]n August 10th Mr. Darryl Hunt and Sammy Mitchell were at Motel 6 and Darryl Hunt and Sammy Mitchell left the room at about 6:00 a.m. and that they were both wearing black shirts and black pants and Darryl told me he was going to call a cab. The next time I saw Darryl was about 9:30 a.m. and he was nervous when he came back to the motel room and he said he needed a drink. Darryl had mud or grass stains on his pants knees[.]

[A]bout two weeks ago me and Darryl were at Motel 6 and Darryl was saying some stuff about the white lady that got killed downtown and Darryl said that Sammy did it when we were watching the Crimestoppers on the news and the television and I said to Darryl I wish I knew who killed that lady because I could use the money and Darryl said Sammy did it and he fucked her too.

Hunt, 324 N.C. at 345-46, 378 S.E.2d at 755-56.

19. *Id.* at 345, 378 S.E.2d at 755.

had made a statement and then later said she did not remember giving the prosecutor or the police detective a statement.²⁰ A *voir dire* followed, during which the prosecutor showed Marie the statements and Marie again denied giving or signing them.²¹ The court then denied defendant's motion to prevent the prosecution from cross-examining its own witness with rule 607.²² Although the defense argued that under rule 403 the prejudice to defendant "overwhelmed" the probative value, the trial court held that under the 403 balancing test, the probative value of the statements outweighed the danger of unfair prejudice or confusion.²³

In front of the jury, Marie again denied making the prior statements, but admitted signing the paper.²⁴ Defendant objected to reading the statements to the jury, but the trial court overruled the objection.²⁵ After asking if Officer Daulton would testify later, the court held that the statements were admissible for the purpose of corroborating the testimony of a later witness and instructed the jury.²⁶ The prosecution then read the statements to Marie in front of the jury. When Officer Daulton testified, the prosecution reintroduced the statements through the officer.²⁷ When the State offered the statements into evidence, defendant again objected, saying that the statements could not be used as substantive evidence, but only to challenge Marie's credibility.²⁸ The court overruled the objection and allowed both statements into evidence without giving any limiting instructions.²⁹ When the trial judge gave final jury instructions, he told the jurors that they should use Marie's conflicting statements only to determine her credibility.³⁰ Yet the judge then reiterated the testimony of Officer Daulton and the substance of Marie's statements.³¹ The jury, after seventeen hours of deliberation, convicted Hunt of first-degree murder based on the felony-murder doctrine and later sentenced him to life imprisonment.³²

Defendant appealed directly to the North Carolina Supreme Court, bypassing an appeal to the North Carolina Court of Appeals.³³ The supreme court granted Hunt a new trial.³⁴ The court held that the prosecution could not impeach Marie with Officer Daulton's extrinsic evidence of her prior inconsistent

20. *Id.*

21. *Id.*

22. *Id.* at 346-47, 378 S.E.2d at 756.

23. *Id.*

24. *Id.*

25. *Id.* at 347, 378 S.E.2d at 756.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 347-48, 378 S.E.2d at 756-57.

31. *Id.* at 348, 378 S.E.2d at 757.

32. Defendant-Appellant's Brief at 2, *Hunt* (No. 84 CRS 42263).

33. When a defendant is convicted of murder in the first degree and sentenced to either death or life imprisonment, he can appeal as of right directly to the supreme court. N.C. GEN. STAT. § 7A-27(a) (1989).

34. *Hunt*, 324 N.C. at 356, 378 S.E.2d at 761.

statements because they concerned collateral issues.³⁵ Marie's hearsay statements concerned Hunt's alibi, which was a material issue; her testimony, however, was not material to the issues. The court correctly focused on Marie's testimony, not her prior statements, to determine materiality.³⁶

More significantly, the court held that because of the jury's inability to distinguish impeachment from substantive evidence,³⁷ impeaching one's own witness using rule 607 "may not be permitted where employed as a *mere subterfuge* to get before the jury evidence not otherwise admissible."³⁸ The court noted that impeaching one's own witness is legitimate only in "rare" cases.³⁹ The court stated that this was not such a case because Marie's testimony was not critical and because the State "appeared to know before Marie was called to the stand that she would not cooperate."⁴⁰ The court also held that the statements could not be admitted as corroboration of Officer Daulton's testimony because the statements were not prior consistent statements of the officer but were hearsay statements by Marie.⁴¹ Finally, the court said that the statements also failed to satisfy the requirements of North Carolina Rule of Evidence 403 because "[t]he prejudicial effect of this testimony far outweighed the need to show Marie to be less than credible . . . or the need to bolster Officer Daulton's credibility."⁴²

The goal of impeachment is to "reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony."⁴³ This can be done by showing a defect in the witness's perception, memory, narration, or truthfulness.⁴⁴ A primary method of attacking the credibility of a witness is through prior inconsistent statements. The witness may have made

35. *Id.* at 348, 378 S.E.2d at 757.

36. Since Marie's testimony contained little of value to the State, the issues in the testimony were collateral, and the State could not prove them with extrinsic evidence. *See infra* text accompanying notes 160-166.

37. Interestingly, the *Hunt* court acknowledged that jury instructions alone cannot mitigate the jury's confusion over impeachment and substantive evidence. *See Hunt*, 324 N.C. at 349, 378 S.E.2d at 757. In fact, the court stated that this "danger of confusion has been widely recognized." *Id.* However, the court later stated that an effective jury instruction qualified as one of the rare situations in which a party can impeach its own witness. *Id.* at 350, 378 S.E.2d at 758. *See supra* text accompanying notes 18-20.

38. *Hunt*, 324 N.C. at 349, 378 S.E.2d at 757 (quoting *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975)).

39. *Id.* at 350, 378 S.E.2d at 758. The court cited three "rare" situations in which federal courts have been willing to allow impeachment of one's own witness. *Id.* These included when the witness' testimony is extensive and vital; when the party calling the witness is genuinely surprised; and when the judge gives an effective limiting instruction. *Id.*; *see infra* text accompanying notes 120, 142-59.

40. *Hunt*, 324 N.C. at 351, 378 S.E.2d at 758.

41. *Id.* at 352, 378 S.E.2d at 759.

42. *Id.* at 353, 378 S.E.2d at 759. On a separate issue, the court also held that the police department's lineup identification by the hotel employee violated defendant's sixth amendment right to effective assistance of counsel. *Id.* at 354-55, 378 S.E.2d at 760-61. The court said the police should have allowed defendant's attorney to view the lineup, but that defendant had waived this right by failing to object when the witness in front of the jury pointed out defendant as the man he had identified in the lineup. *Id.* at 355, 378 S.E.2d at 761.

43. 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 38, at 192 (3d ed. 1988 & Supp. 1989) (quoting *State v. Nelson*, 200 N.C. 69, 72, 156 S.E. 154, 156 (1930); *State v. Adcox*, 303 N.C. 133, 141, 277 S.E.2d 398, 403 (1981)).

44. *Id.*

these inconsistent statements orally or in writing, in or outside a formal hearing or trial.⁴⁵ Inconsistent statements for impeachment are admissible simply for the jury to consider in evaluating the witness's credibility, but not as substantive proof of what is asserted in the statements.⁴⁶ Therefore, an inconsistent statement is not usually admissible until the witness has testified to something that is inconsistent with the previous statement.⁴⁷

The method by which a prior inconsistent statement is proved depends upon the relationship of the witness's testimony to the prior statements. For example, if the inconsistent statement relates to a material issue, it can be proved by extrinsic evidence;⁴⁸ that is, other witnesses can testify about the statement without first calling the statement to the witness's attention.⁴⁹ The statement relates to a "material" issue if it is "pertinent and material" to the issues or if it involves "the subject matter in regard to which [the witness] is examined."⁵⁰

Conversely, if the prior statement relates to a collateral⁵¹ issue but shows the witness's partiality or bias toward the cross-examiner's adversary, or "the

45. *Id.* § 46, at 215-16.

