NEW MEXICO LAW REVIEW

Volume 19
Issue 3 *Summer 1989*

Summer 1989

Evidence

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EVIDENCE

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I. INTRODUCTION

Hearsay issues predominated the evidence questions in cases which were decided during the survey year. In one case, the court of appeals held the Rules of Evidence do not apply to suppression hearings. The confrontation clause may, nevertheless, bar the use of hearsay evidence offered against the defendant at a suppression hearing. In other hearsay cases, the court considered the admissibility of out of court statements of co-conspirators and of co-defendants and the court decided that implied assertions are not hearsay. The only significant evidentiary decision which did not involve hearsay concerned the admissibility of juror testimony under Rule 11-606(B).

II. HEARSAY ISSUES

A. Sixth Amendment Bars Use of Hearsay in Suppression Hearings

In *State v. Hensel*,[1] the court of appeals considered a warrantless search of ranch property where police found illegal drugs in the possession of Craig Hensel.[2] The police relied on an authorization to search the premises from Hensel's mother, who had complained to police that Craig had stolen her car, that she wanted it back, and that he probably had illegal drugs in his possession.[3] Mrs. Hensel did not appear at the suppression hearing; the only evidence of Mrs. Hensel's authority to consent to the search was in the testimony of a police officer.[4] Defense counsel objected to the testimony on the grounds of hearsay and that defendant was being deprived of his right of confrontation.[5] The trial court overruled the objections and denied the motion to suppress.[6]

The court of appeals held that the New Mexico Rules of Evidence do

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1. 106 N.M. 8, 738 P.2d 126 (Ct. App. 1987).
2. *Id.* at 8, 738 P.2d at 126.
3. *Id.* at 9, 738 P.2d at 127.
4. *Id.*
5. *Id.* at 10, 738 P.2d at 128.
6. *Id.*

not apply to suppression hearings on the authority of Rule 11-1101(D)(1).[7] The New Mexico appellate courts had not previously construed Rule 11-1101, although the interpretation of the Rule in this case is consistent with the United States Supreme Court's decision in *United States v. Matlock*.[8]

In the next breath, however, the court suppressed the evidence and reversed the district court because Hensel was denied his right of confrontation by not having an opportunity to cross-examine his mother.[9] The court ruled the use of hearsay evidence under the circumstances was "fundamentally unfair."[10] The court's decision is somewhat curious because, while it acknowledges the source of the confrontation right is the sixth amendment,[11] the cases it cites in support of its holding are, with two exceptions, either not sixth amendment cases, or reach an opposite result under the sixth amendment.[12] Moreover, in *Matlock*, the United States Supreme Court stated in dictum that the admission of hearsay at the suppression hearing did not violate a defendant's right of confrontation under the sixth amendment.[13]

The New Mexico Supreme Court denied certiorari in *Hensel*, so the law in New Mexico now provides that when the key witness in a suppression hearing does not take the stand, the declarations of that witness are inadmissible hearsay under the sixth amendment.[14] Unanswered questions

7. *"Rules inapplicable.* The rules (other than those with respect to privileges) do not apply in the following situations: (1) *Preliminary questions of fact.* The determination of questions of fact preliminary to the admissibility of evidence when the issue is to be determined by the judge under Rule 11-104 . . . ." *See*, SCRA 1986 11-104(A).

8. 415 U.S. 164, 172-77 (1974) (construing FED. R. EVID. 104(a) and 1101(d)(1)). There is no significant difference between SCRA 1986 11-104(A), 11-1101(D)(1) and FED. R. EVID. 104(a), 1101(d)(1).

9. 106 N.M. at 10, 738 P.2d at 128.

