CHARACTER AND HABIT EVIDENCE

Rules 404, 405, and 406

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Special Superior Court Judge
Updated October 2009

A. Generally Speaking

The general rule:

CHARACTER EVIDENCE IS NOT ADMISSIBLE.

More particularly, character evidence is generally not admissible when offered for the purposes of proving conduct in conformity with the character trait offered.

Character is the actual qualities of an individual; reputation is that person's standing in the community as viewed by other people. (As noted in *State v. Ussery*, 118 N.C. 1177 (1896), character is inside a person; reputation is outside a person.) Because of this distinction, courts typically limit the use of character evidence – it is not directly relevant to the charges at hand (except in very limited instances), and there is a danger that the jury will misuse it.

B. Use of Character Evidence

(1) Proof of character can be made in four ways:

Rules 404 and 405:	**Reputation***
	Opinion
	Specific Instances of Conduct
Rule 406:	**Habit**

* Reputation evidence (with associates, or in the community) is a hearsay exception set out in Rule 803(21).

(2) Standard of Proof for Character Evidence: Preponderance of the Evidence

(3) Circumstantial use - where character trait is admissible, proof may be made by testimony involving **reputation** or **opinion** (Rule 405).

* Where charged with murder of child, Defendant can't offer specific instances where he did not abuse other children; reputation and opinion only. *State v. Murphy*, 172 N.C. App. 734 (2004), *vacated in part on other grounds and remanded*, 361 N.C. 264 (2006).

* Cross-examination of witness who gives reputation or opinion evidence can be made on relevant **specific instances of conduct** (relevant to the character trait admitted).

    * Cross-examiner has to have good faith basis for specific instance evidence. *State v. Flannigan*, 78 N.C. App. 629 (1985), *cert. denied*, 316 N.C. 197 (1986).

* Party seeking to admit reputation or opinion testimony has to lay appropriate foundation; you need more foundation as to reputation (based on familiarity with reputation in the community, etc.) than opinion (based on personal dealings). *State v. Morrison*, 84 N.C. App. 41, *cert. denied*, 319 N.C. 408 (1987).

* Character evidence can also be used to respond to evidence presented by the other side.

    * Character evidence about defendant's reverence for mother and refusal to swear on her grave allowed where State elicited evidence that Defendant refused to swear on mother's grave that he was innocent. *State v. Powell*, 340 N.C. 674 (1995), *cert. denied*, 516 U.S. 1060 (1996).

    * Character evidence about victim's generally appropriate disposition and being a "perfect gentleman" allowed where Defendant elicited evidence that victim suffered from dementia and was dangerous to himself. *State v. Jennings*, 333 N.C. 579 (1993), *cert. denied*, 510 U.S. 1028 (1993).

    * Character evidence that victim was a good nephew and worked hard allowed where Defendant offered evidence that victim was a gang member. *State v. Taylor*, 344 N.C. 31 (1996).

        * There is no time limit on specific instances cross-examination after Defendant puts on evidence of good character. *State v. Cummings*, 332 N.C. 487 (1992). *See also State v. Hargett*, 157 N.C. App. 90 (2003) (thirty-year old conviction OK); *State v. Rhue*, 150 N.C. App. 280 (2002), *cert. denied*, 356 N.C. 689 (2003) (twenty-year old conviction OK).

    * Character evidence that Defendant was a gang member allowed where Defendant had put on character evidence of being a "good Marine." *State v. Perez*, 182 N.C. App. 294 (2007), *cert. denied*, 362 N.C. 248 (2008).

* be careful about mere evidence of gang **membership**, though (as opposed to gang-related activity) – evidence of gang membership must be relevant, as individual has a First Amendment right to association in a gang. *Dawson v. Delaware*, 503 U.S. 159 (1992), *cert. denied*, 519 U.S. 844 (1996). *See also State v. Gayton*, 185 N.C. App. 122 (2007) (admission of evidence about gang membership was error when it was not relevant to drug trafficking charge at issue); *State v. Hope*, ___ N.C. App. ___, 657 S.E.2d 909 (March 18, 2008) (admission of evidence about gang membership error when not relevant to murder charge). *But see also State v. Medina*, 174 N.C. App. 723 (2005), *rev. denied*, 360 N.C. 366 (2006) (admission of gang membership not error when it went to issue of identity); *State v. Ruof*, 296 N.C. 623 (1979) (same).

(4) Expert opinion as to character trait is INADMISSIBLE. *State v. Aguallo*, 318 N.C. 590 (1986) (victim was "believable"); *State v. Mixion*, 110 N.C. App. 138 (1993), *cert. denied*, 334 N.C. 437 (1993) (victim was "not homicidal" in murder case where Defendant claimed self-defense); *State v. Randall*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1995 (November 4, 2008) (unpublished) (victim gave a "clear and credible disclosure" of sexual assault).

* IMPORTANT DISTINCTION – Experts can testify as to the credibility of children in general, including the profiles of sexually abused children and whether the victim has characteristics or symptoms that are consistent with the profile. *See State v. Kennedy*, 320 N.C. 20 (1987); *State v. O'Connor*, 150 N.C. App. 710 (2002).

* Experts can testify as to whether the victim suffered from a psychological or emotional condition that would impair victim's ability to distinguish fantasy from reality, or to cause victim to fantasize or fabricate in general. *State v. Teeter*, 85 N.C. App. 624 (1987), *rev. denied*, 320 N.C. 175 (1987).

* BUT experts cannot testify to the effect that victim suffered from a psychological or emotional condition that caused the victim to "make up a story about the assault." *State v. Heath*, 316 N.C. 337 (1986).

* IMPORTANT DISTINCTION - look out for things that sound like expert's character assessments about victims but are not – "genuineness" or "reliability" of responses, or that victim "did not seem to be coached." *See State v. Jones*, 339 N.C. 114 (1994), *cert. denied*, 515 U.S. 1169 (1995) ("reliability"); *State v. Baymon*, 336 N.C. 748 (1994) (victim "did not seem to be coached"); *State v. Wise*, 326 N.C. 421 (1990), *cert. denied*, 498 U.S. 853 (1990) (victim's responses during interview seemed "genuine").

* Expert testimony about Defendant's specific mental condition (here, that Defendant's mental state makes him prone to false confessions – the defendant's personality makes him likely to fabricate stories to reduce stress in confrontation with authority) ruled admissible. *See State v. Baldwin*, 125 N.C. App. 530 (1997), *rev. dismissed*, 347 N.C. 348 (1997).

