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## PRIOR CRIMES AS EVIDENCE IN PRESENT CRIMINAL TRIALS

BY CHARLES W. GAMBLE\*

### I. INTRODUCTION

The accused's criminal history is agreed to be one of the most influential types of evidence. Unrelated criminal misconduct for which the accused has or has not been convicted has an inestimable effect upon the minds of the jurors. Perhaps no evidence is more helpful to the prosecution or harmful to the defense. This evidence is of such importance that the defense attorney and prosecutor continually and justifiably are concerned about its admissibility.

This article is a discussion of the instances when criminal acts of the accused, occurring both prior and subsequent to the now-charged crime, are admissible in a present criminal prosecution. Instances when criminal history gains admission are divided into two categories: admissibility regardless of the trial tactics of the defense and admissibility due to the trial tactics of the defense. The principles of evidence stated in the article are North Carolina rules with frequent footnote reference to the corresponding Federal Rules of Evidence.

A major obstacle to a clear understanding of the rules governing the use of criminal history lies in the fact that they are part of one of the most elusive and misunderstood areas within the subject of evidence—character. Few cases arise in which the attorney is not concerned with whether character is at issue and, if it is, what form of evidence is admissible to prove it. In our evidentiary system, character historically has been proven in one of several forms: reputation, specific acts and opinion.<sup>1</sup> This article deals only with character in the form of specific acts.

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1. E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 186 (2d ed. 1972); 7 J. WIGMORE, EVIDENCE §§ 1980-1986 (3d ed. 1940); 5 J. WIGMORE, EVIDENCE §§ 1608-1621 (Chadbourn rev. 1974); 1 J. WIGMORE, EVIDENCE §§ 191-213 (3d ed. 1940).

## II. GENERAL EXCLUSIONARY RULE

We begin on the criminal side with a general exclusionary rule which precludes the prosecution in its case in chief from taking the initiative to introduce evidence of the accused's bad character to prove that he acted in keeping therewith on the occasion in question.<sup>2</sup> A major application of this character evidence rule renders inadmissible any evidence of the commission of other independent and unrelated crimes or offenses when offered to prove the accused guilty of the now-charged crime.<sup>3</sup> There are differences of opinion as to the basic justification for this exclusionary rule, but the following is an excellent summary of all such justifications:

Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence. . . . Furthermore, it is clear that evidence of other crimes compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that the evidence must be confined to the point in issue in the case on trial.<sup>4</sup>

This rule of exclusion precludes the admission of distinct, independent or separate offenses when their only relevance is to show the character of the defendant or his disposition to commit an offense similar to the one for which he is on trial.<sup>5</sup> If, however, the evidence of other offenses tends to prove any other relevant fact, it will not be excluded merely because it also shows that he was guilty of an independent crime.<sup>6</sup> The philosophy is that character evidence is inadmissible when offered by the prosecution to prove that the accused was of a particular character and acted in keeping with that character on the occasion in question. However, the rule does not

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2. *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978); *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974), *vacated in part*, 428 U.S. 903 (1976).

3. *State v. Patterson*, 284 N.C. 190, 200 S.E.2d 16 (1973); *State v. Austin*, 31 N.C. App. 20, 228 S.E.2d 507 (1976); *State v. Foster*, 27 N.C. App. 531, 219 S.E.2d 535 (1975).

4. *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954) (leading case enunciating the exclusionary rule and its exceptions).

5. *State v. Felton*, 283 N.C. 368, 196 S.E.2d 239 (1973); *State v. Gainey*, 32 N.C. App. 682, 233 S.E.2d 671, *cert. denied*, 292 N.C. 732, 235 S.E.2d 786 (1977); *State v. Harvey*, 26 N.C. App. 716, 217 S.E.2d 88 (1975).

6. *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977); *State v. Bishop*, 293 N.C. 84, 235 S.E.2d 214 (1977) (admissible if it tends to prove any relevant fact

preclude character evidence when it is offered for some other purpose. This gap in the general exclusionary rule has given rise to a group of purposes on the criminal side for which the courts have admitted character evidence in the form of the accused's prior specific criminal acts. One of the best expressions of this principle is found in Federal Rule of Evidence 404(b) which reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In their mental struggles to determine whether evidence of the accused's commission of another crime is admissible for a purpose other than tending to show guilt via bad character, the appellate courts, in numerous opinions, have set forth a list of the various purposes for which evidence of this nature is admissible. Although it would be impossible to compile a complete list of the purposes for which an accused's commission of another crime is admissible, an effort will be made in the following sections to set forth what seem to be the principal purposes for which proof of prior criminal acts has been held admissible.

### III. ADMISSIBILITY OF CRIMINAL HISTORY REGARDLESS OF TRIAL TACTICS EMPLOYED BY THE DEFENSE

This portion of the article discusses those purposes for which the prosecution may take the initiative, even in its case in chief, to introduce other criminal acts of the accused. Clearly these acts may be elicited through cross-examination of the accused, but the thrust of this section is that they do not have to be thus elicited. The prosecution without regard to any tactical maneuvers of the defense may introduce this evidence through the testimony of its own witnesses. For example, the defense cannot preclude the admission of this evidence by preventing the accused from taking the witness stand or by failing to call character witnesses in his behalf.

#### A. KNOWLEDGE

One of the common "other purposes" for which the prosecution

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other than character of accused); *State v. Collins*, 35 N.C. App. 250, 241 S.E.2d 98 (1978) (if evidence of another crime reasonably tends to prove a material fact in issue, then such is admissible even if it incidentally shows that defendant is guilty of another crime).

may introduce prior specific acts is to prove knowledge.<sup>7</sup> Evidence of the accused's commission of another crime or act is admissible if his knowledge of a certain fact is an element of the now-charged crime and his commission of that other crime or act is relevant to give rise to the inference that he possesses the prerequisite knowledge.

The present exception has its most active application in state prosecutions for the crime of receiving stolen property. This crime requires as a prerequisite mental element that the defendant had knowledge or reasonable grounds to believe that the goods were stolen. The state may introduce prior instances of the defendant's receiving other stolen property to infer his knowledge or reasonable belief.<sup>8</sup> This element also may be proven by the accused's subsequent purchase of other stolen property.<sup>9</sup> Other instances of the defendant's having received stolen property are admissible even though the stolen property received on the other occasions was not similar in kind to the property described in the indictment. Admissibility of this evidence also will not be affected where the property received on the other occasions was stolen from a different owner than the property mentioned in the indictment.<sup>10</sup>

A common application of the present exception on the federal level is found in cases involving the crime of transporting stolen vehicles across state lines.<sup>11</sup> Prior specific acts which are relevant to prove the prerequisite knowledge are admissible in the prosecution of such a crime.

7. See *State v. Lash*, 21 N.C. App. 365, 204 S.E.2d 563, *appeal dismissed*, 285 N.C. 593, 206 S.E.2d 865 (1974); 2 J. WIGMORE, EVIDENCE §§ 301, 310, 324 (3d ed. 1940).

8. *State v. Gregory*, 32 N.C. App. 762, 233 S.E.2d 623 (crime of receiving stolen goods knowing them to be stolen; court admitted fact that, two weeks before receiving the cigarettes in question, the accused had received a delivery of cigarettes at 2:00 a.m. and had loaded and left with them by 3:00 a.m.; admitted to show prerequisite knowledge), *cert. denied*, 292 N.C. 732, 236 S.E.2d 702 (1977); Annot., 105 A.L.R. 1288 (1936) (admissibility, in prosecution for receiving stolen property, of evidence of other transactions for purpose of showing guilty knowledge).

9. *State v. Newton*, 25 N.C. App. 277, 212 S.E.2d 700 (1975) (prosecution for receiving stolen goods and conspiracy to receive stolen goods; court admitted evidence that on subsequent occasion an undercover agent sold accused goods described as "hot").

10. *State v. Lindsey*, 25 N.C. App. 343, 213 S.E.2d 434 (court admitted unrelated acts of receiving stolen goods as admissible to prove guilty knowledge), *cert. denied*, 287 N.C. 468, 215 S.E.2d 627 (1975).

11. *United States v. Brand*, 79 F.2d 605 (2d Cir. 1935) (knowingly transporting stolen car in interstate commerce; evidence of previous sale of a stolen car), *cert. denied*, 296 U.S. 655 (1936); 2 J. WIGMORE, EVIDENCE § 301 (3d ed. 1940).

## B. INTENT

Where the accused is charged with a crime that requires a specific prerequisite intent, prior criminal acts are admissible to show that he had the necessary intent when he committed the now-charged crime.<sup>12</sup> One of the better statements of this exception is expressed in the comprehensive decision, *State v. McClain*:<sup>13</sup> "Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts . . . of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused."

