ADDENDUM TO

RELEVANCY AND ITS LIMITS:

ARTICLE FOUR OF THE NORTH CAROLINA EVIDENCE CODE

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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.

Applicable standard of relevance concerning the admissibility of a possible murder weapon: "Every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury. State v. Whiteside, 325 N.C. 389, 397 (1989). The trial court properly admitted into evidence a knife found three months after the murder in a pond some distance away from the crime scene. State v. DeCastro, 343 N.C. 667, 682 (1996). The lapse in time in finding the knife and the distance of the knife from the crime scene affected the weight or probative value of the evidence, not its admissibility.

Defendant challenges the admission of certain insulation particles into evidence. The State's theory of this case was that the defendant crawled through the attic linking the duplex unit of the victim Moore with that of the defendant's girlfriend. William Rose of the State Bureau of Investigation testified that pieces of insulation were found in the victim's apartment. He further testified that material taken from the defendant's clothing, which he was wearing at the time of his arrest on 29 January, was "consistent with" the sample pieces of insulation taken from the attic. Although the fact that insulation particles in the defendant's clothing had apparently come from the attic used to gain access to the victim's apartment does not prove that he killed her, it was relevant to the State's case. **Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case.** State v. Wingard, 317 N.C. 590,346 S.E.2d 638 (1986); State v. Sloan, 316 N.C. 714, 343 S.E.2d 527 (1986); N.C.G.S. § 8C-1, Rule 401 (1986). Certainly a fact of consequence in this action was the presence of fiber on the defendant's clothing consistent with that found in the victim's apartment. State v. Crandell, 322 N.C. 487, 503 (1988).

Video tape and magazines shown to victim by defendant during the commission a sex offense are relevant to corroborate the testimony of the victim. State v. Rael, 321 N.C. 528, 534 (1988).

Reversible error to exclude testimony that defendant, her husband and oldest stepson consulted a lawyer for the purpose of bringing a custody action against husband's ex-wife two weeks before the Department of Social Services received a complaint that defendant had committed sex offenses with the two boys. This evidence was relevant because it tended to establish why the ex-wife

might have suborned her son's testimony. Whatever antipathy might naturally exist between a natural mother and a stepmother would be exacerbated when the stepmother threatens the natural mother with loss of her children's custody. State v. Helms, 322 N.C. 315, 319 (1988).

RELEVANCY OF EVIDENCE THAT ANOTHER COMMITTED THE CRIME

Such evidence must create more than an inference, conjecture or possibility. To be relevant, evidence that another person committed the crime for which the defendant is charged **must tend both to implicate another by pointing directly to the guilt of some other specific person and be inconsistent with the guilt of the defendant.** State v. Israel, 353 N.C. 211 (2000), State v. Dickens, 346 N.C. 26, 48 (1997).

Trial court did not err in excluding evidence of a knife threat made by a witness on a police officer ten years earlier. The *modus operandi* were different. The evidence was not relevant in that it did not point directly to the guilt of the State's witness. State v. Hamilton, 351 N.C. 14, 20 (1999).

DEFENDANT'S LACK OF GRIEVING AT FUNERAL IS RELEVANT IN MURDER TRIAL. State v. Richmond, 347 N.C. 412, 428 (1998), State v. Stager, 329 N.C. 278, 322 (1991), State v. Gallagher, 313 N.C. 132, 138 (1985).

PRIOR ASSAULT BY MURDER VICTIM ON ANOTHER PERSON, WHICH WAS KNOWN BY DEFENDANT NOT RELEVANT WHEN DEFENDANT DOES NOT RELY ON SELF DEFENSE. State v. Strickland, 346 N.C. 443 (1997).

RULE 402

Defendant assigns error to the trial court's admission of the pepper spray and stun gun found in defendant's car as well as evidence concerning how these weapons function. Defendant contends it was mere speculation that either weapon was connected to the offenses.

The law concerning the admissibility of a potential murder weapon is well established:

"Under our rules of evidence, unless otherwise provided, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1988)." "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. N.C.G.S. § 8C-1, Rule 401 (1988). In criminal cases, "every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." State v. Whiteside, 325 N.C. 389, 397, 383 S.E.2 911, 915 (1989) (quoting State v. Hamilton, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965). Cert. Denied, 384 U.S. 1020, 16 L. Ed. 2d 1044, 86 S. Ct. 1936 (1966))." State v. DeCastro, 342 N.C. 667, 680-81, 467 S.E.2d 653, 569 (quoting State v. Felton, 330 N.C. 619, 638, 412 S.E. 2d 344, 356 (1992), overruled on other grounds by State v. Jackson, 348 N.C. 644, 503 S.E.2d 101 (1998)), cert. Denied, 519 U.S. 896, 136 L. Ed. 2d 170 (1996) (alteration in original).

Considering admission of the pepper spray, we note the State conducted a test to illustrate the pepper spray's use. This test revealed the pepper spray left a pink stain when sprayed on a clean sheet. Separate evidence showed the victim's jacket had a reddish stain on it that tested negative for blood. Moreover, defendant told investigators prior to trial that the victim's shirt ripped when defendant pulled the victim from the tub. Defendant stated she dried the victim's hair and washed the rest of her clothes but disposed of the victim's shirt. According to defendant, she disposed of the shirt because "the fingerprints would lift off of them quicker or whatever to implicate me or whatever." **Evidence is relevant if it negates a defendant's explanation of her actions.** State v. Collins, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). Evidence that pepper spray was found in defendant's car and that this spray could leave a stain on garments was thus admissible to discredit defendant's explanation of the victim's death and defendant's subsequent disposal of the victim's shirt. The State sought to prove that defendant did not rip the victim's shirt while pulling her from the tub. Instead, the shirt was stained when defendant sprayed the victim with pepper spray during the murder. Defendant was then forced to destroy the shirt to conceal evidence of her crime. Accordingly, admission of the pepper spray and its potential to leave stains was proper to negate defendant's statement to investigators that she disposed of the shirt to eliminate her fingerprints**. The fact that the State's evidence failed to show with complete certainty that pepper spray was used in the killing "impacted the weight of the evidence, not its admissibility."** DeCastro, 342 N.C. at 681, 467 S.E.2d at 659. Turning to admission of the stun gun, the State offered evidence from Dr.