46. Under the Federal Rules of Evidence, certain prior inconsistent statements are not hearsay and can be used as substantive evidence as well as for impeachment. Federal rule 801(d)(1)(A) states that prior statements given at a trial or hearing and subject to cross-examination are not hearsay if "inconsistent with [the witness] testimony, and . . . given under oath." FED. R. EVID. 801(d)(1)(A). In North Carolina, however, all prior inconsistent statements are considered hearsay and can be used only for impeachment purposes, unless a hearsay exception applies. *See* State v. Bartlett, 77 N.C. App. 747, 752, 336 S.E.2d 100, 103 (1985). As the commentary to the North Carolina Evidence Code notes, the federal rule "departs markedly from the common law in North Carolina" by excluding these prior statements from hearsay, and so "[a]ccordingly, the language of Fed. R. Evid. 801(d)(1) . . . was deleted." N.C.R. EVID. 801 commentary. This indicates North Carolina's reservations about a jury basing a criminal conviction or civil judgment solely on the substantive use of a witness's prior statement. Note, *The New North Carolina Rules of Evidence: Privileges, Relevancy, Competency, Impeachment, and Expert Opinion*, 62 N.C.L. REV. 1290, 1304-05 (1984).

47. 1 H. BRANDIS, *supra* note 43, § 46, at 219. For example, in State v. Platt, 85 N.C. App. 220, 354 S.E.2d 332, *disc. rev. denied*, 320 N.C. 516, 358 S.E.2d 529 (1987), the witness never testified about the events he saw, but merely denied making a statement to police. *Id.* at 224-25, 354 S.E.2d at 334-35. The prosecution then called a police officer to testify about the statement he took from the witness and to read the statement to the jury. The court refused to admit the contents of the statements as impeachment evidence because "[a]s Townsend never testified to his recollection of the events . . . , he never 'testified to something with which [his statement was] inconsistent . . .'" *Id.* at 225, 354 S.E.2d at 335 (quoting 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 46, at 176 (2d rev. ed. 1982 & Supp. 1983)).

48. Extrinsic evidence is external evidence, or evidence "not contained in the body of an agreement, contract and the like." BLACK'S LAW DICTIONARY, *supra* note 1, at 529; *see* 1 H. BRANDIS, *supra* note 43, § 48, at 224.

49. State v. Green, 296 N.C. 183, 193, 250 S.E.2d 197, 203 (1978). *See* 1 H. BRANDIS, *supra* note 43, § 46, at 221. North Carolina's Evidence Rule 613 omits subsection (b) of federal rule 613. *See* N.C.R. EVID. 613 commentary. Federal rule 613(b) bars extrinsic evidence of prior inconsistent statements, unless the witness is given a chance to explain or deny the statements and the opponent is given the chance to interrogate the witness. FED. R. EVID. 613(b). Since this subsection is omitted from the state rule, requirements are governed by North Carolina case law. N.C.R. EVID. 613 commentary.

50. Green, 296 N.C. at 193, 250 S.E.2d at 203 (citations omitted). For example, when a defense witness's testimony about defendant's alibi differed from prior statements made by that witness to the police, that testimony was material because it "respected the *main subject matter* in regard to which such witnesses were examined, namely, the whereabouts of the defendant at the time the offense is alleged to have been committed." *Id.* at 194, 250 S.E.2d at 204 (quoting State v. Wellmon, 222 N.C. 215, 217-18, 22 S.E.2d 437, 439 (1942)). The State could then call a witness to testify about the prior inconsistent statements given to the police.

51. Collateral facts consist of evidence "outside the controversy, or . . . not directly connected

witness'[s] hostility toward the cross-examiner's cause," the cross-examiner is not bound by the witness's denial of bias.⁵² The witness has a chance to deny or explain the bias, but if she denies it, the prior statements can be proved by other witnesses.⁵³

Finally, if the statement relates to a collateral issue, the party may not contradict it with other witnesses' testimony about the prior statements.⁵⁴ In such a case, "the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them by other testimony."⁵⁵ The policy behind refusing to allow extrinsic evidence for a collateral matter "is not the saving of time and confusion, . . . but the protection of the other party against the hearsay use by the jury of the previous statement."⁵⁶

Determining what is a material issue and what is a collateral issue is not always easy. The key to materiality is that the prior statement must concern the subject matter about which the witness is questioned, and the subject matter of the witness's testimony must be "itself material to an issue in the case."⁵⁷ A court therefore must examine the materiality of the statement in light of the witness's testimony, not the materiality of the conflicting prior statements alone. For example, a witness's denial of a prior inconsistent statement makes that testimony collateral because a "denial did not tend to establish any material fact in the case; it was negative testimony which proved nothing."⁵⁸ The rule is that "a negative answer is not damaging to the examiner, but merely disappointing, and may not be thus impeached."⁵⁹

Before federal and North Carolina rule 607 were enacted, the traditional rule was that a party could not impeach its own witness.⁶⁰ Courts developed this rule for three reasons: 1) The calling party was said to vouch for the testi-

with the principal matter or issue in dispute." BLACK'S LAW DICTIONARY, *supra* note 1, at 237. See *infra* notes 57-59 and accompanying text.

52. State v. Cutshall, 278 N.C. 334, 349, 180 S.E.2d 745, 754 (1971).

53. 1 H. BRANDIS, *supra* note 43, § 48, at 226-27.

54. Green, 296 N.C. at 192, 250 S.E.2d at 203.

55. *Id.*

56. State v. Moore, 275 N.C. 198, 214, 166 S.E.2d 652, 663 (1969) (quoting MCCORMICK, LAW OF EVIDENCE § 36, at 67 (2d ed. 1954)).

57. Green, 296 N.C. at 193, 250 S.E.2d at 204. Several cases, however, indicate that the court should focus on the prior statement, not the testimony, to see if it is collateral or material. See State v. Cutshall, 278 N.C. 334, 349, 180 S.E.2d 745, 754 (1971); Jones v. Jones, 80 N.C. 246, 247 (1879); State v. Patterson, 24 N.C. (1 Ired.) 346, 353-54 (1842). If that were the case, then Marie's statements were material and not collateral, and could be proved by extrinsic evidence.

58. Moore, 275 N.C. at 213, 166 S.E.2d at 662. In Moore defendant's brother denied that defendant admitted he shot the victim. *Id.* The sheriff could not testify that the witness told him that defendant made the admission because the witness's denial was a collateral matter that could not be impeached with extrinsic evidence. *Id.*; see State v. Williams, 322 N.C. 452, 456, 368 S.E.2d 624, 626 (1988).

59. Moore, 275 N.C. at 213, 166 S.E.2d at 662-63 (quoting MCCORMICK, LAW OF EVIDENCE § 36, at 67 (2d ed. 1954)). Unlike the North Carolina courts, some courts have distinguished between a witness's denial and a witness's failure to recall. If a witness states that she cannot recall, "there is nothing harmful in evidence and any attempt to 'impeach' becomes subterfuge. . . . However, where a witness affirmatively denies that the defendant made an admission of guilt to him, there is at least an exculpatory inference that something did not take place as alleged and impeachment should be allowed." United States v. Long Soldier, 562 F.2d 601, 605 (8th Cir. 1977).

