

Did You Really Just Say That? Impeachment by Prior Inconsistent Statement

Impeachment

- The process of discrediting a witness
- Evidence relates to credibility
 - Limited purpose
- But some impeachment evidence may also be offered as substantive evidence

The Rules

- IRE 613 (impeachment procedure)
- IRE 801(d)(1)(A) (substantive admissibility of prior statement)
 - adopts Section 115-10.1
- IRE 607 (affirmative damage rule)

Impeachment Evidence may be *Intrinsic* or *Extrinsic*

- Intrinsic: Facts from witness during examination
- Extrinsic: Facts from another witness or other evidence

Collateral Facts

- Pertinent only to witness's credibility
- Not related to issue in case
- If witness denies collateral fact, opponent bound by answer
- Extrinsic evidence not admissible

Extrinsic Evidence Rule

- If witness admits fact on cross-examination, witness is impeached
- No extrinsic evidence admissible
- Witness's admission prevents extrinsic evidence

Extrinsic Evidence Rule

- Witness denies impeaching fact, and fact is material (*i.e.* not collateral)
- Extrinsic evidence admissible to prove up impeachment
 - Typically required to do so

The Basics

Witness makes a written statement during the investigation of the case.

Witness testifies; part of testimony inconsistent with prior statement.

What to do?

The Basics

1. Recommit witness to “new” version
2. Set-up witness regarding making of prior statement

The Basics

3. Ask witness whether made prior statement
4. If witness admits prior statement, impeachment complete

The Basics

5. If witness denies prior statement, confront with prior statement
 - Rule 613(b) (opportunity explain / deny)
 - Not entire prior statement
6. If witness still denies, must prove up prior statement

What's it for?

- Witness credibility
 - Prior statement limited purpose – impeachment
- Unless admitted substantively
 - Credibility, and so much more

Substantive Evidence

- IRE 801(d)(1)(A)
- Section 115-10.1

Substantive Evidence

- In a criminal case
- Declarant testifies subject to cross-examination concerning the statement
- Statement inconsistent with declarant's testimony, and—

Substantive Evidence

- Statement made under oath
 - at a trial, hearing, or other proceeding
 - in a deposition
 - added to Rule 801(d)(1)(A)

OR

Substantive Evidence

- Statement narrates, describes, or explains an event or condition of which the declarant had personal knowledge,
and

Substantive Evidence

- declarant had personal knowledge, and
(a) the statement is proved to have been written or signed by the declarant, or

Substantive Evidence

- declarant had personal knowledge, and
(b) declarant acknowledged under oath making the statement, or

Substantive Evidence

- declarant had personal knowledge, and
- (c) statement proved to have been accurately recorded.

Section 115-10.1

“Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein.”

Impeachment Only

- “Normal” impeachment
- Limited purpose: credibility
 - ✓ Remember IPI-Criminal No. 3.11
 - ✓ Cannot argue as substantive evidence

Impeachment Only

- Credibility of witness can always be attacked
- By any party
- BUT, if party's own witness....

Impeachment Only

- Affirmative damage rule:
- "credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of affirmative damage"

Impeachment Only

- Affirmative damage rule:
- Rule 607
- Not apply to prior inconsistent statements admitted as substantive evidence

Impeachment Only

- Affirmative damage rule:
- Issue: witness's testimony affirmatively damage or merely disappoint
- Affirmative damage when party's case worse than would have been if witness not testify at all

Impeachment Only

- Affirmative damage rule:
- If affirmative damage, prior statement admissible (for credibility only)
- If merely disappoint, prior statement NOT admissible

Trial 1

Defendant on trial for Predatory CSA.

Victim made inconsistent statement to uncle.

Victim testifies. On cross-examination, defense NOT ask victim whether made prior statement to uncle.

Trial 1

Defense calls uncle, seeking to introduce victim's prior inconsistent statement.

State objects.

Correct ruling?

