CHARACTER EVIDENCE PROBLEMS[1]

Problem 1

Defendant is charged w/ S&D/PWISD Cocaine. State calls Witness Shady Hood to testify about previous instances in which defendant bought, sold, and used drugs. State says: "Your honor, he has been a drug dealer for years and we are offering this to show his character as being a drug dealer. We are not offering it under 404(b)." Defense objects.

Answer: Inadmissible under 404(a). Being a drug-dealer is not a "pertinent character trait." See State v Williams, ___ N.C.App. ___ , 577 SE2d 143 (2003)("The only relevance of the testimony [of defendant's prior drug deals] was to illustrate defendant's predisposition toward drug violations")

What if the state offers it under Rule 608(b)? That governs specific instances of conduct. No Good. Rule 608(b): "Specific instances of conduct **of a witness** for the purpose of attacking or supporting his credibility. . . may not be proved by **extrinsic evidence**." First, defendant hasn't testified. Second, this would be extrinsic evidence. Moreover, even if defendant did testify, many cases say drug sales aren't pertinent to credibility. E.g., State v. Taylor, 117 N.C. App. 644 (1995)(C/E of "defendant concerning his alleged sale of marijuana to his neighbor" was not relevant "to his veracity as a witness and should have been excluded" because it was "not probative of defendant's truthfulness in this case.").

What if it were convictions? Could State call a Clerk to testify about all the defendant's previous convictions regarding drugs to prove that he acted in conformity therewith? NO. State v. Wilkerson, 356 N.C. 418, 571 S.E.2d 583 (2002), *reversing for the reasons stated in the dissent*, 148 N.C.App. 310, (2002)(In prosecution for possession with intent to sell or deliver cocaine and trafficking in cocaine, State may not offer the bare fact of defendant's prior convictions for cocaine offenses to show knowledge and intent under 404(b) when defendant did not testify. Rule 609 governs admissibility of the bare fact of a defendant's prior convictions, and it is not trumped by Rule 404(b), which governs conduct, not convictions. **Rule 609.**

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[1] Some of these problems were provided by former Wisconsin Supreme Court Justice Janine P. Geske, through the National Judicial College's Advanced Evidence Course. Others I created based on trials over which I have presided or based on North Carolina appellate cases. The answers are mine.

But note: Say defendant testifies that he has never been involved in drugs. Then it is ok for State to **cross-examine** the defendant about specific instances, or about prior convictions, but not ok for State to offer Shady Hood's testimony – that would be **extrinsic evidence**. Rule 608(b).

Or what if it were witnesses the state wanted to examine about their other drug activities? Not relevant to show they are drug dealers, but may be relevant to show knowledge of drug trade, if that is at issue. In a drug conspiracy case, the Court upheld admission into evidence of prior bad acts of various witnesses because it was relevant to show their knowledge of the drug trade in general. **Rule 404(b)** applies to defendants in criminal cases and not to witnesses and so is not a basis for exclusion of otherwise relevant evidence. State v. Holmes, 120 NCApp 54 (1995); **See Rule 401.**

Problem 2

Defendant is charged with killing his foreman after the foreman fired the defendant. The defendant made statements after the killing that the victim "set him up," "made his life hell since I've worked there," and "wouldn't do anything for me." State calls a co-worker to testify and asked her "Describe the victim's temperament." Defense objects based on Rule 404(a). On voir dire the witness says: "He was a good listener and an easy person to work with. He had a lot of concern for the employees at work and was involved with everybody that worked there. He had an open-door policy."

Answer: Overruled. In this circumstance, it is not offered to prove that the victim acted consistently with his temperament or character on a particular occasion, but rather was offered to show what kind of employer the victim was. In view of the defendant's post-killing statements, evidence of the victim's temperament and management style was relevant to prove the circumstances of the crime. Because it is not character evidence, Rule 404(a) does not apply. State v. Davis, 349 N.C. 1 (1998)

Problem 3

In a motor vehicle negligence wrongful death case, the Defendant was asked on direct about his criminal record and about his driving record. On voir dire, he answered that he had no convictions and no traffic tickets. He further testifies that he has never been in a car accident Plaintiff objects.

