

Criminal Evidence: Relevancy

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I. Relevancy – Generally

A. Relevancy Defined. Rule 401 defines relevant evidence as follows:

Rule 401

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

B. Only Relevant Evidence is Admissible. Rule 402 provides that relevant evidence is admissible, subject to the rules of legal relevancy, and that irrelevant evidence is inadmissible.

Rule 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible.

C. Logical Relevancy Versus Legal Relevancy. Rule 401 sets out a rule of logical relevancy—it provides that evidence is relevant if it has a logical connection to a fact of consequence. However, not all relevant evidence is admissible. The rules of legal relevancy exclude, for a variety of reasons, evidence that has logical relevance. The concept of legal relevancy is embedded in Rule 402, which provides that relevant evidence is admissible “except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules.” One example of a rule of legal relevance contained in the evidence code is Rule 403, which excludes relevant evidence when its probative value is significantly outweighed by the danger of unfair prejudice, waste of time, confusion, etc. Other are Rule 410, which excludes, among other things, certain relevant statements made in connection with plea discussions in order to promote plea bargaining and Rule 412, commonly known as a rape shield rule. An example of a constitutional rule of legal relevancy is the *Crawford* rule, which excludes relevant evidence that violates the defendant’s confrontation clause rights.

D. “Any Tendency.” To be relevant, evidence must have probative value. Rule 401 defines relevant evidence as evidence “having any tendency” to make a fact of consequence more or less probable. The evidence need not be conclusive of the fact; it need only throw “any light” on the issue. *State v. Smith*, 357 N.C. 604 (2003) (quotation omitted) (noting that the weight of the evidence is a question for the jury); *State v. Miller*, ___ N.C. App. ___, 676 S.E.2d 546 (May 19, 2009) (“The value of the evidence need only be slight.”) (quotation omitted). Thus, evidence is not subject to

exclusion simply because its probative value is weak (although it may be excluded under Rule 403, which balances probative value against unfair prejudice, waste of time, etc.). The fact that the evidence is duplicative of other admissible evidence, while pertinent to a Rule 403 analysis, is not pertinent for Rule 401 purposes. *State v. Jones*, 358 N.C. 330 (2004).

When the required probative value is absent, courts sometimes say that the evidence is too “speculative” or “tenuous” to be relevant. *See, e.g., State v. Roache*, 358 N.C. 243 (2004) (evidence that was only “tenuously related” was irrelevant); *State v. Baker*, 320 N.C. 104 (1987) (evidence was “too speculative” to be relevant).

E. Relevancy Versus Sufficiency. The question of relevancy (any tendency to make a fact of consequence more or less likely) is different from the question of sufficiency (whether there is enough evidence to go to the jury). Evidence may be relevant but insufficient to take the issue to the jury. Additionally, the strength of the evidence goes to the issue of sufficiency, not admissibility. *See* Commentary to N.C. R. EVID. 401 (“the language of the rule . . . avoid[s] confusion between questions of admissibility and questions of the sufficiency of the evidence”).

F. “Fact . . . of Consequence.” To be relevant, the evidence must have a tendency to make the existence of “any fact that is of consequence to the determination” more or less probable. This part of the rule essentially establishes a requirement of materiality: if the evidence does not help to establish a fact that is material to the case, it is not relevant. *See, e.g., State v. Cowan*, ___ N.C. App. ___, 669 S.E.2d 811 (Dec. 16, 2008) (at the defendant’s drug trial, evidence about his aunt’s prior drug trafficking trial and conviction was irrelevant where there was no evidence that the aunt’s criminal activities had any relation to the defendant’s alleged crimes); *State v. Bodden*, 190 N.C. App. 505 (2008) (nine-millimeter bullet found near a murder scene was irrelevant where the bullets used to shoot the victim were .38 or .357 caliber). Obviously, whether a fact is of consequence depends on the substantive law at issue in the case.

Rule 401 does not require that the fact of consequence be in dispute. *See* Commentary to N.C. R. EVID. 401. Thus, background information, such as a witness’s education or employment that will aid the jury in deciding disputed issues of fact is admissible under the Rule. *See* Commentary to N.C. R. EVID. 401. Of course, when the fact is not disputed, Rule 403 provides a basis for excluding the evidence.

