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Rule 404(b): Evidence of Other Crimes, Wrongs, or Acts

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Introduction

The admissibility of Rule 404(b) evidence is one of the most litigated evidence issues. The rule—which is reproduced in the sidebar—pertains to evidence of other crimes, wrongs, or acts. This bulletin explains Rule 404(b) and provides a framework for analyzing admissibility issues regarding other crimes, wrongs, or acts evidence.

Generally

Applies to Any Witness

Rule 404(b) evidence typically is offered by the State with respect to the defendant. However, the rule applies more broadly to evidence of other crimes, wrongs, or acts of *any person*. N.C. R. Evid. 404(b).

Relevant Evidence

Other Crimes, Wrongs, or *Acts*

Although many tend to think of Rule 404(b) as applying only to evidence of other crimes, its scope is broader. The rule covers evidence of other crimes, wrongs, or acts. N.C. R. Evid. 404(b).

Juvenile Offenses

Rule 404(b) evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult. N.C. R. Evid. 404(b).

Rule 404(b)

Other crimes, wrongs, or acts. – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

Source: G.S. Chapter 8-C, Article 4, Rule 404(b).

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Timing of Other Crime, Wrong, or Act

The other crime, wrong, or act need not have occurred before the offense being tried to come under Rule 404(b). *See, e.g.*, State v. Twitty, ___ N.C. App. ___, 710 S.E.2d 421, 425 (2011) (the trial court properly admitted 404(b) evidence that occurred after the incident in question); State v. Mobley, 200 N.C. App. 570, 577 (2009) (same).

Arrest, Charge, or Conviction Not Required

404(b) evidence may be admissible even if the defendant was never arrested, charged, or convicted in connection with the incident. *See, e.g.*, State v. Adams, ___ N.C. App. ___, 727 S.E.2d 577, 579–80 (2012) (404(b) evidence of the defendant's prior break-in was properly admitted even though the defendant was never arrested for, charged with, or convicted of the prior offense).

Bare Fact of Conviction Rule

Subject to the exceptions noted below, the bare fact of a defendant's conviction is not admissible under Rule 404(b). The North Carolina supreme court established the bare fact of conviction rule in *State v. Wilkerson*, 356 N.C. 418 (2002), where it reversed the decision below (State v. Wilkerson, 148 N.C. App. 310 (2002)) for the reasons stated in Judge Wynn's dissent. *See also* State v. McCoy, 174 N.C. App. 105, 110–11 (2005) (reversing because of *Wilkerson* error); State v. Scott, 167 N.C. App. 783, 785–86 (2005) (same).

In his *Wilkerson* dissent (subsequently adopted by the state supreme court), Judge Wynn reasoned that 404(b) evidence is admissible only for certain purposes. *Wilkerson*, 148 N.C. App. at 319; *see generally* pages 6–9, below (discussing the proper purposes for 404(b) evidence). The bare fact of conviction, he reasoned, "would rarely, if ever, be probative of any legitimate Rule 404(b) purpose." *Wilkerson*, 148 N.C. App. at 319. Rather, it is the facts and circumstances of the offense that have probative value. *Id.* Additionally, Judge Wynn concluded, even if the bare fact of conviction had any probative value for Rule 404(b) purposes that value is substantially outweighed by prejudice, requiring exclusion under Rule 403. *Id.;* see page 13, below (discussing the Rule 403 balancing for Rule 404(b) evidence).

The *Wilkerson* rule prohibiting the admissibility of the bare fact of conviction under Rule 404(b) is in contrast to admissibility under N.C. Rule of Evidence 609, which allows for impeachment with evidence of a conviction. *Wilkerson*, 148 N.C. App. at 319. For purposes of Rule 609 impeachment, the *only* admissible evidence is the record of conviction (bare fact of conviction). *Id*. at 320–23; *see generally* Jessica Smith, *Rule 609: Impeachment by Evidence of Conviction of a Crime* (Feb. 2013), *in* The Survival Guide: Superior Court Judges' Benchbook (UNC School of Government), under the link for the "Evidence" section, www.sog.unc.edu/node/1092. Thus, when the defendant testifies at trial, both the facts and circumstances of the conviction may be admissible (under Rule 404(b)) and the fact of conviction may be admissible (under Rule 609).

At least one case has held that a Transcript of Plea in which the defendant admitted having committed armed robbery was not a bare fact of conviction. State v. Brockett, 185 N.C. App. 18, 25–26 (2007) (in this murder case, the 404(b) evidence was admitted to show that the defendant had possession of the firearm used to kill the victim; the court noted that the judgment of conviction was not introduced).

EXCEPTIONS TO BARE FACT OF CONVICTION RULE

Categorical Exception in Second-Degree Murder Cases. In his dissent in *Wilkerson,* Judge Wynn noted that "our courts have recognized a categorical exception" that allows admission of prior traffic-related convictions to prove malice in second-degree murder cases. *Wilkerson*, 148 N.C. App. at 328; *see also* State v. Rollins, ___ N.C. App. ___, 725 S.E.2d 456, 462 (2012) (prior traffic citations were relevant to establish malice for purposes of second-degree murder).

Narrow Exception for Sexual Assault Cases. In his dissent in *Wilkerson,* Judge Wynn noted that case law supported a narrow exception to the bare fact of conviction rule allowing evidence of a prior sexual assault conviction to be admitted under Rule 404(b) to show the defendant's intent to rape the victim in a case where the victim escaped before the offense was completed. *Wilkerson,* 148 N.C. App. at 325 & 328. Later case law confirms the limited applicability of this exception. State v. Bowman, 188 N.C. App. 635, 643–44 (2008) (error to admit bare fact of conviction in a sex case).

Narrow Exception for Motive or Intent. Judge Wynn also noted the following in his *Wilkerson* dissent:

> Arguably, under very narrow circumstances, bare evidence of a prior conviction could be probative of an enumerated purpose under 404(b); for instance, the bare fact that defendant was convicted of an offense could be probative of a defendant's motive or intent in committing a subsequent crime of assaulting a witness that helped procure the earlier conviction. Even then, the trial court would be required to assess the prejudice of allowing the bare evidence of the prior conviction under Rule 403.

