

A JUDGE'S PERSPECTIVE ON EVIDENCE

(Basic Tools of Your New Trade)

W. David Lee

Senior Resident Superior Court Judge

District 20B

School for New Superior Court Judges

January, 2009

### The Exercise of Judicial Discretion

- An unstructured opportunity in which you, and not the law, make the decision.
- Standard: What the reasonable person would view as fair, just, and proper. Directed by circumspection, and must not be arbitrary or capricious.
- Generally, the greater your discretion, the narrower the scope of appellate scrutiny. As a trial judge, you have a superior vantage point. You are in the best position to judge credibility and to get the “feel of the case.”
- Generally distinguishable from the court’s “inherent power,” but there is some overlap of these doctrines.
- The exercise of judicial discretion sometimes touches upon the Constitutional right of a party to have facts determined by the jury. (Is the evidence sufficient to go to the jury?)
- Ultimately, after considering the facts and the legal concepts, your thought process will go through the balancing of facts and legal implications, after which you must DO JUSTICE.

### Relevant Evidence

Rule 401 defines “relevant evidence.” Rule 402 makes all relevant evidence admissible unless it is excluded by another rule or law. Rule 403 permits exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

The test is a very liberal one, and does not entail your determination of the sufficiency of the evidence.

Use caution where experiments or demonstrations are offered to show how a particular event occurred. Is there a substantial similarity of conditions?

### Objections

It may be necessary to instruct counsel, outside of the presence of the jury, regarding “speaking objections.”

I have developed the habit of taking notes during bench conferences and/or *voir dire* hearings on objections. Consider your obligation to preserve the record and to insure that rulings that need explanation are indeed clarified on the record, especially where there is a request to “make the record” when an objection has been sustained. I often reserve the right to supplement the record.

Be prepared to take action in the absence of an objection in the “Oh My Goodness” plain error circumstance.

### Limiting Instructions

I have appended to this manuscript those limiting instructions from the Pattern Jury Instructions most often utilized. These should be kept at your fingertips! Mine are included in both my trial notebook and on my computer hard drive.

The “Remarks to Jurors” in both civil and criminal cases provide the basic framework for trial. I follow these scripts religiously, and have “personalized” them over the years. These may be found under your Trial Court Desktop icon, North Carolina Conference of Superior Court Judges, “Additional Documents of Interest.”

In addition, in my introductory remarks to the jury pool, I usually paraphrase a portion of a charge that was written and distributed by the South Carolina Chief Justice’s Commission on the Profession entitled “Juror Expectations-Professionalism Charge.” The first paragraph of that charge is set forth below.

***Before we begin this trial, I want to tell you that this trial probably will be different from what you might expect. Many people do not have the chance to attend actual court sessions, as you are doing now, and may think, from watching television or movies or reading books, that trials are always full of high drama, intense action, and riveting circumstances. While all of these things may be true at times, this trial is not for entertainment. It is a fundamental part of our democracy; a search for the truth in an effort to make sure that justice is done between the parties before the court. Searching for the truth and making sure that justice is done is often slow, deliberate, and repetitive-the opposite of what you may have seen on television or in the movies or read in books.***

### Offers of Proof

I welcome offers of proof. It affords me the opportunity to reconsider (and on a rare occasion, change) my ruling. It also affords the appellate court the opportunity to evaluate what I have done. Recognizing this latter purpose, however, prompts me to insure that “my view” (i.e. the correct view) is fully explained on the record. Be certain that these offers of proof satisfy you in that regard.

See N.C.G.S. 15A-1446(a); N.C.R.C.P. Rule 43(c), and Evidence Rule 103.

### Considerations Regarding Sequestration of Witnesses

- Let the record reflect the names of those being excluded and the reasons supporting your discretionary ruling.
- Inquire whether continuing sequestration is sought after the sequestered witness has testified.
- Be sure that accommodations are provided that protect the integrity of your ruling.
- Instructions to counsel. Instructions to witnesses.

### Utilization of Rule 611

Rule 611 adds flexibility to the traditional rule of limiting cross-examination to the subject matter of the direct examination/credibility. It can also be used to limit the number of character witnesses. If utilized, have counsel identify additional witnesses and the substance of each proffer; allow opportunity for cross-examination.

### Order of Witnesses and Control of Examination

Resist the temptation to try the case as an advocate. I often allow witnesses to be taken “out of order” with adverse counsel’s consent. In the absence of consent, I make inquiry to insure that there are no foundational or similar issues that will make the order of presentation problematic.