G. Direct Versus Circumstantial Evidence. Direct evidence is evidence that does not rely on an inference. An example of direct evidence is a witness’s testimony at an armed robbery trial that she saw the defendant rob the victims with a firearm. When direct evidence is involved, determining relevancy is usually a fairly straightforward analysis. In the example given, the testimony is clearly relevant.

Circumstantial evidence requires an inference to be made from the evidence. For example: in order to identify the defendant as the perpetrator of an armed robbery, the State seeks to introduce evidence that the defendant was seen with the weapon used in the robbery minutes after the crime occurred. In this situation, an inference is required to connect the evidence (the defendant’s possession of the weapon minutes after the crime) with the fact sought to be proved (that the defendant was the perpetrator). Circumstantial evidence may be used to establish a fact of consequence. *See, e.g., State v. Muhammad*, 186 N.C. App. 355 (2007) (in a murder case, the victim’s last words, “I’m not scared of you. I am a Christian,” made as the

defendant was approaching, was circumstantial evidence of the defendant's state of mind). In fact, "[t]he law makes no distinction between the weight given to either direct or circumstantial evidence." N.C. Pattern Jury Instruction – Criminal 104.05. However, because of the inference involved with circumstantial evidence, most complicated relevancy issues involve circumstantial evidence.

- H. Testimonial, Real, and Demonstrative Evidence.** Evidence may be testimonial (e.g., a witness's testimony under oath in court), real (e.g., a letter, a quantity of a controlled substance, or a murder weapon), or demonstrative (e.g., a model, a chart, or a demonstration of how events occurred). To be admissible, all types of evidence—testimonial, real, and demonstrative—must be relevant. See, e.g., *State v. Fowler* 159 N.C. App. 504 (2003) (demonstration was relevant to whether the defendant killed the victim with premeditation and deliberation).
- I. Relevancy Inquiry.** When analyzing relevancy, it may be helpful to follow this simple analytical framework:

Steps for Assessing Relevancy

- Identify the evidence at issue.
- Identify the fact of consequence to which the evidence relates.
- Determine whether the evidence has any tendency to make that fact more or less likely.

- J. Preliminary Question/Procedure.** Relevancy is a preliminary question for the court under Rule 104(a). In making the preliminary determination as to relevancy, the court is not bound by the rules of evidence, except for those relating to privileges. N.C. R. EVID. 104(a).
- K. Conditional Relevancy.** When evidence is relevant only if some other preliminary fact which also requires proof exists, Rule 104(b) provides that the court is to admit the evidence upon, or subject to, the introduction of sufficient evidence to allow the jury to find that the preliminary fact exists. This principle is called "conditional relevancy." The Commentary to Rule 401 provides an example: If evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged with notice heard the statement. In this example from the Commentary, the relevancy of the spoken statement is conditioned on it having been heard by the person charged with notice.

Whether the trial court admits the evidence upon the proponent's assurance that its relevance will become apparent, or interrupts the examination of one witness to allow another to be called to demonstrate the relevance of the questioned evidence, is within the court's discretion. N.C. R. EVID. 611(a). In making the decision, the court should consider the likelihood of overcoming the resulting prejudice if the questioned evidence later must be stricken. If an instruction to disregard will not be effective, the trial court may consider allowing the proponent to call witnesses out of order, or make an offer of proof in the absence of the jury.

L. When Irrelevant Evidence May be Admissible. Sometimes irrelevant evidence will be admitted, such as when the other side fails to object or the judge errs when ruling on a relevancy objection. There do not seem to be any hard and fast rules on how a judge should handle this situation. It seems appropriate to consider the time required for presentation of the rebuttal evidence, the risk of confusion, how damaging the irrelevant evidence is, and whether a limiting instruction can cure the error.

M. Standard on Appeal. A trial court's rulings on relevancy are not discretionary and will not be reviewed for abuse of discretion. See, e.g., *State v. Grant*, 178 N.C. App. 565 (2006). However, the appellate courts give such rulings great deference on appeal. *Id.*

II. Common Scenarios Raising Relevancy Issues. Because relevancy is such a fact-specific determination, a general catalogue of cases on relevancy would not be very helpful. However, some recurring relevancy issues are discussed below.

