
21.3 Right to Testify

A. Right to Testify

Federal constitution. The defendant has a constitutional right to take the witness stand and to testify in his or her own defense. This right is applicable to the states through the Fourteenth Amendment. *Rock v. Arkansas*, 483 U.S. 44 (1987). Although not recognized at common law or specifically enumerated in the U.S. Constitution, this right is now accepted to be an inherent part of the Due Process Clause of the Fourteenth Amendment and the Compulsory Process Clause of the Sixth Amendment. *See id.*; *State v. Colson*, 186 N.C. App. 281 (2007).

Statutory authority. G.S. 8-54 provides that a criminal defendant is "at his own request, but not otherwise, a competent witness." If a defendant decides to testify, he or she will be treated as any other witness and thereby subjects himself or herself "'to all the disadvantages of that position.'" *State v. Auston*, 223 N.C. 203, 205 (1943) (citations omitted). The defendant is subject to cross-examination and impeachment as is any other witness. *See id.*; *State* v. *Weaver*, 3 N.C. App. 439 (1969); *see also* G.S. 8-54.

The decision whether to testify. Whether to testify "is an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972). "[T]he decision whether to testify is a substantial right belonging to the defendant." *State v. Luker*, 65 N.C. App. 644, 649 (1983) (counsel can advise defendant not to testify, but the ultimate decision belongs to the defendant), *aff'd in part, rev'd in part on other grounds*, 311 N.C. 301 (1984); *see also* JOHN RUBIN & ALYSON A. GRINE, 1 NORTH CAROLINA DEFENDER MANUAL § 12.8A (Control and Direction of Case) (2d ed. 2013) (discussing decision-making in the attorney-client relationship); Appendix A (2d ed. 2012), *infra*, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 7.6(b) Presenting the Defense Case (Nov. 2004) ("Counsel should discuss with the client all of the considerations relevant to the client's decision to testify, including but not limited to, the likelihood of cross-examination and impeachment concerning prior convictions and prior bad acts that affect credibility.").

If the defendant chooses to testify, the trial judge is not required to instruct the jury, on request or otherwise, that the defendant cannot be compelled to testify. *State v. Walden*, 311 N.C. 667, 677 (1984) (no error by trial judge in denying defendant's request for an instruction on his decision to testify, "the inference of which would be to insure that the jury look favorably upon his willingness to testify").

Waiver. A defendant may waive the constitutional right to testify as long as the waiver is knowing and voluntary. *State v. Luker*, 65 N.C. App. 644 (1983), *aff'd in part, rev'd in part on other grounds*, 311 N.C. 301 (1984). Unlike other waivers of constitutional rights, however, the trial judge is not required to inform a defendant of his or her right to testify or to make an inquiry on the record to determine whether his or her waiver is knowing and voluntary. *State v. Carroll*, 356 N.C. 526 (2002); *see also State v. Hayes*, 314 N.C. 460 (1985) (finding no denial of the right to testify because defendant did not indicate to the judge that he wished to testify). Nevertheless, trial judges are not prohibited from conducting an inquiry, and it is a common practice for trial judges, sua sponte or at the request of defense counsel, to inquire of the defendant to determine whether the waiver of the right to testify is made knowingly, voluntarily, and understandingly. *See, e.g., State v. Thompson*, 359 N.C. 77 (2004); *Carroll*, 356 N.C. 526.

Impermissible chilling of the defendant's right to testify. The trial judge, by his or her statements or conduct, should not impermissibly chill the defendant's right to testify. For example, a delay in ruling on, or the erroneous denial of, a motion in limine could have an unacceptable chilling effect on a defendant's right to testify. *Compare State v. Lamb*, 321 N.C. 633 (1988) (new trial granted where the bald denial of defendant's motion in limine to exclude inadmissible evidence implicating her in other killings impermissibly chilled the defendant's right to take the stand in her own defense), *with State v. Barber*, 120 N.C. App. 505 (1995) (no impermissible chilling of the right to testify where judge declined to rule on defendant's motion in limine to suppress evidence of underlying facts of prior convictions where the evidence did not clearly show that defendant's decision whether to testify rested solely on the judge's decision on the motion, and the judge did not erroneously deny the motion but deferred the decision until he had more facts and assured defendant that he would not admit impermissible evidence). Whether the denial of a defendant's motion in limine impermissibly chills his or her right to testify "depends on the peculiar facts of each case." *Lamb*, 321 N.C. 633, 648.

