The Rules of Evidence - An Introduction
Penny J. White

I. Purpose of the Rules – Rule 102
- A. Overriding Purpose of Ascertaining Truth and Administering Justice
- B. Three Objectives of Construction
- C. Application

II. Applicability of the Rules - General Applicability – Rules 101, 1101

III. Preliminary Questions under the Rules
- A. Threshold Questions of Admissibility – Rule 104(a)
  1. Qualification of a Person to be a witness
  2. Existence of a Privilege
  3. Admissibility of Evidence
- B. Conditional Admissibility – Rule 104(b)
- C. Determinations of Preliminary Questions – Rule 104(c)
- D. Effect of Preliminary Determination – Rule 104(d) & (e)

IV. Admission of Evidence
- A. Burden on Proponent
- B. Limited Admissibility – Rule 105
- C. Judicial Instruction as to Use

V. Judicial Discretion under the Rules
- A. Application of Discretion
- B. Meaning of Abuse of Discretion

VI. Standards of Appellate Review

VII. Resources

Kenneth S. Broun, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §§ 1-23 (referred to herein as Broun, at __)

Judge Catherine C. Eagles, "North Carolina Rule of Evidence 104: The Overlooked But Omnipresent Rule" (http://www.judges.unc.edu/200706conference/EaglesEvidencePaper.pdf) (referred to herein as Judge Eagles, at __)

I. Purpose of the Rules – Rule 102

A. Overriding Purpose of Ascertaining the Truth and Administering Justice

The purpose of the North Carolina Rules of Evidence, along with the manner of construction, is set forth in **Rule 102.** It provides that **"[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."** In essence, the overriding purpose of the rules is to ascertain the truth and administer justice. While this lofty purpose may seem indefinite, and at times fallacious, it is not only an important reminder of the significance of evidentiary rulings, but also a helpful fallback position for the trial judge faced with a difficult issue which the rules do not definitively resolve.

B. Three Objectives of Construction

Similarly, Rule 102's description of the manner in which the rules should be construed aid the trial judge in applying the rules to indefinite situations. The rules are to be construed to accomplish three objectives: fairness, elimination of unjustifiable expense and delay, and promotion of the growth and development of the law of evidence. A trial judge faced with a difficult evidentiary issue unresolved by application of the rules should construe the rules and render a decision, consistent with these objectives and with Rule 102's overriding purpose.

C. Application

In *State v. Valentine*, 357 N.C. 512 (2003), various statements of the deceased victim were introduced under the residual exception to the hearsay clause. In reviewing the trial judge's determination, the North Carolina Supreme Court noted that the trial judge had failed to make the requisite findings of fact with regard to the trustworthiness of the hearsay statements. Because of the trial court's failure, the Supreme Court conducted its own review and concluded that the statements were admissible under the residual exception. The Court then added that "the North Carolina Rules of Evidence provide that the rules 'shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.'" 357 N.C. at 517. The admission of the victim's statements served the "interests of justice" by providing jurors with the necessary tools to ascertain the truth. Id.

Valentine demonstrates an appropriate use of Rule 102. After analyzing the evidence under the applicable hearsay rule, the North Carolina Supreme Court fortified its decision by reference to the underlying purpose of the rule of evidence. Similarly, in *State v. Brewington*, 170 N.C. App. 264 (2005), the North Carolina Court of Appeals utilized Rule 102 to uphold a procedure employed by the trial court. Without motion, the trial court conducted an evidentiary hearing prior to the beginning of the habitual felon phase of the trial. Defendant complained that trial court committed plain error by doing

so in the absence of a request by either party. The Court of Appeals reasoned that based on Rule 102 and Rule 104, the trial judge "has the inherent authority 'to conduct an evidentiary hearing outside the presence of the jury *sua sponte* to clarify questions of admissibility and to prevent undue delay in the proceedings.'" 170 N.C. App. at 279-80.

Rule 102 does not form an independent basis for admissibility of evidence. It would be error, for example, for a trial judge to admit evidence on the basis that the evidence might help the jury to find the truth. Similarly, the rule does not allow the judge to admit inadmissible evidence "in the interests of justice." Rather than creating an independent basis for admissibility, Rule 102 requires the judge to tip the scales in favor of truth and justice in the close or uncertain situation and allows the court to utilize procedures that facilitate the efficient administration of justice.