A. Witness's Background. Rule 401 permits the use of background information such as a witness's education or employment, when that information aids the jury in deciding disputed issues of fact. See, e.g., *State v. Summerlin*, 98 N.C. App. 167 (1990) (questions regarding a witness's name, residence, knowledge of the case, etc. are appropriate; such evidence is relevant if it establishes an introduction for the witness); see *also* Commentary to N.C. R. EVID. 401.

B. "Context," "Circumstances," "Chain of Events," And Related Evidence. Evidence is relevant if it establishes the context or circumstances of an event or if it explains a chain of events. This rule sometimes is called the "same transaction" rule, the "complete story" rule, or the "course of conduct" rule. *State v. Sexton*, 153 N.C. App. 641 (2002). Chain of circumstances evidence "is admissible if it forms part of the history of the event or serves to enhance the natural development of the facts." *Id.* Such evidence is relevant even if it incidentally establishes commission of a prior bad act. *Id.* When the chain of events evidence reveals a bad act, the courts typically find Rule 404(b) to be no bar to admission, on grounds that the evidence is admissible for the proper purpose of completing the story of the crime by providing immediate context, and not for propensity. See, e.g., *State v. Agee*, 326 N.C. 542 (1990); *Sexton*, 153 N.C. App. 641. Illustrative cases include: *State v. Barden*, 356 N.C. 316 (2002) (testimony of the murder victim's supervisor was relevant to explain the circumstances of the crime); *Agee*, 326 N.C. 542 (evidence of the defendant's possession of marijuana was admissible in a trial for possession of LSD because it gave rise to a chain of events or circumstances; "[d]iscovery of the marijuana on defendant's person constituted an event in the officer's narrative which led naturally to the search of the defendant's vehicle and the subsequent detection of the LSD"); *State v. Miller*, ___ N.C. App. ___, 676 S.E.2d 546 (May 19, 2009) (questions posed to the defendant by law enforcement officers relaying statements made by third parties were relevant; the questions gave context to the defendant's responses and explained the defendant's subsequent conduct of changing his story); *Sexton*, 153 N.C. App. 641 (in an arson trial, evidence that the defendant was pacing in a yard, staring at a neighbors' home, and inhaling intoxicants from a plastic bag shortly before the home was ignited was relevant to establish the chain of events or circumstances leading to the fire; the fact that it incidentally involved the defendant's alleged illegal use of drugs did not make the evidence irrelevant); *State v. Robertson*, 149 N.C. App. 563 (2002) (in a trial for rape and kidnapping, the victim's testimony

that the defendant told her that he was an ecstasy dealer was relevant to establish context for the charged crimes, which incidentally involved illegal drugs).

Related cases hold that evidence is relevant if it explains the course of a law enforcement investigation. *See, e.g., State v. Patterson*, 185 N.C. App. 67 (2007) (in a trial for possession of stolen property pursuant to a breaking and entering and possession of implements of housebreaking, a detective's testimony regarding businesses that had reported break-ins was relevant because it explained the chain of events in the police investigation).

C. Guilt of Another. Perhaps the most litigated relevancy issue in North Carolina criminal cases is the admissibility of evidence regarding guilt of another. To be relevant, evidence of the guilt of another must:

- point directly to the guilt of another party and
- be inconsistent with the defendant's guilt.

By contrast, evidence which creates only an inference or conjecture as to another's guilt is irrelevant and inadmissible.

Cases holding that guilt of another evidence is inadmissible include:

State v. Williams, 355 N.C. 501 (2002) (evidence attempting to implicate others in murders).

State v. May, 354 N.C. 172 (2001) (evidence showing that another person had an argument with the victim days before the murder, had been committed because he was hearing voices telling him to kill, told his doctor that he was having hallucinations telling him to kill, and had a history of violent conduct; even if the evidence showed that the other person committed the crime, it was not inconsistent with the defendant's guilt where the State's evidence put both the defendant and that person at the scene).

State v. Hamilton, 351 N.C. 14 (1999) (evidence of a prior knife threat by another; no unusual facts surrounding the threat were present in the murder at issue; the evidence did not point directly to the other person's guilt).

