

Rule 404(b): The Bare Fact of Conviction Rule

Author : Jessica Smith

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Tagged as : [404\(b\)](#), [bare fact of conviction](#), [wilkerson](#), [wynn](#)

Date : April 17, 2013

Evidence Rule 404(b) allows for the admission of evidence of other crimes, wrongs, or acts for purposes other than propensity, such as proving motive, opportunity, intent, preparation or plan. In a series of posts, I'll explore common issues that arise regarding Rule 404(b). First up is the bare fact of conviction rule.

As a general rule, the bare fact of a defendant's conviction is not admissible under Rule 404(b). The North Carolina Supreme Court established the bare fact of conviction rule in *State v. Wilkerson*, 356 N.C. 418 (2002), where it reversed the decision below (*State v. Wilkerson*, 148 N.C. App. 310 (2002)) for the reasons stated in Judge Wynn's dissent. *See also* *State v. McCoy*, 174 N.C. App. 105, 110-111 (2005) (reversing because of *Wilkerson* error); *State v. Scott*, 167 N.C. App. 783, 785-86 (2005) (same). In his *Wilkerson* dissent (subsequently adopted by the Supreme Court), Judge Wynn reasoned that 404(b) evidence is admissible only for certain purposes. *Wilkerson*, 148 N.C. App. at 319. The bare fact of conviction, he reasoned, "would rarely, if ever, be probative of any legitimate Rule 404(b) purpose." *Id.* Rather, it is the facts and circumstances of the offense that have probative value. *Id.* Additionally, he concluded, even if the bare fact of conviction had any probative value for Rule 404(b) purposes that value is substantially outweighed by prejudice, requiring exclusion under Rule 403. *Id.*

The *Wilkerson* rule prohibiting the admissibility of the bare fact of conviction under Rule 404(b) is in contrast to admissibility under Rule 609, which allows for impeachment with evidence of a conviction. *Wilkerson*, 148 N.C. App. at 319. For purposes of Rule 609 impeachment, the *only* admissible evidence is the record of conviction (bare fact of conviction). *Id.* at 320-23. Thus, when the defendant testifies at trial, both the facts and circumstances of the conviction may be admissible (under Rule 404(b)) and the fact of conviction may be admissible (under Rule 609).

As is often the case, however, where there is a general rule, there are exceptions. With regard to the bare fact of conviction rule, there are four:

- 1. Categorical Exception in Second-Degree Murder Cases.** In his dissent in *Wilkerson*, Judge Wynn noted that "our courts have recognized a categorical exception" that allows admission of prior traffic-related convictions to prove malice in second-degree murder cases. *Wilkerson*, 148 N.C. App. at 328; *see also* *State v. Rollins*, ___ N.C. App. ___, 725 S.E.2d 456, 462 (2012) (citations were relevant to establish malice for purposes of second-degree murder).
- 2. Narrow Exception for Sexual Assault Cases.** In his dissent in *Wilkerson*, Judge Wynn noted that case law supported a narrow exception to the bare fact of conviction rule allowing evidence of a prior sexual assault conviction to be admitted under Rule 404(b) to show the defendant's intent to rape the victim in a case where the victim escaped before the offense was completed. *Wilkerson*, 148 N.C. App. at 325 & 328. Later case law confirms the limited applicability of this exception. *State v. Bowman*, 188 N.C. App. 635, 643-44 (2008) (error to admit bare fact of conviction in a sex case).
- 3. Narrow Exception for Motive or Intent.** In his dissent in *Wilkerson*, Judge Wynn noted:

Arguably, under very narrow circumstances, bare evidence of a prior conviction could be probative of an enumerated purpose under 404(b); for instance, the bare fact that defendant was convicted of an offense could be probative of a

defendant's motive or intent in committing a subsequent crime of assaulting a witness that helped procure the earlier conviction. Even then, the trial court would be required to assess the prejudice of allowing the bare evidence of the prior conviction under Rule 403.

Wilkerson, 148 N.C. App. at 327 n. 2.

4. Exception for Victim's Prior Convictions. The bare fact of conviction rule does not apply to evidence of the victim's convictions. *State v. Jacobs*, 363 N.C. 815, 824-25 (2010) (*Wilkerson* did not require exclusion of the certified copies of the victim's convictions; unlike evidence of the defendant's conviction, evidence of certified copies of the victim's convictions does not encourage the jury to acquit or convict on an improper basis).

So there you have it: the general rule and the four exceptions. Questions? Fire away!