CRIMINAL EVIDENCE: RULE 403

Jessica Smith, UNC School of Government (March 2015)

Contents

I. Introduction. Rule 403 is a rule of legal relevancy. Rules of legal relevancy limit the admissibility of evidence that is logically relevant. *See* N.C. R. EVID. 402. In the case of Rule 403, it allows a trial judge to exclude evidence if its probative value is substantially outweighed by its costs. The rule provides:

> **Rule 403**
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> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

II. Balancing Generally.

A. Broad Balancing Test. While many think of Rule 403 as involving a balancing of probative value versus prejudice, the rule is broader. The rule allows for the exclusion of relevant evidence when it is substantially outweighed by the danger of:

- unfair prejudice,
- confusion of the issues,
- misleading the jury,
- undue delay,
- waste of time, or
- needless presentation of cumulative evidence.

B. Substantially Outweighed. Rule 403 provides for exclusion when relevancy is "substantially outweighed" by the danger of unfair prejudice, etc. *See* State v. Walters, 209 N.C. App. 158, 163 (2011) ("[T]he trial judge must determine whether the *unfair* prejudice *substantially* outweighs the probative value." (emphasis in original)). This suggests that exclusion requires something more than a slight tipping of the scales.

C. Unfair Prejudice. In a criminal case, all of the State's evidence that tends to establish guilt is prejudicial to the defense. Exclusion under Rule 403 is not justified simply because the evidence is prejudicial, or even highly prejudicial. *See, e.g.*, State v. Rainey, 198 N.C. App. 427, 433 (2009) ("While all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial."). Rather, the inquiry under Rule 403 is whether relevancy is substantially outweighed by "unfair prejudice," etc. State v. Mercer, 317 N.C. 87, 94 (1986). "Unfair prejudice" refers to the "capacity of some concededly relevant evidence to lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997) (interpreting similar federal rule). Put another way, unfair prejudice means an undue tendency to suggest decision on an improper basis, such as emotion. *See id.*; State v. DeLeonardo, 315 N.C. 762, 772 (1986).

D. Confusion of the Issues or Misleading the Jury. Evidence is excludable under Rule 403 if its probative value is substantially outweighed by danger of confusion of the issues or misleading the jury. Cases holding that the trial court did not abuse its discretion by excluding evidence on the basis of these factors include:

> *State v. King*, 366 N.C. 68, 75-77 (2012) (trial court did not abuse its discretion by excluding the State's expert testimony regarding repressed memory where the trial court found that "the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse or mislead the jury").
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> *State v. Smith*, 359 N.C. 199, 209-10 (2005) (basis of expert's opinion that defendant's cocaine dependency impaired his ability to reason, plan, and think was properly excluded where basis included defendant's own

statements; defendant's self-serving statements were the only evidence of cocaine use on the day in question; the trial court found that the jury would have difficulty following a limiting instruction and understanding that the statements were not offered for their truth).

State v. Brown, 335 N.C. 477, 487 (1994) (no abuse of discretion in excluding an accomplice's uncorroborated statement on grounds it would mislead the jury where statement was "clearly false" and the accomplice was unavailable to testify).

State v. Cook, 195 N.C. App. 230, 240-42 (2009) (in a case where the defendant was charged with having sex with his stepdaughter, evidence that the victim had sex with her boyfriend even if not barred by Rule 412 would have created confusion where there was no evidence that such activity could have caused the victim's injuries).

State v. Hall, 187 N.C. App. 308, 315-16 (2007) (testimony by defense expert regarding likelihood of defendant's release from involuntary commitment if found not guilty by reason of insanity; any value of evidence was outweighed by confusion).

State v. McLean, 183 N.C. App. 429, 434-35 (2007) (no abuse of discretion in excluding defense expert testimony on identification procedures; expert did not interview the witnesses, observe their trial testimony, or visit the crime scene).

State v. Knox, 78 N.C. App. 493, 495-96 (1985) (testimony of a defense expert in psychology on memory variables affecting eyewitness identification; expert spoke in generalities, did not interview the victim, or discuss how principles applied to the case at issue).