60. D. LOUSELL & C. MUELLER, *supra* note 4, § 297, at 182.

mony of its own witnesses; 2) the calling party was morally bound by that testimony; and 3) the court wanted to prevent attorneys from coercing testimony by threatening potentially uncooperative witnesses with impeachment of their character.⁶¹ Courts have recognized that these ancient reasons no longer apply because parties in modern trials do not vouch for their witnesses and are "rarely able to select their witnesses: they must take them where they find them."⁶² The voucher rule put the calling party at the mercy of its own witness because "if the witness tells a lie, the adversary will not attack, and the calling party, under the rule, cannot."⁶³ As a result, many courts developed exceptions to the voucher rule so that parties could impeach their own witnesses if their witness' testimony both surprised and affirmatively damaged the calling party.⁶⁴ North Carolina courts required that the party's witness had to mislead and surprise the calling attorney, and that the "testimony as to a material fact [was] contrary to what the [party] had a *right* to expect."⁶⁵ In those cases, the North Carolina courts admitted prior inconsistent statements of one's own witness "to show the [attorney] was surprised by the witness's testimony at trial and to explain why the witness was called by the [party]."⁶⁶

When Congress enacted the Federal Rules of Evidence in 1975,⁶⁷ it abolished the voucher rule with rule 607.⁶⁸ North Carolina's legislature followed suit in 1983 by enacting the identical rule.⁶⁹ The commentary to the North Carolina Evidence Code states that rule 607 "abandons the traditional common-law rule that a party 'vouches' for a witness by calling him and, therefore, may not impeach his own witness."⁷⁰ Rule 607 permits any party to attack the credibility of a witness, including the party calling the witness.⁷¹ As the rule is written, a party could impeach a witness without regard to either the motive of the party or the formalities for impeaching a witness.

In reality, several restrictions remain on impeaching one's own witness with prior inconsistent statements. The general requirements for using prior inconsistent statements discussed above still apply when a party impeaches its own wit-

61. *Id.*

62. *Chambers v. Mississippi*, 410 U.S. 284, 294-97 (1973).

63. E. CLEARY, *MCCORMICK ON EVIDENCE* § 38, at 83 (3d ed. 1984).

64. Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*, 75 MICH. L. REV. 1565, 1612 (1977).

65. *State v. Pope*, 287 N.C. 505, 513, 215 S.E.2d 139, 145 (1975); accord *State v. Lovette*, 299 N.C. 642, 649, 263 S.E.2d 751, 756 (1980).

66. *State v. McDonald*, 312 N.C. 264, 269-70, 321 S.E.2d 849, 852 (1984) (quoting *State v. Cope*, 309 N.C. 47, 51, 305 S.E.2d 676, 679 (1983)).

67. Rules of Evidence, Pub. L. No. 93-595, § 1, 88 Stat. 1934 (1975) (codified at FED. R. EVID. 607).

68. The Advisory Committee on the Proposed Rules stated that the "traditional rule against impeaching one's own witness is abandoned as based on false premises. . . . The substantial inroads into the old rule made over the years by decisions, rules, and statutes are evidence of doubts as to its basic soundness and workability." FED. R. EVID. 607 advisory committee's note.

69. Act of July 7, 1983, ch. 701, § 1, 1983 N.C. Sess. Laws 672 (codified at N.C. GEN. STAT. ch. 8C, Evidence Code, Rule 607 (1988)).

70. N.C.R. EVID. 607 commentary.

71. FED. R. EVID. 607; N.C.R. EVID. 607.

ness.⁷² In addition, the judge, upon request, must give jurors a limiting instruction telling them to consider the prior inconsistent statement only for judging credibility, and not as substantive evidence.⁷³ A court's failure to give the requested limiting instruction when appropriate is reversible error.⁷⁴ Also, North Carolina and Federal Rule of Evidence 403 require the judge to exclude the prior statement if the potential prejudice and confusion caused by the evidence substantially outweigh its probative value.⁷⁵ This limitation on rule 607 is evident from the commentary to North Carolina's rule 607: "The impeaching proof must be relevant within the meaning of Rule 401 and 403"⁷⁶

Along with these general requirements, courts have hesitated to let parties impeach their own witnesses despite the clear wording of rule 607.⁷⁷ Many courts now hold that "impeachment by prior inconsistent statement may not be permitted where employed as mere subterfuge to get before the jury evidence not otherwise admissible."⁷⁸ Indeed, all the circuits of the United States Courts of Appeals are in agreement that "evidence that is inadmissible for substantive purposes may not be purposely introduced under the pretense of impeachment."⁷⁹ Courts have created this exception because of a fear that jurors will not "distinguish between impeachment and substantive evidence," and will permit defendants to be "convicted on the basis of unsworn testimony."⁸⁰ As the United States Court of Appeals for the Seventh Circuit held:

[I]t would be an abuse of [rule 607], in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence—or, if it didn't miss it, would ignore it.⁸¹

72. See *supra* text accompanying notes 43-59. For example, extrinsic evidence can be used to bring out prior inconsistent statements only if the witness's testimony is material. *Id.*

73. *State v. Erby*, 56 N.C. App. 358, 361, 289 S.E.2d 86, 88 (1982).

74. *Id.*

75. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of the unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403; N.C.R. EVID. 403.

76. N.C.R. EVID. 607 commentary.

77. See *infra* notes 78-79.

78. *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975). See, e.g., cases cited *infra* note 79.

79. *United States v. Peterman*, 841 F.2d 1474, 1479 n.3 (10th Cir. 1988) (stating that every circuit now agrees with the restriction of impeachment that operates as subterfuge), *cert. denied*, 109 S. Ct. 783 (1989); see *United States v. Frappier*, 807 F.2d 257, 259 (1st Cir. 1986), *cert. denied*, 481 U.S. 1006 (1987); *United States v. Johnson*, 802 F.2d 1459, 1466 (D.C. Cir. 1986); *Balogh's of Coral Gables, Inc. v. Getz*, 798 F.2d 1356, 1358 n.2 (11th Cir. 1986) (en banc); *United States v. Hogan*, 763 F.2d 697, 701-03 (5th Cir. 1985), *corrected*, 771 F.2d 82 (5th Cir. 1985); *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984); *United States v. Crouch*, 731 F.2d 621, 624 (9th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985); *United States v. Fay*, 668 F.2d 375, 379 (8th Cir. 1981); *United States v. DeLillo*, 620 F.2d 939, 946 (2d Cir.), *cert. denied*, 449 U.S. 835 (1980); *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975); *United States v. Dye*, 508 F.2d 1226, 1234 (6th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975).

80. *Morlang*, 531 F.2d at 190.

81. *Webster*, 734 F.2d at 1192.

The federal courts' new rule does not mean that a party can never impeach its witness even if it knows that some damaging statements will be elicited. Parties can resort to introducing prior inconsistent statements "where the trial court, in its discretion, determines that it is necessary to alleviate the harshness of subjecting a party to the mercy of a witness who is recalcitrant or who may have been unscrupulously tampered with."⁸² Impeachment is only improper "if there is no relevant contribution to be made by the witness's principal testimony on direct examination."⁸³ For example, a party can call a witness whose testimony is helpful and then "attempt to impeach him, about those aspects of his testimony which conflicted."⁸⁴ Unlike the pre-607 rule, "[i]mpeachment under Rule 607 is not limited to occasions where the party calling the witness is surprised or misled by the testimony."⁸⁵ Instead, several courts have applied a good-faith standard on the part of the attorney in determining whether impeachment is permissible.⁸⁶ As the the Seventh Circuit stated:

Suppose the government called an adverse witness that it thought would give evidence both helpful and harmful to it, but it also thought that the harmful aspect could be nullified by introducing the witness's prior inconsistent statement. . . . [W]e are at a loss to understand why the government should be put to the choice between the Scylla of forgoing impeachment and the Charybdis of not calling at all a witness from whom it expects to elicit genuinely helpful evidence. The good faith standard strikes a better balance.⁸⁷

Before *Hunt*, the North Carolina Supreme Court never had mandated requirements for impeaching one's own witness under rule 607. In one case, the court merely stated that because rule 607 permits a witness to be impeached by any party, "the State had the right under Rule 607 to elicit contradictory testimony."⁸⁸ The North Carolina Court of Appeals had reached conflicting decisions on this issue.⁸⁹ In *State v. Bell*⁹⁰ the court held that although rule 607 technically abolished any limitations on impeaching one's own witness, "there exists a real danger that this rule, if not applied cautiously, . . . would make fair

82. *Morlang*, 531 F.2d at 190.

