

Witnesses and Impeachment Problems Work Sheet

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May 2015**

I. Learning Objectives for this Session:

1. Appreciate the available methods for impeaching witnesses;
2. Embrace how the substantive and procedural limitations on impeachment methods impact the admissibility of impeachment evidence;
3. Manage the presentation of impeachment and rehabilitation evidence fairly and efficiently.

II. Resources

Criminal Evidence: Impeachment in NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith, Ed.) (referred to herein as BENCHBOOK) (available at <http://benchbook.sog.unc.edu/>)

Rule 609: Impeachment By Evidence of Conviction of A Crime *in* NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith, Ed.) (referred to herein as BENCHBOOK) (available at <http://benchbook.sog.unc.edu/>)

Kenneth S. Broun, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §§ 150 - 178 (referred to herein as Broun, at §___)

III. Preliminary Test

Indicate whether each statement is true or false.

1. When a witness admits a prior conviction, the witness may not be asked about the time and place of the conviction.
2. When a witness admits a prior conviction, the witness may be asked about the punishment imposed.
3. Despite a pretrial stipulation that defendant is a convicted felon for purposes of a possession of a firearm by a felon charge, defendant is subject to impeachment on the basis of the prior convictions if defendant testifies.
4. The purpose of allowing a witness to be impeached with a prior criminal conviction is that the conviction reveals the character of the witness.
5. If a juvenile adjudication is offered to impeach, the issue for the court is whether the offense would be admissible to attack the credibility of an adult.

6. Criminal convictions may be offered to impeach deceased hearsay declarants.
7. Before admitting a conviction to impeach a criminal defendant, the court must conduct a Rule 403 balancing test.
8. The test for inconsistency for purposes of using a prior statement to impeach is whether there is any material variance between the testimony and the prior statement.
9. A party may not cross-examine a witness about a collateral prior inconsistent statement.
10. Before cross-examining a witness about a prior inconsistent statement, the witness has a right to be shown the prior inconsistent statement.
11. Extrinsic evidence of a prior inconsistent statement that reveals bias on the part of the witness is admissible, even if the subject matter of the prior inconsistent statement is collateral to the subject matter of the trial.
12. When a witness denies making a prior statement, a party may not impeach the witness with extrinsic evidence of the substance of the prior inconsistent statement.
13. Even with regard to non-collateral, material matters, a witness must be given an opportunity to explain or deny inconsistencies before extrinsic evidence of the inconsistencies is admissible.
14. Reputation or opinion evidence pertaining to a witness's character for untruthfulness is admissible.
15. A witness who gives opinion testimony concerning the character for truthfulness of another witness may be asked about specific instances of her own conduct that are probative of untruthfulness.
16. The trial judge has discretion to disallow inquiry into specific instances of a witness's conduct even if the instances are probative of untruthfulness.

IV. Discussion Problems

A. Witnesses & Vouching

1. Prosecution asks witness in a series of questions on direct examination whether her office has made any promises to the witness in exchange for the witness's truthful testimony. Defendant objects on the basis that the prosecution is improperly vouching for the witness.¹ How do you rule?

2. Prosecutor asks the following questions at the end of the direct examination of a child witness:

Q: Now, earlier when you came up to the witness stand and the judge had you put your hand on the Bible and swear that you would tell the truth, do you understand what that meant?

A: Yes.

Q: When you put your hand on the Bible, who were you swearing you were going to tell the truth to?

A: Jesus.

Q: Have you told the truth to these folks here today?

A: Yes.

Defense objects and argues that the testimony allowed evidence concerning the witness's credibility before any attack on the witness's credibility had occurred.² How do you rule?

3. DSS social worker, testifying on direct examination, stated that "there was a substantiation of sex abuse of the victim by the defendant."³ Defendant objects and moves for a mistrial. How do you rule and proceed?

4. During the State's case in chief, the following exchange took place between the prosecutor and a detective witness:

Q: At any point did you ever question this case, this has a lot of family drama?

A: Yes

Q: What made you go forward?

A: [The victim] seemed to be telling me the truth, she gave me all the information possible that she had and we are required to investigate everything to the fullest.

¹ See *State v. Powell*, 732 S.E.2d 491 (2012).

² See *State v. Streater*, 1997 N.C. App. 632 (2009).

³ See *State v. Sprouse*, 217 N.C. App. 230 (2011); *State v. Giddens*, 199 N.C. App. 115 (2009), *aff'd* 363 N.C. 826 (2010).

Defense objects and argues that the detective's testimony vouched for the victim's credibility.⁴ How do you rule?