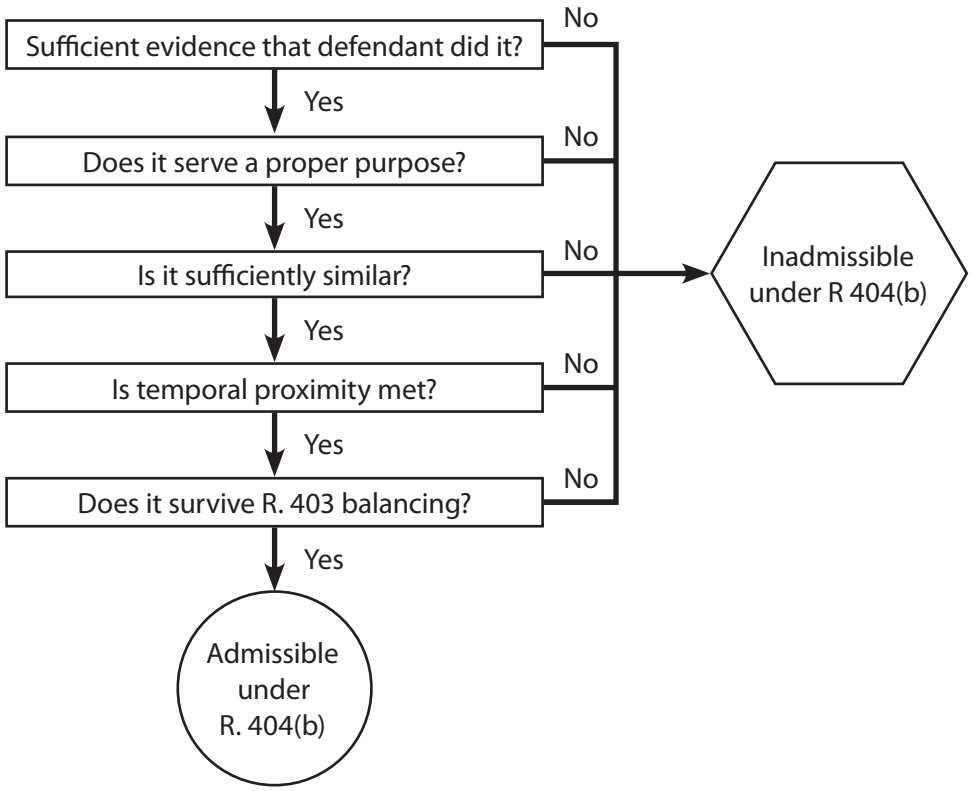
Wilkerson, 148 N.C. App. at 327 n.2.

Exception for Victim's Prior Convictions. The bare fact of conviction rule does not apply to evidence of the victim's convictions. State v. Jacobs, 363 N.C. 815, 824–25 (2010) (*Wilkerson* did not require exclusion of the certified copies of the victim's convictions; unlike evidence of the defendant's conviction, evidence of certified copies of the victim's convictions does not encourage the jury to acquit or convict on an improper basis).

Test for Admissibility

In order for Rule 404(b) evidence to be relevant, there must be sufficient evidence that the defendant, or the relevant witness, committed the other act in question. Once that preliminary threshold is satisfied, the Rule 404(b) analysis applies. The cases make clear that Rule 404(b) is a rule of inclusion, s*ee, e.g.,* State v. Beckelheimer, ___ N.C. ___, 726 S.E.2d 156, 159 (2012), subject to one exception: 404(b) evidence must be excluded if its *only* probative value is to show that the defendant had the propensity or disposition to commit the charged offense. State v. Coffey, 326 N.C. 268, 278–79 (1990). Nevertheless, where 404(b) evidence is relevant to an issue other than propensity or disposition, admissibility is "constrained by the requirements of similarity and temporal proximity." *Beckelheimer*, 726 S.E.2d at 159 (quoting State v. Al-Bayyinah, 356 N.C. 150, 154 (2002)). Finally, the admissibility of 404(b) evidence is subject to the weighing of probative value versus unfair prejudice mandated by North Carolina Rule of Evidence 403. State

Figure 1. 404(b) Analysis



v. Oliver, 210 N.C. App. 609, 612–13 (2011). These requirements are explored in more detail below. Figure 1 illustrates the relevant analysis.

Evidence That Defendant Committed the Act

As was stated immediately above, Rule 404(b) evidence only is relevant if the evidence sufficiently establishes that the act was in fact committed by the defendant. State v. Haskins, 104 N.C. App. 675, 679 (1991). Some decisions articulate this requirement as a preliminary determination. *Id.* at 679–80 ("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").

When the defendant has been convicted of the prior conduct, the requirement that the evidence sufficiently establish that the defendant committed the act presents no special issues. Similarly, this requirement is easily satisfied when a witness credibly testifies that the defendant committed the other act. *Haskins*, 104 N.C. App. at 681 (the 404(b) evidence was of an attempted robbery; the victim positively identified the defendant as the perpetrator and testified at trial to that effect). However, if the defendant has been tried and acquitted of the conduct, evidence of the other act is inadmissible. State v. Ward, 199 N.C. App. 1, 7–20 (2009) (the trial court erred by admitting 404(b) evidence of earlier charges when they were dismissed for insufficient

evidence; the probative value of the evidence depended on the defendant's having committed those offenses; so ruling under a Rule 403 balancing). A dismissal by the prosecution, however, does not have the same preclusive effect. State v. Flaugher ___ N.C. App. ___, 713 S.E.2d 576, 583–84 (2011) (prosecutorial dismissal did not preclude admission of 404(b) evidence).

Where the prior incident did not result in a conviction against the defendant and where no witnesses credibly testify that the defendant committed the act in question, the relevancy inquiry is more complex. With respect to the quantum of evidence required to establish relevancy, it is sometimes said that the proponent must present "sufficient evidence" to establish that the defendant committed the act in question. State v. Peterson, 361 N.C. 587, 601 (2007) (in a case in which the defendant was tried for murdering his wife, the trial court properly admitted 404(b) evidence regarding another woman's death where there was "sufficient circumstantial evidence that defendant was involved in [the other woman's] death—such as defendant being the last known person to see [her] alive; defendant being with [her] the night of her death; and there being no sign of forced entry and nothing missing from the residence, which indicated that [she] likely knew her assailant"); State v. Matthews, ___ N.C. App. ___, 720 S.E.2d 829, 834–36 (2012) (evidence of another break-in by the defendant was properly admitted where DNA evidence was "sufficient" to link the defendant to the crime); *Haskins*, 104 N.C. App. at 679–80 (citing Rule 104(b) and stating that the trial judge must determine that there is "sufficient evidence that the defendant in fact committed the extrinsic act"); *see generally* N.C. R. Evid. 104(b) (when relevancy is conditioned on the fulfillment of fact, there must be "evidence sufficient to support a finding of the fulfillment of the condition"). However, when articulating the required quantum of evidence, the courts sometimes use the terms "sufficient" and "substantial" interchangeably. *See, e.g., Haskins*, 104 N.C. App. at 679–80; *Peterson*, 361 N.C. at 601 (quoting State v. Stager, 329 N.C. 278, 303 (1991)) ("substantial evidence tending to support a reasonable finding *by the jury* that the defendant committed [the other crimes, wrongs, or acts]").