83. *Frappier*, 807 F.2d at 259.

84. *United States v. DeLillo*, 620 F.2d 939, 946 (2d Cir.), *cert. denied*, 449 U.S. 835 (1980). The court in *DeLillo* affirmed the admission of a tape recording to impeach part of the testimony of a State witness. *Id.* at 946-47. The court said that because the witness' corroborating testimony was "essential in many areas of the government's case," the State could impeach him on other conflicting matters. *Id.* at 946.

85. *Frappier*, 807 F.2d at 259 (quoting *Robinson v. Watts Detective Agency*, 685 F.2d 729, 740 (1st Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983)).

86. *See, e.g., United States v. Webster*, 734 F.2d 1191, 1193 (7th Cir. 1984).

87. *Id.*

88. *State v. Covington*, 315 N.C. 352, 357, 338 S.E.2d 310, 314 (1986). The court noted that this impeachment also met the pre-607 requirements because the State was genuinely surprised by the testimony. *Id.* at 358, 338 S.E.2d at 314.

89. *Compare State v. Bell*, 87 N.C. App. 626, 633, 362 S.E.2d 288, 292 (1987) (requiring that a party need to impeach the witness) with *State v. Hyleman*, 89 N.C. App. 424, 426-27, 366 S.E.2d 530, 532 (1988) (permitting impeachment if the witness's testimony is needed), *rev'd on other grounds*, 324 N.C. 506, 379 S.E.2d 830 (1989).

90. 87 N.C. App. 626, 362 S.E.2d 288 (1987).

game of almost any out-of-court statement ever made by any witness.”⁹¹ The court, therefore, required that the trial court decide “whether the witness’s testimony is other than what the State had reason to expect or whether a need to impeach otherwise exists.”⁹² Four months later, in *State v. Hyleman*,⁹³ the court of appeals relaxed its impeachment requirements by permitting a second witness to impeach the testimony of a witness who denied making a statement.⁹⁴ The court stated that the witness’s “actions were important to the State’s case, and his testimony was needed.” It added that the State had acted in good faith in impeaching the witness.⁹⁵

Besides intentionally impeaching one’s own witness as subterfuge, an attorney also may use rule 607 to introduce inadmissible hearsay disguised as a prior consistent statement. The attorney would do this by 1) bringing out a prior inconsistent statement while impeaching his own witness, 2) introducing a second witness who heard the statement to testify about it, and then 3) arguing that those prior statements of the first witness should be admissible to corroborate the testimony of the second witness.⁹⁶ Clearly, prior statements can be used to corroborate⁹⁷ a witness’s testimony. However, the testimony being corroborated cannot be hearsay also.⁹⁸ If the court permitted this, a party could use prior hearsay statements of one witness to corroborate the hearsay testimony of another witness.

In North Carolina, prior consistent statements are admissible “solely for the purpose of affirming the credibility of the witness, and, upon proper request, the jury must be instructed accordingly.”⁹⁹ Unlike other jurisdictions, North

91. *Id.* at 633, 362 S.E.2d at 292.

92. *Id.* The court said that without such restraints, “the rule too easily camouflages a ruse whereby a party may call an unfriendly witness *solely* to justify the subsequent call of a second witness to testify about a prior inconsistent statement.” *Id.*

93. 89 N.C. App. 424, 366 S.E.2d 530 (1988), *rev’d on other grounds*, 324 N.C. 506, 379 S.E.2d 830 (1989). The North Carolina Supreme Court held that on retrial, the trial court must re-examine the impeachment issue in *Hyleman* in light of the test given in *Hunt*. *Hyleman*, 324 N.C. at 511, 379 S.E.2d at 833.

94. *Hyleman*, 89 N.C. App. at 426-27, 366 S.E.2d at 532.

95. *Id.* at 427, 366 S.E.2d at 532. Judge Becton strongly dissented, stating that he was “concerned with what may be a growing trend of using prior inconsistent statements as a subterfuge to get before the jury hearsay evidence not otherwise admissible.” *Id.* at 430, 366 S.E.2d at 533 (Becton, J., dissenting). He noted the State’s need for the witness’s testimony did not justify impeachment, and that the State knew that the witness was going to deny his previous statements. *Id.* at 430, 366 S.E.2d at 533-34 (Becton, J., dissenting).

96. This is exactly what the State in *Hunt* argued to the trial court. *Hunt*, 324 N.C. at 347, 378 S.E.2d at 756. The State contended that even if the statements were not admissible as impeachment, Marie’s statements corroborated Officer Daulton’s testimony. *Id.* at 352, 378 S.E.2d at 759. The problem, however, with that argument was that Officer Daulton’s testimony about the content of the statements also was hearsay. *Id.*

97. Corroboration is the process of persuading the trier of fact that a witness is credible. 1 H. BRANDIS, *supra* note 43, § 49, at 230. It is the opposite of impeachment. *Id.* North Carolina courts have defined “corroborate” as “to strengthen, to add weight or credibility to a thing by additional and confirming facts or evidence.” *State v. Higgenbottom*, 312 N.C. 760, 769, 324 S.E.2d 834, 840 (1985) (quoting *State v. Case*, 253 N.C. 130, 135, 16 S.E.2d 429, 433 (1960), *cert. denied*, 365 U.S. 830 (1961)).

98. See *Wolfe v. Hewes*, 41 N.C. App. 88, 92, 254 S.E.2d 204, 207, *disc. rev. denied*, 298 N.C. 206 (1979).

99. 1 H. BRANDIS, *supra* note 43, § 52, at 242 (footnotes omitted); see *State v. Erby*, 56 N.C.

Carolina does not require impeachment of the witness before a party can introduce prior consistent statements to boost that witness's credibility.¹⁰⁰ Prior consistent statements, however, are admissible only when they actually are consistent with the witness's trial testimony.¹⁰¹ A witness's prior contradictory statement cannot be admitted "under the guise of corroborating his testimony."¹⁰² In addition, "the state may not, under the guise of 'corroboration,' introduce 'new' evidence—that is, evidence which substantially and materially goes beyond that which it is intended to corroborate."¹⁰³ The prior statement need not parallel exactly the specific facts from the witness's testimony "so long as the prior statement in fact tends to add weight or credibility to such testimony."¹⁰⁴

Generally, prior consistent statements made outside the courtroom by someone other than the witness are not admissible in North Carolina to corroborate the witness's testimony.¹⁰⁵ "A corroborative statement is admissible only to corroborate the testimony of *the witness who made the statement*."¹⁰⁶ North Carolina courts, however, have permitted a third person's statements to corroborate the testifying witness in some cases.¹⁰⁷

The admission or exclusion of a prior consistent or inconsistent statement is left to the discretion of the trial judge.¹⁰⁸ These decisions are not subject to review "except upon a showing of an abuse of discretion."¹⁰⁹ A trial court has

App. 358, 361, 289 S.E.2d 86, 88 (1982). North Carolina Rules of Evidence exclude rule 801(d)(1)(B) of the federal rules. See N.C.R. EVID. 801. Federal rule 801(d)(1) indicates that a statement is not hearsay if the witness testifies under oath at a trial or hearing, is subject to cross-examination, and "the statement is . . . consistent with [the declarant's] testimony and is offered to rebut an express or implied charge against [the declarant] of recent fabrication or improper influence or motive." FED. R. EVID. 801(d)(1). This rule permits some prior consistent statements to be used both for corroboration and as substantive evidence. See *United States v. Harris*, 761 F.2d 394, 399-400 (1985).

100. 1 H. BRANDIS, *supra* note 43, § 51, at 236-37.

101. *Id.* § 52, at 240.

