

NC SUPERIOR COURT JUDGES CONFERENCE

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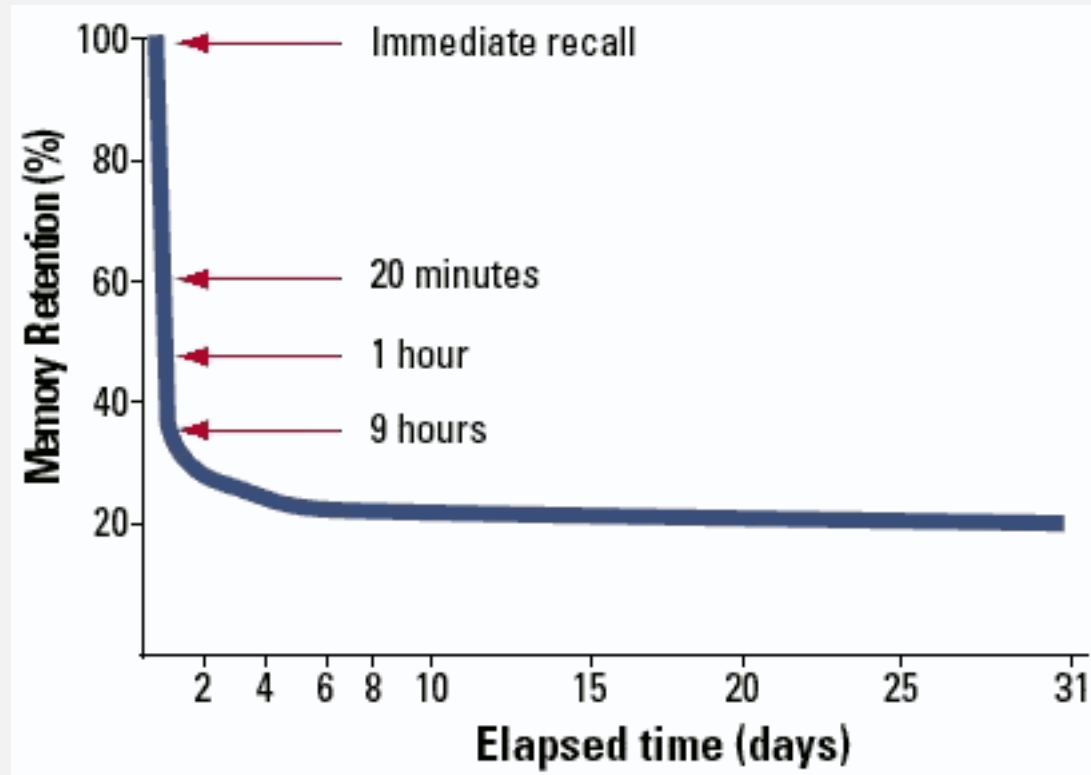
April 29, 2025

GOALS

1. Provide an Evidence Schema
2. Review Rule 404(b)
3. Review Witnesses
4. Review Impeachment

- 1. T/F. Civility in the courtroom has been worse since the pandemic.
- 2. True/False. Most of our decisions are a product of conscious thought.
- 3. True/False. The brain bases much of its quick decision-making on generalized patterns that can lead to heuristics, such as overconfidence, confirmation bias, and availability bias.
- 4. True/False. We forget 40% of what we learn in 4 days.
- 5. T/F. Using an algorithm-generated proprietary software risk-assessment program, such as COMPAS, might not violate due process of law if considered in sentencing.
- 6. T/F. If the singer, FKA Twigs, creates a deepfake clone of herself using AI to interact with fans, the deepfake's statements are hearsay.

ISSUE: EBBINGHAUS' FORGETTING CURVE



JUDICIAL NEUROSCIENCE & LEARNING

- Which is better:
 1. Drawing Pictures or Taking Notes?
 2. Multitasking or just listening?
 3. Writing down what you learned right away or waiting until the next day?
 4. Reviewing at the end of a case or several times a day?

THE EVIDENCE HIGHWAY

3 Prequel Qs:

1. Civil or Crim?
2. Which Party Offered?
3. What Form?

Offered to
Prove
what?

To Impeach?

Intrinsic
Extrinsic
Rehabilitation

To Prove
Element?

