

CRIMINAL EVIDENCE: HABIT

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I. Introduction.

- A. The Rule.** North Carolina Evidence Rule 406 provides: “Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.”
- B. Substantive Evidence.** Evidence of habit constitutes substantive evidence. See, e.g., *State v. Howell*, 335 N.C. 457, 473 (1994) (evidence of habit is admissible to establish an essential element of a crime).
- C. Distinguished from Character Evidence.** Habit and character are easily confused. A leading treatise distinguishes the two as follows:

Character is a generalized description of a person’s disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness Habit . . . is more specific. It denotes one’s regular response to a repeated situation. If we speak of a character for care, we think of the person’s tendency to act prudently in all the varying situations of life—business, at home, in handling automobiles and in walking across the street. A habit, on the other hand, is the person’s regular practice of responding to a particular kind of situation with a specific type of conduct. Thus, a person may be in the habit of bounding down a certain stairway two or three steps at a time, of patronizing a particular pub after each day’s work, or of driving his automobile without using a seatbelt. The doing of the habitual act may become semi-automatic, as with a driver who invariably signals before changing lanes.

1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 1081 (7th ed. 2013) [hereinafter MCCORMICK]. It is generally understood that this type of evidence is both more probative and less prejudicial than character evidence. *Id.* at 1082. Thus, while there are strict limits on the admissibility of character evidence in a criminal trial, the rules are more permissive with regard to evidence of habit. For a discussion of character evidence, see [Character Evidence](#) under Evidence in this Guide.

II. Test for Admissibility. The North Carolina Supreme Court has instructed:

In determining whether a practice constitutes habit, a court must weigh, on a case-by-case basis, the number of specific instances of the behavior, the regularity of the behavior, and the similarity of the behavior. To rise to the level of habit, the instances of specific conduct must be sufficiently numerous to warrant an inference of systematic conduct and to establish one's regular response to a repeated specific situation.

State v. Fair, 354 N.C. 131, 151 (2001) (citations omitted); State v. Chavis, 141 N.C. App. 553, 562 (2000) (same).

- A. Activity Must Be Regular and Systematic.** To constitute a habit, the activity at issue must be regular and systematic. *Compare Fair*, 354 N.C. at 151 (the defendant's evidence did not show that the victim had a habit of frequenting adult-oriented establishments; on voir dire two witnesses testified that the victim visited their adult-oriented establishments two or three times each month; "[o]ccasional visits to a store do not rise to the level of regular and systematic conduct"), *and Chavis*, 141 N.C. App. at 562 (trial court did not abuse its discretion by excluding the defendant's proffered evidence that the victim had a habit of reporting sexual assaults in order to obtain a pregnancy test; the trial court properly determined that "'two incidents' occurring 'two years apart' were not sufficient to constitute a habit"), *with State v. Palmer*, 334 N.C. 104, 112 (1993) (trial court did not err by allowing the decedent's sister to testify that she was familiar with the decedent's habit of keeping money and that the decedent always kept twenty to forty dollars on her person; the court held that "the custom of always having money on her person constituted a habit"), *and State v. Tappe*, 139 N.C. App. 33, 41 (2000) (where a witness testified to the "customary required procedures routinely utilized by himself and other chemical analysts in administering a [breathalyzer test], including performance of a simulator test," this testimony provided competent evidence that the breathalyzer test administered to the defendant was in conformity with the habit or routine practice of himself and other chemical analysts administering the tests), *and State v. Williams*, 680 S.E.2d 903 (N.C. Ct. App. 2009) (unpublished) (witness's testimony that he saw the defendant once or twice a week and defendant always carried a knife established the defendant's habit of always carrying a knife on his person).
- B. Intemperance As Evidence of Drunkenness.** In accord with the majority rule, the North Carolina Supreme Court has stated that "[m]ere evidence of intemperance ordinarily does not meet the 'invariable regularity' standard required of evidence of habit." *State v. Hill*, 331 N.C. 387, 408 (1992) (citation

omitted); see *generally* 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 582-83 (7th ed. 2012) (so stating the general rule). However, evidence that the victim always arrived home from work at 5:15 pm, removed his shoes and tie, and had two martinis likely will establish a habit of drinking two martinis after work.

III. Method of Proof.

- A. Opinion Testimony.** The easiest way to prove habit is with opinion testimony. In order to provide such an opinion, the witness must be “sufficiently familiar with a person’s conduct to conclude that the conduct in question is habitual.” *State v. Tappe*, 139 N.C. App. 33, 40 (2000) (citing *Crawford v. Fayez*, 112 N.C. App. 328, 332 (1993) (civil case)); see *generally* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE 356 (7th ed. 2011) [hereinafter BRANDIS & BROUN]; ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS § 7-3(A) (2d ed. 2006) (“To be qualified to express an opinion on the existence of a habit, the witness must have been familiar with the person or business for a substantial time and observed numerous instances of the person’s or business[’s] relevant conduct.”) [hereinafter EVIDENTIARY FOUNDATIONS].
- B. Specific Instance of Conduct.** Specific instances of conduct may be used to prove habit, provided that the specific instances are sufficient in number to establish a regular practice. *Crawford*, 112 N.C. App. at 335 (civil case); see *generally* BRANDIS & BROUN at p. 356; EVIDENTIARY FOUNDATIONS at § 7-3(A).
- C. Corroboration and Eyewitnesses Not Required.** The evidence of habit need not be corroborated and is admissible “regardless of the presence of eyewitnesses” to the incident in question. N.C. R. EVID. 406.

IV. Discretionary Decision. The trial court’s ruling on the admissibility of habit evidence will not be disturbed absent an abuse of discretion. *State v. Fair*, 354 N.C. 131, 151 (2001); *State v. Chavis*, 141 N.C. App. 553, 562 (2000).

V. Trial Practice.

- A. Preliminary Determination.** The trial judge should make a preliminary determination that the evidence is sufficient to establish a habit. See *generally* N.C. R. Evid. 104 (preliminary determinations of admissibility). This will involve a voir dire outside of the presence of the jury. See, e.g., *State v. Fair*, 354 N.C. 131, 151 (2001) (noting that the trial judge conducted such a voir dire).
- B. Relation to Rule 403.** In some circumstances, such as where a party seeks to prove habit through a succession of witnesses who each will testify to a single specific act repeated over a great length of time, Rule 403 may come into play with respect to considerations of undue delay, etc. See *generally* [Criminal Evidence: Rule 403](#), under Evidence in this Guide.