State v. Hester, 343 N.C. 266 (1996) (evidence that merely aroused suspicion that another might have had a motive to murder the victim).

State v. McNeill, 326 N.C. 712 (1990) (even if another person had possession of an item similar to one owned by the murder victim, such possession did not put him at the scene and was not inconsistent with the defendant's guilt).

State v. Loftis, 185 N.C. App. 190 (2007) (evidence of methamphetamine use by a resident of a house near the shed in which methamphetamine was found and of the resident's prior violation of probation was not relevant in the defendant's trial for trafficking in methamphetamine; the evidence was not inconsistent with the defendant's guilt; because the probation violation had not been adjudicated, it was not conclusive).

State v. Wiley, 182 N.C. App. 437 (2007) (evidence of another's guilt was irrelevant where that person was the defendant's accomplice; under accomplice

liability, the defendant would be guilty regardless of whether he or the other person inflicted the injury at issue).

State v. Ryals, 179 N.C. App. 733 (2006) (a witness's answer to question about whether he would submit to a DNA test in relation to a hat was irrelevant where there was conflicting testimony as to whether the perpetrator wore a hat).

State v. Couser, 163 N.C. App. 727 (2004) (evidence that the victim's father was convicted of sexually assaulting the victim's sister 17 years before the sexual assault at issue was irrelevant; the fact that the victim's father previously was convicted of sexual assault in a completely different case was not inconsistent with the defendant's guilt).

State v. Floyd, 143 N.C. App. 128 (2001) (testimony that the defendant's girlfriend's sons were hostile to the victim, and that they were not in school on the day of the murder did no more than arouse suspicion and was not inconsistent with the defendant's guilt).

Cases concluding that the trial court erred by refusing to admit guilt of another evidence include:

State v. Snead, 327 N.C. 266 (1990) (excluded evidence tended to show that another identified person committed a robbery and killed the victim; all of the evidence showed that only one person was involved in the crime).

State v. Israel, 353 N.C. 211 (2000) (new trial; evidence that another individual had the opportunity to kill the victim and a history of violent, recent dealings with the victim cast doubt upon the defendant's guilt and implicated another person as the perpetrator beyond conjecture or mere implication).

State v. McElrath, 322 N.C. 1 (1988) (evidence of a larceny scheme in which the murder victim and his companions appeared to be involved was relevant where the defense alleged that the victim was killed by one of the companions after a falling out).

State v. Cotton, 318 N.C. 663 (1987) (evidence that within a short time of the burglary and sexual assault at issue, three homes in close proximity were broken into and the female occupants were sexually assaulted and that someone other than the defendant committed one of the other break-ins).

The United States Supreme Court has held that there are constitutional limitations on rules that exclude evidence of guilt of another. Specifically, in *Holmes v. South Carolina*, 547 U.S. 319 (2006), the Court held that a defendant's federal constitutional right to present a defense was violated by a state evidence rule providing that a defendant may not introduce evidence of guilt of another if the prosecution has introduced strong forensic evidence of guilt. The Court held that the state rule was arbitrary, reasoning that by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Two North Carolina cases have distinguished *Holmes* and held that North Carolina's rule regarding guilt of

another is not arbitrary. *State v. Loftis*, 185 N.C. App. 190 (2007); *State v. Wright*, 182 N.C. App. 767 (2007) (unpublished).

D. Demonstrations. A demonstration is an illustration or explanation by exemplification of practical application. *State v. Arnold*, 98 N.C. App. 518 (1990), *aff'd*, 329 N.C. 128 (1991). For courtroom demonstrations, the demonstrator need not be an expert, but a proper foundation must be laid as to the demonstrator's familiarity with what he or she is demonstrating. *Id.* The North Carolina courts have upheld the relevancy of demonstrations in a variety of contexts. Relevant cases include:

State v. Golphin, 352 N.C. 364 (2000) (demonstration of the effect of pepper spray to rebut the defendant's claim that he could not have committed the crime because he was debilitated by the spray).

State v. Fowler, 159 N.C. App. 504 (2003) (demonstration of how an apron string was tied around a murder victim's neck, to show premeditation and deliberation).