II. Applicability of the Rules - General Applicability – Rules 101, 1101

The Rules of Evidence apply "[e]xcept as otherwise provided . . . to all actions and proceedings in the courts of th[e] state." N.C.R. Evid. 1101. The rules do not apply to preliminary questions determined by the judge, N.C.R. Evid. 1101(b)(1); to proceedings before the Grand Jury, N.C.R. Evid. 1101(b)(2); to certain miscellaneous proceedings, N.C.R. Evid. 1101(b)(3);[1] or to summary contempt proceedings, N.C.R. Evid. 1101(b)(4).

The North Carolina Rules of Evidence are specifically inapplicable to sentencing hearings and to probation and parole revocation hearings, but may be helpful in determining reliability and relevance. *State v. Bond*, 345 N.C. 1 (1996). In addition, even in those proceedings in which the rules do not apply, constitutional due process standards always apply and may impact evidentiary rulings. *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319 (2006)(due process right to present a defense); *Bearden v. Georgia*, 461 U.S. 660 (1983)(probation revocation determination must include inquiry into reasons for failure to pay fines or restitution); *Gardner v. Florida*, 430 U.S. 349 (1977)(confrontation at capital sentencing hearing); *Morrissey v. Brewer*, 408 U.S. 471 (1972)(due process requirements in parole revocation proceeding). The requirements of due process are ascertained on a case-by-case basis. *See, e.g.*, *State v. Lombardo*, 306 N.C. 594 (1982)(consideration of unconstitutionally seized evidence in probation revocation hearing).

As noted, a trial judge who is determining preliminary questions, including the admissibility of evidence, is not bound by the rules. Therefore, the judge may consider otherwise inadmissible evidence in determining the threshold question of witness qualifications, privilege, and admissibility of evidence. N.C.R. Evid. 104(a).

[1] "These miscellaneous proceedings include – Proceedings for extradition or rendition; first appearance before district court judge or probable cause hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise." N.C.R. Evid. 1101(b)(3).

III. Preliminary Questions Under the Rules

The United States Supreme Court has referred to the judge as "the governor of the trial." *Quercia v. United States*, 289 U.S. 466 (1933). As "governor," the trial judge plays the crucial goal of gatekeeper at trial. It is the judge that often must make preliminary decisions as to whether evidence is admissible, wholly or conditionally.

When a judge decides a preliminary question, the decision itself may require a factual determination, a legal determination, or both. The judge, who is not bound by the rules of evidence in deciding preliminary questions, is given the leeway to consider all relevant and reliable information that may aid in the decision.

A. Threshold Questions of Admissibility – Rule 104(a)

Very often, the admissibility of evidence, both tangible and verbal, will depend upon a number of threshold factual determinations. Is the witness competent to testify? Was the conversation privileged? Is the statement offered for its truth or for some other purpose? Is the document genuine? Was the weapon the one found at the scene of the crime? In each instance the admissibility of evidence will depend upon factual or legal findings made by the trial judge. In making these determinations, the trial judge is not bound by the rules of evidence. N.C.R. Evid. 104(a).

Rule 104(a) provides **"[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."** Thus, Rule 104 requires that the judge determine if evidence is admissible. The rule must be read in conjunction with Rule 103, however, which requires counsel to raise objections to evidence either by motion or objection.

The trial judge's determination of admissibility is basic threshold admissibility. Except in unique situations, a judge does not weigh the evidence; nor does the judge ordinarily consider the quality or probativeness of the evidence. Some of these exceptions are noteworthy. For example, certain hearsay exceptions, although the judge has found that the proponent has established the existence of the exception, the judge may exclude the evidence based on concerns about trustworthiness.[2] Similarly, a judge must consider and weigh probativeness when ruling on objections under Rule 403, Rule 609(b), and arguably when determining the appropriateness of evidence offered under Rules 404(b).[3]

---

[2] N.C.R. Evid. 803(6)("unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness"); (8)(unless the sources of information or other circumstances indicate lack of trustworthiness); 804(b)(5)("having equivalent circumstantial guarantees of trustworthiness").

[3] Under Rule 609(b), the judge must determine whether the "probative value of [a more than ten year old] conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Under Rule 404(b), the judge must determine whether the evidence offered is probative on some issue other than propensity; and under Rule 608 must determine whether a specific instance of conduct is probative of untruthfulness or truthfulness.

