

**Garden State CLE presents:**

***Advanced New Jersey Trial  
Evidence***



***Lesson Plan***

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**Part I – The *VERY* Bad Memory - NJRE  
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**A crime victim who is a critical witness for the state is conveyed to court under the authority of a previously issued material witness complaint. She is brought before the trial judge and the following colloquy ensues:**

**Q Okay. Now, the State is asking you to testify as a witness in the case, the alleged victim. And I assume that they wanted you to testify consistent with a statement that you may have given that I don't have a copy of, I don't know what it says. Do you intend to testify and answer the State's questions?**

**A Yeah, I intend to. And I talked to I guess it's the prosecutor, and I made it clear to him that I can't recollect everything that happened that night due to the fact that it was late at night and it was so long ago and I was drinking, but I'm going to testify to the best of my knowledge.**

**Q Well, do you realize that if I deem you to be a reluctant witness that I can then have the prosecutor question you about the specific statement that you gave to the police?**

**A I don't understand that part.**

**Q Well, you gave a formal written statement to the police?**

**THE COURT: Is that accurate, Mr. Prosecutor?**

**Prosecutor: That is correct. She gave a handwritten statement and then she gave a formal written statement.**

**BY THE COURT:**

**Q Have you had an opportunity to review those statements?**

**A Yes, I have.**

**Q And does that help refresh your recollection as to what you told the police?**

**A A little bit.**

**Q If you were asked to testify and you are asked questions about your recollection, they are going to show you that statement and they are going to show you a handwritten statement in the other one. And they're going to expect that you are going to testify consistent with that. Was that the truth when you testified to it-strike that-when you gave those statements?**

**A I can't remember that night, your Honor, what I said and if it was.**

**Q Even being shown the documents doesn't help refresh your recollection?**

**A No. If it's possible I could write a statement out now and I can testify to that.**

**Q How would you write the statement now?  
You just say you don't remember anything.**

**A Because I told you that night I was  
drinking and it was late at night and I was  
frustrated. It was a lot going on that night.**

**Following this exchange, the State moves  
to utilize the victim's prior statement as  
substantive evidence. What procedure, if  
any, can be used to accomplish this?**

## **803. Hearsay exceptions not dependent on declarant's unavailability**

**The following statements are not excluded by the hearsay rule:**

**(a) Prior statements of witnesses. A statement previously made by a person who is a witness at a trial or hearing, provided it would have been admissible if made by the declarant while testifying and the statement:**

**(1) is inconsistent with the witness' testimony at the trial or hearing and is offered in compliance with [Rule 613](#). However, when the statement is offered by the party calling the witness, it is admissible only if, in addition to the foregoing requirements, it (A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition; or**

**(2) is consistent with the witness' testimony and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive; or**

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## **Rule 613. Prior statements of witnesses**

**(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time. Upon request the statement shall be shown or disclosed to opposing counsel.**

**(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement made by a witness may in the judge's discretion be excluded unless the witness is afforded an opportunity to explain or deny the statement and the opposing party is afforded an opportunity to interrogate on the statement, or the interests of justice otherwise require. This rule does not apply to admissions of a party opponent as defined in [Rule 803\(b\)](#)**

## **NJRE 803(a) - Comment**

Rule 803 states the hearsay exceptions whose application does not depend on the unavailability of the declarant. Rule 804 states the hearsay exceptions that apply only if the declarant is unavailable.

As noted in the Comment to Rule 801, Rule 803(a) treats certain prior extrajudicial statements of witnesses as an exception to the hearsay rule, and Rule 803(b) treats extrajudicial statements of party-opponents (admissions) as an exception to the hearsay rule. The result is consistent with that of [Fed.R.Evid. 801\(d\)\(1\)](#) and (2) which provide that such prior statements of witnesses and admissions of party-opponents are, by definition, not hearsay. Rules 803(c)(1) to (c)(26) collect the other general hearsay exceptions as to which the unavailability of the declarant is not a criterion for admissibility.