Whatever the standard, the evidence offered to meet it need not be direct evidence; circumstantial evidence is sufficient. *Peterson*, 361 N.C. at 600 (quoting State v. Jeter, 326 N.C. 457, 459 (1990)) (the Rule "includes no requisite that the evidence tending to prove defendant's identity as the perpetrator of another crime be direct evidence"; holding that sufficient circumstantial evidence linked the defendant to the prior act); State v. Moore, 335 N.C. 567, 594 (1994) (same). However, when the evidence that the defendant committed the prior act is sufficient but weak, this will be relevant to the trial court's Rule 403 balancing. *Peterson*, 361 N.C. at 600–01*; see* page 13, below (discussing Rule 403 balancing for 404(b) evidence).

Although cases can be found in which the 404(b) evidence was held to be inadmissible because there was insufficient evidence connecting the defendant to the act in question, State v. English, 95 N.C. App. 611, 614 (1989) (prejudicial error occurred when there was no "demonstrable nexus between the defendant and the act sought to be introduced against him"), other decisions are relatively permissive as to this requirement. *See Peterson*, 361 N.C. at 600–03; State v. Adams, ___ N.C. App. ___, 727 S.E.2d 577 (2012) (in the defendant's trial for breaking and entering into his ex-wife's Raleigh residence and for burning her personal property, the trial court did not abuse its discretion by admitting 404(b) evidence of a prior break-in at the victim's Atlanta apartment for which the defendant was not investigated, charged, or convicted; the police could not locate any fingerprints or DNA evidence tying the defendant to the earlier crime and no eyewitnesses placed the defendant at the scene).

Must Be Offered for a Purpose Other Than Propensity

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity with that character. N.C. R. Evid. 404(b). Put another way, the evidence may not be used to show propensity. However, evidence of other crimes, wrongs, or acts is admissible for other purposes, such as proof of motive, opportunity, intent, plan, preparation, knowledge, identity, or absence of mistake, entrapment, or accident. N.C. R. Evid. 404(b). These purposes are discussed in more detail below.

Motive

404(b) evidence may be admitted to prove motive. N.C. R. Evid. 404(b). Motive refers to "something within a person (as need, idea, organic state, or emotion) that incites [the person] to action." State v. Brown, ___ N.C. App. ___, 710 S.E.2d 265, 270 (2011) (citation, internal quotation marks omitted). The State may offer 404(b) evidence of a defendant's motive as circumstantial evidence to prove its case when the defendant denies committing the charged crime. *Id.*; State v. Haskins, 104 N.C. App. 675, 683 (1991) (because the defendant denied participation in the crime, motive was at issue).

Courts have held admissible 404(b) evidence of the defendant's

- possession of incestuous pornography to show the defendant's motive to commit sexual intercourse with his own child, Brown, ___ N.C. App. ___, 710 S.E.2d at 270–71;
- act of breaking into and stealing from two houses near the time of the victim's death to show that the defendant's motive for a robbery resulting in a death was the need to support a prescription pain killer addiction, State v. Blymyer, 205 N.C. App. 240, 245–46 (2010);
- submission of false information in a loan application to show the defendant's financial motive for killing his wife, State v. Britt, ___ N.C. App. ___, 718 S.E.2d 725, 730–31 (2011); and
- prior assault on the murder victim to show that the defendant killed the victim in order to prevent her from testifying against him in the assault trial, State v. Graham, 200 N.C. App. 204, 208–09 (2009).

Theoretically, the motives of a person other than the defendant may support admission of that person's crimes, wrongs, or acts under Rule 404(b). However, such proffers are not always successful. *See* State v. Laurean, ___ N.C. App. ___, 724 S.E.2d 657, 662–63 (2012) (in a murder case, the trial court did not err by excluding defense evidence of the victim's military infractions; after several infractions, the victim was referred to the defendant for counseling; after she alleged that the defendant raped her, she was murdered; the defendant argued that evidence about the victim's infractions established her motive for making a false rape allegation against him, but that issue was not before the jury and evidence pertaining to it shed no light on the charged crimes).

Opportunity

404(b) evidence is admissible to show the defendant's opportunity to commit the crime charged. N.C. R. Evid. 404(b); *see, e.g.*, State v. McAbee, 120 N.C. App. 674, 680–81 (1995) (in a case in which the defendant was charged with murdering a child, 404(b) evidence that the defendant was unemployed was admissible to show opportunity; because he was unemployed he was frequently at home with the child).

Intent

404(b) evidence may be admitted to show intent. N.C. R. Evid. 404(b). Courts have found admissible 404(b) evidence that the defendant

- engaged in similar sexual acts with another child to show the defendant's intent to engage in sexual activity with the child victim, State v. Houseright, ___ N.C. App. ___, 725 S.E.2d 445, 449 (2012);
- possessed incestuous pornography to show the defendant's intent to engage in sexual acts with his own child, State v. Brown, ___ N.C. App. ___, 710 S.E.2d 265, 270 (2011);
- possessed a fraudulent check to show intent to defraud with regard to charges of uttering a forged instrument and obtaining property by false pretenses in connection with a different fraudulent check, State v. Conley, ___ N.C. App. ___, 724 S.E.2d 163, 167–68 (2012); and
- previously assaulted the victim to show his intent to kill her to prevent her from testifying against him in the assault trial, State v. Graham, 200 N.C. App. 204, 208–09 (2009).