Be aware of the parameters of re-direct and re-cross. Consider your discretionary rulings within the context of Rule 611 of the Rules of Evidence. Also, be aware of the usual constraints regarding co-counsel questioning under Rule 11 of the General Rules of Practice.

### The Child Witness

- Conduct *voir dire* hearing. After counsel has concluded questioning, ask such additional questions as you deem appropriate. Factual inquiries generally focus on the following:
- Family members? Grade in school? Grades at school? Church? Activities?
- Understand obligation of oath?
- Understand importance of telling the truth?
- Difference between truth and a lie?
- What will happen if you don’t tell the truth?
- Meaning of punishment?
- Importance of telling truth in this courtroom?

### Jury Exhibits

#### *Criminal Cases*

If, during jury deliberations in a *criminal* case, the jury requests a review of exhibits, the trial judge **must** direct that the jurors be conducted to the courtroom. Thereafter, the trial judge, in the exercise of his or her discretion, may permit the jury to reexamine the requested materials ( as well as other evidence as deemed appropriate so as not to give undue prominence to the materials requested) **in open court**.

It is only upon the request of the jury, and with the **consent** of both the prosecutor and the defendant(s) that the trial judge, in his or her discretion, may permit exhibits to be taken back into the jury room for further examination—but not experiments!

See G.S. 15A-1233

#### *Civil Cases*

If, during jury deliberations in a *civil* case, the jury requests a review of exhibits, the jurors **must** be conducted to the courtroom. The trial judge, after giving all parties the **opportunity to be heard**, in the exercise of his or her discretion, may then permit the jury to reexamine the exhibits **in open court**.

If the jury requests to take items back into the jury room for further examination, it is important to consider what specifically is being requested, and to be familiar with G.S. 1-181.2(b), appended to this manuscript. The trial judge, in his or her discretion **may permit** the jury to take into the jury room: (1) Admitted exhibits which have been passed to the jury; (2) admitted photographs which have been shown to the jury and used by any witnesses in their testimony; and (3) any admitted illustrative exhibits used by any witnesses in their testimony. It is important to note that under the statute the trial judge **shall not permit** the jury to take into the jury room (even if admitted into evidence and requested by the jury): (1) summaries of testimony prepared in the courtroom by any party; and (2) lists made by any party in the courtroom. Depositions may be taken into the jury room only upon request of the jury and with the consent of the parties. Finally, upon the request of the jury, the trial judge may permit the jury to take into the jury room any exhibit that all parties stipulate and agree may be taken into the jury room.

See G.S. 1-181.2.

#### Closing Thoughts

Be ever mindful of the jurors, witnesses and victims in your courtroom. Be no less mindful of the bailiffs, the court reporter, and the Clerk or deputy clerks assisting you.

Do not rush to judgment! My most painful mistakes have occurred when I was “under the gun” and proceeded without due thought and deliberation.

You have the best job in the State of North Carolina. Take pleasure in it and benefit from the experience.

**N.C.P.I.--Crim. 100.30 MAKING NOTES BY JURORS.**

***Replacement May 2005***

**G.S. § 15A-1228.**

*NOTE WELL: G.S. § 15A-1228 permits a jury in a criminal case to make notes and take them into the jury room (except where the judge on his own motion or the motion of a party rules otherwise in his discretion).<1>*

[In my discretion, members of the jury, you will not be allowed to take notes in this case.]

[In this case, you will be allowed to take notes.

When you begin your deliberations, you may use your notes to help refresh your memory as to what was said in court. I caution you, however, not to give your notes or the notes of any of the other jurors undue significance. While taking notes, a juror may fail to hear important portions of testimony.

Any notes taken by you are not to be considered evidence in this case. Your notes are not an official transcript of the trial. For that reason, you must remember that in your jury deliberations notes are not entitled to any greater weight than the individual recollections of other jurors.

If you take notes, disclose them only to your fellow jurors. You are not to show them to anyone else. While I will permit you to take notes, I instruct you to listen at all times intently to the testimony.

