

## CRIMINAL EVIDENCE: RELEVANCY

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### I. Relevancy — Generally

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

#### Rule 401

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

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

**Rule 402**

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

- C. Logical Relevancy Versus Legal Relevancy.** Rule 401 sets out a rule of logical relevancy—it provides that evidence is relevant if it has a logical connection to a fact of consequence. However, not all relevant evidence is admissible. The rules of legal relevancy exclude, for a variety of reasons, evidence that has logical relevance. The concept of legal relevancy is embedded in Rule 402, which provides that relevant evidence is admissible “except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules.” See *also* *State v. Ervin*, 298 N.C. App. 420, 426 (2025) (describing Rules 401 and 402). One example of a rule of legal relevance contained in the evidence code is Rule 403, which excludes relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, confusion, etc. See [Rule 403](#). Others are Rule 410, which excludes, among other things, certain relevant statements made in connection with plea discussions in order to promote plea bargaining and Rule 412, commonly known as a rape shield rule. See [Criminal Evidence: Pleas and Plea Discussions](#); [Sexual Assault Cases](#). An example of a constitutional rule of legal relevancy is the *Crawford* rule, which excludes relevant evidence that violates the defendant’s confrontation clause rights. See [Crawford & The Confrontation Clause](#).
- D. “Any Tendency.”** To be relevant, evidence must have probative value. Rule 401 defines relevant evidence as evidence “having any tendency” to make a fact of consequence more or less probable. The evidence need not be conclusive of the fact; it need only throw “any light” on the issue. *State v. Smith*, 357 N.C. 604, 613 (2003) (citation omitted) (noting that the weight of the evidence is a question for the jury); *State v. Miller*, 197 N.C. App. 78, 86-87 (2009) (“The value of the evidence need only be slight.” (citation omitted)). Thus, evidence is not subject to exclusion under Rule 401 simply because its probative value is weak (although that fact may be considered in a decision whether to exclude the evidence under Rule 403, which balances probative value against unfair prejudice, waste of time, etc.). The fact that the evidence is duplicative of other admissible evidence, while pertinent to a Rule 403 analysis, is not pertinent for Rule 401 purposes. *State v. Jones*, 358 N.C. 330, 341 (2004).
- When the required probative value is absent, courts sometimes say that the evidence is too “speculative” or “tenuous” to be relevant. See, e.g., *State v. Roache*, 358 N.C. 243, 296 (2004) (evidence that was only “tenuously related” was irrelevant); *State v. Baker*, 320 N.C. 104, 108 (1987) (evidence was “too speculative” to be relevant).
- E. Relevancy Versus Sufficiency.** The question of relevancy (any tendency to make a fact of consequence more or less likely) is different from the question of sufficiency (whether there is enough evidence to go to the jury). Evidence may be relevant but insufficient to take the issue to the jury. Additionally, the strength

of the evidence goes to the issue of sufficiency, not admissibility. See Commentary to N.C. R. EVID. 401 (“[T]he language of the rule . . . avoid[s] confusion between questions of admissibility and questions of the sufficiency of the evidence”).

- F. “Fact . . . of Consequence.”** To be relevant, the evidence must have a tendency to make the existence of “any fact that is of consequence to the determination” more or less probable. This part of the rule essentially establishes a requirement of materiality: if the evidence does not help to establish a fact that is material to the case, it is not relevant. See, e.g., *State v. Cowan*, 194 N.C. App. 330, 332 (2008) (at the defendant’s drug trial, evidence about his aunt’s prior drug trafficking trial and conviction was irrelevant where there was no evidence that the aunt’s criminal activities had any relation to the defendant’s alleged crimes); *State v. Bodden*, 190 N.C. App. 505, 509 (2008) (nine-millimeter bullet found near a murder scene was irrelevant where the bullets used to shoot the victim were .38 or .357 caliber). Whether a fact is of consequence depends on the substantive law at issue in the case.

