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Criminal Law -- Sua Sponte Instructions on Defendant's Failure to Testify

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only with reference to instructions in cases in which the defendant, having pleaded not guilty by reason of insanity, has already introduced evidence of mental disorder. Hopefully, when the issue presented to the court is the admissibility of such evidence to show lack of capacity to premeditate, the court will give diminished responsibility more serious consideration.

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Criminal Law—Sua Sponte Instructions on Defendant's Failure to Testify

Section 8-54 of the North Carolina General Statutes provides that a defendant in a criminal action is a competent witness but that the defendant's failure to testify in his own behalf "shall not create any presumption against him."[1] In several decisions,[2] the most recent of which is *State v. Caron*,[3] the North Carolina Supreme Court has dealt with the issue of whether it is error under section 8-54 for the judge, on his own initiative, to instruct the jury that the defendant has a right not to testify and that no adverse inference is to be drawn from the defendant's silence. Other state and federal courts, dealing with similar statutes, have divided[4] as to whether such an instruction, given without a defendant's request, so sensitizes the jury to the defendant's silence that an inference of guilt may arise or an existing adverse inference may be

1. N.C. GEN. STAT. § 8-54 (1969) provides:

Defendant in criminal action competent but not compellable to testify. —In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself.

2. State v. Baxter, 285 N.C. 735, 208 S.E.2d 696 (1974); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973); State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971); State v. Paige, 272 N.C. 417, 158 S.E.2d 522 (1968); State v. Rainey, 236 N.C. 738, 74 S.E.2d 39 (1953); State v. Wood, 230 N.C. 740, 55 S.E.2d 491 (1949); State v. McNeill, 229 N.C. 377, 49 S.E.2d 733 (1948); State v. Jordan, 216 N.C. 356, 5 S.E.2d 156 (1939); State v. Horne, 209 N.C. 725, 184 S.E. 470 (1936).

3. 288 N.C. 467, 219 S.E.2d 68 (1975).

4. *See* Annot., 18 A.L.R.3d 1335 (1968) for a compilation of these cases.

strengthened. In *State v. Caron* the court repeated its frequently stated assertion that the better practice is to "give no instruction concerning a defendant's failure to testify unless such an instruction is requested by defendant,"[5] but declined to hold a sua sponte instruction to be reversible error.

Defendant Caron was tried and convicted in Wake County Superior Court for feloniously setting fire to a building that housed his body and paint shop. The defense called witnesses to testify, but the accused himself did not take the stand.[6] Although the defendant did not request an instruction on his right to have no adverse inference drawn from his failure to testify, the court charged the jury as follows:

> "I recall that the defendant, even though he offered evidence, he did not take the stand and testify in his own behalf. Now, I make mention of that fact for this purpose. I have told you that he had no responsibility to offer any evidence, had a right to but no responsibility to; that he owed you no duty to offer any evidence; that the State had the whole burden and has the whole burden of proof throughout this case. Now that being so, he had an absolute right under the law to try his lawsuit in the fashion that he decided that it ought to be tried. He had a right to offer no evidence. If he offered any, he had a right to remain off the stand. You can't punish any man for exercising a lawful right. So I give emphasis to this fact: The fact that the defendant did not testify does not permit you to speculate about why he did not. He has exercised a lawful right. You may not take the position during your deliberations did he have something he didn't want us to know. He has exercised the lawful right and you may not hold it against him to any extent the fact that he did not testify. You must deal with what you have before you in this evidence and you may not hold against the defendant a'tall the fact that he did not testify."[7]

The North Carolina Supreme Court, in an opinion by Justice

5. 288 N.C. at 472-73, 219 S.E.2d at 72, *quoting* State v. Barbour, 278 N.C. 449, 457, 180 S.E.2d 115, 120 (1971), *cert. denied*, 404 U.S. 1023 (1972).

6. The evidence against defendant showed that he increased the first insurance coverage on his business several days before the fire; defendant had purchased a fifty-five gallon drum of lacquer thinner the day before the fire; lacquer thinner had apparently been poured in a trail throughout the shop and then ignited; defendant admitted being in the building shortly before the fire; and when notified of the blaze by the fire department, defendant arrived on the scene in a less-than-pristine state—that is, his hands, clothes, and face were coated with soot—a phenomenon that the defendant was unable to explain at the time. Defendant presented evidence that his accountant recommended the increased insurance coverage and that he was "habitually dirty" from his work in the body shop. 288 N.C. at 470-71, 219 S.E.2d at 70-71.