* when Defendant does not testify, expert can give opinion as to whether she thought Defendant was "lying" during evaluation, as it went to reliability of information received. *State v. Jones*, 339 N.C. 114 (1994).

(5) Direct use: Specific instances of conduct are admissible where character trait is an essential element of a charge, claim, or defense.

* These are very rare in the criminal context. They include entrapment defense, seduction, perjury.

IMPORTANT NOTE – the violent disposition of a victim is NOT an "essential element" of a self-defense claim (as explained further below). So only reputation and opinion testimony are admissible as a general rule. *See State v. Wall*, ___ N.C. App. ___, 2003 N.C. App. Lexis 392 (April 1, 2003) (unpublished), *rev. denied*, 357 N.C. 469 (2003).

C. Character Evidence about the Defendant – Rule 404(a)(1)

THE TEST: RELEVANCE + 403 BALANCING

1. The State can't get into bad character of Defendant until Defendant puts on evidence of his own good character first. *See, e.g.*, *State v. Syriani*, 333 N.C. 350 (1993), *cert. denied*, 510 U.S. 948 (1993).

* Defendant can put evidence of good character on through character witnesses or through Defendant's own testimony.

* A judge can limit the number of character witnesses in an exercise of discretion (403 concerns). *State v. McCray*, 312 N.C. 519 (1985).

* Defendant's merely reciting criminal record on direct is not evidence of "good character" and does not open the door to cross on bad character. *State v. Lynch*, 334 N.C. 402 (1993).

* Generally, State cannot bolster cross-examination of character witness as to specific instances with extrinsic evidence as to those specific instances. *Cf. State v. Maynor*, 331 N.C. 695 (1992).

* Although that extrinsic evidence could be relevant under Rule 404(b) in certain circumstances. (See below.)

* This kind of evidence does not have to be explicitly character-related; where Defendant places character in evidence by "painting a picture," cross-examination as to relevant specific instances is appropriate. *State v. Garner*, 330 N.C. 273 (1991); *cf. State v. Dennison*, 163 N.C. App. 375 (2004), *rev'd per curiam*, 359 N.C. 312 (2005) (defendant was "not into fighting" and "don't like" violence).

2. Rule of exclusion: 404(a) is restrictively construed. *See, e.g.*, *State v. Sexton*, 336 N.C. 321 (1994), *cert. denied*, 513 U.S. 1006 (1994); *State v. Bogle*, 324 N.C. 190 (1989).

3. Relevance: The character trait has to be relevant to crime charged.

* Types of Evidence: These traits can be established by **reputation** or **opinion** testimony ONLY (Rule 405) – no specific instances of conduct allowed.

- Relevant character traits include:

*** Law-abiding nature**: whether Defendant is law-abiding is ALWAYS relevant. *State v. Bogle*, 324 N.C. 190 (1989).

* There is a difference in law-abidingness (admissible) and not having any criminal convictions, or of being a "good person," or "not dealing in drugs" (not admissible), though. *See Bogle*; *State v. Moreno*, 98 N.C. App. 642 (1990), *rev. denied*, 327 N.C. 640 (1990).

* where evidence of "law-abidingness" is contradictory, Defendant is still entitled to the instruction. *See Moreno*.

*** Peacefulness**: Relates to crime of violence. *State v. Gappins*, 320 N.C. 64 (1987).

*** Honesty**: Relates to crime of dishonesty (embezzlement, etc.). Does not relate to drug offenses. *See Bogle*, 324 N.C. 190 (1989)

* While it may not be relevant to the charge, character evidence about honesty of defendant can be relevant when defendant testifies. *Cf. Bogle; State v. Cardwell*, 133 N.C. App. 496 (1999) (honesty not relevant to DWI, but Defendant didn't testify).

*** But:** Where D does not testify but made statement to police about which State offers contradictory evidence at trial, D's credibility is "impugned," and D can offer reputation/opinion evidence as to truthfulness. *State v. Marecek*, 152 N.C. App. 479, 506-07 (2002).

*** Temperance (no drugs/drinking)**: Relates to crime involving drugs or alcohol.

* Reputation evidence that Defendant was not a drug user relevant to charge of drug trafficking. *State v. Moreno*, 98 N.C. App. 642 (1990).

- Irrelevant character traits include:

*** General "good character" or "moral character"** - *see State v. Fultz*, 92 N.C. App. 80 (1988); *State v. Squire*, 321 N.C. 541 (1988).

*** General "psychological make-up"** – an absence of mental health problems, absence of substance abuse problems, absence of sexual attraction to children, absence of "high risk" offender behaviors – all this is inadmissible. *State v. Wagoner*, 131 N.C. App. 285 (1998), *rev. denied*, 350 N.C. 105 (1999). *Compare with State v. Baldwin*, 125 N.C. App. 530 (1997), *rev. dismissed*, 347 N.C. 348 (1997), about the *presence* of problems – "evidence in the form of expert testimony as to conditions affecting a person's mental condition is not character evidence.")

* BUT reputation or opinion evidence about non-use of drug or alcohol can be admissible if tailored to a particular charge involving drug or alcohol use. *See Moreno*, 98 N.C. App. 642.

* history of military service (honorable discharge, etc.). *See State v. Mustafa*, 113 N.C. App. 240 (1994), *cert. denied*, 336 N.C. 613 (1994).

4. **INSTRUCTIONS**: The character traits of peacefulness, honesty, law-abidingness, etc., are **substantive evidence** of a defendant's guilt or innocence – so Defendant is entitled to an instruction on this issue **if he asks.** *State v. Bogle*, 324 N.C. 190 (1989).

* BUT you only get an instruction as to pertinent traits of character. Law-abidingness plus peacefulness in crimes of violence, or law-abidingness and honesty in crimes of dishonesty, etc.

5. Once Defendant puts on evidence of his good character, State can cross with specific instances.

* State cannot put on reputation or opinion evidence that goes straight to the heart of the charges at issue - where Defendant charged with drug offenses, his reputation for being a drug dealer is not admissible. *State v. McBride*, 173 N.C. App. 101 (2005), *rev. denied*, 360 N.C. 179 (2005).

* but evidence in a murder trial (or assault) that Defendant had a "temper" would be relevant once Defendant put on evidence of good character. *Cf. State v. Stafford*, 150 N.C. App. 566 (2002), *cert. denied*, 357 N.C. 169 (2003).

* specific instances would have to be admissible under 404(b).