Relevant
Character –
404(B)
Opinion
Hearsay
Privilege
Witnesses
Writings

The Evid Highway

1. Civil or Crim?
2. Who's offering?
3. What form?

GOAL: IN EVIDENCE

THE FUNNEL

- AREA
- *
- RULE
- *
- EXCEPTION

HYPOTHESIS

- Pat prosecuted Dan as a result of an automobile accident. Dan testified that he was traveling 34 mph at the time of the accident – within the 35 mph speed limit.
 - On cross examination, Plaintiff asked Dan, “Didn’t you say in your cell phone conversation after the accident with a friend that, ““I might have been going 40 mph when we collided, but no faster.””
 - Dan objects.
-
- A. What are the likely bases for the objection?
 - B. What ruling and why?

AN EVIDENTIARY ANALYSIS PROCESS: HOW TO

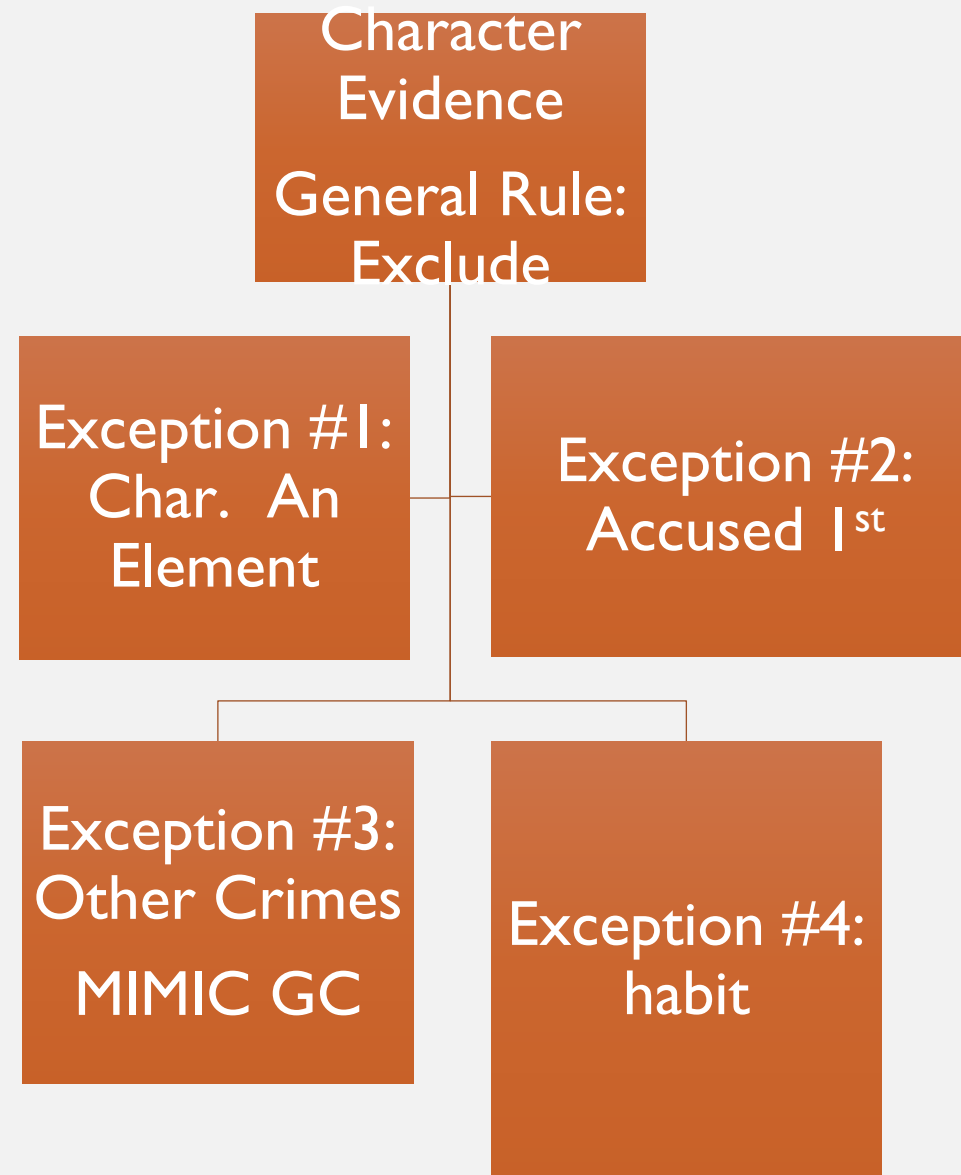
- Draw It: P v. D.
- D testifies
- Cross D (D said before...)
- Step 1. 3 Pre-Drive Questions? (mirror check)
 - A. Civil or Criminal?
 - B. Which party is offering?
 - C. Form?
- Step 2. Big Question #1: Offered to Prove What? (Relevant to What?)
 - A. Element in the case?
 - B. Impeachment of a witness?
 - C. Both?