This exception to the general exclusionary rule arises only in those prosecutions for crimes which require a specific intent as opposed to a general intent. Although it can be said that all crimes require some sort of mental element, the present exception becomes available only when successful prosecution requires proof of a specific intent. Specific intent, as distinguished from general intent, refers to a special mental element beyond that required by the *actus reus* of the crime.<sup>14</sup> Illustrative examples of the application of this exception to the general rule excluding prior crimes are found in cases involving larceny,<sup>15</sup> possession of illegal drugs with intent to sell<sup>16</sup> or distribute,<sup>17</sup> assault with intent to rape,<sup>18</sup> obtaining property

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12. *State v. May*, 292 N.C. 644, 235 S.E.2d 178 (accused charged with murder committed in course of attempted robbery; court admitted evidence of prior robbery, under similar circumstances, as relevant to issue of whether accused had intent to rob), *cert. denied*, 434 U.S. 928 (1977); *State v. Sink*, 31 N.C. App. 726, 230 S.E.2d 435 (1976).

13. *State v. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 366 (1954).

14. W. LAFAVE & A. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* § 28, at 202 (1972).

15. *State v. Stancill*, 178 N.C. 683, 100 S.E. 241 (1919) (other tobacco stealings admissible to prove intent in larceny); *State v. Sink*, 31 N.C. App. 726, 230 S.E.2d 435 (1976) (intent to steal).

16. *State v. Richardson*, 36 N.C. App. 373, 243 S.E.2d 918 (1978) (possession of marijuana with intent to sell and deliver; undercover agent allowed to testify of previously going to accused's house and purchasing marijuana).

17. *State v. Mitchell*, 27 N.C. App. 313, 219 S.E.2d 295 (1975) (witness allowed to testify to suspicious items and paraphernalia found in accused's home), *cert. denied*, 289 N.C. 301, 222 S.E.2d 701 (1976).

18. *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978); *State v. Leak*, 156 N.C. 643, 72 S.E. 567 (1911).

by false pretense with intent to defraud<sup>19</sup> and assault with intent to kill.<sup>20</sup>

### C. MOTIVE

Since motive is often difficult to distinguish from intent and knowledge, they frequently are discussed as one category. However, the better-reasoned decisions appear to separate these three mental states. One author defines motive as that state of mind which works to supply "the reason that nudges the will and prods the mind to indulge the criminal intent."<sup>21</sup> Evidence of the accused's commission of another crime is admissible if it tends to show a motive to commit the now-charged crime.<sup>22</sup> This exception to the general exclusionary rule has its most active application in cases where the accused is being tried for homicide and the relevant motive is malice.<sup>23</sup> Decisions in these cases have held proper the proof of: the accused's prior assaults on the victim as indicative of his motive to kill,<sup>24</sup> the accused's commission of a previous crime when a reasonable inference exists that he committed the now-charged homicide for the purpose of escaping arrest and conviction for the previous crime<sup>25</sup> and the accused's commission of another crime when the

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19. *State v. Cruse*, 253 N.C. 456, 117 S.E.2d 49 (1960); Annot., 78 A.L.R.2d 1359 (1951) (admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempts on other occasions).

20. *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978) (prior threats and assaults upon victim relevant to intent); *State v. Benthall*, 20 N.C. App. 167, 201 S.E.2d 34 (1973) (prior assaults upon victim admitted in prosecution for felonious assault with deadly weapon with intent to kill).

21. Slough, *Relevancy Unraveled*, 6 KAN. L. REV. 38, 48 (1957).

22. *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954).

23. *State v. Patterson*, 288 N.C. 553, 220 S.E.2d 600 (1975) (murder by accused of his daughter; admission of accused's statement that he thought daughter-victim had lied in earlier assault prosecution of accused), *vacated in part*, 428 U.S. 904 (1976); *State v. Hamrick*, 30 N.C. App. 143, 226 S.E.2d 404 (murder prosecution; court admitted evidence of joint robbery by defendant and victim along with evidence that victim was spending large sums of money; such went to show motive in defendant), *cert. denied*, 290 N.C. 780, 229 S.E.2d 35 (1976).

24. *Bennefield v. State*, 281 Ala. 283, 202 So. 2d 55 (1967) (to show malice and ill will toward deceased wife, State permitted to prove prior threats by the defendant against his wife); see C. GAMBLE, MCELROY'S ALABAMA EVIDENCE § 70.01(12)(e) (3d ed. 1977).

25. *State v. Hyatt*, 32 N.C. App. 623, 233 S.E.2d 649 (State introduced statements by accused that he and victim previously had committed a crime and he was afraid victim would testify against him), *cert. denied*, 292 N.C. 733, 235 S.E.2d 786 (1977).

evidence warrants a reasonable inference that the accused committed the now-charged homicide for the purpose of concealing his commission of the other crime.<sup>26</sup>

#### D. IDENTITY

The following is the most popularly cited statement of the identity exception to the general rule which excludes evidence of other crimes in present criminal trials:

Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged.<sup>27</sup>

All evidence tending to prove a person's guilt of the now-charged crime may be said to identify him as the guilty person. However, the identity exception to the general exclusionary rule is more narrow and specific. It contemplates the situation where the now-charged crime was committed in a novel and peculiar manner and the state is allowed to show the accused's commission of other similar offenses in order to prove that he is the perpetrator of the now-charged crime.<sup>28</sup> If, for example, the *modus operandi* employed in the commission of a charged larceny were novel or peculiar, the state may prove that the accused committed other larcenies by the same procedure in order to identify him as the perpetrator of the charged larceny.<sup>29</sup> The strongest statement in this regard is that the prior crime and the now-charged crime must be shown to have pat-

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26. *State v. Williams*, 292 N.C. 391, 233 S.E.2d 507 (1977) (proper to show that state trooper was killed for the purpose of concealing another crime).

27. *State v. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 367 (1954). This exception permits the admissibility of other crimes that are subsequent to as well as prior to the now-charged crime. *State v. McClain*, 282 N.C. 357, 193 S.E.2d 108 (1972).

28. *State v. Bishop*, 293 N.C. 84, 235 S.E.2d 214 (1977); *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976) (previous rape offered to show identity in present rape prosecution); *State v. McClain*, 282 N.C. 357, 193 S.E.2d 108 (1972) (the accused was charged with rape, and police were allowed to testify to stopping accused's car from which subsequently abducted rape victim fled; court observed that the identity exception only becomes viable when there are similarities); *State v. Collins*, 35 N.C. App. 250, 241 S.E.2d 98 (1978) (shoot out between accused and sheriff admissible to show identity in prosecution for armed robbery).

29. *State v. Lindsey*, 25 N.C. App. 343, 213 S.E.2d 434, *cert. denied*, 287 N.C. 468, 215 S.E.2d 627 (1975).



ently obvious similarities.<sup>30</sup>

Clearly a failure to apply this exception conservatively could lead to an erosion of the general exclusionary rule. At least one court has cautioned that this evidence should be subjected to rigid scrutiny.<sup>31</sup> In addition to similarities in method, one decision indicates that the now-charged crime and the other crimes must have proximity in place and time.<sup>32</sup>

The identity exception to the general exclusionary rule only becomes applicable when the identity of the person who committed the now-charged crime is in issue.<sup>33</sup> If, for example, the accused is charged with carnal knowledge of his daughter who is under a certain age, the identity of the perpetrator usually will not be an issue and the identity exception will not be viable.

#### E. COMMON PLAN OR SCHEME

Evidence of the accused's commission of another crime is admissible if when considered with other evidence it warrants a finding that both the now-charged crime and the other crime were committed in keeping with or pursuant to a single plan, design, scheme or system.<sup>34</sup> This rule is applicable whether the scope of the plan, design, scheme or system is narrow and specific or measurably broad and general. Dean McCormick expressed the present rule as authorizing admission of other crimes when offered "to prove the existence of a larger continuing plan, scheme, or conspiracy, of

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30. *State v. Perry*, 293 N.C. 97, 235 S.E.2d 52 (1977) (evidence of accused's commission of prior robbery admitted to identify him as perpetrator of now-charged robbery).

31. *State v. Whitney*, 26 N.C. App. 460, 216 S.E.2d 439 (1975).

32. *State v. Tuggle*, 284 N.C. 515, 201 S.E.2d 884 (1974).

33. *State v. McClain*, 282 N.C. 357, 193 S.E.2d 108 (1972) (in present rape prosecution, victim testified that she could not identify her assailant); see 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* § 404(09) (1977) (stating that where the defendant admits committing the act, and bases his defense on some other ground, evidence of other crimes proffered to prove his identity should not be admitted).