* Defendant putting forth evidence of self-defense does not necessarily put character at issue; if evidence only goes to self-defense, then State can't get into specific instances of violent conduct. *See State v. Ammons*, 167 N.C. App. 721 (2005); *State v. Morgan*, 315 N.C. 626 (1986).

6. IMPORTANT DISTINCTION: The State can argue that Defendant has bad character traits or overall bad character based on the (non-character) evidence presented without violating Rule 404. *State v. Taylor*, 344 N.C. 31 (1996); *State v. Abraham*, 338 N.C. 315 (1994).

* BUT the State can't argue bad character if the evidence admitted went only to impeach defendant's credibility. *See State v. Tucker*, 317 N.C. 532 (1986) (where defendant was cross-examined about assault convictions under 609 as to credibility, State could not argue that Defendant had a violent character).

7. CAPITAL CASES: Generally, State can present competent relevant evidence about Defendant's "bad character" during sentencing phase of capital trial when Defendant has placed character at issue by presenting evidence of good character (and to prevent arbitrary imposition of death penalty); this type of evidence also goes to jury's assessment of mitigating circumstances. *State v. Duke*, 360 N.C. 110 (2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 130 (2006); *State v. Williams*, 339 N.C. 1 (1994), *vacated on other grounds and remanded sub nom. Bryant v. North Carolina*, 511 U.S. 1001 (1994).

* once Defendant offers evidence about prior criminal activity, both the State and the Defendant are free to present all evidence concerning the extent and significance of that activity. *State v. Hedgepeth*, 350 N.C. 776 (1999), *cert. denied*, 529 U.S. 1006 (2000).

8. Even after the 404(a) analysis, judge has to make 403 determination (whether probative value is substantially outweighed by the danger of undue prejudice) on the record.

9. Standard of review on appeal: Harmless error.

* BUT more often than not the errors in dealing with character evidence under 404(a) are found to be harmless.

D. Character Evidence about the Victim – Rule 404(a)(2)

THE TEST: RELEVANCE + 403 BALANCING

1. The State can't get into good character of victim until Defendant puts on evidence of victim's (bad) character. *See, e.g.*, *State v. Johnston*, 344 N.C. 596 (1996).

* "Putting on evidence of the victim's bad character" does not include defense counsel's forecast of victim's bad character during opening statements – has to be during the evidentiary phase of the trial. *See State v. Buie*, ___ N.C. App. ___, 2009 N.C. App. Lexis 48 (No. COA-07-1522) (January 6, 2009) (unpublished).

* BUT reputation/opinion/specific instances evidence that the victim did not carry a weapon can be admissible in State's case-in-chief (in addition to in peacefulness context). *See Johnston.*

- this also goes to premeditation/deliberation in 1st degree murder case (attack on unarmed victim). *See Johnston*.

2. Rule of exclusion: 404(a) is restrictively construed. *See, e.g.*, *State v. Sexton*, 336 N.C. 321 (1994), *cert. denied*, 513 U.S. 1006 (1994); *State v. Bogle*, 324 N.C. 190 (1989).

3. RELEVANCE: The evidence must bear a relationship to the crime with which the defendant is charged.

* Victim's violent disposition: Relates to Defendant's crimes of violence (self-defense).

* Then there would be redirect as to specific examples of peacefulness.

* Where Defendant goes beyond mere consent in rape/sex offense case and puts on evidence that victim wanted to cheat on spouse, Rule 412 does not apply, and 404(a) allows rebuttal evidence of marital fidelity and good moral character (Defendant opened the door). *State v. Sexton*, 336 N.C. 321 (1994).

* Victim's reputation for drunkenness not relevant to issue of consent in sexual assault case. *State v. Cronan*, 100 N.C. App. 641 (1990), *rev. dismissed*, 328 N.C. 573 (1991).

4. SELF-DEFENSE CASES: The victim's violent disposition is relevant in self-defense cases when offered to show two things:

(a) **the defendant's fear or apprehension was reasonable.** *State v. Watson*, 338 N.C. 168 (1994), *cert. denied*, 514 U.S. 1071 (1995); *State v. Winfrey*, 298 N.C. 260 (1979).

*Victim's violent character is relevant ONLY as related to

(1) the reasonableness of Defendant's fear or apprehension, and

(2) the reasonableness of the Defendant's use of force.

* Defendant had to know about victim's violent character for this evidence to be admissible.

* Evidence can be reputation, opinion, or specific instances of conduct.

* deceased victim's criminal record is not admissible to show reputation for violence in the community. *State v. Corn*, 307 N.C. 79 (1982); *State v. Adams*, 90 N.C. App. 145 (1988).

* consequently, State cannot argue that victim's lack of a criminal record goes to show that victim did not have a reputation for violence in the community. *State v. Burgess*, 76 N.C. App. 534 (1985).

* is V's criminal record admissible to show reasonableness of D's belief or reasonableness of D's use of force where there is evidence that D knew about victim's criminal record? Case law seems to say no. *See Corn; State v. Leazer*, 337 N.C. 454, 458 (1994). *See also State v. Jacobs*, ___ N.C. App. ___ (March 17, 2009) (2-1 majority says that V's convictions and other incidents of violence are not admissible; dissent says that they go to D's state of mind and should have been admitted) – on appeal to Supreme Court by way of dissent.

* Watch for mix-and-match evidence – effect of intoxication on victim's (already) violent disposition is also relevant and therefore admissible. *State v. Watson*, 338 N.C. 168.

* THIS TYPE OF EVIDENCE IS NOT ADMITTED UNDER RULE 404 – it goes to prove Defendant's state of mind, not to prove conduct of the victim, so 404 does not apply.

(b) **the victim was the aggressor.** *Watson*.

* It doesn't matter whether Defendant knew of violent character or not.

* if Defendant did not know of violent character of victim at the time, admissibility of victim's character is carefully limited to when all the evidence in the case is circumstantial or the nature of the transaction is in doubt. *State v. Winfrey*, 298 N.C. 260 (1979); *State v. Everett*, 178 N.C. App. 44 (2006), *aff'd by an equally divided court*, 361 N.C. 217 (2007).

* This evidence is admitted under Rule 404(a), as it goes to prove conduct of the victim.

* This evidence can be reputation or opinion testimony **but not specific instances of conduct** (Rule 405 - prior specific acts of violence DO NOT go to essential element of claim of self-defense).

* State cannot go ahead and put on evidence of victim's peacefulness in case-in-chief even where it is obvious that Defendant will put on evidence that victim was aggressor. *State v. Faison*, 330 N.C. 347 (1991); *Buie*, ___ N.C. App. ___, 2009 N.C. App. Lexis 48 (January 6, 2009) (unpublished).
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* Again, watch for mix-and-match evidence – effect of intoxication on victim's violent disposition is relevant and therefore admissible. *See Watson*.

