

# North Carolina Criminal Law

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## Common Character Evidence Questions in Self-Defense Cases

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Character evidence is one of the most challenging areas of evidence law to navigate, as Jessie Smith observes [here](#). Jessie's blog features a useful chart to apply Rules 404 and 405 and also links to the [bench book chapter](#).

I find it helpful to see these rules in action with concrete examples. A common context in which the character evidence rules come into play in criminal cases is self-defense cases. This post discusses several common questions that arise, as well as some adjacent issues.

Let's use a simple hypothetical:

*The defendant is charged with shooting the victim outside of a bar after an argument about whether the victim approached the defendant's girlfriend. The defendant claims that the victim came at him first with a knife.*

The questions below deal with what the defendant can elicit about the victim and what the State can elicit about the defendant. As we work through the examples, remember that Rule 404 addresses when character evidence is admissible or inadmissible, and Rule 405 addresses the *method of proof* for the character evidence (reputation/opinion evidence or specific instances of conduct).

Rules 404 and 405 are included at the end of the post for reference.

### **Evidence about the Victim**

*Can the defendant elicit evidence that the victim stabbed someone two years ago?*

This prior incident is admissible if the defendant knew about the prior incident at the time he used deadly force in the case at hand (he was either present during the prior incident or otherwise knew about it).

The evidence is admissible because it illuminates what was in the defendant's mind at the time he used deadly force; it tends to show that the defendant's fear was reasonable and that the defendant had a reasonable belief in the need to defend himself. See Rule 405(b) (specific incidents are admissible where character is an essential element of a charge or a defense, and an essential element of self-defense is the defendant's reasonable belief in the need to defend himself against the threat of harm); *State v. Everett*, 178 N.C. App. 44, 51-52 (2006), *aff'd without precedential value*, 361 N.C. 217 (2007), citing to *State v. Winfrey*, 298 N.C. 260, 262 (1979); *State v. Johnson*, 270 N.C. 215, 219 (1967) ("a jury should, as far as is possible, be placed in defendant's situation and possess the same knowledge of danger and the necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life").

Note that the evidence pertaining to the prior incident is not coming in here to show the victim's propensity to commit violent acts, but rather to show what was in the defendant's mind at the time he used deadly force. There is some authority for the proposition that, before the defendant introduces evidence of the victim's specific acts of violence, the defendant must first present viable evidence of the need to defend himself. See *State v. Jones*, 83 N.C. App. 593, 599 (1986); *State v. Stone*, 73 N.C. App. 691, 694 (1985); *State v. Allmond*, 27 N.C. App. 29, 31 (1975). Of course, if the defense anticipates presenting the case for self-defense later in the trial, the court could find the evidence conditionally relevant under Rule 104(b).

*Is extrinsic evidence allowed to prove up this incident from two years ago?*

Yes. Rule 405(b) does not contain language limiting the use of extrinsic evidence. See *Everett*, 178 N.C. App. at 52 (2006), *aff'd without precedential value*, 361 N.C. 217 (2007) ("Defendant presented evidence she killed the victim in self-defense and tendered Rhodes as a witness. Rhodes's testimony regarding the victim's violent behavior at the car dealership, which was known by defendant, is relevant and admissible to show whether her 'apprehension of death and bodily harm was reasonable.'")

Extrinsic evidence could become excessive or cumulative under Rule 403 and be barred from admission.

*What if the defendant was unaware of this prior violent act?*

The victim's prior violent act is not admissible if the defendant was unaware of the incident because the aggressive *character* of the victim is not an essential element of self-defense (despite the fact that the question of whether the victim was the aggressor in the case at hand is a central one). See Rule 405(b); *State v. Bass*, 371 N.C. 456 (2018), discussed by John Rubin [here](#)).

*How else might this violent incident come into evidence?*

The victim's prior violent incident could potentially come in as rebuttal if the State elicits testimony regarding the victim's reputation for peacefulness, see Rule 405(a) (the State could do so only if this were a homicide case and the defendant had presented evidence that the victim was the first aggressor, see Rule 404(a) (2)). It could also come in to impeach the victim's testimony under Rule 609 if the previous incident resulted in a conviction. Finally, there may be 404(b) exceptions allowing admission of the previous incident (more factual details would be necessary; the hypothetical is intentionally bare-bones in order to observe the rules in action in the most general context possible).

*Are the victim's prior threats against the defendant admissible?*

Yes, as again, they go to show the defendant's reasonable fear and reasonable belief in the need to defend himself. See Rule 405(b); *Johnson*, 270 N.C. at 219-20; G.S. 14-33.1 (evidence of former threats against the defendant by the person alleged to have been assaulted by him are admissible to show reasonableness of apprehension and reasonableness of amount of force used by defendant).