State v. Hunt, 80 N.C. App. 190 (1986) (demonstration of the operation of a shotgun to rebut the defendant's testimony that it discharged accidentally).

State v. Murillo, 349 N.C. 573 (1998) (demonstration that it was physically impossible for the wounds to have been inflicted by accident, as alleged by the defendant).

State v. Arnold, 98 N.C. App. 518 (1990) (demonstration of how a letter might be created by cutting and pasting together pieces of several letters and then photocopying the resulting document, to challenge that State's evidence of photocopies of letters purportedly written by defendant).

E. Weapons. For evidence of a weapon allegedly used in a crime to be relevant, the State need not conclusively connect the weapon to the crime. The lack of evidence establishing such a conclusive connection goes to weight, not admissibility. See *State v. Grooms*, 353 N.C. 50 (2000) (evidence regarding a pocketknife carried by the defendant and a hacksaw frame and blades was relevant in a murder prosecution; any variance in size between the defendant's knife and the medical examiner's description of the wounds affected weight, not admissibility; based on the proximity of the hacksaw frame to the victim's severed hand and evidence that the hand was severed by a blade similar to those at issue, the items were relevant; the lack of fingerprints on the hacksaw frame, lack of evidence that the blades fit into the frame, and the common availability of such blades affected weight, not admissibility); *State v. DeCastro*, 342 N.C. 667 (1996) (evidence of a knife found three months after the murder in a pond some distance from the scene was relevant; although the knife had no bloodstains and was not tested for fingerprints, the medical examiner opined "that some of the fatal knife wounds found on both victims were consistent with the length and width of the knife and that the knife could have been one of the murder weapons;" the lapse in time in finding the knife and its distance from the scene affected weight, not admissibility); *State v. Felton*, 330 N.C. 619 (1992) (the failure of State's expert to conclusively match bullets to the murder weapon affected the weight, not admissibility); *State v. Lytch*, 142 N.C. App.

576 (2001) (bullets found two days after the murders by the manager of a trailer park where the defendant lived were relevant; the lack of evidence conclusively showing where in the trailer park the bullets were discovered impacted weight, not admissibility; the brief time lapse between the crimes and discovery of the bullets, the proximity of the bullets to defendant's residence, and the fact that one of the bullets was at one time in the murder weapon established relevancy), *aff'd*, 355 N.C. 270 (2002).

Of course, there must be a sufficient connection between the weapon and the crime, or the evidence is irrelevant. See, e.g., *State v. Bodden*, 190 N.C. App. 505 (2008) (nine-millimeter bullet found near a murder scene was irrelevant where the bullets used to shoot the victim were .38 or .357 caliber); *State v. Grant*, 178 N.C. App. 565 (2006) (testimony that the defendant possessed a pistol was irrelevant where the pistol was not connected to the shooting of the victim); *State v. Patterson*, 59 N.C. App. 650 (1982) (when the robbery was committed with a small handgun, admission of a sawed-off shotgun was error). In drug cases, this rule has been relaxed somewhat. Our courts have held that evidence regarding gun possession generally is relevant in drug cases, reasoning that there is a common sense connection between guns and drugs. See, e.g., *State v. Boyd*, 177 N.C. App. 165 (2006) (fact that a shotgun was found in a closet in the defendant's home was relevant to drug possession and trafficking charges).

- F. 404(b) Evidence.** Under Rule 404(b), evidence of other crimes, wrongs or bad acts may be admissible if offered for a proper purpose. However, even if offered for a proper purpose, the 404(b) evidence must be relevant. *State v. Haskins*, 104 N.C. App. 675 (1991); see also *State v. Lofton*, 193 N.C. App. 364 (2008) (evidence that the defendant hit his wife when he suspected that she was being unfaithful was relevant to establish motive where the defendant again suspected her infidelity); *State v. Latham*, 157 N.C. App. 480 (2003) (evidence of the defendant's prior assaults against his girlfriend, the murder victim, was relevant to whether the shooting was accidental).