34. *State v. Duncan*, 290 N.C. 741, 228 S.E.2d 237 (1976) (State permitted, in prosecution for burglary, witnesses to testify as to their association with accused in other breakings and enterings over a previous two-year period); *State v. Grace*, 287 N.C. 243, 213 S.E.2d 717 (1975) (armed robbery prosecution; three previous robberies of similar establishments by same persons and with identical pistols admitted as showing a scheme); *State v. Stancill*, 178 N.C. 683, 100 S.E. 241 (1919) (plan was to plunder tobacco barns in the neighborhood); *State v. Sink*, 31 N.C. App. 726, 230 S.E.2d 435 (1976) (prosecution for breaking and entering; evidence of accused's breaking or entering other premises on same night).

which the present crime on trial is a part.”<sup>35</sup> Following is one of the better judicial declarations of this rule in North Carolina:

Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. . . . Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity.<sup>36</sup>

It should be emphasized that this exception to the general exclusionary rule becomes viable only when similarities between the other crimes and the now-charged crime exist.<sup>37</sup>

This ground for admission of other crimes by the accused gains particular importance in North Carolina because its viability also determines when prosecutions of the accused for separate crimes may properly be consolidated. The statute formulating such a test for joinder provides that:

Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or *constituting parts of a single scheme or plan* [emphasis added].<sup>38</sup>

#### F. RES GESTAE OR CONTINUOUS TRANSACTION

Evidence of the accused's commission of another crime is admissible where the other crime is connected inseparably with or is part of the *res gestae* of the presently charged crime. Often the two crimes are said to be parts of one continuous criminal occurrence.<sup>39</sup> This exception may apply when the other crimes and the now-

35. E. CLEARY, *supra* note 1, § 190 at 448.

36. *State v. McClain*, 240 N.C. 171, 176, 81 S.E.2d 364, 367 (1954).

37. *State v. McClain*, 282 N.C. 357, 193 S.E.2d 108 (1972).

38. N.C. GEN. STAT. § 15A-926(a) (1978); see *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978) (sexual assaults on two women within time span of three hours were parts of single scheme or plan within joinder statute).

39. *State v. Jones*, 292 N.C. 513, 234 S.E.2d 555 (1977) (admitting accused's attack on policeman during flight from prosecution for present crimes); *State v. Lowery*, 286 N.C. 698, 213 S.E.2d 255 (1975) (rape prosecution; State allowed to prove unnatural sex act committed by accused and a friend upon same victim soon after the rape), *vacated in part*, 428 U.S. 902 (1976); *State v. Washington*, 283 N.C. 175, 195 S.E.2d 534 (1973) (victim allowed to testify in rape prosecution to a subsequent rape by accused while she was still his captive), *cert. denied*, 414 U.S. 1132 (1974); *State v. Clark*, 18 N.C. App. 621, 197 S.E.2d 605 (1973).

charged crime are so connected by time or circumstance that one cannot fully be shown without proving the other.<sup>40</sup> Dean Wigmore has explained the admission of other crimes under the present exception with:

Suppose that A is charged with stealing the tools of X; the evidence shows that a box of carpenter's tools was taken, and that in it were the tools of Y and Z as well as of X; here we are incidentally proving the commission of two additional crimes, because they are necessarily interwoven with the stealing charged, and together form one deed.<sup>41</sup>

### G. PASSION OR PROPENSITY FOR ILLICIT SEXUAL RELATIONS

An accused who is being prosecuted for a sexual offense can expect his other sexual misdeeds to be admitted more liberally than nonsexual misconduct would be admitted in other types of prosecutions. Originally courts employed a more expansive application of the previously discussed exceptions to the general exclusionary rule in order to achieve this liberality of admission. The Supreme Court of North Carolina has recognized its own liberal approach in admitting evidence of similar sex crimes in construing the exceptions to the general rule.<sup>42</sup>

Arguably, the courts at present are not only more liberal-minded in permitting the admission of sexual misconduct under the historic exceptions, but they actually have fashioned a new and separate sex exception to the general exclusionary rule. Support for this conclusion lies in the courts' suggestions that these admissions have probative value to reveal the disposition,<sup>43</sup> unnatural lust,<sup>44</sup> attitude<sup>45</sup> and state of mind of the accused.<sup>46</sup> These decisions serve

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40. *State v. Poole*, 289 N.C. 47, 220 S.E.2d 320 (1975) (accused charged with kidnapping and victim permitted to testify that accused also raped her as part of the same transaction); *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954).

41. 1 J. WIGMORE, EVIDENCE § 218 (3d ed. 1940).

42. *State v. Greene*, 294 N.C. 418, 423, 241 S.E.2d 662, 665 (1978); see Annot., 77 A.L.R.2d 841 (1961) (admissibility, in prosecution for sexual offense, of evidence of other similar offenses).

43. *State v. Austin*, 285 N.C. 364, 204 S.E.2d 675 (1974) (historic rule has been to admit other incestuous intercourse between the prosecuting witness and defendant during prosecution for incest); see 41 AM. JUR. 2d *Incest* § 17 (1968).

44. *State v. Edwards*, 224 N.C. 527, 31 S.E.2d 516 (1944); *State v. Gainey*, 32 N.C. App. 682, 233 S.E.2d 671 (prosecution for rape and crime against nature; while recognizing admissibility of other similar acts to prove intent, the court further stated that these other sex acts were relevant to show the defendant's unnatural lust), cert. denied, 292 N.C. 732, 235 S.E.2d 786 (1977).

45. *State v. Davis*, 229 N.C. 386, 50 S.E.2d 37 (1948) (the defendant's attitude, animus and purpose).

as a basis upon which to argue that it is permissible in a prosecution for sexual misconduct to offer prior similar sex acts to show that the accused has a propensity for illicit sexual relations.<sup>47</sup> Some states have been rather direct in their adoption of such an exception while others have proceeded indirectly, using the existing exceptions.<sup>48</sup>

It must be emphasized that any exception developed to admit prior sexual misconduct works solely for the admission of such acts when they are similar to those for which the accused is now being tried and when they were committed with the particular person involved in the current criminal prosecution.<sup>49</sup> The present exception does not work to admit prior sexual acts which are dissimilar or were committed with persons other than the victim of the present prosecution.<sup>50</sup> However, these may gain admission under one of the other proper purposes which previously have been developed in this section.<sup>51</sup>

#### H. DISPOSITION TO DEAL IN ILLEGAL DRUGS

The decisions, at the very least, reveal a liberality on the part

46. *State v. Humphrey*, 283 N.C. 570, 196 S.E.2d 516 (*quo animo* or state of mind), *cert. denied*, 414 U.S. 1042 (1973); *State v. Forehand*, 17 N.C. App. 287, 194 S.E.2d 157, *cert. denied*, 283 N.C. 107, 194 S.E.2d 635 (1973).

47. *Woods v. State*, 250 Ind. 132, 235 N.E.2d 479 (1968) (rape and incest; other like acts on victims admissible to show "depraved sexual instinct"); *see E. CLEARY, supra* note 1, at § 190.

48. *See State v. McDaniel*, 80 Ariz. 381, 298 P.2d 798 (1956) in which the court observes:

Certain crimes today are recognized as stemming from a specific emotional propensity for sexual aberration. The fact that in the near past one has given way to unnatural proclivities has a direct bearing upon the ultimate issue whether in the case being tried he is guilty of a particular unnatural act of passion. The importance of establishing this fact far outweighs the prejudicial possibility that the jury might convict for general rather than specific criminality. Even granting the general rule of inadmissibility of evidence of independent crimes to prove the offense charged, many courts recognize a limited exception in the area of sex crimes to prove the nature of the accused's specific emotional propensity.

*Id.*, at 388, 298 P.2d at 802.

49. *State v. Schut*, 71 Wash. 2d 400, 429 P.2d 126 (1967) (incest; prior acts with victim admissible to show a lustful inclination toward the offended female).

50. *Landon v. State*, 77 Okla. Crim. 190, 140 P.2d 242 (1943) (statutory rape on daughter; other offenses with another daughter on other occasions excluded); *State v. Williams*, 36 Utah 273, 103 P. 250 (1909) (statutory rape).

51. *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978) (assault with intent to rape upon one woman admissible in case charging defendant with raping a second woman; held to show defendant's intent); *State v. Arnold*, 284 N.C. 41, 91 S.E.2d 423 (1973); *State v. Davis*, 229 N.C. 386, 50 S.E.2d 37 (1948).

of the courts in admitting other drug violations in a present drug prosecution.<sup>52</sup> On the whole, this has been accomplished by taking a liberal view of the traditional exceptions including: intent, common plan and scheme and knowledge.<sup>53</sup> We have reached the point, however, where it is not erroneous to suggest that a new and separate exception exists for the admission of other drug violations at least in a present prosecution for dealing in illegal drugs. The breadth with which the North Carolina courts presently view the admissibility of such evidence appears in the following language: "In drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, *disposition to deal in illicit drugs*, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs are found."<sup>54</sup>

#### IV. ADMISSIBILITY OF CRIMINAL HISTORY DUE TO THE TRIAL TACTICS OF THE DEFENSE

This section is intended to catalogue and discuss those instances in which evidence of the accused's criminal history will be admitted solely because of some particular defense maneuver. The message is that absent such a trial tactic by the accused this evidence would be inadmissible unless it could be included within one of the "other purposes" discussed in the previous section. The principles discussed herein place upon the defense attorney the burden of deciding whether the value gained by employment of the particular trial tactic outweighs the prejudicial effect of the criminal history thereby rendered admissible.

##### A. SPECIAL PLEAS AND DEFENSES

###### 1. Entrapment

Special pleas and defenses are available which when asserted by the accused place all or a limited portion of his character in issue. The materiality of such character permits the prosecution to introduce any other criminal acts which are relevant to prove it. A major illustration of this principle is found in criminal prosecutions where

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52. See *State v. Logan*, 22 N.C. App. 55, 205 S.E.2d 558, cert. denied, 285 N.C. 666, 207 S.E.2d 752 (1974); Annot., 93 A.L.R.2d 1097 (1964) (admissibility, in prosecution for illegal sale of narcotics, of evidence of other sales).

