

Can the Fact that Daryl Had a Glock Yesterday Be Used to Prove that He Had an AK-47 Today?

Author : Jeff Welty

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When a defendant is charged with possession of a firearm by a felon, may the prosecution introduce, under Rule 404(b), evidence that the defendant previously possessed a different firearm? Courts nationally are divided. The Court of Appeals of North Carolina just ruled in [State v. Williams](#) that the answer is no.

National background. As noted above, there is a split of authority on this question. *Compare, e.g., United States v. Garner*, 396 F.3d 438 (D.C. Cir. 2005) (ruling such evidence admissible because the fact that the defendant was previously in possession of a firearm “made it more likely that [he] was in knowing possession of the loaded handgun found beneath his seat”), *with, e.g., United States v. Thomas*, 321 F.3d 627 (7th Cir. 2003) (ruling such evidence inadmissible because it did not establish the defendant’s opportunity to possess weapons or any *modus operandi* of the defendant).

Facts of Williams. The issue began its way to North Carolina’s appellate courts when a Goldsboro officer responded to a “shots fired” call at an apartment complex. As he arrived, he saw Daryl Williams and two other men standing next to a car. Williams put something in the car and shut the door while the other men walked away. The officer shined a flashlight into the car and saw an AK-47 on the back seat. Further investigation revealed that (1) Williams had the keys to the car in his pocket; (2) several items belonging to Williams were in the car; and (3) there was a “Highpoint” (presumably [Hi-Point](#)) handgun under the vehicle. The officer arrested Williams and charged him with possession of a firearm by a felon.

At trial, the state introduced the above evidence plus evidence that a year and a half earlier, officers had found the defendant in a different vehicle with a Glock handgun under the seat. The trial court admitted that evidence under [Rule 404\(b\)](#), which provides in part that:

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, entrapment or accident.

The state offered the evidence to prove “motive, knowledge, and identity.” The trial court admitted the evidence to prove knowledge and opportunity.

For his part, Williams called the other two men who had been near the vehicle on the night of his arrest. They claimed responsibility for the guns. The jury convicted Williams.

Ruling on appeal. On appeal, Williams argued that the evidence about his prior possession of the Glock was improperly admitted. The court of appeals agreed, rejecting both purposes for which the trial judge had admitted the evidence.

- As to *knowledge*, the court agreed that “defendant’s position at trial—that he was not aware of the rifle and pistol— made his guilty knowledge a material fact in issue.” However, the court found that the ability of the

evidence “to prove knowledge is based almost entirely upon defendant’s propensity to commit the crime charged.” Otherwise, “the fact that defendant, one year prior, was found to be in possession of a different firearm, in a different car, at a different location, during a different type of investigation, does not tend to establish that he was aware of the rifle and pistol in this case.”

- As to *opportunity*, the court observed that the state “offered no explanation” of this purpose, but “assume[d] that the evidence was offered to first establish that defendant had access to firearms, leading to the next logical inference that defendant had an opportunity to possess them.” But the court found that the inference was weak: the state did not show how the defendant had obtained the weapon in the prior incident; the evidence did not establish any “special opportunity” to possess firearms; and the issue of opportunity was not highly contested in any event – the defendant’s own witnesses testified that he associated with people who carried guns. Conducting Rule 403 balancing, the court determined that any relevance the evidence may have had was outweighed by the danger of unfair prejudice, i.e., the risk that the jury would infer that the defendant had a propensity to possess firearms.

The court ruled that the evidence was wrongly admitted, and despite a limiting instruction, was prejudicial error.

Judge Dillon dissented. He would have ruled that the issue was not properly preserved and did not rise to the level of plain error.

Comment. The pendulum may have begun to swing away from very permissive admissibility of Rule 404(b) evidence. In a fairly short period of time we have seen *Williams*, *State v. Reed*, ___ N.C. App. ___, 789 S.E.2d 703 (2016) (discussed [here](#)), and *State v. Hembree*, 368 N.C. 2 (2015) (discussed [here](#)), all Rule 404(b) cases going in favor of the defense. I would be interested to know whether there has been any movement in other jurisdictions regarding the admissibility of Rule 404(b) evidence.

However, I don’t think that *Williams* means that prior evidence of gun possession is never admissible in cases involving firearms possession charges. For example, such evidence might be admissible if the gun possessed previously and the firearm involved in the charged incident were the same gun; or if they were possessed in a distinctively similar manner; or if there were evidence that they came from the same source.

Given the dissent, this case is likely to be reviewed by the state supreme court. If it is, rest assured that you can read about the outcome here.