(c) "Reputation" or "opinion" or specific instances of conduct as to sexual orientation of victim is inadmissible – doesn't go to either reasonableness of defendant's fear or victim as the aggressor. *State v. Laws*, 345 N.C. 585 (1997).

(d) When Defendant is claiming accident (or that someone else did it, etc.), evidence of victim's violent disposition is inadmissible (not relevant). *State v. Goodson*, 341 N.C. 619 (1995).

5. CAPITAL CASES: Generally, "good character" of victim is admissible **when relevant** in sentencing phase/closing arguments of capital trial. *See State v. Jennings*, 333 N.C. 579 (1993), *cert. denied*, 510 U.S. 1028 (1993).

* BUT **general good character of victim** is not admissible in sentencing phase when it goes too far. *See generally State v. Quick*, 329 N.C. 1 (1991) ("eulogistic manner" of testimony; "emotionally charged and inflammatory evidence" about admirable nature of victim; "extensive comments" during closing argument).

* Victim impact evidence (distraught character of victim's family/friends) is not admissible in sentencing phase. *See Booth v. Maryland*, 482 U.S. 496 (1987); *State v. Quick*, 329 N.C. 1 (1991).

6. Character of Third Persons: Evidence of the character of someone who is not a witness or a party to an action is generally inadmissible. *State v. Winfrey*, 298 N.C. 260 (1979); *State v. McBride*, 173 N.C. App. 101 (2005), *rev. denied*, 360 N.C. 179 (2005).

7. Even after the 404(a) analysis, judge has to make 403 determination (whether probative value is substantially outweighed by the danger of undue prejudice) on the record.

8. Standard of review on appeal: Harmless error.

* BUT more often than not the errors in dealing with character evidence under 404(a) are found to be harmless.

* **Note**: As to character evidence involving consent issues with sexual assault/rape, see Rule 412 and cases interpreting it.

* **Note**: As to character evidence involving witnesses, see Rules 607/608/609 and cases interpreting them.

E. Habit Evidence – Rule 406

THE TEST: RELEVANT + 403 BALANCING

(1) Habit evidence of a person, or of an organization, is admissible to prove that the conduct on a particular occasion was in conformity with the habit.

(2) What is a habit? Habit evidence involves "systematic conduct" of doing something with "invariable regularity"; where there is a "regular response to a repeated specific situation." *See, e.g.*, *State v. Hill*, 331 N.C. 387 (1992), *cert. denied*, 507 U.S. 924 (1993).

* Difference in habit of doing something (admissible) vs. habit of being something (usually not admissible).

* habit of drinking, not of being drunk/impaired

* "mere evidence" of drunkenness typically does not rise to habit. *See Hill*, 331 N.C. 387.

* habit of abiding by laws, not of being convicted of breaking laws

* Habit evidence is different from 404(a) character evidence –

* It refers to actual conduct of a person instead of character trait.

* It is used to prove that the person's conduct at a certain time was in conformity with conduct at other times.

* It can also refer to actions of organizations (businesses, etc.)

* It is harder to prove a "negative" habit (a habit of not doing something) than a positive habit (a habit of doing something).

* Evidence from witnesses who knew Defendant for more than twenty years that Defendant was not known to carry a gun not sufficient to establish habit. *State v. Rice*, ___ N.C. App. ___, 2002 N.C. App. Lexis 2317 (August 6, 2002) (unpublished), *rev. denied*, 356 N.C. 689 (2003).

* evidence proffered in this case was more reputation than specific instances or opinion, so didn't establish habit.

* "regular response to repeated specific situation" implies action of some sort, as opposed to inaction in this case.

(3) Standard of proof – preponderance of the evidence.

* Habit can be proved two different ways:

* opinion of eyewitnesses to habit behavior

* specific instances of conduct.

* succession of witnesses testifying about relevant conduct on single, separate occasions is OK – *Crawford v.* Fayez, 112 N.C. App. 328 (1993), *rev. denied*, 335 N.C. 553 (1994).

* You don't need eyewitnesses or other corroborative evidence of the habit; just sufficient foundation as to how witness knows of habit.

* FACTORS in determining habit:

* sufficiency of the foundation -

- similarity of instances

* BUT habit of other people with same job as an individual not necessarily relevant to establish habit of another individual. *Cf. State v. Griffin*, 136 N.C. App. 531 (2000), *rev. denied*, 351 N.C. 644 (2000).

- number of instances

* where victim visited store "two or three times a month," not enough to show habit. *State v. Fair*, 354 N.C. 131 (2001), *cert. denied*, 535 U.S. 1114 (2002).

- regularity of instances

* where victim "always" carried money on person and body was found with no money on it, admitted as habit to support robbery conviction (and therefore felony murder). *See State v. Best*, 342 N.C. 502 (1996), *cert. denied*, 519 U.S. 878 (1996); *State v. Palmer*, 334 N.C. 104 (1993).

* where witness had operated breathalyzer machine "around a thousand times" the same way, admitted as habit to show that he complied with statutory provision about running simulator test before Defendant's test. *State v. Tappe*, 139 N.C. App. 33 (2000).

* where Defendant's evidence tended to show long-term abuse of alcohol and medication, not particular enough to show habit (and therefore insufficient to support diminished capacity). *State v. Hill*, 331 N.C. 387 (1992), *cert. denied*, 507 U.S. 824 (1993).

* Defendant's regular abuse of alcohol and drugs while driving sufficient to establish habit of willful and wanton behavior while driving (not of use of alcohol or drugs while driving). *Anderson v. Austin*, 115 N.C. App. 134 (1994), *rev. denied*, 338 N.C. 514 (1994).

* reliability of the evidence

* where witness's testimony about driving conduct of defendant was "vague and imprecise," court's exclusion of evidence proffered as habit was not error. *Long v. Harris*, 137 N.C. App. 461 (2000).

(5) Even after the habit/406 analysis, judge has to make 403 determination (whether probative value is substantially outweighed by the danger of undue prejudice) on the record.

(6) Standard of Review: Abuse of discretion.

* North Carolina appellate courts have never reversed a ruling on habit evidence. So your case could be first.

F. "Other Bad Acts" of the Defendant – Rule 404(b)

THE TEST: PROPER PURPOSE + RELEVANCE + TIME + SIMILARITY + 403 BALANCING

(1) This is where cases get reversed.