53. *State v. Salame*, 24 N.C. App. 1, 210 S.E.2d 77, (1974), cert. denied, 286 N.C. 419, 211 S.E.2d 800 (1975).

54. *State v. Richardson*, 36 N.C. App. 373, 375, 243 S.E.2d 918, 919 (1978) (emphasis added).

the accused invokes the defense of entrapment.<sup>55</sup> The use of such a defense has been held to place in issue the defendant's predisposition to commit the charged crime.<sup>56</sup> This results in permitting the prosecution to offer evidence of any other criminal violations if they are probative of the accused's predisposition to engage in the particular misconduct with which he presently is charged.<sup>57</sup> The bulk of cases giving rise to this exception involve the violation of drug laws; however, the exception would appear to be viable in other criminal prosecutions.

## 2. Insanity

Character evidence in the form of prior specific acts often gains admission in criminal cases upon the argument that it is relevant to support or negate a plea of insanity.<sup>58</sup> The courts have adhered to a wide-latitude rule relating to the admissibility of a criminally accused's conduct when offered in support of his plea of insanity. This wide latitude has encompassed many forms of conduct which trial courts have held relevant to show his mental incapacity at the time in issue.<sup>59</sup>

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55. Entrapment as a viable defense, of course, requires more than mere invitation or temptation by law enforcement officers. Rather, there must be proof that the agent or officer induced the accused to commit a crime he would not have committed but for the inducement. *State v. Padgett*, 29 N.C. App. 277, 224 S.E.2d 211 (1976); *State v. Green*, 27 N.C. App. 491, 219 S.E.2d 529 (1975).

56. *State v. Salame*, 24 N.C. App. 1, 210 S.E.2d 77 (1974) (prosecution for felonious distribution of marijuana and cocaine; court admitted evidence of subsequent unrelated instances of accused's dispensing drugs; court stating that when defense of entrapment is raised, defendant's predisposition to commit the charged crime becomes the central inquiry), *cert. denied*, 286 N.C. 419, 211 S.E.2d 800 (1975). Note should be taken that if the particular jurisdiction adopts the Model Penal Code, which provides for an objective test of entrapment, predisposition of the particular defendant would not be material and prior crimes would not be admissible upon that issue. See *Langford v. Texas*, 571 S.W.2d 326 (Tex. Crim. App. 1978) (statute governing entrapment defense provides for "objective" test for entrapment; and thus, having once determined that there was an inducement, trial court need consider only nature of police activity involved, without reference to predisposition of particular defendant to commit offense).

57. See *State v. Stanley*, 288 N.C. 19, 215 S.E.2d 589 (1975) (court holding to rule that entrapment puts disposition in issue; however, court excluded conviction of marijuana possession as irrelevant to show a disposition to possess LSD with intent to distribute). This exception could have been discussed as rebuttal since some decisions have admitted prior misconduct as evidence to rebut the accused's defense of entrapment. See *State v. Vallejos*, 89 Ariz. 76, 358 P.2d 178 (1960).

58. See 2 J. WIGMORE, EVIDENCE § 228 (3d ed. 1940).

59. *State v. Bundridge*, 294 N.C. 45, 239 S.E.2d 811 (1978) (recognizing the test of wide latitude in admitting evidence having a tendency to throw light upon

This same wide-latitude rule has been applied in decisions relating to admissibility of conduct and condition of the accused offered by the state in opposition to his plea of insanity.<sup>60</sup> If an accused who pleads not guilty by reason of insanity introduces evidence which warrants a finding of such insanity, the state may introduce evidence of the commission of other crimes and misdeeds by the accused. Such evidence is held admissible to show that the criminal act charged was not the offspring of a mental disease, but of a wicked propensity.<sup>61</sup> The power of the state to introduce evidence of other crimes includes the right to introduce misdeeds of the accused not amounting to a crime but having a tendency to prove his sanity. Despite the application of the wide-latitude rule, the state does not have the right to introduce evidence of all former crimes and misdeeds committed by the accused. The state may introduce only such crimes and misdeeds when they reveal some action by the accused that is relevant to his mental capacity.<sup>62</sup>

## B. IMPEACHMENT

Whenever a party or nonparty witness takes the stand, a limited aspect of his character is placed in issue—his character for telling the truth. This aspect of his character is referred to as “credibility,” and all evidence relevant to this particular trait and to whether he is the kind of person who speaks the truth is admissi-

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the mental condition of a defendant who has entered a plea of not guilty by reason of insanity); *State v. Duncan*, 244 N.C. 374, 93 S.E.2d 421 (1956) (citing a Tennessee decision which held that evidence of his conduct and condition before, at the time of and subsequent to the doing of the thing charged is admissible on question of defendant's mental status at the time he did the thing complained of); *State v. Wells*, 162 S.C. 509, 161 S.E. 177 (1931).

60. *State v. Bundridge*, 294 N.C. 45, 239 S.E.2d 811 (1978).

61. *Reedy v. State*, 246 Ala. 363, 20 So. 2d 528 (1945) (that accused, charged with the commission of rape on February 11, 1944, stated that between the time of his escape from an insane hospital on February 1, 1944, and February 11, 1944, he had committed numerous purse snatchings and thefts and numerous assaults and attempts to assault females to satisfy his lust); *Grammer v. State*, 239 Ala. 633, 196 So. 268 (1940) (that accused, who was charged with committing murder on August 3, 1937, and claimed that he had been mentally deranged long prior to such killing, was convicted on September 5, 1933, of assault with a weapon and sentenced to the penitentiary upon such conviction); see C. GAMBLE, *McELROY'S ALABAMA EVIDENCE* § 61.01(8) (3d ed. 1977).

62. See *State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241 (1969) (holding that evidence is only admissible if it bears such relation to the defendant's condition of mind at the time of the alleged crime as to be worthy of consideration in respect thereto); *State v. Duncan*, 244 N.C. 374, 93 S.E.2d 421 (1956); *Farris v. Commonwealth*, 209 Va. 305, 163 S.E.2d 575 (1968).

ble.<sup>63</sup> This exception to the general exclusionary rule is applicable whether the witness is a party in civil litigation or the accused in criminal proceedings.<sup>64</sup>

### 1. Prior Misconduct or Criminal Acts for Which There Is a Conviction

The common law rendered one totally incompetent to serve as a witness if he had been convicted of what were termed "infamous" crimes.<sup>65</sup> This rule of incompetency eventually was abandoned by statute, but those statutes which abrogated it as a ground for incompetency retained it as permissible evidence for impeachment. They provide that one may be impeached by evidence of his prior conviction for a particular crime. The difficulty came in deciding which crimes reflected upon one's believability. Some statutes provide that only felonies<sup>66</sup> can be used, while others permit impeachment by prior conviction for any crime.<sup>67</sup> The majority of these statutes have adopted the requirement that there can be impeachment only by prior conviction of a crime involving "moral turpitude."<sup>68</sup> Federal Rule of Evidence 609 adopts two categories into which a conviction may fall and thus qualify as permissible impeachment. If the prior conviction was for a crime that (1) was punishable by death or imprisonment in excess of one year or (2) involved dishonesty or false statement, it may be used for impeachment purposes.<sup>69</sup>

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63. See FED. R. EVID. 404(a)(3) (which declares impeachment to be an exception to the general exclusionary rule); E. CLEARY, *supra* note 1, at § 41; 3A J. WIGMORE, EVIDENCE § 874 (Chadbourn rev. 1970).

64. See C. GAMBLE, McELROY'S ALABAMA EVIDENCE §§ 165.01(2), .01(4) (3d ed. 1977); 3A J. WIGMORE, EVIDENCE §§ 890-891 (Chadbourn rev. 1970). It should be noted that in strictly common law jurisdictions one may be prohibited from impeaching his own witness, but Federal Rule of Evidence 607 provides for impeachment by all parties even the party who called the witness.

65. 2 J. WIGMORE, EVIDENCE § 519 (3d ed. 1949); see E. CLEARY, *supra* note 1, at § 43.

66. See CAL. EVID. CODE § 788 (West 1974); IDAHO CODE § 9-1209 (1948).

67. *State v. Hurt*, 49 N.J. 114, 228 A.2d 673 (1967); *State v. Rios*, 155 N.J. Super. 11, 382 A.2d 82 (1977); see N.J. STAT. ANN. § 2A:81-12 (West 1976) which states:

For the purpose of affecting the credibility of any witness, his interest in the result of the action, proceeding or matter or his conviction of any crime may be shown by examination or otherwise, and his answers may be contradicted by other evidence. Conviction of crime may be proved by the production of the record thereof, but no conviction of an offender shall be received in evidence against him in a civil action to prove the truth of the facts upon which the conviction was based.

