North Carolina Rule of Evidence 104:
THE OVERLOOKED BUT OMNIPRESENT RULE

SUPERIOR COURT JUDGES CONFERENCE
ASHEVILLE, NORTH CAROLINA
JUNE 2007

CATHERINE C. EAGLES
Senior Resident Superior Court Judge
District 18

TABLE OF CONTENTS

Rule of Evidence 104: Introduction

Rule 104 of the North Carolina Rules of Evidence applies to virtually every evidence ruling a trial judge will be called upon to make. This manuscript cites primarily cases which actually mention Rule 104, but there are many many cases which follow its procedures without mentioning the Rule itself. E.g., State v. Prentice, 170 NCApp 593 (2005); State v. Redd, 144 NCApp 248 (2001); State v. Brigman, 171 NCApp 305, *review denied*, 360 NC 67 (2005).

Rule 104 is primarily a rule of procedure: it covers how a court makes the evidentiary decisions that arise in a trial. Its title, "Preliminary Questions," gives some indication of its role. For most judges, its precepts are second nature. This is the rule that gives the trial judge the authority to decide what is admissible and what is not, and that lays out the framework for making admissibility decisions.

North Carolina Rules of Evidence: Text of Rule 104

Rule 104. Preliminary questions

(a) *Questions of admissibility generally.* -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact.* -- When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of jury.* -- Hearings on the admissibility of confessions or other motions to suppress evidence in criminal trials in Superior Court shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) *Testimony by accused.* -- The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) *Weight and credibility.* -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 104(a)

(a) *Questions of admissibility generally.* -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Introduction

This Rule comes into play in many situations: Competency of a person, usually a child, to testify; whether someone is allowed to offer expert or lay opinion testimony; whether the requirements of a particular hearsay exception have been met; whether evidence of habit has been established and is admissible; and whether an appropriate foundation has been laid for a document, videotape, or other record are just a few times this rule might be mentioned.

This Rule, particularly taken in context with Rule 104(e), makes it clear that "[a]dmissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge." State v. Sanchez, 328 NC 247 (1991), *quoting* State v. Walker, 266 NC 269, 273 (1966).

1) "Qualification of a person to be a witness "

This issue comes up in two separate major contexts: (1) the competence of a witness, such as a child, to testify, and (2) opinion testimony, particularly with experts but also with lay witnesses.

a) Competence of a witness

State v. Hyatt, 355 NC 642 (2002)
"The obligation of the trial court to make a preliminary competency determination is embodied in Rules 104(a) and 601 of the North Carolina Rules of Evidence, whereby the trial court may disqualify a witness when the trial court determines he is "incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation, by one who can understand him." NCGS § 8C-1, Rules 104(a), 601 (2001). Absent a showing that the trial court's ruling on a challenge to the competency of a witness could not have been the result of a reasoned decision, we must leave the ruling undisturbed. State v. Hicks, 319 NC 84, 89, 352 SE2d 424,426 (1987)."

State v. Fearing, 315 NC 167, 337 SE2d 551 (1995)
Quoted and relied upon often; *see inter alia*, State v. Deanes, 323 NC 508 (1988)
Fearing concerned the admissibility of out of court statements made by the child victim and turned on whether the child witness was "unavailable" by virtue of being incompetent to testify. The parties stipulated that a child victim of sexual abuse was not

competent to testify. The trial judge did not personally examine the child to determine her competence, adopted the parties' stipulations as fact, concluded the child was "unavailable," and admitted the evidence of the child's out-of-court statements implicating the defendant under a hearsay exception. The Supreme Court reversed, noting that "underlying our law governing competency is the assumption that a trial judge must rely on his personal observation of the child's demeanor and responses to inquiry at the competency hearing." (quoted language is from the Deanes case as it discussed Fearing, citing Rule 104). There can be no informed exercise of discretion where the trial judge fails to personally examine or observe the child on voir dire, and the trial judge is not free to base a conclusion that the child is "unavailable" on facts stipulated by the parties.

State v. Baker, 320 NC 104 (1987)
The trial court did not err in a prosecution for rape and incest by conducting a competency *voir dire* of the nine-year-old victim in front of the jury. The Court, on its own initiative and without advising the parties in advance, examined the witness as to her understanding of the duty of a witness to tell the truth. Rule 104(c) provides that such a hearing may be in front of a jury, and the defendant did not demonstrate how he was prejudiced by the examination.