102. *State v. Burton*, 322 N.C. 447, 450, 368 S.E.2d 630, 632 (1988) (quoting *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 574 (1986)).

103. *State v. Rogers*, 299 N.C. 597, 606, 264 S.E.2d 89, 95 (1980) (Exum, J., concurring).

104. *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986). Therefore, slight differences between the testimony and the statement do not make the statement inadmissible. *State v. Covington*, 290 N.C. 313, 337, 226 S.E.2d 629, 646 (1976); see also *State v. Riddle*, 316 N.C. 152, 159, 340 S.E.2d 75, 79 (1986) (allowing prior consistent statements even if they contradict another witness's testimony).

105. *State v. McAdoo*, 35 N.C. App. 364, 367, 241 S.E.2d 336, 338, *disc. rev. denied*, 295 N.C. 93 (1978). A third person's prior statement, of course, could be admissible if it satisfies an exception to the hearsay rule or is used in a way so that it is not hearsay. 1 H. BRANDIS, *supra* note 43, § 52, at 244.

106. *State v. McMillan*, 55 N.C. App. 25, 30, 284 S.E.2d 526, 530 (1981) (citing *State v. Miller*, 288 N.C. 582, 596, 220 S.E.2d 326, 336 (1975)).

107. See *State v. Riddle*, 316 N.C. 152, 159, 340 S.E.2d 75, 79 (1986) (testimony of protective services worker discussing prior conversation used to corroborate victim's testimony); *State v. Squire*, 302 N.C. 112, 117, 273 S.E.2d 688, 691-92 (1981) (witness testimony about co-perpetrator's statements used to corroborate another witness); *Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 481, 157 S.E.2d 131, 138-39 (1967) (plaintiff's prior statement treated as corroboration of expert witness, not plaintiff).

108. Cf. *Inman v. Harper*, 2 N.C. App. 103, 108, 162 S.E.2d 629, 633 (1968) (exclusion of prior consistent statements not reversible error).

109. *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985).

abused its discretion only "upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision."¹¹⁰ North Carolina's statute states the test as whether "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial."¹¹¹

In *State v. Hunt* the Supreme Court of North Carolina confronted the use of prior inconsistent and consistent statements when impeaching one's own witness. The court employed a five-part analysis to examine the issue.¹¹² In each part, the court set out several general rules governing the case: 1) A party cannot use extrinsic evidence to prove a collateral matter; 2) impeachment with rule 607 cannot be used as mere subterfuge; 3) an effective limiting instruction is essential when impeaching one's own witness; 4) prior hearsay statements cannot be used to corroborate the testimony of another witness; and 5) rule 403 also restricts impeachment of one's own witness.

In the first part, the court stated that initially the trial judge admitted the statements for the purpose of impeaching the credibility of the State's own witness, Marie.¹¹³ The court noted that rule 607 allowed the State to impeach its own witness, but that the general principles of cross-examination also applied when impeaching one's own witness.¹¹⁴ As a result, the court applied the general rule that a party cannot use extrinsic evidence to prove prior inconsistent statements "where the questions concern matters collateral to the issues."¹¹⁵ The court said collateral matters include "testimony contradicting a witness's denial that he made a prior statement when that testimony purports to reiterate the substance of the statement."¹¹⁶ Therefore, the State could call Officer Daulton to contradict Marie's denial that she made a prior statement to the police, but Officer Daulton could not testify to the substance of Marie's prior statement.¹¹⁷

In the second part of its analysis, the court adopted the federal courts' holding that "impeachment by prior inconsistent statement may not be permitted where employed as a *mere subterfuge* to get before the jury evidence not otherwise admissible."¹¹⁸ The court went beyond that and inferred from the federal courts' decisions the principle that, except in three "rare" situations, a party

110. *Id.* (citing *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985)).

111. N.C. GEN. STAT. § 15A-1443(a) (1988).

112. *Hunt*, 324 N.C. at 348-354, 378 S.E.2d at 757-60.

113. *Id.* The court noted that analyzing the admissibility of the statements was complicated because "they appear to have been admitted for both credibility and substantive purposes under the authorization of more than one of the North Carolina Rules of Evidence." *Hunt*, 324 N.C. at 348, 378 S.E.2d at 757. The court said it had to examine not only the stated grounds for using the statements and the trial court's reasoning, but also the "purposes for which they were actually used." *Id.* See *supra* text accompanying notes 16-31.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 348-49, 378 S.E.2d at 757.

118. *Id.* at 349, 378 S.E.2d at 757 (quoting *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975)). If parties use subterfuge, they are "taking advantage of the jury's likely confusion regarding the limited purpose of impeachment evidence." *Id.*

impeaches its own witness primarily to get an inadmissible statement before the jury.¹¹⁹ The court stated that the exceptional cases when a party impeaches in good faith have included: 1) when the witness's testimony was "extensive and vital to the government's case;" 2) when the party calling the witness was genuinely surprised by his reversal; and 3) when the trial court followed the introduction of the statement with an effective limiting instruction.¹²⁰ The court noted that Marie's testimony was not critical to the State's case,¹²¹ it was not introduced in good faith,¹²² and it was not followed with an effective limiting instruction.¹²³

In its third section of the analysis, the court detailed why the trial court's limiting instructions were not effective. The court stated that the trial court initially instructed the jury to consider Marie's prior statements only for the purpose of evaluating the officer's credibility, but it failed to give this warning when the statements were read to Marie or when Officer Daulton reiterated them during his direct examination.¹²⁴ The supreme court said that as a result of this failure, the prosecution actually used the prior statements as substantive evidence, and any later restriction on their use was futile.¹²⁵ The court held that because the statements were hearsay, the State could not use them substantively even if they corroborated another witness.¹²⁶

In the fourth part, the court said that Marie's prior statements could not be used to corroborate Officer Daulton's testimony.¹²⁷ The court held that the prior statements should only have been used to show that Marie made the statements to the officer on a certain date, but not to prove the facts in those statements.¹²⁸ The court stated that "extrajudicial declarations of someone other than the witness purportedly being corroborated" cannot be used as prior consistent statements.¹²⁹

In the final part, the court held that, in any case, the prior statements failed the balancing test of North Carolina rule 403.¹³⁰ The court said that the statements' prejudice far outweighed the need to show "Marie to be less than credible . . . or the need to bolster Officer Daulton's credibility."¹³¹ Therefore, the court

119. *Id.* at 350, 378 S.E.2d at 758.

120. *Id.*

121. The court stated that except for the brief testimony about the color of her bicycle, Marie's testimony provided no substantive evidence for the State. *Id.* at 351, 378 S.E.2d at 758.

122. *Id.* at 351, 378 S.E.2d at 758-59. The court noted that the prosecutor knew that the defendant's counsel had visited Marie while she was in jail in Atlanta in 1985 and believed that this visit persuaded Marie not to talk or testify. *Id.* at 351, 378 S.E.2d at 759. In fact, Marie told officers accompanying her back to North Carolina that she would not testify. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 352, 378 S.E.2d at 759.

126. *Id.* The court added that statements that the declarant has denied do not corroborate or strengthen the testimony of another witness. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* (quoting 1 H. BRANDIS, *supra* note 43, § 52, at 243).

130. See *supra* notes 73-76 and accompanying text.

131. *Hunt*, 324 N.C. at 353, 378 S.E.2d at 760. The court said that the statements may have carried more weight in the jurors' minds because of the doubts surrounding the testimony of the

said the trial court had abused its discretion in admitting the statements and ordered a new trial.¹³²

In *Hunt*, the North Carolina Supreme Court examined two issues involved in impeaching one's own witness. Most importantly, it restricted rule 607 and the situations in which a party can use the rule to impeach one's own witness with prior statements. Second, it clarified when a party can introduce the prior statements of its own impeached witness as corroboration of another witness's testimony.