68. See C. GAMBLE, McELROY'S ALABAMA EVIDENCE § 145.01 (3d ed. 1977).

69. FED. R. EVID. 609(a).



Once the criminally accused takes the witness stand in North Carolina, he has put his credibility in issue.<sup>70</sup> Consequently, for the limited purpose of impeachment the prosecution may cross-examine the accused concerning his previous criminal convictions.<sup>71</sup> Unlike the majority of jurisdictions, North Carolina permits inquiry into a prior conviction for any crime.<sup>72</sup> This position is maintained in face of a national effort by the jurisdictions, whatever their individual tests, to limit this method of impeachment to convictions for crimes which are relevant to whether the accused tells the truth.

While the accused may be asked about prior convictions, he may not be asked about charges short of a conviction.<sup>73</sup> This limitation on the prosecution's cross-examination does little to protect the accused who testifies in his own behalf since the court's sustention of a defense objection to a question about an accusation, arrest or indictment fails to preclude the prosecutor from then simply asking the accused if he committed the particular criminal misconduct.<sup>74</sup>

Another limitation upon the right of the prosecution to cross-examine the accused with reference to his other criminal convictions is the principle that his answers to such questions are conclusive.<sup>75</sup> This means that the record of his conviction cannot be offered as evidence to contradict his answer.<sup>76</sup> Much of the value to the accused afforded by the foregoing principle depreciates in light of a companion rule that the prosecutor may continue to question the

70. *State v. Thomas*, 35 N.C. App. 198, 241 S.E.2d 128 (1978).

71. *State v. McLean*, 294 N.C. 623, 242 S.E.2d 814 (1978); *State v. Finch*, 293 N.C. 132, 235 S.E.2d 819 (1977); *State v. Miller*, 281 N.C. 70, 187 S.E.2d 729 (1972).

72. *See Ingle v. Roy Stone Transfer Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967) (any sort of criminal offense may be inquired about).

73. *State v. Lester*, 289 N.C. 239, 221 S.E.2d 268 (1976) (cannot ask about prior criminal charges against him); *State v. Curry*, 288 N.C. 660, 220 S.E.2d 545 (1975) (impermissible to ask accused if he has been accused, indicted or arrested for an unrelated criminal offense).

74. This is permitted as impeachment by prior criminal misconduct for which there has been no conviction. *See State v. Allen*, 34 N.C. App. 260, 237 S.E.2d 869, *cert. denied*, 293 N.C. 741, 241 S.E.2d 516 (1977); *State v. Crawford*, 29 N.C. App. 487, 224 S.E.2d 680 (1976); *State v. Logan*, 22 N.C. App. 55, 205 S.E.2d 558 (court indicating it permissible to ask accused about prior crime for which he is under indictment, provided the prosecution does not mention the word indictment), *cert. denied*, 285 N.C. 666, 207 S.E.2d 752 (1974).

75. *State v. Finch*, 293 N.C. 132, 235 S.E.2d 819 (1977); *State v. Redfern*, 13 N.C. App. 230, 185 S.E.2d 6 (1971), *cert. denied*, 280 N.C. 304, 186 S.E.2d 177 (1972).

76. *State v. Currie*, 293 N.C. 523, 238 S.E.2d 477 (1977); *State v. Heard*, 262 N.C. 599, 138 S.E.2d 243 (1964); *State v. Blue*, 17 N.C. App. 526, 195 S.E.2d 104 (1973) (answer could not be rebutted by other evidence).

accused about his prior unrelated criminal convictions after an initial denial.<sup>77</sup> In the words of the North Carolina Supreme Court, this continued inquiry is allowed for the purpose of "sifting" the witness.<sup>78</sup> This right of the prosecutor to pursue the witness is limited only by boundaries of good faith<sup>79</sup> and trial court discretion.<sup>80</sup>

Strong policy reasons support the principle that ordinarily one may not go into the details of the crime by which the witness is being impeached. Such details unduly distract the jury from the issues properly before it, harass the witness and inject confusion into the trial.<sup>81</sup> However, inquiry is allowed into the time and place of the conviction and the punishment imposed.<sup>82</sup>

Even though the particular crime for which the witness was convicted meets the appropriate test of the jurisdiction, it may be excluded for other reasons. Some decisions, for example, preclude a prior conviction based upon the violation of a municipal ordinance.<sup>83</sup> Other decisions, customarily acting under statutory authority, have held that prior criminal convictions are inadmissible for impeachment purposes if those convictions arose in juvenile proceedings.<sup>84</sup> Federal Rule of Evidence 609 essentially adopts this position of

77. *State v. Garrison*, 294 N.C. 270, 240 S.E.2d 377 (1978) (witness' denial of conviction does not *per se* preclude further cross with reference thereto); *State v. Allen*, 34 N.C. App. 260, 237 S.E.2d 869, *cert. denied*, 293 N.C. 741, 241 S.E.2d 516 (1977); *State v. Jeffries*, 3 N.C. App. 218, 164 S.E.2d 398 (1968).

78. *State v. Currie*, 293 N.C. 523, 238 S.E.2d 477 (1977); *State v. Gaiten*, 277 N.C. 236, 176 S.E.2d 778 (1970).

79. *State v. Fountain*, 282 N.C. 58, 191 S.E.2d 674 (1972) (cross-examination as to prior convictions must be made in good faith and based on information). Whether there is information and good faith is a matter left largely in the trial judge's discretion. *See State v. Curry*, 288 N.C. 660, 220 S.E.2d 545 (1975) (good faith); *State v. Gaiten*, 277 N.C. 236, 176 S.E.2d 778 (1970); *State v. Haith*, 7 N.C. App. 552, 172 S.E.2d 912 (1970).

80. *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976); *State v. Campbell*, 20 N.C. App. 281, 201 S.E.2d 33 (1973); *State v. Adams*, 16 N.C. App. 640, 192 S.E.2d 648 (1972).

81. *State v. Finch*, 293 N.C. 132, 235 S.E.2d 819 (1977).

82. *State v. Mitchell*, 35 N.C. App. 95, 239 S.E.2d 871 (1978) (allowing inquiry as to punishment imposed); *see Annot.*, 67 A.L.R.3d 775 (1975) (propriety, on impeaching credibility of witness in criminal case by showing former conviction, relating to nature and extent of punishment).

83. *Baker v. State*, 344 So. 2d 547 (Ala. Crim. App. 1977); *Birmingham v. Evans*, 53 Ala. App. 358, 300 So. 2d 396 (Crim. App.), *cert. denied*, 293 Ala. 136, 300 So. 2d 401 (1974).

84. *Crenshaw v. Alabama Freight, Inc.*, 287 Ala. 372, 252 So. 2d 33 (1971); *Mayton v. State*, 52 Ala. App. 626, 296 So. 2d 249 (Crim. App. 1974); *see C. GAMBLE, McELROY'S ALABAMA EVIDENCE* § 145.01(4) (3d ed. 1977).

excluding juvenile convictions when offered for impeachment.<sup>85</sup> However, the Federal Rule will permit impeachment by juvenile conviction in a certain limited situation. If the judge decides it is necessary for a fair determination of guilt or innocence, he may admit evidence in a criminal trial of a juvenile adjudication of a witness other than the accused where the conviction would be admissible to attack the credibility of an adult.<sup>86</sup> The corresponding rule in North Carolina is that a witness may be cross-examined for impeachment purposes concerning a juvenile court adjudication where the conduct upon which the disposition was based would be deemed "criminal" if committed by an adult.<sup>87</sup>

The party attempting to impeach a particular witness often offers a prior criminal conviction that occurred a considerable time before the present trial. The party who called the witness may argue that the conviction is too remote to have probative value upon whether the witness tells the truth today. Historically, this issue has been left to the discretion of the trial judge and is said to go more to the weight of the evidence than to its admissibility.<sup>88</sup> The Federal

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85. FED. R. EVID. 609(d); see *United States v. Canniff*, 521 F.2d 565 (2d Cir. 1975) (state youthful offender adjudication held normally inadmissible to attack credibility of a defendant), *cert. denied, sub nom. Begnigno v. United States*, 423 U.S. 1059 (1976); Annot., 39 A.L.R. Fed. 570 (1978) (construction and application of Rule 609(a) of the Federal Rules of Evidence permitting impeachment of witness by evidence of prior conviction of crime).

86. FED. R. EVID. 609(d); see E. CLEARY, *supra* note 1, at § 43 (the federal rule does not preclude the use of a juvenile conviction to impeach a non-accused witness if the crime either carried punishment of more than one year in jail or involved dishonesty and false statement).

87. *State v. Miller*, 281 N.C. 70, 187 S.E.2d 729 (1972); *State v. Tuttle*, 28 N.C. App. 198, 220 S.E.2d 630 (1975), *cert. denied*, 291 N.C. 716, 232 S.E.2d 207 (1977); see Annot., 63 A.L.R.3d 1112 (1975) (use of judgment in prior juvenile court proceeding to impeach credibility of witness). An interesting question in this area, for which present purposes do not permit exhaustive treatment is: What effect upon this method of impeachment will be wrought by statutes which permit the criminal record to be expunged? One such statute exists in North Carolina and, relative to people not over twenty-one years who are found to possess a controlled substance, provides that:

No person as to whom such order [expungment] has been entered shall be held thereafter under any provision of any law to be guilty of perjury . . . by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

N.C. GEN. STAT. § 90-96(b) (1973).