7. 288 N.C. at 471-72, 219 S.E.2d at 71.

Moore upholding the court of appeals,[8] found the instruction "unduly repetitious" but "not prejudicial."[9] Although noting that some jurisdictions hold such instructions erroneous when not requested by defendant and that the North Carolina Supreme Court itself had suggested that such a charge not be given unless requested by defendant, the majority concluded that the "spirit of G.S. 8-54 [had] been complied with."[10]

In dissent, Chief Justice Sharp, joined by Justice Exum, chided the majority for "disregard[ing] this Court's repeated admonition that 'it is better to give *no instruction* concerning failure of defendant to testify unless he requests it.' "[11] To the majority's holding that the undue repetitions in the charge were not prejudicial, the Chief Justice replied, "This conclusion ignores the fact that certain medicines taken in small doses may effect a cure while a large dose of the same medicine, or a small one indiscriminately repeated, can be fatal."[12] Finally, of the trial judge's admonition not to speculate on the reasons for defendant's absence from the stand, the dissent concluded, "[t]o prohibit this thought was to suggest it."[13]

At common law parties to legal actions were not allowed to testify. In the mid-nineteenth century, however, North Carolina and many other states enacted statutes making parties competent witnesses. The question remained whether the removal of a defendant's inability to testify should produce an inference of guilt when defendant failed to use his opportunity to attest to his innocence. In 1881 North Carolina enacted the predecessor of section 8-54,[15] which allowed criminal defendants to remain silent without a presumption of guilt being created.[16] Like its predecessor, the current statute is an attempt to give meaning to a defendant's constitutionally mandated protection from compulsory self-incrimination.[17] If silence were permitted to raise an inference of guilt, the defendant's choice of whether or not to testify would be a meaningless one, for his decision to testify would subject him to questioning that

8. State v. Caron, 26 N.C. App. 456, 215 S.E.2d 878 (1975).
9. 288 N.C. at 473, 219 S.E.2d at 72.
10. *Id.*
11. *Id.* at 474, 219 S.E.2d at 72, *quoting* State v. Bryant, 283 N.C. 227, 232, 195 S.E.2d 509, 512 (1973).
12. 288 N.C. at 474, 219 S.E.2d at 73.
13. *Id.*
14. State v. Walker, 251 N.C. 465, 479, 112 S.E.2d 61, 71 (1960); 8 J. WIGMORE, EVIDENCE § 2272, at 427 (McNaughton rev. 1961).
15. N.C. Rev. Stat. ch. 89 (1881), *as amended* N.C. GEN. STAT. § 8-54 (1969).
16. State v. Walker, 251 N.C. 465, 479, 112 S.E.2d 61, 71 (1960).
17. *See* Note, *Comments to the Jury on Defendant's Failure to Testify*, 64 DICK. L. REV. 164 (1960).

could produce evidence of his guilt, while his decision not to testify would be treated as evidence of guilt.

In *Bruno v. United States*[18] the United States Supreme Court interpreted a federal statute[19] worded almost identically to section 8-54 of the North Carolina General Statutes.[20] The Court held the statute to mean that when the defendant requests a federal judge to so charge, the judge is required to instruct the jury of defendant's right to silence and of the absence of any presumption of guilt resulting from his silence.[21] Although dealing with the problem in a different context, the Court in *Bruno* raised the same issue that underlies cases in which the defendant objects to or fails to request the instruction: how does the jury react to an instruction to ignore the defendant's silence. It was argued in *Bruno* that the defendant was not harmed by the judge's refusal to comply with the requested instruction since, had it been given, the charge would only have directed the jury's attention to the defendant's failure to testify and thus heightened the natural inference of guilt that arises when the jurors learn that the defendant will not testify. The Court found that, "[b]y legislating against the creation of any 'presumption' from a failure to testify, Congress could not have meant to legislate against the psychological operation of the jury's mind."[22] Congress's intent, rather, was to allow the accused "to make his own choice" of whether the jury should be instructed, by balancing the risk of highlighting his failure to testify against the advantage of informing the jury of the "no presumption" principle.[23]

Some legal scholars and jurists have also doubted the efficacy of such instructions regarding defendant's failure to testify.[24] Professor Wigmore, for example, thought that a natural inference of guilt arises

18. 308 U.S. 287 (1939).