Thompson that a stun gun's electrodes leave small red marks on the skin. After examining the stun gun found in defendant's car, Dr. Thompson testified that two sets of marks on the victim's neck were consistent with the use of the stun gun. See id. At 681, 467 S.E.2d at 659-60 (admission of knife held proper despite absence of bloodstains or fingerprint testing, where medical examiner testified some of fatal wounds were consistent with infliction by the knife). Again while the State was unable to provide definitive evidence defendant used the stun gun on the victim, Dr. Thompson's testimony concerning the stun gun's potential use was relevant evidence admissible for the jury's consideration. See id.at 681, 467 S.E.,2d at 659.

Accordingly, the trial court did not err in admitting the pepper spray and stun gun into evidence and allowing the prosecution to demonstrate their functioning to the jury. Defendant's argument that the weapons cannot be directly tied to the crime goes to the weight, rather than admissibility, of the evidence. State v. Parker, 354 N.C. 268 (2001).

Where the claim is negligence for the failure of a motel operator to provide adequate security for guests, evidence of proper criminal acts by third parties on or near the premises involved is relevant to show foreseeability and admissible to show a defendant's knowledge of the need to provide adequate security measures. Murrow v. Daniels, 31 N.C. 494, 501 (1988).

RULE 403 BALANCING

1. Is the evidence relevant?

   Rule 401. Relevant evidence is 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.

2. Does it have probative value?

3. Is its probative value **substantially outweighed** by the danger of

   unfair prejudice

   confusion of the issues

   misleading the jury

or by considerations of

   undue delay

   waste of time

   needless presentation of cumulative evidence

RULE 403 CASES

ALTHOUGH RELEVANT

EVIDENCE MAY BE EXCLUDED, IF ITS PROBATIVE VALUE IS

SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF:

UNFAIR PREJUDICE

"Unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." State v. DeLeonardo, 315 N.C. 762, 772 (1986).

Trial court did not abuse its discretion by permitting law enforcement officers to testify about the victims screams during the murder, the appearance of the crime scene, and the defendant's appearance and demeanor immediately after the murder because this testimony was relevant to negate the defendant's claim of self-defense. State v. Braxton, 352 N.C. 158, 186 (2000).

Rebuttal pepper spray demonstration by law enforcement officers not unfairly prejudicial to defendant where defense counsel had cross-examined many of the State's witnesses on the effects of pepper spray.

Testimony about a defendant-husband's arguments with, violence toward, and threats to his wife have probative value that substantially outweighs any danger of unfair prejudice and should not be excluded. State v. Thibodeaux, 352 N.C 570, 579 (2000).

The court admitted into evidence defendant's involvement in a robbery of a Hardees which occurred two days before the robbery and two murders for which he was being tried. Because the court gave the jury a limiting instruction to consider the evidence only for the purpose of showing a common plan or scheme, its probative value was not substantially outweighed by the danger of unfair prejudice to the defendant. State v. Wilson, 345 N.C. 119, 127 (1995).

CONFUSION OF THE ISSUES

Expert witness' (a forensic psychiatrist) testimony that the defendant did not act with deliberation since he was reacting to a potential fear that he was about to be harmed when he killed the victim was **properly excluded** because it would tend to confuse, rather than help, the jury understand the evidence and determine facts in issue. State v. Lawrence, 352 N.C. 1 (2000). The expert was in no better position than the jury to determine that legal standards (acting with deliberation) had not been met.

Trial court properly sustained State's objection to the proposed testimony of a cellmate of the defendant concerning the drafting of a letter by three cellmates, including the co- defendant, which was intended to result in the defendant taking the full blame for the murder. This would have likely confused the jury on a collateral matter. State v. York, 347 N.C. 79, 95 (1997).

Defendant attempted to introduce into evidence a deposit ticket and cash-register tape as some proof that his wife had purchased a stun gun. The wife was found shot and a stun gun was found near her body. He contended that his wife first had possession of the stun gun, that he got it from her, that she then drew a pistol. He attempted to push the pistol away, it fired, killing her. The trial judge excluded the two exhibits. The proffered evidence did not show that the sale was made to a woman, that it was made to the victim, or that there was a sale of a stun gun. There was as much chance of confusion if this evidence had been introduced as there was that any fact would have been proved. State v. Gray, 347 N.C. 143 (1997).

Evidence that the defendant played with children to show lack of maturity and that he could not form the requisite intent to murder properly excluded. State v. Huggins, 338 N.C. 494, 500 (1994).

NEEDLESS PRESENTATION OF CUMULATIVE EVIDENCE

The witness planned to testify chiefly to the possibility that the victim could have been shot in some position other than kneeling. This testimony had previously been elicited from the State's pathologist on cross-examination. Indeed, the judge was well within his discretion under N.C.G.S. § 8C-1, Rule 403 to exclude this testimony as cumulative. State v. Taylor, 354 N.C. 28, 41 (2001).

EXCLUSION OF EVIDENCE ON THE BASIS OF RULE 403 IS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT

ABUSE OF THAT DISCRETION WILL BE FOUND ON APPEAL ONLY IF THE RULING IS

> **"MANIFESTLY UNSUPPORTED BY REASON OR IS SO ARBITRARY IT COULD NOT HAVE BEEN THE RESULT OF A REASONED DECISION."** State v. White, 349 N.C. 535, 552(1998), quoting State v. Syriani, 333 N.C. 350, 379, *cert. Denied,* 510 U.S. 948 (1993).
>
> **WHAT SHOULD THE TRIAL JUDGE DO IF AN ATTORNEY REQUESTS MORE SPECIFIC FINDINGS OF FACT TO SUPPORT THE RULE 403 BALANCING?** See State v. Julian, 345 N.C. 608, 613 (1997).

The trial court is not required to perform a Rule 403 balancing in a sentencing hearing. The N.C. Rules of Evidence do not apply in sentencing proceedings. N.C.G.S. 8C-1, Rule 1101(b)(3).

RULE 404(a)(1) CHARACTER EVIDENCE GENERALLY; OF THE ACCUSED

N.C.G.S. § 8C-1, Rule 404(a)(1) provides:

(a) Character evidence generally. -- Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. -- Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

N.C.G.S. § 8C-1, Rule 404(a)(1) (1988).