B. Collateral, Non-Collateral Matters and Admission of Extrinsic Evidence

5. Defendant calls his brother to testify in his rape trial. The testimony tends to exculpate defendant. On cross-examination, the prosecution asks defendant's brother whether he told his probation officer that defendant had admitted to having sex with the victim. The brother denies having done so. The prosecution calls the brother's probation officer to testify that the brother did tell him that defendant had admitted the act. Defense objects on the basis that the matter is collateral and that extrinsic evidence is, therefore, barred.⁵ How do you rule?

6. Defense witness testified that defendant, who was accused of sexual offenses, had never "improperly physically or emotionally or sexually abused" her. On cross-examination, the witness was asked whether they had told a detective that defendant had "done something sexual to both you and your sister and that you had gotten over it." The witness denied that she had told the detective the information.

During rebuttal, the State called the detective to testify about her conversations with the witness. The defense objects. The State proffers that the detective will testify that "the witness told me that she and her sister had been sexually assaulted by defendant when they were children, but they had got along well in life and had put it behind them."⁶ How do you rule?

7. Defendant testifies in a child sexual assault case. Over objection, the prosecutor cross-examines defendant with questions summarizing a psychological evaluation of defendant done in conjunction with a custody case. The psychologist did not testify and the report was not admitted. On cross-examination of defendant, reading from the report, the prosecutor asked questions, including:

Isn't it true that you attempted to place yourself in an overly positive light by minimizing your faults and denying psychological problems?

Doesn't it say that you have a prominent elevation on the psychopathic deviant scale?

These individuals may be risk takers who may do things others do not approve for the personal enjoyment. Doesn't it say that?

May show bad judgment and tend to be self-centered, pleasure oriented, narcissistic, and manipulative. It says that, doesn't it?

⁴ See *State v. Taylor*, 767 S.E.2d 585 (N.C. App. 2014); *State v. O'Hanlan*, 153 N.C. App. 546 (2002), *cert. denied*, 358 N.C. 158 (2004).

⁵ See *State v. Jerrells*, 98 N.C. App. 318 (1990).

⁶ See *State v. Mitchell*, 169 N.C. 417 (2005).

Assuming that the State responds to the defense objection to each of these questions that the “evaluation is admissible through cross-examination, but not through extrinsic evidence as relating to defendant’s credibility.” How do you rule?⁷

C. Bias, Motive, Interest

8. In defendant’s murder case, defendant’s sister testified for the State. Her testimony included a description of defendant’s appearance on the night of the murder; the presence of blood on defendant’s clothing; and the defendant’s inconsistent explanations for the blood. On cross-examination, defense counsel questioned the sister about prior inconsistent statements she had made to family members; about her mental health and drug use; and about her involvement in destroying evidence. Defense counsel sought to impeach the witness additionally with an voice message she had left with another family member stating that she would “call the law and the D.A.” on her family. The message arose as a result of efforts to persuade the sister not to testify against defendant. Defendant argued that the cross-examination should be allowed to show the sister’s bias toward defendant and defendant’s family, but the State objected and argued that the message, while relevant in a witness intimidating case, was not relevant in the murder case and would tend to cast defendant in a negative light.⁸ How do you rule?

9. Defendant was charged with assault with a deadly weapon with intent to kill. The State alleged that defendant enticed the victim to drive him to a location to buy marijuana, but en route pulled a gun, demanded money, and ultimately shot the victim in the stomach. Defendant sought to cross-examine the victim about an unrelated first-degree murder charge pending against the victim at the time of his testimony. The State objects to the cross-examination.⁹ How do you rule?

10. During a break in defendant’s trial for first-degree sexual offense and other offenses, the State’s lead detective in the case said to a deputy sheriff juror “you know he flunked a polygraph, right?” The deputy sheriff juror knew about the polygraph examination because he defendant had told him during a transport while awaiting trial, but the juror did not disclose the comment to the judge. On retrial, defense counsel argues that he should be allowed to question the detective about the incident to establish the detective’s bias against defendant.¹⁰ Do you allow the cross-examination?

D. Prior Inconsistent Statements

10. During trial, State’s witness testified that he did not see defendant at the scene of the crime. The State showed the witness a pretrial, unsworn written statement that he had given to the police and the witness acknowledged that it was his statement. But, the witness insisted that the statement was a “lie.” In the pretrial statement, the witness had identified defendant as the assailant.¹¹ May the State introduce the prior inconsistent statement of the witness?

⁷See *State v. Davis*, 222 N.C. App. 562 (2012).

⁸See *State v. Triplett*, 762 S.E.2d 632 (2014).

⁹See *State v. Council*, 753 S.E.2d 223 (2014).

¹⁰See *State v. Lewis*, 365 N.C. 488 (2012).