In examining the first issue, *Hunt* established for North Carolina the rule already accepted by the federal courts: A party cannot introduce for substantive use hearsay evidence "under the guise of impeachment evidence."¹³³ The court adopted the test of whether a party employed impeachment as "*mere subterfuge*" to get inadmissible hearsay before the jury.¹³⁴ "Subterfuge" is involved whenever a party impeaches its own witness "for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible."¹³⁵ The *Hunt* court was correct that the prosecutor called Marie as subterfuge for the primary purpose of impeaching her with impermissible hearsay. Marie testified to "little if anything of value to the state,"¹³⁶ and the State knew before she testified that she would not cooperate by reiterating her prior statements.¹³⁷

The court's restriction on rule 607 is necessary because it prevents a party from intentionally introducing inadmissible statements as impeachment knowing that "despite the court's instruction to the contrary, the jury will give the statement substantive weight."¹³⁸ Although rule 607 as written allows impeachment by any means, such a reading of rule 607 would usurp the common-law

three witnesses who identified the defendant. *Id.* The court noted the "limited opportunity for observation of the witness who drove by, certain discrepancies in the description of the witness who reported the assault, and the belated identification of defendant by the third witness." *Id.* at 352-53, 378 S.E.2d at 760. In addition, the statements may have been unreliable because of Marie's problems with telling the truth in the past and her fear of being implicated. *Id.* at 354, 378 S.E.2d at 760.

132. *Id.* at 344, 378 S.E.2d at 754-55. The dissenting opinion written by Justice Mitchell agreed that the trial court erred by allowing the State to impeach Marie with her unsworn statements. *Id.* at 356, 378 S.E.2d at 761 (Mitchell, J., dissenting). Justice Mitchell, however, said that the error was not prejudicial and "did not affect the outcome at trial." *Id.* at 356, 378 S.E.2d at 761-62 (Mitchell, J., dissenting). The dissent then reviewed the evidence against the defendant, which it called "overwhelming." *Id.* at 356, 378 S.E.2d at 762 (Mitchell, J., dissenting). In light of that evidence, the dissent said that the jury did not give any significant weight to the unsworn statements of "a retarded fourteen-year-old who had been a prostitute since she was eleven." *Id.* at 358, 378 S.E.2d at 763 (Mitchell, J., dissenting). The dissent noted that the defendant, who carried the burden to show "a reasonable possibility that . . . a different result would have been reached at the trial," had not met that burden. *Id.* at 358-59, 378 S.E.2d at 763 (Mitchell, J., dissenting).

133. *Id.* at 350, 378 S.E.2d at 758.

134. *Id.* at 349, 378 S.E.2d at 757 (quoting *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975)).

135. *United States v. Miller*, 664 F.2d 94, 97 (5th Cir. 1981) (per curiam), cert. denied, 459 U.S. 854 (1982).

136. *Hunt*, 324 N.C. at 351, 378 S.E.2d at 758.

137. *Id.* at 351, 378 S.E.2d at 759. The prosecutor asked Marie if she had told officers that "she was not going to testify," which indicated that the State was on notice. *Id.*

138. *Ordovery, Surprise! That Damaging Turncoat Witness is Still with Us: An Analysis of Federal Rules of Evidence 607, 801(d)(1)(A) and 403*, 5 HOFSTRA L. REV. 65, 66 (1976).

principle that "introduction of [prior unsworn] testimony, even where limited to impeachment, necessarily increases the possibility that a defendant may be convicted on the basis of unsworn evidence."¹³⁹ The *Hunt* court's restriction on evidence disguised as impeachment is consistent with the commentary to North Carolina rule 607, which states that the prior statements "must in fact be impeaching."¹⁴⁰ This indicates that the North Carolina legislature did not want parties to impeach their own witnesses when the prior statements do not contradict the witness but actually introduce new evidence. The holding is also consistent with the legislature's refusal to permit any use of prior inconsistent statements as substantive evidence.¹⁴¹

The *Hunt* court, however, went beyond the restrictions on rule 607 that the legislature had in mind by stating that a party rarely impeaches its own witness with prior statements without being motivated primarily by a desire to put the substance of the statements before the jury.¹⁴² This view will restrict rule 607 drastically so that a party can impeach its own witness only in exceptional cases. After *Hunt*, North Carolina courts will find good faith impeachment in only three instances: first, when the witness's testimony is extensive and vital to the government's case; second, when the party calling the witness is genuinely surprised by the testimony; and third, when the trial court follows the introduction of the statement with an effective limiting instruction.¹⁴³

The first situation is a logical one because if the witness's testimony is important to the party, the party obviously has called the witness for some reason other than merely to introduce impermissible evidence. Testimony that is "extensive and vital" is clear evidence that impeachment of this witness by the calling party is not subterfuge. A requirement, however, that the testimony be "extensive and vital" is too stringent. A party may need to call a witness to add some small but important detail to the case, but still may need to impeach that witness on other damaging testimony.¹⁴⁴ For example, a party may call a witness to testify about a fact that could link two events, but still may need to impeach that witness either to take the wind out of the opponent's cross-exami-

139. *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975).

140. N.C.R. EVID. 607 commentary.

141. Unlike the Federal Rules of Evidence, the North Carolina rules do not permit any substantive use of prior inconsistent statements. See N.C.R. EVID. 801 commentary. See *supra* note 46 and accompanying text. Compare FED. R. EVID. 801(d) (permitting the substantive use of prior inconsistent statements in some circumstances) with N.C.R. EVID. 801(d) (omitting the section treating prior inconsistent statements as non-hearsay evidence).

142. *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758.

143. *Id.*

144. Although the *Hunt* court stated that the "extensive and vital" requirement had been recognized by the federal courts, this factor actually is more rigid than the federal courts' rule against impeaching one's own witness for the "primary purpose" of getting impermissible evidence before the jury. *United States v. Miller*, 664 F.2d 94, 97 (5th Cir. 1981), *cert. denied*, 459 U.S. 854 (1982). The *DeLillo* case cited by the court for this "extensive and vital" factor did state that the impeached witness's testimony was "essential in many areas of the government's case." *United States v. DeLillo*, 620 F.2d 939, 946 (2d Cir.), *cert. denied*, 449 U.S. 835 (1980). Yet it actually was hesitant in restricting impeachment with prior statements unless they were introduced "with the primary aim of getting to the jury a statement impeaching [the witness]." *Id.* The *DeLillo* court only pointed out that the testimony was essential as clear evidence that the party was not using subterfuge.

nation or to clarify a fact that the witness stated incorrectly. Under the "extensive and vital" test of the *Hunt* court, a party could not impeach such a witness because the testimony is not elaborate and absolutely essential to the party's case. A lesser requirement—for example, a requirement that the testimony be "important and helpful"—would allow such a witness to testify and still ensure that parties do not use impeachment primarily as subterfuge. A requirement that the testimony be important is more in line with what the North Carolina legislature had in mind when it revoked the voucher rule and enacted rule 607. However, in *Hunt*, under either the court's "extensive and vital" standard or a more relaxed "importance" standard, Marie's testimony still would have failed.¹⁴⁵

The second situation—when the party calling the witness is genuinely surprised—was one of the exceptions to the pre-607 voucher rule.¹⁴⁶ Surprise may indicate that the party is not motivated by subterfuge in its impeachment.¹⁴⁷ Surprise, however, should not be a requirement because a party may call a witness it knows "would give evidence both helpful and harmful to it, [thinking] that the harmful aspect could be nullified by introducing the witness's prior inconsistent statement."¹⁴⁸ The *Hunt* court's second factor contradicts courts that have stated that "[r]ule 607 is not limited to occasions where the party calling the witness is surprised or misled by the testimony."¹⁴⁹

A better approach would be to impose a good-faith standard on the party impeaching its own witness.¹⁵⁰ Under such a standard, the court would examine whether the party impeached the witness in good faith by determining whether the party believed the witness would testify to some important evidence or whether the party called the witness primarily to introduce impermissible hearsay. This standard would ensure that a party will not call a witness when it knows he will not testify to anything of value, and yet would allow the party to impeach the witness on the harmful parts of the testimony. For example, if the testimony is important, that would indicate a party's good faith and lack of subterfuge. And, if the testimony had no importance, the court could examine whether the party acted in good faith and was unaware that no important testimony would result.