88. *State v. Bullock*, 28 N.C. App. 1, 220 S.E.2d 169 (1975), *cert. denied*, 289 N.C. 299, 222 S.E.2d 699 (1976); *State v. Locklear*, 26 N.C. App. 300, 215 S.E.2d 859, *cert. denied*, 288 N.C. 248, 217 S.E.2d 672 (1975); see *United States v. Hild-*

Rules of Evidence drift away from this discretionary position to an arbitrary ten-year time limit beyond which the conviction is too remote.<sup>89</sup>

Other grounds for arguing the exclusion of convictions which otherwise qualify as proper impeachment arise out of the status of the conviction.<sup>90</sup> Under the majority rule in this country, for example, the position has been that pardon does not prevent the use of the conviction for impeachment.<sup>91</sup> However, the Federal Rules provide:

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.<sup>92</sup>

The traditional rule and that adopted by the Federal Rules<sup>93</sup> has been that pendency of an appeal from the conviction does not render it inadmissible for impeachment.<sup>94</sup>

reth, 387 F.2d 328 (4th Cir. 1967); Annot., 67 A.L.R.3d 824 (1975) (right to impeach credibility of accused by showing prior conviction, as affected by remoteness in time of prior offense).

89. FED. R. EVID. 609(b) provides:

Evidence of a conviction under this rule is not admissible if a period of more than ten 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 fact 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.

90. See *State v. Vincent*, 35 N.C. App. 369, 241 S.E.2d 390 (1978) (impermissible to impeach with conviction arising where accused was indigent and afforded no legal counsel).

91. See 3A J. WIGMORE, EVIDENCE § 980 (Chadbourne rev. 1970) (stating that, unless otherwise expressly declared therein, a pardon does not imply a finding of the innocence of the person convicted); Annot., 30 A.L.R.2d 893 (1953) (pardon as affecting impeachment by proof of conviction of crime).

92. FED. R. EVID. 609(c).

93. FED. R. EVID. 609(e).

94. *State v. Waller*, 11 N.C. App. 434, 181 S.E.2d 195 (court recognizing that accused has right to apprise jury that the conviction is on appeal), *cert. denied*,

## 2. Prior Misconduct or Criminal Acts for Which There Is No Conviction

Any witness, including the criminally accused, may be impeached by his prior criminal acts or misconduct for which there has been no conviction.<sup>95</sup> Impeachment by prior non-convicted misconduct may be accomplished only through the testimony of the witness being impeached.<sup>96</sup> If the witness denies that he ever committed the act or engaged in the misconduct, the impeaching party is bound by his answer.<sup>97</sup> This latter rule prohibiting extrinsic proof is probably a concession to those holding to the philosophy that one should not be allowed to even ask about prior misconduct where there was no conviction for it.<sup>98</sup>

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279 N.C. 351, 182 S.E.2d 584 (1971); see Annot., 16 A.L.R.3d 726 (1967) (permissibility of impeaching credibility of witness by showing former conviction, as affected by pendency of appeal from conviction); Annot., 14 A.L.R.3d 1272 (1967) (permissibility of impeaching credibility of witness by showing verdict of guilty without judgment or sentence thereon).

95. *State v. Garrison*, 294 N.C. 270, 240 S.E.2d 377 (1978) (any act tending to impeach his character); *State v. Bishop*, 293 N.C. 84, 235 S.E.2d 214 (1977); *State v. McKenna*, 289 N.C. 668, 224 S.E.2d 537, *vacated in part*, 429 U.S. 912 (1976); see 3A J. WIGMORE, EVIDENCE § 987 (Chadbourn rev. 1970).

96. See *State v. Currie*, 293 N.C. 523, 238 S.E.2d 477 (1977); *State v. Gaiten*, 277 N.C. 236, 176 S.E.2d 778 (1970); FED. R. EVID. 608(b) ("Specific instances of the conduct of a witness, for purposes of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence."); 3A J. WIGMORE, EVIDENCE § 981 (Chadbourn rev. 1970).

97. *State v. Garrison*, 294 N.C. 270, 240 S.E.2d 377 (1978) (even after denial, the prosecutor may, at trial court's discretion, further "sift" the accused witness as to his prior misconduct); *State v. Currie*, 293 N.C. 523, 238 S.E.2d 477 (1977).

98. *Christie v. Brewer*, 374 S.W.2d 908 (Tex. Civ. App. 1964); *Sparks v. State*, 366 S.W.2d 591 (Tex. Crim. App. 1963); IDAHO CODE § 9-1302 (1948) (exemplifies a state statute forbidding cross-examination as to acts of misconduct for impeachment); E. CLEARY, *supra* note 1, at § 42 (minority of jurisdictions forbid all cross-examination as to particular misconduct not the subject of convictions). There are recognizable dangers in allowing this method of impeachment. For example, what is to prevent the unscrupulous cross-examiner from thinking of a horrible act, relevant to credibility, and asking the witness if he committed it? The majority rule permitting such cross-examination is based upon the belief that such an abuse will be prevented by the ethical discretion of the bar and by the trial judge's requiring some basis for a belief by the cross-examiner that the witness actually committed the prior act. See *United States v. Crippen*, 570 F.2d 535 (5th Cir. 1978) (discussing judge's inquiry into whether counsel had a good faith basis for the question); 3A J. WIGMORE, EVIDENCE § 983 (Chadbourn rev. 1970). North Carolina solves this problem by requiring that the prosecutor be proceeding with information and in good faith when asking about such misconduct. *State v. McLean*, 294 N.C. 623, 242 S.E.2d 814 (1978); *State v. Garrison*, 294 N.C. 270, 240 S.E.2d 377 (1978); *State v. Foster*, 293 N.C. 674, 239 S.E.2d 449 (1977) (holding that prosecutor must have

Some division has existed through the years over what kind of act will qualify under this exception for impeachment purposes. Some have limited the exception to conduct relevant to veracity,<sup>99</sup> while others have required relevancy to veracity and honesty.<sup>100</sup> The Federal Rules of Evidence go further and require that the specific act must be clearly probative of the witness' truthfulness or untruthfulness.<sup>101</sup> North Carolina has taken the approach that the prosecutor may inquire about any prior act of the accused which can be described as criminal,<sup>102</sup> degrading<sup>103</sup> or reprehensible.<sup>104</sup>

Analogous to the situation in which prior convictions are offered for impeachment, some prior specific acts of misconduct arguably will have occurred so long ago that opposing counsel may assert that they are irrelevant to show the witness' present capacity for truth telling. The majority of jurisdictions permitting the non-conviction method of impeachment have deemed the question of remoteness subject to the discretionary control of the trial judge.<sup>105</sup> In fact, historic precedent exists for the position that the entire question of cross-examination regarding prior non-convicted acts should be left primarily to the discretion of the court.<sup>106</sup> In addition to remoteness,

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reasonable grounds to believe that the witness committed the criminal or degrading act).

99. *Moore v. United States*, 394 F.2d 818, 819 (5th Cir. 1968) (court declined to allow a witness' veracity to be attacked by evidence that she had illegitimate children), *cert. denied*, 393 U.S. 1030 (1969); 3A J. WIGMORE, EVIDENCE § 982 (Chadbourn rev. 1970).

100. *Hug v. United States*, 329 F.2d 475, 483 (6th Cir.), *cert. denied*, 379 U.S. 818 (1964); *Pullman Co. v. Hall*, 55 F.2d 139, 141 (4th Cir. 1932).

101. FED. R. EVID. 608(b); *see People v. Mitchell*, 402 Mich. 506, 265 N.W.2d 163 (1978) (holding under MICH. R. EVID. 608(b) that homosexual conduct is not relevant to truthfulness).

102. *State v. Chapman*, 294 N.C. 407, 241 S.E.2d 667 (1978) (criminal acts); *State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976).

103. *State v. Garrison*, 294 N.C. 270, 240 S.E.2d 377 (1978); *State v. Foster*, 293 N.C. 674, 239 S.E.2d 449 (1977); *State v. Black*, 283 N.C. 344, 196 S.E.2d 225 (1973).

104. *State v. McLean*, 294 N.C. 623, 242 S.E.2d 814 (1978); *State v. Willis*, 20 N.C. App. 43, 200 S.E.2d 408 (1973), *aff'd*, 285 N.C. 195, 204 S.E.2d 33 (1974).

105. *See Shailer v. Bullock*, 78 Conn. 65, 61 A. 65 (1905); *State v. Locklear*, 26 N.C. App. 300, 215 S.E.2d 859, *cert. denied*, 288 N.C. 248, 217 S.E.2d 672 (1975); E. CLEARY, *supra* note 1, at § 42.