Answer: Sustained. This evidence was offered to show either that the Defendant had no convictions or tickets in the past and thus was driving without negligence on the instance at issue – improper under **Rule 404(a)** - or was acquitted in criminal court – which is irrelevant to his civil liability - or to bolster his credibility on direct examination – which is improper under **Rule 608(b).** Holland v. Hinnant, 92 N.C.App.. 142 (1988)

Problem 4

In murder case in which the defendant asserts self-defense, defendant offers an evaluation of the victim by a school psychologist in which the victim was described as follows: poor self-concept, disruptive and immature behaviors, provokes and aggravates others, blames others, poor peer relationships, consistent inappropriate emotional responses, and most pronounced, lying and making excuses." State objects.

Answer: Sustained. "Although this testimony arguably may tend to show the victim's general bad character, we fail to see how this testimony is relevant on the issue of the victim's character for violence. . . ." State v. Jordan, 130 N.C.App. 236 (1998); See Rule 404(a)(2) – character trait must be pertinent. If the defendant claimed the victim was the aggressor, I think the testimony that the victim "provokes and aggravates others," would be admissible. See State v. Watson, 338 NC 168, which says defendant can offer character evidence to prove the victim was the aggressor.

Problem 5

Defendant charged with kidnapping and other offenses. Victim testifies. On cross-examination, she denies that several months before the incident at issue she let the tires out of the defendant's car. During defense case, defendant calls his sister to testify that several months before the incident at issue the victim did let the tires out of the defendant's car. State objects. Defendant contends it is relevant to victim's credibility.

Answer: Sustained. State v. Guice, 141 N.C.App. 177 (2000) *remanded on other grounds*, 353 N.C. 731 (2001). No extrinsic evidence allowed on prior bad acts relevant to credibility only.

Problem 6
Defendant charged with murdering his wife. Defense asks D's daughter on cross-examination if D ever beat her (the child). The child said yes. Defendant objects and moves to strike, citing Rule 608(b).

Answer: Overruled. "Defendant cannot invalidate trial by inviting error, eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence has been offered by the State." State v. Syriani, 333 N.C. 350 (1993)

If the State had objected to this question ("Did your dad ever beat you?"), that objection should be sustained. Defendant is trying to prove that because he never beat his daughter, he didn't kill his wife; this is trying to use one specific instance of conduct – his failure to beat his daughter – and infer from it that he acted consistently towards his wife. Rule 404(a) and (b) both prevent this.

Problem 7
Defendant charged with rape and burglary. During defense case, he presents character witness who testifies that defendant is honest and that the witness has "never heard anything bad about" the defendant. On cross-examination, the State seeks to ask the witness if he knows that the defendant was charged with selling marijuana in jail. Defense objects.

Answer: Sustained. State v. Martin, 322 N.C. 229 (1988)("An indictment's function is not to determine whether a person is guilty of a crime but, rather, is to show only that the State's evidence is sufficient to try the defendant. For this reason it may not be used to impeach a witness. The same considerations apply during the cross-examination of a character witness. The fact that the defendant had been charged with a crime does not show he is guilty of the crime. The objection to this question should have been sustained.") Rule 405(a). Being charged is not conduct of the defendant. If defendant had been convicted, that would be admissible. The state could ask the witness if he knew the defendant had sold marijuana in jail, even if the defendant hadn't yet been convicted, so long as the charge wasn't mentioned.

Problem 8

Defendant, a juvenile, is charged with murder and tried in Superior Court. He testifies at his trial. On cross-examination, State proposed to ask defendant about his drug-dealing and his juvenile adjudications. On voir dire, you hear this:

Q. Did you used to stand out with Quondell while he was selling drugs? Did you used to stand out with Quondell over at Cinnamon Ridge while he was selling drugs?

