

RULE 609: IMPEACHMENT BY EVIDENCE OF CONVICTION OF A CRIME

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- I. Generally.** North Carolina Evidence Rule 609 allows for impeachment of a witness, including a defendant, with evidence that the witness has been previously convicted of a crime. N.C. R. EVID. 609; *State v. Bell*, 338 N.C. 363, 381 (1994). Impeachment, of course, can be done by many means. *See, e.g.*, N.C. R. EVID. 608 (impeachment with bad character). However, Rule 609 has a limited purpose. Specifically the rule allows for admission of prior convictions to cast doubt on the witnesses *veracity*. *State v. Carter*, 326 N.C. 243, 250 (1990) (the only legitimate purpose for admitting prior convictions under Rule 609 is to cast doubt on veracity). The rule may not be used to reveal the witness's character. *Id.*

The text of the rule is reproduced below.

Rule 609. Impeachment by evidence of conviction of crime.

(a) General rule. – For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

(b) Time limit. – Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence

of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon. – Evidence of a conviction is not admissible under this rule if the conviction has been pardoned.

(d) Juvenile adjudications. – Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. – The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

II. For Impeachment Only. Rule 609 allows prior convictions to be admitted only for purposes of impeachment; prior convictions are not admissible under the rule as substantive evidence. N.C. R. EVID. 609(a); *State v. Tucker*, 317 N.C. 532, 544 (1986) (“Although it was proper to cross-examine defendant concerning his prior convictions on the question of his credibility, these convictions were not admissible as substantive evidence tending to prove his guilt.”); *State v. McEachin*, 142 N.C. App. 60, 69 (2001) (citing *Tucker* for the proposition that Rule 609 evidence is “not admissible as substantive evidence to show the defendant committed the crime charged”). It is thus error to allow a party to refer to Rule 609 prior convictions in opening or closing statements as substantive evidence. *Tucker*, 317 N.C. at 540-45 (new trial where the prosecutor did so in closing argument); *McEachin*, 142 N.C. App. at 69-71 (following *Tucker* but finding that the error was not prejudicial).

A party may impeach a witness under Rule 609 only if the witness testifies. *State v. Badgett*, 361 N.C. 234, 247-48 (2007) (error to allow the State to introduce evidence of the defendant’s prior conviction where the defendant did not testify; error not prejudicial). However, when a declarant’s hearsay statement is admitted into evidence, the credibility of the declarant may be attacked as if the witness testified. *State v. McConico*, 153 N.C. App. 723, 726-28 (2002) (where the defendant’s hearsay statement was admitted through a defense witness, the State could attack the defendant’s credibility under Rule 609); see generally N.C. R. EVID. 806 (attacking and supporting the credibility of a hearsay declarant). This basically means that an out-of-court declarant is treated the same as a live witness with respect to impeachment. *McConico*, 153 N.C. App. at 726.

III. Relevant Prior Convictions.

A. Rule Only Applies to Certain Classes of Convictions. By its terms, Rule 609 only applies to the following classes of convictions:

- felonies,
- Class A1 misdemeanors,

- Class 1 misdemeanors, or
- Class 2 misdemeanors.

N.C. R. EVID. 609(a). Class 3 misdemeanors and infractions are not admissible under the rule.

“Unclassified” misdemeanors that are categorized by statute as Class A1, 1, or 2 misdemeanors may be used to impeach under the rule. *State v. Gregory*, 154 N.C. App. 718, 722 (2002). See generally JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 51 (UNC School of Government 7th ed. 2012) (explaining the classification of unclassified misdemeanors).

- B. Out-of-State Convictions.** The statute is not limited to North Carolina offenses; out-of-state convictions may be admitted. See, e.g., *State v. Brown*, 357 N.C. 382, 389-90 (2003) (Virginia conviction properly admitted under Rule 609).
- C. Prayer for Judgment Continued (PJC).** When a PJC is entered after a defendant freely, understandingly, and voluntarily pleads guilty, the PJC counts as a conviction for purposes of Rule 609. *State v. Sidberry*, 337 N.C. 779, 781-82 (1994). However, at least one case has held that a PJC conditioned upon payment of costs, without more, is not a conviction for purposes of the rule when it is entered after a finding of guilt at trial. *State v. Lynch*, 337 N.C. 415, 421-22 (1994). See generally [Prayer for Judgment Continued](#) under Criminal in this Guide.
- D. No Contest Pleas.** For purposes of Rule 609, a no contest plea counts as a conviction. *State v. Outlaw*, 326 N.C. 467, 468-69 (1990).
- E. Charges Absent Convictions.** The rule allows for impeachment with prior convictions, not prior charges. *State v. Jones*, 329 N.C. 254, 258-59 (1991) (error for the State to cross-examine the defendant regarding whether he had been charged with assaulting his wife; error not prejudicial).
- F. Effect of Appeal.** The pendency of an appeal does not render evidence of a conviction inadmissible, N.C. R. EVID. 609(e), including appeals from district to superior court. *State v. Weaver*, 160 N.C. App. 61, 66 (2003). Evidence of the pendency of the appeal is admissible. N.C. R. EVID. 609(e).
- G. Reversed Convictions.** A party may not impeach a witness under Rule 609 with priors that were subsequently reversed. *State v. Jordan*, 162 N.C. App. 308, 313 (2004).
- H. Pardoned Offenses.** Pardoned convictions are not admissible under the rule. N.C. R. EVID. 609(c).
- I. Juvenile Adjudications.** As a general rule, juvenile adjudications are not admissible under the rule. N.C. R. EVID. 609(d). However, in a criminal case the trial court may “allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult *and* the court is satisfied that admission of the evidence is