(2) Rule 404(b) – Evidence of other bad acts is not admissible to show character in conformity with bad act, but is admissible for any other reason.

* Act itself does not have to be "bad" – evidence that Defendant legally possessed firearm at time before victim was shot properly admitted under 404(b). *State v. Knight*, 87 N.C. App. 125 (1987), *rev. denied*, 321 N.C. 476 (1988).

* Defendant's conversation with witness about robbing convenience stores to get money admissible under 404(b) as to plan. *State v. Wilson*, 108 N.C. App. 117 (1992).

* Act itself also does not have to be prior bad act – can be subsequent as long as other tests are met. *State v. Hutchinson*, 139 N.C. App. 232 (2000).

(3) 404(b) is a rule of **inclusion**; other bad acts evidence admissible unless its only probative value is in showing propensity. *State v. Berry*, 356 N.C. 490 (2002), *writ denied*, 358 N.C. 236 (2004).

* while other criminal offenses may be admissible at trial under 404(b), standard for joinder of different criminal offenses in one trial is different – more stringent standard under N.C. Gen. Stat. § 15A-926(a). *State v. Bowen*, 139 N.C. App. 18 (2000).

* ruling on joinder is not relevant to issue whether evidence is admissible under 404(b). *State v. Locklear*, ___ N.C. ___, 2009 N.C. Lexis 814 (August 28, 2009).

* watch for inadmissible evidence that tries to come in as a part of proper 404(b) evidence – although 404(b) evidence about Defendant's acquisition of dynamite was properly admitted under 404(b) as part of plan to kill victim, the fact that Defendant stole dynamite is not relevant to plan and therefore not admissible under 404(b). *State v. Sullivan*, 86 N.C. App. 316 (1987), *rev. denied*, 321 N.C. 123 (1987).

(4) Standard of Proof: Preponderance of the evidence. Burden is on **Defendant** to show that the evidence should not be admitted. *State v. Moseley*, 338 N.C. 1, 32 (1994), *cert. denied*, 514 U.S. 1091 (1995).

* Evidence may include offenses committed by juveniles if they are Class A-E adult felonies.

(5) Procedure: The preferred way to deal with 404(b) evidence is to first hear it on *voir dire* outside the presence of the jury, make a ruling, and then bring the jury back in.

* **Put the basis for your ruling in the record.** "Admissible under 404(b)" is not enough – make sure record reflects what the purpose was, time and similarity, 403, etc.

* 404(b) evidence is not limited to cross-examination of defendant; can be extrinsic evidence offered in State's case-in-chief. *See State v. Morgan*, 315 N.C. 626 (1986).

* When you are dealing with evidence on *voir dire*, Defendant does have right to ask questions on cross outside the presence of the jury to get the whole story on the record for judge to make ruling. *Cf. State v. Smith*, 152 N.C. App. 514 (2002), *rev. denied*, 356 N.C. 623 (2002) (presumed error where trial judge refused to let defense counsel ask 404(b)-related questions on *voir dire* outside presence of jury).

* If judge fails to note additional 403 analysis of admitted 404(b) evidence on the record, it is presumed error. *See Smith*, 152 N.C. App. 514 (presumed error when trial judge does not note 403 analysis on the record); *State v. Washington*, 141 N.C. App. 354 (2000), *disc. rev. denied*, 353 N.C. 396 (2001) (no error where trial judge demonstrated 403 analysis in ruling); *State v. Rowland*, 89 N.C. App. 372, *rev. dismissed*, 323 N.C. 619 (1988) (evidence of Defendant's drug addiction inadmissible under 404(b) where trial judge did not make findings as to admissibility under 404(b)).

(6) Proper purposes: (This list is not exclusive – can be for "any purpose" other than to show propensity. *See State v. Moseley*, 338 N.C. 1, 32 (1994), *cert. denied*, 514 U.S. 1091 (1995)).

(a) Motive:

***** in drug cases, evidence of other drug violations is often admissible to prove motive where the other acts go to the chain of events explaining the context, motive, and set-up of the crime and are naturally a part of telling the whole story of the crime to the jury. *State v. Williams*, 156 N.C. App. 661 (2003); *see also State v. Welch*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1741 (October 7, 2008).

* evidence of prior drug dealing went to motive in murder case where there was a dispute between Defendant and victim over manner in which drug money was to be distributed. *State v. Lundy*, 135 N.C. App. 13 (1999), *rev. denied*, 351 N.C. 365 (2000).

* evidence of prior drug possession can go to motive in breaking and entering cases. *See State v. Martin*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1447 (August 5, 2008) (unpublished) (motivation for money – also goes to *res gestae*; see below).

* evidence of prior sex offense against victim A went to motive to murder victim B where previous sex offense was discovered and Defendant could have feared that victim B would report him. *State v. Coffey*, 326 N.C. 268 (1990).

(b) Opportunity:

* evidence of previous sex offenses and manner in which they occurred admissible under 404(b) to show Defendant took advantage of opportunity to assault victims when mother wasn't home. *State v. Morrison*, 94 N.C. App. 517 (1989), *cert. denied*, 325 N.C. 549 (1989).

* five-year period where Defendant did not assault victim was result of Defendant not having opportunity to be alone with victim, so prior sexual offenses were not too remote in time to be inadmissible as part of common scheme or plan to abuse victim. *State v. Thompson*, 139 N.C. App. 299 (2000).

(c) Intent/knowledge:

* evidence of similar murder committed seventeen years earlier went to intent to murder as well as knowledge that actions would in fact kill second victim. *State v. Hipps*, 348 N.C. 377 (1998), *cert. denied*, 525 U.S. 1180 (1999).

* evidence of threats and entry of domestic violence orders against Defendant proper to show intent to kill victim. *State v. Morgan*, 156 N.C. App. 523 (2003), *cert. denied*, 357 N.C. 254 (2003).

* evidence of prior violent conduct toward a particular victim can go to show absence of victim's consent to acts (kidnapping, sex offenses, etc.). *State v. Maysonet*, ___ N.C. App. ___, 2008 N.C. App. Lexis 2177 (December 16, 2008) (unpublished).

* evidence of previous DSS investigations as to care of Defendant's children went to intent to harm child – relevant to Defendant's knowledge of appropriate levels of care for children. *State v. Fritsch*, 351 N.C. 373 (2000), *cert. denied*, 531 U.S. 890 (2000).

* evidence of sex offense against victim A admissible as to the issue of intent to commit murder against victim B where evidence of sex offense against A went to specific intent to kidnapping of B (for purpose of sex offense against victim B). While it did show propensity, it also went to intent. *State v. Coffey*, 326 N.C. 268 (1990).