Rather, the judge's factual and legal determinations, which should be clearly stated on the record, determine only whether the evidence should be admitted for consideration by the trier of fact.

The judge's particular gatekeeper function under Rule 104(a) applies to whether a particular witness is competent to testify, either in general, or as an expert; whether statements are protected by evidentiary privileges and thus, inadmissible; and whether evidence is generally admissible under the rules.

1. Qualification of a Person to be a Witness

Preliminary questions concerning the qualifications of a person to be a witness may include issues about competence to testify generally. The rules of evidence presume competence, N.C.R. Evid. 601, and require only that a witness testify from personal knowledge, N.C.R. Evid. 602, and under oath or by affirmation, N.C.R. Evid. 603.[4]

a. Competence of a witness

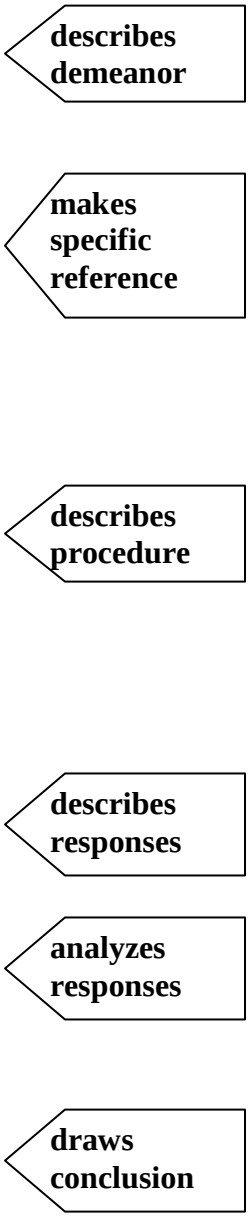
In determining whether a witness is competent to testify, "the trial judge is not acting as the trier of fact, [but] is rather deciding a threshold question of law, which lies mainly, if not entirely, within the judge's discretion. . . . The trial court must make only sufficient inquiry as to satisfy itself that the witness is or is not competent to testify. The form and the manner of that inquiry rests in the discretion of the trial judge." *In re Will of Leonard*, 82 N.C.App. 646, 648 (1986).

The preliminary determination must be based on the judge's personal observation. As noted by the North Carolina Supreme Court in a case involving a child witness: "underlying our law governing competency is the assumption that a trial judge must rely on his personal observation of a child's demeanor and responses to inquiry at the competency hearing." A trial judge who does not personally examine or observe the child cannot exercise informed discretion in determining competency. *State v. Deanes*, 323 N.C. 508, 522 (1988)(quoting *State v. Fearing*, 315 N.C. 167, 174 (1995)).

A recent case offers a good illustration of the types of facts that a trial judge might rely upon in ruling on a challenge to a witness' competence and how the judge should articulate the exercise of discretion. In *State v. Painter*, 173 N.C.App. 448 (2005), the defendant moved to strike the testimony of A.M., a witness. The court noted that it had observed the witness and the witness' responses to questions, "not only what is said but in the way that he said it." In great detail, the court explained:

[4] Implicit in the witness' affirmation is the declaration that the witness understands the obligation to tell the truth. N.C.R. Evid. 602.

> Both at voir dire and during the testimony of [A.M.] the court had the opportunity to observe him, both his demeanor and his manner in responding to questions. And I would note that although he appeared to be reluctant to respond to questions, particularly on, for one example but not intending to be exhaustive, I think he was, asked what if any nickname he might have for private parts. And he appeared at that time to the court to understand the question but really to be in some genuine embarrassment and unwilling to discuss it at that time.
>
> Both because of the youth of the witness, who the court finds to be eight years old and in the second grade, and the sensitive nature of the subject matter and his response to it, the court found that it would be appropriate to allow both the State and the defendant to ask leading questions of the defendant. And I did permit both the State -- certainly the State was given more leeway than would have been allowed with an adult witness. However, I think the same leeway was given to the defendant in terms of asking leading questions.
>
> And I will note that although [A.M.] responded certainly more emphatically and more directly to leading questions, which again, I think is not unexpected from an eight year old witness, I will note that on occasion he was unable to respond to leading questions. And the court would find that on those occasions typically A.M. indicated that either he didn't remember or did not know the answer to those questions . . . .
>
> . . . [A]nd that it would be the court's evaluation of that testimony that he was responding truthfully and was doing the best that he could.