10. *Id.*

11. No mention is made of the New Mexico Constitution.

12. 106 N.M. at 10, 738 P.2d at 128. State v. Asbury, 145 Ariz. 381, 701 P.2d 1189 (Ct. App. 1984), and Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969), support the holding based on the sixth amendment. *Asbury*, 145 Ariz. at 387, 701 P.2d at 1194 (relying on State v. Hanely, 108 Ariz. 144, 148, 493 P.2d 1201, 1205 (1972)). In McLean v. State, 482 A.2d 101 (Del. 1984), the court allowed admission of a hospital record of a blood-alcohol analysis in a trial for vehicular homicide without an opportunity for the defendant to cross-examine the hospital technician who performed the test. *Id.* at 103-04. The court used the indicia of reliability which appear in SCRA 1986 11-803(F), to override the sixth amendment. *Id.* at 104-05. State v. Wilson, 183 N.J. Super. 86, 443 A.2d 252 (1981), was a due process case which discussed 14th amendment due process and liberty interest issues in connection with a termination hearing regarding a pretrial criminal intervention program. In State v. Self, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975), the court disposed of a claim that hearsay evidence that the declarant had obtained a gun from the defendant, who had obtained the gun in a pawnshop robbery, was not admissible as an admission against interest under current SCRA 1986 11-804(B)(4). 88 N.M. at 40-42, 536 P.2d at 1096-98. The court did not reach the constitutional claim. *Id.* at 40, 536 P.2d at 1096.

13. United States v. Matlock, 415 U.S. 164, 174-75 (1974).

14. *cert. denied*, 106 N.M. 8, 738 P.2d 126 (1987). The court distinguished statements of lesser than "key" declarants, noting the denial of the right of confrontation may be harmless in certain circumstances. 106 N.M. at 11, 738 P.2d at 129.

suggested by this decision are whether it extends to statements by co-defendants, co-conspirators, or by confidential informants, and what important rules of evidence, not involving a question of confrontation, will no longer be applicable in suppression hearings under the court's interpretation of Rule 11-1101(D)(4).

B. Co-conspirator Exception to the Hearsay Rule

State v. Zinn[15] decided several evidentiary issues arising in the course of a trial where defendant was convicted of nineteen felonies, including murder, kidnapping, criminal sexual penetration and conspiracy to commit various crimes. One issue decided in *Zinn* concerned the admission at trial of hearsay statements by two co-conspirators who claimed that a third co-conspirator told both of them that the defendant had ordered the third conspirator to "get rid of" the victim.[16] The evidence was offered to show the defendant's involvement in the murder, which occurred outside his presence.

Rule 11-801(D)(2)(e) governs:[17] "A statement is not hearsay if: . . . [t]he statement is offered against a party and is . . . (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Applying "well-settled" prior decisions construing the hearsay exception[18] the court easily found independent record evidence of a conspiracy sufficient to meet the requirement that a conspiracy be independently proved to the level of a prima facie case.[19] This much broke no new ground.

The court went on, however, and noted with approval the United States Supreme Court's decision in *Bourjaily v. United States*.[20] In *Bourjaily*, the Supreme Court held that the hearsay statement of a co-conspirator could itself be considered along with independent evidence of a conspiracy

15. 106 N.M. 544, 746 P.2d 650 (1987).

16. *Id.* at 551-52, 746 P.2d at 657-58.

17. The court noted that the defendant did not object to the first co-conspirator's testimony, but did object to the second co-conspirator's testimony six days further into the trial. The court seemed on the verge of finding harmless error or waiver: "It would have been of little effect for the trial court to have sustained Zinn's objection to [the second co-conspirator's] testimony . . . because the statement had already been planted—properly—in the jurors' minds." *Id.* at 551, 746 P.2d at 657. Instead, the court proceeded to the hearsay issue.

18. *Id.* State v. Johnson, 98 N.M. 92, 645 P.2d 448 (Ct. App.), *cert. denied*, 78 N.M. 336, 648 P.2d 794 (1982); State v. Mead, 100 N.M. 27, 665 P.2d 289 (Ct. App. 1983), *modified sub nom.*, State v. Segotta, 100 N.M. 498, 672 P.2d 1129 (1983); State v. Harge, 94 N.M. 11, 17, 606 P.2d 1105, 1111 (Ct. App. 1979), *rev'd sub nom.*, Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

19. *Zinn*, 106 N.M. at 551, 746 P.2d at 657. In fact the court stated the independent evidence allowed an inference of conspiracy "beyond a reasonable doubt." *Id.*

20. It is not clear whether it did so as part of its holding. The court's discussion of *Bourjaily* may have been prompted by Justice Walter's dissent on the grounds the independent evidence did not show a conspiracy to murder, but only to kidnap and rape. *Id.* at 552-53, 746 P.2d at 658-59 (discussing *Bourjaily*, 107 S.Ct. 2775 (1987)).

in determining admissibility of the hearsay statement under Federal Rule of Evidence 801(D)(2)(e). The Supreme Court also decided that the standard of proof for the trial court's determination of admissibility under Federal Rule of Evidence 104(a)[21] is a preponderance of the evidence, regardless of the standard of proof on the substantive issues.[22] Thus, New Mexico trial courts may now consider co-conspirators' hearsay statements along with independent evidence of a conspiracy when they make the determination required by Rule 11-801(D)(2)(e) that the declarant was a member of the conspiracy, and that the statement furthered the aims of the conspiracy.[23] In making the determination of admissibility under Rule 11-104(a) the trial court should apply the preponderance of the evidence standard regardless of the existence of a higher standard for the merits, for instance beyond a reasonable doubt in a criminal case, or clear and convincing evidence in some civil matters.