* evidence of previous drug sales (2½ years prior to offense date) was relevant to D's intent to commit offense of maintaining dwelling to keep controlled substances – since maintaining dwelling offense occurs over time, 2 ½ year period not too remote. *State v. Rogers*, ___ N.C. App. ___, 2009 N.C. App. Lexis 1284 (August 4, 2009) (unpublished).

(d) Preparation/plan/*modus operandi*:

* with sex offenses, evidence of preparation or plan involving pornography and other sexual paraphernalia must be tied to actual conduct with victim – introduction of sexually related evidence that is not related to conduct with victim at issue is error. *Compare State v. Smith*, 152 N.C. App. 514 (2002), *rev. denied*, 356 N.C. 623 (2002) (admission of unrelated pornographic videos and magazines is error) *with State v. Rael*, 321 N.C. 528 (1988) (admission of pornographic videos and magazines not error where defendant had showed them to victim). *See also State v. Maxwell*, 96 N.C. App. 19 (1989), *rev. denied*, 326 N.C. 53 (1990) (defendant's nudity and fondling himself not admissible where not related to any activity with victim); *State v. Owens*, ___ N.C. App. ___, 2009 N.C. App. Lexis 785 (May 19, 2009) (unpublished) (admission of incest-related and child pornography found on computer not error where D "considered himself to be uncle" to victim – also went to motive and intent).

* gang activity involving drug dealing and robberies can go to *modus operandi*. *State v. Hightower*, 168 N.C. App. 661, *disc. rev. denied*, 359 N.C. 639 (2005).

* domestic violence assault against different victim from 17 years earlier admissible under 404(b) where there were numerous similarities in the way the different assaults were carried out. *State v. Brooks*, 138 N.C. App. 185 (2000).

* where Defendant was charged with sexual offenses involving son, evidence of sex offenses involving daughter also admissible to establish plan to molest his children. *State v. DeLeonardo*, 315 N.C. 762 (1986); *see also State v. Owens*, ___ N.C. App. ___, 2009 N.C. App. Lexis 785 (May 19, 2009) (unpublished) (admission of evidence that D molested one sister not error as to trial involving molestation of other sister during same general time period).

(e) Identity:

* State can only use 404(b) for identity when identity is at issue in the case. *State v. White*, 101 N.C. App. 593 (1991), *rev. denied*, 329 N.C. 275 (1991).

* where evidence showed more than one possible perpetrator, 404(b) evidence of domestic violence against child's mother went to issue of identity of father as the perpetrator and was therefore admissible. *State v. Carrilo*, 149 N.C. App. 543 (2002).

* where Defendant "pleaded not guilty and denied that he was the assailant," identity was at issue, so 404(b) evidence to issue of identity was proper. *State v. Gilliam*, 317 N.C. 293 (1986); *State v. Morgan*, 359 N.C. 131 (2004), *cert. denied*, 546 U.S. 830 (2005).

* where Defendant admits identity during opening statement, identity may no longer be at issue. *Cf. White*.

* similar types of injuries to other victims admissible to show identity. *State v. Burr*, 341 N.C. 263 (1995), *cert. denied*, 517 U.S. 1123 (1996).

* use of same gun in multiple robberies/shootings sufficient to show identity. *State v. Brockett*, 185 N.C. App. 18 (2007), *rev. denied*, 361 N.C. 697 (2007).

* since evidence of other similar crimes can be admissible against defendant at trial, defendant can also offer 404(b) evidence of other similar crimes to show that <u>someone else</u> committed the offense at issue (doesn't just go to identity of defendant). *State v. Cotton*, 318 N.C. 663 (1987).

* BUT there has to be strong similarity between the prior acts of the other person and the crime with which Defendant is charged (has to raise more than an inference) – evidence has to "point directly" to the guilt of the other party. *State v. Deese*, 136 N.C. App. 413 (2000), *rev. denied*, 351 N.C. 476 (2000).

(f) <u>Absence of accident/mistake/entrapment</u>:

*where Defendant claims accident, evidence of similar acts is **more** probative than when accident is not an issue. *State v. Stager*, 329 N.C. 278 (1991).

* evidence of Defendant's prior assaults are not admissible against Defendant to show that his belief in self-defense was mistaken. *State v. Goodwin*, 186 N.C. App. 638 (2007).

* "absence of mistake <u>on the part of the State</u> (of someone other than Defendant) is not proper purpose under 404(b). *State v. Fluker*, 139 N.C. App. 768 (2000) (error to admit prior incident offered to show that law enforcement had not made mistake in detaining defendant).

* evidence of drug possession and use admissible to show lack of entrapment. *State v. Goldman*, 97 N.C. App. 589 (1990), *rev. denied*, 327 N.C. 484 (1990).

* can't put it in until entrapment becomes an issue, though (in *Goldman*, defense counsel made reference to it in opening statement, so 404(b) was fair game).

(g) *res gestae*: to tell "the whole story" of the crime ("same transaction" or "course of conduct" rule). *See State v. Agee*, 326 N.C. 542 (1990).

* evidence that defendant gets violent when drinking admissible to show why victim told defendant to leave. *State v. Beal*, 181 N.C. App. 100 (2007).

* prior assaults by the defendant went directly to elements of charge of communicating threats (reasonable belief of the victim that threat would be carried out), so proper under 404(b). *State v. Elledge*, 80 N.C. App. 714 (1986); *State v. Young*, 317 N.C. 396 (1986) (prior assaults went to victim's fear of Defendant).

* victim's knowledge of Defendant's prior crimes can also go to issue of consent where crime at issue involves lack of consent or offense committed against will of victim. *See Young*, 317 N.C. 296.

* Defendant's prior knowledge and involvement in drug activity went directly to elements of charge of maintaining a dwelling, so proper under 404(b). *State v. Rosario*, 93 N.C. App. 627 (1989), *rev. denied*, 325 N.C. 275 (1989); *State v. Moore*, 162 N.C. App. 268 (2004).

* Defendant's long history of domestic violence admissible to show victim's fear of Defendant and explain why victim did not move out. *State v. Everhardt*, 96 N.C. App. 1 (1989), *aff'd*, 326 N.C. 777 (1990).

* Defendant's prior history of domestic violence and deputy's knowledge of it, including that D was on probation for threatening wife, relevant to show deputy's conduct in going to victim's residence after he was unable to contact her. *State v. Madures*, ___ N.C. App. ___, 2009 N.C. App. Lexis 1077 (July 7, 2009).