In denying the motion to strike the witness' testimony, the judge concluded that the witness was "capable of expressing himself so that he can be understood [and further found that the witness] is capable of understanding the duty to tell the truth as a witness pursuant to Rule 601." *State v. Painter*, 173 N.C.App. at 452.

b. Qualifications of Expert Witness

The trial judge must also determine preliminary questions regarding the qualifications of a person to testify as an expert witness under Rule 104(a). The issue is

whether the person has sufficient skill, education, experience, or training to testify as an expert. In addition, the judge must determine:

(1) whether scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue;
(2) whether the expert's proffered method of proof is sufficiently reliable a an area for expert testimony;
(3) whether the expert's proffered testimony is relevant to the issues in the case; and
(4) if the underlying facts or data upon which the expert bases the opinion are not admissible, whether they are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.

N.C.R. Evid. 702 - 704; *State v. Goode*, 341 N.C. 513 (1995).

"Whether the witness has the requisite skill to qualify him as an expert is chiefly a question of fact[.]" *State v. Bullard*, 312 N.C. 129, 140 (1984)(citation and quotation omitted). As a result, whether a witness qualifies as an expert is an issue exclusively within the discretion of the trial judge. The decision will not be reversed on appeal absent a complete lack of evidence to support the ruling. *State v. Howard*, 78 N.C. App. 262, 270 (1985).

c. Admissibility of Lay Opinion

The trial judge must determine that a lay witness' opinion is "rationally based on perception and helpful to the jury." N.C.R. Evid. 701.

2. Existence of a privilege

Rule 104 also provides that questions concerning the existence of a privilege are preliminary questions to be determined by the trial judge. Thus, for example, if a witness refuses to answer questions based on a privilege, the trial court must determine whether the claim of privilege is valid. "When the individual invokes the [F]ifth [A]mendment privilege, the trial court must determine whether the question is such that it may reasonably be inferred that the answer may be self-incriminating." *State v. Eason*, 328 N.C. 409, 418 (1991).

When the privilege is invoked validly, the invocation may generate a conflict between the witness' Fifth Amendment privilege and defendant's Sixth Amendment right to confrontation.

> In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege

> prevents inquiry into matters about which the witness testified on direct examination.

United States v. Cardillo, 316 F.2d 606, 611 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963).

To accommodate this conflict, North Carolina authorities require trial courts to follow a precise procedure when a witness asserts the privilege in a criminal trial. The trial judge must determine whether the witness invoked the privilege in response to questions pertaining to collateral matters or to questions relating to the details of the direct examination. This sometimes difficult question requires the judge to determine "whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness' direct testimony." *State v. Ray*, 336 N.C. 463, 471 (1994)(internal citations and quotations omitted). The witness may not be permitted to "disclose part of the facts and withhold the rest." *Perry v. State*, 210 N.C. 796, 798 (1936). If the privilege is invoke regarding questions that relate to the direct testimony, the trial judge must either require the witness to answer the questions or strike all or part of the testimony given on direct examination. *State v. Ray*, 336 N.C. 463 (1994).

3. Admissibility of evidence

The broadest category of preliminary questions is the "admissibility of evidence." N.C.R. Evid. 104(a). The trial judge must determine as a preliminary question, for example, whether an exhibit is authentic; whether evidence is relevant; whether an out of court statement is offered for some purpose other than the truth of the matter; whether the elements of a hearsay exception have been established; whether a document is the "original" under the best evidence rule; whether facts should be judicially noticed; whether impeachment evidence is collateral or non-collateral; whether a foundation has been laid for the introduction of reputation evidence; whether character evidence is offered for some purpose other than propensity; whether a specific act offered to impeach is one of untruthfulness; and dozens of other questions pertaining to the admissibility of evidence.

By way of example, under Rule 608, a witness may be questioned, in the court's discretion, about specific instances of conduct probative of truthfulness or untruthfulness. Both the judge's decision as to whether to allow the inquiry and the judge's determination that the instance of conduct is probative of truthfulness or untruthfulness are threshold issues determined under Rule 104(a).