19. The statute provided that in federal criminal trials "the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." Act of March 16, 1878, ch. 37, 20 Stat. 30, *as amended*, 18 U.S.C. § 3481 (1969).

20. *Compare* statute quoted at note 19 *supra, with* statute quoted at note 1 *supra*.

21. 308 U.S. at 293.

22. *Id.* at 293.

23. *Id.* at 294.

24. An interesting study which lends support to this point of view is cited at Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264, 266 (1966). The University of Chicago Jury Project found that experimental juries reacted to an instruction to disregard evidence by becoming even more aware of the evidence. When defendants in negligence suits disclosed they had insurance and no objection was made, the average verdict was $33,000. When defendants disclosed that they were insured, the plaintiff objected and the judge instructed the jury to disregard the evidence, the average verdict was $46,000.

when jurors observe the defendant's failure to take the stand and that instructing a jury to ignore this inference is useless. "It is well enough to contrive artificial fictions for use by lawyers, but to attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends toward confusion and a disrespect for the law's reasonableness."[25] One judge, arguing for eliminating the required instruction, stated that doing so " 'would cure . . . a species of legal hypocrisy whereby courts and jurors are compelled to assume an appearance of disregarding and forgetting something which is practically impossible for either of them to disregard or forget.' "[26]

While a natural inference probably does arise from the accused's failure to take the stand, courts have generally rejected the arguments for entirely eliminating the instruction. Some have stressed that the law presumes the innocence of defendants and that therefore the accused should be allowed to attempt to minimize any existing adverse inference either by choosing to instruct the jury of the presumption or by choosing not to further emphasize his silence.[27]

Not all courts, however, recognize the right to a choice in cases in which the defendant does not desire the instruction. The *Bruno* Court,[28] in upholding the defendant's right to the instruction when requested, noted that knowledge of the human mind was not so certain as to "justify us in disregarding the will of Congress by a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court that the failure of an accused to be a witness in his own cause 'shall not create any presumption against him.' "[29] In *United States v. Garguilo*[30] Judge Friendly for the Second Circuit Court of Appeals relied on the above quotation from *Bruno* to find that there was no error when the same instruction was given in the absence of a request by the accused. Noting the natural adverse inference that arises from defendant's failure to testify, Judge Friendly thus found it quite possible that the instruction would be helpful rather than prejudicial since it is not known that the jury could not or would not heed the instruction.[31] The Second Circuit thereby

25. J. WIGMORE, *supra* note 14, at 436.

26. Hiscock, *Criminal Law and Procedure in New York*, 26 COLUM. L. REV. 253, 259 (1926), *quoted in* L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT 22 (1959).

27. *See* United States v. Gainey, 380 U.S. 63, 73 (1965) (Douglas, J., dissenting); Bruno v. United States, 308 U.S. 287 (1939).

28. *See* text accompanying notes 18-23 *supra.*

29. 308 U.S. at 294.

30. 310 F.2d 249 (2d Cir. 1962).

31. *Id.* at 252.

interpreted *Bruno* in such a way as to allow removal of the very choice that the *Bruno* decision had provided.

Although the United States Supreme Court's decision in *Griffin v. California*[32] has furnished the rationale for some courts' decisions that the unrequested instruction is erroneous, it has been seen by other courts as not preventing a contrary conclusion.[33] *Griffin* held that the fifth and fourteenth amendments to the United States Constitution forbid comment by the court on the accused's silence.[34] The *Griffin* case dealt with an instruction that defendant's silence *could* be considered by the jury as evidence of his guilt. The debate about *Griffin*'s meaning has centered around whether *Griffin* forbids only those instructions that allow adverse inferences or whether *Griffin*'s sanction against "comment" extends to an unrequested charge that no adverse inference is allowed.[35]

In *State v. Bryant*[36] the North Carolina Supreme Court interpreted *Griffin* as barring only an instruction that defendant's silence was evidence of guilt.[37] While the North Carolina court has held that, in the absence of a request by the accused, section 8-54 does not create a duty for the judge to instruct that silence creates no inference of guilt,[38] the court has frequently suggested that the instruction not be given unless requested by the defendant.[39] Despite these repeated admonitions, the court has found prejudicial error in the sua sponte instruction in only two cases, and in both cases the judge informed the jury of the defendant's right not to testify but failed to mention that no adverse inference could arise from the exercise of that right.[40] These two instructions