* Defendant's "bad acts" the day before, the day of, and the day after murder were "necessary to complete the story" for the jury and therefore admissible. *State v. Smith*, 152 N.C. App. 29 (2002), *cert. denied*, 356 N.C. 311 (2002).

* evidence that Defendant's probation for felony conviction was revoked went to felony conviction for possession of firearm by felon and was therefore admissible. *State v. Boston*, 165 N.C. App. 214 (2004).

* evidence surrounding Defendant's travel out of state and subsequent unrelated arrest went to manner in which confession to crimes charged was made and flight from crime scene, so admissible under 404(b). *State v. Rannels*, 333 N.C. 644 (1993).

* evidence about victim's knowledge of D's prior violent acts toward others relevant to victim's state of mind and lack of consent to sex offense. *State v. Parker*, ___ N.C. App. ___, 2009 N.C. App. Lexis 771 (June 16, 2009) (unpublished).

* IMPORTANT DISTINCTION: while evidence of other acts may be relevant under 404(b) when it comes through other witnesses, cross-examination of Defendant as to those acts may not be appropriate. Attacking credibility is not a proper purpose for 404(b) evidence. *State v. Cook*, 165 N.C. App. 630 (2004). Cross-examination of Defendant as to specific instances of misconduct **when used only to attack his credibility** goes **only** to truthfulness or untruthfulness under Rule 608(b). *State v. Gordon*, 316 N.C. 497 (1986); *State v. Morgan*, 315 N.C. 626 (1986); *State v. Frazier*, 121 N.C. App. 1 (1995), *aff'd*, 344 N.C. 611 (1996); *State v. Brooks*, 113 N.C. App. 451 (1994).

***** when 404(b) offered on cross-examination of Defendant for purposes other than attacking credibility, specific instances are admissible. *Cf. State v. Scott*, 318 N.C. 237 (1986) (cross-examination on specific instances that goes to *modus operandi* or identity is appropriate).

* Victim impact testimony about the effect of the 404(b) evidence on victim is not admissible. *State v. Bowman*, ___ N.C. App. ___, 656 S.E.2d 638 (2008) (on appeal to Supreme Court).

* exception where "victim impact" is part of an element of the crime charged. *See State v. Lofton*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1815 (October 21, 2008) (where "victim impact" of assault involved psychological damage to victim, this came in as element of aggravated assault on handicapped person with element of "serious injury," which includes "serious mental injury")

(7) Two main considerations: **time** and **similarity**. The more similar the acts are, the less problematic long periods of time are. *See State v. Sneeden*, 108 N.C. App. 506 (1993), *aff'd*, 336 N.C. 482 (1994). BUT the passage of time between offenses tends to "erode" the commonality between offenses. *State v. Jones*, 322 N.C. 585.

* time:

* remoteness in time is less significant when 404(b) is being used to show intent, motive, *modus operandi*, knowledge, or lack of accident or mistake; generally goes to weight, not admissibility. *State v. Stager*, 329 N.C. 278 (1991) (ten year period between events); *State v. Peterson*, 361 N.C. 587 (2007), *cert. denied*, ___ U.S. ___, 170 L. Ed. 2d 377 (2008) (sixteen-year period between events); *State v. Sneeden*, 108 N.C. App. 506 (1993) (twenty-three years between events); *State v. Brooks*, 138 N.C. App. 185 (2000) (seventeen years between events); *State v. Hairston*, ___ N.C. App. ___, 2009 N.C. App. Lexis 1516 (September 15, 2009) (unpublished) (between twenty-seven and thirty-seven years between events).

* remoteness in time can be more problematic when 404(b) is being used to show common plan or scheme. *See State v. Jones*, 322 N.C. 585 (1988) (sexual offenses seven years apart offered as part of common plan were admitted in error); *State v. Scott*, 318 N.C. 237 (1986) (offenses nine years apart as part of common plan admitted in error). *But see State v. Patterson*, 149 N.C. App. 354 (2002) (sexual offenses between ten and fifteen years admissible as part of common scheme or plan where continuing pattern over time).

* where acts and conduct are regular or continuous over a long period of time, length of time actually increases relevance. *State v. Frazier*, 121 N.C. App. 1 (1995) (continuous offenses over twenty-six year period); *State v. Shamsid-Deen*, 324 N.C. 437 (1989) (twenty year period); *State v. Curry*, 153 N.C. App. 260 (2002) (ten year period).

* where Defendant is incarcerated or otherwise removed from access to victim for intervening time period, remoteness not as significant. *State v. Riddick*, 316 N.C. 127 (1986); *State v. Jacob*, 113 N.C. App. 605 (1994).

* where Defendant is incarcerated in between B&E sprees, "it is proper to exclude time defendant spent in prison when determining whether prior acts are too remote." *State v. Bryant*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1361 (July 15, 2008) (unpublished).

* generally speaking, remoteness goes more to weight than to admissibility. *See State v. Maready*, 362 N.C. 614 (2008).

* similarity: where there are "some unusual facts" present in both crimes, or particularly similar sets of circumstances indicating that defendant committed both acts – where there is enough similarity that it results in the jury's reasonable inference that the defendant committed both the prior and the present acts. *See Stager*.

* on the other hand, where the similarities are inherent to "most crimes" of that type, then you don't have sufficient similarity for the evidence to be admissible under 404(b). (Example: prior robbery evidence involving use of weapon, demand for money, and immediate flight from the scene not enough.) *State v. Al-Bayyinah*, 356 N.C. 150, 155 (2002).

* with respect to prior crimes of violence, where the only reasoning is to show Defendant's "intent to assault," not admissible. *State v. Brooks*, 113 N.C. App. 451 (1994).

* prior acts of unrelated violence are not admissible to show that Defendant was aggressor and did not act in self-defense. *State v. Morgan*, 315 N.C. 626 (1986) (defendant previously pointed gun at other people); *State v. Mills*, 83 N.C. App. 606 (1986) (defendant previously fired gun at various objects). The acts have to be related and have a connection to the crime charged. *Cf. Morgan; Mills*.

* garden-variety prior drug offenses (sales, PWISD, etc.) do not meet similarity requirement for 404(b) purposes without more particularized evidence. *State v. Carpenter*, 361 N.C. 382 (2007).

* BUT where there are similarities in drug sales that go to a *modus operandi* on part of Defendant, more likely that prior drug sales come in under 404(b). *State v. Welch*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1741 (October 7, 2008).