This rule, which became effective 1 July 1984, has significantly changed North Carolina practice. State v. Squire, 321 N.C. 541, 546, 364 S.E.2d 354, 357 (1988). Under our prior practice, the only method for introducing evidence of character was by general reputation. Id. Under the new rule, an accused may no longer offer evidence of undifferentiated, overall "good character," but may now only introduce evidence of "pertinent" traits of his character.

In determining whether a more general trait of character such as law-abidingness is admissible in a criminal case, we have concluded that the term "pertinent" is generally synonymous with "relevant in the context of the crime charged." Id. at 548, 364 S.E.2d at 358. Using this analysis, this Court has previously held that **the character trait of law-abidingness is "pertinent" in virtually all criminal cases.** Id. Evidence of law-abidingness tends to establish circumstantially that defendant did not commit the crime charged. Id.

The Court of Appeals recognized that the character trait of law-abidingness is "pertinent." State v. Bogle, 90 N.C. App. 277, 285, 368 S.E.2d 424, 429. However, it concluded that Mr. Townsend's testimony concerning defendant's law-abidingness was not competent since his "answer was clearly based on defendant's lack of prior arrests or convictions." It held that since "this answer is the only evidence in the record that is even arguably competent as substantive character evidence," the trial court did not err in refusing to give the instruction on law-abidingness. Id. We disagree.

Defendant's uncle, Mr. Townsend, responded to the question, "Do you know his [defendant's] reputation for being a law-abiding citizen?" with the answer, "I would say excellent." Then he continued, "Because there was nothing before this incident." We do not understand the latter remark to address only the fact that defendant had no prior arrests or convictions. Rather, it is simply a statement to the effect that there was nothing before the current charge that would have indicated that defendant was not a law-abiding person. Rule 405(a) permits testimony in the form of reputation or opinion. It does not exclude a witness' opinion of a defendant's reputation for law-abidingness merely because that opinion is accompanied by a statement such as the one here.

The State objects for the first time on the appeal of this action to the lack of a foundation laid by defendant before the admission of this testimony. It contends that the record is devoid of any evidence that Mr. Townsend had gleaned knowledge about defendant's "'reputation' for . . . law-abidingness from Townsend's contacts with members of the community in which defendant lived or worked." The record shows that the State failed to object at trial to the foundation laid by defendant for Mr. Townsend's reputation testimony. The evidence, having been offered without objection, was properly admitted.

Having determined that such evidence was properly admitted, we next consider if defendant was entitled to an instruction on this evidence of his law-abidingness. It is the duty of the trial judge to instruct the jury on all substantial features of a case. State v. Higgenbottom, 312 N.C. 760, 764, 324 S.E.2d 834, 838 (1985). When a defendant offers evidence of a pertinent character trait, he is entitled to have the jury consider this evidence as substantive evidence bearing directly upon the issue of his guilt or innocence. See State v. Peek, 313 N.C. 266,328 S.E.2d 249 (1985). A court is not required to charge on this feature of the case, however, unless defendant requests it. State v. Martin, 322 N.C. 229, 236, 367 S.E.2d 618, 623 (1988). See generally 1 Brandis on North Carolina Evidence § 108, at 400 n.94 (2d rev. ed. 1982 & Cum. Supp. 1986). As previously noted, evidence of a defendant's character trait of law-abidingness is relevant in virtually any criminal prosecution. State v. Squire, 321 N.C. 541, 548, 364 S.E.2d 354, 358. This relevance goes to the substantive question of defendant's guilt of the crime charged. Id. at 546-47,364 S.E.2d at 357. In determining whether a defendant is entitled to an instruction to that effect, the facts of the case are to be viewed in the light most favorable to him. State v. McCray, 312 N.C. 519, 324 S.E.2d 606 (1985). Accordingly, since defendant requested the instruction, and since Mr. Townsend's testimony was competent evidence of defendant's character for the relevant trait of law-abidingness, we hold that defendant was entitled to an instruction on his character trait of law-abidingness as substantive evidence of his innocence. It is for the jury to assess the weight of this evidence.

We next address defendant's argument that he offered other evidence which should have been admitted to show his law-abidingness. Two law enforcement officers and defendant himself testified that defendant had no prior convictions. The Court of Appeals concluded that the lack of a prior criminal conviction was not in the form of reputation or opinion testimony, and since "the Rules of Evidence limit the methods of proving character to testimony as to reputation and testimony in the form of an opinion," this evidence was not competent character evidence. State v. Bogle, 90 N.C. App. 277, 285, 368 S.E.2d 424, 429. We agree. The evidence presented was neither in the form of reputation nor of an opinion and not of the character contemplated in Rule 405(a). We conclude that testimony of defendant and of the police officers of defendant's absence of convictions was not admissible as substantive evidence of defendant's innocence, not only because it was not in the proper form, but also for the reason that evidence of the lack of prior convictions is not evidence of a "trait of character" but is merely evidence of a fact. It does not address a trait of

defendant's character. Whereas being "law-abiding" addresses one's trait of character of abiding by all laws, a lack of convictions addresses only the fact that one has not been convicted of a crime. Many clever criminals escape conviction. Accordingly, we conclude that the evidence of a lack of convictions should not have been admitted as character evidence.

Finally, we address yet another of defendant's arguments. Defendant's uncle testified that defendant's reputation for "truth and veracity" and "honesty" was very good. While the trial judge correctly admitted the evidence of defendant's truthfulness and honesty and agreed to charge (and did subsequently charge) that the evidence of truthfulness and honesty was admissible on the issue of defendant's credibility, he refused to give the requested instruction that evidence of these character traits could be considered as substantive evidence of defendant's innocence.

Special rules govern the admission of character evidence. While Rule 404 provides for the circumstances in which character evidence is admissible, Rule 405 provides for the form in which it may be presented. Rule 404(a) is a general rule of exclusion, prohibiting the introduction of character evidence to prove that a person acted in conformity with that evidence of character. One of the exceptions to Rule 404(a) permits the accused to offer evidence of a "pertinent trait of his character" as circumstantial proof of his innocence. N.C.G.S. § 8C-1, Rule 404(a)(1) (1988).