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

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

Circumstantial evidence requires an inference to be made from the evidence. For example: in order to identify the defendant as the perpetrator of an armed robbery, the State seeks to introduce evidence that the defendant was seen with the weapon used in the robbery minutes after the crime occurred. In this situation, an inference is required to connect the evidence (the defendant’s possession of the weapon minutes after the crime) with the fact sought to be proved (that the defendant was the perpetrator). Circumstantial evidence may be used to establish a fact of consequence. See, e.g., *State v. Whiteside*, 325 N.C. 389, 397-98 (1989) (defendant’s tennis shoes and expert testimony concerning their similarity to footwear impressions at the crime scene were admissible circumstantial evidence tending to connect defendant to the murder; it was reasonable to infer from the State’s evidence that defendant was wearing the tennis shoes on the night of the murder notwithstanding conflicting evidence that he was wearing boots). In fact, “[t]he law makes no distinction between the weight to be given to either direct or circumstantial evidence.” N.C.P.I. – CRIM.104.05. However, because of the inference involved with circumstantial evidence, most complicated relevancy issues involve circumstantial evidence.

- H. Testimonial, Real, and Demonstrative Evidence.** Evidence may be testimonial (e.g., a witness’s testimony under oath in court), real (e.g., a letter, a quantity of a controlled substance, or a murder weapon), or demonstrative (e.g., a model, a chart, or a demonstration of how events occurred). To be admissible as

substantive evidence, all types of evidence—testimonial, real, and demonstrative—must be relevant. See, e.g., *State v. Fowler*, 159 N.C. App. 504, 511 (2003) (demonstration was relevant to whether the defendant killed the victim with premeditation and deliberation).

- I. **Relevancy Inquiry.** When analyzing relevancy, it may be helpful to follow this simple analytical framework:

#### Steps for Assessing Relevancy

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

- J. **Preliminary Question/Procedure.** Relevancy is a preliminary question for the court under Rule 104(a). In making the preliminary determination as to relevancy, the court is not bound by the rules of evidence, except for those relating to privileges. N.C. R. EVID. 104(a).

- K. **Conditional Relevancy.** When evidence is relevant only if some other preliminary fact which also requires proof exists, Rule 104(b) provides that the court is to admit the evidence upon, or subject to, the introduction of sufficient evidence to allow the jury to find that the preliminary fact exists. This principle is called “conditional relevancy.” The Commentary to Rule 401 provides an example: If evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged with notice heard the statement. In this example from the Commentary, the relevancy of the spoken statement is conditioned on it having been heard by the person charged with notice.

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

- L. **When Irrelevant Evidence Reaches the Jury.** Sometimes irrelevant evidence may reach the jury, such as when the other side fails to object or the judge errs when ruling on a relevancy objection. There do not seem to be any hard and fast rules on how a judge should handle this situation when the judge realizes it has occurred. It seems appropriate to consider how damaging the irrelevant evidence is and whether a limiting instruction is necessary or would be effective to cure the error.

- M. Standard on Appeal.** A trial court's rulings on relevancy are not discretionary and are reviewed de novo rather than for abuse of discretion. *See, e.g., State v. Triplett*, 368 N.C. 172, 175 (2015); *State v. Ervin*, 298 N.C. App. 420, 426 (2025). However, the appellate courts give such rulings great deference on appeal. *Id.*

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

- A. Witness's Background.** Rule 401 permits the use of background information introducing a witness. *State v. Gillard*, 386 N.C. 797, 826 (2024); *see also* Commentary to N.C. R. EVID. 401. Basic introductory information, such as a witness's name or residence often is uncontroversial. *See Gillard*, 386 N.C. at 826 (describing it as "elementary" that such preliminary questions are proper). More extensive introductory information also may be admitted when that information aids the jury in deciding disputed issues of fact. *Id.* (no error in admitting lengthy introductory evidence including witness's abusive childhood and work as a prostitute).
- B. "Context," "Circumstances," "Chain of Events," And Related Evidence.** Evidence is relevant if it establishes the context or circumstances of an event or if it explains a chain of events. *See Gillard*, 386 N.C. at 824 (evidence of victim's abusive background and subsequent prostitution was relevant to explain why she was engaging in prostitution on the night she was murdered); *State v. Barden*, 356 N.C. 316, 349 (2002) (evidence of victim's work duties and payday routine was relevant to explain why he was working late and where he kept his money at the time he was murdered); *State v. Hope*, 189 N.C. App. 309, 314 (2008) (evidence of the victim's drug use was relevant to the context and chain of events surrounding his murder).