### **Rule 803(a)--Prior Statements**

Rule 803(a)(1) follows almost verbatim *N.J.Evid.R. 63(1)(a)*, as amended effective July 1, 1982. The words "sound recording" are omitted because they are contained in the definition of writing in [Rule 801\(e\)](#). The New Jersey formulation as to the substantive use of prior inconsistent statements of witnesses is less restrictive than the federal formulation in [Fed.R.Evid. 801\(d\)\(1\)\(A\)](#). The New Jersey rule permits the use of a prior inconsistent statement as substantive evidence when offered by a party other than the proponent of the witness, [State v. Provet, 133 N.J.Super. 432, 435-439 \(App.Div.1975\)](#), *certif. denied*, [68 N.J. 174 \(1975\)](#), and also allows such use when offered by the party calling the witness if the inconsistent statement is in written or recorded form in circumstances bespeaking reliability, or was made under oath as specified by the rule. [State v. Mancine, 124 N.J. 232, 236-256 \(1991\)](#); [State v. Gross, 121 N.J. 1, 7-15 \(1990\)](#); [State v. Gross, 121 N.J. 18 \(1990\)](#). By contrast, [Fed.R.Evid. 801\(d\)\(1\)\(A\)](#) makes no distinction based upon which party called the witness and admits inconsistent statements as substantive evidence only if made under oath. Thus, the federal rule is much narrower than the New Jersey rule. For the history

and application of the New Jersey rule and its relationship to Rule 607, see [\*State v. Hacker\*, 177 N.J.Super. 533, 537 n. 2 \(App.Div.\)](#), *certif. denied*, [87 N.J. 364 \(1981\)](#), and commentary on the 1982 amendment published in *108 N.J.L.J.* 302 (1981). See also [\*State v. Gross\*, 121 N.J. 1 \(1990\)](#), defining circumstantial reliability with regard to a prior inconsistent statement of an accomplice called by the prosecution as a witness.

Unlike Rule 803(a)(1), [\*Fed.R.Evid. 801\(d\)\(1\)\*](#) expressly requires that the declarant be a person who testifies at the trial or hearing "and is subject to cross-examination." While the "cross-examination" requirement is not explicitly stated in Rule 803(a)(1), it is implicit. The Rule requires that the statement be "inconsistent with [the witness'] testimony." The requirements that the statement be one which was previously made by "a witness at a trial or hearing" which is "inconsistent with his testimony" insure that the declarant is a witness who testifies, and is, therefore, subject to cross-examination. If the declarant is called as a witness and refuses to testify, his prior statement cannot be admitted as an inconsistent statement. [\*State v. Williams\*, 182 N.J.Super. 427, 431-437 \(App.Div.1982\)](#), holding that a prior signed statement by a witness who was charged with the same crimes could not be admitted as a prior inconsistent statement, since the witness refused to testify despite being granted immunity. The court reasoned that the statement was not inconsistent with the witness' testimony since he did not testify and he could not be cross-examined. The court held that admission of the statement would violate defendant's sixth amendment confrontation rights, citing [\*Douglas v. Alabama\*, 380 U.S. 415, 419-420, 13 L.Ed.2d 934, 937-938 \(1965\)](#).

A more difficult issue arises when the statement was made by a witness who testifies that he cannot remember making the statement, or cannot remember the subject matter of the statement. Courts have admitted the prior statement as inconsistent with the witness' testimony where the trial judge finds that the witness' forgetfulness was feigned. [\*State v. Bryant\*, 217 N.J.Super. 72, 75-79 \(App.Div.1987\)](#), *certif. denied*, [108 N.J. 202 \(1987\)](#), *cert. denied*, [484 U.S. 978 \(1987\)](#); [\*State v. Burgos\*, 200 N.J.Super. 6, 10-12 \(App.Div.1985\)](#), *certif. denied*, [101 N.J. 304 \(1985\)](#); see [\*California v. Green\*, 399 U.S. 149, 168-169, 26 L.Ed.2d 489, 502-503 \(1970\)](#), *on remand*, [\*People\*](#)

*v. Green*, 3 Cal.3d 98, 92 Cal.Rptr. 494, 479 P.2d 998, 1000-1004 (1971); but see *United States v. Palumbo*, 639 F.2d 123, 128 n. 6 (3d Cir.1981), cert. denied, 454 U.S. 819 (1981), noting that a lack of memory as to the substance of the prior statement may not be inconsistent with the statement in various circumstances; 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(1)(A)[04] at 801-120 (1988), stating that the prior statement should not be admitted "if the judge finds that the witness genuinely cannot remember and the period of amnesia or forgetfulness is crucial as regards the facts in issue."