In construing what the legislature meant by a "pertinent" trait of character, we stated "[u]nder the present rule, an accused must tailor his character evidence to a 'pertinent' trait . . . relevant in the context of the crime charged." State v. Squire,321 N.C. 541, 548, 364 S.E.2d 354, 358. In criminal cases, **in order to be admissible as a "pertinent" trait of character, the trait must bear a special relationship to or be involved in the crime charged.** N.C.G.S. § 8C-1, Rule 404 commentary (1988) (citing 1 Brandis on North Carolina Evidence § 114 (1982)). **Thus, in the case of a defendant charged with a crime of violence, the peaceable character of the defendant would be "pertinent"; or in a case of embezzlement, the honesty of the defendant would be "pertinent." Id. In these examples, the character trait bears a special relationship to or is involved in the crime charged.**

This interpretation of the word "pertinent" is consistent with the rule of statutory construction which restrictively construes exceptions to a general rule of exclusion. Rule 404(a), as a general rule, excludes character evidence. Therefore, the language of its exception permitting the accused to offer evidence of a "pertinent" trait should be restrictively construed.

We note also that this interpretation of the term "pertinent" creates no internal inconsistencies in our Rules of Evidence. Rule 402, the general rule of admissibility, provides that "[a]ll relevant evidence is admissible, except as otherwise provided . . . by these rules." N.C.G.S. § 8C-1, Rule 402 (1988). Although this interpretation of the term "pertinent" in Rule 404(a)(1) may result in the exclusion of what could otherwise be considered "relevant" evidence, the

language of Rule 402 expressly permits this exclusion of relevant evidence where "otherwise provided . . . by these rules."

On the authority of a Fifth Circuit case, United States v. Jackson, 588 F.2d 1046, 1055 (5th Cir.), cert. denied, 442 U.S. 941, 61 L. Ed. 2d 310 (1979), our Court of Appeals concluded that the crimes charged in this case did not involve dishonesty or deception on the part of defendant, and therefore truthfulness and honesty were not traits of character pertinent to the crimes with which defendant was charged. Accordingly, it found no error in the trial court's refusal to instruct that the evidence of defendant's truthfulness and honesty could be considered as evidence of his innocence. We agree.

Truthfulness and honesty are closely related concepts. Webster's Ninth New Collegiate Dictionary defines "truthful" as "telling or disposed to tell the truth." Webster's Ninth New Collegiate Dictionary 1268 (1988). It defines "honest" as "free from fraud or deception." Id. at 579. In common usage, a person is "truthful" if he speaks the truth. He is "honest" if his conduct, including his speech, is free from fraud or deception. Neither trafficking by possession nor by transporting marijuana necessarily involves being untruthful or engaging in fraud or deception. Consequently, we hold that the traits of truthfulness and honesty are not "pertinent" character traits to the crime of trafficking in marijuana by possession or transportation.

A further reason exists to follow the decision in United States v. Jackson, 588 F.2d 1046 (5th Cir.): there is merit in uniformity of interpretation of similar rules by state and federal courts. The commentary to Rule 102 (purpose and construction of our Rules of Evidence) notes that federal precedents are not binding on our courts in construing the rules.5 However, "[u]niformity of evidence rulings in the courts of this State and federal courts is one motivating factor in adopting these rules and should be a goal of our courts in construing those rules that are identical." N.C.G.S. § 8C-1, Rule 102 commentary (1988). State v. Bogle, 324 N.C. 190 (1989).

SWEARING ON MOTHER'S GRAVE

The State offered evidence that the defendant's brother asked him to swear on their mother's grave that he (the defendant) did not commit the murder with which he was charged. The defendant replied, "I tried to borrow some money from you right before that happened, didn't I?" This raised the implication that the defendant refused to swear on his mother's grave because he knew that he was guilty.

The defendant tried to offer evidence through his ex-wife that he loved his mother dearly and in her opinion would never swear on his mother's grave. The trial court sustained the State's objection to this on the ground of hearsay. The

Supreme Court, though not reversing the case, said that this was evidence of a character trait which was admissible and may be introduced by testimony in the form of an opinion. Rule 404(a)(1) and Rule 405(a). State v. Powell, 340 N.C. 674, 691 (1995).

RULE 404(a)(2) CHARACTER TRAITS OF A VICTIM

Rule 404(a)(2) allows admission of evidence of pertinent character traits of a victim. "Pertinent" means "relevant in the context of the crime charged." In criminal cases, to be relevant the trait must bear a special relationship to or be involved in the crime charged. State v. Bogle, 324 N.C. 190, 201 (1989).

When a defendant argues that he acted in self-defense, the victim's character is admissible for two purposes:

To show defendant's fear or apprehension was reasonable, or
To show the victim was the aggressor.

State v. Watson, 338 N.C. 168, 187 (1994).

Rule 404(a)(2) is restrictively construed. State v. Sexton, 336 N.C. 321, 360 (1994).

Evidence offered by a defendant showing that the victim had a reputation for being a homosexual is not a pertinent character trait within the meaning of Rule 404(a)(2). It does not show that the victim was the aggressor. State v. Laws, 345 N.C. 585, 596 (1997).

RULE 404(b) Other crimes, wrongs, or acts

Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is **not admissible to prove the character of a person in order to show that he acted in conformity therewith**. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1999).

This is a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant. State v. Thomas, 350 N.C. 315, 356 (1999).

Hence, evidence is admissible under this rule so long as it is relevant for some purpose **other than to show that defendant has the propensity for the type of conduct for which he is being tried.** State v. Lloyd, 354 N.C. 76, 88 (2001); State v. Bagley, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), cert. denied, 485 U.S. 1036, 99 L. Ed. 2d 912, 108 S. Ct. 1598 (1988). The **test** for determining whether evidence of crimes, wrongs, or acts other than those specifically at issue is admissible is **whether the incidents are sufficiently similar and not so remote in time** that they are more probative than prejudicial under the Rule 403 balancing test. State v. Boyd, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). The similarities between the incidents need not rise to the level of the unique and bizarre but simply must tend to support a reasonable inference that the same person committed both the earlier and the later acts. State v. Stager, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991).

THE TRIAL JUDGE CONDUCTS A *VOIR DIRE* HEARING TO DETERMINE IF THE EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS ARE SUFFICIENTLY SIMILAR. DID IT EVER OCCUR TO YOU THAT MOST OF THE FACTS YOU FIND TO SHOW THAT THE PRIOR BAD ACT IS SUFFICIENTLY SIMILAR ALSO TEND TO SHOW THE CHARACTER OF THE DEFENDANT AND THAT HE ACTED IN CONFORMITY THEREWITH! THAT IS WHY A LIMITING INSTRUCTION TO THE JURY IS ESSENTIAL.