ANALYSIS CONTINUED

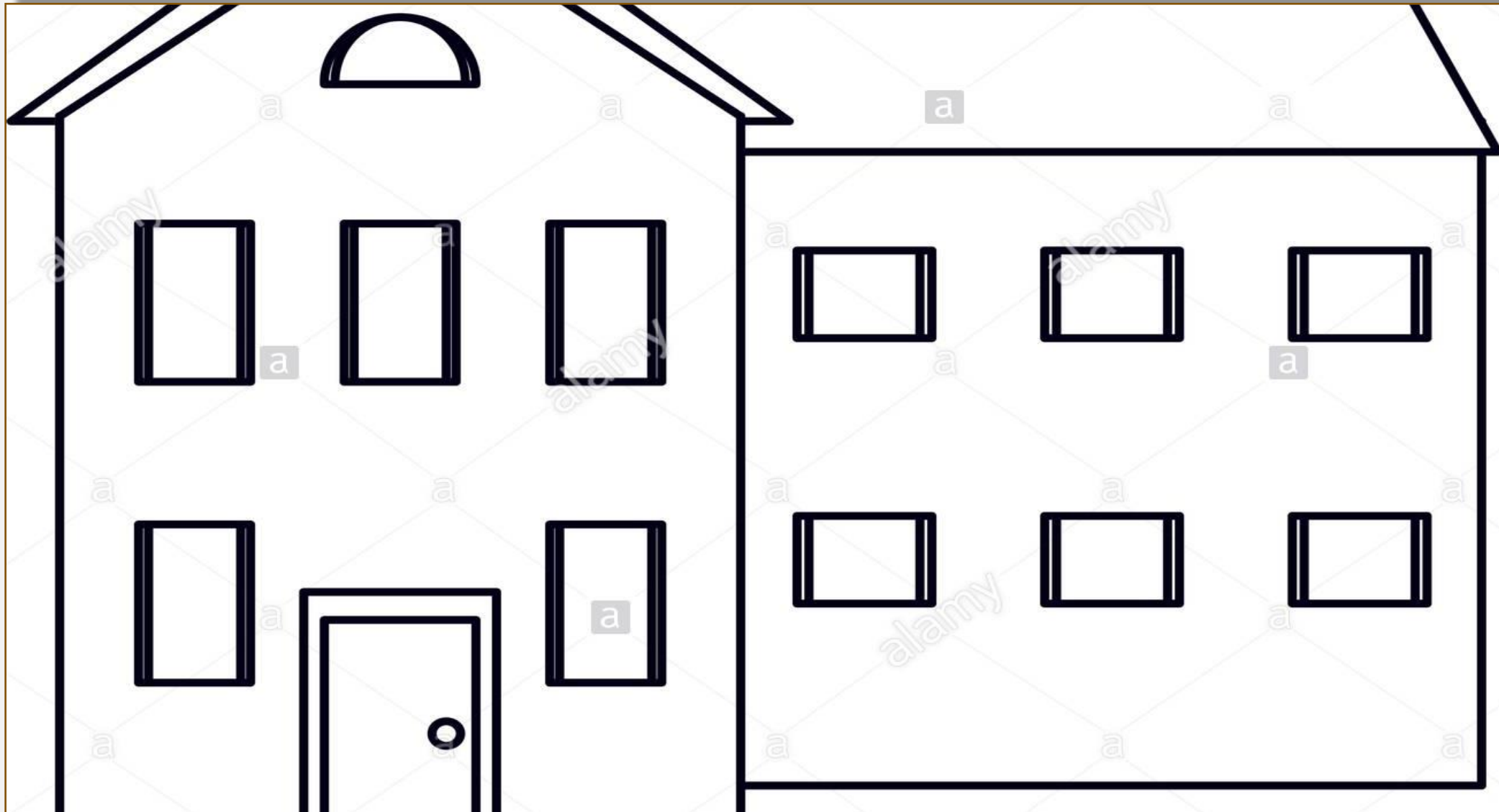
- **Step #3: Big Question #2**
- **A. If offered to impeach**, is it
 - (a) intrinsic, (b) extrinsic, or (c) rehabilitation?
- **B. If offered to prove an element**, is it
 - A. Relevant? B. Unfairly Prejudicial? C. Improper Character? D. Opinion? E. Hearsay? F. Privileged? G. Witness Issue?
 - H. Writing (HS, BER, Lack of Authentication)?

- 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 (2) Character of Victim (3) Character of Witness
- (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.

