

## **Criminal Procedure Appeal**

*State v. Waring*, \_\_ N.C. \_\_, \_\_ S.E.2d \_\_ (Nov. 5, 2010)

(<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf>). (1) A capital defendant unsuccessfully moved pretrial for suppression of certain statements that he made to the police. Because the defendant failed to object to the admission of those statements at trial, plain error review applied. (2) The court rejected a capital defendant's argument that the trial court committed plain error by failing to instruct the jury that the same evidence could not be used to support more than one aggravating circumstance. Because the trial court was under no duty to give such an instruction in the absence of a request, plain error review was not available to defendant.

### **Jury Selection**

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(<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf>). (1) The trial court did not err in denying a capital defendant's *Batson* challenge when the defendant failed to establish a prima facie case that the prosecutor's use of a peremptory challenge against Juror Rogers, an African-American female, was motivated by race. Because Ms. Rogers was the first prospective juror peremptorily challenged, there was no pattern of disproportionate use of challenges against African-Americans. Ms. Rogers was the only juror who stated, when first asked, that she was personally opposed to the death penalty. (2) The trial court did not err in denying a capital defendant's *Batson* challenge to the State's peremptory challenge of a second juror. There did not appear to be a systematic effort by the State to prevent African-Americans from serving when the State accepted 50% of African-American prospective jurors. The prosecutor's race-neutral reasons were that the juror had not formulated views on the death penalty, did not read the newspaper or watch the news, had been charged with a felony, and gave information regarding disposition of that charge that was inconsistent with AOC records. Considering these reasons in the context of the prosecutor's examination of similarly situated whites who were not peremptorily challenged, the court found they were not pretextual and that race was not a significant factor in the strike. (3) The court rejected the defendant's argument that a remand was required for further findings of fact under *Snyder v. Louisiana*, 552 U.S. 472 (2008). Unlike in *Snyder*, the case at hand did not involve peremptory challenges involving demeanor or other intangible observations that cannot be gleaned from the record. However, the court stated that "[c]onsistent with *Snyder*, we encourage the trial courts to make findings . . . to elucidate aspects of the jury selection process that are not preserved on the cold record so that review of such subjective factors as nervousness will be possible."

### **Jury Argument**

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(<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf>). (1) No gross impropriety occurred in closing argument in the guilt-innocence phase of a capital trial when the prosecutor (a) asserted that a mark on the victim's forehead was caused by the defendant's shoe and evidence supported the statement; (b) improperly expressed his personal belief that there was overwhelming evidence of guilt; (c) improperly injected his personal opinion that a stab wound to the victim's neck showed intent; (d) suggested that the defendant's accomplice committed burglary at the victim's home; the comment only referred the accomplice, neither the defendant nor the accomplice were charged with burglary, and the trial court did not instruct the jury to consider burglary; or (e) suggested that the victim was killed to eliminate her as a witness when the argument was a reasonable extrapolation of the evidence made in the context of explaining mental state. (2) The trial court did not err by failing to intervene ex mero motu during the State's opening statement during the sentencing phase of a capital trial when the prosecutor stated that the "victim and the victim's loved ones would not be heard from." According to the defendant,

the statement inflamed and misled the jury. The prosecutor's statement described the nature of the proceeding and provided the jury a forecast of what to expect. (3) The trial court did not err by failing to intervene ex mero motu during closing argument in the sentencing phase of a capital trial when the prosecutor (a) made statements regarding evidence of aggravating circumstances; the court rejected the argument that the prosecutor asked the jury to use the same evidence to find more than one aggravating circumstance; (b) improperly injected his personal beliefs, repeatedly using the words, "I think" and "I believe;" (c) used the words "laugh, laugh" when impeaching the credibility of a defense expert; (d) properly used a neighbor's experience to convey the victim's suffering and nature of the crime; (e) offered a hypothetical conversation with the victim's father; (f) referred to "gang life" to indicate lawlessness and unstrained behavior, and not as a reference to the defendant being in a gang or that the killing was gang-related; also the prosecutor's statements were supported by evidence about the defendant's connection to gangs; (g) asserted that defense counsel's mitigation case was a "lie" based on "half-truths" and omitted information. (4) The collective impact of these arguments did not constitute reversible error.

## **Evidence**

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(<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf>). In a capital murder case, the trial court did not abuse its discretion by allowing the State to introduce for illustrative purposes 18 autopsy photographs of the victim. Cynthia Gardner, M.D. testified regarding her autopsy findings, identified the autopsy photos, and said they accurately depicted the body, would help her explain the location of the injuries, and accurately depicted the injuries to which Dr. Gardner had testified. The photos were relevant and probative, not unnecessarily repetitive, not unduly gruesome or inflammatory, and illustrated both Gardner's testimony and the defendant's statement to the investigators.