Finally, relying on *United States v. Inadi*,[24] the court held, over a vigorous dissent by Justice Walters,[25] that the confrontation clause is no bar to admissibility of a co-conspirator's hearsay statement. *Inadi* holds that the confrontation clause's "unavailability rule . . . is not applicable to co-conspirators' out-of-court statements."[26] Thus, prosecutors and others seeking to introduce co-conspirator hearsay in New Mexico need not demonstrate that the co-conspirator is unavailable to testify before offering the hearsay declaration.

C. Standards for Admissions of Co-defendant's Out of Court Confession

In a somewhat similar case, *State v. Earnest*,[27] the supreme court ruled admissible the out-of-court confession of a criminal accused's co-defendant. The case was before the court on remand from the United States Supreme Court[28] for proceedings not inconsistent with the Supreme Court's opinion in *Lee v. Illinois*.[29] *Lee* held that the confession of an accused's

21. SCRA 1986 11-104(A) is virtually identical to FED. R. EVID. 104(a).

> *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of Paragraph B. In making his determination he is not bound by the Rules of Evidence except those with respect to privileges.

SCRA 1986 11-104(A).

22. *Bourjaily*, 107 S.Ct. at 2778-82.

23. *See id.* at 2783 (Stevens, J., concurring).

24. 475 U.S. 387 (1986).

25. 106 N.M. at 554-55, 746 P.2d at 660-61. Justice Stowers did not participate in the decision, so the rulings on these issues are sustained by a three to one majority of the court.

26. 475 U.S. at 394.

27. 106 N.M. 411, 744 P.2d 539 (1987).

28. New Mexico v. Earnest, 477 U.S. 648 (1986) (per curiam).

29. 476 U.S. 530 (1986).

co-defendant is presumptively unreliable and that its use against an accused would violate the confrontation clause of the sixth amendment.[30] The *Lee* Court went on to rule that the presumption may be rebutted, however, where there is no material departure from the standard of admissibility under the general confrontation rule, the purpose of which is to "augment accuracy in the fact-finding process by ensuring the defendant effective means to test adverse evidence."[31] The Court also described the standard as whether the "statement at issue bears sufficient indicia of reliability to satisfy Confrontation Clause concerns."[32] A third statement of the standard in *Lee* is that "even if certain hearsay evidence does not fall within 'a firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.'"[33]

In *Earnest* the New Mexico Supreme Court applied its reading of *Lee* to the facts surrounding the taking of the co-defendant's statement and to the evidence at trial and found four reasons why the statement bore "sufficient 'indicia of reliability'" to satisfy the confrontation clause.[34] The court did not mention the other formulations of the analysis discussed in *Lee*.[35]

First, the court stated that the co-defendant was not offered leniency for giving his confession to police officers, and that he was in fact convicted of murder in a separate trial and sentenced to life imprisonment.[36] This supported a conclusion that his statement was reliable. The reported decisions in the *Lee* case do not state whether Lee's co-defendant was offered leniency for giving his statement, although the description of the circumstances of the confession suggests he was not.[37] According to the opinion, the co-defendant gave his statement after the police had let him

30. *Id.* at 539. The confrontation clause provides "[in] all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

31. *Id.* at 543 (quoting Ohio v. Roberts, 448 U.S. 56, 65 (1980)).

32. *Id.* at 542.

33. *Id.* at 543. The quoted phrases are from Ohio v. Roberts, 448 U.S. 56, 66 (1980). The New Mexico Supreme Court relied on this formulation of the confrontation clause analysis when it reversed defendant's conviction before the appeal to the United States Supreme Court. State v. Earnest, 103 N.M. 95, 98-99, 703 P.2d 872, 875-76 (1985).