32. 380 U.S. 609 (1965).
33. Many of these cases are collected at 18 A.L.R.3d 1335 (1968).
34. 380 U.S. at 613.
35. 18 A.L.R.3d 1335 (1968).
36. 283 N.C. 227, 195 S.E.2d 509 (1973).
37. *Id.* at 233, 195 S.E.2d at 513.
38. State v. Baxter, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974); State v. Bryant, 283 N.C. 227, 231, 195 S.E.2d 509, 512 (1973); State v. Rainey, 236 N.C. 738, 741, 74 S.E.2d 39, 41 (1953); State v. Jordan, 216 N.C. 356, 365, 5 S.E.2d 156, 161 (1939).
39. State v. Bryant, 283 N.C. 227, 233-34, 195 S.E.2d 509, 513 (1973); State v. Barbour, 278 N.C. 449, 457, 180 S.E.2d 115, 120 (1971), *cert. denied*, 404 U.S. 1023 1972); State v. Jordan, 216 N.C. 356, 366, 5 S.E.2d 156, 161 (1939).
40. State v. Baxter, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974) (instruction that defendants " 'did not offer any evidence as they have a right to do' " was prejudicial error since it failed to instruct the jury "correctly and completely"). State v. Rainey, 236 N.C. 738, 740-41, 74 S.E.2d 39, 41 (1953) (error in mentioning defendant's right to silence without noting presumption of innocence, but held harmless error since presumption was mentioned three times elsewhere in the charge).

were erroneous because they were incomplete statements of the law, not because any right of the defendant would be violated if the judge gave the full instruction without a request by the defendant.[41]

Even accepting the notion that the unsolicited instruction is not error per se, the phrasing of instructions such as the one given in *Caron*,[42] which repeatedly emphasizes defendant's silence, could certainly prejudice the defendant. It is the wording of instructions rather than the fact that an instruction was given that the court has criticized most often.[43] The North Carolina courts have frequently urged that the language of the statute itself be used in giving the instruction,[44] and since 1973, a pattern instruction has been available.[45] Yet instructions such as that in *Caron* continue to be given, and only two supreme court justices have been willing to go beyong a suggestion that more "commendable" language could be used.[46]

Adoption of the view that the sua sponte charge of "no presumption of guilt" is reversible error would raise the question of the proper procedure to use at trial. The rule of *Bruno v. United States*[47] and the similar North Carolina case, *State v. Rainey*,[48] should be retained: when defendant requests the instruction that no inference arises from his failure to testify, the trial judge is required to so charge the jury. This

41. State v. Baxter, 285 N.C. 735, 738-39, 208 S.E.2d 696, 698 (1974):
While it was not error for the court, in the absence of a request by the defendant, to instruct the jury correctly and completely on this point, any instruction thereon is incomplete and prejudicially erroneous unless it makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him.

42. *See* text accompanying note 7 *supra*.

43. *E.g.*, State v. Caron, 288 N.C. 467, 473, 219 S.E.2d 68, 72 (1975) ("we do not commend the instruction given . . . as it was unduly repetitious"); State v. Baxter, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974) (charge was "incomplete statement"); State v. Bryant, 283 N.C. 227, 233-34, 195 S.E.2d 509, 513 (1973) ("we do not approve the language chosen"); State v. Barbour, 278 N.C. 449, 457, 180 S.E.2d 115, 120 (1971), *cert. denied*, 404 U.S. 1023 (1972) ("the instruction is meager and is not commended"); State v. Paige, 272 N.C. 417, 423, 158 S.E.2d 522, 527 (1968) ("infelicitous choice of words").

44. *E.g.*, State v. McNeill, 229 N.C. 377, 379, 49 S.E.2d 733, 734 (1948); State v. Caron, 26 N.C. App. 456, 460, 215 S.E.2d 878, 880 (1975); State v. Powell, 11 N.C. App. 465, 474, 181 S.E.2d 745, 760 (1971).

45. NORTH CAROLINA PATTERN INSTRUCTIONS—CRIM. 101.30 (1973). It reads: "The defendant in this case has not testified. The law of North Carolina gives him this privilege. This same law also assures him that his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in any way."

46. *See* State v. Caron, 288 N.C. 467, 474, 219 S.E.2d 68, 72 (1975) (Sharp & Exum, JJ., dissenting).

47. 308 U.S. 287 (1939).

