

CRIMINAL EVIDENCE: RELEVANCY

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I. Relevancy – Generally

A. Relevancy Defined. Rule 401 defines relevant evidence as follows:

Rule 401

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

B. Only Relevant Evidence is Admissible. Rule 402 provides that relevant evidence is admissible, subject to the rules of legal relevancy, and that irrelevant evidence is inadmissible.

Rule 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible.

- C. Logical Relevancy Versus Legal Relevancy.** Rule 401 sets out a rule of logical relevancy—it provides that evidence is relevant if it has a logical connection to a fact of consequence. However, not all relevant evidence is admissible. The rules of legal relevancy exclude, for a variety of reasons, evidence that has logical relevance. The concept of legal relevancy is embedded in Rule 402, which provides that relevant evidence is admissible “except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules.” One example of a rule of legal relevance contained in the evidence code is Rule 403, which excludes relevant evidence when its probative value is significantly outweighed by the danger of unfair prejudice, waste of time, confusion, etc. Others are Rule 410, which excludes, among other things, certain relevant statements made in connection with plea discussions in order to promote plea bargaining and Rule 412, commonly known as a rape shield rule. An example of a constitutional rule of legal relevancy is the *Crawford* rule, which excludes relevant evidence that violates the defendant’s confrontation clause rights.
- D. “Any Tendency.”** To be relevant, evidence must have probative value. Rule 401 defines relevant evidence as evidence “having any tendency” to make a fact of consequence more or less probable. The evidence need not be conclusive of the fact; it need only throw “any light” on the issue. *State v. Smith*, 357 N.C. 604, 613 (2003) (citation omitted) (noting that the weight of the evidence is a question for the jury); *State v. Miller*, 197 N.C. App. 78, 86-87 (2009) (“The value of the evidence need only be slight.” (citation omitted)). Thus, evidence is not subject to exclusion under Rule 401 simply because its probative value is weak (although that fact may be considered in a decision whether to exclude the evidence under Rule 403, which balances probative value against unfair prejudice, waste of time, etc.). The fact that the evidence is duplicative of other admissible evidence, while pertinent to a Rule 403 analysis, is not pertinent for Rule 401 purposes. *State v. Jones*, 358 N.C. 330, 341 (2004).
- When the required probative value is absent, courts sometimes say that the evidence is too “speculative” or “tenuous” to be relevant. *See, e.g.*, *State v. Roache*, 358 N.C. 243, 296 (2004) (evidence that was only “tenuously related” was irrelevant); *State v. Baker*, 320 N.C. 104, 108 (1987) (evidence was “too speculative” to be relevant).
- E. Relevancy Versus Sufficiency.** The question of relevancy (any tendency to make a fact of consequence more or less likely) is different from the question of sufficiency (whether there is enough evidence to go to the jury). Evidence may be relevant but insufficient to take the issue to the jury. Additionally, the strength of the evidence goes to the issue of sufficiency, not admissibility. *See* Commentary to N.C. R. EVID. 401 (“[T]he language of the rule . . . avoid[s]

confusion between questions of admissibility and questions of the sufficiency of the evidence”).

- F. “Fact . . . of Consequence.”** To be relevant, the evidence must have a tendency to make the existence of “any fact that is of consequence to the determination” more or less probable. This part of the rule essentially establishes a requirement of materiality: if the evidence does not help to establish a fact that is material to the case, it is not relevant. *See, e.g., State v. Cowan*, 194 N.C. App. 330, 332 (2008) (at the defendant’s drug trial, evidence about his aunt’s prior drug trafficking trial and conviction was irrelevant where there was no evidence that the aunt’s criminal activities had any relation to the defendant’s alleged crimes); *State v. Bodden*, 190 N.C. App. 505, 509 (2008) (nine-millimeter bullet found near a murder scene was irrelevant where the bullets used to shoot the victim were .38 or .357 caliber). Obviously, whether a fact is of consequence depends on the substantive law at issue in the case.

Rule 401 does not require that the fact of consequence be in dispute. *See* Commentary to N.C. R. EVID. 401. Thus, background information, such as a witness’s education or employment that will aid the jury in deciding disputed issues of fact is admissible under the Rule. *See id.* Of course, when the fact is not disputed, Rule 403 may provide a basis for excluding the evidence.

- G. Direct Versus Circumstantial Evidence.** Direct evidence is evidence that does not rely on an inference. An example of direct evidence is a witness’s testimony at an armed robbery trial that she saw the defendant rob the victims with a firearm. When direct evidence is involved, determining relevancy is usually a fairly straightforward analysis. In the example given, the testimony is clearly relevant to, among other things, identify the defendant as a perpetrator.