Likewise, if the trial judge undertakes to advise the defendant about the legal consequences of taking the stand, he or she may impermissibly chill the defendant's free exercise of that right by giving erroneous advice. *See State v. Autry*, 321 N.C. 392 (1988) (error found where trial judge gave a defendant an incorrect explanation about the scope of cross-examination to which the defendant could have been subjected). If the judge correctly advises the defendant in general on the consequences of testifying, there is not an impermissible chilling effect on a defendant's right to testify. *See State v. Davis*, 349 N.C. 1 (1998) (no error where trial judge did not attempt to give the defendant detailed instruction on the scope of cross-examination, and defendant had discussed the consequences of testifying with his attorneys); *see also State v. Davis*, 353 N.C. 1 (2000) (no error by failure to give more detailed instructions to defendant about cross-examination; instructions were not inaccurate); *State v. Little*, ___ N.C. App. ___, 799 S.E.2d 427 (2017) (holding that since there is no obligation for a trial judge to inform a defendant of the possible consequences of the decision to testify, the trial judge was not required to balance his colloquy with defendant about the impeachment consequences of testifying with an instruction on the advantages of testifying).

B. Right Not to Take the Stand

Constitutional privilege against self-incrimination. A defendant has a right to refuse to testify under the Fifth Amendment to the U.S. Constitution, as incorporated by the Fourteenth Amendment, and also under article I, section 23 of the N.C. Constitution. A defendant's exercise of this right may not be used against him or her, and any reference by the State to a defendant's failure to testify violates the defendant's constitutional rights. *See Griffin v. California*, 380 U.S. 609 (1965); *State v. Mitchell*, 353 N.C. 309 (2001).

Statutory privilege against self-incrimination. G.S. 8-54 likewise recognizes that, although the defendant has the right to testify if he or she so chooses, nothing in that statute renders a criminal defendant "competent or compellable to give evidence against himself," nor does it "render any person compellable to answer any question tending to criminate himself."

Right not to be called as witness. The right of a defendant not to testify means not only that the defendant has the right not to take the stand but also that the court, the State, and a co-defendant in a joint trial may not call the defendant as a witness. *See Jones v. State*, 586 A.2d 55 (Md. Ct. Spec. App. 1991).

The State may require a defendant to stand or otherwise exhibit himself or herself before the jury as long as the act is relevant and is not of a testimonial or communicative nature. Such an exhibition has been held not to violate the Fifth Amendment's protection against self-incrimination or the Due Process Clause of the Fourteenth Amendment. Likewise, a defendant should be allowed to challenge the State's evidence by exhibiting himself or herself before the jury, if the exhibition is relevant and non-testimonial, without being subjected to cross-examination or impeachment. For further discussion of this topic, see *infra* § 27.2B, View of the Defendant (2d ed. 2012).

Comment on the exercise of the right not to testify. Prosecutors are strictly prohibited from making any reference to a defendant's failure to testify. *See State v. Reid*, 334 N.C. 551 (1993) (new trial granted where prosecutor argued that defendant had not testified, that he had that right, and that the jury was not to hold it against him); *see also Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976) (holding that the trial judge and prosecutor are prohibited from suggesting to the jury that it may treat a defendant's silence as substantive evidence of guilt); *State v. Baymon*, 336 N.C. 748 (1994) (new trial granted where prosecutor's argument directly referred to defendant's failure to testify and was intended to disparage defendant in the eyes of the jury) ; *see also infra* § 33.7C, Impermissible Content (2d ed. 2012) (discussing impermissible closing arguments by prosecution).