34. There was no question of unavailability of the witness in the case because the co-defendants had been called to the stand at defendant's trial and had refused to testify, citing the fifth amendment, even after being granted use immunity and found in contempt. State v. Earnest, 103 N.M. at 98, 703 P.2d at 875; SCRA 1986 11-804(A)(2).

35. 106 N.M. at 411-12, 744 P.2d at 539-40. As the court noted, this was the formulation of the anlysis Justice Rehnquist used in his concurring opinion in New Mexico v. Earnest, 477 U.S. at 540.

36. 106 N.M. at 412, 744 P.2d at 540.

37. *Id.*

meet with Lee and she told him the police knew about the "whole thing" and reminded him he had said "we wouldn't let one or the other take the rap alone."[38] The reported decisions do not reveal the result of Lee's co-defendant's trial.

The second reason supporting the New Mexico Supreme Court's conclusion of reliability was that the co-defendant's statement was "strongly" against his penal interest.[39] He admitted he "tried" to cut the victim's throat and it was clear from a colloquy with police in the taped statement that wounds to the throat were thought to be the cause of death.[40] The court also noted that the co-defendant's confession exposed him to the death penalty because it included a description of applicable aggravating circumstances.[41] The court did not state, however, whether the co-defendant knew about the existence or significance of aggravating circumstances or the possibility of the death penalty. Nor did the court discuss footnote 5 in *Lee v. Illinois*.[42] There Justice Brennan stated "we reject respondent's categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant."[43] The footnote is ambiguous, to be sure. One possible construction is that the United States Supreme Court has rejected the "against penal interest" concept as a grounds for showing "particularized guarantees of trustworthiness." Another equally plausible construction of the footnote is that "simply" noting that any confession is against a penal interest is not enough, but a stronger or more particularized showing would be acceptable. The New Mexico Supreme Court's emphasis on the strength of the conflict between Earnest's co-defendant's statement and his penal interest may be directed towards fitting this latter construction.

Third, the court noted Earnest's co-defendant made no attempt to shift responsibility from himself to Earnest or another co-defendant.[44] The court stated that the co-defendant equally implicated all three defendants.[45] Although Lee's co-defendant did not try to shift responsibility from himself to Lee, the United States Supreme Court emphasized his statement implicated Lee in areas no other evidence did: premeditation and planning

38. 476 U.S. at 533.
39. 106 N.M. at 412, 744 P.2d at 540.
40. *Id.*
41. *Id.*
42. 476 U.S. at 544.
43. *Id.*
44. 106 N.M. at 412, 744 P.2d at 540.
45. *Id.*

of the two murders, and facilitation in one of them which Lee had denied.[46] Furthermore the Court noted that one reality of the criminal process is "that once partners in a crime recognize 'the jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices."[47] Thus, while *Earnest* may have presented a better case for admitting the confession than did *Lee*, *Earnest* does not deal with "the jig is up" theory which caused the United States Supreme Court to add an extra note of caution which seems to apply generally to co-defendants' post-arrest statements.

The fourth factor which led the *Earnest* court to conclude that the co-defendant's statement was reliable was independent evidence at trial which the court found substantially corroborated the description of the murder in the co-defendant's statement.[48] The court found substantial corroboration in four particular congruences between the other evidence and the co-defendant's statement.[49] Only one of the congruences, however, concerned the elements of the murder.[50] The court's finding that the co-defendant's statement was reliable is seriously flawed in light of *Lee v. Illinois*. Before the Supreme Court, the State of Illinois argued that the co-defendant's confession was reliable because it "interlocked" with the defendant's confession "on some points."[51] The Court rejected that argument because the two statements did not interlock on the key points of the defendant's premeditation, planning and facilitation of the murders; the Court termed the congruence "selective reliability."[52] The court stated,

> As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another. If those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession,

46. 476 U.S. at 545.

47. *Id.* at 544-45.

48. 106 N.M. at 412, 744 P.2d at 540.

49. They were, first, a description of a drug deal, apparently some time before the murder; second, a belief showed by the defendants that the victim was an informant; third, an attempt to kill the victim by another means than the actual cause; and, fourth, the co-defendant's accurate description of where the murder weapon could be found. *Id.*

50. Although the court referred in its opinion only to a crime of murder, Earnest was also convicted of conspiracy to murder, kidnapping, conspiracy to distribute a controlled substance and possession of a controlled substance. State v. Earnest, 103 N.M. at 96, 703 P.2d at 873. The co-defendant was convicted of all the same crimes in a separate trial. State v. Boeglin, 105 N.M. 247, 248, 731 P.2d 943, 944 (1987).