HIERARCHY DIAGRAM



“THE BIG HOUSE OF CHARACTER EVIDENCE”



BIG PICTURE ORGANIZER: CHARACTER FIRST

- I. AREA: Character
 - A. Meaning? 1. **Party/Victim** 2. **Trait** (or disposition)
- 2. RULE: Generally exclude when offered as propensity evidence. 404(a)
 - A. Propensity = Circumstantial Evid. showing “acted in conformity”
 - B. Why exclude?
 - 1. People can change
 - 2. Inaccurate representations
 - 3. Distance from actual event
- 3. EXCEPTION: 404(B): rule of inclusion

RULE 404(B) WARM-UP

- 1. T/F. Important 404(b) factors include regression analysis, closeness in time, and how unusual the other wrongs are.
- 2. T/F. The Rule allows evidence to be admitted for certain other purposes – motive, intent, absence of mistake, plan and identity.
- 3. T/F. Motive is why someone does something; intent is their purpose or knowledge as they are doing it.
- 4. T/F. Courts must consider separately whether evidence meets the 404(b) standard and whether it survives the weighted balancing test of Rule 403.
- 5. T/F. Propensity evidence in an auto case could include evidence that a party is a cautious driver, has no speeding tickets, and has never been convicted of any driving-related crimes

NC RULE OF EVID. 404(B)

- (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.

NC RULE 403

- Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
- Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

A QUESTION

- Defendant is charged with robbing a convenience store. At trial, the prosecution offers evidence that the defendant has robbed three other stores in the past three years. Is this evidence allowed?
 - A. Yes, because it is proper impeachment evidence.
 - B. Yes, because it show the identity of the defendant as part of other crimes.
 - C. No, because this is a specific act when character evidence requires only reputation or opinion.
 - D. No, because the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

A 404(B) FRAMEWORK

- 1. Is There a Sufficiency of the Evidence for Other Crime or Wrong under Rule 104(b)?
- 2. Is the Other Crime or Wrong Relevant to an Issue Other Than Propensity?
- 3. Is The Relevance Sufficiently Similar And In Temporal Proximity?
- 4. Does the Evidence Satisfy NC Rule Evid. 403?
- *****
- 5. On Appeal: 404(b) (*de novo*); 403 (abuse of discretion)

NCGS CHAP. 8C-1404(B) OTHER PURPOSES

- Such As:
- “motive,
- opportunity,
- intent,
- preparation,
- plan,
- knowledge,
- identity, or
- absence of mistake,
- entrapment or
- accident.” [MIMIC GC]

AN EVIDENCE INFLECTION POINT: SPECIFIC ACTS

- 1. Similar Occurrences (e.g., 403, third parties, experiments)
- 2. Prior Party or Victim Acts (e.g., 404(b))
- 3. Prior Witness Acts (e.g., 608(b))
- 4. Generalizations (e.g., propensity character, reputation, groups) (e.g., 403, 404, 702)

HYPOS

- 1. Defendant was prosecuted for check fraud, where he falsely signed his name as “I.M. Wild.” Can the prosecution offer the fact that defendant:
 - (a) was prosecuted for check fraud on three prior occasions? (2 dismissals)
 - (b) signed his name the same way on three prior checks four years earlier?

- 2. Plaintiff was fired from her job at Southern Tech University after she had participated in union activity. Plaintiff sued the school. At trial, the school’s president claimed the firing was due to poor job performance. Can the Plaintiff offer evidence that the University had discriminated against other workers who had participated in union activity?

HYPOTHESIS: CROSS EXAM

- 3. D was charged with battery at a bar after getting into an argument, hitting a person with a gun butt. On cross examination by the prosecutor, D was asked:
- “Didn’t you hit another person with a gun three months ago at a soccer game after getting into an argument?” Objection! Ruling?



- 4. A man was charged in 2018 with breaking and entering a shed using burglary tools to get inside. Two years later, the same man was charged with attempting to break and enter a free-standing garage. A video cam caught the man on tape each time.
- Admit?