The most significant relevancy issue with regard to 404(b) evidence comes from the rule that the evidence is relevant only if the jury can conclude by a preponderance that the other act occurred and that the defendant committed that act. *Haskins*, 104 N.C. App. 675. The trial court must make an initial determination under Rule 104(b) as to whether there is sufficient evidence that the defendant committed the extrinsic act. *Id.* The standard is not beyond a reasonable doubt, clear and convincing, or by a preponderance; “[r]ather . . . the trial court must find the evidence to be substantial.” *Id.*

- G. Victim's Prior Violent Behavior.** When the defense seeks to introduce evidence of the victim's prior violent behavior, that evidence may be admissible if relevant to a claim of self defense. See *State v. Lloyd*, 354 N.C. 76 (2001) (evidence irrelevant where defense was accident, not self-defense); *State v. Campbell*, 359 N.C. 644 (2005) (evidence not relevant where the defendant did not assert self-defense or that the victim was the first-aggressor); *State v. Strickland*, 346 N.C. 443 (1997) (not relevant where the defense did not rely on self defense).
- H. Flight.** Evidence of the defendant's flight is routinely admitted to show consciousness of guilt. See, e.g., *State v. King*, 343 N.C. 29 (1996) (evidence of a high speed police chase four months after a shooting was relevant evidence of flight); *State v. McDougald*, 336 N.C. 451 (1994) (evidence of a jail escape

constituted evidence of flight, which is relevant to show consciousness of guilt); *State v. Williamson*, 122 N.C. App. 229 (1996) (evidence of the defendant's failure to appear for trial was relevant in determining guilt); see also N.C. Pattern Instruction – Criminal 104.35 and 104.36 (pattern jury instructions on flight).

- I. Gang-Related Evidence.** Evidence of gang-related tattoos or clothing associated with a gang is relevant only if gangs or gang membership is relevant to the crime. *State v. Hope*, 189 N.C. App. 309 (2008) (in a murder case, it was error to allow cross-examination of the defendant concerning whether tattoos and burn marks on his body were indicative of gang membership, where there was no evidence that the murder was gang-related); *State v. Gayton*, 185 N.C. App. 122 (2007) (evidence of gang membership was not relevant in a drug trafficking case not involving gangs).
- J. “Negative Evidence.”** Sometimes a party will seek to admit evidence to prove that an alleged fact does not exist or that certain evidence could not be obtained. See generally, *Old Chief v. United States*, 519 U.S. 172 (1997) (noting that if the jurors' expectations about what proper proof should be are not satisfied, e.g., production of a gun in a case alleging use of a firearm, the jurors “may penalize the party who disappoints them by drawing a negative inference against that party”) (quotation omitted). Such evidence generally is relevant. See, e.g. *State v. Wiggins*, 161 N.C. App. 583 (2003) (in a sexual assault case, an expert's testimony was relevant when it explained why there would be no physical findings even after years of sexual abuse). However, the proponent of such evidence must establish that the witness's “position with respect to the matter was such that [he or she] would have known of the existence of the fact had it been true.” *State v. Hamlette*, 60 N.C. App. 306 (1983) (prejudicial error to admit negative evidence by an officer that there was no evidence pointing to the guilt of a third party when the officer's involvement with the investigation was insufficient to form an adequate basis for the negative testimony).
- K. Victim Impact Evidence.** Victim impact evidence refers to evidence of physical, psychological, or emotional injury, or economic or property loss suffered by the victim, as well as evidence of the effect of the crime on the victim's family. *State v. Graham*, 186 N.C. App. 182 (2007); G.S. 15A-833(a). As a general rule, while victim impact evidence is pertinent at sentencing, it is not relevant during the guilt phase of a trial. See *State v. Raines*, 362 N.C. 1 (2007); *Graham*, 186 N.C. App. 182 (witness testimony regarding how seeing the attack on her son had affected her mental health was irrelevant in guilt phase of trial); *State v. Bowman*, 188 N.C. App. 635 (2008) (reversible error to allow previous victims of the defendant's sex offenses to testify about the emotional impact of the crimes).