145. Marie testified only to the color of her bicycle and responses to challenges of credibility and bias, and the State was on notice that she would not testify to anything of importance. *Hunt*, 374 N.C. at 351, 378 S.E.2d at 758-59.

146. See *supra* text accompanying notes 64-65.

147. For example, a party may think that a witness will testify to something of importance that actually disavowed the first situation, but at trial be surprised that the witness will not testify.

148. *United States v. Webster*, 734 F.2d 1191, 1193 (7th Cir. 1984).

149. *Robinson v. Watts Detective Agency*, 685 F.2d 729, 740 (1st Cir.), cert. denied, 459 U.S. 1105 (1982). The case that the *Hunt* court cited in stating that a party should be genuinely surprised actually disavowed requiring surprise. See *Webster*, 734 F.2d at 1193. That court said: "[W]e think it would be a mistake to graft [a surprise] requirement to Rule 607 . . ." *Id.*; see also *United States v. Frappier*, 807 F.2d 257, 259 (1st Cir. 1986) (allowing impeachment of one's own witness unless there was "no relevant contribution" in the witness's testimony), cert. denied, 449 U.S. 835 (1987). But see *Graham*, *supra* note 64, at 1617 (proposing that rule 607 be amended to include surprise requirement).

150. See *Webster*, 734 F.2d at 1193 (advocating a good-faith standard be imposed, and not a surprise requirement).

This is a better standard because if the party is not surprised by the harmful evidence, the party should not have to choose between "not calling at all a witness from whom it expects to elicit genuinely helpful evidence" and calling that witness without impeaching him.¹⁵¹ If the party is surprised, it should have an opportunity to impeach the witness if it acts in good faith and believed something important would result. Instead of examining whether the State "appeared to know before Marie was called to the stand that she would not cooperate,"¹⁵² the *Hunt* court should only have examined whether the prosecutor impeached in good faith. In *Hunt*, under either a surprise or a good-faith standard, the court should not have admitted the statements because the prosecutor was not surprised by the denial and did not act in good faith by calling Marie solely for the purpose of introducing the prior statements.

The third situation in which the *Hunt* court indicated that a party can impeach its own witness is when the judge gives an effective limiting instruction. This third factor is essential. The *Hunt* court was correct that the trial court's instructions failed in not effectively limiting the statements' use when the prosecutor read the statements to Marie, when he introduced them substantively during the officer's testimony,¹⁵³ and when the judge reiterated them in the final charge to the jury.¹⁵⁴ The *Hunt* court's emphasis on instructions will help ensure that juries use inconsistent statements of an impeached witness only for "determining the witness's credibility."¹⁵⁵ Yet by including "an effective limiting instruction" as one of the three exceptional cases in which it would find no subterfuge, the court implied that a jury instruction alone could justify impeachment of one's own witness.¹⁵⁶ Even with an instruction, commentators cite "the notorious inability of juries to ignore substantively evidence introduced solely for purposes of impeachment."¹⁵⁷ Therefore, a jury instruction alone is not enough to assure that rule 607 is used properly.¹⁵⁸ The instruction must be accompanied by other safeguards, such as evidence that the party did not call the witness "solely for the purpose of introducing otherwise inadmissible

151. *Id.*

152. *Hunt*, 324 N.C. at 351, 378 S.E.2d at 758.

153. The statements could not be introduced as substantive evidence because the North Carolina Rules of Evidence do not permit any substantive use of prior consistent or inconsistent statements, as does Federal Rule of Evidence 801. See 1 H. BRANDIS, *supra* note 43, § 46, at 219, § 52, at 242 n.97; *supra* text accompanying note 41.

154. *Hunt*, 324 N.C. at 352, 378 S.E.2d at 759.

155. 1 H. BRANDIS, *supra* note 43, § 46, at 219.

156. *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758. The court used "or," not "and," between the three exceptional cases, indicating that any of the three would be enough. *Id.*

157. Graham, *supra* note 64, at 1615. In the hearings on adoption of federal rule 607, one speaker noted the dangers of allowing impeachment testimony: "Although technically not substantive evidence, the impact on the trier of fact, whether judge or jury, of the extra-judicial statements may be substantial. As trial lawyers recognize, limiting instructions to jurors have little effect, if any." *Hearings on H.R. 5463 Before the Senate Committee on the Judiciary*, 93rd Cong., 2d Sess. 304 (1974) [hereinafter *Hearings*] (statement of Herbert Semmel).

158. In fact, the cases that the *Hunt* court cited for this proposition focused not on the limiting instruction but on the fact that witness's actual testimony was important to the calling party. See *United States v. DeLillo*, 620 F.2d 939, 946 (2d Cir.), *cert. denied*, 481 U.S. 1006 (1980); *United States v. Long Soldier*, 562 F.2d 601, 605 (8th Cir. 1977).

evidence.”¹⁵⁹

In addition, an effective limiting instruction does not indicate that the party acted in good faith and in the absence of subterfuge. It only indicates that the judge acted properly in agreeing to tell the jury to limit the statements to their proper use. When the *Hunt* court stated that an effective limiting instruction indicates “good faith and a lack of subterfuge,” the court was confusing the judge’s competence with the party’s good faith. The court, therefore, should not have lumped this factor with the other two factors, but instead addressed it separately as an overriding requirement regardless of the party’s good faith.

The *Hunt* court correctly recognized that the trial court’s error was compounded by the use of extrinsic evidence—Officer Daulton’s testimony—to prove Marie’s prior inconsistent statements for a collateral issue.¹⁶⁰ Marie’s prior statement involved the defendant’s alibi, which was a material issue. As one court noted, “[T]here can be little doubt that the witness’s alibi testimony was itself material ‘This testimony went to the very heart of the case’”¹⁶¹ Yet the *Hunt* court correctly focused on the relationship of the statements to Marie’s testimony, not on the prior statement’s content alone, to determine materiality.¹⁶² The prosecution could not prove Marie’s statements by extrinsic evidence because although the statements did concern “the subject-matter in regard to which [the witness was] examined,” the witness’s testimony was not material to an issue in the case.¹⁶³ Marie’s testimony was collateral because Marie denied her prior inconsistent statements, instead of testifying inconsistently with her statements.¹⁶⁴ Therefore, the substance of the statements was no longer important or contradictory because Marie had not yet “testified to something with which they [were] inconsistent.”¹⁶⁵ Therefore, the prosecution was bound by Marie’s answers to the questions about the statements “in the sense that he may not contradict it by the testimony of others.”¹⁶⁶ The court was correct that the prosecution could call Officer Daulton only to impeach Marie about the fact that she had given the statements to him on a certain date, but not to indicate the substance of those statements.

159. *Long Soldier*, 562 F.2d at 605.

160. *See State v. Williams*, 322 N.C. 452, 455, 368 S.E.2d 624, 626 (1988).

161. *State v. Green*, 296 N.C. 183, 193-94, 250 S.E.2d 197, 204 (1978) (quoting *State v. Wellmon*, 222 N.C. 215, 218, 22 S.E.2d 437, 439 (1942)).

162. *See, e.g., id.* at 192-94, 250 S.E.2d at 203-04; *State v. Moore*, 275 N.C. 198, 213, 166 S.E.2d 652, 662-63 (1969).

163. *Green*, 296 N.C. at 193, 250 S.E.2d at 204 (quoting *State v. Patterson*, 24 N.C. (1 Ired.) 346, 353 (1842)).