In Re Will of Leonard, 82 NCApp 646 (1986)
"Rule 104(a) provides, in part, that preliminary questions concerning the qualification of a person to be a witness shall be determined by the court. This is in accord with North Carolina practice. Rule 104(a) also provides that in making its determination the court is not bound by the rules of evidence except those with respect to privileges. The plain meaning of Rule 104(a), the commentary to the rule, and sound judgment all contemplate that, in deciding preliminary matters, the trial court will consider any relevant and reliable information that comes to its attention, whether or not that information is technically admissible under the rules of evidence.

"The rules of evidence are designed to facilitate the introduction into evidence of relevant information which will aid the trier of fact. When deciding preliminary matters such as the competency of a witness, however, the trial court is not acting as the trier of fact. Rather, it is deciding a threshold question of law, which lies mainly, if not entirely, within the trial judge's discretion. Where competency is questioned, the trial judge is not required to conduct a formal hearing at which all of the rules of evidence are applicable. The trial court must make only sufficient inquiry to satisfy itself that the witness is or is not competent to testify. The form and manner of that inquiry rests in the discretion of the trial judge. While the trial court's power to determine the competency of a witness is not an arbitrary one, there is no abuse of its discretion where there is evidence to support its ruling. Where there is a clear abuse of discretion, however, the ruling will be reversed."

b) Expert opinion

State v. Barnes, 333 NC 666, 680, *cert denied* 510 U.S. 946 (1993)

This case appears to say that any objection to the testimony of a witness offered as an expert must be made before the expert has been accepted by the court as an expert witness in order to preserve the objection for appeal.

Howerton v. Arai Helmet, 358 NC 440 (2004)

"It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. N.C.G.S. § 8C-1, Rule 104(a) (2003). When making such determinations, trial courts are not bound by the rules of evidence. *Id.* In this capacity, trial courts are afforded 'wide latitude of discretion when making a determination about the admissibility of expert testimony.' State v. Bullard, 312 NC 129, 140, 322 SE2d 370, 376 (1984). Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion. [citations omitted.]"

The expert's testimony does not have to be proven "conclusively reliable or indisputably valid before it can be admitted into evidence." 358 NC at 460.

In deciding whether an expert's testimony should be admitted into evidence, the Court is not bound by the rules of evidence and is not required to view the evidence in the light most favorable to the party seeking to admit the evidence. 358 NC at 468.

Following Howerton and quoting it at length: Hughes v. Webster, 175 NCApp 726 (2006); State v. Anderson, 175 NCApp 444 (2006)(ballistics expert)

Hamilton v. Hamilton, 93 NCApp 639 (1989)
"When a party objects to the testimony of an expert on the ground that he is using 'facts or data' not 'of a type reasonably relied upon by experts in the particular field,' the trial court must make a preliminary determination, pursuant to NCGS § 8C-1, Rule 104(a) as to 'whether the particular underlying data is of a kind that is reasonably relied upon by experts in the particular field.' 3 J. Weinstein & M. Berger, *Weinstein's Evidence* Sec. 703[03], p. 703-16 (1988); NCGS § 8C-1, Rule 104(a) 1988) ('Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court'). This determination does not necessarily require a hearing outside the presence of the jury as "[m]uch evidence on preliminary questions . . . may be heard by the jury with no adverse effect." NCGS § 8C-1, Rule 104(a), comment. Whether or not to hold a hearing outside the presence of the jury on this matter is left to the discretion of the judge 'as the interests of justice require.' *Id.* However, '[h]earings on the admissibility of confessions or other motions to suppress evidence in criminal trials in Superior Court' *must be held* outside the presence of the jury. NCGS § 8C-1, Rule 104(c) (1988). 'The primary consideration of the judge in deciding whether to remove the jury is the potential for prejudice inherent in the evidence which will be produced by parties on the preliminary question.' 1 J. Weinstein & M. Berger, Sec. 104[10], p. 104-74 (1988)."

State v. Sanchez, 328 NC 247 (1991)

Trial court did not err in prohibiting psychologist from testifying before the jury as to whether the defendant voluntarily waived his Miranda rights, as that is a legal question, but did err in preventing the psychologist to testify as to the defendant's understanding of those rights at the time he made the statement to law enforcement, as that would have been helpful to the jury in evaluating the credibility of and weight to be given to the defendant's statement.

c) Lay opinion

State v. Shuford, 337 NC 641 (1994)
Rule 104(a) also applies to Lay Opinion Testimony. Under Rule 701, the court must make a preliminary determination that the lay opinions proferred are rationally based on perception and helpful to the jury;

2) "The existence of a privilege"

I found no cases discussing Rule 104 in the context of determining whether a privilege exists, but many cases implicitly use the Rule 104 framework in evaluating this evidentiary issue. E.g., State v. Brown, 350 NC 193, 207 (1999)(trial court did not err in allowing impeachment of state's witness by defense with letters to witness from witness's wife, despite state's claim of privilege; trial court conducted a voir dire, made findings of fact concerning the existence of the privilege, and made its evidence ruling on admissibility); State v. Pickens, 346 NC 628 (1997)(after conducting a voir dire, trial court made findings concerning existence of Fifth Amendment privilege and ruled witness did not have to testify); State v. Maynard, 311 NC 1, *cert denied*, 469 US 1963 (1984)(trial court did not err in refusing to allow defendant to voir dire co-defendant before calling co-defendant to testify in order to determine if co-defendant would invoke the privilege; voir dire only appropriate if there is objection to the invocation of the privilege, not just to determine if privilege would be asserted).