¹¹See *State v. Avent*, 222 N.C. App. 147 (2012).

Assume that you allow defense counsel to voir dire the witness before ruling on whether the pretrial statement would be admitted. On voir dire, defense counsel establishes that the State was aware that the witness would testify that the pretrial statement was untruthful. How, if at all, does this affect your ruling?

11. On direct examination, the State's witness denies telling a third party that on the day of the shooting, the witness saw defendant with a gun.¹² May the State call the third party to testify that the witness did in fact say he saw the defendant with a gun?

12. In defendant's murder trial, the State called witness Brown to testify to events leading up to and following the shooting, which took place near Brown's house. Brown testified that he did not recall seeing defendant enter his home immediately after the shooting with a weapon. The State moved to allow the State to treat Brown as a hostile witness. During the State's cross-examination, Brown denied telling police that he saw Brown with a gun following the shooting. The State then moved to introduce a redacted portion of a transcript of Brown's prior statements that included the following exchange:

Q: What did you notice that defendant had in his hand?

A: Something long.

Q: Okay.

A: Like a rifle or something . . .

Q: Alright. So you saw him with a gun?

A: Yes.

Q: You saw defendant with a gun?

A: Yes.

The defense objects that the extrinsic evidence is collateral and not admissible. How do you rule?

13. Defendant was charged with murder arising out of the death of his girlfriend's two-year old child. On direct examination, defendant claimed that the child died while left unattended in a bathtub while defendant conducted business with a drug dealer (who he knew only as Eric) outside of the apartment. On cross-examination, the prosecutor asked:

Q: Who is this Eric person you mentioned yesterday?

A: One of my blood friends. Who I purchase marijuana from.

Q: You talked to two detectives for almost three hours the day Junior died, correct?

A: Yes, ma'am.

Q: You never mentioned anyone named Eric to them, did you?

¹² See *State v. Wilson*, 197 N.C. App. 154 (2009).

A: No, ma'am.

Q: Not even when they came back and charged you with the death of the child did you mention anyone named Eric?¹³

Assume objection by the defense to this line of questioning. How do you rule?

E. Character for Untruthfulness

14. During a break in defendant's trial for first-degree sexual offense and other offenses, the State's lead detective in the case said to a deputy sheriff juror "you know he flunked a polygraph, right?" The deputy sheriff juror knew about the polygraph examination because he defendant had told him during a transport while awaiting trial, but the juror did not disclose the comment to the judge. On retrial, defense counsel argues that he should be allowed to question the detective about the incident because the incident is a specific instance of the detective's conduct that is probative of untruthfulness.¹⁴ Do you allow the cross-examination? If the detective denies the statement, do you allow the defense to call the juror to whom the detective directed the comment?

F. Criminal Convictions

15. The State seeks to impeach defendant based upon a prior conviction that is more than ten years old, but has failed to give written notice as required by Rule 609(b). The defense was provided with a copy of the conviction as part of the State's open-file discovery and had moved to exclude all "stale convictions" in a pretrial motion, thus evidencing actual knowledge that the State would attempt to use the conviction.¹⁵ What do you consider in determining whether to allow the state to impeach based upon the conviction?

16. The parties stipulated that the "defendant was a convicted felon on or about December 24, 2011." When defendant testified on his own behalf and was asked about his prior criminal record during direct examination, he stated he had been convicted "just maybe eleven years ago what the judge talked about earlier." On cross-examination, the prosecution asked: "Isn't it true you were convicted on April 29, 2002, in Michigan of felonious carrying a concealed weapon, that being a .22-caliber revolver?" After clarifying the date, defendant answered no.¹⁶ May the prosecutor inquire further into the circumstances of the crime or admit the certified conviction?

17. In a trial occurring in 2011, prosecution seeks to cross-examine defense witness about a manslaughter conviction from March 1986, for which the witness was released from custody in January 1991. Defendant objects.¹⁷ How do you rule?

¹³ See *State v. Smith*, 206 N.C. App. 404 (2010).

¹⁴ See *State v. Lewis*, 365 N.C. 488 (2012).

¹⁵ See *State v. Shelly*, 176 N.C. App. 575 (2006).

¹⁶ See *State v. Gayles*, 756 S.E.2d 46 (N.C. App. 2014).

¹⁷ See *State v. Ellerbee*, 218 N.C. App. 596 (2012).

18. Victim in robbery and kidnapping case has extensive criminal record, including twelve felonies. Defense counsel offered in evidence an exhibit consisting of certified public records of the convictions. The State objected based on the fact that the victim had admitted his prior convictions.¹⁸ Do you allow the admission of the exhibit?

¹⁸ See *State v. Lynch*, 217 N.C. App. 455 (2011).