A COURT DECIDES

- “Because a prior breaking and entering incident involving Defendant was substantially similar to the charged conduct, temporally proximate, and introduced for a non-propensity purpose, the trial court did not err in admitting evidence about the prior incident on Rule of Evidence 404(b) grounds. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019).
- Further, because the probative value of the same evidence was not substantially outweighed by unfair prejudice, the trial court did not err in admitting it on Rule of Evidence 403 grounds. N.C. Gen. Stat. § 8C-1, Rule 403(2019).... Thus, we conclude there was no error.” *State v. Jones* (NC Ct. App. 2023)

SIMILARITY

- Prior crimes or acts by the defendant are deemed similar when there are “some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both[.]” *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)
- “However, it is not necessary that the similarities between the two situations rise to the level of the unique and bizarre.
- Rather, the similarities simply must tend to support a reasonable inference that the same person committed both the earlier and later acts.” *State v. Stager*, 329 N.C. at 304, 406 S.E.2d at 891 (1991). *State v. Brockett*, 185 N.C. App. 18 (2007))[emphasis added]

- 5. The alleged victim, Vanessa, recanted her pre-trial claim that the defendant had assaulted her during her testimony at trial. The Prosecution then offers evidence of several instances of prior domestic violence by the defendant against Vanessa. Allowed?
- 6. Charlie sold Barry some cocaine. Right after the sale occurred, Barry found out that the cocaine had been cut with an inferior agent, ruining its value. Barry became furious and beat Charlie up, almost killing him. Barry was charged with attempted murder. Is Charlie's sale of cocaine to Barry admissible in the attempted murder trial? Why?

HYPOTHESIS

- 7. A middle school chorus teacher is charged with the statutory rape of a student. Can the prosecution offer evidence that the accused raped another middle school student?
- [State v. Pickens, 385 N.C. 351 \(2023\)](#)

HYPO: THE DISRESPECTFUL INMATE

- 8. An inmate at the Lanesboro Correctional Institution was charged with felony battery on a correctional officer due to a November 2015 fight. The defendant testified he was the victim. On cross-examination:
- Prosecutor: You're always respectful of other inmates?
- Defendant: Yes.
- Prosecutor: you are respectful of the guards all the time out at Lanesboro?
- Defendant: Yes.
- *****
- The prosecutor then sought to question the defendant about 10 prior occasions where the defendant threatened, verbally abused, and disrespected other inmates and correctional officers.

404(B) REVIEW

- 1. SPECIFIC ACTS - conviction or no conviction
 - A. FACTUAL BASIS for the other crime under Rule 104(b)?
- 2. RELEVANT FOR "OTHER PURPOSES" (non-propensity) or PROPENSITY?
 - A. Limited purpose admissibility (limiting instruction)
 - B. Similarity and Temporal Proximity
- 3. PROCEDURE: Presented by a motion *in limine* or a hearing outside the jury's presence?
- 4. TAG TEAM: Have there been separate 404(b) and 403 analyses?



WITNESSES

WHO?

- A. People Testifying
- B. Hearsay Declarants (surrogate witness)

HOW?

- A. Opinions
- B. Form Of Questions

TECHNIQUES: 1. Wrap-around; 2. Stop Sign; 3. Highlight

WARM-UP

- 1. T/F. A witness who is 5 years old or mentally ill might be allowed to testify.
- 2. T/F. Witnesses are presumptively competent and the opponent of the witness often seeks a *voir dire* exam of the witness.
- 3. T/F. Sometimes, witnesses can testify out-of-order.
- 4. T/F. “Opening the door” involves the waiver of a known right often by offering misleading or incomplete inadmissible evidence.

OPENING THE DOOR

- Factors: Did the party intend to or was reckless in offering inadmissible evidence? What is the impact of the inadmissible evidence? What is the response offered by the opposing party?
- If the Door is Opened, What Can a Court Do?
 - 1. Curative Admissibility – Allow inadmissible evidence in response to explain or rebut the other party's evidence
 - 2. Strike the inadmissible evidence and exclude

HYPOS: OPENING THE DOOR

- I. Murder case. McKoy shot and killed Brandon. McKoy claimed self-defense.
 - A. At trial, Brandon's father testified for the prosecution, saying, "my son was always happy, no guns were allowed in the home, and he did not possess one." The defense counsel sought to offer contents of Brandon's cell phone, showing Brandon and friends holding guns and texts of a violent nature. Allowed?
 - *State v. McKoy*, 891 S.E.2d 74 (NC 2023)
 - B. At trial, the defense counsel asks a prosecution witness, "When you saw Mr. McKoy on the day of the alleged murder, did he have a gun on him?" Answer: "No, he is more likely to carry a peace sign than a gun."
 - C. In the same case, the defense counsel asks a different witness, "Does Mr. McKoy carry a gun?" Answer: "No, he is more likely to carry a peace sign than a gun."

HYPOS CONTINUED

- 2. D is charged with murder by shooting a 9 mm bullet. D claims a third party, Morris, did it and offered as evidence that officers found 9 mm shells on Morris's night table. In response, the prosecutor offered Morris's plea allocution, saying Morris only admitted to possessing a .357 revolver, nothing else. Morris was not available to testify. Allow?
- *Hemphill v. New York*, 595 U.S. ___, 142 S. Ct. 681 (U.S. 2022).