necessary for a fair determination of the issue of guilt or innocence.” N.C. R. EVID. 609(d). Whether to admit such evidence is within the trial court’s discretion. *State v. Deese*, 136 N.C. App. 413, 418-19 (2000) (trial court did not abuse its discretion by deciding that admission of a witness’s juvenile adjudication was not necessary to a fair determination of guilt or innocence); *State v. McAllister*, 132 N.C. App. 300, 301-03 (1999) (same). Whether to allow the actual juvenile adjudication orders into evidence is also within the trial court’s discretion. *State v. Whiteside*, 325 N.C. 389, 399-402 (1989) (no abuse of discretion where the trial court allowed the defendant to impeach a witness with juvenile adjudication orders by questioning the witness about them, but did not allow the orders into evidence).

J. Age of the Convictions.

- 1. Convictions That Are Not More Than Ten Years Old.** Rule 609 states that for purposes of attacking the credibility of a witness a qualifying conviction “shall” be admitted. N.C. R. EVID. 609(a). This means that convictions that are less than ten years old must be admitted and the trial court does not have discretion as to admissibility. *State v. Brown*, 357 N.C. 382, 389-90 (2003) (the language of Rule 609(a) “shall be admitted” is mandatory, leaving no room for the trial court’s discretion to exclude under Rule 403 evidence of a conviction that is not more than ten years old); *State v. Lynch*, ___ N.C. App. ___, 720 S.E.2d 452, 454-56 (2011) (citing *Brown* and holding that the trial court committed prejudicial error by declining to admit the defendant’s evidence of certified copies of the victim’s criminal records under Rule 609 for impeachment purposes); *State v. McConico*, 153 N.C. App. 723, 728 (2002).
- 2. Convictions That Are More Than Ten Years Old.** As a general rule, evidence of a prior conviction is not admissible under Rule 609 if more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is later. N.C. R. EVID. 609(b). However, older convictions may be admitted if:
 - the trial court finds that their probative value exceeds prejudice, the proponent gives timely notice, and the judge makes adequate findings; *or*
 - the defendant opens the door to the evidence.
- a. Probative Value Must Exceed Prejudice.** Convictions that are more than ten years old may be admitted if “the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” N.C. R. EVID. 609(b). The rule creates a rebuttable presumption that convictions more than ten years old are more prejudicial than probative of the witness’s credibility. *State v. Ross*, 329 N.C. 108, 119 (1991); *State v. Lynch*, 337 N.C. 415, 420 (1994) (same; citing *Ross*); *State v. Shelly*, 176 N.C. App. 575, 581 (2006); *State v. Harris*, 140 N.C. App. 208, 216-17 (2000). In fact, the courts have recognized that instances in which older convictions will be more probative than prejudicial are “rare”. *Shelly*, 176 N.C. App. at 581 (quoting *State v. Blankenship*, 89 N.C. App. 465, 468 (1988)).

In conducting the balancing “it is important to remember that the only legitimate purpose for introducing evidence of past convictions is to *impeach the witness’s credibility*.” *Ross*, 329 N.C. at 119. Thus, the most probative type of prior convictions are those that indicate a lack of veracity, such as fraud, forgery, and perjury, *State v. Harris*, 149 N.C. App. 398, 403 (2002) (so stating and going on to hold that it was reversible error to admit the defendant’s prior conviction for felony aggravated battery where it was not probative of his veracity but instead characterized him “as a woman abuser and a violent person who would have been likely to hit [the victim] in the head with a hammer”); *State v. Shelly*, 176 N.C. App. 575, 584 (2006) (proper to admit evidence of credit card fraud), as well as larceny and robbery, *Shelly*, 176 N.C. App. at 584; *Lynch*, 337 N.C. at 420-21 (no error where the trial court admitted evidence of prior robbery in part because the offense involved dishonesty (taking another’s property)). By contrast, an older conviction for drug possession may not be probative of truthfulness. *Shelly*, 176 N.C. App. at 584 (noting that while the trial court admitted evidence of older convictions for common law robbery, felonious larceny and credit card fraud it excluded evidence of an older conviction for drug possession). Nevertheless, the rule is not expressly limited to prior convictions directly bearing on veracity, see N.C. R. EVID. 609(a) (any felony or Class A1, 1, or 2 misdemeanor), and in appropriate circumstances a party may be able to rebut the presumption that other older convictions are more probative of credibility than prejudicial. *State v. Muhammad*, 186 N.C. App. 355, 362-63 (2007) (the fact that the prior conviction did not involve dishonesty is not dispositive of the Rule 609 analysis; finding that no error occurred when the trial court admitted evidence regarding an older prior conviction for aggravated assault).