E. Undue Delay, Waste of Time, or Needless Presentation of Cumulative Evidence. Undue delay and waste of time can come into play when the evidence is only tangentially related to a fact of consequence or has only marginal relevance. Needless presentation of cumulative evidence can come into play when multiple character witnesses are offered, *see*, *e.g.*, State v. Webster, 111 N.C. App. 72, 81 (1993) (no abuse of discretion in limiting defendant to eight character witnesses), *aff'd*, 337 N.C. 674 (1994), and when the proffered evidence duplicates that already introduced, *see, e.g.*, State v. Barton, 335 N.C. 696, 704-05 (1994) (no abuse to exclude cumulative evidence). Of course, this factor should not be used to prevent a defendant from putting on a defense by, for example, offering evidence that corroborates his or her testimony. In this respect, it may be helpful to think of needless presentation of cumulative evidence as linked to undue delay and waste of time.

F. Surprise Not a Basis for Exclusion. Rule 403 does not permit exclusion of evidence because of surprise. Presumably, any issue regarding surprise would be addressed as a discovery issue.

III. Depriving Defendant of a Defense. In *State v. Whaley*, 362 N.C. 156 (2008), the North Carolina Supreme Court held that the trial court abused its discretion by excluding, on

Rule 403 grounds, defense evidence that cast doubt on the victim's capacity to observe, recollect, and recount. The excluded evidence would have showed that the victim previously indicated that she had difficulty recalling whether certain events actually occurred, and thus called her credibility into question. The court concluded that excluding the evidence under Rule 403 "had the effect of largely depriving defendant of [her] major defense." *Id.* at 161 (citation omitted). *Whaley* is a cautionary note for the trial judge to avoid Rule 403 decisions that deprive the defendant of a defense.

IV. Alternative Forms of Evidence. When analyzing whether to admit evidence in the face of a Rule 403 objection, the trial judge should consider whether the proponent can prove the fact of consequence with other evidence that lessens the risk of unfair prejudice, etc. In fact, in some circumstances, the availability of other evidence requires the judge to sustain a Rule 403 objection. *See* Section X.A, below, discussing the admissibility of evidence of a prior conviction when the defendant offers to stipulate to the prior crime.

V. Limiting Instruction. The trial judge also should consider whether the danger at issue (e.g., confusion, etc.) can be ameliorated with a limiting instruction. *See* State v. Badgett, 361 N.C. 234, 245 (2007) (in a capital murder case, trial court did not abuse its discretion under Rule 403 by admitting Rule 404(b) evidence of a prior homicide; the trial court guarded against the possibility of unfair prejudice by instructing the jury to consider the evidence only for the purposes allowed by Rule 404(b) and admonishing the jury not to consider it on the issue of defendant's character). When a limiting instruction is insufficient, exclusion may be required. *See, e.g.*, State v. Smith, 359 N.C. 199, 209-10 (2005) (trial court properly excluded evidence under Rule 403 after concluding that the jury would have difficulty following a limiting instruction and understanding that the statements were not offered for the truth of the matter).

VI. Voir Dire and Review of the Evidence. A voir dire is not required as part of the Rule 403 balancing, *State v. Hope*, 189 N.C. App. 309, 316 (2008), but should be done if requested so as to create a record for appeal. With regard to recordings of police interrogations, the Court of Appeals has suggested that the better practice for the trial judge is to preview the entire recording, rather than rely on a forecast of the evidence. State v. Miller, 197 N.C. App. 78, 93-94 (2009) (reminding the trial courts that because questions posed by the police during an interrogation may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that are legitimate points of inquiry but that are inadmissible in court, "the wholesale publication of a recording of a police interview to the jury . . . might very well violate . . . Rule 403").

VII. Record. Although the trial judge need not make a specific finding that the probative value of the evidence was or was not substantially exceeded by unfair prejudice, etc., the record should reflect that the judge engaged in the Rule 403 balancing. State v. Washington, 141 N.C. App. 354, 367 (2000); State v. Harris, 149 N.C. App. 398, 405 (2002). However, the better practice is to make such a finding. State v. Mabrey, 184 N.C. App. 259, 266 (2007).

VIII. Standard on Appeal. The appellate courts will review a trial court's decision to admit or exclude evidence under Rule 403 for abuse of discretion. *See, e.g.*, State v. Whaley, 362 N.C. 156, 160 (2008). An abuse of discretion occurs when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted).