In certain circumstances, this category of evidence may incidentally reveal a defendant's commission of a prior bad act. *See, e.g., State v. Agee*, 326 N.C. 542, 549 (1990); *State v. Ervin*, 298 N.C. App. 420, 427-29 (2025). When the chain of events evidence reveals a bad act, the courts typically find Rule 404(b) to be no bar to admission, on grounds that the evidence is admissible for the proper purpose of completing the story of the crime by providing immediate context, and not to show the defendant's propensity for bad acts. *See, e.g., Agee*, 326 N.C. at 549; *Ervin*, 298 N.C. App. at 428; *see generally* [Rule 404\(b\): Evidence of Other Crimes, Wrongs, or Acts](#) in this Benchmark.

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

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

*See, e.g., State v. Abbitt*, 385 N.C. 28, 40-41 (2023). Both prongs must be satisfied for guilt of another evidence to be properly admitted. *Id.* at 43-44 (trial court and the State agreed with the defense at trial that the evidence pointed directly to the guilt of a specific other person; trial court properly excluded

evidence because it was not inconsistent with the defendant's guilt); *see also* State v. May, 354 N.C. 172, 176-77 (2001) (evidence showing that another person had recently argued with the victim, had been hospitalized for violent hallucinations, and had a violent history was properly excluded because it was not inconsistent with the defendant's guilt where the State's evidence put both the defendant and that person at the scene).

By contrast, evidence which creates only an inference or conjecture as to another's guilt is irrelevant and inadmissible. Abbitt, 385 N.C. at 40-41. As our courts have stated: "[e]vidence which tends to show nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded." *Id.* (quoting State v. Brewer, 325 N.C. 550, 564 (1989)); *see also* State v. Williams, 355 N.C. 501, 532-33 (2002) (the trial court properly excluded defense evidence that other men may have committed the homicide in question where no evidence implicated one of them in the crime and the only evidence connecting another to it was that he discovered the victim's body about 200 yards away from an abandoned truck in which he was living); State v. Hamilton, 351 N.C. 14, 20 (1999) (evidence of a prior knife threat by another was properly excluded; no unusual facts surrounding the threat were present in the murder at issue; the evidence did not point directly to the other person's guilt); State v. McNeill, 326 N.C. 712, 721-22 (1990) (even if another person had possession of an item similar to one owned by the murder victim, such possession did not put him at the scene and was not inconsistent with the defendant's guilt).

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

*State v. Israel*, 353 N.C. 211, 219 (2000) (new trial; evidence that another individual had the opportunity to kill the victim and a history of violent, recent dealings with the victim cast doubt upon the defendant's guilt and implicated another person as the perpetrator beyond conjecture or mere implication).

*State v. Sneed*, 327 N.C. 266, 271 (1990) (excluded evidence tended to show that another identified person committed a robbery and killed the victim; all of the evidence showed that only one person was involved in the crime).

*State v. McElrath*, 322 N.C. 1, 13-14 (1988) (evidence of a larceny scheme in which the murder victim and his companions appeared to be involved was relevant where the defense alleged that the victim was killed by one of the companions after a falling out).

*State v. Cotton*, 318 N.C. 663, 667 (1987) (evidence that within a short time of the burglary and sexual assault at issue, three homes in close proximity were broken into and the female occupants were sexually assaulted and that someone other than the defendant committed one of the other break-ins).

The United States Supreme Court has held that there are constitutional limitations on rules that exclude evidence of guilt of another. Specifically, in *Holmes v. South Carolina*, 547 U.S. 319, 330-31 (2006), the Court held that a defendant's federal constitutional right to present a defense was violated by a state evidence rule providing that a defendant may not introduce evidence of guilt of another if the prosecution has introduced strong forensic evidence of guilt. The Court held that the state rule was arbitrary, reasoning that by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. The Court of Appeals has distinguished *Holmes* and held that North Carolina's rule regarding guilt of another is not arbitrary. *State v. Loftis*, 185 N.C. App. 190, 202 (2007). The North Carolina Supreme Court also has cited *Holmes* while affirming the exclusion of guilt of another evidence that implicated others but did not exculpate the defendants. *Abbitt*, 385 N.C. at 40.