Circumstantial evidence requires an inference to be made from the evidence. For example: in order to identify the defendant as the perpetrator of an armed robbery, the State seeks to introduce evidence that the defendant was seen with the weapon used in the robbery minutes after the crime occurred. In this situation, an inference is required to connect the evidence (the defendant’s possession of the weapon minutes after the crime) with the fact sought to be proved (that the defendant was the perpetrator). Circumstantial evidence may be used to establish a fact of consequence. *See, e.g., State v. Muhammad*, 186 N.C. App. 355, 360 (2007) (in a murder case, the victim’s last words, “I’m not scared of you. I am a Christian,” made as the defendant was approaching, was circumstantial evidence of the defendant’s state of mind). In fact, “[t]he law makes no distinction between the weight to be given to either direct or circumstantial evidence.” N.C.P.I. – CRIM.104.05. However, because of the inference involved with circumstantial evidence, most complicated relevancy issues involve circumstantial evidence.

- H. Testimonial, Real, and Demonstrative Evidence.** Evidence may be testimonial (e.g., a witness’s testimony under oath in court), real (e.g., a letter, a quantity of a controlled substance, or a murder weapon), or demonstrative (e.g., a model, a chart, or a demonstration of how events occurred). To be admissible as substantive evidence, all types of evidence—testimonial, real, and demonstrative—must be relevant. *See, e.g., State v. Fowler* 159 N.C. App. 504, 511 (2003) (demonstration was relevant to whether the defendant killed the victim with premeditation and deliberation).

- I. **Relevancy Inquiry.** When analyzing relevancy, it may be helpful to follow this simple analytical framework:

Steps for Assessing Relevancy

- Identify the evidence at issue.
- Identify the fact of consequence to which the evidence relates.
- Determine whether the evidence has any tendency to make that fact more or less likely.

- J. **Preliminary Question/Procedure.** Relevancy is a preliminary question for the court under Rule 104(a). In making the preliminary determination as to relevancy, the court is not bound by the rules of evidence, except for those relating to privileges. N.C. R. EVID. 104(a).

- K. **Conditional Relevancy.** When evidence is relevant only if some other preliminary fact which also requires proof exists, Rule 104(b) provides that the court is to admit the evidence upon, or subject to, the introduction of sufficient evidence to allow the jury to find that the preliminary fact exists. This principle is called “conditional relevancy.” The Commentary to Rule 401 provides an example: If evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged with notice heard the statement. In this example from the Commentary, the relevancy of the spoken statement is conditioned on it having been heard by the person charged with notice.

Whether the trial court admits the evidence upon the proponent’s assurance that its relevance will become apparent, or interrupts the examination of one witness to allow another to be called to demonstrate the relevance of the questioned evidence, is within the court’s discretion. N.C. R. EVID. 611(a). In making the decision, the court should consider the likelihood of overcoming the resulting prejudice if the questioned evidence later must be stricken. If an instruction to disregard will not be effective, the trial court may consider allowing the proponent to call witnesses out of order, or conduct a voir dire in the absence of the jury.

- L. **When Irrelevant Evidence May be Admissible.** Sometimes irrelevant evidence will be admitted, such as when the other side fails to object or the judge errs when ruling on a relevancy objection. There do not seem to be any hard and fast rules on how a judge should handle this situation. It seems appropriate to consider the time required for presentation of the rebuttal evidence, the risk of confusion, how damaging the irrelevant evidence is, and whether a limiting instruction can cure the error.
- M. **Standard on Appeal.** A trial court’s rulings on relevancy are not discretionary and will not be reviewed for abuse of discretion. *See, e.g.*, *State v. Garcia*, ___ N.C. App. ___, 743 S.E.2d 74, 79 (2013); *State v. Grant*, 178 N.C. App. 565, 573 (2006). However, the appellate courts give such rulings great deference on

appeal. *Garcia*, ___ N.C. App. at ___, 743 S.E.2d at 79; *Grant*, 178 N.C. App. at 573.

II. **Common Scenarios Raising Relevancy Issues.** Because relevancy is such a fact-specific determination, a general catalogue of cases on relevancy would not be very helpful. However, some recurring relevancy issues are discussed below.

A. **Witness's Background.** Rule 401 permits the use of background information such as a witness's education or employment, when that information aids the jury in deciding disputed issues of fact. *See, e.g., State v. Summerlin*, 98 N.C. App. 167, 172 (1990) (questions regarding a witness's name, residence, knowledge of the case, etc. are appropriate; such evidence is relevant if it establishes an introduction for the witness); *see also* Commentary to N.C. R. EVID. 401.