IX. Framework for the Trial Judge's Rule 403 Analysis. When undertaking a Rule 403 analysis after determining that the evidence at issue is relevant, it may be helpful to follow these steps:

Rule 403 Analysis

(1) Determine what if any risks are implicated by the evidence:
- Unfair prejudice
- Confusion of the issues
- Misleading the jury
- Undue Delay
- Waste of time
- Needless presentation of cumulative evidence

If no such risks are created, the evidence is admissible under Rule 403.
If any such risks exist, proceed to the next step.

(2) Determine if the identified risks substantially outweigh the probative value of the evidence. In this determination, consider:
- Whether an alternative form of evidence is available, and
- The effectiveness of a limiting instruction.

If the risks substantially outweigh probative value, exclude the evidence.
If the risks do not substantially outweigh probative value, the evidence is admissible under Rule 403.
In either situation, make a record of your findings.

X. Recurring Rule 403 Issues

A. Evidence of Prior Convictions When the Defense Stipulates to the Prior.

Some crimes, such as felon in possession of a firearm, include as an element that the defendant has a qualifying prior conviction. When this is the case, the defense may seek to limit the prejudicial effect of the prior conviction by offering to stipulate to its existence and asking the trial judge to preclude the State from introducing evidence of the crime at trial. This was the precise posture of *Old Chief v. United States*, 519 U.S. 172 (1997). That case involved a prosecution for the federal crime of felon in possession of a firearm. So as to keep the details of his prior felony—assault causing serious bodily injury—from the jury, the defendant offered to stipulate to the prior conviction. The prosecutor objected, insisting that he had a right to prove his case his own way. The trial court rejected the defendant's offer to stipulate and allowed the government to prove its case by introducing evidence of the prior crime. The defendant was convicted and he appealed. The United States Supreme Court held that because the nature of the prior offense raised a risk of a verdict tainted by improper considerations and the evidence was admitted solely to prove the fact of the prior conviction, the trial court abused its discretion under Federal Rule 403 by admitting the record of the defendant's prior conviction where an admission was available as an alternative form of proof. *Id.* at 174. It explained:

> In dealing with the specific problem raised by [the federal felon in possession statute] and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case . . . but will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious . . . .

Id. at 185. The Court went on to note that when a prior offenses is far removed "in time or nature" from the current charges, its potential to prejudice the defendant is minimal. *Id.* at 185 n.8.

Noting that *Old Chief* was decided under federal evidence rule 403, several North Carolina Court of Appeals decisions have concluded that the case is not binding on North Carolina courts interpreting state Rule 403. State v. Little, 191 N.C. App. 655, 660 n.1 (2008); State v. Jackson, 139 N.C. App. 721, 731 (2000), *rev'd in part on other grounds,* 353 N.C. 495 (2001); State v. Faison, 128 N.C. App. 745, 747 (1998). That court, however, has declined to reject *Old Chief* outright, opting instead to distinguish it from the facts presented. *Jackson*, 139 N.C. App. at 732 (at defendant's trial for carrying a concealed weapon, possession of a firearm by a felon, and resisting an officer, the State offered evidence of the defendant's prior voluntary manslaughter conviction and the defendant offered to stipulate to having a prior felony conviction; the defendant was not "charged with any attendant offenses similar to his prior conviction of voluntary manslaughter, thus reducing the potential of prejudice in comparison to *Old Chief*"); *Little,* 191 N.C. App. at 661-62 (defendant was charged with felon in possession, attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and discharging a firearm into occupied property; defendant offered to stipulate to the existence of a prior felony conviction; distinguishing *Old Chief,* the court concluded that given the charged crimes, "we cannot say admission of the record evidence of defendant's prior involuntary manslaughter conviction in lieu of defendant's stipulation . . . so risked unfair prejudice that it substantially outweighed the discounted probative value of the record of conviction"); State v. Fortney, 201 N.C. App. 662, 666-67 (2010) (no abuse of discretion by allowing the State to introduce evidence of the defendant's prior rape conviction, notwithstanding the defendant's offer to stipulate to a prior felony conviction; the prior conviction was not substantially similar to the offenses being tried: drug possession, possession of a firearm by a felon, and carrying a concealed weapon).