Plan

404(b) evidence may be admitted to show a plan. N.C. R. Evid. 404(b). Courts have found admissible 404(b) evidence that the defendant

- and his accomplices broke into a pharmacy but failed to procure narcotics to show a plan to obtain controlled substances through the drug store break-in at issue, State v. Woodard, 210 N.C. App. 725, 728–29 (2011);
- engaged in similar sexual acts with another child to show the defendant's plan to engage in sexual activity with the child victim, State v. Houseright, ___ N.C. App. ___, 725 S.E.2d 445, 449 (2012); and
- took his daughter to an x-rated movie and told her to look at scenes depicting graphic sexual acts to show his plan to make her aware of such conduct and arouse her so that he could have sexual intercourse with her, State v. Williams, 318 N.C. 624, 631–32 (1986).

Preparation

404(b) evidence may be admitted to show preparation. N.C. R. Evid. 404(b); *see, e.g., Williams*, 318 N.C. at 631–32 (in a rape and incest case, the trial court properly admitted 404(b) evidence that the defendant took his daughter to an x-rated movie and told her to look at scenes depicting graphic sexual acts; the evidence showed "his preparation and plan to engage in sexual intercourse with her and assist in that preparation and plan by making her aware of such sexual conduct and arousing her").

Knowledge

404(b) evidence is admissible to show that the defendant acted knowingly, N.C. R. Evid. 404(b), such as when the defendant is charged with knowingly possessing a controlled substance. *See, e.g.,* State v. Weldon, 314 N.C. 401, 404–07 (1985) (the trial court properly admitted evidence that controlled substances had been found on the defendant's premises on other occasions to show her guilty knowledge that heroin was present at the time in question).

Identity

404(b) evidence may be admitted to show that the defendant is the perpetrator of the crime at issue. N.C. R. Evid. 404(b). This is referred to as identity evidence. For example, evidence that the defendant committed another act very similar to the one charged may be probative of identity. *See, e.g.,* State v. Adams, ___ N.C. App. ___, 727 S.E.2d 577, 583 (2012).

Sometimes the proponent of the 404(b) evidence will articulate the purpose as "modus operandi." Modus operandi refers to a particular method or way of doing things, Black's Law Dictionary 1095 (9th ed. 2009), and is a proper 404(b) purpose. State v. Beckelheimer ___ N.C. ___, 726 S.E.2d 156, 159 (2012). Thus, the proponent will argue: the fact that the perpetrator's modus operandi with respect to the charged offense is similar to the defendant's modus operandi in another incident creates a reasonable inference that the defendant committed the act in question. State v. Blackwell, 133 N.C. App. 31, 36 (1999) (in a child sexual assault case, the defendant's acts with other minors "tend[ed] to demonstrate that he was the minor victim's assailant by showing a similar modus operandi"). In this context modus operandi is a vehicle to establish identity.

Not all 404(b) evidence offered to show identity will involve evidence of an act committed by the defendant similar to the one at issue. Evidence that the defendant used a weapon connected to the present offense during another incident also is probative of identity. *See* State v. Garner, 331 N.C. 491, 509 (1992) (in an armed robbery and first-degree murder case, the trial court properly admitted 404(b) evidence that the defendant attempted to murder a taxicab driver three weeks after the murder in question where the same gun was used on both occasions); State v. Dean, 196 N.C. App. 180, 191–92 (2009) (in a murder case, evidence of an assault committed by the defendant two days before the murder was admissible to show identity when the same weapon was used in both offenses); State v. Brockett, 185 N.C. App. 18, 22–23 (2007) (evidence that the defendant pled guilty to three robberies was properly admitted to prove identity when the weapon used in the robberies was the same weapon used to kill the victim in the case at bar).

Lack of Accident or Mistake

404(b) evidence is admissible to show lack of accident or mistake. N.C. R. Evid. 404(b). Where a defendant claims accident, evidence of a prior act with a "concurrence of common features" to the charged offenses tends to negate the claim of accident. State v. Lloyd, 354 N.C. 76, 90 (2001) (quoting State v. Barfield, 298 N.C. 306, 329 (1979)). For cases on point, see, for example, *id*. at 89 (in a murder case in which the defendant claimed that a shooting was accidental, the trial court properly admitted evidence of a prior assault by the defendant in which he shot the victim to show lack of accident); State v. Paddock, 204 N.C. App. 280, 285 (2010) (in a child abuse case, 404(b) evidence that the defendant systematically abused her other children in ways consistent with that alleged in the current case was relevant to rebut her allegation that the child was hurt by accident); State v. Lanier, 165 N.C. App. 337, 342–47 (2004) (in a murder case in which the defendant argued that her most recent husband's death was accidental, evidence concerning the death of her former husband was properly admitted to show lack of accident); *see also* State v. Flaugher, ___ N.C. App. ___, 713 S.E.2d 576, 583 (2011) (in a maiming case in which the defendant was accused of attacking the victim with a pickaxe and almost severing his finger, no plain error occurred when the trial judge admitted 404(b) evidence that the defendant previously attacked the victim with a fork and stabbed his finger to show absence of accident or mistake).

Lack of Entrapment

404(b) evidence is admissible to challenge the defense of entrapment. N.C. R. Evid. 404(b); *see, e.g.,* State v. Goldman, 97 N.C. App. 589, 593–95 (1990) (in a drug case, 404(b) evidence of the defendant's prior drug use and possession was properly admitted to show predisposition); State v. Artis, 91 N.C. App. 604, 606–07 (1988) (same; to prove absence of entrapment).

Other Permissible Purposes

COMMON PLAN OR SCHEME

Courts sometimes admit 404(b) evidence to show the defendant's common plan or scheme to engage in the charged conduct. State v. Barnett, ___ N.C. App. ___, 734 S.E.2d 130, 133–34 (2012) (in a second-degree rape case, the trial court properly admitted 404(b) evidence of the defendant's prior sexual conduct with the victim to show common scheme that showed a progression from inappropriate touching in 1977 to sexual intercourse in 1985); State v. Twitty, ___ N.C. App. ___, 710 S.E.2d 421, 424–25 (2011) (in a case in which the defendant was charged with obtaining property by false pretenses after he lied to church members to gain sympathy and collect funds, no abuse of discretion occurred when the trial court admitted 404(b) evidence that the defendant engaged in the same behavior at other churches to show common plan or scheme). To some extent, common scheme overlaps with intent and modus operandi, discussed above.