WATCH OUTS

- 1. Leading (advocacy) Questions.
 - How can tell? Did -Does–Was- Were-Is- Are
 - Definition: Qs that suggest an answer (clue: yes/no answer)
 - Exs. 1. Did you go to the store after the game?
 - 2. Why did you go to the store after the game?
- 2. Non-leading (Inquiry) Questions: What –Where- When – Why- How- Describe- Explain
- 3. Wrap Around Qs. When/Why/How you X?
- 4. Listening Technique (if attorney argument) – “What I heard you saying is that _____”

WIDE OPEN CROSS

- Rule 611. Mode and order of interrogation and presentation.
- (a) Control by court. - The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
- (b) Scope of cross-examination. - **A witness may be cross-examined on any matter relevant to any issue in the case**, including credibility.
- (c) Leading questions. - Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination....

HYPOTHESIS

- In a tort action against UPS for an accident allegedly caused by the negligence of one of its drivers, Danny, the defendant UPS calls another driver, Tess, to testify that Danny was on a “fun and frolic” outside the scope of his employment at the time of the accident. On cross examination, Tess is asked:
- 1. Q: On April 14th, the day of the accident, didn't you meet Danny in the driver's room at 5 a.m., 40 minutes before the accident?
- Answer: Yes.
- 2. Were his eye bloodshot? Objection!
- Answer: Yes.
- 3. Was his speech garbled?
- Answer: Yes.

NC RULE 612: REFRESHING MEMORY

- Rule 612. Writing or object used to refresh memory.
- (a) While testifying. - If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.
- (b) Before testifying. - If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have those portions of any writing or of the object which relate to the testimony produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.
- (c) Terms and conditions of production and use. - A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains privileged information or information not directly related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any such portions, and order delivery of the remainder to the party entitled thereto....

REFRESHING RECOLLECTION VS. RECORDED RECOLLECTION

- One is witness “smelling salts,” the other is a hearsay exception.
- Rule 803(5), Recorded Recollection. – A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

REFRESHING MEMORY

- 1. Witness: I forgot
- 2. Atty Q: Might your memory possibly be refreshed?
- 3. Witness: Yes.
- 4. Atty Q: Your Honor, I would like to have this object marked for Identification. May I approach the witness?
- 5. Judge: Yes.
- 6. Atty Q: I show you, witness, what has been marked as ____ Exhibit ____ for identification. Please look it over silently to yourself and when done, look up.
- 7. Atty Q. (after taking back the object or writing), Is your memory now refreshed about what happened after you ran to the car?

HYPOTHESIS

- Murder case. Two witnesses give a statement afterwards implicating the defendant. At trial 3 years later, they testify for the prosecution but say they don't remember the details of what they said in the statement. They concede it was their handwriting and signatures on the statements. Admit the statements?
- State v. Brown, 258 N.C. App. 58, 811 S.E.2d 224 (2018)

RULE 702. TESTIMONY BY EXPERTS.

- (a) If scientific, technical or other specialized knowledge will assist the trier of fact to
- understand the evidence or to determine a fact in issue, a witness qualified as an expert by
- knowledge, skill, experience, training, or education, may testify thereto in the form of an
- opinion, or otherwise, if all of the following apply:
- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of
- the case.

NEW FRE 702 (DECEMBER 1, 2023)

- A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if **the proponent has demonstrated by a preponderance of the evidence that:**
 - (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods; and
 - (d) the [expert has reliably applied] **expert's opinion reflects a reliable application of** the principles and methods to the facts of the case.
- Amended December 1, 2023.

A FOUR POINT FRAMEWORK FOR EXPERTS

1. Reliable Theory (*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993))
2. Reliable Application of Theory
3. Helpfulness to trier of fact
4. Qualified Witness

TWO BROAD THEMES AFTER DAUBERT

- (1) Relocates the line between judge and jury, and turns judges into amateur scientists.
- (2) Creates a managerial model for judges (Case Management), with a new gravitational center -- experts
- *Daubert* gives us 4 Rs for expert testimony –
- Relevant, Reliable, Reviewable, Refutable

HYPO: “THE DRUG CARRIER”

- Delilah Diaz was arrested in August of 2020 for possession with intent to distribute 54 pounds of methamphetamine. The drugs were found inside her Toyota RAV 4 door as she attempted to enter the United States from Mexico.
- Diaz claimed she did not know the drugs were in the car, which she said was her boyfriend’s auto. At trial, the government called Homeland Security Investigations Special Agent Flood to testify on Mexican drug-trafficking organizations, specifically, that the organizations “generally do not entrust large quantities of drugs to people who are unaware they are transporting them.”
- Flood added, “in most circumstances, the driver knows they are hired . . . to take the drugs from point A to point B.” That knowledge minimizes the risk for the drug organizations.
- Objection! Ruling?