B. **"Context," "Circumstances," "Chain of Events," And Related Evidence.** Evidence is relevant if it establishes the context or circumstances of an event or if it explains a chain of events. This rule sometimes is called the "same transaction" rule, the "complete story" rule, or the "course of conduct" rule. *State v. Sexton*, 153 N.C. App. 641, 648 (2002), *aff'd in part on other grounds* 357 N.C. 235 (2003). Generally, evidence "is admissible if it forms part of the history of the event or serves to enhance the natural development of the facts." *Id.* This type of evidence arises most frequently—but not exclusively—with respect to the context or the circumstances of the crime in question. In that regard

[o]ur Supreme Court has held that [e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

State v. Peterson, 205 N.C. App. 668, 674 (2010) (quotations omitted). Illustrative cases include:

State v. Barden, 356 N.C. 316, 349 (2002) (testimony of the murder victim's supervisor was relevant to explain the circumstances of the crime).

State v. Peterson, 205 N.C. App. 668, 674 (2010) ("Evidence of what precipitated the argument between [the victim] and defendant and what the argument was about is part of the account of the assault on [the victim] and is necessary to complete the story of that assault for the jury.").

State v. Sexton, 153 N.C. App. 641, 647-48 (2002) (in an arson trial, evidence that the defendant was pacing in a yard, staring at a neighbors' home, and inhaling intoxicants from a plastic bag shortly before the home was ignited was relevant to establish the chain of events or circumstances leading to the fire), *aff'd in part on other grounds*, 357 N.C. 235 (2003).

State v. Robertson, 149 N.C. App. 563, 570 (2002) (in a trial for rape and kidnapping, the victim's testimony that the defendant told her that he was an ecstasy dealer was relevant to establish context for the charged crimes, which incidentally involved illegal drugs).

Such evidence is relevant even if it incidentally establishes commission of a prior bad act. *Sexton*, 153 N.C. App. at 648 (the fact that it incidentally involved the defendant's alleged illegal use of drugs did not make the evidence irrelevant). When the chain of events evidence reveals a bad act, the courts typically find Rule 404(b) to be no bar to admission, on grounds that the evidence is admissible for the proper purpose of completing the story of the crime by providing immediate context, and not for propensity. See, e.g., *State v. Agee*, 326 N.C. 542, 549 (1990); *Sexton*, 153 N.C. App. 649; see generally [Rule 404\(b\): Evidence of Other Crimes, Wrongs, or Acts](#) in this Benchbook.

As noted, this type of evidence arises most frequently with respect to the context or the circumstances of the crime in question. However, such evidence also has been held relevant to show:

- Circumstances related to the investigation of the crime in question. *Agee*, 326 N.C. at 548 (evidence of the defendant's possession of marijuana was admissible in a trial for possession of LSD because it gave rise to a chain of events or circumstances; "[d]iscovery of the marijuana on defendant's person constituted an event in the officer's narrative which led naturally to the search of defendant's vehicle and the subsequent detection of the LSD"); *State v. Patterson*, 185 N.C. App. 67, 70 (2007) (in a trial for possession of stolen property pursuant to a breaking and entering and possession of implements of housebreaking, a detective's testimony regarding businesses that had reported break-ins was relevant because it explained the chain of events in the police investigation).
- Context for the defendant's statements during an interrogation. *State v. Miller*, 197 N.C. App. 78, 86-87 (2009) (questions posed to the defendant by law enforcement officers relaying statements made by third parties were relevant; the questions gave context to the defendant's responses and explained the defendant's subsequent conduct of changing his story); *State v. Garcia*, ___ N.C. App. ___, 743 S.E.2d 74, 80-81 (2013) (following *Miller* and holding that an officer's statements to the defendant during an interrogation provided context for the defendant's answers denying any involvement in the homicide where the defendant switched tactics at trial and admitted killing the victim (but claimed self-defense) and admitted lying during the interrogation; the officer's questions gave context to the defendant's admitted lies). However, this is not a blanket rule and the determination of "whether an interrogator's remarks provide relevant 'context' for a defendant's responses" must be decided on a case by case basis. *Garcia*, ___ N.C. App. at ___, 743 S.E.2d at 80.

C. Guilt of Another. Perhaps the most litigated relevancy issue in North Carolina criminal cases is the admissibility of evidence offered by the defendant regarding guilt of another. To be relevant, evidence of the guilt of another must:

- point directly to the guilt of another party and

- be inconsistent with the defendant's guilt.

See, e.g., *State v. McCoy*, ___ N.C. App. ___, 745 S.E.2d 367, 372 (2013) (quoting *State v. Cotton*, 318 N.C. 663, 667 (1987)). By contrast, evidence which creates only an inference or conjecture as to another's guilt is irrelevant and inadmissible. *Id.* As our courts have stated: “[e]vidence which tends to show nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded.” *Id.* (quoting *State v. Brewer*, 325 N.C. 550, 564 (1989)).

Cases holding that guilt of another evidence was inadmissible include:

State v. Williams, 355 N.C. 501, 532-33 (2002) (the trial court properly excluded defense evidence that other men may have committed the homicide in question where no evidence implicated one of them in the crime and the only evidence connecting another to it was that he discovered the victim's body about 200 yards away from an abandoned truck in which he was living).