Trial 1

- *People v. Burgess*, 2015 IL App (1st) 130657
- *People v. Brothers*, 2015 IL App (4th) 130644
- *People v. Evans*, 2016 IL App (3d) 140120
- *People v. Hallbeck*, 227 Ill.App.3d 59 (2nd Dist. 1992)
- *People v. Lewis*, 2017 IL App (4th) 150124

Trial 2

Defendant on trial for murder.

Franklin was near scene of murder; later made video-recorded statement to police.

Recorded statement to police included that Defendant bragged he "beat the f**k out of that n*****'s head with a bat about 30 times"

Trial 2

Called by State at trial, Franklin testifies on direct that he did not remember what Defendant told him.

State then calls the detective and offers the video-recorded prior inconsistent statement as substantive evidence.

Trial 2

Defense objects.

Correct ruling?

Trial 2

- *People v. Simpson*, 2015 IL 116512 (defense failed to object)
- *People v. Lofton*, 2015 IL App (2d) 130135 (defense failed to object)

"Now, more than 30 years after the statute's enactment, seasoned attorneys and trial judges still regularly mishandle section 115-10.1 issues when they come up at trial."

People v. Brothers, 2015 IL App (4th) 130644

Trial 3

Defendant on trial for Agg DUI-death with 3 victims, based upon claims he was huffing.

Fritch, surviving passenger, gave a verbal statement to police that the 3 victims were the back seat passengers.

Trial 3

Fritch also told police that just before the crash, he was looking out the window and heard a back-seat passenger tell defendant, "you shouldn't be doing that".

A State's witness at trial, Fritch denied telling the police the above.

Trial 3

Is Fritch's statement to police that he heard a back-seat passenger tell defendant, "you shouldn't be doing that" admissible as *substantive* evidence?

- Personal knowledge?

Trial 3

Is Fritch's statement to police that he heard a back-seat passenger tell defendant, "you shouldn't be doing that" admissible for *limited purpose* of impeachment?

- Affirmative damage or merely disappoint?

Trial 3

- *People v. Blakey*, 2015 IL App (3d) 130719
- *People v. Brothers*, 2015 IL App (4th) 130644
- *People v. Wilson*, 2012 IL App (1st) 101038

Thank you!

Rule 613

PRIOR STATEMENTS OF WITNESSES

(a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is first afforded an opportunity to explain or deny the same and the opposing party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to statements of a party-opponent as defined in Rule 801(d)(2).

(c) Evidence of Prior Consistent Statement of Witness. A prior statement that is consistent with the declarant-witness's testimony is admissible, for rehabilitation purposes only and not substantively as a hearsay exception or exclusion, when the declarant testifies at the trial or hearing and is available to the opposing party for examination concerning the statement, and the statement is offered to rebut an express or implied charge that:

- (i) the witness acted from an improper influence or motive to testify falsely, if that influence or motive did not exist when the statement was made; or
- (ii) the witness's testimony was recently fabricated, if the statement was made before the alleged fabrication occurred.

Rule 801

DEFINITIONS

The following definitions apply under this article:

....

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if

(1) **Prior Statement by Witness.** In a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(A) inconsistent with the declarant's testimony at the trial or hearing, and—

(1) was made under oath at a trial, hearing, or other proceeding, or in a deposition, or

(2) narrates, describes, or explains an event or condition of which the declarant had personal knowledge, and

(a) the statement is proved to have been written or signed by the declarant, or

(b) the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition, or

(c) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

Section 115-10.1
(725 ILCS 5/115-10.1)

Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

- (a) the statement is inconsistent with his testimony at the hearing or trial, and
- (b) the witness is subject to cross-examination concerning the statement, and
- (c) the statement--

- (1) was made under oath at a trial, hearing, or other proceeding, or
 - (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein.

Rule 607

WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of affirmative damage. The foregoing exception does not apply to statements admitted pursuant to Rules 801(d)(1)(A), 801(d)(1) (B), 801(d)(2), or 803.