B. Conditional Admissibility – Rule 104(b)

Sometimes, evidence only becomes relevant, if other evidence exists. For example, a handwritten letter, asserted to be the defendant's confession, is relevant only if it can be established that the defendant wrote the letter. A prior act of assault is only relevant to establish the defendant's intent if defendant actually committed the prior assault. In these situations, if the judge acted as a strict gatekeeper, as under Rule 104(a)

then the jury's role as trier of fact would severely limited. Therefore, the rules treat these situations differently, providing in Rule 104(b) that **"[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."** Thus the standard for admissibility of this type of evidence is not by a preponderance but is "evidence to support a finding of the fulfillment of the condition."

In situations of conditional admissibility, the judge determines first whether the foundation evidence is "sufficient to support a finding of fulfillment of the condition." If it is, then the judge admits the items subject to the introduction of the other evidence. If counsel fails to offer the other evidence, frequently referred to as "failing to connect it up," the court must strike the conditionally admitted evidence and instruct the jury to disregard it.

Rule 104(b) is frequently applicable with regard to the introduction of evidence of other wrongs, crimes, or acts, under Rule 404(b) to establish motive, opportunity, plan, identity, absence of accident, or for some other legitimate purpose, other than propensity. North Carolina law requires consideration of both 104(a) and 104(b) preliminary questions for the proper introduction of this evidence. For example, the court must determine that the purpose for which the evidence is offered is proper given the issues in the case. The court must also determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant. Both of these determinations are made under Rule 104(a).

Even after the court has made these preliminary findings, it is still necessary for the evidence of the other crimes, wrongs, and acts to be relevant and sufficiently connected to the defendant. Under North Carolina law, this is a Rule 104(b) determination.

> The trial court is required to make an initial determination pursuant to Rule 104(b) of whether there is sufficient evidence that the defendant in fact committed the extrinsic act. The judge is not required to be convinced beyond a reasonable doubt, by clear and convincing evidence, or by a preponderance of the evidence, that defendant committed the extrinsic act. Rather, as a prerequisite to admitting the evidence, the trial court must find the evidence to be substantial. *State v. Williams*, 307 N.C. 452, 454, 298 S.E.2d 372, 374 (1983) (defining substantial evidence as "such evidence as a reasonable mind might accept as adequate to support a conclusion"). [But Rule 404(b)] evidence is relevant only if the jury can conclude by a preponderance of the evidence that the extrinsic act occurred and that the defendant was the actor."

State v. Haskins, 104 N.C.App. 675, 679 (1991). If the court determines initially that the evidence is sufficient and allows admission, but the proponent fails to "connect the evidence," the trial court must instruct the jury to disregard the evidence.

In a case in which the defendant was charged with first-degree murder of his drug dealer, the trial court admitted evidence of a domestic disturbance incident between defendant and his wife which occurred during the previous year. The evidence was admitted under Rule 404(b). *State v. Strickland*, 2009 WL 2501929 (N.C. App. 2009)(unpublished). On appeal, defendant challenged the relevance of the evidence and its admissibility based upon the dissimilarity between the charged offense and the prior misconduct. Defendant argued that evidence of a prior bad act must constitute "substantial evidence tending to support a reasonable finding by the jury that the defendant committed a *similar* act." *State v. Al-Bayyinah*, 356 N.C. 150, 155 (2002)(quotation and citation omitted)(emphasis in original).

The North Carolina Court of Appeals agreed that the offense and the prior act must be similar so as to "tend to support a reasonable inference that the same person committed both the earlier and later acts." *State v. Strickland*, 2009 WL 2501929 (N.C. App. 2009)(unpublished)(quoting *State v. Stager*, 329 N.C. 278, 303 (1991)). But the similarities do not have to "rise to the level of the unique and bizarre." *State v. Green*, 321 N.C. 594, 603 (1988). Despite the fact that the trial judge enumerated five similarities between the two events,[5] the appellate court found that the similarities "could be applied generically to a large number of violent altercations" and that the trial judge ignored "significant differences between the two incidents."[6]

The appellate court also held that the evidence was not relevant to establish defendant's motive, intent, and malice, as argued by the State. "There is no logical way to establish defendant's motive, malice, and intent against [the victim] based upon his significantly less violent behavior towards his wife the previous year. . . . [T]his evidence bears no relation to defendant's intent or his apparent necessity to defend himself. The evidence . . . could only reasonably be used to establish that defendant had a propensity for violence, and 'that he must have acted in conformity with that character and not in self-defense.'" *State v. Strickland*, 2009 WL 2501929 (N.C. App. Aug. 18, 2009)(unpublished)(quoting *State v. Irby*,113 N.C. App. 427, 439 (1994)).