Rule 803(a)(2), dealing with prior consistent statements offered to rebut a charge of recent fabrication, has no direct New Jersey analogue located in the hearsay exception rules, but, rather, it repeats a portion of *N.J.Evid.R.* 20 which has been incorporated in Rule 607. The provision is included in this rule to allow such evidence to be used substantively. See also Comment on Rule 607. This rule follows *Fed.R.Evid.* 801(d)(1)(B) verbatim.

Rule 803(a)(3), dealing with evidence of prior identification, follows without substantial change the formulation of *N.J.Evid.R.* 63(1)(c). See *State v. Matlack*, 49 N.J. 491, 497-500 (1967), cert. denied, 389 U.S. 1009 (1967). It is consistent with *Fed.R.Evid.* 801(d)(1)(c), but adds criteria relating to reliability.

**Cases related to problem in Part I:**

**State v. Gross, 121 NJ 1 (1990)**

**State v. Gross, 121 NJ 18 (1990)**

**State v. Mancine, 124 NJ 232 (1991)**

**State v. Cherry, 289 NJ Super. 503 (App. Div. 1995).**

## **Conduct of the Gross hearing and NJRE 104(a)**

### **Factors Relevant to a determination of reliability: (State v. Gross, 121 NJ 1, 10 (1990))**

- (1) the declarant's connection to and interest in the matter reported in the out-of-court statement;**
- (2) the person or persons to whom the statement was given;**
- (3) the place and occasion for giving the statement;**
- (4) whether the declarant was then in custody or otherwise the target of investigation;**
- (5) the physical and mental condition of the declarant at the time;**
- (6) the presence or absence of other persons,**
- (7) whether the declarant incriminated himself or sought to exculpate himself by his statement;**
- (8) the extent to which the writing is in the declarant's hand;**
- (9) the presence or absence, and the nature of, any interrogation;**
- (10) whether the offered sound recording or writing contains the entirety, or only a portion of the summary, of the communication;**
- (11) the presence or absence of any motive to fabricate;**
- (12) the presence or absence of any express or implicit pressures inducement or coercion for making the statement;**
- (13) whether the anticipated use of the statement was apparent or made known to the declarant;**
- (14) the inherent believability or lack of believability of the statement; and**
- (15) the presence or absence of corroborating evidence.**

**Part II –The Curious Drug Dealer - NJRE  
609**

**Statement of facts**



**Defendant is on trial in the Superior Court on charges of possession of CDS (cocaine), possession with intent to distribute and possession with intent to distribute within a school zone.**

**So far, the prosecution has produced evidence that on the afternoon of August 1, 2007, two Fort Lee police officers were conducting a surveillance operation near the GWB in response to citizen complaints of narcotics activity at that location. Both were dressed in black pants and in black shirts with the word "Police" emblazoned in large yellow letters on the front and back. Both wore police badges hanging from their necks.**

**While conducting their surveillance at the train station, the officers observed a man, later identified as Oliver North Bergen, flag down a man who was riding a bicycle. The man on the bicycle, later identified as defendant, stopped just long enough for Bergen to hand him some currency, after which defendant immediately rode away. Police did not observe defendant hand anything to Bergen in exchange for the currency.**

**The officers continued to observe Bergen for another twenty minutes, while he continually looked left and right as though waiting for someone to return.**

**Believing such conduct to be suspicious in light of what they had already observed, the two officers approached Bergen.**

**While one officer was speaking to Bergen, the other observed defendant pedaling toward them. The officer testified that as defendant got closer, he approached defendant and identified himself as a police officer. As he did so, based upon his experience and training, the officer specifically focused his attention on defendant's hands. While only three to four feet away from defendant, he observed defendant open his right hand and drop an item to the ground. The officer retrieved the item, which was later analyzed and found to be cocaine.**