- D. Demonstrations and Experiments.** A demonstration is an illustration or explanation by exemplification or practical application. *State v. Golphin*, 352 N.C. 364, 434 (2000). For courtroom demonstrations, the demonstrator need not be an expert, but a proper foundation must be laid as to the demonstrator's familiarity with what he or she is demonstrating. *State v. Hunt*, 80 N.C. App. 190, 193 (1986). Demonstrations are subject to ordinary relevancy principles requiring that they make a fact of consequence more or less probable. See, e.g., *Golphin*, 352 N.C. at 436-37 (demonstration of the effect of pepper spray relevant to rebut the defendant's claim that he could not have committed the crime because he was debilitated by the spray); *State v. Murillo*, 349 N.C. 573, 601 (1998) (demonstration relevant to show that it was physically impossible for the wounds to have been inflicted by accident, as alleged by the defendant).

In contrast to a demonstration, 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." *Golphin*, 352 N.C. at 433-34 (internal quotation omitted); see also *Hunt*, 80 N.C. App. at 193 (noting that it is not always simple to distinguish between an experiment and a demonstration). Experiments are subject to ordinary relevancy principles and "the further restriction that the circumstances of the experiment must be substantially similar to those of the occurrence before the court." See, e.g., *State v. Jones*, 287 N.C. 84, 98 (1975); see also *Golphin*, 352 N.C. at 434 (exact similarity is not required; trial court has broad discretion to determine whether conditions are sufficiently similar). Many cases stating the substantial similarity requirement were decided prior to the 2011 amendment to Rule 702 adopting the federal standard for admission of expert testimony. See generally [Expert Testimony](#). When experimental evidence is presented through expert testimony, substantial similarity is now considered as part of the amended Rule 702 reliability inquiry rather than as a separate admissibility test. *State v. Turner*, 273 N.C. App. 701, 706–08 (2020). Experimental evidence is not, however, categorically limited to expert testimony. *State v. Chapman*, 244 N.C. App. 699, 715 (2016), decided after the 2011 amendment, applied the traditional substantial-similarity requirement to an experiment conducted and described by a detective without addressing Rule 702, which suggests that the requirement remains applicable when experimental evidence is not governed by that rule.

- E. Weapons and Ammunition.** The relevance of weapons and ammunition is frequently litigated. Common bases on which evidence of weapons and ammunition may be relevant include:
- as an element of the charged offense, *see, e.g.*, *State v. Glasco*, 160 N.C. App. 150, 154-56 (2003) (in a felon in possession case, rifle was properly admitted as real evidence);
  - proof of the weapon's use as the instrumentality of a charged offense, *see, e.g.*, *State v. Grooms*, 353 N.C. 50, 71-72 (2000) (knife and hacksaw evidence was relevant where the items were consistent with the victim's wounds; the absence of a conclusive connection affected weight, not admissibility);
  - identification of the defendant or connection of the defendant to the offense, *see, e.g.*, *State v. Gillard*, 386 N.C. 797, 821-22 (2024) (in a case where the firearm used in a murder was never recovered, evidence of defendant's preference for and prior assaultive use of a firearm was relevant because it made it more probable that he possessed and used the firearm in the murder); *State v. Royster*, 237 N.C. App. 64, 70 (2014) (ammunition found at the defendant's residence linked him to shell casings of the same brand and caliber found at the crime scene);
  - proof of planning, intent, or state of mind, *see, e.g.*, *State v. Stewart*, 231 N.C. App. 134, 139-40 (2013) (firearms and ammunition not used in charged offense nevertheless were relevant to show the defendant's advanced planning and state of mind);
  - explanation of the context, circumstances, or chain of events, *see, e.g.*, *State v. Broussard*, 239 N.C. App. 382, 387-89 (2015) (firearms found in the vehicle when the defendant was arrested were relevant to explain the circumstances surrounding his flight, although they were not connected to the charged crime); or
  - connection to drug activity; *see, e.g.*, *State v. Boyd*, 177 N.C. App. 165, 171-72 (2006) (fact that a shotgun was found in a closet in the defendant's home was relevant to drug possession and trafficking charges).

With respect to weapons alleged to be instrumentalities of a charged offense, the general rule is that they are "relevant . . . 'where there is evidence tending to show that they were used in the commission of [the] crime.'" *State v. Thomas*, 281 N.C. App. 159, 187 (2021) (quoting *State v. Sierra*, 335 N.C. 753, 761 (1994)). It is not necessary that the proponent conclusively connect the weapon or ammunition to the crime. The lack of evidence establishing such a conclusive connection goes to weight, not admissibility. *See, e.g.*, *Grooms*, 353 N.C. at 71-72 (absence of a conclusive connection between a saw and knife to victim's wounds affected weight, not admissibility); *State v. DeCastro*, 342 N.C. 667, 681-82 (1996) (evidence of a knife found three months after the murder in a pond some distance from the scene was relevant; the lapse in time in finding the knife and its distance from the scene affected weight, not admissibility); *State v. Felton*, 330 N.C. 619, 638 (1992) (the failure of State's expert to conclusively match bullets to the murder weapon affected the weight, not admissibility).