However, evidence of a victim's fear and distress during an offense may be admissible if relevant to an element of the crime. See, e.g., *State v. Jackson*, 161 N.C. App. 118 (2003) (the victim's testimony concerning how she felt when a gun was placed to her head was relevant in an armed robbery trial to establish the element that the victim's life had been threatened and endangered). Also, evidence that tends to show the context or circumstances of the crime, even if it also shows the effect of the crime on the victim or his or her family, may be admissible as context evidence. Compare *State v. Barden*, 356 N.C. 316 (2002) (evidence that the murder victim sent money to his wife and child showed why the victim needed money was relevant), with *Graham* 186 N.C. App. 182 (victim impact evidence did not shed light on the circumstances of the crime and was irrelevant). See also the discussion above regarding context evidence.

- L. Drug Use.** Evidence regarding the victim's drug use is relevant if connected to the crime. *State v. Hope*, 189 N.C. App. 309 (2008) (no error to admit testimony that the victim had a drug addiction where such drug use was relevant to support the State's theory that the murder was drug-related; evidence also was relevant as context evidence to explain the connection between the parties). The same rule applies to the defendant's drug use. *State v. Lawson*, ___ N.C. App. ___, 669 S.E.2d 768 (Dec. 16, 2008) (evidence of the defendant's abuse of pain medication was relevant to motive). When such evidence is unconnected with the charges, it is irrelevant. See, e.g., *State v. Clark*, 128 N.C. App. 87 (1997) (evidence of the murder victim's drug use was irrelevant to any issue in the case).
- M. Motive for Reporting Crime or Delay in Reporting.** Cases have held that evidence is relevant if it explains the victim's motive for reporting the crime, *State v. Whitman*, 179 N.C. App. 657 (2006) (photographs of children, taken from the defendant's house by the victim, were relevant to the victim's motive (protecting the other children) for coming forward with allegations of sexual abuse), or delay in reporting. See *State v. Tadeja*, 191 N.C. App. 439 (2008) (evidence of the defendant's extra-marital affair was relevant to explain why the victim waited to come forward and disclose the defendant's conduct).
- N. Sexually Explicit Photographs or Videotapes.** In sexual assault cases, evidence that the defendant possessed or viewed pornographic material is relevant when related to the crime. See, e.g., *State v. Rael*, 321 N.C. 528 (1988) (videotape and magazines seized from the defendant's home were admissible to corroborate the child victim's testimony that the defendant showed him the materials when the defendant committed the acts at issue); *State v. Williams*, 318 N.C. 624 (1986) (evidence that the defendant took his daughter to an x-rated movie was relevant to show his preparation and plan to have sexual intercourse with her); *State v. Creech*, 128 N.C. App. 592 (1998) (in a trial for indecent liberties and crime against nature, photos of male models and men in underwear were admissible to corroborate testimony of a witness who said that the defendant had shown him the photographs). When no such connection exists, the evidence is irrelevant. *State v. Smith*, 152 N.C. App. 514 (2002) (evidence of defendant's possession of pornographic materials was not relevant in a child sexual assault case where there was no evidence that the defendant showed the victim the pornographic materials at the time of the alleged crimes or that the two of them had ever viewed pornographic materials together).
- O. Photographs of the Victim.** Although the primary evidence issue regarding photographs of the victim is whether they are properly admitted under Rule 403, relevancy objections to such evidence arise with some frequency. Cases have held that photographs of the victim are relevant to:
- Establish a victim's identity. *State v. McNeill*, 326 N.C. 712 (1990).
 - Establish that the victim was once alive. *Id.*
 - Show a victim's appearance before the crime. *State v. Barden*, 356 N.C. 316 (2002).
 - Contrast a victim's appearance before and after a crime. *State v. Stephenson*, 144 N.C. App. 465 (2001) (photograph of victim taken before she died was relevant to contrast the victim's normal, well-kept appearance with her appearance when she was found dead and to establish that a struggle occurred).

- Provide a chain of causation between an event and the victim's death, *State v. Bethea*, 167 N.C. App. 215 (2004) (photographs of the victim's dead body in the emergency room).
- Illustrate testimony. *Bethea*, 167 N.C. App. 215 (to illustrate observations of the condition of the victim's body).

Provide a basis of an expert's opinion. *Barden*, 356 N.C. 316 (photograph of a murder victim, taken three months before his death, was relevant and helped establish a basis from which medical examiner could testify as to various wounds inflicted upon the victim).