VICTIM'S STATE OF MIND

Courts have held that proving the victim's state of mind is a permissible 404(b) purpose. State v. Foust, ___ N.C. App. ___, 724 S.E.2d 154, 159–60 (2012) (prior bad acts admitted to explain why the rape victim was afraid of the defendant and did not report the rape and that the incident was nonconsensual).

CHAIN OF EVENTS/CONTEXT

Rule 404(b) evidence is admissible to establish the chain of circumstances or context of the charged crime. State v. White, 340 N.C. 264, 284 (1995). Such evidence is admissible if it "serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury." *Id.* at 284 (404(b) evidence admissible for this purpose). For example, in *State v. Rollins,* ___ N.C. App. ___, 725 S.E.2d 456, 460–61 (2012), a second-degree murder case stemming from a vehicle accident during a high speed chase following a shoplifting incident, details of the shoplifting incident were properly admitted under Rule 404(b) to explain the reason for the defendant's flight. *See also* State v. Golden, ___ N.C. App. ___, 735 S.E.2d 425, 429–31 (2012) (in a perpetrating a hoax by use of a false bomb case, the trial court did not err by admitting evidence of the defendant's prior acts against his estranged wife; the wife had a domestic violence protective order against the defendant and called 911 when he appeared at her house; in a search after his arrest for violating the domestic violence protective order, officers found evidence of the charged offense); State v. Madures, 197 N.C. App. 682, 687–88 (2009) (in a trial for assault on a law enforcement officer and resisting and obstructing, the trial court properly admitted evidence relating to the defendant's earlier domestic disturbance arrest; the same officer involved in the present offenses handled the earlier arrest and at the time had told the defendant's mother to call him if there were additional problems; it was the defendant's mother's call that brought the officers to the residence on the date in question; the fact of the earlier arrest helped to provide a complete picture of the events for the jury).

Evidence that explains the context of the defendant's admission of guilt also may be admissible as context evidence. *White*, 340 N.C. at 284–85 (evidence of the defendant's involvement in a conspiracy with a witness provided context for her confession to that witness to having murdered her stepson nineteen years earlier).

MALICE

Evidence of a defendant's prior motor vehicle–related convictions is admissible to show malice in a second-degree murder case based on a vehicular homicide. State v. Maready, 362 N.C. 614, 620 (2008).

Similarity

General Requirement

As a general rule, 404(b) evidence must be sufficiently similar to the act in question. 404(b) evidence is considered sufficiently similar if there are unusual facts present in both incidents. State v. Beckelheimer, ___ N.C. ___, 726 S.E.2d 156, 159 (2012). However, the similarities need not "rise to the level of the unique and bizarre." *Id.* at 159 (citations, internal quotation marks omitted). Nor must the incidents be identical. *Id.* at 160. As the North Carolina Supreme Court has stated: "near identical circumstances are not required; . . . rather, the incidents need only share some unusual facts that go to a purpose other than propensity . . . ." *Id.* (citations, internal quotation marks omitted); *see also* State v. Khouri, ___ N.C. App. ___, 716 S.E.2d 1, 8 (2011) (in a child sex case, the court rejected the defendant's argument that the defendant's sex acts with another child were different from those charged because one occurred in private and the other occurred in public).

By the same token, for most 404(b) purposes, some degree of similarity is required; when the requisite similarity is lacking, the evidence is inadmissible. *See* State v. Davis, ___ N.C. App. ___, 731 S.E.2d 236, 239–42 (2012) (in a child sex case in which the defendant was charged with assaulting his 6-year-old son, the trial court committed reversible error by admitting evidence of the defendant's writings in a composition book about forcible, nonconsensual anal sex with an adult female acquaintance; the events described in the book were not sufficiently similar to the case at bar given that "the only overlapping fact [wa]s anal intercourse"; the actual force described in the book was "not analogous to the constructive force theory that applies with sexual conduct between a parent and child"; aside from anal intercourse, "the acts bore no resemblance to each other, involving different genders, radically different ages, different relationships between the parties, and different types of force"); State v. Flood, ___ N.C. App. ___, 726 S.E.2d 908, 913–14 (2012) (in a case involving a 2007 drug-related murder, the trial court committed reversible error by admitting, to show identity, evidence that the defendant was involved in a 1994 homicide in which he broke into an apartment, found his girlfriend in bed with the victim, and shot the victim; the acts were not sufficiently similar); State v. Gray, 210 N.C. App. 493, 510–13 (2011) (in a child sex case involving a 5-year-old female victim and allegations of digital penetration, the trial court committed prejudicial error by admitting evidence that the defendant had anal intercourse with a 4-year-old male eighteen years earlier; although the incidents both involved very young children and occurred at a caretaker's house where the defendant was a visitor, the nature of the assaults was very different).

When Greater Similarity May Be Required

When the prior acts are very old, the requirement of similarity may be heightened. *See, e.g.,* State v. Webb, 197 N.C. App. 619, 623 (2009) (in a child sexual abuse case, evidence that the defendant abused two witnesses twenty-one and thirty-one years ago was improperly admitted, requiring a new trial; in light of the fact that the prior incidents were decades old, more was required in terms of similarity than that "the victims were young girls in the defendant's care, the incidents happened in [the defendant's] home, and [the defendant] told the [victims] not to report his behavior").

When Similarity Is Not a Factor

In certain circumstances, the requirement of similarity may not apply at all, such as when the 404(b) evidence establishes

- identity by connecting the defendant to the weapon used in the current offense, State v. Dean, 196 N.C. App. 180, 191–92 (2009) (in a murder case, evidence of an assault committed by the defendant two days before the murder at issue was admissible to show identity when ballistics evidence established that the same weapon was used in both incidents; the court rejected the defendant's argument that the incidents were dissimilar);
- motive, State v. Haskins, 104 N.C. App. 675, 682–83 (1991); and
- chain of events leading up to the incident in question, State v. Golden, ___ N.C. App. ___, 735 S.E.2d 425, 429–32 (2012) (in this perpetrating a hoax by use of a false bomb case, the trial court did not err by admitting evidence of the defendant's acts against his estranged wife where those incidents were part of the chain of events leading up to the crime and thus completed the story of the crime for the jury; the court rejected the defendant's argument that the prior acts were not sufficiently similar to the act charged on grounds that similarity was "not pertinent to the purpose for which the incidents were admitted").