This decision is instructive in that it demonstrates the importance of a careful application of the Rule 104(b) standard, particularly in cases in which evidence is offered

[5] The similarities included the following: (1) defendant had an altercation or argument prior to both; (2) defendant had consumed alcohol prior to both; (3) a cell phone played a part in both arguments with his wife; (4) in the earlier event, defendant felt that his wife would not "lay off" and in the later incident, defendant felt that the victim would not "lay off;" (5) defendant concealed himself after the 2005 incident and hid in the woods after shooting the victim.

[6] The appellate court noted that in the earlier incident the fight concerned the use of a cell phone, while the later incident argument concerned the signing of cell phone contracts for defendant's drug dealer. The appellate court also noted that in the earlier incident defendant physically injured his wife with his hands while arguing with her, but in the later incident defendant shot the victim who was not present during the initial argument.

under Rule 404(b). The trial judge must be meticulous in applying the multi-part inquiry – proper purpose, sufficient connection and relevance, balance – and must articulate a basis for each determination.

C. Determinations of Preliminary Questions – Rule 104(c)

Rule 104(c) establishes the procedure for determining preliminary questions. When the preliminary questions concern **the admissibility of a confession or "other motions to suppress evidence in criminal trials in Superior Court,"** the hearing on the preliminary question **"shall be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or, when an accused is a witness, if he so requests."** N.C.R. Evid. 104(c). The rule has been interpreted to grant "inherent authority to conduct an evidentiary hearing outside the presence of the jury *sua sponte* to clarify questions to admissibility and to prevent undue delay in the proceedings." *State v. Brewington*, 170 N.C.App. 264, 280 (2005).

In evaluating whether the "interests of justice require" a jury-out hearing, trial judges should evaluate the "the potential for prejudice inherent in the evidence which will be produced by parties on the preliminary question." Judge Eagles, at 14. While some confusion exists as to whether hearings on the admissibility of Rule 404(b) evidence must be held outside of the jury's presence, *see* Judge Eagles, at 13, the better course of practice, if there is doubt, is to conduct the inquiry outside the presence of the jury.

D. Effect of Preliminary Determinations – Rule 104(d) & (e)

Rule 104(d) provides that an accused who testifies concerning a preliminary matter does not "subject himself to cross-examination as to other issues in the case." This rule embodies the constitutional principle set forth in *Simmons v. United States*, 390 U.S. 377 (1968) that it is improper for the government to establish guilt at trial by use of testimony given by the defendant in an effort to suppress illegally obtained evidence. While this rule seems straightforward, its application sometimes is not. Courts frequently allow cross-examination on the issue of credibility, reasoning that by testifying at all, the defendant has placed his credibility in issue. *See, e.g. U.S. v. Jaswal*, 47 F.3d 539 (2d Cir. 1995); *U.S. v. Grady*, 2005 WL 2739031 (M.D.N.C., October 24, 2005).

A judge's determination of a preliminary question does not "limit the right of a party to introduce before the jury evidence relevant to weight or credibility." N.C.R. Evid. 104(e). As the North Carolina Supreme Court has aptly put it: "[a]dmissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge." *State v. Walker*, 266 N.C. 269, 273 (1966). *See, e.g. State v. Hester*, 330 N.C. 547 (1992)(error to exclude evidence about police department's usual practice of recording confessions); *State v. Sanchez*, 328 N.C. 247 (1991)(error to exclude opinion evidence regarding defendant's understanding of *Miranda* warnings); *State v. Baldwin*, 125 N.C.App. 530 (1977)(evidence related to claim of coerced confession);

IV. Admission of Evidence

A. Burden on Proponent

The rules of evidence do not generally address the burdens that rest upon the parties with regard to the admission and exclusion of evidence. It is traditionally accepted, however, that the proponent of evidence must establish admissibility of the evidence if its admissibility is challenged. When the court determines that the evidence is admissible under Rule 104, the court is determining threshold admissibility, not weight. The matter of weight is left to the fact finder.