The trial court did not err in a prosecution for first degree sexual offense involving a seven-year-old girl by admitting testimony that defendant had admitted fondling the private parts of two other children where the other incidents occurred within three months of the incident for which defendant was tried and were similar to the incident for which defendant was tried. N.C.G.S. § 8C-1, Rule 404(b). State v. Rosier, 322 N.C. 826 (1988).

Strikingly similar licking *modus operandi* was attributed to the defendant by both women in incidents ten weeks apart. Evidence admissible to show motive, intent, preparation and plan.

North Carolina is quite liberal in admitting evidence of other sex offenses when those offenses involve the **same victim.** Evidence that the defendant had committed another sex offense against the same child, his young son, on the day after the offense for which he was being tried was admissible under Rule 404(b). State v. Miller, 321 N.C. 445, 454 (1988).

Approximately four weeks after a rape on 18 November 1985, the child complained of vaginal irritation and was taken by her mother to see a doctor. She was subsequently diagnosed as having gonorrhea, trichomonas, and herpes. Eight months prior to the incident, defendant had been diagnosed as having herpes. Defendant's wife testified that she told the examining doctor, after hearing the diagnosis, that she thought defendant had had intercourse with her daughter, stating that "if it was anybody, it had to be my husband." She was then asked by the prosecutor why she had been of this opinion. Mrs. Boyd testified that she had found defendant asleep naked in her daughter's bottom bunk bed with her eight-year-old female cousin on one occasion. Defendant objected to this line of questioning and requested a voir dire examination. It was then established that the alleged incident involving the cousin took place sometime within twelve months of the rape of defendant's stepdaughter, in the stepdaughter's room, and while Mrs. Boyd was at work.
The trial judge overruled defendant's objection and admitted this evidence since it formed the foundation for Mrs. Boyd's belief that defendant had had intercourse with his stepdaughter and because the testimony was admissible under Rule 404(b) of the North Carolina Rules of Evidence. The trial court was correct in its ruling. State v. Boyd, 321 N.C. 574, 576 (1988).

TO PROVE MOTIVE

"The State may also introduce [other crimes] evidence if it is relevant to establish a pattern of behavior on the part of the defendant tending to show that the **defendant acted pursuant to a particular motive**." Stager, at 307, 406 S.E.2d at 892; see also State v. White, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) ("Evidence of defendant's acts of violence against [the witness], even though not part of the crimes charged, was admissible since it "pertained to the chain of events explaining the context, motive and set-up of the crime" and "formed an integral and natural part of an account of the crime . . . necessary to complete the

story of the crime for the jury." State v. Agee, 326 N.C. 542, 548, 391 S.E.2d 171, 174-75 (1990) (quoting United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1999))"), cert. denied, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). In both shootings, there was strong evidence suggesting defendant acted out of jealousy. In the case at bar, proof of motive was significant in light of defendant's testimony that he had a good relationship with the victim prior to her death. State v. Lloyd, 354 N.C. 76, 89 (2001).

In 1995, defendant was convicted of sixteen counts of obtaining property by false pretenses for forging checks of an elderly woman for whom she provided care. Defendant was put on probation and was ordered to make restitution payments. Defendant was thousands of dollars in arrears. Defendant's prior crimes are thus relevant as proof of **motive**, plan, and preparation. Moreover, defendant's modus operandi was similar in the crimes committed three years prior to the murder. See State v. Penland, 343 N.C. 634, 653-54, 472 S.E.2d 734, 744-45 (1996), cert. denied, 519 U.S. 1098, 136 L. Ed. 2d 725, 117 S. Ct. 781 (1997). The crimes shed light on defendant's urgent need for funds to make her payments and on her motive for the kidnapping and the ultimate murder. State v. Parker, 543 N.C. 268 (2001).

TO PROVE INTENT

Defendant contends that he is entitled to a new trial because the trial court admitted inadmissible and prejudicial "other crimes" evidence. First, the court allowed Chris Vigil, the jailer from Ozark, Arkansas, to testify that defendant escaped from jail and to describe how defendant assaulted him with a pipe. Second, the court allowed William Harriman to testify that his truck and a .22 rifle were stolen on 28 or 29 August 1985. Defendant argues that this "other crimes" evidence is inadmissible under N.C.G.S. § 8C-1, Rule 404(b) as tending to show that defendant had a propensity to commit assaults and robberies. The testimony of Vigil and Harriman was admissible to **show intent** and motive. Their testimony shows that defendant and Rios intended to escape from jail, then do whatever was necessary to avoid capture, and therefore that they had a motive for killing Trooper Coggins. The chain of events from the time of their escape demonstrates their attempt to avoid apprehension: they assaulted the jailer with a pipe to escape from jail; they broke into an Arkansas home and stole a rifle and a truck; they drove to North Carolina; they stole a South Carolina license plate for the truck; they borrowed a pistol; they shot a state trooper, stole his revolver, then fled the scene; they broke into another home, where they stole another gun. We therefore hold that Vigil's and Harriman's testimony was admissible under Rule 404(b). Moreover, because we find that the probative value of this testimony outweighs any possible unfair prejudice to defendant, we hold that the court properly admitted it into evidence. N.C.G.S. § 8C-1, Rule 403 (1986). State v. Bray, 321 N.C. 663, 675 (1988).

In a prosecution of defendant for the first-degree murder and armed robbery of a taxicab driver, evidence concerning defendant's robbery five days later of a Shoney's restaurant and a second cab driver who took defendant and his accomplice to the restaurant was relevant and admissible to show defendant's **motive, intent, plan and modus operandi** in the robbery of the cab driver in this case where the victims in both cases were taxicab drivers who initially picked up defendant and his accomplice as customers; both drivers were forced out of their cabs at gunpoint and their cabs were stolen; and the gun used by defendant and his accomplice in the robbery and murder of the first driver was the same gun used to rob the restaurant and the second driver. State v. Cheek, 351 N.C. 48 (1999).

Intent. State v. Lloyd, 354 N.C. 76, 90 (2001).