3) "Admissibility of Evidence"

"Admissibility of evidence" obviously covers a huge range of topics, and rule 104 has been explicitly referenced in terms of deciding whether a hearsay exception has been established and whether a sufficient foundation for a document has been laid. *See cases infra*. Its procedures have been implicitly followed or endorsed in numerous cases. E.g., State v. Scott, 343 NC 313 (1996)(after voir dire hearing, trial court found documents were kept in the regular course of business and were completed by a person with knowledge, and thus were admissible as business records; no error; court further held after voir dire that decedent's statements concerned her state of mind and were admissible; no error); State v. Alston, 341 NC 198 (1995)(after voir dire, court found decedent's statements concerned her state of mind and were admissible; no error); State v. Levan, 326 NC 155 (1990)(after voir dire, court found statements to be against declarant's penal interest and admissible; no error); State v. Bell, 359 NC 1 (2004)(state's evidence that witness was unavailable was DA's statement that the witness was out of state; this was inadequate to support a finding that witness was unavailable as that term is

defined in Rule 805 governing hearsay exceptions and in Sixth Amendment Confrontation rights cases) *cert denied*, 544 US 1052 (2005); State v. Brigman, 171 NCApp 305 (2005)(court found witness was unavailable for purposes of rule 805 and then addressed Crawford issues, all on voir dire).

a) Hearsay

Donovant v. Hudspeth, 318 NC 1 (1986)
While decided under the law pre-Rules of Evidence, the opinion cites the Rules of Evidence extensively. The Court noted that before admitting medical records under the Business Records exception to the hearsay rule, the court had to determine if the records were kept in the ordinary course of business and if the person making the record had first hand knowledge of the events recorded. This determination is for the court to make, as set forth in Rule 104.

"Although we agree with the plaintiff that 'evidence of practice and a reasonable assumption that general practice was followed in regard to a particular matter,' Cleary, *McCormick on Evidence* § 310 (1972), is sufficient to establish *prima facie* that the business record was prepared from personal knowledge, in the case *sub judice* the defendant presented positive evidence that the report in question was prepared by Dr. Orr and that he did not talk with Dr. Hudspeth and had no firsthand knowledge about the reasons for Dr. Hudspeth's requesting the catheterization. The trial judge conducted a *voir dire* hearing on admissibility and after hearing evidence regarding the source of the information contained in the hospital record, ruled that the contested portion of the report was inadmissible. . . . The trial judge's ruling that the excluded portion of the catheterization report was not rendered admissible by the business record exception to the hearsay rule was proper."

Donovant was cited with approval in State v. Galloway, 145 NCApp 555 (2001), *appeal dism.*, 356 NC 307 (2002), in which the court held that the trial court did not abuse its discretion in redacting medical records which contained information the trial court either affirmatively found to be unreliable and untrustworthy or found to be internally inconsistent. Quoting Donovant, the Galloway court held: "Under Rule 803(6), business records, including medical records, are admissible, 'unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.' Moreover, 'the simple fact that a record qualifies as a business record does not necessarily make everything contained in the record sufficiently reliable to justify its use as evidence at trial.'" Thus, it would seem from Galloway, that it is the trial court's duty under Rule 104 to make this "lack of trustworthiness" determination.

b) Foundation

State v. Wiggins, 334 NC 18 (1993)
"There was sufficient evidence to support the trial court's admission of a letter into evidence where the letter was purportedly written by defendant and received by a witness while the witness was in prison, the letter was printed rather than written in cursive

lettering, and defendant contends that it is impossible to reliably identify printing, so that the letter was not properly authenticated. The witness testified on voir dire and again before the jury that he recognized defendant's handwriting, having received another letter from defendant and having seen some songs which defendant had written, all of which were printed. NCGS §8C-1, Rule 901, NCGS §8C-1, Rule 104(e).
"It was not error for the trial court to admit the letter if it could reasonably determine that there was sufficient evidence to support a finding that 'the matter in question is what its proponent claims.' NCGS §8C-1, Rule 901. Defendant then, of course, would have been free to introduce any competent evidence relevant to the weight or credibility of Moore's testimony. *See* NCGS §8C-1, Rule 104(e). After reviewing Moore's testimony concerning his familiarity with defendant's handwriting, we conclude that there was sufficient evidence to support the trial court's admission of the letter into evidence**.** Thus, we find no merit in defendant's sixth assignment of error."