The North Carolina Court of Appeals has said that even if *Old Chief* applies in North Carolina, the issue cannot be raised on appeal unless the defendant offers to stipulate to the prior conviction at trial. *Faison*, 128 N.C. App. at 747 (in the absence of a defense stipulation "[t]he State . . . had no alternative but to introduce evidence of Defendant's prior convictions in order to meet its burden of showing an element of the crime charged").

B. Photographs of Homicide Victims. As a general rule, photographs may be offered as substantive evidence or for illustrative purposes. G.S. 8-97. When

admitted for illustrative purposes only, a limiting instruction should be given. *See* N.C.P.I. – CRIM. 104.50 (photographs, etc. as illustrative evidence). Although many appellate decisions addressing Rule 403 issues with respect to photographs of the victim contain language referencing the use of the photographs for only illustrative purposes, this language seems to refer to the old North Carolina rule limiting the use of photographic evidence to that purpose. With enactment of G.S. 8-97 in 1981, photographs now can be used as substantive or illustrative evidence and our courts have indicated that the statute applies with respect to photographs of a homicide victim. *See* State v. Rogers, 323 N.C. 658, 665 (1989).

Photographs of a homicide victim are admissible even if "gory, gruesome, horrible or revolting, so long as an excessive number of photographs are not used solely to arouse the passions of the jury" *Id.* The North Carolina appellate courts only rarely have held such photographs to be unfairly prejudicial. State v. Robinson, 327 N.C. 346, 357 (1990). Relevant cases include:

> *State v. Hennis*, 323 N.C. 279, 282-83 (1988) (abuse of discretion to admit thirty-five autopsy and crime scene photographs of murdered mother and children for illustrative purposes, even with a limiting instruction; photographs were displayed on a large screen accommodating two images three feet, ten inches by five feet, six inches, side by side; eight- by ten-inch glossy photographs, most in color, were distributed to jurors one at a time for an hour).
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> *State v. Mercer*, 275 N.C. 108, 121 (1969) (photographs of victim's dead body in a funeral home, with projecting probes indicating entry and exit points of bullet; evidence was uncontradicted as to cause of death and showed that victim was lying on a bed when shot; photographs were "poignant and inflammatory"), *overruled on other grounds,* State v. Caddell, 287 N.C. 266 (1975).
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> *State v. Temple*, 302 N.C. 1, 13-14 (1981) (criticizing admission of photographs of victim's exhumed body lying in a casket).
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> *State v. Johnson*, 298 N.C. 355, 377 (1979) (prejudicial error in sentencing phase of capital trial to admit photographs of the murder victim's body two months after his death, in advanced stages of decomposition and after having been partially ravaged and dismembered by animals).

Cases finding that no abuse of discretion occurred when photographs of the victim were admitted are legion. A small sampling includes:

> *State v. Waring*, 364 N.C. 443, 496-97 (2010) (in a capital murder case, the trial court did not abuse its discretion by allowing the State to introduce for illustrative purposes eighteen autopsy photographs of the victim).
>
> *State v. Walters*, 357 N.C. 68, 95-97 (2003) (close-up of murder victim's face, showing blood on her face and a fly on her eyelid).

State v. Haselden, 357 N.C. 1, 15-16 (2003) (one close-up of the murder victim's head and two of her body; defendant's stipulation as to cause of death did not preclude use of the photographs).

State v. Bedford, 208 N.C. App. 414, 421 (2010) (in a murder case in which the victim suffered many distinct injuries to different parts of her body, the trial court did not abuse its discretion by admitting photographs of the victim's body, even though the defendant offered to stipulate to cause of death; two of the photos were taken of the victim's body just after being removed from a grave and were used to illustrate the testimony of officers who unearthed the body; twenty color photographs of the victim's decomposing body were used to illustrate the testimony of the pathologist who did the autopsy and were projected onto a six-foot by eight-foot screen).

State v. Early, 194 N.C. App. 594, 598 (2009) (eight autopsy photographs, displayed by monitor, showing location of wounds and whether they were entrance or exit wounds illustrated the manner of the killing and had probative value as to the defendant's claim of self-defense).