**Defendant desires to testify and would relate a vastly different account of what had transpired to the jury. Defendant would explain that he knew Bergen and the two had combined their money so that defendant could ride over to a nearby liquor store and purchase some beer for the two to share. After purchasing two cans of beer, defendant rode back to the**

**train station; however, before he reached the spot where Bergen had been standing, he saw that Bergen was surrounded by two police officers. Fearing that he would be arrested for being in possession of an open container of beer, defendant hid the beer on the side of the train station and then resumed pedaling toward Bergen and the two officers because he "just was trying to see what was going on."**

**In the event the defendant attempts to testify, the prosecutor will seek to utilize the defendant's prior criminal history for impeachment purposes. The history includes an adult, 17 year-old criminal mischief conviction (4<sup>th</sup> degree), a juvenile cocaine possession conviction and a conditional discharge that followed a cocaine possession charge that was downgraded to reflect a violation of NJSA 2C:35-10(c).**

**What evidence issues are presented here?**

# Rule 609. Impeachment by evidence of conviction of crime

For the purpose of affecting the credibility of any witness, the witness' conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes. Such conviction may be proved by examination, production of the record thereof, or by other competent evidence.

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## COMMENT

Rule 609 is adopted in place of [Fed.R.Evid. 609](#). The rule follows provisions contained in [N.J.S.A. 2A:81-12](#) as interpreted by [State v. Sands, 76 N.J. 127 \(1978\)](#). There is no comparable 1967 rule, since the then proposed Rule 21, which contained restrictive provisions on the use of criminal convictions to impair credibility, was not adopted, the intention then being to leave [N.J.S.A. 2A:81-12](#) in effect, except for the portion concerning the use in civil actions of judgments of conviction as substantive evidence of facts, which was superseded by virtue of the official note to *N.J.Evid.R. 63(20)*. See *R. 3:9-2* and *R. 7:4-2(b)*.

The general rule stated by [Fed.R.Evid. 609\(a\)](#) limits the use of convictions to impeach the credibility of a witness to (1) crimes punishable by death or

imprisonment in excess of a year and (2) all crimes involving dishonesty or false statement regardless of punishment. A further qualification in respect of the first category only is the determination by the judge that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant. This rule makes no admissibility distinction in terms of the crime of which the witness has been convicted. Evidence of any conviction of crime is subject to exclusion if its probative value is outweighed by its prejudicial effect, but it is the defendant who bears the burden of proving the exclusion. See [\*State v. Kelly\*, 97 N.J. 178, 217 n. 21 \(1984\)](#); [\*State v. Balthrop\*, 92 N.J. 542, 544-547 \(1983\)](#). Paragraph (b) of the federal rule deals with the admissibility of convictions which are more than ten years old. This rule does not refer explicitly to the ten-year limitation and exceptions thereto. These are matters dealt with by *State v. Sands, supra*, whose principles, similar to those embodied by [\*Fed.R.Evid. 609\(b\)\*](#), should be deemed to have been incorporated in this rule.

While this rule draws no distinction between crimes of dishonesty or false statement and other crimes, it is clear that it applies only to indictable offenses which are the subject of valid convictions. Neither evidence of arrests for or charges of crime are admissible under this rule. See, e.g., [\*State v. McBride\*, 213 N.J. Super. 255, 267 \(App.Div.1986\)](#). Neither are convictions of disorderly persons offenses or traffic violations. See, e.g., *State v. Rowe*, 52 N.J. 293, 302 (1970). Nor are adjudications of juvenile delinquency. See [\*State in Interest of K.P.\*, 167 N.J. Super. 290, 293-294 \(App.Div.1979\)](#), *certif. denied*, [\*87 N.J. 394 \(1981\)\*](#). And, it has been held, uncounseled convictions are inadmissible. [\*State v. Rios\*, 155 N.J. Super. 11, 15 \(Law Div.1978\)](#). See also [\*State v. Koch\*, 119 N.J. Super. 184 \(App.Div.1972\)](#).