51. 476 U.S. at 545.

52. *Id.*

> the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment.[53]

To be sure, the New Mexico Supreme Court apparently had no conflicting evidence before it, so it was not faced with discrepancies in the evidence. Nevertheless, the interlocking on only collateral issues between the co-defendant's and the defendant's statements in *Lee* is hardly distinguishable from the interlocking on these collateral issues and one element of the crime between the co-defendant's statement and other types of evidence in *Earnest*.

The language of the United States Supreme Court opinion on the "selective reliability" issue is strong, but it is still qualified by the opinion's clear recognition that the presumption of unreliability may be rebutted.[54] Although the New Mexico Supreme Court did not clearly follow the *Lee* Court's reasoning on the selective reliability issue, it offered three other grounds for finding that the presumption of unreliability had been rebutted.[55]

Earnest thus serves as a good source of four possible avenues to argue admissibility of a co-defendant's confession for practitioners faced with hearsay and confrontation clause problems. Practitioners considering the question of admissibility when the co-defendant is unavailable due to a refusal to testify should also be aware that the type of analysis *Earnest* requires can be disposed of entirely if the statement is admissible under another "firmly rooted" exception to the hearsay rule.[56]

D. "Implied Assertions" are not Hearsay

An interesting hearsay issue was decided in *Jim v. Budd*.[57] In this wrongful death action the plaintiff's decedent was shop foreman at a shop where the defendant, an independent trucker, brought his belly-dump tractor trailer truck for repairs on the belly-dump mechanism.[58] The belly-dump mechanism consisted of two heavy metal gates at the bottom of the trailer which, when open, allowed the contents of the trailer to flow out and onto the ground.[59] To prepare the mechanism for work, both men hooked chain between the gates and a bracket on the side of the tractor

53. *Id.*
54. *Id.* at 543, 546.
55. The United States Supreme Court declined an invitation to examine these issues in light of *Lee* when it denied Earnest's second petition for certiorari in late 1987. 108 S.Ct. 284 (1987).
56. 476 U.S. at 543.
57. 107 N.M. 489, 760 P.2d 782 (Ct. App.), *cert. denied*, 106 N.M. 95, 739 P.2d 509 (1987).
58. *Id.* at 490, 760 P.2d at 783.
59. *Id.*

to keep the gates in an open position.[60] According to the testimony at issue, the decedent told the defendant to "[l]et the gates down against the chain" to take any slack out of the chain.[61] Defendant positioned the switch which operated the gate mechanism in the "closed" position, which had the effect of applying pressure to the gates in the direction of closure, and therefore also applied pressure against the chain which kept the gates open.[62] Instead of then putting the switch in the "off" position, the defendant left it in the "closed" position.[63] This kept pressure against the chain and the gates in an effort to close them.[64] In the second part of the testimony at issue, the decedent answered "yes" when the defendant asked him if that was satisfactory.[65] Because of a hairline crack in the bracket holding one end of the chain, the chain gave way and the gate closed on the decedent, Mr. Jim, killing him.[66]

Plaintiff objected to the admission of both statements of the decedent on hearsay grounds.[67] The trial court admitted them over the objection, and the jury brought in a verdict for the defendant.[68] The court of appeals agreed with the trial court, holding that the statements were not hearsay under Rule 11-801.[69]

The court characterized the statements as "implied assertions" offered to show that the decedent was in control of the procedure and that he knew what he was doing.[70] The words, the court said, were not offered for their truth, because "they have no particular relevance" and because the statement "let the gates down against the chain" were words of direction and not an assertion.[71] The court focused on two parts of Rule 11-801 to reach its holding. Rule 11-801(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." Rule 11-801(A) defines "statement" as "(1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by him as an assertion." The court construed these provisions to mean that statements or conduct which are not assertive are not hearsay.[72] The court found support for its holding in the commentators and case law which have

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. Id.
67. *Id.* at 491, 760 P.2d at 784.
68. *Id.* at 490, 491, 760 P.2d at 783, 784.
69. SCRA 1986 11-801; *Budd*, 107 N.M. at 491, 760 P.2d at 784.
70. 107 N.M. at 491, 760 P.2d at 784.
71. *Id.*
72. *Id.*

concluded, in essence, that implied assertions are more trustworthy than explicit statements of the same assertions by the same person.[73]