*Can the defendant elicit victim's convictions based on the prior violent incident?*

Potentially. See *State v. Jacobs*, 363 N.C. 815, 824-25 (2010) (when the defendant testified that the victim was a violent person who had been incarcerated, the trial court erred by excluding evidence of the victim's prior convictions to corroborate the defendant's testimony; appellate court declines to apply the *Wilkerson* "bare fact of conviction" rule because the conviction belongs to victim not defendant and victim is not on trial). *But see, State v. Greenfield*, 262 N.C. App. 631, 637-38 (2018) (trial court properly excluded victim's prior conviction for armed robbery under Rule 403).

*Is reputation or opinion testimony regarding the victim's character for violence admissible?*

If the defendant was aware of this reputation, the evidence is admissible to show the defendant's fear of harm was reasonable, as discussed above. *See State v. Watson*, 338 N.C. 168, 186-88 (1994), citing *Johnson*, 270 N.C. at 218-19.

But even if the defendant was unaware of this reputation, the reputation/opinion evidence may be admissible to show that the victim was the initial aggressor under Rule 404(a)(2) and 405(a). *See Watson*, 338 N.C. at 186-88, citing Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 90, p. 273 (4th ed. 1993); *State v. Barbour*, 295 N.C. 66 (1978); *Winfrey*, 298 N.C. at 262 (noting that the admission of such character evidence where the defendant is unaware of the victim's reputation or opinion should be carefully limited to situations where all the evidence surrounding the use of force is circumstantial or the "nature of the transaction" is in doubt).

*Can the defendant elicit evidence that the victim regularly carried a knife?*

This evidence falls under Rule 406, rather than Rules 404 and 405, as the evidence pertains to habit rather than character. It is a repeated pattern of behavior, not a character trait.

But is such evidence relevant? Likely, if the parties contest whether the victim was carrying a knife on the day in question. But if this fact is not in dispute, the probative value may be minimal.

## **Evidence about the Defendant**

*Can the State elicit evidence that the defendant assaulted another person previously?*

Generally no, as such evidence would be inadmissible propensity evidence. *See* Rule 404(b). It is improper to convey to the jury that the defendant is likely guilty of assault on this occasion because he assaulted someone in the past. *See State v. Dennison*, 163 N.C. App. 375, 383 (2004), *rev'd on other grounds*, 359 N.C. 312 (2005) ("raising a self-defense claim does not interject a defendant's character into the proceedings, and a defendant's character is not an essential element of a self-defense claim;" the trial court committed prejudicial error by allowing the State to

introduce specific instances of conduct evidence pertaining to the defendant's character for violence).

However, as in the parallel question regarding the victim above, if the defendant affirmatively elicits reputation/opinion evidence regarding his peacefulness, the prior incident would be admissible in rebuttal. See Rule 404(a)(1); 405(a). And if the defendant were convicted of a crime in connection with the prior assault, the conviction could be used to impeach the defendant under Rule 609 if the defendant testifies.

Also, as above, the incident could be admissible if there is a proper 404(b) purpose (Does the prior assault shed light on the defendant's motive or intent in the case at hand? Did the defendant previously assault someone in a similar and distinctive way, such that it could be said that the defendant has a *modus operandi*?).

*Can the State elicit reputation or opinion testimony regarding the defendant's character for violence?*

Again, the answer is generally no. Such testimony is inadmissible propensity evidence, unless the defendant has opened the door by affirmatively putting his character for peacefulness at issue. See Rule 404(a), (a)(1).

*Can the State elicit evidence that the defendant regularly carried a gun?*

Only if such evidence is relevant. Such evidence likely has very little probative value, given that the defendant is acknowledging as part of his self-defense claim that he possessed a firearm and shot the victim.

## **Rules 404 and 405 (emphasis added)**

### **Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.**

(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;

(2) **Character of victim.** – Evidence of a pertinent trait of character of the victim of the crime **offered by an accused**, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. – Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. – 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. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

#### **Rule 405. Methods of proving character.**

(a) **Reputation or opinion.** – 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. Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.

(b) **Specific instances of conduct.** – In cases in which character or a trait of character of a person is an **essential element of a charge, claim, or defense**, proof may also be made of specific instances of his conduct. (1983, c. 701, s. 1.)

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*Thanks to Joe Hyde for his assistance with this post. See his recent **post** on evidence of gang affiliation for more on character evidence.*