State v. Bare, 194 N.C. App. 359, 363-64 (2008) (photographs of the murder victim's partially decomposed body including three of the victim's trunk and lower body, depicting the remains of a fire, mummification and decay of flesh, branches placed over the body, and his pants and shoes; two of a skull and jawbone; four of other bones, all largely devoid of flesh; one of a partially decayed hand; two of the underbrush where the victim was found; photographs illustrated officer's testimony regarding the condition of the body when it was discovered, including that body had been partially eaten by animals and was missing part of an arm, fingers, and a hand).

State v. Snider, 168 N.C. App. 701, 706-07 (2005) (three autopsy photographs to illustrate the testimony of the medical examiner who testified to location of knife and gunshot wounds and that gunshot wound was the cause of death; photographs were projected onto a screen in the courtroom).

State v. Gladden, 168 N.C. App. 548, 552 (2005) (ten autopsy photographs to illustrate the testimony of pathologist; seven were of the victim's body wrapped in plastic, three were of the victim's head, with one showing the face; number of photographs was not excessive).

Factors to be considered in determining whether to admit or exclude photographs of the victim's body under Rule 403 include:

- What the photograph depicts
- The level of detail
- The size of the photograph
- Whether the photograph is in color or in black and white
- Whether the photograph is a slide or a print
- Where and how it is projected or presented
- The scope and clarity of the testimony it illustrates
- The relevance of the scene depicted

- The number of photographs
- Whether the photographs will inflame the passions of the jury
- Whether the photographs are unnecessarily duplicative of other evidence, including other photographs

State v. Hennis, 323 N.C. 279, 285-86 (1988).

C. Rule 404(b) Evidence. Rule 404(b) provides that although evidence of other crimes, wrongs, or acts is not admissible to prove propensity, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident. N.C. R. EVID. 404(b); *see generally* Rule 404(b): Evidence of Other Crimes, Wrongs, or Acts in this Benchbook. However, Rule 404(b) evidence is subject to Rule 403 balancing. As our courts have said, the ultimate test for admissibility of such evidence is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under Rule 403. State v. Boyd, 321 N.C. 574, 577 (1988). Many cases hold that prior bad acts evidence passes muster under Rule 403 and no attempt is made to collect those cases. Cases holding that prior bad acts evidence was inadmissible under Rule 403 include:

State v. Ward, 199 N.C. App. 1, 15-18 (2009) (defendant had been acquitted of prior conduct and prior bad acts evidence was not part of a single continuous transaction with the current crime), *aff'd on other grounds*, 364 N.C. 133 (2010).

State v. Mabrey, 184 N.C. App. 259, 264-67 (2007) (defense evidence that victim previously attacked the defendant).

State v. McMillian, 169 N.C. App. 160, 164-65 (2005) (defendant's prior arrest for DWI not sufficiently similar to the attempted armed robbery charge being tried).

1. Bare Fact of Conviction Rule. In North Carolina, evidence of the bare fact of a prior conviction offered under Rule 404(b) does not survive the Rule 403 balancing test. The rule comes from the case of *State v. Wilkerson*, 356 N.C. 418 (2002), in which the court, per curiam, adopted the Judge Wynn's dissenting opinion below. Judge Wynn reasoned that "the bare fact of a defendant's prior conviction would rarely, if ever, be probative of any legitimate Rule 404(b) purpose." State v. Wilkerson, 148 N.C. App. 310, 319 (2002) (Wynn, J., dissenting). Contrasting Rule 404(b) to Rule 609, which allows admission of the bare fact of conviction to impeach a defendant who has testified, Wynn explained that for 404(b) purposes "it is the facts and circumstances underlying such a conviction which hold probative value," not the bare fact of conviction. *Id.* at 319-20; *see also* State v. Mewborn, 178 N.C. App. 281, 289-90 (2006) (distinguishing *Wilkerson* and holding that the bare fact of conviction was admissible under Rule 609 to impeach the defendant, who had testified). Wynn concluded: "[E]ven if a conviction, in and of itself, held a scintilla of probative value for Rule 404(b) purposes, the inherent prejudicial effect of such a conviction would substantially outweigh its probativity, mandating