State v. May, 354 N.C. 172, 176-77 (2001) (evidence showing that another person had an argument with the victim days before the murder, had been committed because he was hearing voices telling him to kill, told his doctor that he was having hallucinations telling him to kill, and had a history of violent conduct; even if the evidence showed that the other person committed the crime, it was not inconsistent with the defendant's guilt where the State's evidence put both the defendant and that person at the scene).

State v. Hamilton, 351 N.C. 14, 20 (1999) (evidence of a prior knife threat by another; no unusual facts surrounding the threat were present in the murder at issue; the evidence did not point directly to the other person's guilt).

State v. Hester, 343 N.C. 266, 271 (1996) (evidence that merely aroused suspicion that another might have had a motive to murder the victim).

State v. McNeill, 326 N.C. 712, 721-22 (1990) (even if another person had possession of an item similar to one owned by the murder victim, such possession did not put him at the scene and was not inconsistent with the defendant's guilt).

State v. McCoy, ___ N.C. App. ___, 745 S.E.2d 367, 372-73 (2013) (evidence that the victim's friend previously assaulted one of the friend's employees was not relevant to show that the friend committed the assault in question on the victim; the court characterized the evidence as “sheer conjecture” and not inconsistent with the defendant's guilt).

State v. Miles, ___ N.C. App. ___, 730 S.E.2d 816, 826-28 (2012), *aff'd per curiam*, 366 N.C. 503 (2013) (evidence suggesting that the victim's wife

committed the murder in question was not relevant where the defendant offered “merely conjecture” as to the wife’s possible actions and the State contradicted these “speculations” with testimony by the wife’s daughters that they were with their mother on the night in question).

State v. Loftis, 185 N.C. App. 190, 202 (2007) (evidence of methamphetamine use by a resident of a house near the shed in which methamphetamine was found and of the resident's prior violation of probation was not relevant in the defendant’s trial for trafficking in methamphetamine; the evidence was not inconsistent with the defendant's guilt; because the probation violation had not been adjudicated, it was not conclusive).

State v. Wiley, 182 N.C. App. 437, 441-42 (2007) (evidence of another’s guilt was irrelevant where that person was the defendant’s accomplice; under accomplice liability, the defendant would be guilty regardless of whether he or the other person inflicted the injury at issue).

State v. Ryals, 179 N.C. App. 733, 741 (2006) (a witness’s answer to a question about whether he would submit to a DNA test in relation to a hat was irrelevant where there was conflicting testimony as to whether the perpetrator wore a hat).

State v. Couser, 163 N.C. App. 727, 732-33 (2004) (evidence that the victim's father was convicted of sexually assaulting the victim's sister 17 years before the sexual assault at issue was irrelevant; the fact that the victim's father previously was convicted of sexual assault in a completely different case was not inconsistent with the defendant’s guilt).

State v. Floyd, 143 N.C. App. 128, 133-34 (2001) (testimony that the defendant’s girlfriend’s sons were hostile to the victim and that they were not in school on the day of the murder did no more than arouse suspicion and was not inconsistent with the defendant’s guilt).

Cases concluding that the trial court erred by refusing to admit guilt of another evidence include:

State v. Israel, 353 N.C. 211, 219 (2000) (new trial; evidence that another individual had the opportunity to kill the victim and a history of violent, recent dealings with the victim cast doubt upon the defendant’s guilt and implicated another person as the perpetrator beyond conjecture or mere implication).

State v. Sneed, 327 N.C. 266, 271 (1990) (excluded evidence tended to show that another identified person committed a robbery and killed the victim; all of the evidence showed that only one person was involved in the crime).

State v. McElrath, 322 N.C. 1, 13-14 (1988) (evidence of a larceny scheme in which the murder victim and his companions appeared to be

involved was relevant where the defense alleged that the victim was killed by one of the companions after a falling out).

State v. Cotton, 318 N.C. 663, 667 (1987) (evidence that within a short time of the burglary and sexual assault at issue, three homes in close proximity were broken into and the female occupants were sexually assaulted and that someone other than the defendant committed one of the other break-ins).

The United States Supreme Court has held that there are constitutional limitations on rules that exclude evidence of guilt of another. Specifically, in *Holmes v. South Carolina*, 547 U.S. 319, 330-31 (2006), the Court held that a defendant's federal constitutional right to present a defense was violated by a state evidence rule providing that a defendant may not introduce evidence of guilt of another if the prosecution has introduced strong forensic evidence of guilt. The Court held that the state rule was arbitrary, reasoning that by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Two North Carolina cases have distinguished *Holmes* and held that North Carolina's rule regarding guilt of another is not arbitrary. *State v. Loftis*, 185 N.C. App. 190, 202 (2007); *State v. Wright*, 182 N.C. App. 767, *4 (2007) (unpublished).