As to the impeachment use of a prior conviction against a witness in a criminal trial rather than against the defendant himself and particularly against a prosecution witness, see [\*State v. Balthrop, supra, 92 N.J. at 544-547\*](#), where the Court explained that while the same balancing test of probative value versus prejudicial effect applies to determine exclusion, nevertheless the prejudice to the defendant, not merely to the witness, must be a significant factor in the equation. In this regard, the federal rule is explicit, paragraph (a)(1) specifically defining prejudice as prejudice to the defendant.

As to the use of prior convictions for impeachment of witnesses in civil causes, see, e.g., [\*Tonsberg v. VIP Coach Lines, Inc., 216 N.J.Super. 522, 529 \(App.Div.1987\)\*](#); [\*Vartenissian v. Food Haulers, Inc., 193 N.J.Super. 603, 610-611 \(App.Div.1984\)\*](#).

With respect to the mode of proof of prior convictions, [\*Fed.R.Evid. 609\(a\)\*](#) expressly requires proof by way of public record or admission by the witness. This rule incorporates both modes, which have been held to be acceptable. See [\*State v. H.G.G., 202 N.J.Super. 267 \(App.Div.1985\)\*](#); [\*State v. Mazur, 158 N.J.Super. 89, 106 \(App.Div.1978\)\*](#), *certif. denied*, 75 N.J. 399 (1978). In addition, the rule also permits, without definition, proof by "other competent evidence." This provision may be deemed to incorporate [\*N.J.S.A. 2C:44-4\(d\)\*](#), which provides: "Any prior conviction may be proved by any evidence, including fingerprint records, made in connection with arrest, conviction or imprisonment, that reasonably satisfies the court that the defendant was convicted." Cf. [\*State v. Carey, 232 N.J.Super. 553, 555-558 \(App.Div.1989\)\*](#) (holding a computer printout of defendant's driving record

admissible to prove a prior driving-while-intoxicated conviction).

This rule contains no provisions comparable to [Fed.R.Evid. 609\(c\)](#), [\(d\)](#) and [\(e\)](#). Paragraph (c) of the federal rule deals with the effect of a pardon, annulment or other procedure upon the viability of the conviction. This subject is left for development by case law and the judicial interpretation of applicable statutes or other pertinent laws both of the jurisdiction in which the conviction was entered and in this jurisdiction. See, for example, [N.J.S.A. 2C:52-27](#) which provides that, if an order of expungement is entered, the conviction "shall be deemed not to have occurred."

Paragraph (d) of the federal rule addresses juvenile adjudications. Since adjudications of juvenile delinquency are not convictions of crime in New Jersey, such adjudications do not come within this rule. [State in Interest of K.P., supra, 167 N.J.Super. at 293-294](#). However, if a juvenile has been tried and convicted of a crime as an adult on a waiver of jurisdiction by the Chancery Division, Family Part, that conviction may be shown to impeach his credibility. [State v. Steffanelli, 133 N.J.Super. 512 \(App.Div.1975\)](#).

Paragraph (e) of [Fed.R.Evid. 609](#) deals with effect of a pending appeal on the use of a conviction to impeach credibility and provides that such pendency does not render evidence of the conviction inadmissible. New Jersey case law holds to the contrary. See [State v. Biegenwald, 96 N.J. 630, 638 \(1984\)](#), citing with approval [State v. Blue, 129 N.J.Super. 8, 12 \(App.Div.1974\)](#), *certif. denied*, [66 N.J. 328 \(1974\)](#). See also [State v. Eddy, 189 N.J.Super. 22 \(Law Div.1982\)](#). The conviction is, however, admissible

pending appeal if the appeal challenges only the sentence and not the validity or integrity of the guilt adjudication. See [\*State v. Anderson\*, 177 N.J.Super. 334 \(App.Div.1981\)](#); [\*State v. Eddy, supra\*, 189 N.J.Super. at 23](#). Cf. [\*State v. Rodriguez\*, 202 N.J.Super. 543 \(Law Div.1985\)](#).

This rule is not limited to convictions of crimes obtained in New Jersey. See [\*State v. Koch\*, 118 N.J.Super. 421, 424-425 \(App.Div.1972\)](#). Cf. [\*State v. Lueder\*, 74 N.J. 62 \(1977\)](#).