Aside from the nature of the prior conviction and whether it bears on veracity, other factors that may be considered in the balancing include whether the proponent of the evidence has other means to attack the witness’s credibility, *Harris*, 140 NC. App. at 217 (the defendant had such opportunities), as well as the impeachment value of the prior crime, its remoteness, and the centrality of the witness’s credibility. *State v. Holston*, 134 N.C. App. 599, 606 (1999). One case stated that “findings on each of these factors should be included in the trial court’s determination.” *Shelly*, 176 N.C. App. at 583.

The trial court’s balancing of prejudice and probative value for older convictions will not be upset absent an abuse of discretion. *Harris*, 140 N.C. App. at 216; *Shelly*, 176 N.C. App. at 578.

- b. Proponent Must Give Notice.** In order for evidence of a conviction more than ten years old to be admissible, the proponent must provide the adverse party sufficient advance written notice of its intent to use the evidence so that the adverse party has a fair opportunity to contest the evidence. N.C. R. EVID. 609(b); *But see Shelly*, 176 N.C. App. at 578-81 (although the State failed to give the defendant written notice of its intent to use older convictions, the State provided the defendant with a copy of his record before trial and defense counsel had prepared a written motion with the record attached to it; the defendant had “actual notice” even if he did not have written notice

and the State's failure to abide by the Rule's notice requirement did not require reversal).

- c. Trial Judge Must Make Findings.** Before admitting a conviction that is more than ten years old, the trial court must make findings as to the specific facts and circumstances regarding the probative versus prejudice balancing. *State v. Carter*, 326 N.C. 243, 248-52 (1990) (trial court's statement that older assault convictions involved "the use of violence", that their only purpose was to impeach credibility, and that probative value exceeded prejudice was insufficient; error not prejudicial); *State v. Ellerbee*, ___ N.C. App. ___, 721 S.E.2d 296, 298-99 (2012) (trial court erred by admitting older manslaughter conviction without making any of the necessary findings; error not prejudicial); *State v. Hensley*, 77 N.C. App. 192, 194-95 (1985) (findings insufficient). The trial court must do more than simply state that the probative value exceeds prejudice. *Compare State v. Ross*, 329 N.C. 108, 120-21 (1991) (trial court's finding that "there is probative value and that in the interests of justice" the State would be allowed to question the defendant about the conviction was insufficient because it described no relevant facts or circumstances), *and State v. Farris*, 93 N.C. App. 757, 760-61 (1989) (ordering a new trial where the trial court merely stated that in the interest of justice the probative value of convictions for contributing to the delinquency of a minor and assault on a juvenile exceeded their prejudicial effect), *with State v. Shelly*, 176 N.C. App. 575, 578-84 (2006) (trial court's findings that prior convictions for common law robbery, felonious larceny and financial credit card fraud were probative of truthfulness and that probative value outweighed prejudice were "minimally sufficient"), *State v. Muhammad*, 186 N.C. App. 355, 362-63 (2007) (findings that addressed the facts and circumstances of the prior conviction were sufficient), *and State v. Holston*, 134 N.C. App. 599, 606-07 (1999) (trial court's findings that the defendant's credibility was central to the case and that therefore evidence of an attempted robbery conviction was more probative than prejudicial was minimal but sufficient).
- d. Opening the Door.** Even if a trial court initially excludes an older conviction, evidence of it may be admissible if the defendant later opens the door to the evidence at trial. *State v. Chandler*, 100 N.C. App. 706, 710-11 (1990) (although the trial court ruled pretrial that an older conviction would not be admissible, when the defendant testified at trial that he had no convictions other than those that were ten years old or less, the trial court then properly allowed the State to cross-examine the defendant about the older conviction); *State v. Blankenship*, 89 N.C. App. 465, 468-70 (1988) (the defendant opened the door to inquiry about an older conviction by testifying that he had no record other than the one he had testified to).

IV. Scope of Admissible Evidence. When a conviction is admissible under Rule 609, the permissible scope of inquiry is limited to:

- the name of the crime,
- the time and place of the conviction; and

- the punishment imposed.