Other cases discussing adequate foundation use the Rule 104 procedure without explicitly mentioning it. E.g., State v. Jones, 358 NC 330 (2004)(after voir dire hearing, court found sufficient evidence that proferred audiotape was a tape of victim arguing with defendant and admitted tape into evidence; affirmed)

4) Rules of Evidence Do Not Apply To Preliminary Determinations Except Privilege

I found no cases specifically discussing this part of the Rule in North Carolina, but any number implicitly follow it.

State v. Wilson, 313 NC 516 (1985)
While not mentioning Rule 104(a), this case makes it clear that the court makes the preliminary determination looking at all the evidence before it, including circumstantial evidence, and that a high degree of proof is not required. "Business records made in the ordinary course of business at or near the time of the transaction involved are admissible as an exception to the hearsay rule if they are authenticated by a witness who is familiar with them and the system under which they are made.[citation omitted] The authenticity of such records may, however, be established by circumstantial evidence. [citation omitted]. There is no requirement that the records be authenticated by the person who made them. [citation omitted] Furthermore, if the records themselves show that they were made at or near the time of the transaction in question, the authenticating witness need not testify from personal knowledge that they were made at that time. [citation omitted]."

State v. Hinnant, 351 NC 277 (2000)
When the court decides if the residual hearsay exception is appropriate in a case to admit evidence, one of the things the court must consider is whether the statement possesses "equivalent circumstantial guarantees of trustworthiness;" in making this decision, the court does NOT look at all of the evidence but rather is limited to evidence about the out of court statement itself. "Although the trial court's examination of a hearsay statement's trustworthiness is based upon the totality of the circumstances surrounding

the statement, [citation omitted], the trial court must not consider the corroborative nature of the statement when determining whether it qualifies as residual hearsay. [citation omitted]. Instead, '"hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."' No mention of Rule 104(a).

State v. Jennings, 333 NC 579 (1993)
State proposed to call District Court Judge with whom defendant spoke on the day after the murder. Defendant objected based on attorney-client privilege. No error to prohibit defendant from testifying during voir dire hearing on the privilege question that defendant thought she had an attorney client relationship with the judge. The record conclusively established the witness's status as a judge, the court took judicial notice that active judges are prohibited from practicing law, and there could be no privilege as a matter or law, regardless of what the defendant testified she thought.

Rule 104(b)

> (b) *Relevancy conditioned on fact.* -- When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Rule 104(b) plays a specific role in a court's decision to admit or exclude evidence offered pursuant to Rule 404(b), other crimes, wrongs, or acts. The most frequently cited case on this relationship is State v. Haskins, 104 NCApp 675 (1991), as it covers the court's role clearly and relatively succinctly.

This is the rule which allows the proponent of certain evidence to offer evidence not on its face relevant, subject to "connecting things up" later. However, this "promise to connect up later" is expressly prohibited when the Rape Shield Rule is at issue. See State v. Mason, 315 NC 724 (1986) and State v. Sexton 336 NC 321 (1994).

Cf., State v. Barnes, 345 NC 184 (1997)(It is not necessary for the prosecution to establish the conspiracy before the admission of a co-conspirator is admitted pursuant to Rule 801(D)(e), so long as the existence of the conspiracy is eventually established.)(No citation to Rule 104)

State v. Haskins, 104 NCApp 675 (1991)

"The admissibility of 'other crimes, wrongs, or acts' evidence is determined through an application of Rules of Evidence 404(b), 402, 401, 403, 104**(**b), and 105. *See* Huddleston v. United States, 485 U.S. 681, 691 (1988). That is, the evidence must be offered for a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the danger of unfair prejudice to the defendant, and, if requested, must be coupled with a limiting instruction. A proper application of these rules balances the State's interest in presenting the evidence of 'other crimes, wrongs, or acts' against the possibility of unfair prejudice to the defendant.