Note that New Jersey law permits a defendant who does not testify to appeal a trial court determination that a prior conviction could be used to impeach him if he were to testify at the trial. See [\*State v. Whitehead\*, 104 N.J. 353 \(1986\)](#). This is contrary to the federal rule which requires the defendant to testify in order to preserve for appeal the claim that a prior conviction was improperly admitted for impeachment purposes. See [\*Luce v. United States\*, 469 U.S. 38, 83 L.Ed.2d 443 \(1984\)](#).

**Cases related to problem in Part II:**

**State v. Sands, NJ 127 (1978)**

**State v. Whitehead, 104 NJ 353 (1986)**

**State v. Brunson, 132 NJ 377 (1993)**

**State v. Lykes, 192 NJ 519 (2007)**

**State v. Hamilton, 193 NJ 255 (2008)**

**State v. Murphy, 412 NJ Super. 553 (App. Div. 2010)**

**State v. Singleton, 308 NJ Super. 407 (App. Div. 1998)**

**As to Witnesses:**

**State v. Balthrop, 92 NJ 542 (1983)**

## **Part III –The Speedy Shoplifter - NJRE 404(b)**

### **Statement of facts**



**On April 7, 2009, the North Bergen Police Department received a call from the security guard at National Wholesale Liquidators who believed that two people had just driven out of the store parking lot after shoplifting. While the security guard initially pursued the two, the police took up the chase. Once the vehicle stopped, defendant was identified as the driver of the vehicle. He was in possession of a knife. Three bottles of champagne from National Wholesale Liquidators were found in the vehicle.**

**Defendant was indicted for possession of a weapon, [N.J.S.A. 2C:39-5](#)(d) (fourth-degree), and eluding, [N.J.S.A. 2C:29-2](#)(b) (second-degree). The store filed a**

**complaint against him for shoplifting, a disorderly persons offense.**

**Defendant moved to sever the shoplifting charge from the indictable offenses and to exclude evidence of the shoplifting pursuant to [N.J.R.E. 104\(a\)](#). The State indicated that it intended to offer the testimony of the cashier and security guard at the National Wholesale Liquidators Liquor Department. The cashier would testify that on the day in question, she saw a man adjust his jacket as though something were falling as he was leaving the store through the entrance. This suggested to her, based on her training and experience, that he had shoplifted. She shared her suspicion with the security guard. The security guard would testify that he also had observed the man adjust his jacket and walk out of the store with another man. He called the police, got in his vehicle, and followed the men as they drove out of the store parking lot. The police picked up the chase.**

**Pursuant to NJRE 403, the trial court granted the motion and barred evidence relating to the shoplifting, including the testimony of the cashier and the introduction into evidence of the champagne bottles.**

**The state now appeals on an interlocutory basis. What evidential issues are implicated here and how should the Appellate Division rule?**

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# **Rule 404(b). Character evidence not admissible to prove conduct; exceptions; other crimes; evidence**

**(b) Other Crimes, Wrongs, or Acts. Except as otherwise provided by [Rule 608\(b\)](#), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.**

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## **Comment**

**Rule 404 generally follows [Fed.R.Evid. 404](#) and replaces *N.J.Evid.R.* 46, 48, and 55. It also incorporates a portion of *N.J.Evid.R.* 47.**

**[Paragraph \(a\) of Rule 404](#) is almost identical to [Fed.R.Evid. 404\(a\)](#). The introductory sentence of paragraph (a) adds to the federal formulation the phrase “including a trait of care or skill or lack thereof.” This addition repeats the principle expressed by *N.J.Evid.R.* 48. Paragraph (a)(3) of this rule omits the cross references to Rule 607 and 609 appearing in the federal analogue. These references were deleted because only Rule 608 deals with character evidence offered to affect the credibility of a witness.**

The formulation of paragraph (b) of this rule follows [Fed.R.Evid. 404\(b\)](#) rather than the New Jersey analogue, *N.J.Evid.R. 55*, except that it uses the word "disposition" contained in the New Jersey rule and it adds the final phrase "when such matters are relevant to a material issue in dispute." This addition was made to emphasize the provision of *N.J.Evid.R. 55* that ordinarily other crimes evidence is admissible only to prove "some other fact in issue," and not a general disposition to commit crimes or other wrongs. In conformity with the federal rule, "opportunity" and "preparation" have been added to the *N.J.Evid.R. 55* list of examples of other purposes for which other crimes evidence may be admitted.