**N.C.P.I.--Crim. 100.31 ADMONITIONS TO JURORS AT RECESSES.**

**June 1978**

**G.S. § 15A-1236**

*Note Well: At appropriate times the judge must give the following admonitions to the jurors. Appropriate times include all significant recesses, such as for lunch, overnight and for a weekend, and could also include shorter recesses during the day, voir dire examinations of witnesses, considerations of motions or objections, and any other occasions when the jurors will be out of the presence of the court. The admonitions need not be given at all such times, and the judge may use his discretion in determining when it is necessary to give or repeat them. The admonitions are as follows:*

Members of the jury, [the court will now stand recessed until **(state time)**.] [the court will now take a **(state period)** recess.] [you are excused from the courtroom. You shall retire to the jury room and return when the bailiff summons you.] I [admonish] [remind] **1** you that it is your duty not to talk among yourselves about the case. It is your duty not to talk to parties, witnesses or counsel about anything. It is your duty not to talk to anyone else or to allow anyone else to talk with you or in your presence about the case. If anyone attempts to communicate with you about the case you must report to me immediately. It is your duty not to form an opinion about the guilt or innocence of the defendant or to express any opinion about the case. **(It is your further duty to avoid reading, watching or listening to any accounts of the trial.)<sup>2</sup> (Finally, it is your duty not to go to the place where the offense was alleged to have been committed.)**

**N.C.P.I.--Crim. 104.15 EVIDENCE OF SIMILAR ACTS OR CRIMES.<1>**

***Replacement May 2005***

**Strong Criminal Law § 34**

**G.S. § 8C-1, Rule 404(b).**

Evidence has been received tending to show that (*state specific evidence*). This evidence was received solely for the purpose of showing

[the identity of the person who committed the crime charged in this case, if it was committed]

[that the defendant had a motive for the commission of the crime charged in this case]

[that the defendant had the intent which is a necessary element of the crime charged in this case]

[that the defendant had the knowledge which is a necessary element of the crime charged in this case]

[that there existed in the mind of the defendant a plan, scheme, system or design involving the crime charged in this case]

[that the defendant had the opportunity to commit the crime]

[the absence of mistake]

[the absence of entrapment]

[the absence of accident].<2>

If you believe this evidence you may consider it, but only for the limited purpose for which it was received.

**N.C.P.I.--Crim. 104.50 PHOTOGRAPHS, MAPS, MODELS--AS ILLUSTRATIVE EVIDENCE.**

***Replacement March 1998***

**Strong's: Criminal Law § 43**

A [photograph] [diagram] [map] [model] was introduced into evidence in this case for the purpose of illustrating and explaining the testimony of a witness. This [photograph] [map] [model] may not be considered by you for any other purpose.

**N.C.P.I.--Crim. 105.35 IMPEACHMENT OF A WITNESS (OTHER THAN THE DEFENDANT) BY PROOF OF CRIME. <sup>1</sup>**

***Replacement March 1986***

**G.S. § 8C-1, Rule 609.**

When evidence has been received tending to show that a witness has been convicted of **(a)** criminal charge**(s)**, you may consider this evidence for one purpose only. If, considering the nature of the crime**(s)**, you believe that this bears on truthfulness, then you may consider it, together with all other facts and circumstances bearing upon the witness' truthfulness, in deciding whether you will believe or disbelieve his testimony at this trial. Except as it may bear on this decision, this evidence may not be considered by you in your determination of any fact in this case.

**FOOTNOTES**

FOOTNOTE 1. For limitations as to crimes applicable, see G.S. § 8C-1, Rule 609.

**N.C.P.I.--Crim. 105.40 IMPEACHMENT OF THE DEFENDANT AS A WITNESS BY  
PROOF OF UNRELATED CRIME.<1>**

***Replacement May 2005***

**G.S. §8C-1, Rule 609.**

When evidence has been received that at an earlier time the defendant was convicted of (a) criminal charge(s), you may consider this evidence for one purpose only. If, considering the nature of the crime(s), you believe that this bears on truthfulness, then you may consider it, together with all other facts and circumstances bearing upon the defendant's truthfulness, in deciding whether you will believe or disbelieve the defendant's testimony at this trial. It is not evidence of the defendant's guilt in this case. You may not convict the defendant on the present charge because of something the defendant may have done in the past.

**FOOTNOTES**

FOOTNOTE 1. For limitations as to crimes applicable, see G.S. 8C-1, Rule 609. This instruction is to be used only when the defendant has testified. As to substantive use of evidence of other crimes, see N.C.P.I.--Crim. 104.15.

**N.C.P.I.--Civil 101.36 Impeachment of a Party or Witness by Proof of Crime. 1**

***Replacement April 1986***

**G.S. 8c-1, Rule 609.**

Evidence has been received tending to show that [the plaintiff (*name plaintiff*)] [the defendant (*name defendant*)] [the witness (*name witness*)] has been convicted of [a] [several] criminal charge(s). 2 You may consider this evidence for one purpose only. If, considering the nature of the crime(s), you believe that this bears on truthfulness, then you may consider it, together with all other facts and circumstances bearing upon the witness' truthfulness, in deciding whether you will believe or disbelieve the testimony of such witness at this trial. Except as it may bear on this decision, this evidence may not be considered by you in your determination of any fact in this case.