B. Limited Admissibility – Rule 105

The judge may also limit the application of evidence to particular issues or parties. Rule 105 provides for limited admissibility by providing that **"[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."**

C. Judicial Instructions as to Use

Rule 105 provides that limiting instructions are only to be given "upon request." In some circumstances, counsel may have strategic reasons for not requesting a limiting instruction. In other situations, the appellate courts have noted that instructions should be given *sua sponte*.

The jury instruction should be clear as to the permissible and impermissible uses of the evidence. The instruction should be given in plain and concise terms. If possible, the judge should refer to a model jury instruction, rather than delivering one extemporaneously. If the issue is crucial, the judge should compose the instruction and review it before delivering it.

An example of a model, which can be modified for each situation, follows:

> **The_____ (party) has offered evidence of _____ (witness, document). You may only consider this evidence for the purpose of _____ (the permissible purpose). I instruct you that you may not consider this evidence for the purpose of _____ (impermissible purpose).**

Within the North Carolina Pattern Jury Instructions for Civil Cases are helpful instructions that may also be used as a guide to develop a model instruction for general use when no specific pattern instruction is available. For example, N.C.P.I – Civil 101.33 provides an instruction for use when evidence is limited to a specific purpose.

> Evidence has been received (describe nature of evidence). (You must not consider this evidence (describe forbidden use of evidence).) If you [(believe this evidence) (find that this evidence (describe what must be found for evidence to be relevant))], then you may consider this evidence for the purpose(s) of (describe permissible purpose). Except as it bears upon (specify permissible purpose), [this evidence] [(describe evidence)] may not be used by you in your determination of any fact in this case.

When evidence has been admitted for a limited purpose, the judge should also monitor counsel's use of and reference to the evidence to assure that the jury is not encouraged to use the evidence in an impermissible way. For example, if the court admits evidence against one party but not another, counsel should be prohibited from making a closing argument that urges the use of the evidence against the other party.

While Rule 105 allows a trial judge to admit evidence for a limited purpose, it does not require it. When, for example, an objection is made under Rule 403, the judge may consider the availability and effectiveness of Rule 105 admissibility and a contemporaneous limiting instruction in determining whether to exclude evidence under Rule 403.

D. Judicial Comments during Objections

Judges must be careful not to comment on the evidence. Judge must not make inadvertent comments while questioning counsel about objections or ruling on objections that, in effect, express an opinion about the evidence or the objection. Section 15A-1222 of North Carolina General Statutes provides: "The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." A trial judge does not impermissibly expressing an opinion by making ordinary rulings during the course of the trial, but based on the totality of the circumstances, a judge's comments may merit a reversal. In *State v. Sidbury*, 64 N.C. App. 177 (1983), the appellate court reversed a conviction in a case in which the judge, by his questions to the defendant's wife, "implanted in the juror's minds to question the defendant's inability to handle a gun" and then "indirectly reminded them of this seeming inconsistency by its statement at the end of the day." 64 N.C. App. At 178.

V. Judicial Discretion Under the Rules

A. Application of Discretion

Virtually every evidence ruling will be resolved by the exercise of judicial discretion. This broad power is appropriate because it is the trial judge that is in the best position to observe the demeanor of the witness, assess the impact of the evidence, and sense its effect on the proceedings. When a trial judge rules on an evidentiary matter, the decision will not be disturbed on appeal unless the trial judge's ruling constitutes an abuse of discretion.

B. Meaning of Abuse of Discretion

As Judge Friendly once observed, "[t]here are a half dozen different definitions of 'abuse of discretion,' ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes." Henry J. Friendly, INDISCRETION ABOUT DISCRETION, 31 Emory L.J. 747, 763 (1982). The standard results in most evidentiary decisions being affirmed and endorsed with repetitive, unhelpful phrases commending the sound use of judicial discretion. *See, e.g., State v. Peterson*, 361 N.C. 587, 607 (2003)("The trial court did not act outside the bounds of reason in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.").