Intent. Defendant's misconduct toward his wife over an extended period of time as shown by photographs of injuries and testimony by the shelter director, police officers, a family abuse services director, a motel clerk, a grocery clerk and a grocery store manager is admissible to prove motive, opportunity, intent, preparation, absence of mistake or accident with regard to the subsequent fatal attack upon her. State v. Syriani, 333 N.C. 350, 376 (1993).

Malice. Evidence of defendant's pending DWI charge admissible to show that he had the requisite state of malice, one of the elements of the second degree murder charge wherein the defendant was speeding on the wrong side of the road and ran another motorist off of the road while impaired which shows that the defendant was aware that his conduct leading up to the collision in this case was reckless and inherently dangerous to human life.. State v. Jones, 353 N.C. 159, 173 (2000). A first degree murder conviction was reversed in this case wherein the State contended that the felony murder rule applied to a drunk driver involved in a fatal accident. Prior speeding convictions admissible to show malice. State v. Rich, 351 N.C. 386, 400(2000)

TO PROVE A PLAN

Prior to trial, defendant filed a motion *in limine* to exclude all evidence regarding his involvement in a robbery of a Hardee's restaurant two days before the two murders and robbery of the case on trial. The court conducted a *voir dire* and ruled that the Hardee's robbery possessed sufficient similarities to the robbery of the case on trial to be admissible as evidence of a plan, scheme, or design. When the evidence was introduced under Rule 404(b), the trial court gave a limiting instruction. State v. Wilson, 345 N.C. 119 (1996).

TO PROVE IDENTITY

Defendant tried for first degree murder of her two-and –one-half year old child. Evidence that she had previously punished her children with a belt and by biting was admissible to prove identity. State v. Anderson, 350 N.C. 152, 174 (1999).

In prosecution of defendant for murder of a four month old child, mother's testimony of defendant inflicting similar unusual injuries on her was admissible to show identity. State v. Burr, 341 N.C. 263, 289-291.

The other crime may be offered on the issue of defendant's identity as the perpetrator when the ***modus operandi*** of that crime and the crime for which the defendant is being tried are **similar enough** to make it likely that the same person committed both crimes. State v. Moses, 350 N.C. 741, 759(1999), quoting State v. Carter, 338 N.C. 569, 588 (1994).

At both the B&D Tavern and the Chief's Club there was evidence that one of the victims was pistol-whipped. At the B&D Tavern defendant jammed his gun into the ear of the man he pistol-whipped. Jimmy Grimes, one of the Chief's Club victims, had a lacerated ear which may have been produced by the same procedure. In Durham, Randall Perry was shot in the stomach at point-blank range; this same fate befell Grimes and Charlie Johnson at the Chief's Club. In both the Durham and Apex crimes the savagery of the violence visited upon the victims was never adequately accounted for by any motive, legitimate or criminal. In both incidents the defendant employed Debra Blankenship in a supporting role, dispatching her to fetch him guns and to ready the van in which he fled the scene. Evidence of such similarities {*605} could assist the jury in determining whether defendant was responsible for the Apex murders. There was no error in allowing the jury to hear the Durham incident evidence for the limited purposes for which it was admitted. State v. Green, 321 N.C. 594, 604 (1988).

Identity. State v. Abraham, 338 N.C. 315, 337 (1994).

TO PROVE ABSENCE OF MISTAKE

After defendant took child victim to the hospital, he made statements that he shook her to revive her. Testimony that the defendant shook and threw a four year-old boy on a prior occasion was sufficiently similar to contradict his suggestion that the injuries in this case were inflicted while trying to revive her. State v. Pierce, 346 N.C. 471, 490 (1997).

TO PROVE LACK OF ACCIDENT

Expert testimony on the battered child syndrome is admissible to show that certain injuries sustained by a child were not by accidental means. State v. Elliott, 344 N.C. 242, 272 (1996).

The trial court did not abuse its discretion in a capital first-degree murder prosecution by admitting evidence of the circumstances leading to defendant's 1991 conviction for assault with a deadly weapon with intent to kill inflicting serious injury under N.C.G.S. § 8C-1, Rule 404(b), because: (1) the evidence was admissible to show **lack of accident**, motive, common plan or scheme and intent; (2) the probative value of the evidence outweighed any unfair prejudice; (3) the prior incident was not too remote in time when defendant spent part of the time between 1991 and 1998 in jail; and (4) the trial court followed the pattern instruction which was in substantial conformity with defendant's requested instruction as to the "other crimes" evidence. State v. Lloyd, 354 N.C. 76 (2001). **N.B. The trial court gave a limiting instruction from N.C.P.I.—Crim. 104.15 informing the jury about the purposes for which the evidence could be considered and instructing the jury that it could "not convict [defendant] on the present charge because of something he may have done in the past."** State v. Lloyd, 354 N.C. 76 (2001).

ERRONEOUS LIMITING INSTRUCTIONS

In State v. Hardy, 339 N.C. 207, 233 (1994), the Court allowed a portion of the murder victim's diary to be read to the jury. Just prior to the reading from the diary, the trial court gave the following limiting instruction:

Now, members of the jury, I do want to indicate that evidence of other actions may be included by the defendant in this exhibit. That evidence is not admissible to prove the character of the defendant in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, identity or absence of mistake, entrapment or accident.

There were no other instructions given the jury regarding the diary entry. Thus, **while the jury was instructed that it could not consider the evidence in the diary to prove the character of the defendant, it was in effect instructed that it could consider the contents of the diary entry as substantive evidence for other purposes.**
This instruction was error. As stated earlier, the statements in the diary were not admissible to establish the truth of the matters asserted therein. Even if Rule 403 did not require the exclusion of the diary entry, the attacks and the threat as

described therein were admissible only to show Karen's state of mind. The evidence contained in the diary was not admissible to show defendant's character or anything else, such as motive or intent, beyond the extent to which those matters are shown by Karen's state of mind.