48. 236 N.C. 738, 74 S.E.2d 39 (1953).

rule protects the defendant who fears that the jury may attach undue significance to his silence and who yet believes that the judge's instruction has the potential of diminishing the adverse inference that naturally arises from his silence.[49]

Currently in North Carolina, attorneys are not required to request instructions on "substantive" features of a case, while they must request an instruction on a "subordinate" feature.[50] Failure to request the "subordinate" feature instruction leaves the judge with discretion whether to charge the jury on the issue.[51] The instruction about defendant's failure to testify has been classified as relating to a subordinate feature of a case,[52] and thus the question arises whether the judge's discretion to instruct in the absence of a request should be retained. Several jurisdictions allow the judge to use his discretion but subject it to the defendant's right to object.[53] If the accused offers an objection to the judge's proposed instruction, it is error for the judge to give the instruction.

In North Carolina, however, attorneys are not required to object to errors in an instruction in order to preserve the error for appeal; [54] and even if they do object, it is not necessarily erroneous for the judge to instruct over their objections. The alternatives for implementing the rule that the sua sponte charge is error are thus either to remove the judge's discretion to charge when the defendant does not request the instruction or to retain the discretion and to require the defendant to object if he thinks the instruction will call undue attention to his silence. Since a judge-made rule currently excuses the defendant from objecting in criminal actions,[55] the court itself could change the rule and require the accused to object at trial if he wishes to bar comment on his right to silence. If the judge then instructed over the defendant's objection, the charge would be erroneous. Either of these alternatives would allow "defendant's counsel [to] observe the entire proceedings and make his

49. Bruno v. United States, 308 U.S. 287 (1939). *See* Note, *Comments to the Jury on Defendant's Failure to Testify*, 64 DICK. L. REV. 164.

50. Broun, *North Carolina Jury Instruction Practice—Is It Time to Get the Judge Off the Tightrope?*, 52 N.C.L. REV. 719, 720 (1974).

51. State v. Powell, 11 N.C. App. 465, 474, 181 S.E.2d 754, 760 (1971).

52. State v. Rainey, 236 N.C. 738, 741, 74 S.E.2d 39, 41 (1953).

53. *E.g.*, United States v. Smith, 392 F.2d 302 (4th Cir. 1968) (dictum); Russell v. State, 240 Ark. 97, 398 S.W.2d 213 (1966); Gross v. State, 261 Ind. 489, 306 N.E.2d 371 (1974).

54. Broun, *supra* note 50, at 720.

55. *Id.* Professor Broun points out that N.C.R. Civ. P. 46(c) excuses attorneys from objecting to the charge in civil cases. *Id.* at 720 n.6. Broun argues for requiring objections to preserve error for appeal in civil and criminal cases, with an exception for "plain error." *Id.* at 733-34.

choice after he has determined whether an instruction is needed to protect the defendant's rights in the particular case."[56] In addition, the choice would be given "to the one whose rights are at stake; hence, if defendant [were] ultimately prejudiced by his selection, he [would] have no cause to complain."[57]

Regardless of whether the rule is changed to allow the defendant an absolute choice about giving the instruction, North Carolina's appellate courts should enforce their frequently repeated suggestion that the words of the statute or the available pattern instruction be used in charging the jury.[58] The instruction in *Caron* is a flagrant example of the ineffectiveness of these mere warnings to the trial courts. It is difficult to believe that such an instruction could not prejudice the defendant's right to remain silent, and when the means to assure that the instruction is properly given are so readily available, failure to do so is inexcusable.

The "natural inference" that a defendant who does not testify in his own behalf must be guilty runs counter to the law's presumption of innocence and to the accused's privilege of silence. Innocent defendants who decline to testify do exist; their silence may be prompted by fear of impeachment through the introduction of evidence of bad character or prior conviction, by fear that under the pressure of cross-examination their demeanor may adversely affect the jury, or by fear of exposing matters remotely related to the charges.[59] If the defendant, innocent or guilty, "is to have the unfettered right to testify or not to testify he should have a correlative right to say whether or not his silence should be singled out for the jury's attention."[60] *State v. Caron* is the latest example of the North Carolina Supreme Court's willingness to pay lip service to this right of the defendant while refusing to enforce the right.

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56. Note, 64 DICK. L. REV. *supra* note 17, at 171.
57. *Id.*
58. *See* notes 44-45 and accompanying text *supra.*
59. Wilson v. United States, 149 U.S. 60, 66 (1893); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 118 (2d ed. E. Cleary 1972); J. WIGMORE, *supra* note 14, at § 2272.
60. Russell v. State, 240 Ark. 97, 100, 398 S.W.2d 213, 215 (1966).