- D. Demonstrations.** A demonstration is an illustration or explanation by exemplification of practical application. *State v. Arnold*, 98 N.C. App. 518, 535 (1990), *aff'd*, 329 N.C. 128 (1991). For courtroom demonstrations, the demonstrator need not be an expert, but a proper foundation must be laid as to the demonstrator's familiarity with what he or she is demonstrating. *Id.* The North Carolina courts have upheld the relevancy of demonstrations in a variety of contexts. Relevant cases include:

State v. Golphin, 352 N.C. 364, 436-37 (2000) (demonstration of the effect of pepper spray to rebut the defendant's claim that he could not have committed the crime because he was debilitated by the spray).

State v. Murillo, 349 N.C. 573, 601 (1998) (demonstration that it was physically impossible for the wounds to have been inflicted by accident, as alleged by the defendant).

State v. Fowler, 159 N.C. App. 504, 510-11 (2003) (demonstration of how an apron string was tied around a murder victim's neck, to show premeditation and deliberation).

State v. Arnold, 98 N.C. App. 518, 535-36 (1990) (demonstration of how a letter might be created by cutting and pasting together pieces of several letters and then photocopying the resulting document, to challenge that State's evidence of photocopies of letters purportedly written by defendant), *aff'd*, 329 N.C. 128 (1991).

State v. Hunt, 80 N.C. App. 190, 192-93 (1986) (demonstration of the operation of a shotgun to rebut the defendant's testimony that it discharged accidentally).

- E. Weapons and Ammunition.** "As a general rule weapons may be admitted in evidence where there is evidence tending to show that they were used in the commission of a crime." *State v. Rollins*, ___ N.C. App. ___, 738 S.E.2d 440, 449 (2013) (quotation omitted). For evidence of a weapon or ammunition allegedly used in a crime to be relevant, the State need not conclusively connect the weapon or ammunition to the crime. The lack of evidence establishing such a conclusive connection goes to weight, not admissibility. For illustrative cases where such evidence was admitted, see:

State v. Grooms, 353 N.C. 50, 71-72 (2000) (evidence regarding a pocketknife carried by the defendant and a hacksaw frame and blades was relevant in a murder prosecution; any variance in size between the defendant's knife and the medical examiner's description of the wounds affected weight, not admissibility; based on the proximity of the hacksaw frame to the victim's severed hand and evidence that the hand was severed by a blade similar to those at issue, the items were relevant; the lack of fingerprints on the hacksaw frame, lack of evidence that the blades fit into the frame, and the common availability of such blades affected weight, not admissibility).

State v. DeCastro, 342 N.C. 667, 681-82 (1996) (evidence of a knife found three months after the murder in a pond some distance from the scene was relevant; although the knife had no bloodstains and was not tested for fingerprints, the medical examiner opined "that some of the fatal knife wounds found on both victims were consistent with the length and width of the knife and that the knife could have been one of the murder weapons;" the lapse in time in finding the knife and its distance from the scene affected weight, not admissibility).

State v. Felton, 330 N.C. 619, 638 (1992) (the failure of State's expert to conclusively match bullets to the murder weapon affected the weight, not admissibility).

State v. Royster, ___ N.C. App. ___, 763 S.E.2d 577, 581 (2014) (in this murder case evidence concerning nine-millimeter ammunition found at the defendant's house was relevant because it linked the defendant to the crime scene, where eleven shell casings of the same brand and caliber were found, thus allowing the jury to infer that the defendant was the perpetrator).

State v. Rollins, ___ N.C. App. ___, 738 S.E.2d 440, 449-50 (2013) (in a murder case, the trial court did not err by admitting a knife found four years after the crime where the defendant's wife testified that he told her that he murdered the victim with a knife that matched the description of the one that was found, the defendant was seen on the day of the murder approximately 150 yards from where the knife was found, and

the knife was consistent with the description of the likely murder weapon provided by the State's pathologist).

State v. Lytch, 142 N.C. App. 576, 581-82 (2001) (bullets found two days after the murders by the manager of a trailer park where the defendant lived were relevant; the lack of evidence conclusively showing where in the trailer park the bullets were discovered impacted weight, not admissibility; the brief time lapse between the crimes and discovery of the bullets, the proximity of the bullets to defendant's residence, and the fact that one of the bullets was at one time in the murder weapon established relevancy), *aff'd*, 355 N.C. 270 (2002) (per curiam).

A corollary general rule states that if the evidence is insufficient to connect the weapon to the crime in question, evidence of the weapon is irrelevant. Illustrative cases include:

State v. Samuel, 203 N.C. App. 610, 618-21 (2010) (in an armed robbery case, admission of evidence of two guns found in the defendant's home was reversible error where "not a scintilla of evidence link[ed] either of the guns to the crimes charged").