Another case with an erroneous limiting instruction is State v. White, 331 N.C. 604, (1992) wherein immediately after testimony, the trial judge instructed the jury that it could consider the testimony as evidence of defendant's intent, without specifying that this evidence was to be considered only with respect to the second-degree burglary charge. At the conclusion of all of the evidence, the trial court, apparently because of concern over the lack of direct evidence to show that defendant sexually assaulted Ewing, concluded that there was insufficient evidence to support the State's theory that defendant broke or entered Ewing's home with the intent to commit rape or a first-degree sexual offense. Accordingly, the trial judge refused to instruct the jury on second-degree burglary on this basis. This may very well have been error favorable to defendant. However, because the testimony of defendant's alleged sexual assault of Hamrick was admitted only for the purpose of proving that defendant entered Ewing's home with the intent to commit a sexual assault upon Ewing, the jury should have been instructed that it should disregard Hamrick's testimony. Nevertheless, the trial court did not instruct the jury to disregard this evidence but instead repeated in substance its earlier instruction, stating:

> Now, Members of the jury, in this case, evidence was received, tending to show, and what it does show is for you, the jury, to determine, that the defendant, Clifton White, had an assaultive sexual encounter with Mrs. Hamrick.
>
> This evidence was received solely for the purpose of showing that the defendant had the intent, which is a necessary element of the crimes charged in this case.
>
> If you believe this evidence, you may consider it only for the limited purpose for which it was received.

Based on this instruction, the jury may have erroneously concluded that it could consider the evidence of the sexual assault for the purpose of proving that defendant had the intent to commit any of the crimes with which he had been charged.

NO DUTY TO DISCLOSE RULE 404(b) EVIDENCE PRIOR TO TRIAL

We find no support for defendant's assertions that disclosure of Rule 404(b) evidence is required by North Carolina law, nor does defendant refer to any. To the contrary, we have previously held that Rule 404(b) "addresses the

admissibility of evidence; it is not a discovery statute which requires the State to disclose such evidence as it might introduce thereunder." State v. Ocasio, 344 N.C. 568, 576, 476 S.E.2d 281, 285 (1996) (quoting State v. Payne, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994), cert. denied, 514 U.S. 1038, 131 L. Ed. 2d 292, 115 S. Ct. 1405 (1995)). Accordingly, the trial court did not err in denying defendant's motion to compel disclosure of evidence offered pursuant to Rules 803(24), 804(b)(5), and 404(b). State v. Anthony, 354 N.C. 372, 391 (2001).

MOTION *IN LIMINE* DOES NOT PRESERVE OBJECTION FOR APPEAL

A motion *in limine* is not sufficient to preserve for appeal the question of admissibility of Rule 404(b) evidence if the defendant does not object to that evidence at the time it is offered at trial. State v. Grooms, 353 N.C. 50, 76 (2000).

THIN ICE FOR A TRIAL JUDGE

Under Rule 404(b), evidence of other crimes, wrongs, or acts is admissible for purposes other than to prove the character of a person or to show that he acted in conformity therewith. Such other purposes include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." **The aforementioned list is not exclusive and "the fact that evidence cannot be brought within a category does not necessarily mean that the evidence is inadmissible."** State v. DeLeonardo, 315 N.C. 762, 770 (1990, quoted in State v. Scott, 343 N.C. 313, 330 (1996).

The list of purposes in the second sentence of subsection (b) of Rule 404 is **neither exclusive nor exhaustive.** State v. Morgan, 315 N.C. 626, 637 (1994). **The defendant's general objection is ineffective unless there is no proper purpose for which the evidence could be admitted.** State v. Young, 317 N.C. 396, 412 (1986). **The burden is on the objecting party to show that there was no proper purpose for which the evidence could be admitted.** State v. Moseley, 338 N.C. 1, 32 (1994).

Ask yourself, if you cannot connect the offered evidence into a category named in Rule 404(b), do you want the whole trial to be reversed if you allow the evidence and an appellate court disagrees with your analysis?

Then ask yourself, are you a judge with courage and conviction?

Then ask yourself, how overwhelming is the other evidence against the defendant? Would this be harmless error? N.B. If you get this far in your analysis, you will be on thin ice if you admit the evidence.

DEFENDANT MAY NOT OFFER PRIOR CRIMES OF THE VICTIM TO PROVE THAT THE VICTIM WAS THE AGGRESSOR

The trial court in a murder prosecution did not err by denying defendant's motion to permit the defendant to introduce, pursuant to Rule 404(b), prior convictions of the victim for assault with a deadly weapon and burglary, and prison records of the victim's disciplinary infractions. There was no evidence that the defendant was aware of the victim's criminal past at the time of the killing. **Defendant's stated purpose for offering the evidence was to show that the victim had a propensity for violence and was the aggressor in the affray which led to the fatal shooting which is expressly prohibited by Rule 404(b).** State v. Smith, 337 N.C. 658, 665-666 (1994).

THINGS THAT YOU MAY NOT WANT TO DO

1. Go to sleep at night with an iron pipe under your pillow which you said you had thrown away earlier.

Woman killed with a blunt object

State v. Weathers, 339 N.C. 441, 448 (1994).

2. Dance with a woman the night that she disappears.

State v. Moseley, 338 N.C. 1, 30 (1994).

RULE 405. METHODS OF PROVING CHARACTER.

A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue. The State in rebuttal can then introduce evidence of defendant's bad character. See State v. Gappins, 320 N.C. 64, 69, 357 S.E.2d 654, 658 (1987). Such evidence offered by the defendant or the prosecution in rebuttal must be "**a pertinent trait of his character**." N.C.G.S. § 8C-1, Rule 404(a)(1) (1999).

BEHAVIOR AND APPEARANCE (which changed after defendant began his association with the co-defendant) **IS NOT THE SAME THING AS CHARACTER.** State v. Collins, 345 N.C.170 (1996).

Rule 405(a) provides in pertinent part:
In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
N.C.G.S. § 8C-1, Rule 405(a) (1999).

Defendant placed his character at issue by having members of his family testify about his reputation for nonviolence or peacefulness, "a pertinent trait of his character." In accordance with Rule 405(a), the prosecutor then cross-examined these witnesses about whether they knew of or had heard any accusations that defendant had hit or been violent toward his wife.
Defendant argues that the prosecutor failed to limit his inquiry only to specific instances of misconduct by defendant by asking very general questions about whether the witnesses knew about any "violence in the marriage" or "allegations" of violence. Given that defendant's character witnesses testified that defendant was not a violent person, the prosecution was entitled to probe their knowledge of defendant's violence in his marriage. Such an inquiry was directed at specific instances of defendant's misconduct in the context of his marriage, not just general charges of violent behavior. On this basis, defendant's argument that the prosecutor elicited irrelevant information concerning problems in defendant's marriage is without merit.
Defendant also argues that the trial court should not have allowed the prosecution to ask the character witnesses whether defendant had been "accused" of or "charged" with hitting his wife. One of the passages cited by defendant is as follows:
{*554} Q. You indicated that you had never known Chris [defendant] to be violent?
A. No.