If the evidence is insufficient to connect the weapon or ammunition to the crime in question, evidence of the weapon or ammunition is irrelevant. *Thomas*,

281 N.C. App. at 187 (evidence of a .45 caliber bullet was irrelevant where the murder weapon was .40 caliber); *see also State v. Samuel*, 203 N.C. App. 610, 618-21 (2010) (in an armed robbery case, admission of evidence of two guns found in the defendant's home was reversible error where "not a scintilla of evidence link[ed] either of the guns to the crimes charged"); *State v. Patterson*, 59 N.C. App. 650, 653 (1982) (admission of irrelevant evidence concerning a sawed-off shotgun found in the defendant's car was reversible error when the robbery was committed with a small handgun).

However, in drug cases, courts sometimes have held that evidence regarding gun possession is relevant on the basis of a common sense connection between guns and drugs. *See, e.g., State v. Boyd*, 177 N.C. App. 165, 171-72 (2006) (fact that a shotgun was found in a closet in the defendant's home was relevant to drug possession and trafficking charges); *State v. Huerta*, 221 N.C. App. 436, 445-46 (2012) (following *Boyd* in a drug trafficking and maintaining a dwelling case where the evidence showed that a handgun and ammunition were found in the defendant's home).

- F. 404(b) Evidence.** Under Rule 404(b), evidence of other crimes, wrongs, or acts may be admissible if offered for a proper purpose. *State v. Rael*, 321 N.C. 528, 534 (1988). However, even if offered for a proper purpose, the 404(b) evidence must be relevant. *Compare id.* (evidence of sexually explicit video and magazines discovered at defendant's residence were relevant to corroborate victim's testimony that defendant showed him such material at the time of committing the sexual offenses at issue), *with State v. Sheffield*, 282 N.C. App. 667, 676 (2022) (evidence of dildos discovered at defendant's residence was "entirely irrelevant" where there was no evidence that defendant exposed the victim to them in connection with the sexual offense at issue). A significant relevancy issue with regard to 404(b) evidence comes from the rule that 404(b) evidence only is relevant if the proponent sufficiently establishes that the act was in fact committed by the defendant. For a detailed discussion of this and other Rule 404(b) issues, see [Rule 404\(b\): Evidence of Other Crimes, Wrongs, or Acts](#).
- G. Relevance in Self-Defense Cases of Victim's Character or Prior Conduct.** When self-defense is at issue, evidence of the victim's violent or aggressive character or past conduct known to the defendant and related to the confrontation at issue may be relevant to the reasonableness of the defendant's fear or apprehension and belief in the need to defend. *State v. Hague*, 389 N.C. 552, 557-58 (2026). Evidence of the victim's violent character also may be relevant to whether the victim was the aggressor, regardless of whether the defendant knew of the victim's character. *State v. Watson*, 338 N.C. 168, 187-88 (1994), overruled in part on other grounds by *State v. Richardson*, 341 N.C. 585 (1995). However, the admissibility of such evidence is governed primarily by Rules 404(a), 404(b), 405, and 403. For a fuller discussion, see [Character Evidence](#) and [Rule 404\(b\): Evidence of Other Crimes, Wrongs, or Acts](#).
- H. Flight.** Evidence of the defendant's flight is routinely admitted to show consciousness of guilt. *See, e.g., State v. Bracey*, 388 N.C. 689, 694 (2025) (defendant's flight was relevant to whether defendant knew or had reasonable grounds to believe a firearm he possessed was stolen, even though he had other reasons to flee, including avoiding culpability for possessing a firearm as a felon); *State v. King*, 343 N.C. 29, 39-40 (1996) (evidence of a high speed police chase