State v. Lynch, 334 N.C. 402, 409-411 (1993) (new trial where the State went beyond this inquiry); State v. Bell, 338 N.C. 363, 381-82 (1994) (the trial court properly restricted the defendant's questioning with respect to witness's prior convictions to the time and place of the convictions and the penalties imposed); State v. Gallagher, 101 N.C. App. 208, 210-211 (1990) (reversible error to allow the State to ask questions that went beyond the time and place of the convictions and the punishment imposed).

Thus, cases have held or indicated that it is impermissible under Rule 609 to ask the witness:

- about the type of weapon involved in the prior convictions, *Lynch*, 334 N.C. at 409-411;
- whether the defendant possessed a gun when the prior crime was committed, State v. Wilson, 98 N.C. App. 86, 90-91 (1990) (reversible error where the State asked the defendant whether he had money or a gun on him at the time of the prior offense); or
- what the original charges were that lead to the prior conviction; State v. Riley, 202 N.C. App. 299, 302-04 (2010) (the trial court properly sustained the defendant's objection to the State's questions about the original charges that were brought and that lead to the defendant's prior convictions).

Notwithstanding this case law, some cases allow questioning beyond the name of the prior, the time and place of conviction and the punishment imposed when the questions relate to the "factual elements of the prior offenses and [are] descriptive of the particular crime of which the defendant had been convicted." State v. King, 343 N.C. 29, 49 (1996) (quoting *Lynch*, 334 N.C. at 409). In *King*, for example, the prosecutor asked the defendant whether it was "true that on October 9th of last year Judge Titus . . . gave you a 90-day sentence for kicking [victim] in the mouth and cutting him so that he had to get 13 stitches?" 343 N.C. 29 at 48-49. The defendant argued this was improper because it included the specifics of the crime. The court found no error, reasoning that the question related to the "factual elements of the crime rather than the tangential circumstances of the crime." *Id.* at 49. It further noted that the State was entitled to ask about the name of the crime and thus could have asked the defendant if he had been convicted of assault inflicting serious injury. *Id.* The court went on to conclude that even if the question was error, it was not prejudicial. *Id.* at 49-50. Clearly, however, the trial court has discretion to limit such an inquiry.

Additionally, evidence which would otherwise be inadmissible may become admissible if the defendant opens the door and the evidence is required to "to correct inaccuracies or misleading omissions in the defendant's testimony or to dispel favorable inferences arising therefrom." State v. Braxton, 352 N.C. 158, 192-94 (2000) (quoting *Lynch*, 334 N.C. at 412) (additional questioning about prior convictions was required to correct inaccuracies or misleading omissions in the defendant's testimony which tended to minimize the seriousness of his prior actions); State v. Bishop, 346 N.C. 365, 388-90 (1997) (the defendant's misleading testimony opened the door to the State going beyond inquiry into the name of the crime and time and place of the convictions, and the punishment imposed); State v. Blair, 181 N.C. App. 236, 243-44 (2007) (by minimizing the seriousness of his criminal history the defendant opened the door to evidence about the details of his prior convictions); State v. Mewborn, 178 N.C. App. 281, 287-88 (2006)

(the defendant had misled the jury about his prior record and opened the door to further questioning).

- V. Method of Proof.** The rule states that a witness's prior convictions may be elicited from the witness or established by public record during cross-examination or thereafter. N.C. R. EVID. 609(a); *State v. Dalton*, 96 N.C. App. 65, 70 (1989) (after the defendant denied his prior convictions on cross-examination, the trial court properly allowed the State to introduce a public record of those prior convictions). Additionally, when an out-of-court declarant's hearsay statement is admitted through a testifying witness, see Section II above, evidence of the declarant's prior conviction may be elicited from the testifying witness. *State v. McConico*, 153 N.C. App. 723, 727 (2002) (once the defendant's hearsay statement was admitted through a witness, evidence regarding the defendant's prior conviction was properly elicited through the testifying witness, who took the place of the defendant).
- VI. Trial Practice.**
- A. Limiting Instructions.** When Rule 609 evidence is admitted, the trial judge should give appropriate limiting instructions. See N.C.P.I.—Crim. 105.35 & 105.40, reproduced in [Routine Limiting Instructions in Criminal Cases](#) under Criminal, Instructions to the Jury During Trial in this Guide.
- B. When Improper Questions Are Asked.** If a party attempts to impeach a witness with a prior conviction that is inadmissible under the rule the trial court's options are to immediately give a curative instruction, *State v. Best*, 342 N.C. 502, 515-16 (1996) (the State questioned the defendant at trial regarding a conviction more than ten years old without having given the appropriate notice; no error where the trial court sustained an objection and instructed the jury not to consider the question), or consider a mistrial.