OUTCOME?

- “The Rule as a whole makes clear that an opinion is “about” the ultimate issue of the defendant’s mental state only if it includes a conclusion on that precise topic, not merely if it concerns or refers to that topic.
- An expert’s conclusion that “most people” in a group have a particular mental state is not an opinion about “the defendant” and thus does not violate Rule 704(b). Accordingly, the judgment of the Court of Appeals is affirmed.”
- *Diaz v. United States*, 602 U.S. ____ (2024)(Thomas, J.)

- I struggle to see how a witness claiming to offer an opinion about another person's (or class of persons') thoughts at a particular moment in the past can meet any of those [reliability and assisting the trier of fact] standards. No one, at least outside the fortuneteller's den, can yet claim the power to conjure reliably another's past thoughts.
- Testimony like Agent Flood's may be dubiously circular, too. For each time a law enforcement agent takes the stand to say "most people know" and that helps the government secure another conviction, he himself is creating the very proof on which a government expert may purport to rely in the next trial.
- Gorsuch, J., with Sotomayor and Kagan, JJ. (Emphasis added)



IMPEACHMENT OF A WITNESS

- Four Main Words: Attack-Witness-Truth-Accuracy
- Stages:
 - 1. Intrinsic (witness answers)
 - 2. Extrinsic (new W, new Evid, only when it is non-collateral or important)
 - 3. Rehab (redirect)

TYPES

- **Intrinsic:**
- CONTRADICTION
- BIAS
- CONVICTION
- BAD UNTRUTHFUL ACTS
- TESTIMONIAL SENSES
- STATEMENTS (PRIOR INCONSISTENT)
- [CBC BATS]

EXTRINSIC: NON-COLLATERAL (IMPORTANT) IMPEACHMENT

- **Bias**
- **At Issue**
- **Testimonial Senses (e.g., sight, hearing, smell, touch)**

- **Conviction**
- **Reputation for untruthfulness**
- **Opinion of untruthfulness**

- **[BAT CRO]**

WARM-UP

- 1. The plaintiff offers an eyewitness who tells what he saw at the scene. The witness is asked her statement to her friend before trial, which provides a different story. If the witness says no, can the friend be offered to testify?
- 2. The Prosecution asks defendant's witness if she owes money to the defendant. The woman says "No way." The prosecution offers another witness who saw the witness promise to pay back a loan from defendant when she could get the money.
- 3. The defendant cross examines a witness for the plaintiff in a personal injury case, asking, "Right before the accident, didn't you tell your friend Pam you attended the Snow White film and not Gladiator II as you just testified? If the witness says no, can Pam be called to the stand?"

HYPOTHESIS: DAVID COPPERFIELD

- Gavin Cox was picked by the magician, David Copperfield, to participate in his “lucky 13” magic trick during his show in Las Vegas. Cox tripped, fell, and was injured during the trick and sued for more than \$1 million.
- In the liability phase of a bifurcated trial Cox needed assistance to walk in the courtroom and to the witness stand. On cross exam, Cox said he needed assistance walking. In rebuttal, Copperfield offered six surveillance videos of Cox walking easily without help outside the court. The trial court admitted the videos.

How should the appellate court rule on appeal?

RULING?

- The videos qualified as impeachment-by-contradiction evidence, and the district court did not abuse its discretion.
- *Cox v. Copperfield*, 507 P.3d 1216, 1220 (Nev. 2022)

HYPOTHESIS

- Ned goes to hospital and tells Officer Wanda, “I am dying, Otter did it.” Two days later, Ned is feeling much better and he tells Nurse Nicky, “Handy stabbed me but it looks like I will survive.” Alas, Ned died a week later. Otter is prosecuted for the murder of Ned. (*State v. Otter*)
- A. Can Officer Wanda testify to Ned’s statement implicating Otter?
- B. If yes, can Nurse Nicky testify in rebuttal to Ned’s statement that Handy did it?