Two lines of reasoning support this proposition. First, in the case of an implied assertion, issues of sincerity and credibility are not involved because the declarant did not intend to make the assertion which is implied. Put another way, purposeful deception in making an assertion is less likely in the absence of an intent to make an assertion.[74] In this case, the reasoning goes: the decedent did not intend to say "I am in control of this instrumentality" when he said "Yes, [the gates have been let down to my satisfaction.]" Second, because the declarant has undertaken another action, in this case the words uttered, which is consistent with the implied assertion, there is a justifiable presumption that the implied assertion is correct.[75] Thus, when the decedent said "let the gates down against the chain," he made a declaration entirely consistent with the implied assertion sought to be proved, that he had control of the instrumentality. This is so because giving directions implies control.

The court's work did not end when it determined that the declarations were not hearsay. Plaintiff raised three other objections. First, she argued that the testimony was untrustworthy because the declarant was unavailable and the defendant witness was an interested party.[76] The court quickly disposed of this argument by pointing out that whether the statements were made was a question of weight and credibility of the witness rather than a question of the truth of the utterances.[77] The court relied on cases involving direct testimony by interested defendants in wrongful death cases where the only person who could have contradicted the testimony was the decedent.[78] These cases discuss the principle that testimony of an interested witness always raises an issue of credibility for a jury.[79]

Next, plaintiff argued that the evidence was so prejudicial to plaintiff

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73. *Id.*

74. E. CLEARY, MCCORMICK ON EVIDENCE, § 250 (3d ed. 1984). The Advisory Committee Notes to Rule 801 adopt this rationale: Assertion by non-verbal conduct

> [a]dmittedly . . . is untested with respect to the perception . . . but the Advisory Committee is of the view that the dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds . . . . Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted . . . .

FED. R. EVID. 801, advisory committee notes to subdivision (a).

75. 4 WEINSTEIN'S EVIDENCE, paragraph 801(a)[01] (1983).

76. 107 N.M. at 492, 760 P.2d at 785.

77. *Id.*

78. Silva v. City of Albuquerque, 94 N.M. 332, 610 P.2d 219 (Ct. App. 1980); Strickland v. Roosevelt County, 94 N.M. 459, 612 P.2d 689 (Ct. App. 1980).

79. *But see* Silva v. City of Albuquerque, 94 N.M. 332, 334, 610 P.2d 219, 221 (when other uncontradicted evidence requires the same result whether or not the defendant's testimony is believed, no jury issue arises).

its probative value was outweighed, relying on Rule 11-403.[80] The court endorsed the trial court's exercise of discretion, in accordance with the rule, to admit the evidence.[81] The court noted that prejudice alone did not justify exclusion, and that in balancing the weights, the probative value was heightened because decedent's control of the instrumentality could only be shown by the testimony including the statements; the statements were part of the only way control could be proved.[82]

Finally, plaintiff argued that she was entitled to a limiting instruction both when the evidence was admitted and as part of the charge to the jury.[83] The court held that, given the trial court's proper finding that the statements were not hearsay, a limiting instruction was unnecessary, and that the uniform civil jury instruction on credibility of witnesses, which was given, disposed of the credibility, bias and interest of the witness issues.[84]

The decision does not describe the proffered instruction.[85] If the plaintiff argued that a limiting instruction should have been given to caution the jury that the "yes" statement was not offered for its truth, i.e. that decedent understood and was satisfied *with the position of the switch*, perhaps some question might be raised about the propriety of this part of the decision. It is within the realm of possibility that an uninstructed jury might conclude that decedent not only controlled the procedure but also knew that defendant had left the switch in a position which continued to apply pressure to the gates, risking the result which occurred. A limiting instruction might have been appropriate and might have aided plaintiff's jury argument that defendant was negligent, in leaving the switch closed and the pressure on, and that there was no proof decedent had knowledge of the negligence.