"Furthermore, the 'other crimes, wrongs, or acts' evidence is relevant only if the jury can conclude by a preponderance of the evidence that the extrinsic act occurred and that the defendant was the actor. *See* Huddleston v. United States, 485 U.S. [681] at 689-90. In this regard, the trial court is required to make an initial determination pursuant to Rule 104(b) of whether there is sufficient evidence that the defendant in fact committed the extrinsic act. [citation omitted.] The judge is not required to be convinced beyond a reasonable doubt, by clear and convincing evidence**,** or by a preponderance of the evidence**,** that defendant committed the extrinsic act. *See* Huddleston v. United States, 485 U.S. at 690; Beechum, 582 F.2d [898] at 913. Rather, as a prerequisite to admitting the evidence**,** the trial court must find the evidence to be substantial. State v. Williams, 307 NC 452, 454 (1983) (defining substantial evidence as 'such evidence as a reasonable mind might accept as adequate to support a conclusion"') *see also* Huddleston v. United

States, 485 U.S. at 690 (trial court must determine 'whether the jury could reasonably find . . . by a preponderance of the evidence that defendant committed the extrinsic act'); State v. Stager, 329 NC 278, 303 (1991). If the proponent's evidence is not substantial, the trial court must, if the evidence has been presented in the presence of the jury, instruct the jury to disregard the evidence. Huddleston v. United States, 485 U.S. 690; *see also* NCGS §8C-1, Rule 104(c)(1988) (hearings on admissibility of evidence shall be conducted out of the hearing of the jury when the interests of justice require); Stager, 329 NC at 303 (proper for trial court to conduct *voir dire* hearing to determine whether evidence offered pursuant to Rule 404(b) is admissible)."

Rule 104(c)

(c) *Hearing of jury*. -- Hearings on the admissibility of confessions or other motions to suppress evidence in criminal trials in Superior Court shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

State v. Brewington, 170 NCApp 264 (2005)
"Next, defendant contends the trial court committed plain error by conducting an evidentiary hearing prior to the beginning of the habitual felon phase as no motion for such a hearing had been properly made before the court. Thus, defendant contends the trial court's actions constituted an impermissible advisory opinion.

"Under N.C. Gen. Stat. § 8C-1, Rule 104(a) (2003), 'preliminary questions concerning . . . the admissibility of evidence shall be determined by the court[.]' *Id*. Any hearings concerning the admissibility of evidence shall be conducted outside the hearing of the jury when the interests of justice require. *See* N.C. Gen. Stat. § 8C-1, Rule 104**(**c). Furthermore, the Rules of Evidence 'shall be construed to secure fairness in administration [and the] elimination of unjustifiable expense and delay . . . .' N.C. Gen. Stat. § 8C-1, Rule 102(a) (2003). Therefore, based upon these rules of evidence, we conclude the trial court has the inherent authority to conduct an evidentiary hearing outside the presence of a jury *sua sponte* to clarify questions of admissibility and to prevent undue delay in the proceedings."

State v. Campbell, 142 NCApp 145 (2001)
Citing Haskins, 104 NCApp 675 (1991), see discussion *supra*, the court ruled that when there is a question about the admissibility of Rule 404(b) evidence because of doubts the defendant committed the extrinsic act, "[u]pon a request by the opponent of the evidence, the trial court must, therefore, determine on *voir dire* "whether there is sufficient evidence that the defendant in fact committed the extrinsic act." This would seem to indicate that the court must have this hearing outside the presence of the jury, but Footnote One says otherwise: "We note the defendant may request the trial court conduct the *voir dire* outside the presence of the jury when the interests of justice so require. NCGS §8C-1, Rule 104(c)(1999). When the *voir dire* is conducted in the jury's presence, however, and the trial court subsequently determines the evidence the defendant committed the extrinsic act is not substantial, the trial court must "instruct the jury to disregard the evidence."

State v. Hensley, 120 NCApp 313 (1995)
When the eleven-year old victim was called to the stand, the Court on its own asked questions concerning the witness's age and understanding of the obligation to tell the truth, then found the witness competent. The defendant did not object at trial, but on appeal contended the court should not have made this inquiry "unrequested." The Court noted that Rule 104(c) of the North Carolina Rules of Evidence requires *voir dire* inquiry

into the competency of a witness to be conducted outside the presence of the jury only "when the interests of justice require," and found that the questions of the court in no way constituted plain error.

State v. Baker, 320 NC 104 (1987)
"Rule 104(c) requires that a hearing such as the one requested in this case [competency of the 9 year old witness to testify] be held out of the presence of the jury only when the ends of justice require it. We cannot hold it was error in this case for the court not to hold the hearing out of the presence of the jury, particularly when the defendant did not request it."