106. *See* 3 J. WIGMORE, EVIDENCE § 983 (3d ed. 1940). FED. R. EVID. 608(b) specifically qualifies the rule with the words "in the discretion of the court." *Stansbury v. United States*, 219 F.2d 165 (5th Cir. 1955). The North Carolina courts rather consistently preface the rule with the words "within the discretion of the trial court." *State v. Williams*, 292 N.C. 391, 233 S.E.2d 507 (1977); *State v. Black*, 283 N.C. 344, 196 S.E.2d 225 (1973).

the court's discretion would come to bear on other issues including probative value being outweighed by prejudicial effect,<sup>107</sup> relevancy to the trait of credibility,<sup>108</sup> consummation of an undue amount of time and distraction of the jury.<sup>109</sup>

### C. REBUTTAL

On occasion, the accused not only will take the stand in his own behalf, opening the door to the criminal history discussed in the preceding subsection, but he also will engage in what could be termed "over testifying." This usually consists of general denials that he does not now and has never engaged in this kind of criminal activity. Although this may be a wise tactical maneuver by the defense counsel, it does have the decided disadvantage of authorizing the prosecution to introduce the accused's prior criminal misconduct on the ground that it is proper rebuttal.<sup>110</sup>

The most historic and familiar example of the rebuttal rule is found in prosecutions where the accused claims that he did not have the physical ability to have committed the crime.<sup>111</sup> The most fertile area for the appearance of this particular basis for admitting the accused's criminal history is drug prosecutions.<sup>112</sup>

107. See *State v. Bullock*, 28 N.C. App. 1, 220 S.E.2d 169 (1975), *cert. denied*, 289 N.C. 299, 222 S.E.2d 699 (1976); FED. R. EVID. 403; E. CLEARY, *supra* note 1, at § 42.

108. *State v. Foster*, 293 N.C. 674, 239 S.E.2d 449 (1977) (any act which tends to discredit his character and challenge his credibility); *State v. Foster*, 284 N.C. 259, 200 S.E.2d 782 (1973); FED. R. EVID. 403; 3A J. WIGMORE, EVIDENCE § 983 (Chadbourne rev. 1970).

109. *Robinson v. Atterbury*, 135 Conn. 517, 66 A.2d 593 (1949); *Corum v. Comer*, 256 N.C. 252, 123 S.E.2d 473 (1962); *Deming v. Gainey*, 95 N.C. 528 (1886); FED. R. EVID. 403; E. CLEARY, *supra* note 1, at § 42.

110. *State v. Breeze*, 26 N.C. App. 48, 214 S.E.2d 802 (charge of larceny by trick and defendant testified that he had refused to participate in the confidence game; court properly permitted State rebuttal witness to testify as to similar schemes attempted by defendant), *cert. denied*, 287 N.C. 665, 216 S.E.2d 908 (1975).

111. *State v. Dawson*, 278 N.C. 351, 180 S.E.2d 140 (1971) (in manslaughter prosecution defendant testified that, due to injuries received in an earlier accident, he was not physically able to kick victim; in rebuttal the prosecution was allowed to have witness testify that he had been assaulted by accused during this period of alleged disability).

112. *State v. Johnson*, 13 N.C. App. 323, 185 S.E.2d 423 (1971) (accused denied knowledge of marijuana and tried to give impression that someone else had placed it in his home; court permitted State's rebuttal witness to testify about purchasing marijuana at defendant's home two weeks before the incident in question).

One method of triggering the rebuttal rule, other than through the scope of the accused's direct examination, is an overly zealous cross-examination of the prosecution witness.<sup>113</sup> Where, for example, the defense elicits testimony from a witness on cross-examination tending to show bias, the North Carolina Supreme Court has held it proper for that witness to testify on redirect that the reason she disliked the defendant was due to the fact that he had raped her.<sup>114</sup> The earliest enunciation of this principle by the North Carolina courts was in the following form:

A party cannot be allowed to impeach a witness on the cross-examination by calling out evidence culpatory of himself and then stop, leaving the opposing party without opportunity to have the witness explain his conduct, and thus place it in an unobjectionable light if he can. In such case the opposing party has the right to such explanation, even though it may affect adversely the party who cross-examined.<sup>115</sup>

#### V. DEFENSE TACTICS TO PRECLUDE THE ADMISSION OF OR DIMINISH THE PROBATIVE VALUE OF THE ACCUSED'S CRIMINAL HISTORY

##### A. TACTICS TO EXCLUDE CRIMINAL HISTORY

###### 1. Immateriality

The general rule excluding criminal history does so only when the misconduct is offered to prove the accused's character or disposition for committing the kind of offense for which he is on trial.<sup>116</sup> Such evidence is not precluded when offered for some other purpose including: intent, knowledge, identity and common plan or scheme.<sup>117</sup> The foregoing dichotomy produces a situation in which the defense invariably objects to criminal history as inadmissible under the general exclusionary rule, and the prosecution responds that it is offered for some purpose other than to prove bad character.

Once the prosecution has suggested one of these other purposes,

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113. *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977) (accused cross-examined State's witness and intimated that reason witness accompanied accused to victim's home was to kill the victim himself; on redirect the State's witness was allowed to testify that he went with accused because accused had pistol whipped him several years before).

114. *State v. Patterson*, 284 N.C. 190, 200 S.E.2d 16 (1973).

115. *State v. Glenn*, 95 N.C. 677 (1886).

116. See generally cases cited *supra* in note 5.

117. See *supra* note 6.



the likely response of the defense would be that the offered purpose is not material to the case.<sup>118</sup> In order to understand when this response is appropriate, the defense counsel must first have a firm understanding of the distinction between materiality and relevancy. Fact A may be offered in evidence for the purpose of proving the existence of inference number one. If inference number one is not an issue in the case, fact A would be immaterial and, consequently, inadmissible. For example, suppose the defendant is being prosecuted for the crime of having carnal knowledge of a female under twelve years of age. The prosecution introduces fact A (that the accused and the prosecutrix had had prior sexual relations) for the purpose of proving inference number one (that she consented to the present sexual relations). Obviously, fact A is relevant to give rise to inference number one in the foregoing hypothetical. However, fact A is immaterial because it does not give rise to an inference that is an ultimate issue in the case since the consent of this female is immaterial in the prosecution for this crime.

When the prosecutor states, for example, that he is offering the criminal history to prove intent, then operating under the foregoing analysis the defense would attempt to persuade the court that the now-charged crime has no prerequisite material intent.<sup>119</sup> Similarly, if the prosecution offers criminal history for the purpose of impeachment, the defense will remind the court that until the accused takes the witness stand in his own behalf credibility is not material.<sup>120</sup>

## 2. Irrelevancy

The second tactic of the defense is to argue that the proffered criminal misconduct is not relevant to the purpose for which it is offered. Such a tactic cannot be asserted convincingly unless the defense counsel has a clear understanding of the applicable test of relevancy. Suppose that D is charged with and prosecuted for murder. Evidence is introduced that D was the beneficiary of an insurance policy on the life of the victim. Fact A (D was the beneficiary on the victim's life policy) is introduced to give rise to inference number one (D is likely to have committed the crime). The attorney for the defendant will argue that fact A leads as validly to inference number two (being the insurance beneficiary does not indicate guilt) as it does to inference number one (being the beneficiary does infer guilt). There have been two tests of relevancy employed to

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118. See FED. R. EVID. 401 (concept of materiality is included within the scope of relevancy).

119. See *supra* note 13.

120. See cases collected *supra* in note 70.

resolve this dilemma. The first test, utilized by North Carolina, is that fact A is relevant if there is any logical relationship between it and the ultimate inference for which it is offered.<sup>121</sup> In the foregoing hypothetical this would mean that fact A (D was the beneficiary) is relevant if it, in any way, gives rise to the inference that he is more likely to have killed the victim. A second test, proposed by Professor Wigmore, states that the evidence must have more than a minimum degree of relevancy and must have a plus value. Applied to the foregoing hypothetical, this test would work to the effect that fact A (D was the beneficiary) is only relevant if it leads more to inference number one (D more likely murdered the victim) than to inference number two (D is not more likely to have murdered the victim).

Let us assume that the accused is charged with the crime of transporting stolen vehicles across state lines. The prosecutor offers testimony from a witness of an alleged offer by the accused to steal and burn the witness' automobile in order to defraud the insurance carrier. The defense objects that this is an impermissible use of prior criminal history to prove criminal character. The prosecutor responds by alleging this to be a crime requiring a prerequisite knowledge with this previous proposition being offered for the purpose of proving such knowledge.<sup>122</sup> An objection likely will be heard from the defense that this offer to burn an automobile is not relevant because it does not give rise to an inference that the accused knew the vehicle he drove across state lines was stolen. This will require a decision from the trial judge as to whether this alleged proposition has any logical tendency to prove the knowledge.<sup>123</sup> This judicial dilemma should be resolved in light of the following philosophy: "Whether the requisite degree of relevancy exists is a judicial question to be determined in light of the inevitable tendency of such evidence to raise a legally spurious presumption of guilt in the minds of the jurors."<sup>124</sup>

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121. *State v. Braxton*, 294 N.C. 446, 242 S.E.2d 769 (1978) (whether it tends to shed any light on the subject of inquiry); *State v. Bundridge*, 294 N.C. 45, 239 S.E.2d 811 (1978) (any logical tendency, however slight, to prove fact in issue); *State v. Hugenberg*, 34 N.C. App. 91, 237 S.E.2d 327, cert. denied, 293 N.C. 591, 238 S.E.2d 151 (1977); see *FED. R. EVID.* 401 (any tendency to make the existence of any fact that is of consequence to the determination of the action).