four months after a shooting was relevant evidence of flight); *State v. McDougald*, 336 N.C. 451, 456-57 (1994) (evidence of a jail escape constituted evidence of flight, which is relevant to show consciousness of guilt); *State v. Williamson*, 122 N.C. App. 229, 232 (1996) (evidence of the defendant's failure to appear for trial was relevant in determining guilt); *see also* N.C.P.I. – CRIM. 104.35 and 104.36 (pattern jury instructions on flight). For the same reason, one case held to be relevant the defendant's statement that he would have fled if he had been given the opportunity to do so. *State v. Capers*, 208 N.C. App. 605, 616-17 (2010). Except to rebut evidence that the defendant attempted to flee or escape, a defendant generally is not allowed to offer his or her refusal to flee, despite an opportunity to do so, as evidence of innocence. *See State v. Burr*, 341 N.C. 263 (1995); *State v. Edwards*, 276 N.C. App. 45, 48 (2021).

**I. Evidence of Affiliation with a Criminal Gang or Other Organization.**

Evidence of membership in an organization may be admitted only if relevant to the defendant's guilt. *State v. Allen*, 265 N.C. App. 480, 489 (2019). This issue frequently arises in the context of alleged criminal gang affiliation, such as with evidence of gang-related tattoos or clothing associated with a gang. *Id.*; *see also State v. Hinton*, 226 N.C. App. 108, 113 (2013) (plain error to allow officer's "extensive" testimony referencing gangs and gang-related activity where the evidence was not relevant to guilt or to an aggravating factor). Courts, however, state the relevance requirement as applying more broadly to "membership in an organization." *Allen*, 265 N.C. App. at 489; *see also State v. Tatum-Wade*, 229 N.C. App. 83, 92-94 (2013) (considering relevance of defendant's alleged association with "tax protestor" and "sovereign citizen" groups).

In some cases, this rule may require careful parsing of the evidence to distinguish which evidence is relevant and which is not. *See, e.g., State v. Privette*, 218 N.C. App. 459, 479-83 (2012) ((1) the trial court erred by admitting evidence concerning the history of the Bloods gang and the activities of various Bloods subsets where the evidence was not relevant; (2) the trial court did not err by allowing evidence about the hierarchy of gang structure when evidence regarding the defendant's position in the gang was relevant to extortion-related charges where, among other things, it helped explain a third party's decision to confess; (3) the trial court did not err by admitting photograph of the defendant's tattoos and related testimony describing the relationship between some of these tattoos and Bloods symbols where that evidence explained the defendant's position in gang hierarchy).

Note that 2026 legislation, S.L. 2026-37, enacted new G.S. 14-50.34, which provides that "[c]riminal gang activity, membership, association, leadership, and existence may be proven through the testimony of a fact witness, an expert witness, or a combined fact and expert witness pursuant to [the Rules of Evidence]." In proceedings under Article 13A of G.S. Chapter 14, the North Carolina Criminal Gang Suppression Act, "expert testimony is admissible to show particular conduct, status, and customs indicative of criminal gangs and criminal gang activity." G.S. 14-50.34, as enacted by S.L. 2026-37. S.L. 2026-37 also enacted new Evidence Rule 416, which provides that "[i]n any proceeding in which a person is accused of conducting, participating in, or conspiring to commit criminal gang activity, or in any proceeding under Article 13B of Chapter 14 of the General Statutes, evidence of the defendant's commission of criminal gang activity may be considered for the purpose of proving any element of the alleged criminal offense." N.C. R. EVID. 416, as enacted by S.L. 2026-37 (also providing

that the rule is not the exclusive means of admitting or considering evidence it describes). New Rule 416 generally requires a prosecutor to disclose evidence intended to be offered under the rule at least 10 days in advance of trial. Both provisions are effective December 1, 2026 and apply to offenses committed on or after that date.