State v. Bodden, 190 N.C. App. 505, 509-10 (2008) (nine-millimeter bullet found near a murder scene was irrelevant where the bullets used to shoot the victim were .38 or .357 caliber).

State v. Grant, 178 N.C. App. 565, 576 (2006) (testimony that the defendant possessed a pistol was irrelevant where the pistol was not connected to the shooting of the victim).

State v. Patterson, 59 N.C. App. 650, 653 (1982) (when the robbery was committed with a small handgun, admission of a sawed-off shotgun was error).

However, in drug cases, the latter rule has been relaxed somewhat. The courts have held that evidence regarding gun possession generally is relevant in drug cases, reasoning that there is a common sense connection between guns and drugs. See, e.g., *State v. Boyd*, 177 N.C. App. 165, 171-72 (2006) (fact that a shotgun was found in a closet in the defendant's home was relevant to drug possession and trafficking charges); *State v. Huerta*, 221 N.C. App. 436, 445-46 (2012) (following *Boyd* in a drug trafficking and maintaining a dwelling case where the evidence showed that a handgun and ammunition were found in the defendant's home).

Additionally, in certain circumstances weapons evidence may be relevant even if the weapon is not connected to the crime, such as, for example, when the evidence shows the circumstances surrounding the defendant's flight, *State v. Broussard*, ___ N.C. App. ___, 768 S.E.2d 367, 371-72 (2015) (evidence that four firearms were found in the car when the defendant was arrested was relevant to show the circumstances surrounding the defendant's flight; the court rejected the defendant's argument that the evidence was irrelevant and inadmissible because nothing connected the firearms to the crime); see Section II.H. below (discussing relevancy of flight evidence), or the defendant's state of

mind. *State v. Stewart*, ___ N.C. App. ___, 750 S.E.2d 875, 879-80 (2013) (in a multiple murder case where the defendant killed the victims with a shotgun, evidence of different firearms and ammunition found in the defendant's residence and ammunition found in his truck was relevant to show the defendant's advanced planning and state of mind).

- F. 404(b) Evidence.** Under Rule 404(b), evidence of other crimes, wrongs or bad acts may be admissible if offered for a proper purpose. However, even if offered for a proper purpose, the 404(b) evidence must be relevant. The most significant relevancy issue with regard to 404(b) evidence comes from the rule that 404(b) evidence only is relevant if the proponent sufficiently establishes that the act was in fact committed by the defendant. For a detailed discussion of this and other Rule 404(b) issues, see [Rule 404\(b\): Evidence of Other Crimes, Wrongs, or Acts](#), in this Benchbook.
- G. Victim's Prior Violent Behavior.** When self-defense is at issue, evidence of the victim's violence or aggression may be relevant to show that
- the defendant's fear or apprehension was reasonable and as a result that the defendant's belief in the need to defend was also reasonable; or
 - the victim was the aggressor.

Emphasis however must be put on the word "may" in the preceding sentence. For example, while a defendant who asserts self-defense normally may offer evidence of the victim's violent character to show the reasonableness of the defendant's belief that he needed to use force, such evidence is relevant only where the defendant knew of the victim's character for violence. *State v. Watson*, 338 N.C. 168, 187-88 (1994) (where there was no evidence that the defendant knew of the witness's opinion of the victim's dangerousness, the evidence was irrelevant as to whether the defendant's belief in the need to kill the victim was reasonable); *State v. Shoemaker*, 80 N.C. App. 95, 101-02 (1986) (the trial court properly precluded defense counsel from asking about a specific instance of violence by the victim where no evidence suggested that the defendant was aware of the incident). For a complete discussion of when evidence of the victim's violence or aggression is admissible, see [Character Evidence](#) in this Benchbook.

Where self-defense is not at issue, evidence of the victim's violence or aggression may not be relevant. See *State v. Lloyd*, 354 N.C. 76, 95-96 (2001) (evidence irrelevant where defense was accident, not self-defense); *State v. Campbell*, 359 N.C. 644, 670-71 (2005) (evidence not relevant where the defendant did not assert self-defense or that the victim was the first-aggressor); *State v. Strickland*, 346 N.C. 443, 456 (1997) (not relevant where the defense did not rely on self-defense).

- H. Flight.** Evidence of the defendant's flight is routinely admitted to show consciousness of guilt. See, e.g., *State v. King*, 343 N.C. 29, 39-40 (1996) (evidence of a high speed police chase four months after a shooting was relevant evidence of flight); *State v. McDougald*, 336 N.C. 451, 456-57 (1994) (evidence of a jail escape constituted evidence of flight, which is relevant to show consciousness of guilt); *State v. Williamson*, 122 N.C. App. 229, 232 (1996) (evidence of the defendant's failure to appear for trial was relevant in determining

guilt); see also N.C.P.I. – CRIM. 104.35 and 104.36 (pattern jury instructions on flight). For the same reason, one case held to be relevant the defendant's statement that he would have fled if he had been given the opportunity to do so. *State v. Capers*, 208 N.C. App. 605, 616-17 (2010).