122. See *supra* note 11.

123. See *Bullard v. United States*, 395 F.2d 658 (5th Cir. 1968).

124. *State v. Fowler*, 230 N.C. 470, 475, 53 S.E.2d 853, 856 (1949). While it is a discretionary matter, a common ground of argued irrelevancy is remoteness. The defense asserts that the particular prior crime was committed by the accused so long ago that it does not have probative value to give rise to the inference for which it

### 3. Unfair Surprise, Misleading, Confusion, Undue Prejudice and Waste of Time

The next objection of the defense to preclude the admission of criminal history may come from the collection of objections which find comprehensive expression in the Federal Rules of Evidence: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>125</sup>

The most popular of these grounds of exclusion asserted against the admission of prior crimes is an objection based upon the premise that the probative value of the evidence is weak compared to the likelihood of its playing upon the passions and prejudices of the jury.<sup>126</sup> This objection not only effectuates the exclusion of prior crimes, but, even if prior crimes are admissible, it also serves as a basis for the accused to object to specific unnecessary details of such offenses when these would only inflame the minds of the jurors.<sup>127</sup>

### 4. Lack of Good Faith and Information

Whenever the prosecutor cross-examines the accused about a prior conviction or a prior criminal act for which there is no conviction, either for impeachment or substantive purposes, the North Carolina cases are replete with statements which indicate such a question can be propounded only when based upon information and asked in good faith.<sup>128</sup> A prosecutor conceivably could question an

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is offered. *See State v. Locklear*, 26 N.C. App. 300, 215 S.E.2d 859 (court admitting two-year-old altercation between accused and victim as relevant to motive despite remoteness objection), *cert. denied*, 288 N.C. 248, 217 S.E.2d 672 (1975).

125. FED. R. EVID. 403; *see State v. Hugenberg*, 34 N.C. App. 91, 237 S.E.2d 327 (recognizing objections of confusion, unfair surprise and unnecessary prolonging of the trial), *cert. denied*, 293 N.C. 591, 238 S.E.2d 151 (1977).

126. *State v. Braxton*, 294 N.C. 446, 242 S.E.2d 769 (1978); *State v. Bullock*, 28 N.C. App. 1, 220 S.E.2d 169 (1975), *cert. denied*, 289 N.C. 299, 222 S.E.2d 699 (1976); *State v. Stack*, 12 N.C. App. 101, 182 S.E.2d 633 (1971). A second prong of this particular objection is that the evidence has so little probative value that it distracts the jury's attention from material matters. *State v. Jenkins*, 292 N.C. 179, 232 S.E.2d 648 (1977).

127. *See State v. Whitney*, 26 N.C. App. 460, 216 S.E.2d 439 (1975) (court granted new trial because testimony included details which only could relate to defendant's character and inflame the mind of the jury).

128. *See generally* cases collected *supra* in note 97; *State v. Heard*, 262 N.C. 599, 138 S.E.2d 243 (1964). Whether there is information and good faith is a matter largely left in the trial judge's discretion. *State v. Curry*, 288 N.C. 660, 220 S.E.2d 545 (1975) (good faith); *State v. Fountain*, 282 N.C. 58, 191 S.E.2d 674 (1972).

accused concerning unrelated criminal offenses which the prosecutor actually has no factual basis to believe occurred. It would behoove the defense counsel to object whenever he feels this is occurring.<sup>129</sup> The maneuver of the defense to assure such a factual basis would be to ask for a *voir dire* hearing to determine whether the prosecutor's question is based upon fact and asked in good faith. It is entirely permissible for the trial judge to conduct such a hearing.<sup>130</sup> The only weakness in the accused's calling for such a *voir dire* hearing lies in the judicial pronouncement that such a procedure, while it is permissible, is not required.<sup>131</sup>

## B. TACTICS TO DIMINISH EFFECT OF CRIMINAL HISTORY

### 1. Limiting Instructions

The common justification for admitting prior criminal misconduct is that it is admissible for some particular purpose other than to prove the accused's bad character.<sup>132</sup> If requested by the defense counsel, the trial judge should instruct the jury regarding the limited purpose for which the criminal history is admitted and warn them not to consider it for any other purpose.<sup>133</sup> Should the prosecutor assert, for example, that he is offering the prior crime of the accused to prove his motive for committing the now-charged crime,<sup>134</sup> the defense should ask that the jury be instructed to consider such evidence only as it relates to motive and that such proof cannot be used to satisfy them as to the other elements of crime now being prosecuted.<sup>135</sup>

Perhaps the most common application of this defense tactic occurs where the prosecution seeks to impeach the accused by prior conviction or prior criminal act for which there was no conviction.<sup>136</sup> Whenever this impeachment by criminal history occurs, the defense should request that the jury be instructed that this evidence may be used only for impeachment and that it does not constitute sub-

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129. *Young v. State*, 363 So. 2d 1007 (Ala. Crim. App. 1978); see Annot., 3 A.L.R.3d 965 (1965).

130. *State v. Heard*, 262 N.C. 599, 138 S.E.2d 243 (1964).

131. *State v. Gaiten*, 277 N.C. 236, 176 S.E.2d 778 (1970).

132. See *supra* note 6.

133. *State v. McClain*, 282 N.C. 357, 193 S.E.2d 108 (1972) (trial judge instructed jury to consider such evidence only as it relates to the identity of the defendant); *State v. Richardson*, 36 N.C. App. 373, 243 S.E.2d 918 (1978); *State v. Newton*, 25 N.C. App. 277, 212 S.E.2d 700 (1975).

134. See *supra* note 22.

135. *State v. Fowler*, 230 N.C. 470, 53 S.E.2d 853 (1949).

136. See *supra* notes 71 and 95.

stantive evidence.<sup>137</sup> The burden clearly is on the defendant to ask for such a limiting instruction, and failure to give that instruction cannot constitute reversible error in the absence of a request by the accused.<sup>138</sup>

## 2. Explanation

A primary defense tactic used to diminish the prejudicial effect of criminal history is to have the accused explain it away or bring out those facts which indicate that the criminal act does not prove that for which the prosecution offered it. The most common illustration of this maneuver is found where the accused has been impeached on cross-examination by his prior conviction. The impeached accused is entitled on redirect examination to explain any such conviction which he admitted.<sup>139</sup> It would certainly be to his advantage, for example, to explain that he had a pending appeal from the conviction.<sup>140</sup> The extent and scope of these explanations are within the considerable discretion of the trial judge.<sup>141</sup>

## VI. CONCLUSION

The emphasis within this article has been upon the purposes for which the accused's criminal history is admissible. These purposes constitute exceptions to the rule which generally calls for the exclusion of this form of character evidence. The future question to be reckoned with by the North Carolina defense attorney is the extent to which the courts will recognize additional purposes. Alert prosecutors may be expected to work for the expansion of both the scope and number of these purposes in an effort to make the jury privy to the accused's criminal history.

The better-reasoned view, strongly advocated by Dean Wigmore,<sup>142</sup> is that the present list of purposes is not exclusive and room for expansion through the recognition of new purposes should be allowed. These purposes will be based either upon the trial tactics of the defense or upon the issues, regardless of the accused's actions

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137. *State v. Norkett*, 269 N.C. 679, 153 S.E.2d 362 (1967); *State v. Long*, 20 N.C. App. 91, 200 S.E.2d 825 (1973).

138. See *State v. Goodson*, 273 N.C. 128, 159 S.E.2d 310 (1968).

139. *State v. Sanders*, 276 N.C. 598, 174 S.E.2d 487 (1970), *rev'd*, 403 U.S. 948 (1971); *State v. Chandler*, 30 N.C. App. 646, 228 S.E.2d 69 (1976).

140. *State v. Waller*, 11 N.C. App. 434, 181 S.E.2d 195, *cert. denied*, 279 N.C. 351, 182 S.E.2d 584 (1971).

141. *State v. Chandler*, 30 N.C. App. 646, 228 S.E.2d 69 (1976).

142. 1 J. WIGMORE, EVIDENCE § 64 (3d ed. 1940).

at trial.<sup>143</sup> Illustrative of this continuing expansion is the recent recognition by the judiciary of North Carolina of new purposes which, even now, defy categorization within the present article.<sup>144</sup>

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143. *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977).

144. *See State v. Felton*, 283 N.C. 368, 196 S.E.2d 239 (1973) (rape victim allowed to relate accused's boasting of another rape as relevant to prove that her will to resist had been overcome by fear); *State v. Staton*, 33 N.C. App. 270, 234 S.E.2d 767 (State's witness who had talked with accused was allowed to testify that he was a probation officer; defense objected that such proved accused's criminal character, but court ruled it admissible for the purpose of placing the witness in his setting in order to judge his credibility), *cert. denied*, 293 N.C. 257, 237 S.E.2d 539 (1977).