This formulation is intended to encompass relevant New Jersey case law. See *e.g. State v. Cofield*, 127 *N.J.Super.* 328 (1992); [State v. Stevens, 115 N.J. 289 \(1989\)](#).

Paragraph (c) of this rule has no federal analogue although its principle is implicit in the federal practice. This paragraph is based on the general principle formerly expressed by *N.J.Evid.R. 46*, that evidence of character or a trait of character is admissible when that character or trait is an element of a claim or defense which is in issue.

As a result of adoption of [Rule 404](#), evidence of a trait of character offered for the purpose of drawing inferences as to the conduct of a person on a specified occasion is no longer admissible in civil cases except as provided in [Rule 404\(c\)](#) (character and character trait in issue) and [Rule 608](#) (trait of character for truthfulness/untruthfulness offered to affect the credibility of a witness).

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## **Cases related to problem in Part III:**

**State v. Stevens, 115 NJ 289 (1989)**

**State v. Cofield, 127 NJ 328 (1992)**

**State v. Fortin, 162 NJ (2000)**

**State v. Williams, 190 NJ 114 (2007)**

**State v. Kemp, 195 NJ 136 (2008)**

**State v. Barden, 195 NJ 375 (2008)**

[Based upon State v. Henry – 2009 WL 4725225]

## Part IV The Stipulated Poly - NJRE 704

### Statement of facts



**Defendant has been charged with aggravated assault and related weapons offenses. Before the trial, defendant, who was represented by counsel, signed an agreement to take a polygraph test and stipulated to its admissibility at his trial. The State presented the test results through the testimony of a polygraph expert, Lieutenant Maywood. He first explained in general how a polygraph works, repeatedly referring**

**to the different reactions of persons who are "innocent" as opposed to those who are "guilty." He also referred to the ability of the test to differentiate persons who are "telling the truth" as opposed to those who are "lying."**

**After next describing the results of defendant's polygraph test, during which defendant denied involvement in the assault, Maywood was asked if he was "able to develop an opinion whether or not the Defendant was telling the truth." Summarizing his views, Maywood testified that "in my opinion ... he wasn't telling the truth." Under questioning from the prosecutor, Maywood also testified that in his extensive experience as a polygrapher, in "between 60 and 70 percent of the ... tests I conduct[,] I find the ... people are truthful." In those cases, he would report the results to the "investigating officers" and "a lot of times the case is terminated or charges against the person are dropped."**

**On cross-examination, Maywood referred to the test as "not just a lie detector [but] also a truth indicator." He testified that he had never encountered a situation in which he had opined that "someone was ... showing signs of deception, and [it later] came out that they were truthful." He also described a "guilty" suspect as being "a little more anxious ... because they know that the truth is going to be found out."**

**Defendant testified that he was not involved in the attack on victim. According to defendant, he insisted on taking a polygraph test because he believed it would establish his "innocence." He testified that at the time he took the test, he was distraught because his mother had just died. When told that he failed, defendant offered to re-take the polygraph test, but**