Judges likewise may not comment on the defendant's failure to testify except, if requested by the defendant, to instruct the jury on the right not to testify (discussed further below).

Defense counsel may refer to the defendant's right not to testify in closing argument by reading the Fifth Amendment and G.S. 8-54. The cases also indicate that defense counsel may use words to that effect and may paraphrase that right. *See State v. Banks*, 322 N.C. 753, 764 (1988) (defense counsel should have been permitted to read that clause of the Fifth Amendment pertinent to the defendant's right not to testify and "to say simply that because of this provision, the jury must not consider defendant's election not to testify adversely to him, or words to this effect"); *State v. Bovender*, 233 N.C. 683, 690 (1951) ("mere statement by defendants' counsel that the law says no man has to take the witness stand would seem to be unobjectionable"). Defense counsel is not allowed to comment on or explain further why the defendant did not testify. *Bovender*, 233 N.C. 683, 689–90 (so holding because permitting extended comment by defense counsel "would open the door for the prosecution and create a situation the statute was intended to prevent").

Defense counsel also has the right to inquire of prospective jurors during jury selection about their ability to follow the law, including the laws on the defendant's right not to testify. *See State v. Blankenship*, 337 N.C. 543, 554–55 (1994).

Instruction on the effect of the decision not to testify. If the defendant requests an instruction on his or her decision not to testify, the trial judge is required by the Fifth and Fourteenth Amendments to give one. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (the failure to give the requested prophylactic instruction "exacts an impermissible toll on the full and free exercise of the privilege"); *see also State v. Sanders*, 288 N.C. 285 (1975) (there is no mandatory formula for instructing the jury on a defendant's decision not to testify but an instruction is sufficient if it makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he or she sees fit and that the failure to testify should not raise any adverse inference).

Absent a request, it is discretionary with the trial judge whether to instruct the jury on the defendant's decision not to testify. The appellate courts have emphasized, however, that it is the "better practice" for a judge not to give such an instruction unless it is requested by the defendant. *See State v. Barbour*, 278 N.C. 449 (1971); *State v. Powell*, 11 N.C. App. 465 (1971).

Practice note: If you believe that an instruction on the defendant's decision not to testify would be helpful, you should specifically request that the judge instruct the jury that the defendant has not testified, that the law gives him or her that privilege, that the decision creates no presumption against him or her, and that the defendant's silence is not to influence their decision in any way. *See* N.C. Pattern Jury Instruction—Crim. 101.30 (May 2005); *see also Carter v. Kentucky*, 450 U.S. 288, 301 (stating that without an instruction on the defendant's decision not to testify, "the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt").

The U.S. Supreme Court has held that the giving of a "no-inference" instruction, over the defendant's objection, does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments. *See Lakeside v.*

Oregon, 435 U.S. 333 (1978). However, if the judge indicates that he or she intends to give a "no-inference" instruction and you do not want one, be sure to object so that any error will be preserved on appeal. *See State v. Bennett*, 308 N.C. 530 (1983) (where defendant failed to object to the trial judge's instruction on the defendant's failure to testify, the error would be reviewed for "plain error" only). Include as a basis for your objection the state constitutional right not to testify under article I, section 23 of the N.C. Constitution. *See also State v. Bryant*, 283 N.C. 227, 233 (1973) ("Some jurisdictions hold that unless the defendant so requests, such an instruction tends to accentuate the significance of his silence and thus impinges upon defendant's unfettered right to testify or not to testify at his option." (citing 18 A.L.R.3d 1335)).

Additional resources. For a further discussion of the privilege against self-incrimination, see Robert Farb, *Fifth Amendment Privilege and Grant of Immunity*, N.C. SUPERIOR COURT JUDGES' BENCHBOOK (May 2014).