Joinder Decision Not Dispositive

"Although the decision to join offenses for trial often involves [an analysis of similarity], the decision to join or not join offenses does not determine admissibility of evidence under Rule 404(b)." State v. Locklear, 363 N.C. 438, 446 (2009).

Temporal Proximity

Temporal proximity is a relevant factor in the admissibility analysis because, as a general rule, the probative value of the other crime, wrong, or act diminishes as the event becomes more remote. *See*, *e.g.*, State v. Barnett, ___ N.C. App. ___, 734 S.E.2d 130, 134 (2012). Unfortunately, there are no bright line rules regarding temporal proximity for purposes of Rule 404(b) admissibility. State v. Maready, 362 N.C. 614, 623–24 (2008) (rejecting a bright line rule). *Compare, e.g.,* State v. Jones, 322 N.C. 585, 587–91 (1988) (in a child sex case, a seven-year gap between the last act on the witness and the first act on the victim made the event too remote to show common plan or scheme), *with* State v. Carter, 338 N.C. 569, 588–89 (1994) (in a murder case, an eight-year gap between a prior assault and the homicide at issue did not make the incident too remote for purposes of establishing identity). However, some general guidelines can be gleaned from the case law. These are discussed below.

Case-by-Case Analysis

The North Carolina Supreme Court has instructed that remoteness must be considered in light of the specific facts of each case. State v. Beckelheimer, ___ N.C. ___, 726 S.E.2d 156, 160 (2012).

Interplay between Purpose and Proximity

The proffered purpose of the 404(b) evidence affects the temporal proximity analysis. *Id*. at 160. For example, remoteness in time may be significant when the 404(b) evidence is introduced to show that the crime arose out of a common scheme or plan. State v. Lloyd, 354 N.C. 76, 91 (2001); *Carter*, 338 N.C. at 588; State v. Mobley, 200 N.C. App. 570, 577 (2009). On the other hand, it may be less significant when the evidence is admitted to show

- modus operandi, *Beckelheimer*, 726 S.E.2d at 160; *see also* State v. Paddock, 204 N.C. App. 280, 287 (2010);
- state of mind, such as malice, State v. Maready, 362 N.C. 614, 624 (2008);
- motive, State v. Locklear, 363 N.C. 438, 448 (2009); State v. Haskins, 104 N.C. App. 675, 682 (1991); or
- lack of accident, *Locklear*, 363 N.C. at 448.

In these instances, remoteness goes to the weight of the evidence rather than to its admissibility. *Beckelheimer*, 726 S.E.2d at 160; *Locklear*, 363 N.C. at 448; *Maready*, 362 N.C. at 624; *Mobley*, 200 N.C. App. at 577.

Pattern of Activity

When the 404(b) evidence occurred some time ago but shows a pattern of similar activity over time, courts have found that the passage of time can actually reinforce rather than undercut the value of the evidence. State v. Shamsid-Deen, 324 N.C. 437, 445 (1989) (prior sexual acts occurring over a twenty-year period were not too remote to be considered as evidence of defendant's common scheme to abuse the victim sexually; "[w]hen similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan"); State v. Khouri, ___ N.C. App. ___, 716 S.E.2d 1, 8–9 (2011) (in a child sex case, 404(b) evidence that the defendant sexually assaulted another child from 2001 to until she turned eighteen in 2007 was admissible where the defendant's sexual assault on the child victim at issue began in 2007; once the defendant discontinued his acts on the first girl, he initiated contact with the victim).

This rule applies with special force in second-degree murder cases where the 404(b) evidence is a pattern of prior motor vehicle offenses being offered to show malice. *Maready*, 362 N.C. at 622–24 (no plain error occurred when the trial judge admitted 404(b) evidence of the defendant's six prior DWI convictions where four occurred in the sixteen years before the events at issue, including one within six months of the event at issue; the convictions "constitute part of a clear and consistent pattern of criminality that is highly probative of his mental state"). However, that does not mean that any combination of prior motor vehicle offenses will be admissible as part of a pattern of behavior to show malice for purposes of second-degree murder. *See, e.g.*, State v. Davis, 208 N.C. App. 26, 43–46 (2010) (the trial court committed prejudicial error by admitting evidence of three of the defendant's four prior DWI convictions to show malice; three of her convictions occurred eighteen or nineteen years prior to the accident at issue, and one occurred two years prior; given the gap between the older convictions and the more recent one, there was not a clear and consistent pattern of criminality, and the older convictions were too remote to be admissible).

Interruption

The age of a conviction may be discounted for periods when the defendant's activity was interrupted by, for example, a prison sentence or lack of access to victims. State v. Barnett, ___ N.C. App. ___, 734 S.E.2d 130, 134 (2012) (five-year gap between incidents of rape was explained by the defendant's lack of access to the victim for three years); State v. Register, 206 N.C. App. 629, 639–41 (2010) (gap between the incidents of abuse occurred because the defendant did not have access to victims); State v. Brooks, 138 N.C. App. 185, 200 (2000) (seventeen-year gap between incidents of assaults on his wives was explained by the defendant's incarceration and lack of marital discord); State v. Frazier, 121 N.C. App. 1, 11 (1995) (gaps between the defendant's acts of sexual abuse on children were explained by the defendant's lack of access to victims); State v. Jacob, 113 N.C. App. 605, 609–12 (1994) (ten-year gap between incidents of sexual abuse of biological children was explained by lack of access to such children). However, in order for a period of time to be excluded from the temporal proximity analysis, the proponent must introduce competent evidence of the period of the interruption. State v. Gray, 210 N.C. App. 493, 509 (2011) (rejecting the State's argument that the time period should be tolled during the defendant's incarceration because the State failed to offer competent evidence as to the length of his incarceration); State v. Delsanto, 172 N.C. App. 42, 51–52 (2006) (State failed to establish interruption).

Rule 403 Balancing

If the evidence is proffered for a proper purpose, meets the requirements of similarity and temporal proximity, and there is sufficient evidence that the defendant committed the act, the court next must engage in a Rule 403 balancing of the evidence's probative value against the danger of undue prejudice, confusion, etc. *See, e.g.,* State v. Oliver, 210 N.C. App. 609, 612–13 (2011). For a discussion of Rule 403 balancing, see Jessica Smith, *Rule 403* (Jan. 2013), *in* The Survival Guide: Superior Court Judges' Benchbook (UNC School of Government), under the link for the "Evidence" section, www.sog.unc.edu/node/1092.