THE PERFECT MARRIAGE

- Donny was charged with the murder of his wife. Donny testified at trial that he and his wife had a “perfect marriage” and that he loved her. Donny stated that he was coerced by his wife’s friend, Pam, to use drugs. On cross exam, Donny was asked if the marriage was broken and part of the reason was his increasing voluntary use of illegal drugs. Donny denied the contentions.
- Can the prosecution call a new witness to testify:
- 1. Donny and his wife were seen throwing things and yelling at each other multiple times.
- 2. Donny asked for drugs from a dealer on multiple occasions, increasing the dosage over time.
- 3. Donny was heard saying, “I am not in love with anyone.”

Evidence of character and conduct of witness.

- (a) Opinion and reputation evidence of character. - The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- (b) Specific instances of conduct. - Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
- The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

TWO SEPARATE RULES

- **608(a):** A rule governing Reputation and Opinion Impeachment Evidence.
 - **A. Allowed to Attack Another Witness's Truth or Veracity by Rep or Opinion**
 - **B. Good Truthfulness Rep or Opinion Evidence: Only After an Attack First** on witness's general bad character for truthfulness (e.g., prior bad acts, prior convictions, reputation or opinion evidence of untruthfulness). Something specific like bias, sensory deficiency, etc., does NOT count as an attack on the witness's general character for truthfulness.
-
- **608(b):** Can use **untruthful specific acts on cross to attack the witness**, "Didn't you?"
- Can use untruthful specific acts on cross to attack another witness the witness just testified about, "Have you heard?" "Do you know?"

QUESTION

- A bartender sued a customer for battery after the parties had a physical altercation at the nightclub where the bartender worked. The bartender called the manager of the nightclub as a witness, and the manager testified that she saw the customer make an unprovoked attack on the bartender. On cross-examination, the customer's attorney asks the manager, "Didn't you cheat on your taxes four years ago?"
- (A) Yes, because the manager's misconduct involved untruthfulness.
- (B) Yes, provided that the manager's misconduct resulted in a conviction.
- (C) No, because a witness cannot be impeached with a specific act.
- (D) No, because the tax return in question would be the best evidence.

HYPOTHESIS

- Zed claims Vi did not deliver widgets as agreed so Zed sued Vi. At trial, Zed offered Expert Elle, who is asked on cross examination if she had been reprimanded for lying on her board certification exam.
- Is this question proper?
- A. Yes, because it is about a prior untruthful act.
- B. Yes, because it is on cross examination.
- C. No because this is character evidence.
- D. No because it is not permitted either on cross or with a new witness.

HYPOTHESIS

- In a criminal robbery trial, the accused offers Wanda to say she was with the accused when the robbery occurred many miles away from the incident.
- A. On cross examination, the prosecution asks Wanda if she lost her job for falsely creating expenses for which she was paid at work?
- B. Wanda denied the allegation. The defense then called Ted, who worked with Wanda, to say she did falsely billed the company for non-existent expenses.
- C. A separate defense witness, Andi, then testified that Wanda had a very truthful reputation in the community.
- D. On cross examination of Andi, she was asked, Have you heard that Wanda lied on her driver's license exam?

NC RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME.

- (a) General rule. - For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.
- (b) Time limit. - Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.
- (c) Effect of pardon. - Evidence of a conviction is not admissible under this rule if the conviction has been pardoned.
- (d) Juvenile adjudications. - Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.
- (e) Pendency of appeal. - The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible. (1983, c. 701, s. 1; 1999-79, s. 1.)

CONVICTIONS - RULE 609

- 2 parts:
- 1. TYPE – felony, or of a Class A1, Class 1, or Class 2 misdemeanor, or unclassified if punishment qualifies as Class 2 or higher.
- 2. STALE - > 10 years from date of conviction or release?
- A. Reverse 403 test
- B. Advance Written Notice Given to Adverse Party

HYPOS

- 1. Jones is prosecuted for murder. On cross of Jones, he is asked, weren't you convicted of a felony in March, 2004? Allowed?
- 2. Also on cross, Jones is asked if he committed a misdemeanor as well (DWI). Allowed?

DWI

- Impeachment might be allowed for certain “unclassified” offenses (such as DWI) if the statutorily prescribed punishment qualifies the offense as a Class 2 misdemeanor or higher. See [G.S. 15A-1340.23\(a\)](#); [G.S. 14-3\(a\)](#); [State v. Armstrong, 203 N.C. App. 399 \(2010\)](#).

THE END

- Finish each day and be done with it. You have done what you could. Some blunders and absurdities no doubt crept in; forget them as soon as you can. Tomorrow is a new day. You shall begin it serenely and with too high a spirit to be encumbered with your old nonsense.” -- Ralph Waldo Emerson
- “If you change your mindset, you have the ability to change your whole world.” -- Damian Thomas
- “Here comes the sun. And I say, it’s all right.” – The Beatles