164. *See id.* at 192-93, 250 S.E.2d at 203-04. In *Green*, for example, the witness testified inconsistently with his prior statement and then denied making the statement. *Id.* at 192, 250 S.E.2d at 203. Because his testimony was material and the statements related to it, “the State could introduce extrinsic testimony of Bruce Ray’s prior inconsistent statement where such statement conflicted with the subject matter of his testimony.” *Id.* at 194, 250 S.E.2d at 204; *see Moore*, 275 N.C. at 213, 166 S.E.2d at 662-63 (1969); *Williams*, 322 N.C. at 456, 368 S.E.2d at 626-27.

165. 1 H. BRANDIS, *supra* note 43, § 46, at 219.

166. *Id.* § 48, at 227. However, the cross-examiner can “at some point, exhibit or divulge the contents of a prior statement” of a collateral issue in the questions. *Id.* § 48, at 227 n.31. This means that the party cannot call other witnesses to testify to the substance, but may reveal the substance of the statements in its questions on cross.

In its second major issue, the *Hunt* decision justifiably restricted the use of the impeached witness's prior statements to corroborate another witness. First, Marie's prior statements could not corroborate Officer Daulton's testimony, except to confirm his testimony that Marie had made statements to him.¹⁶⁷ Those statements were hearsay statements of Marie, not prior statements of the officer, and so were not admissible substantively as corroborative evidence.¹⁶⁸ The hearsay statements that Marie denied could not corroborate Officer Daulton's testimony because a "corroborative statement is admissible only to corroborate the testimony of the witness who made the statement."¹⁶⁹ Second, Marie's denial was contradictory and "the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony."¹⁷⁰ Because Marie denied the statements, they could not be used to corroborate the police officer's testimony. If Marie had agreed in direct examination that she made the statements, the State could then have used that testimony to corroborate Officer Daulton's testimony.

Along with the other failings of these prior statements, Marie's prior statements failed the balancing test under rule 403.¹⁷¹ Although in this case the statements were relevant under rule 401, the *Hunt* court correctly stated that rule 403 should have excluded them because the probative value of subterfuge statements was substantially less than the prejudice to the defendant. The court, though, stated that even if the statements were not objectionable for other reasons, they would fail the rule 403 balancing test. This conclusion is not justified. If the prosecutor had not violated the rule 607 limitation and the extrinsic-evidence rule, the statements' high probative value would have offset the strong prejudice to the defendant. Because of the *Hunt* court's restrictive view of "probative value," the rule 403 balancing test in cases when a party impeaches its own witness may be more likely to exclude prior statements even in the absence of subterfuge.

In sum, the admission of these prior statements flunked on a number of grounds: They were used as subterfuge; they were not accompanied by the proper limiting instruction; they were collateral and yet were introduced with

167. *Hunt*, 324 N.C. at 352, 378 S.E.2d at 759.

168. The North Carolina rule is that prior statements "are admitted, not as substantive evidence of the facts stated, but solely for the purpose of affirming the credibility of the witness; and, upon proper request, the jury must be instructed accordingly." 1 H. BRANDIS, *supra* note 43, § 52, at 242 (footnotes omitted). North Carolina's evidence rules do not include federal rule 801(d)(1)(B) permitting substantive use of prior consistent statements. This indicates that North Carolina's legislature was hesitant to allow even sworn prior consistent statements as substantive evidence. Generally, though, North Carolina allows the "utmost latitude" in receiving this kind of evidence to support a witness's credibility. *Id.* § 50, at 232.

169. *State v. McMillan*, 55 N.C. App. 25, 30, 284 S.E.2d 526, 530 (1981); see 1 H. BRANDIS, *supra* note 43, § 52, at 243. The trial court, however, was not totally unjustified in allowing these statements because some courts have permitted others' declarations to corroborate a witness. *Id.* § 52, at 244; see *supra* note 107; *State v. Erby*, 56 N.C. App. 358, 362, 289 S.E.2d 86, 88-89 (1982) (allowing patrolman's testimony to corroborate defendant's testimony).

170. *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 574 (1986).

171. Rule 403 requires that the probative value of all evidence substantially outweigh the prejudice to the defendant and the confusion of issues for the jury. See *supra* notes 75-76 and accompanying text.

extrinsic evidence; they were not proper corroborating evidence; and they failed the rule 403 balancing test. Although on individual points the court went too far in restricting rule 607, the *Hunt* court clearly was justified in finding the statements inadmissible in this particular case.¹⁷²

The decision in *Hunt* will force North Carolina attorneys to satisfy more stringent requirements before impeaching their own witnesses under rule 607. Indeed, after *Hunt*, a party will rarely, if ever, be able to impeach its own witness. When impeaching one's own witness, a party will be scrutinized to see whether it is motivated "primarily (or solely) by a desire to put the substance of that statement before the jury."¹⁷³ In deciding this, judges in North Carolina will consider whether the testimony is "extensive and vital" to the party, whether the party was surprised, and whether a limiting instruction was given.¹⁷⁴ In addition, parties will not be able to introduce other witnesses' testimony about the statements when the impeached witness denies ever having made the prior statements. The courts also will not admit the prior statements of one's own witness to corroborate another witness's testimony about those hearsay statements.

The *Hunt* court was justified in restricting the open-ended wording of rule 607. Rule 403 does not provide a sufficient and consistent safeguard against subterfuge impeachment because the 403 balancing test often produces differing results from a single fact situation. However, the standard that the court created went too far in restricting impeachment of one's own witness. This is clear because the decision nearly wipes out the effect of rule 607 by reinstating a new form of the old voucher rule. Admittedly, the decision does not hold that a party may never impeach one's own witness as the voucher rule did. However, the *Hunt* court concedes it will take a "rare" and "exceptional" case for a court to allow impeachment of one's own witness. The requirements of surprise or "extensive and vital" testimony return North Carolina's law nearly to where it stood just before rule 607 was developed: impeachment of one's own witness is permitted only if the party was surprised, affirmatively damaged and misled by the witness. This restriction on rule 607 clearly goes against what the North Carolina legislature intended in passing the rule. As the commentary to rule 607 states, the legislature intended "to abandon[] the traditional common law rule that a party 'vouches' for a witness by calling him."¹⁷⁵ Indeed, although the *Hunt* court believed it was modelling its standard on the federal courts' interpre-

172. The court deemed the inclusion of the statements to be grave enough to reverse for "abuse of discretion." *Hunt*, 324 N.C. at 353, 378 S.E.2d at 760. The dissent, however, argued that the decision should not be reversed because "[t]he record does not support the conclusion that the jury would have reached a different result at trial, had the evidence of her prior statements not been admitted." *Id.* at 359, 378 S.E.2d at 763 (Mitchell, J., dissenting). The prior statements did contradict the defendant's alibi. Yet the defendant was implicated by three witnesses. In addition, the jury was not likely to give Marie's statements as much credence after the defendant impeached her with witnesses who described her inability to tell the truth. Despite the evidence implicating the defendant and Marie's questionable credibility, the majority may have held that the trial court abused its discretion because it wanted to give more force to its new interpretation of rule 607.

173. *Id.* at 350, 378 S.E.2d at 758.

174. *Id.*

175. N.C.R. EVID. 607 commentary.

tation, the *Hunt* court actually goes much further than any other federal court has gone in inhibiting rule 607.

Instead, the limitation on rule 607 should be whether the impeachment was for the primary purpose of introducing impermissible hearsay. In determining this, courts should examine first, whether the testimony itself had some importance to the State, and second, whether the impeaching party acted in good faith if the testimony was not important to the State. This test would help ensure that rule 607 is not restricted to the point of returning to the pre-607 voucher rule. Yet it would also prevent the rule from "open[ing] the back door to evidence which is inadmissible through the front door."¹⁷⁶

COLLEEN GALE TREML

176. *Hearings*, *supra* note 157.