- I. **Gang-Related Evidence.** Evidence of gang-related tattoos or clothing associated with a gang is relevant only if gangs or gang membership is pertinent to the crime. Cases holding it was error to admit such evidence include:

State v. Hinton, ___ N.C. App. ___, 738 S.E.2d 241, 246 (2013) (plain error to allow officer's "extensive" testimony referencing gangs and gang-related activity where the evidence was not relevant to guilt or to an aggravating factor; the motive for the crime of violence was the victim's sexual relationship with defendant's aunt, not gang violence).

State v. Hope, 189 N.C. App. 309, 316 (2008) (in a murder case, it was error to allow cross-examination of the defendant concerning whether tattoos and burn marks on his body were indicative of gang membership, where there was no evidence that the murder was gang-related).

State v. Gayton, 185 N.C. App. 122, 124-25 (2007) (evidence of gang membership was not relevant in a drug trafficking case not involving gangs).

In some cases, this rule may require careful parsing of the evidence to distinguish which evidence is relevant and which is not. See, e.g., *State v. Privette*, 218 N.C. App. 459, 479-83 (2012) ((1) the trial court erred by admitting evidence concerning the history of the Bloods gang and the activities of various Bloods subsets where the evidence was not relevant and its only effect "was to depict a 'violent' gang subculture of which [the defendant] was a part and to impermissibly portray [the defendant] as having acted in accordance with gang-related proclivities;" (2) the trial court did not err by allowing evidence about the hierarchy of gang structure when evidence regarding the defendant's position in the gang was relevant to extortion-related charges where, among other things, it helped explain a third party's decision to confess; (3) the trial court did not err by admitting photographs of the defendant's tattoos and related testimony describing the relationship between some of these tattoos and Bloods symbols where that evidence explained the defendant's position in gang hierarchy).

- J. **"Negative Evidence."** Sometimes a party will seek to admit evidence to prove that an alleged fact does not exist or that certain evidence could not be obtained. See generally, *Old Chief v. United States*, 519 U.S. 172, 188 (1997) (noting that if the jurors' expectations about what proper proof should be are not satisfied, e.g., production of a gun in a case alleging use of a firearm, the jurors "may penalize the party who disappoints them by drawing a negative inference against that party." (quotation omitted)). Such evidence generally is relevant. See, e.g., *State v. Wiggins*, 161 N.C. App. 583, 591-92 (2003) (in a sexual assault case, an expert's testimony was relevant when it explained why there would be no physical findings even after years of sexual abuse). However, the proponent of such evidence must establish that the witness's "position with respect to the matter was such that [he or she] would have known of the existence of the fact

had it been true.” *State v. Hamlette*, 60 N.C. App. 306, 318 (1983) (prejudicial error to admit negative evidence by an officer that there was no evidence pointing to the guilt of a third party when the officer’s involvement with the investigation was insufficient to form an adequate basis for the negative testimony).

- K. Victim Impact Evidence.** Victim impact evidence refers to evidence of physical, psychological, or emotional injury, or economic or property loss suffered by the victim, as well as evidence of the effect of the crime on the victim's family. *State v. Graham*, 186 N.C. App. 182, 190 (2007); G.S. 15A-833(a). As a general rule, while victim impact evidence is pertinent at sentencing, it is not relevant during the guilt phase of a trial. *See State v. Raines*, 362 N.C. 1, 15 (2007); *Graham*, 186 N.C. App. at 190-92 (witness testimony regarding how seeing the attack on her son had affected her mental health was irrelevant in guilt phase of trial); *State v. Bowman*, 188 N.C. App. 635, 645-46 (2008) (reversible error to allow previous victims of the defendant’s sex offenses to testify about the emotional impact of the crimes).

However, evidence of a victim’s fear and distress during an offense may be admissible if relevant to an element of the crime. *See, e.g., State v. Jackson*, 161 N.C. App. 118, 123 (2003) (the victim’s testimony concerning how she felt when a gun was placed to her head was relevant in an armed robbery trial to establish the element that the victim’s life had been threatened and endangered). Also, evidence that tends to show the context or circumstances of the crime, even if it also shows the effect of the crime on the victim or his or her family, may be admissible as context evidence. *Compare State v. Barden*, 356 N.C. 316, 346-49 (2002) (evidence showing that the murder victim regularly sent money to his wife and child and why the victim needed money was relevant), *with Graham*, 186 N.C. App. at 191-92 (victim impact evidence did not shed light on the circumstances of the crime and was irrelevant). *See also* Section II.B. above regarding context evidence.