## **Cross-Examination**

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(<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf>). (1) In the guilt phase of a capital trial, the trial court did not err by limiting the defendant's recross-examination of law enforcement officers about whether an alleged accomplice cooperated with the police. The defendant failed to establish how the accomplice's cooperation was relevant to the defendant's guilt. Furthermore, the State's questioning did not elicit responses that required explanation or rebuttal or otherwise opened the door for the defendant's questions. (2) In the sentencing phase of a capital trial, the trial court did not abuse its discretion by overruling the defendant's objection to the State's cross-examination of a defense expert seeking to elicit a concession that other experts might disagree with his opinions regarding whether the defendant was malingering. (3) In the sentencing phase of a capital trial, the trial court did not err by failing to intervene ex mero motu when the prosecutor asked the defendant's expert witness whether he was ethically obligated to record the defendant's test results on a score sheet and about the defendant's scores in the scale for violence potential.

## **Opinions**

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(<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf>). The trial court properly sustained the State's objection to the defendant's attempt to introduce opinion testimony regarding his IQ from a special education teacher who met the defendant when he was eleven years old. Because the witness had not been tendered as an expert, her speculation as to IQ ranges was inadmissible.

## **Arrest, Search & Investigation**

### ***Miranda***

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(<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf>). (1) A capital defendant was not in custody when he admitted that he stabbed the victim. Considering the totality of the circumstances, the defendant is an adult with prior criminal justice system experience; the officer who first approached the defendant told him that he was being detained until detectives arrived but that he was not under arrest; when the detectives arrived and told him that he was not under arrest, the defendant voluntarily agreed to go to the police station; the defendant was never restrained and was left alone in the interview room with the door unlocked and no guard; he was given several bathroom breaks and offered food and drink; the defendant was cooperative; the detectives did not raise their voices, use threats, or make promises; the defendant was never misled, deceived, or confronted with false evidence; once the defendant admitted his involvement in the killing, the interview ended and he was given his *Miranda* rights. Although the first officer told the defendant that he was “detained,” he also told the defendant he was not under arrest. Any custody associated with the detention ended when the defendant voluntarily accompanied detectives, who confirmed that he was not under arrest. The defendant’s inability to leave the interview room without supervision or escort did not suggest custody; the defendant was in a non-public area of the station and prevention of unsupervised roaming in such a space would not cause a reasonable person to think that a formal arrest had occurred. (2) The court rejected the defendant’s argument that by telling officers that he did not want to snitch on anyone and declining to reveal the name of his accomplice, the defendant invoked his right to remain silent requiring that all interrogation cease.

## **Criminal Offenses**

### **Acting in Concert**

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(<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf>). In a capital case involving two perpetrators, the court rejected the defendant’s argument that the State should have been obligated to prove that the defendant himself had the requisite intent. The trial court properly instructed on acting in concert with respect to the murder charge, in accordance with *State v. Barnes*, 345 N.C. 184 (1998).

## **Capital**

### **Jury Selection**

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(<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf>). (1) The trial court did not err by allowing the State’s challenge for cause of a prospective juror when the juror’s beliefs about the death penalty could not be pinned down. (2) The trial court did not err in denying the defendant’s motion to dismiss asserting that disproportionate numbers of prospective jurors who were African-American, opposed the death penalty, or both, were excluded from the jury in violation of *Wainwright v. Witt*, 469 U.S. 412 (1985). The court declined to reconsider its previous holding that death qualifying a jury in a capital case does not violate the United States or North Carolina Constitutions. (3) The trial court did not err by prohibiting defense counsel from suggesting during voir dire that there is a presumption that life without parole is the appropriate sentence when North Carolina law does not establish such a presumption. (4) The court rejected the defendant’s argument that the State injected error when it stated to prospective jurors that the jury had to be unanimous as to a sentence of death or life without parole. According to the defendant, these comments erroneously indicated that the jury had to recommend a life sentence unanimously, placing a burden on the defendant, when in fact life sentence is imposed if the jury cannot agree during a capital sentencing proceeding. While the defendant was correct that an inability to reach unanimity in a capital sentencing proceeding will result in a life sentence, the jury is not to be

instructed as to the result of being unable to reach a unanimous sentencing recommendation. (5) The State did not reduce its burden when it asked prospective jurors to presuppose that the defendant had been found guilty. Such a supposition was a necessary prelude to voir dire questions relating to the sentencing proceeding, should one be needed.

### **Mitigating Circumstances Peremptory Instructions**

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(<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf>). (1) The trial court did not err by failing to give a peremptory instruction on statutory mitigating circumstances when the evidence as to each was contested. (2) Although the trial court erred by failing to give a peremptory instruction on the non-statutory mitigating circumstance that the defendant's mother did not accept his deficits, the error was harmless beyond a reasonable doubt. (3) The trial court did not err by failing to give peremptory instructions on non-statutory mitigating circumstances when it was not clear how one was mitigating or that the evidence was credible; as to others, the evidence was not uncontroverted.

### **(f)(1) Mitigating Circumstance**

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(<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf>). The trial court did not err by instructing the jury to consider, over the defendant's objection, the (f)(1) mitigating circumstance (no significant history of prior criminal activity). The defendant's priors consisted of breaking and entering a motor vehicle (Class I felony) and several misdemeanors (larceny, public disturbance, defrauding an innkeeper, trespassing, carrying a concealed weapon, and possession of marijuana). There was also evidence of unspecified thefts, mostly at school. Because the evidence pertained to minor offenses, a rational jury could conclude that the defendant had no significant history of criminal activity.