Practically speaking, as a general rule, the trial court's analysis of similarity and temporal proximity feeds into the Rule 403 analysis, State v. Houseright, ___ N.C. App. ___, 725 S.E.2d 445, 448 (2012) (quoting State v. Badgett, 361 N.C. 234, 243 (2007)) ("When the features of the earlier act are dissimilar from those of the offense . . . charged, such evidence lacks probative value. Similarly, when otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor."), as does its determination as to whether the defendant committed the act. State v. Ward, 199 N.C. App. 1, 12–18 (2009) (because prior charges were dismissed for insufficient evidence, the 404(b) evidence failed the Rule 403 balancing).

Trial Practice: Voir Dire, Limiting Instructions

If the admissibility of the 404(b) evidence is not raised in a motion in limine pretrial, the trial court likely will need to hear the evidence outside of the presence of the jury. *See, e.g.,* State v. Beckelheimer, ___ N.C. ___, 726 S.E.2d 156, 160–61 (2012) (noting that the trial court did this).

Admission of 404(b) evidence should be accompanied by an appropriate limiting instruction. *See* State v. Haskins, 104 N.C. App. 675, 680 (1991). For the limiting instruction that should be used for 404(b) evidence, see N.C.P.I.—Crim. 105.40.

Standard of Review on Appeal

When the trial court has made findings of fact and conclusions of law to support its ruling on 404(b) evidence, the appellate court looks to whether the evidence supports the findings and whether the findings support the conclusions. *Beckelheimer*, ___ N.C. ___, 726 S.E.2d at 159. The court reviews de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). *Id.* The appellate court reviews the trial court's Rule 403 determination for abuse of discretion. *Id.*

Common Types of 404(b) Evidence

Examples of common types 404(b) evidence are provided below; this list is not exhaustive.

Defendant's Sex Acts with Another

In sexual assault cases, the courts have been "markedly liberal" with regard to admission of 404(b) evidence of defendants' other sexual acts. *Beckelheimer*, ___ N.C. ___, 726 S.E.2d at 159 (citations, internal quotation marks omitted); State v. Houseright, ___ N.C. App. ___, 725 S.E.2d 445, 447 (2012) (citations, internal quotation marks omitted). Sample cases are annotated below.

Cases Where 404(b) Evidence Was Held Admissible

State v. Beckelheimer, ___ N.C. ___, 726 S.E.2d 156 (2012). In a child sex case, the trial judge did not err by admitting 404(b) evidence of the defendant's sex acts with another. At the time of the alleged offense, the defendant was 27 years old and the victim was the defendant's 11-year-old male cousin. After inviting the victim to his bedroom to play video games, the defendant climbed on top of the victim, pretended to be asleep, unzipped the victim's pants, and performed oral sex on the victim while holding him down. On at least two prior occasions the defendant placed his hands on the victim's genital area outside of his clothes while pretending to be asleep. At trial, a witness testified about sexual activity between himself and the defendant. The witness, then 24 years old, testified that when he was younger than 13 years old, the defendant, who was four-and-one-half years older, performed various sexual acts on him. The witness and the defendant would play video games together and spend time in the defendant's bedroom. The witness described a series of incidents in which the defendant first touched his genital area outside of his clothes while pretending to be asleep and then reached inside his pants to touch his genitals and performed oral sex on him. The witness also related an incident in which he performed oral sex on the defendant in an effort to stop the defendant from digital anal penetration. The court found this conduct sufficiently similar to the acts at issue given the victim's ages, where they occurred, and how they occurred. The court reversed the court of appeals, which had found the evidence inadmissible, improperly focusing on the differences between the acts rather than their similarities (among other things, the court of appeals viewed the acts with the witness as consensual and those with the victim as nonconsensual and relied on the fact that the defendant was only four-and-one-half years older than the witness but sixteen years older than the victim). Given the similarities between the incidents, the remoteness in time was not so significant as to render the prior acts irrelevant, and the temporal proximity of the acts was a question of evidentiary weight. Finally, the court held that the trial court did not abuse its discretion by admitting the evidence under Rule 403.

State v. Houseright, ___ N.C. App. ___, 725 S.E.2d 445 (2012). In a child sex case involving a female victim, the trial court did not err by admitting 404(b) evidence of the defendant's sexual activity with another female child, E.S., to show plan and intent. The conduct with E.S. took place within the same time period as the charged offenses and with a young girl of similar age.

State v. Khouri, ___ N.C. App. ___, 716 S.E.2d 1 (2011). In a sexual assault case involving a child victim, no error occurred when the trial court admitted 404(b) evidence that the defendant engaged in sexual contact with another child to show common plan or scheme. The court rejected the defendant's argument that the acts were not sufficiently similar, concluding that both incidents occurred while the victims were in the care of the defendant, their grandfather; the victims were around the same age when the conduct began; for both victims, the conduct occurred more than once; and with both victims, the defendant initiated the conduct by talking to them about whether they were old enough for him to touch their private parts. The court also determined that the acts met the temporal proximity requirement.

State v. Oliver, 210 N.C. App. 609 (2011). In a case in which the defendant was charged with sexual offense, indecent liberties, and crime against nature against a 10-year-old female victim, no error occurred when the trial court admitted evidence of the defendant's prior bad acts against another teenaged female to show common scheme or plan, identity, lack of mistake, motive, and intent. The defendant's acts with respect to the victim and the other female were similar: the defendant had a strong personal relationship with one of their parents, used the threat of parental disbelief and disapproval to coerce submission and silence, initiated sexual conduct after wrestling or roughhousing, digitally penetrated each victim's vagina, and forced each girl to masturbate him. Only two years separated the incidents and both involved a similar escalation of sexual acts.