its exclusion under Rule 403." *Wilkerson*, 148 N.C. App. 310, 319-20; *see also* State v. Badgett, 361 N.C. 234, 247 (2007) (following *Wilkerson*); State v. McCoy, 174 N.C. App. 105, 110-11 (2005) (same); State v. Scott, 167 N.C. App. 783, 785-86 (2005) (same); State v. Hairston, 156 N.C. App. 202, 204 (2003) (same).The rule applies even when the bare fact of conviction is offered after evidence has been presented establishing the facts and circumstances of the prior conviction. *McCoy*, 174 N.C. App. at 110-11. At least one case has held that an admission of guilt in a transcript of plea is not a bare fact of conviction. State v. Brockett, 185 N.C. App. 18, 25-26 (2007).

2. Exceptions to the Bare Fact of Conviction Rule.

a. 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, 220 N.C. App. 443, 450 (2012) (citations were relevant to establish malice for purposes of second-degree murder).

b. Narrow Exception for Sexual Assault Cases. In his *Wilkerson* dissent, 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).

c. Narrow Exception for Motive or Intent. In his dissent in *Wilkerson*, Judge Wynn noted:

> 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.

d. 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).

D. **Prior Convictions Under Rule 609.** Rule 609 provides that evidence of certain convictions within 10 years "shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." The use of the mandatory word "shall" means that such convictions are not subject to Rule 403's balancing test. State v. Brown, 357 N.C. 382, 390 (2003). However, when the priors are more than ten years old, the trial court must determine that the probative value of the prior conviction substantially outweighs its prejudicial effect before the prior conviction can be used to impeach. N.C. R. EVID. 609(b); *See, e.g.,* State v. Smith, 155 N.C. App. 500, 507-09 (2002) (error where the trial court made no findings of specific facts and circumstances in the record to support its determination that the evidence of priors was more probative than prejudicial).

E. **Weapons and Ammunition.** As a general rule, evidence that the defendant possessed weapons or ammunition is relevant where there is evidence tending to show that the weapons or ammunition were used in the commission of the crime, were connected to the crime in some way, or tend to establish some other relevant fact. *See* Criminal Evidence: Relevancy in this Benchbook (discussing relevancy issues related to weapons and ammunition). Rule 403 conceivably could bar admission of this otherwise relevant evidence, but cases have found no abuse of discretion when this evidence has been admitted. State v. Grant, 178 N.C. App. 565, 575-76 (2006) (no abuse of discretion under Rule 403 by admitting evidence regarding defendant's possession of an SKS assault rifle); State v. Lakey, 183 N.C. App. 652, 654-55 (2007) (in a drug trafficking case, no abuse of discretion to admit photographs of guns found in defendant's house).

F. **Demonstrations.** A number of cases have held that the trial court did not abuse its discretion under Rule 403 by allowing a courtroom demonstration. Relevant cases include:

> *State v. Anderson*, 200 N.C. App. 216, 221-22 (2009) (no abuse of discretion by allowing witness to use a toy doll to illustrate how shaken baby syndrome would occur and the amount of force necessary to cause the victim's injuries).
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> *State v. Witherspoon*, 199 N.C. App. 141, 147-151 (2009) (in a murder case in which the defendant argued accident, no abuse of discretion by allowing the State's in-court demonstration involving use of a mannequin placed on a couch to show the position of the victim's head and the path of the bullet).
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> *State v. Fowler*, 159 N.C. App. 504, 509-12 (2003) (no abuse of discretion by allowing a detective to use a mannequin's head to demonstrate how a string was wrapped and knotted around the victim's neck; demonstration was brief and unemotional, a live model was not used, and the detective was not asked to speculate on the victim's physical or emotional experience of the choking).
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> *State v. Carrilo*, 149 N.C. App. 543, 552-53 (2002) (video demonstration of a doll being subjected to shaken baby syndrome was not unfairly prejudicial).