- L. Drug Use.** Evidence regarding the victim’s drug use is relevant if connected to the crime. *State v. Hope*, 189 N.C. App. 309, 313-15 (2008) (no error to admit testimony that the victim had a drug addiction where such drug use was relevant to support the State’s theory that the murder was drug-related; evidence also was relevant as context evidence to explain the connection between the parties). The same rule applies to the defendant’s drug use. *State v. Lawson*, 194 N.C. App. 267, 277 (2008) (evidence of the defendant’s abuse of pain medication was relevant to motive). When such evidence is unconnected with the charges, it is irrelevant. *See, e.g., State v. Clark*, 128 N.C. App. 87, 96 (1997) (evidence of the murder victim’s drug use was irrelevant to any issue in the case).
- M. Motive for Reporting Crime or Delay in Reporting.** Cases have held that evidence is relevant if it explains the victim’s motive for reporting the crime, *State v. Whitman*, 179 N.C. App. 657, 668 (2006) (photographs of children, taken from the defendant’s house by the victim, were relevant to the victim’s motive (protecting the other children) for coming forward with allegations of sexual abuse), or delay in reporting. *See State v. Tadeja*, 191 N.C. App. 439, 445 (2008) (evidence of the defendant’s extra-marital affair was relevant to explain why the victim waited to come forward and disclose the defendant’s conduct).

- N. Sexually Explicit Photographs or Videotapes.** In sexual assault cases, evidence that the defendant possessed or viewed pornographic material is relevant when related to the crime. *See, e.g., State v. Rael*, 321 N.C. 528, 534 (1988) (videotape and magazines seized from the defendant's home were admissible to corroborate the child victim's testimony that the defendant showed him the materials when the defendant committed the acts at issue); *State v. Williams*, 318 N.C. 624, 632 (1986) (evidence that the defendant took his daughter to an x-rated movie was relevant to show his preparation and plan to have sexual intercourse with her); *State v. Creech*, 128 N.C. App. 592, 596 (1998) (in a trial for indecent liberties and crime against nature, photos of male models and men in underwear were admissible to corroborate testimony of a witness who said that the defendant had shown him the photographs). When no such connection exists, the evidence is irrelevant. *State v. Smith*, 152 N.C. App. 514, 521-22 (2002) (evidence of defendant's possession of pornographic materials was not relevant in a child sexual assault case where there was no evidence that the defendant showed the victim the pornographic materials at the time of the alleged crimes or that the two of them had ever viewed pornographic materials together).
- O. Photographs.**
- 1. Of Defendant.** Photographs of the defendant have been held to be relevant to identify the defendant as the perpetrator. *See, e.g., State v. Carpenter*, ___ N.C. App. ___, 754 S.E.2d 478, 483-83 (2014) (photographs of defendant's tattoos, taken at the jail after his arrest were relevant to proving his identity as the perpetrator of a robbery where crime scene surveillance camera footage clearly showed the location and general dimensions of one of the robber's tattoos, even though the specifics of it were not visible on the footage).
 - 2. Of Victim.** Although the primary evidence issue regarding photographs of the victim is whether they are properly admitted under Rule 403 (which balances probative value against unfair prejudice, waste of time, etc.; see generally [Rule 403](#) in this Benchbook (discussing application of Rule 403 to photographs, among other evidence), relevancy objections to such evidence arise with some frequency. Cases have held that photographs of the victim are relevant when they:
 - Establish a victim's identity. *State v. McNeill*, 326 N.C. 712, 720 (1990).
 - Establish that the victim was once alive. *Id.*
 - Show a victim's appearance before the crime. *State v. Barden*, 356 N.C. 316, 350-51 (2002).
 - Contrast a victim's appearance before and after the crime. *State v. Stephenson*, 144 N.C. App. 465, 473 (2001) (photograph of victim taken before she died was relevant to contrast the victim's normal, well-kept appearance with her appearance when she was found dead and to establish that a struggle occurred).
 - Depict the crime scene. *State v. Stewart*, ___ N.C. App. ___, 750 S.E.2d 875, 880 (2013) (crime scene and autopsy photographs of the victims' bodies were relevant because they depicted the crime scene).

- Depict the victim's injuries. *Id.* (crime scene and autopsy photographs of the victims' bodies were relevant because they depicted the victims' injuries); *State v. Blymyer*, 205 N.C. App. 240, 244-45 (2010) (crime scene photographs showed "the position and general condition of the victim's body in the room where he was found, as well as the injuries the victim sustained"; autopsy photos showed the condition of the body).
- Provide a chain of causation between an event and the victim's death, *State v. Bethea*, 167 N.C. App. 215, 223 (2004) (photographs of the victim's dead body in the emergency room).
- Provide a basis of an expert's opinion. *Barden*, 356 N.C. 316, 351 (photograph of a murder victim, taken three months before his death, was relevant and helped establish a basis from which medical examiner could testify as to various wounds inflicted upon the victim).

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