*evidence: sales in same general neighborhood, D working the streets on foot selling to people who drove by, D selling single rocks of crack for $20. NOTE also that these matters were much closer in time than in *Carpenter* (here – six days for one, ten months for another; *Carpenter* – eight years).

* for sexual assault cases, general similarity in ages of victims is not enough; does not go to motive to commit sex offense with young victim. *State v. White*, 135 N.C. App. 349 (1999).

* for breaking and entering cases, also goes to a *modus operandi*-type of analysis. *See State v. Martin*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1447 (August 5, 2008) (unpublished) (evidence: D goes through windows, homes in same neighborhoods, break-ins are at similar hours).

(8) Prior charges and 404(b):

(a) The "bare fact" of a prior conviction is not admissible under 404(b) absent some offer of evidence regarding facts and circumstances underlying prior convictions. *State v. Wilkerson*, 356 N.C. 418 (2002) (*per curiam* opinion adopting dissent in COA opinion at 148 N.C. App. 310 (2002)).

* "Bare fact of conviction" is only admissible to impeach a witness's credibility under Rule 609. *See Wilkerson.*

* State's admission of Defendant's plea transcripts from previous robbery charges did not violate *Wilkerson* rule – they contained Defendant's admission to previous robberies (not "brand" of convictions) and went to identity. *State v. Brockett*, 185 N.C. App. 18, 647 S.E.2d 628 (2007).

* State's admission of license revocation notification letters containing conviction offenses resulting in revocation did violate *Wilkerson* rule. *State v. Scott*, 167 N.C. App. 783 (2005).

* BUT "bare fact of conviction plus" evidence could be admissible in very limited circumstances (for example – where defendant's motive for assault is prior conviction in which victim testified against defendant, etc.). *See Wilkerson* (Wynn, J., dissenting – n.2).

* convictions admissible as 404(b) where Defendant was behind in court-ordered restitution; went to motive, plan, and preparation. *State v. Parker*, 354 N.C. 268 (2001).

* EXCEPTION: where there is a statutory provision approving use of conviction evidence, it comes in under that statute, and not 404(b). N.C. Gen. Stat. § 90-113.21(b) allows prior drug convictions to come in where D is charged with paraphernalia to show intent to use a matter to consume drugs. *State v. Bailey*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1072 (June 3, 2008) (unpublished).

* A prior conviction can be a "bad act" for purposes of 404(b) when it is not used to show propensity – in murder case, evidence of murder of prior spouse and resulting manslaughter conviction admissible where evidence went to show intent and absence of accident. *State v. Murillo*, 349 N.C. 573 (1998) (pre-*Wilkerson*).

> * generally speaking, murder cases using prior convictions do pretty well in the appellate courts.

* Prior driving convictions can be used to show malice in impaired driving second degree murder cases. *See, e.g.*, *State v. Jones*, 353 N.C. 159 (2000); *State v. Goodman*, 149 N.C. App. 57 (2002), *rev'd in part on other grounds, disc. rev. improvidently allowed*, 357 N.C. 43 (2003).

> * Determinations about whether prior driving convictions are too remote in time are to be made on a case-by-case basis based on a review of the totality of the circumstances. *State v. Maready*, 362 N.C. 614 (2008).
>
> * evidence that D's license was revoked also comes in under 404(b) for malice purposes. *Jones.*

* AND prior convictions for sexual offenses can be used for any proper purpose in trials of subsequent sexual offenses. *See State v. Greene*, 294 N.C. 418 (1978); *State v. Hall*, 85 N.C. App. 447, *disc. rev. denied*, 320 N.C. 515 (1987) (NC has liberal admission policy with respect to similar sexual offense evidence). *See also Wilkerson* (Wynn, J., dissenting).

> * BUT the COA recently ruled that admission of prior conviction for sexual battery was error in sex offense trial – apparently under a theory that the prejudicial effect of the conviction outweighed any probative value, given that a number of witnesses testified about the facts of the case underlying that conviction. *State v. Bowman* (2008) (on appeal to Supreme Court).

(b) Evidence of bad acts that result in acquittals can not be used in subsequent criminal trial to show that Defendant in fact committed the earlier crime. *State v. Scott*, 331 N.C. 39 (1992); *State v. Fluker*, 139 N.C. App. 768 (2000).

> * where probative value of the earlier charge resulting in acquittal goes to something other than actual guilt of previous offense, can be admissible. *See State v. Robertson*, 115 N.C. App. 249 (1994) (evidence of prior assault resulting in acquittal went to victim's fear of defendant where victim knew of assault); *State v. Agee*, 326 N.C. 542 (1990) (evidence of prior marijuana possession resulting in acquittal went to "chain of circumstances" in defendant's drug charges). Note: Watch 403 concerns in a situation like this, though.

(9) Limiting Instructions: Court must give limiting instruction as to 404(b) evidence when Defendant asks for it. *State v. Haskins*, 104 N.C. App. 675 (1991), *disc. rev. denied*, 331 N.C. 287 (1992); *State v. Everette*, 111 N.C. App. 775 (1993).

* where there are limiting instructions being given in cases where there is more than offense being tried, the limiting instruction given must make reference to the specific charge or charges to which the limiting instruction applies. *See State v. White*, 331 N.C. 604 (1992) (trial court's instruction limiting consideration of 404(b) evidence to intent was error when it did not specify that consideration of evidence was limited to intent as to burglary and not other charges).

* While limiting instructions "guard[] against the possibility of prejudice," *see State v. Stevenson*, 169 N.C. App. 797, 802 (2005), limiting instructions do not help make "harmless error" in close or circumstantial cases. *See State v. Moctezuma*, 141 N.C. App. 90 (2000).

* Limiting instruction about "bare fact of conviction" evidence will not keep case from getting reversed. *See, e.g.*, *State v. Hairston*, 156 N.C. App. 202 (2003).

(10) 404(b) and discovery: While the North Carolina appellate courts have yet to address the issue, the new criminal discovery statutes essentially provide that 404(b) evidence be turned over to the Defendant. *See* N.C. Gen. Stat. § 15A-903(a)(1) ("Upon motion by the defendant, the Court must order the State to make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes **or of the prosecution of the defendant**.")

* BUT the State is not required to give notice of its intent to use 404(b) evidence other than providing a witness list prior to the beginning of trial. *See* N.C. Gen. Stat. § 15A-903(a)(3).

(11) Standard of Review: Abuse of Discretion.

* even where appellate courts find abuse of discretion, harmless error review still applies. *Cf. State v. White*, 331 N.C. 604 (1992).