A. Sometimes.

Q. You sell drugs too?

A. I have.

Q. Did you sell drugs also over by Muffin's house?

A. No, I did not.

Q. Over in southeast Raleigh anywhere?

A. No, I didn't.

Q. Who else would sell drugs out there with you at Cinnamon Ridge, Maurice?

A. No one sold drugs with me. They did it on their own.

Q. So you just sold drugs on your own, you didn't sell for anybody?

A. No, I didn't.

Q. Where did you get them from?

A. Does it really matter?

Q. Where did you get them from?

A. I got it from a guy.

Q. Who?

A. I don't know.

Q. Did your mother teach you right from wrong?

A. Yes, she did.

Q. Did she tell you it was wrong to shoot people?

A. Yes, she did.

Q. Did she tell you it was wrong to steal?

A. Yes.

Q. Did she tell you it was wrong to fight people or hurt them?

A. She told me not to do it unless like I'm protecting myself.

Q. Did she tell you it was wrong to lie?

A. Yes, she did.

Q. But you do all those things, don't you?

A. No, I don't.

Q. You don't steal?

A. I have -- I don't do it anymore.

Q. You're on probation for that, aren't you?

A. Not on probation anymore.

Q. Because you got arrested for murder?

A. Yes.

Q. You've gotten in fights before too, haven't you?

A. Yes, I have.

Q. You've been convicted of being in fights too, haven't you?

A. No.

Q. Have you not been convicted of assault?

A. No.

Q. You weren't put on probation for assault?

A. No.

Q. On [10 February] 2000, you weren't placed on probation for assault?

A. I was placed on probation for stealing.

Q. And after you got placed on probation for stealing, you were also convicted of assault, weren't you?

A. No, I wasn't.

Q. You didn't get an assault and have them have to extend your probation for stealing because you got in trouble again?

A. No.

Answer: Lots of mistakes here. As to juvenile adjudications, admission would be error. Under Rule 609(d), a defendant cannot be impeached by a juvenile adjudication in a criminal case. State v. Perkins, 571 SE2d 645, Nov. 19, 2002 (N.C.App.)

As to other issues, court in Perkins found no plain error (defense had not objected at trial), but didn't discuss the law. There are many cases saying that selling drugs is not pertinent to veracity, State v. Taylor, ___ N.C.App. ___ (2002); State v. Stevenson, 328 N.C. 542 (1991), nor was there anything to indicate the killing was drug-related (it appears to have been over a woman), so it does not appear that defendant's drug-dealing was relevant to anything other than character. Under Rule 404(a) and Rule 608(b), virtually all of these questions should be prohibited.

Problem 9
Defendant charged with first degree felony murder of defendant's girlfriend's two-year old son. Defendant testified. He was cross-examined about statement to deputy shortly after arrest in which deputy said "Why'd you do it?" and defendant said " I f-'ed up, I lost it." Defendant denied saying "I lost it," but admitted saying "I f'ed up." State calls the deputy as a rebuttal witness to recount the self-incriminating statements made by defendant. Defense objects based on Rule 608(b).

> **Answer:** Overruled. The statements made by defendant to the deputy were "material to the central issue" of the trial, not collateral, so the deputy's "testimony rebutting defendant's cross-examination responses to the prosecutor was properly admitted." In other words, extrinsic evidence can be admitted if the matters at issue are relevant to the issues at hand and not just credibility. Court cites **Rule 607** but **Rule 608(b)** appears to be what the court meant. State v. Stokes, __ N.C. ___, 581 S.E.2d 51 (N.C. 2003). "When a witness is confronted with prior statements that are inconsistent with the witness' testimony, the witness' answers are final as to collateral matters, but where the inconsistencies are material to the issue at hand in the trial, the witness' testimony may be contradicted by other testimony," Stokes, citing State v. Green, 296 N.C. 183 (1978).

Problem 10
In murder case, defendant cross-examined victim's girlfriend about whether she and victim were "looking for a fight" on the night victim died. State proposes to ask girlfriend on redirect whether she and the victim had ever been in a fight with anybody else or if the victim had ever been in a fight in her presence. Defense objects.

> **Answer:** Overruled. State v. Johnson, 344 N.C. 596 (1996) "Defendant having thereby opened the door, the State was entitled to introduce rebuttal evidence" pursuant to **Rule 404(a)(2)**

Problem 11

A witness for the plaintiff testifies that the plaintiff's reputation for truthfulness is good. On cross-examination, the defense attorney asks:

a) Did you know that the plaintiff's high school biology teacher caught the plaintiff cheating on an exam?
b) Did you know that the IRS audited the plaintiff two years ago and found that the plaintiff failed to list all of his outside income and had to pay $1000 in back taxes and penalties?
c) Did you know that the plaintiff has been cheating on his wife with his secretary and has lied to his wife about it?
d) Did you know that the plaintiff frequently steals pens and paper from his employer for his kids to use at home?