G. Expert Testimony. A number of cases have held that the trial court did not abuse its discretion by excluding expert testimony under Rule 403. In one recent case, *State v. King*, 366 N.C. 68, 75-77 (2012), the North Carolina Supreme Court affirmed a decision by the court of appeals holding that the trial court did not abuse its discretion by excluding the State's expert testimony regarding repressed memory. The trial court had concluded that although the expert's testimony was "technically" admissible under the old *Howerton* version of Rule 702 and was relevant, it was inadmissible under Rule 403 because recovered memories are of "uncertain authenticity" and susceptible to alternative possible explanations. The trial court found that "the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse or mislead the jury." The supreme court held that the trial court did not abuse its discretion by excluding the repressed memory evidence under Rule 403. Other cases holding that the trial court did not abuse its discretion by limiting expert testimony under Rule 403, include:

State v. Smith, 359 N.C. 199, 209-10 (2005) (basis of expert's opinion that defendant's cocaine dependency impaired his ability to reason, plan, and think was properly excluded where basis included defendant's own statements; defendant's self-serving statements were the only evidence of cocaine use on the day in question; the trial court found that the jury would have difficulty following a limiting instruction and understanding that the statements were not offered for their truth).

State v. Hall, 187 N.C. App. 308, 315-16 (2007) (testimony by defense expert regarding likelihood of defendant's release from involuntary commitment if found not guilty by reason of insanity; any value of evidence was outweighed by confusion).

State v. McLean, 183 N.C. App. 429, 434-35 (2007) (following *Lee* and *Cole* (both below) and holding that the trial court did not abuse its discretion by excluding defense expert testimony on eyewitness identification procedures where the expert did not interview the witnesses in the case, did not observe their trial testimony, and did not visit the crime scene).

State v. Lee, 154 N.C. App. 410, 416-17 (2002) (expert did not interview the victims, visit the crime scene, or observe the eyewitnesses' trial testimony; sole basis for the expert's testimony regarding eyewitness confidence, eyewitness memory and showups was his review of the eyewitnesses' testimony at a suppression hearing and research studies conducted by others; no abuse of discretion by excluding the evidence on grounds that probative value was outweighed by danger of confusion and undue prejudice; "[w]hile expert testimony concerning eyewitness identification may be appropriate in some cases, we do not believe its admission was warranted in the present case").

State v. Cole, 147 N.C. App. 637, 642-43 (2001) (no abuse in excluding expert testimony that there are several factors affecting an eyewitness identification, witnesses often state they are sure of their identification when they are wrong, and when the crime involves a weapon, the

accuracy of the identification is "considerably lower"; the trial court found that the expert was in no better position than the jury to determine the weight to be given to the identifications at issue, the expert's testimony would not provide any appreciable assistance to the jury in evaluating the identifications, and that his testimony, even if probative, was outweighed by the risk it carried of confusing the jury).

State v. Cotton, 99 N.C. App. 615, 621-22 (1990) (no abuse to exclude testimony of expert witnesses on identification; the trial court found the evidence "to be of no more than minimal value and assistance to the jury" and that admission of it would be unduly prejudicial in the defendant's favor), *aff'd on other grounds,* 329 N.C. 764 (1991).

State v. Knox, 78 N.C. App. 493, 495-96 (1985) (no abuse in excluding testimony of an expert in psychology offered to provide testimony on memory variables affecting eyewitness identification; while expert testified at voir dire about "unconscious transference" generally, he did not discuss how that phenomenon applied to the case at issue and he did not interview the victim; noting that the court's decision "should not . . . be interpreted to prohibit evidence such as that offered here").

For a case where the trial court was held to have abused its discretion by excluding expert testimony, see *State v. Cooper*, ___ N.C. App. ___, 747 S.E.2d 398, 412 (2013) (in this murder case, the trial court abused its discretion by excluding, under Rule 403, testimony by a defense expert that certain incriminating computer files had been planted on the defendant's computer).

H. Sexual Assault Victim's Prior False Accusations. In sexual assault cases, the defense may wish to admit evidence that the victim previously made false accusations of sexual assault. At least one case has concluded that the trial court did not abuse its discretion by excluding this evidence. State v. Cook, 195 N.C. App. 230, 240-41 (2009) (defendant was alleged to have had sex with his stepdaughter; no abuse of discretion by excluding evidence that victim had previously admitted having sex with her boyfriend but falsely said that it was nonconsensual; because of the difference between the prior event and the crime at issue, the trial court could reasonably determine that the evidence was not highly probative when compared to the potential for unfair prejudice if the jury perceived the victim as promiscuous).