For those judges who have been reversed under the abuse of discretion standard, the concept seems amorphous. Again, reviewing courts use pat phrases that offer little analysis of the trial judge's error. So, for example, an abuse of discretion occurs when a ruling is "manifestly unsupported by reason and could not have been the result of a reasoned decision" or when it is "patently arbitrary." *State v. Elliott*, 360 N.C. 400, 419 (2006)(quoting *State v. Hennis*, 323 N.C. 279, 285(1988)). Some courts have become so disenchanted with the phrase that they have replaced it with the phrase "exceeded its discretion," thus removing the negative implication that flows from the use of the word "abuse."

C. Application of Exercise of Discretion

Judges should articulate the reasons for their evidentiary rulings in order to receive the benefit of deferential appellate review. When evidentiary rulings are based in whole or in part on circumstances which are not captured in the transcript, such as the amount of time involved, demeanor of the witness or counsel, or other visual or emotional issues, the court should detail the attendant circumstances so that the appellate court can have a full picture of the circumstances that prompted the ruling.

Cases involving demonstrative evidence offer a good opportunity to illustrate the importance of detailed evidentiary rulings. In *State v. Witherspoon*, 681 S.E.2d 348 (N.C. App. 2009), the state's expert demonstrated the nature of the entrance and exit wounds and the trajectory of the bullet by inserting wooden dowels in the head of a mannequin. The mannequin was then positioned on a couch which was purchased for trial in order to recreate the position of the victim's body as it was found. Defendant objected based on the state's failure to establish that the conditions were not substantially similar to the conditions at the time of the crime. The appellate court affirmed the trial judge and emphasized that North Carolina differentiates between demonstrations and experiments. "An experiment is 'a test made to demonstrate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried.'" *State v. Golphin*, 352 N.C. 364, 433 (2000). "A demonstration, on the other hand, is 'an illustration or explanation, as of a theory or product, by exemplification or

practical application.'" 352 N.C. at 434. For evidence pertaining to an experiment to be admissible, the experiment must be conducted under similar circumstances to those which surrounded the occurrence, but when evidence is used to illustrate, explain, or demonstrate, the substantial similarity rule does not apply. In this case, the court's clear explanation led the appellate court to conclude that the evidence offered was not an experiment but a demonstration. Thus, the evidence was admissible if relevant and, if in the trial judge's discretion, the evidence did not violate Rule 403. The court focused on the length of the demonstration, whether it was conducted in an inflammatory manner, and the degree to which is included emotional or speculative testimony, and ultimately, affirmed the trial court's admission of the evidence. 681 S.E.2d at 354. *See also State v. Anderson*, 684 S.E.2d 450 (N.C. App. 2009)(holding that court did not err in allowing shaken baby syndrome demonstration with toy doll because evidence was demonstration, not experiment; relevant; and not misleading or unfairly prejudicial).

VI. Standards of Appellate Review

A trial court's evidentiary rulings infrequently result in reversal on appeal. In addition to an exacting preservation process, N.C.R. Evid. 103, which often stumps counsel, the standard of review on appeal favors affirmance of the lower court ruling.

When counsel properly preserves an evidentiary objection in accordance with Rule 103, the standard of appellate review is an abuse of discretion. Great deference is given to the trial court's rulings, particularly when they are clearly stated in the record of the proceedings. Thus, trial judge should carefully and thoroughly recite the factual findings and conclusions that lead to their important evidentiary rulings. When the trial court makes factual findings that are supported by competent evidence in the record, the appellate courts must consider the facts conclusive on appeal. *State v. Wiggins*, 334 N.C. 18, 38 (1993). As such, the appellate court cannot substitute its judgment of the facts for the trial court's factual findings. But when the trial judge fails to make findings, the appellate court must exercise its own judgment in evaluating the facts, or remand for reconsideration. *See State v. Valentine*, 357 N.C. 512 (2003).

When counsel fails to preserve the issue in a criminal case, the appellate court will review the error under the plain error standard. An appellate court will not find plain error unless the court is convinced that

> absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by [law] upon defendants who have preserved their rights by timely objection.

State v. Walker, 316 N.C. 33, 39 (1986).

Despite the deferential standard of review of evidentiary rulings, trial judges should aim to create a clear, cogent record of the underlying reasons for the evidentiary ruling. In addition to addressing the relevant rule of evidence, the parties' proof and argument, trial courts should remember to address the very important aspects of the decision that are not captured in the appellate record, including the tenor of the trial, the circumstances surrounding the offer of evidence, the demeanor of the witness, the existence or nonexistence of related evidence, and the overall posture of the case.