Hamilton v. Hamilton, 93 NCApp 639 (1989)
When a party objects to the testimony of an expert, the trial court must make a preliminary determination about admissibility. "This determination does not necessarily require a hearing outside the presence of the jury as '[m]uch evidence on preliminary questions . . . may be heard by the jury with no adverse effect.' NCGS § 8C-1, Rule 104(a) , comment. Whether or not to hold a hearing outside the presence of the jury on this matter is left to the discretion of the judge 'as the interests of justice require.' *Id.* However, '[h]earings on the admissibility of confessions or other motions to suppress evidence in criminal trials in Superior Court' *must be held* outside the presence of the jury. NCGS § 8C-1, Rule 104(c) (1988). 'The primary consideration of the judge in deciding whether to remove the jury is the potential for prejudice inherent in the evidence which will be produced by parties on the preliminary question.' 1 J. Weinstein & M. Berger, Sec. 104[10], p. 104-74 (1988)."

NOTE THE OVERLAP between Rule 104(c) and Rule 103(c), which provides that "[i]n jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers or proof or asking questions in the hearing of the jury."

Rule 104(d)

> (d) *Testimony by accused.* -- The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

No cases were found discussing this Rule. It appears to be straightforward and self-explanatory: If a defendant testifies during a Motion to Suppress about events leading up to a search, he does not have to answer questions about his guilt of the underlying offense, for example.

Rule 104(e)

(e) *Weight and credibility.* -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Howerton v. Arai, 358 NC 441, 460 (2004)
Once expert testimony is admitted into evidence, "any lingering questions or controvery concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility."

State v. Hester, 330 NC 547 (1992)
"As a threshold matter, it is beyond dispute that the trial court was empowered to make the preliminary determination regarding the admissibility of defendant's alleged statement. However, in the wake of this determination, defendant retained the right 'to introduce before the jury evidence relevant to [the statement's] weight or credibility.' NCGS §8C-1, Rule 104(e) (1988). 'Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge.' State v. Walker, 266 NC 269, 273 (1966)."

The Court found that the trial judge erred in excluding evidence about the police department's usual practice of recording confessions, as that would be relevant and helpful to the jury in determining whether the defendant's alleged confession was in fact made and if made, was truthful. The Court relied upon Rule 104(e) as interpreted in State v. Sanchez, 328 NC 247 (1991), in which the Supreme Court found that the trial court erred in excluding a clinical psychologist's testimony about his opinion regarding defendant's understanding of the *Miranda* warnings he was given prior to providing police with a confession. The Sanchez court held that "[t]estimony of this type is clearly admissible as evidence of the surrounding circumstances under which the statements were made. In order for a jury to adequately evaluate the credibility and weight of confessions, [it] must hear all the competent evidence of the surrounding circumstances." 328 NC at 251-252 (citation omitted).

State v. Baldwin, 125 NCApp 530 (1997)
Once the trial court determines that the confession is admissible, its weight and credibility are for the jury and the defendant retains the right to present evidence relevant to these issues. N.C. Gen. Stat. § 8C-1, N.C. Evid. R. 104(e). Hence, evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury. Thus even if the court determines that the confession was not coerced, the defendant may introduce evidence of coercion, since this is relevant to the weight of the evidence. NCGS §8C-1, Rule 104(e).
.
State v. Allen, 353 NC 504 (2001)
Trial court ruled that victim's statements to law enforcement were admissible under various hearsay objections. During closing argument, the prosecutor argued "you heard her words through Officer Barros, because the Court let you hear it, because the Court

found they were trustworthy and reliable. . . . If there had been anything wrong with that evidence, you would not have heard that." The defendant objected and trial court overruled the objection. ERROR.

"This portion of the argument was not part of the evidence presented to the jurors. Rather, it was a second-hand statement or revelation of the trial judge's legal determination or opinion on the evidence made during a hearing properly held outside the jury's presence. The jurors were not entitled to hear the trial judge's legal findings and conclusions regarding the admissibility of these hearsay statements. This argument clearly conveyed an opinion as to the credibility of evidence that was before the jury. This opinion was attributed directly to the trial judge in his presence, and he then overruled defendant's objection to this revelation.

"Parties in a trial must take special care against expressing or revealing to the jury legal rulings which have been made by the trial court, as any such disclosures will have the potential for special influence with the jurors. *See* NCGS §15A-1222 (1999) (stating that "the judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury"). * * * The potential for prejudicial influence remains, even if the opinion is conveyed indirectly through a party's closing argument to the jury. Although the trial court in the instant case did not convey, through its own words, an improper opinion to the jury, it did allow the prosecutor to convey the court's opinion, with virtually the same effect." Reversed and remanded for new trial.

Other cases follow rule 104(e) without specifically citing it. E.g., State v. Leeper, 356 NC 55 (2002)(" In addition to the legal issue of voluntariness to be decided by a trial judge, . . . 'the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence.' [citation omitted] Therefore, the factual issue of credibility for a jury's consideration stands apart from the issue of voluntariness that is decided as a question of law by a trial judge.")