Plaintiff's attorney objects to each. How do you rule?

Answer: These are all matters in the court's discretion. Rule 608(b). Taking into account the guidelines in Weston v. Daniels, 114 N.C.App. 418 (1994) and Rule 611, I would say:

a) Sustained. Too remote and petty.
b) Overruled. Seems directly related to credibility and is recent.
c) Sustained. Too collateral and has the potential to sidetrack the jury.
d) Sustained. Too petty.

As to all of these matters, it would be error to allow the defendant to call another witness to testify that the plaintiff was caught cheating on a high school biology test, the plaintiff had to pay back taxes because he failed to list all of his income, he had an affair with his secretary, or he steals office supplies from work. No collateral evidence of other bad acts relevant only to credibility, per Rule 608(b).

Problem 12

In a homicide case, on direct examination the Defendant asked a witness for an opinion as to the reputation for truthfulness or untruthfulness of his brother, a prosecution witness. The defense witness stated that his brother was "very dishonest" and "I don't believe my brother." The defense then asked "What is the basis for your opinion?" On voir dire, the witness answered "He would do whatever it takes to come out ahead. If he needs to plea bargain or whatever he needs to do, he'll do it." Defense asserts that the basis for the witness's opinion is admissible, relying on Rule 405(a) and Rule 608(b).

Answer: In State v. Hunt, 339 N.C. 622 (1995), the court upheld exclusion of this testimony because the witness's answers were neither specific instances of misconduct or untruthfulness, as allowed by **Rule 405(a)**, nor a statement of opinion, as allowed by **Rule 608(a)**. But note that Rule 405(a) only allows specific instances of misconduct on cross-examination, and this witness was testifying on direct, so Rule 405(a) does not make this admissible and doesn't speak to whether the basis of the opinion is admissible. If the basis of the opinion is other specific acts, then that would probably not be admissible - Rule 404(b) governs admissibility of other acts and states that it is not admissible to prove the character of the person or that he acted in conformity therewith; see State v. Smith, 337 N.C. 658. Of course, it could be inquired into on cross-examination.

Problem 13

Defendant charged with first degree rape. In defense case, defendant calls the former supervisor of the victim at the store where the victim worked as a cashier and offers reputation and opinion testimony. On voir dire, the supervisor testifies that the victim was caught stealing in a Sears store and that later she was dismissed from her position for failing to ring up some items she was checking out for a close friend. The witness testified that she had known the victim for 7 months through work and she had a reputation as a dishonest person. She further testifies that in her opinion the victim was a dishonest and untruthful person.

Answer: As to reputation testimony, within the Court's discretion to exclude it. Opinion testimony should be admitted. Rule 608(a). State v. Morrison, 84 N.C.App. 41 (1987). This is the only post-Rules of Evidence N.C. case discussing the foundation required for opinion and reputation testimony. It states, omitting citations: "With the introduction of Rule 608(a) of the Rules of Evidence in 1984, the long-standing North Carolina rule against allowing a witness to testify as to his own opinion of another's character for truth and veracity was abrogated."

The Morrison Court then appears to adopt the standards set forth in a Fifth Circuit case and an Eleventh Circuit case, quoting as following from those cases: "[The Fifth Circuit has held that] 'The rule imposes no prerequisite conditioned upon long acquaintance or recent information about the witness; cross-examination can be expected to expose defects of lack of familiarity and to reveal reliance on isolated or irrelevant instances of misconduct or the

existence of feelings of personal hostility towards the principal witness.' [The Eleventh Circuit has held]: 'that opinion testimony does not require the foundation of reputation testimony follows from an analysis of the nature of the evidence involved. The reputation witness must have sufficient acquaintance with the principal witness and his community in order to ensure that the testimony adequately reflects the community's assessment. . .. In contrast, opinion testimony is a personal assessment of character. The opinion witness is not relating community feelings, the testimony is solely the impeachment witness' own impression of an individual's character for truthfulness. Hence, a foundation of long acquaintance is not required for opinion testimony. Of course, the opinion witness must testify from personal knowledge. *See* Fed. R. Evid. 602. But once that basis is established the witness should be allowed to state his opinion, "cross-examination can be expected to expose defects.'"