- J. “Negative Evidence.”** Sometimes a party will seek to admit evidence to prove that an alleged fact does not exist or that certain evidence could not be obtained. See *generally* *Old Chief v. United States*, 519 U.S. 172, 188 (1997) (noting that if the jurors’ expectations about what proper proof should be are not satisfied, e.g., production of a gun in a case alleging use of a firearm, the jurors “may penalize the party who disappoints them by drawing a negative inference against that party.” (quotation omitted)). Such evidence generally is relevant. See, e.g., *State v. Wiggins*, 161 N.C. App. 583, 591-92 (2003) (in a sexual assault case, an expert’s testimony was relevant when it explained why there would be no physical findings even after years of sexual abuse); *State v. Chavez*, 241 N.C. App. 562, 569 (2015) (similar expert testimony was relevant). However, the proponent of such evidence must establish that the witness’s “position with respect to the matter was such that [he or she] would have known of the existence of the fact had it been true.” *State v. Hamlette*, 60 N.C. App. 306, 318 (1983) (prejudicial error to admit negative evidence by an officer that there was no evidence pointing to the guilt of a third party when the officer’s involvement with the investigation was insufficient to form an adequate basis for the negative testimony).
- K. Collateral Impact Evidence.** Evidence offered solely to show the collateral impact of a crime on the victim or others is rarely relevant during the guilt phase of a trial. See, e.g., *State v. Hembree*, 368 N.C. 2, 16 (2015) (the effect of the victim’s death on others is “only rarely relevant” to guilt); *State v. Graham*, 186 N.C. App. 182, 190-92 (2007) (witness testimony regarding how seeing the attack on her son had affected her mental health was irrelevant in guilt phase of trial); *State v. Bowman*, 188 N.C. App. 635, 645-46 (2008) (reversible error to allow previous victims of the defendant’s sex offenses to testify about the emotional impact of the crimes). However, evidence that has independent relevance to guilt may be admissible on that basis even if it also shows the effect of the crime on the victim or his or her family. Examples of such situations include evidence with a tendency to show the context or circumstances of the crime, see, e.g., *State v. Barden*, 356 N.C. 316, 346-49 (2002) (evidence showing that the murder victim sent money to his wife and child and why the victim needed money was relevant), and evidence that bears on a witness’s credibility. *State v. McCutcheon*, 281 N.C. App. 149, 155 (2021) (evidence of victim’s brother’s grief over victim’s death was relevant to brother’s credibility as a witness).

Note that G.S. 15A-833(a) gives a victim the right to offer “victim impact” evidence that must be considered by the court or jury in sentencing. Victim impact evidence may include the collateral effects of the offense on the victim or the victim’s family. See *Graham*, 186 N.C. App. at 190 (“[v]ictim impact evidence is generally relevant and admissible in sentencing”; also explaining that courts have allowed evidence of the collateral impact of a crime on a victim’s family at sentencing). Although the Rules of Evidence, other than those with respect to privileges, do not apply at sentencing, victim-impact evidence remains subject to

statutory relevance requirements. See N.C. R. EVID. 1101(b)(3) (evidence rules do not apply at sentencing proceedings); G.S. 15A-1334(b) (at noncapital sentencing proceeding parties “may present witnesses and arguments on facts relevant to the sentencing decision” but “formal rules of evidence do not apply”); G.S. 15A-2000(a)(3) (at capital sentencing proceeding “[e]vidence may be presented as to any matter that the court deems relevant to sentence”); see also *State v. Allen*, 360 N.C. 297, 310 (2006) (victim impact evidence must not be so prejudicial that it renders sentencing proceeding fundamentally unfair).

- L. Motive for Reporting Crime or Delay in Reporting.** Cases have held that evidence is relevant if it explains the victim’s motive for reporting the crime, *State v. Whitman*, 179 N.C. App. 657, 668 (2006) (photographs of children, taken from the defendant’s house by the victim, were relevant to the victim’s motive (protecting the other children) for coming forward with allegations of sexual abuse), or delay in reporting. See *State v. Betts*, 377 N.C. 519, 526 (2021) (evidence of defendant’s past domestic violence against victim’s mother was relevant to show why she delayed reporting sexual abuse).
- M. Photographs.** Photographs are subject to ordinary principles of relevance and are “usually competent to explain or illustrate anything that is competent for a witness to describe in words.” *State v. Hennis*, 323 N.C. 279, 283 (1988). Thus, depending on the issues in the case, photographs may be relevant to a wide variety of facts of consequence, including to depict a person’s condition, to depict the crime scene, to illustrate a witness’s testimony, or to corroborate other evidence. See, e.g., *State v. Hyde*, 352 N.C. 37, 54-55 (2000) (photographs were relevant on all these bases). Photographs also may establish a person’s identity. See, e.g., *State v. McNeill*, 326 N.C. 712, 720 (1990) (victim’s identity); *State v. Carpenter*, 232 N.C. App. 637, 642 (2014) (defendant’s identity). The admissibility of photographs often turns on evidentiary issues other than relevancy, such as whether they are properly authenticated, are unfairly prejudicial, or are impermissibly offered solely as propensity evidence.