**FOOTNOTES**

FOOTNOTE 1 For limitations as to crimes applicable, see G.S. 8C-1, Rule 609.

FOOTNOTE 2 If the specific offenses are enumerated by the trial judge, all convictions which have been introduced in evidence must be included. In *State v. Wallace*, 54 N.C. App. 278 (1981), the Court of Appeals stated: "If the trial court undertakes to name or list previous convictions, however, it must be supported by the evidence so that the jury will know that the limiting instruction applies to all the prior convictions contained in the record. Fairness to the defendant may indicate that the trial judge should not list the prior convictions, especially if the defendant has a long prior criminal record." *Id.* at 283. Accord, *State v. Hedgepeth*, 66 N.C. App. 390, 397-399 (1984). Compare, *State v. Carrington*, 74 N.C. App. 40, 45-46, 327 S.E.2d 594, 597-598 (1985) (Wallace rule not violated where defense counsel limits number of prior convictions to which limiting instruction applies, or where other prior convictions are not within same category as offense being tried).

**N.C.P.I.--Civil 101.40 Photograph, Videotape, Motion Pictures, X-Ray, Other Pictorial Representations Map, Models, Charts--Illustrative And Substantive Evidence.**

**Replacement October 1985**

**Strong's: Evidence § 25**

*Note Well: Use this instruction only if an exhibit was introduced for illustrative purposes. If all exhibits were received as substantive evidence, then no instruction is necessary.*

**(Specify illustrative exhibit)** was received in evidence in this case for the purpose of illustrating and explaining the testimony of the witness **(name witness)**.<sup>1</sup> This [photograph] [map] [model] [chart] is not substantive or direct evidence, that is, it has not been received into evidence to prove any fact in this case. You may consider this [photograph] [map] [model] [chart] only for the purpose of illustrating and explaining the testimony of the witness, to the extent, if any, that you find that it does so illustrate and explain the testimony of the witness. You may not consider it for any other purpose in connection with the trial of this case.

*Note Well: If a photograph, videotape, motion picture, or other photographic representation was introduced as substantive evidence,<sup>2</sup> use the following language to distinguish such exhibit from the exhibit admitted for illustrative purposes.*

Now **(specify substantive exhibit)** was received in evidence as substantive evidence. This means that your consideration of this [photograph] [videotape] [motion picture] [photographic representation] is not limited to purposes of illustration but may be considered by you as evidence of what you determine it tends to show or represent.

**FOOTNOTES**

FOOTNOTE 1 See generally, Brandis on North Carolina Evidence, § 34 (1982).

FOOTNOTE 2 G.S. 8-97. The statute does not include maps and models which are apparently limited to illustrative purposes.

**N.C.P.I.--Civil 101.41 Stipulations. 1**

**January 1988**

Plaintiff (name plaintiff) and defendant (name defendant) have agreed or stipulated that certain facts shall be accepted by you as true without further proof. The agreed facts in this case are as follows:

***(Here read stipulated facts)***

Since the parties have so agreed, **2** you are to take these facts as true for the purpose of this case.

**N.C.P.I.--Civil 101.43 Deposition Evidence. 1**

**April 1988**

During the trial of this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. You are to consider the credibility and weight of this testimony, insofar as possible, in the same way as if the witness had been present and testified from the witness stand.] **2**

***(At an earlier time, the deposition of a [party] [witness] was taken under oath. If, in the deposition, such [party] [witness] made contradictory statements or any statements in conflict with his testimony here in court, you may consider such conflicts and any explanations therefor in determining his credibility, the same as if the testimony in the deposition had been given at the trial. 3 )***

**FOOTNOTES**

FOOTNOTE 1 N.C.G.S. § 1A-1, Rules 30 and Rule 31.

FOOTNOTE 2 N.C.G.S. § 1A-1, Rule 32(a). The "fairness doctrine" would appear to apply to depositions. See Rule 32(a)(5) and N.C.Rule of Evidence 106.

FOOTNOTE 3 Use this paragraph where the deposition was used for impeachment purposes. N.C.G.S. § 1A-1, Rule 32(a)(1) and (2); 1 California Jury Instructions, No. 31A (Revised); McBride, The Art of Instructing a Jury, § 3.37.