Q. Had you heard any accusations from Laurie [wife] about him being violent during their marriage?
A. One time.
Q. One time? Do you know if Laurie ever had him charged with being violent toward her, any kind of criminal action?
A. One time that I know of.
Q. One time? He was married to Laurie for eight years. How long did he live with Laurie?
A. I think up until maybe six months before he got in trouble, these charges was brought against him.

Defendant relies on State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988), in which we held that it was error to allow the prosecution to cross-examine a character witness about whether he knew that the defendant had been charged with a crime. "The fact that the defendant had been charged with a crime does not show he is guilty of the crime." Id. at 238, 367 S.E.2d at 623. However, Martin is distinguishable. Notwithstanding the prosecution's choice of words, the questions in this case were intended to address the witness' knowledge of defendant's acts of violence against his wife rather than his criminal record, as in Martin. In Martin, the question was based entirely on the fact that the defendant had been charged with selling marijuana in jail. Id. at 237, 367 S.E.2d at 623. Here, the prosecution's questions were based on evidence from the prior trial: a witness' testimony that defendant's wife had told him about defendant hitting her and defendant's evaluation report from Dorothea Dix which stated that defendant admitted hitting his wife.
We conclude that the prosecutor's questions were not improper cross-examination and that allowing the witness to answer was not error, much less plain error. Defendant is not entitled to relief, and this assignment of error is overruled. State v. Roseboro, 351 N.C. 536 (2000).

RULE 406

HABIT OF A PERSON

ROUTINE PRACTICE OF AN ORGANIZATION

Evidence of the **habit of a person** or the **routine practice of an organization**,

whether corroborated or not and

regardless of eyewitnesses,

is relevant

to prove that the **conduct** of a person or organization

on a particular occasion

was in conformity with the habit or routine practice.

See pages 33 and 34 of Judge Clarence Horton's manuscript.

RULE 412

The defendant argues that testimony that the father repeatedly had intercourse with his daughter violated Rule 412(d), because the trial court failed to conduct the required in camera hearing to determine its admissibility. Rule 412 was designed to protect rape and sexual offense victims from unnecessary and irrelevant inquiry into their prior sexual behavior. It is unnecessary here, however, for us to decide whether Rule 412 can ever be used as a sword by the defendant in a rape case rather than as a shield for the victim. Subdivision (b) of Rule 412 states in pertinent part that: "Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior: (1) Was between the complainant and the defendant . . . ." N.C.G.S. § 8C-1, Rule 412(b) (1986). In the present case it is both obvious and uncontested that all of the testimony complained of by the defendant related to sexual behavior between the complainant and the defendant. Therefore, even if it is assumed arguendo that the trial court erred by failing to conduct the required in camera hearing before admitting such testimony, the error was harmless.

Exclusion of expeditionary (going fishing) questions.
On cross-examination of the victim, defense counsel asked:

Q. Now, isn't it true that you'd dated several boys previous to September of '86?

The prosecutor objected. Before the trial court ruled, the victim answered: "No." The court then overruled the objection.
Defense counsel next asked:

Q. Have you ever dated Marcus Hannah?

The prosecutor again objected, the court sustained the objection, and the victim nevertheless responded in the negative.
Defense counsel's next question was:

Q. Now, isn't it true that your mother had to chase some boys out of your bedroom at your house?

The court sustained the prosecutor's objection and thereupon excused the jury. Following discussion in the absence of the jury, the court indicated to counsel that, absent prior inconsistent statements of the victim that would impeach her declaration on direct examination that she had had no prior sexual relations, evidence of the type defense counsel sought to elicit would be excluded. Defendant assigns error to this exclusion.

Nothing else appearing, the exclusion was proper under Rule 412(b), which provides:

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complainant and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C.G.S. § 8C-1, Rule 412(b) (1986). The exceptions to inadmissibility contained in the rule are inapplicable here; indeed, defendant does not contend otherwise. He argues, instead, that the State opened the door to questions of this nature by asking the victim on direct examination whether she had had intercourse with any man other than defendant prior or subsequent to 13 September 1986, and that he thus should have been allowed to impeach the victim's negative answer for the purpose of casting doubt on her credibility.

In the absence of the jury, the trial court stated to defense counsel that it "might allow . . . a prior inconsistent statement concerning events relating to other people for the purpose of impeachment only." Defense counsel indicated that "[t]here are no statements other than what [the victim] has said on the stand." Assuming that the State could, and did, open the door -- for impeachment purposes -- to the introduction of evidence regarding the victim's sexual behavior, defendant clearly had no such evidence to offer. By the questions asked, he sought to embark upon a fishing expedition, hoping it would yield the desired evidence. **Had defendant possessed evidence of the victim's sexual behavior which he contended was relevant for impeachment purposes, he could have requested an in camera hearing to determine its relevancy and admissibility. N.C.G.S. § 8C-1, Rule 412(d) (1986).** He made no such request, however, and absent such request exclusion of his merely expeditionary questions accords with the letter and the purpose of the rape shield statute. State v. Degree, 322 N.C. 302 305,306 (1988).

SAVING GRACE

The trial court in a felony murder case did not err in denying defendant's motion for a mistrial when a detective testified that he had gotten information about an unspecified previous charge against defendant in Maryland, although such testimony was improper under N.C.G.S. § 8C-1, Rule 404(b), where the trial court sustained defendant's objection and instructed the jury to disregard the incompetent evidence, and where the evidence could not have resulted in substantial and irreparable prejudice to defendant's case in light of his confession and the corroborating evidence that supported it. N.C.G.S. § 15A-1061. State v. Hogan, 321 N.C. 719, 723 (1988).

It does not matter whether the trial court gave the correct or best reason for excluding the evidence so long as its ruling was correct. State v. Hill, 347 N.C. 275, 295 (1997). See State v. Austin, 320 N.C. 276, 290 (1987).

The failure of a trial court to admit or exclude evidence will not result in the granting of a new trial absent a showing by the defendant that a reasonable possibility exists that a different result would have been reached absent the error. State v. Macon, 346 N.C. 109, 117, *quoting* Burke, 343 N.C. 142-143 (1988).