BURDEN OF PROOF

RULES OF EVIDENCE

Neither Rule 104 itself nor any North Carolina case explicitly states whether the proponent of evidence generally has the burden of proof to establish the admissibility of that evidence, or whether the opponent of evidence generally has to burden to establish the inadmissibility of that evidence. The issue of burden or proof has been addressed specifically in the contexts of the co-conspirator exception to the hearsay rule, of expert testimony, and of Rule 404(b) evidence. The US Supreme Court has implied that the burden of proof is on the proponent of the evidence to show admissibility by a preponderance of the evidence. North Carolina cases make it clear that a party objecting to the admission of evidence must be specific, thus implying somewhat indirectly that

ordinarily the burden is on the party objecting to the evidence to demonstrate why it is not admissible.

Co-Conspirator Statements/Hearsay

The United States Supreme Court in Bourjaily v. United States, 483 US 171 (1987) has held that the preponderance of the evidence standard governs preliminary factfinding under Federal Rule 801(d)(2)(E) in the context of coconspirator statements. The Bourjaily court noted that this standard had been used successfully to determine the admissibility of confessions and evidence seized pursuant to searches conducted under Fourth Amendment standards, and implied that the preponderance of the evidence standard should be used for all Rule 104 preliminary questions. North Carolina Rule 104 and Federal Rule 104 are virtually identical.

Also in the context of co-conspirator admissions, the North Carolina Court of Appeals has held that in determining whether there is adequate evidence of a conspiracy such that statements made in furtherance of the conspiracy are admissible pursuant to rule 801(d)(E), the Court is to view the evidence in the light most favorable to the state; the ultimate question of whether there is a conspiracy is for the jury, however. State v. Collins, 81 NCApp 346 (1986), *appeal dismissed*, 318 NC 418 (1986). In order for an alleged co-conspirator's out of court statement to be admissible, "the burden [is] upon the prosecution to establish a *prima facie* case of conspiracy through evidence independent of these statements before the close of the State's evidence." State v. Withers, 111 NCApp 340, 345 (1993). "Because of the nature of a conspiracy, the State can seldom establish a *prima facie* case of conspiracy by extrinsic evidence before tendering the acts and declarations of the conspirators which link them to the crimes charged. Therefore, our courts often permit the State to offer the acts or declarations of a conspirator before the *prima facie* case of conspiracy is sufficiently established. Of course, the prosecution must properly prove the existence of the *prima facie* case of conspiracy before the close of the State's evidence in order to have the benefit of these declarations and acts." State v. Polk, 309 NC 559, 565-66 (1983); *accord*, State v. Williams, 345 NC 137 (1996). Another court has phrased the burden this way: "When attempting to rely on the co-conspirator exception to the hearsay rule, the State's burden is to produce evidence independent of the statements themselves sufficient to permit the jury to find the existence of a conspiracy." State v. Cotton, 102 NCApp 93 (1991), *appeal dismissed*, 329 NC 501 (1991).

Expert Testimony

The United States Supreme Court relied on Bourjaily and Fed.R.Evid. 104 to find that the proponent of expert testimony has the burden of establishing reliability under Rule 702 by a preponderance of the evidence. Daubert v. Merrell Dow Pharmaceuticals, 509 US 579 (1993). When it rejected the Daubert approach in Howerton, *supra*, the North Carolina Supreme Court did not mention the burden of proof, though the Court discussed Daubert extensively. I found no North Carolina case directly discussing burden of proof in the context of evidentiary decisions on expert testimony.

Rule 404(b)

Both federal and North Carolina courts have been clear that in the Rule 404(b) context, the Court itself is not making any factual findings but rather determines if the evidence is sufficient for a jury to determine that the defendant committed the extrinsic act. As stated in State v. Haskins, 104 NCApp 675 (1991):

> Furthermore, the 'other crimes, wrongs, or acts' evidence is relevant only if the jury can conclude by a preponderance of the evidence that the extrinsic act occurred and that the defendant was the actor. *See* Huddleston v. United States, 485 U.S. at 689-90. In this regard, the trial court is required to make an initial determination pursuant to Rule 104(b) of whether there is sufficient evidence that the defendant in fact committed the extrinsic act. [citation omitted.] The judge is not required to be convinced beyond a reasonable doubt, by clear and convincing evidence**,** or by a preponderance of the evidence**,** that defendant committed the extrinsic act. *See* Huddleston v. United States, 485 U.S. at 690; Beechum, 582 F.2d at 913. Rather, as a prerequisite to admitting the evidence**,** the trial court must find the evidence to be substantial. State v. Williams, 307 NC 452, 454 (1983) (defining substantial evidence as 'such evidence as a reasonable mind might accept as adequate to support a conclusion"') *see also* Huddleston v. United States, 485 U.S. at 690 (trial court must determine 'whether the jury could reasonably find . . . by a preponderance of the evidence that defendant committed the extrinsic act'); State v. Stager, 329 NC 278, 303 (1991). If the proponent's evidence is not substantial, the trial court must, if the evidence has been presented in the presence of the jury, instruct the jury to disregard the evidence. Huddleston v. United States, 485 U.S. 690; *see also* NCGS §8C-1, Rule 104(c)(1988) (hearings on admissibility of evidence shall be conducted out of the hearing of the jury when the interests of justice require); Stager, 329 NC at 303 (proper for trial court to conduct *voir dire* hearing to determine whether evidence offered pursuant to Rule 404(b) is admissible).