**he was not permitted to do so. Defendant was cross-examined extensively about the polygraph results.**

## **Rule 704. Opinion on ultimate issue**

**Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.**

## **Cases related to problem in Part IV**

**[Net Opinion – Ultimate issue – Scientific Basis & Reliability]**

**State v. A.O., 198 NJ 69 (2009) (Ultimate)**

**State v. Odom, 116 NJ 65 (1989) (Ultimate)**

**State v. Zola, 112 NJ 384 (1988)**

**Hisenaj v. Kuehner, 194 NJ 6 (2008)  
(Scientific)**

**Frye v. US, 293 F. 1013 (1923) (Scientific)**

**State v. Doriguzzi, 334 NJ Super. 530 (App. Div. 2000) (Scientific)**

**State v. Harvey, 151 NJ 117 (1997)  
(Scientific)**

**State v. Mervilus, \_\_\_\_ NJ Super \_\_\_\_ (App. Div. 2011) (Scientific)**

**Maynard v. Pelican Leisure, \_\_\_\_ NJ Super. \_\_\_\_ (App. Div. 2011) (Net Opinion)**

**Part V –The Disappearing Diva - NJRE**  
**803(c)(2)**

**Statement of facts**



**On February 12, 2005, at about 1:00 am, Officer Anthony Ruocco of the Jersey City Police Department testified that he and Officer William Sullivan, as well as other police units, responded to a report of a man with a shotgun at 199 Bidwell Avenue in Jersey City. On his arrival, the officer observed approximately three males, including defendant, in the area of 199 Bidwell Avenue and was approached by an extremely hot, young woman. She looked to be eighteen- or**

**nineteen-years old, and “came from around the corner.” The young woman told Officer Ruocco that defendant had pointed a shotgun in her direction (she apparently was with a group of people), and that defendant uttered words to the effect of, “Get off the corner.” She also stated that she saw defendant throw the shotgun underneath a black Cadillac. As the woman spoke to the officer, “she was shaking a little bit” and her “voice was elevated.” Two other officers then recovered the shotgun from underneath the Cadillac.**

**After Officer Ruocco arrived at the scene, other officers approached and questioned defendant about the report of the shotgun. Following the young woman's report and the discovery of the shotgun, defendant was placed in the back of a police car.**

**The young woman told Officer Ruocco that she lived in the area but nothing else about herself. She said she did not want to speak with any detectives or become involved in the case “because she was scared for her safety.” Officer Ruocco did not get her name, address, or telephone number. The young woman just “left [and] walked away.” The police took no further steps to question or identify her.**

**At trial, the State seeks to use her on-scene statements.**

**What evidentiary issues are implicated?**

Rule 803. Hearsay exceptions not dependent on declarant's unavailability

(c) Statements not dependent on declarant's availability. Whether or not the declarant is available as a witness:

(2) *Excited utterance*. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate.

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**To determine whether statements qualify as excited utterances, courts must consider:**

- (1) the amount of time that transpired between the initial observation of the event and the subsequent declaration of the statement;**
- (2) the circumstances of the event;**
- (3) the mental or physical condition of the declarant;**
- (4) the shock produced;**
- (5) nature of the statement; and**
- (6) whether the statement was made voluntarily or in response to a question.**

**Truchan v. Sayreville Bar & Restaurant, 323 N.J.Super. 40, 48-49 (App.Div.1999)**

**The excited utterance exception to the hearsay rule allows a trial court to admit certain out-of-court statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate. Such statements are admissible under the rationale that excitement suspends the declarant's powers of reflection and fabrication, consequently minimizing the possibility that the utterance will be influenced by self interest and therefore rendered unreliable. [A] statement constitutes an excited utterance when the circumstances reasonably warrant the inference that the statement was made as an uncontrolled response to the shock of the event before reasoned reflection could have stimulated a self-serving response.**

**Consistent with the rationale for the excited utterance exception, ... when deciding whether there was an opportunity to fabricate or deliberate, a court should consider the element of time, the circumstances of the incident, the mental and physical condition of the declarant, and the nature of the utterance. Although each of these factors is important, the crucial element is the presence of a continuing state of excitement that contraindicates fabrication and provides trustworthiness. Thus, in this fact-sensitive analysis, a court must determine whether the facts and circumstances reasonably warrant the inference that declarant was still under the stress of excitement caused by the event.**

**[State v. Cotto, 182 N.J. 316, 327-28 \(2005\)](#)**

## **Cases related to problem in Part V**

**State v. Branch, 182 NJ 338 (2005)**

**State v. Buda, 195 NJ 278 (2008)**

**State in the Interest of J.A., 195 NJ 324 (2008)**

**State v. Basil, 202 NJ 570 (2010)**

**Michigan v. Bryant, \_\_\_ US \_\_\_ (2011)**

**Crawford v. Washington, 541 US 36 (2004)**

**Davis v. Washington, 547 US 813 (2006)**