State v. Register, 206 N.C. App. 629 (2010). In a child sexual abuse case involving a female victim, the trial court did not err by allowing testimony from four individuals (three females and one male) that the defendant sexually abused them when they were children to show common plan. The events occurred fourteen, twenty-one, and twenty-seven years prior to the abuse at issue. The court rejected the defendant's argument that the evidence lacked sufficient temporal proximity to the events in question. The challenged testimony established a strikingly similar pattern of sexually abusive behavior by the defendant over a period of thirty-one years in that the defendant was married to either the mother or aunt of each witness; all of the victims were prepubescent; the incidents occurred when the defendant's wife was at work and he was watching the children; and the abuse involved fondling, fellatio, or cunnilingus, mostly taking place in the defendant's wife's bed. Although there was a significant gap in time between the last abuse and the events in question, that gap was the result of the defendant's not having access to children related to his wife, and thus it did not preclude admission under Rule 404(b). Finally, the court held that the trial judge did not abuse his discretion by admitting this evidence under Rule 403.

Cases Where 404(b) Evidence Was Held Inadmissible

State v. Glenn, ___ N.C. App. ___, 725 S.E.2d 58, 68 (2012). In a kidnapping, assault, and indecent exposure case, the trial court erred by admitting testimony from a witness about a sexual encounter with the defendant to show identity, modus operandi, intent, plan, scheme, system, or design. The encounter occurred nine years earlier. The witness testified that the partially clothed defendant approached her on foot while she was walking. He exposed his penis to her

and grabbed at her breasts and buttocks. Although he followed her up a driveway, he did not try to restrain her. In the case at hand, however, the victim got in a man's vehicle and discovered that he was partially clothed. The man called her a bitch and grabbed her hair and shirt as she attempted to exit the vehicle, but there was no evidence of a sexual touching. The court concluded: "Given the differences in the two instances, as well as the remoteness in time of the incident . . . admission of the evidence was error."

State v. Gray, 210 N.C. App. 493, 513 (2011). In a case in which the defendant was charged with committing a sexual offense and indecent liberties against a 5-year-old female victim, the trial court committed prejudicial error by admitting evidence that the defendant had anal intercourse with a 4-year-old male eighteen years earlier. The evidence was admitted to show identity, intent, and common scheme or plan. Turning to admission of the evidence for purposes of identity, the court found the eighteen-year gap between the incidents significant. It rejected the State's argument that the time period should be tolled during the defendant's incarceration on grounds that the State failed to offer competent evidence as to the length of his incarceration. Although the incidents both involved very young children and occurred at a caretaker's house where the defendant was a frequent visitor, the nature of the alleged assaults was very different. In light of these differences and "the great length of time" between the incidents, the State failed to show sufficient unusual facts present in both cases or particularly similar acts which would indicate that the same person committed both crimes. The court went on to reach similar conclusions as to admissibility for the purposes of intent and prior scheme or plan.

State v. Webb, 197 N.C. App. 619 (2009). In a child sexual abuse case, 404(b) evidence that the defendant abused two witnesses twenty-one and thirty-one years ago was improperly admitted. In light of the fact that the prior incidents were decades old, more was required in terms of similarity than that the victims were young girls in the defendant's care, the incidents happened in the defendant's home, and the defendant told the victims not to report his behavior.

Defendant's Possession of Pornography

Issues regarding the admissibility of evidence that the defendant possessed pornography arise most commonly in child sex cases. Rule 404(b) evidence that the defendant possessed, viewed, or used pornography may be admissible to show:

- the defendant's preparation for the crime and plan to commit it, State v. Williams, 318 N.C. 624, 631–32 (1986) (in a rape and incest case, evidence that the defendant took his daughter to an x-rated movie and told her to look at scenes depicting graphic sexual acts was admissible); and
- the defendant's motive and intent to commit the crime, State v. Brown, ___ N.C. App. ___, 710 S.E.2d 265, 268–72 (2011) (in a case in which the defendant was charged with sexually assaulting his own minor child, the trial court did not err by admitting evidence that the defendant possessed incestuous pornographic materials; the court rejected the defendant's argument that the evidence was inadmissible under Rule 404(b) absent a showing that he used the materials during the crimes or showed them to the victim at or near the time of the crimes, concluding that the evidence was properly admitted to show motive and intent).

Evidence of possession of pornography also has been admitted to corroborate the victim's testimony; in these circumstances courts have found no Rule 404(b) violation. State v. Rael, 321 N.C. 528, 533–34, (1988) (no violation of Rule 404(b) when evidence of the defendant's

possession of pornographic video tapes and magazines corroborated the victim's testimony that the defendant showed him pornographic material); State v. Brown, 178 N.C. App. 189, 192–93 (2006) (same with respect to photographs).

Evidence of the defendant's possession of pornography may be admissible under Rule 404(b) even if the defendant never showed the material to the victim. *See, e.g., Brown*, ___ N.C. App. ___, 710 S.E.2d at 268–72 (evidence admissible to show motive and intent where pornography was never shown to the victim). However, some proper purpose must exist for the evidence to be admissible. *See, e.g.,* State v. Delsanto, 172 N.C. App. 42, 52–53 (2005) (in a sex offense and indecent liberties case, the trial court erred by admitting testimony that the defendant possessed pornographic magazines where there was no indication that the defendant showed the victim the pornography or used it otherwise in connection with the crime); State v. Bush, 164 N.C. App. 254, 260–64 (2004) (in a child sexual abuse case, the trial court erred by admitting testimony that the defendant bought and owned pornography and by allowing the video box for a film entitled "Little Pussy" to be published to the jury; there was no evidence that the defendant watched the videos with the victim or that he used them in any other way in connection with the alleged offense); State v. Smith, 152 N.C. App. 514, 519–23 (2002) (in a sex offense and indecent liberties case, the trial court erred by admitting evidence of the defendant's possession of pornographic magazines and videos; the court rejected the State's argument that the evidence demonstrated intent, preparation, knowledge, or absence of mistake where there was no evidence that the defendant attempted to or did expose the victim to the pornography).

Prior Motor Vehicle Offenses

As noted on page 10, above, evidence of a defendant's prior motor vehicle offenses is admissible to show malice for second-degree murder in cases involving a vehicular homicide. State v. Maready, 362 N.C. 614, 622–25 (2008). Pending motor vehicle charges are admissible for the same purpose. State v. Rollins, ___ N.C. App. ___, 725 S.E.2d 456, 462 (2012) (trial court did not err by admitting evidence that the defendant received two citations for driving without a license, including one only three days before the crash at issue to show malice). When prior motor vehicle offenses are admitted for this purpose, no violation of the *Wilkerson* rule occurs by admission of the bare fact of the prior motor vehicle offense. See page 3, above.