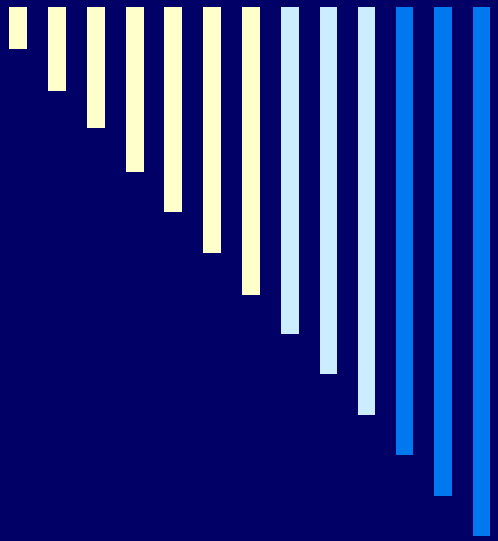

Preliminary Questions of Evidence: Rule 104

Catherine Eagles
Senior Resident Superior Court Judge
Guilford County

A Familiar Rule

- 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)

- *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. . . ."

Rule 104(a)

- State v. Baker, 320 NC 104 (1987)
- Trial court did not err in rape case 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. /

Rule 104(c)

- Hearings on preliminary matters except motions to suppress shall be conducted out of the presence of the jury only when the interests of justice require.

Rule 103(c)

- “In 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 . . .”

Rules 104(c), 103(c) & 404(b)

- “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.” Hamilton v. Hamilton, 93 NCApp 639.

- Cf. State v. Campbell, 142 NCApp 145 (2001) /

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) and Rule 404(b)

- State v. Haskins, 104 NCApp 675 (1991) and Huddleston v. United States, 485 U.S. 681 at 689-90.
- 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.

Rule 104(b) and Rule 404(b) Haskins/Huddleston

- “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.”
- “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.
- “Rather, as a prerequisite to admitting the evidence, the trial court must find the evidence to be substantial.”

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Rule 104(c)

- “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.”

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Rule 104(a)

- “Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, ... In making its determination it is not bound by the rules of evidence except those with respect to privileges.”
- So is Detective Talk’s testimony about what Officer High’s hearsay statement admissible at the suppression hearing?

US v. Matlock, 415 US 164 (1974)

- “There is. . . much to be said for the proposition that in proceedings where the judge . . . is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable;
- “The judge should receive the evidence and give it such weight as his judgment and experience counsel. . . . Certainly there should be no automatic rule against the reception of hearsay evidence in such proceedings. . . ” /

Rule 104(e)

- “This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.”

Rule 104(e)

- 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).

Rule 104(e)

- '"Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge."
- E.g., State v. Walker, 266 NC 269, 273 (1966).

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.
- “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. “

Rule 104(e)

- 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.' . . .
- "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." /

Rule 104(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. . . .

Rule 104(a)

- Specifically applies to questions about “the admissibility of evidence,” such as whether evidence is hearsay or not hearsay or whether a hearsay exception applies.

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Confrontation Clause

- Over-simplified Crawford/Davis recap: Out of court statement by person who doesn't testify is only admissible if:
- It is non-testimonial
- OR, if Testimonial,
  - Witness must be unavailable AND Prior Opportunity to Cross-Examine
  - OR an exception applies (i.e., forfeiture by wrongdoing)

Crawford & Excited Utterances

- Some early caselaw after Crawford indicated Excited Utterance automatically equals non-testimonial.
- But Court of Appeals has said "we recognize that, after *Crawford*, whether a statement qualifies as an excited utterance is not a factor in our Confrontation Clause analysis." State v. Allen, 171 NCApp 71, n.2 (2005)

Crawford/Testimonial

- Hospital records probably aren't testimonial if doctor/nurse wasn't acting as an agent of law enforcement and "primary purpose" of statements was for medical treatment.

- See, State v. Kirby, 908 A2d 506 (Conn 2006); State v. Stahl, 855 NE2d 834 (Ohio); cf. Medina v. State, 143 P2d 471 (Nev. 2006)(statements to Sexual Assault Nurse Examiner were testimonial) /

State v. Galloway, 145 NCApp 555, appeal dism, 356 NC 307

- No abuse of discretion in redacting medical records containing information the trial court either affirmatively found to be unreliable and untrustworthy or found to be internally inconsistent.
- “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.’”

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Rule 104(a)

- State v. Bell, 359 NC 1 (2004) *cert denied*, 544 US 1052 (2005)
  - DA's statement that the witness was out of state was inadequate to support a finding that witness was unavailable as that term is defined in Rule 804 governing hearsay exceptions and in Sixth Amendment Confrontation rights cases

State v. Clark, 165 NCApp 279, *rev. denied*, 358 NC 734 (2004)

- "During defendant's objection to the State's motion to declare Moore unavailable, defense counsel conceded, 'I can't find her.'

- Defense counsel's statement . . . that *he* could not locate Moore does not relieve the State of *its* burden to produce evidence showing it has been "unable to procure [Moore's] attendance . . . by process or other reasonable means."

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Rule 104(a)

- “Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court,. . . .. In making its determination it is not bound by the rules of evidence except those with respect to privileges.”
- Rule 804(a) defines unavailability of a witness as “absent from the hearing and the proponent. . . has been unable to procure his attendance . . . .by process or other reasonable means.”

Unavailable: Hearsay/Crawford

- The State has to actually and really try to get the witness to come to court
- Pre-Crawford, state required to show it acted in “good faith”
- Probably still the law; see Clark

Preliminary Question?

- Is the Determination of “Unavailability” for Confrontation Clause purposes a “Preliminary Question” so that Rules of Evidence don’t apply?

- Remember US v. Matlock, 415 US 164
  - Rules of Evidence don’t automatically apply in hearings on motions to suppress

State v Allen, 90 NCApp 15 (1988)

- “In a hearing before a judge on a preliminary motion, the ordinary rules as to the competency of evidence that apply . . .are relaxed. . .
- “The judge, being knowledgeable in the law, is able to eliminate immaterial and incompetent testimony and to consider only that evidence properly tending to prove the facts to be found. .
- “In a voir dire on a motion to suppress, there is a presumption that the trial judge disregarded incompetent evidence.”

State v. Clark, 165 NCApp 279

- “The trial court must receive substantial supporting evidence before making a finding of unavailability. . . . . .”
- Evidence from Officer Black that he had “repeatedly” tried to locate Moore, corroborated by the prosecutor's unsworn statements regarding its efforts to locate Moore, “sufficiently demonstrate the State's good-faith efforts to procure Moore in order for the trial court to declare her unavailable.”

State v. Clark, 165 NCApp 279

- No error in finding Moore to be unavailable to testify during defendant's trial.”

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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.

State v. Allen, 353 NC 504 (2001)

- “This portion of the argument was not part of the evidence presented . . .. 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.

State v. Allen, 353 NC 504

- “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. . . .

State v. Allen, 353 NC 504 (2001)

- “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.