The Morrison court then held: "In the case at bar, [the supervisor] had formed an opinion based on personal knowledge gained in the course of her position as [the victim's]' supervisor. This threshold requirement was all that was needed in order to allow her to testify as to her opinion of the prosecutrix' character for truth and veracity, and the trial court's exclusion of her testimony for failure to meet a requirement was error." Ok to exclude reputation testimony because the witness did not testify that she knew about or was familiar with the victim's reputation and knew her only a short period of time through work.

Problem 14

In a civil fraud case, the defendant wants to call a witness to the stand to testify that he has known the defendant for fifteen years and believes the defendant to be a man of his word. He also would testify that he heard the defendant's employer once say that the defendant was the most honest and ethical person he had ever met. The Plaintiff objects to this testimony on the grounds that it is improper character evidence. How do you rule and why?

Answer: If the defendant testified, this witness's personal opinion about the defendant's truthfulness would be admissible under Rule 608(b). If the defendant didn't testify and the testimony is being offered substantively on the fraud claim, I would say it is not admissible, since Rule 404(a) says it's not and no exceptions apply. As to what the defendant's employer told the witness, the witness should not be able to repeat what someone else said to him, as someone else's opinion

would be hearsay. It would be a proper matter for the witness to rely on in forming his or her opinion and could be gone into on cross-examination if desired.

Problem 15

Mr. Jones and Ms. Smith were involved in an automobile accident at an intersection. At trial, Mr. Jones contends that Ms. Smith was exceeding the speed limit. Ms. Smith alleges that Mr. Jones ran a red light. Mr. Jones wishes to introduce the testimony of Ms. Bertelson to prove that he is a cautious driver. Ms. Smith objects. Do you allow this testimony?

Answer: No. Specifically prohibited by Rule 404(a) and no exceptions apply. Unrelated to credibility and thus inadmissible under Rule 608(a) even if Mr. Jones testifies.

Problem 16

Defendant's car crashed into plaintiff's building. Plaintiff is a general contractor and did much of the repair work; he testifies he paid his labor and subcontractors in cash and documentation is spotty. Defendant casts doubt on plaintiff's integrity, implying that he didn't really pay the bills he says he paid. Subsequent witnesses testify about their involvement in the repairs; several also testify that they have known plaintiff for years, worked with him, and had numerous business dealings with him. Plaintiff's lawyer then asks each witness: "And has plaintiff always been honest in his dealings with you?" Defense counsel objects. How do you rule?

Answer: Sustained. Rule 608(a) would allow the witness to offer an opinion about the plaintiff's honesty or about the plaintiff's reputation for honesty, since the plaintiff's character for truthfulness has been attacked. However, 608(a) does not allow for specific instances to be testified about, and Rule 608(b) only allows that to be gone into on cross-examination if the witness has offered an opinion about character for truthfulness, which he hasn't here. The plaintiff is asking the question to prove that because the plaintiff was honest in the past, he was honest on the occasion at issue. Rule 404(a) &(b) prohibit that.

Problem 17

The defendant, in a breach of contract case, testifies that he and the plaintiff never agreed to the exact terms of the contract. The plaintiff wants to call the defendant's former boyfriend who would testify that on two unrelated times the defendant lied to him. The defense objects to the proffered testimony. How do you rule?

Answer: Sustained. Not similar enough to be admissible under Rule 404(b), and extrinsic evidence about collateral matters related only to truthfulness is not admissible under Rule 608(b).

Problem 18

The defendant in a motor vehicle/rear end collision case wants to introduce facts from a case in which the plaintiff was sued two years ago. In that case, a life insurance company sued the plaintiff for having made false representations in her application for life insurance. That suit was settled when the plaintiff agreed to forfeit her premiums and terminate any coverage. The plaintiff objects to the introduction of that evidence. How do you rule?

Answer: The defendant wants to offer a prior bad act to prove character that defendant acted in conformity therewith on the occasion at issue – that is, that once before the plaintiff made a false claim against an insurance company and here s/he is doing it again. This is exactly what 404(b) prohibits. (Defendant might figure out a way to make it relevant to intent or motive, however.) If, however, the plaintiff testifies, which surely she will, this can be gone into on cross-examination under Rule 608(b), since it is quite relevant to credibility; similar to Thompson v. James, 80 N.C.App. 535 (1986). Even if she testifies, defense can't introduce other evidence, since 608(b) prohibits extrinsic evidence.