III. OTHER ISSUES

Another evidentiary issue in *State v. Zinn*[86] concerned the admissibility of juror testimony. While the jury was deliberating, the jurors sent five written questions to the trial court.[87] The court answered them at a time

80. SCRA 1986 11-403; 107 N.M. at 492, 760 P.2d at 785.
81. 107 N.M. at 492, 760 P.2d at 785.
82. *Id.*
83. *Id.*
84. N.M. U.J.I. CIVIL 13-2003.
85. *See* 107 N.M. at 492, 760 P.2d at 785.
86. 106 N.M. 544, 746 P.2d 650 (1987).
87. *Id.* at 549, 746 P.2d at 655.

when the defendant was not present in court.[88] Defendant's attorney waived defendant's presence.[89]

On appeal, defendant argued that his absence from court when the judge formulated his answers to the jury's questions created a presumption of prejudice under the supreme court's recent ruling in *Hovey v. State*.[90] *Hovey* held that the State had the burden of showing, in post-trial record proceedings at the trial court, that the court's communication to the jury did not affect the jury's verdict and therefore did not deny the defendant his right to be present.[91] *Hovey* did not reach the due process and confrontation provisions of either the United States or the New Mexico constitution.[92] Nor did *Hovey* reach any issue about how the State might meet its evidentiary burden in post-trial proceedings because the issue there was raised and decided on appeal.[93]

At post-trial proceedings in *Zinn*, the State offered two identical affidavits from each juror and the oral testimony of the foreperson to show that the judge's commmunication did not affect the jury's verdict.[94] The evidentiary question arose when the defendant objected to the jury evidence on the grounds of Rule 11-606(B).[95] The supreme court held that the State's use of the evidence to show "no affect on the verdict" did not contravene the purpose of Rule 11-606(B), which "is to prevent tampering and harassment of the jury and inquiry into its deliberations to the end of casting doubt on the jury's competence."[96] The court reasoned that to hold otherwise would prevent the State from discharging its burden under *Hovey*.[97]

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88. *Id.*

89. *Id.*

90. 104 N.M. 667, 726 P.2d 344 (1986). SCRA 1986 11-606(B) is at issue:

> *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.

91. 104 N.M. at 670, 726 P.2d at 347. A defendant's right to be present is provided by SCRA 1986, 5-610.

92. 104 N.M. at 669-70, 726 P.2d at 346-47. *But see* concurring opinion of Justice Walters, joined by Justice Sosa, relying specifically on the defendant's constitutional right for the concurrence. *Id.* at 671, 726 P.2d at 348.

93. *Id.* at 668, 670-71, 726 P.2d at 345, 347-48.

94. 106 N.M. at 549-50, 746 P.2d at 655-56.

95. *Id.* at 550, 746 P.2d at 656.

96. *Id.* The court also held that the defendant had waived any right to appeal by not objecting in the trial court, noting that Rule 11-606(B) is not a rule of procedure of constitutional dimension, but a rule of evidence subject to waiver. *Id.*

97. *Id.* at 550, 746 P.2d at 656.

The holding joins three others limiting the application of Rule 11-606(B). In *State v. Jane Doe*,[98] the court of appeals construed the exception in the rule regarding extraneous prejudicial information to allow jurors to testify about whether extraneous information reached the jury *and* whether it prejudiced the jury.[99] In *Duran v. Lovato*,[100] the court of appeals construed the same exception to allow jurors to testify about independent vehicle speed tests the jurors, themselves, conducted in a civil case where vehicle speed was an issue.[101] In *State v. Martinez*,[102] a defendant who was attempting to prove the lack of an impartial jury was allowed to present a juror's testimony that her acquaintanceship with the defendant was falsely concealed during voir dire.[103]

Reading these cases together, Rule 11-606(B) appears to be limited to the exclusion of evidence of jury incompetence which occurs wholly within the confines of the jury room. Any extraneous influence, be it improper seating of a juror due to error in voir dire, evidence from a source outside the record, or answers to questions propounded to the court during deliberations, may be proved by evidence from the jurors themselves.

98. 101 N.M. 363, 683 P.2d 45 (Ct. App. 1983), *cert. denied*, 101, N.M. 276, 682 P.2d 61 (1984).

99. 101 N.M. at 366-67, 683 P.2d at 48-49.

100. 99 N.M. 242, 656 P.2d 905 (Ct. App. 1982), *cert. denied*, 99 N.M. 226, 656 P.2d 889 (1983).

101. 99 N.M. at 247-48, 656 P.2d at 910-11.

102. 90 N.M. 595, 566 P.2d 843 (Ct. App. 1977).

103. *Id.* at 597, 566 P.2d at 845.