Thus, in the Rule 404(b) context, the court need not be convinced that the defendant committed the extrinsic act beyond a reasonable doubt, not by clear and convincing evidence, not by a preponderance of the evidence – indeed, not at all. Rather, the court simply decides if there is "substantial" evidence from which the jury could find that the defendant committed the extrinsic act.

Hearsay When Witness is Unavailable

When the state seeks to offer hearsay evidence from a witness under one of the Rule 804 exceptions which require that the witness be unavailable, it would appear that the state has to burden to show that the witness is unavailable before this exception can be applied. State v. Clark, 165 NCApp 279, *rev. denied*, 358 NC 734 (2004) (prosecutors' statement

that witness unavailable is insufficient); State v. Ash, 169 NCApp 715 (2005)(deposition of doctor in criminal case should not have been admitted in the absence of evidence the doctor was unavailable)

Under pre-Crawford law, the State had to show "good faith" that a witness was unavailable. Ohio v. Roberts, 448 US 56, 74 (1980). It is not clear if this requirement survives Crawford. *See* State v. Clark, supra.

Specific Objections

It is clear that a party who objects to the admission of proferred evidence must be specific in its objection. "A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence. [citation omitted.] Counsel claiming error has the duty of showing not only that the ruling was incorrect, but must also provide the trial court with a specific and timely opportunity to rule correctly." State v. Jones, 342 NC 523 (1996).

"It is not the responsibility of the trial court to predict the grounds of every objection made to testimony. It is the duty of counsel claiming error to demonstrate not only that the ruling was in fact incorrect, but also that he provided the judge with a timely and specifically defined opportunity to rule correctly." State v. Adcock, 310 NC 1, (1984).

There are numerous other cases to this same effect. While none state directly that the burden is on the party objecting to the evidence to show why it is inadmissible, it is true that the party objecting to the evidence must at least state why it is inadmissible before the trial court is required to consider the objection.

CONSTITUTIONAL EVIDENCE ISSUES: BURDEN OF PROOF

There is no North Carolina case which definitively discusses the burden of proof as a general matter when a constitutional objection is raised to evidence. However, North Carolina has followed the rule that when a confession or evidence seized pursuant to a search is challenged, then the State has the burden or proving that no constitutional rights were violated by a preponderance of the evidence. E.g., State v. Thibodeaux, 341 NC 53 (1995)(confession); State v. Garner, 331 NC 491, 508-509 (1992)(in face of search which violated 4th Amendment, state had burden of proving inevitable discovery by preponderance of the evidence); Cf., State v. Thompson, 309 NC 421 (1983)(if defendant claims his prior conviction was obtained in violation of the right to counsel, he has certain obligations of proof before any burden is imposed on the state, but once "the defendant establishes a prima facie showing, the burden shifts to the State to prove by a preponderance of the evidence that the challenged evidence is admissible."); State v. Breeden, 306 NC 533 (1982)(if defendant claims a pre-trial identification procedure was improper, he has certain obligations of proof before any burden is imposed on the state, but once he meet his burden, "the burden shifted to the State to prove by a preponderance of the evidence that the evidence was admissible." If the defendant demonstrates that an identification procedure was improper, then an in-court identification is allowed only if

the court is satisfied by clear and convincing evidence that the in-court identification is of independent origin and not tainted by the improper identification process. State v. Mettrick, 54 NCApp 1, (1981), *affirmed on other issues,* 305 NC 383 (1982), *quoting with approval*, State v. Yancey, 291 NC 656, 660 (1977).

In Davis v. Washington, 126 S Ct 2266, 2280 (2006), a post- Crawford case concerning whether admission of certain hearsay testimony violated the defendant's confrontation clause rights, the Supreme Court noted that state and federal courts have "generally held the [prosecution] to a preponderance of the evidence standard" when seeking application of the forfeiture by wrongdoing exception to the confrontation clause.