

## **Criminal Procedure**

### **Counsel Issues**

[State v. Brown](#), \_\_\_ S.E. 2d \_\_\_, \_\_\_ N.C. App. \_\_\_ (Mar. 3, 2015). Because defendant engaged in repeated conduct designed to delay and obfuscate the proceedings, including refusing to answer whether he wanted the assistance of counsel, he forfeited his right to counsel. Citing *State v. Leyshon*, 211 N.C. App. 511 (2011), the court began by holding that defendant did not waive his right to counsel. When asked whether he wanted a lawyer, defendant replied that he did not and, alternatively, when the trial court explained that defendant would proceed without counsel, defendant objected and stated he was not waiving any rights. Defendant's statements about whether he waived his right to counsel were sufficiently equivocal such that they did not constitute a waiver of the right to counsel. However, defendant forfeited his right to counsel. In addition to refusing to answer whether he wanted assistance of counsel at three separate pretrial hearings, defendant repeatedly and vigorously objected to the trial court's authority to proceed. Although defendant on multiple occasions stated that he did not want assistance of counsel, he also repeatedly made statements that he was reserving his right to seek Islamic counsel, although over the course of four hearings and about 3½ months he never obtained counsel. As in *Leyshon*, this behavior amounted to willful obstruction and delay of trial proceedings and therefore defendant forfeited his right to counsel.

### **Discovery Issues**

[State v. Davis](#), \_\_\_ S.E. 2d \_\_\_, \_\_\_ N.C. App. \_\_\_ (Mar. 3, 2015). In this child sexual assault case no discovery violation occurred when the State's experts testified about their own observations regarding the characteristics of sexual abuse and the reasons for delayed reporting. At trial the State offered expert testimony of two medical professionals who had treated the victim. The defendant objected, arguing that because the State had not provided defendant with the experts' opinions prior to trial, they should not be permitted to offer expert opinions at trial. The trial court sustained defendant's objection, ruling that the witnesses could testify to their own observations, but could not offer expert opinions. Because neither witness offered an expert opinion, no error occurred.

### **Jury Instructions**

[State v. Davis](#), \_\_\_ S.E. 2d \_\_\_, \_\_\_ N.C. App. \_\_\_ (Mar. 3, 2015). Citing *State v. Walston*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 19, 2014), the court held in this child sexual assault case that the trial court did not commit reversible error by using the word "victim" in the jury instructions.

### **Jury Deliberations**

[State v. Hayes](#), \_\_\_ S.E. 2d \_\_\_, \_\_\_ N.C. App. \_\_\_ (Mar. 3, 2015). The trial court did not violate G.S. 15A-1233 by providing a preemptive instruction that denied the jury an opportunity to make any evidentiary requests. The court concluded that no such preemptive instruction was given; the trial court instructed that although no transcript existed, it would consider requests to review testimony on a case by case basis and attempt to accommodate requests if necessary.

## **Evidence**

### **Relevancy**

[State v. Hayes](#), \_\_\_ S.E. 2d \_\_\_, \_\_\_ N.C. App. \_\_\_ (Mar. 3, 2015). (1) In this homicide case where the defendant was charged with murdering his wife, the trial court properly allowed forensic psychologist Ginger Calloway to testify about a report she prepared in connection with a custody proceeding regarding the couple's children. The report contained, among other things, Calloway's observations of defendant's drug use, possible mental illness, untruthfulness during the evaluation process and her opinion that defendant desired to "obliterate" the victim's relationship with the children. Because the report was arguably unfavorable to defendant and was found in defendant's car with handwritten markings throughout the document, the report and Calloway's testimony were relevant for the State to argue the effect of the report on defendant's state of mind—that it created some basis for defendant's ill will, intent, or motive towards the victim. (2) The trial court did not err by admitting into evidence lyrics of a song, "Man Killer," allegedly authored by defendant and containing lyrics about a murder, including "I'll take the keys to your car", "I'm just the one to make you bleed" and "I'll put my hands on your throat and squeeze." In this case the evidence showed that the victim's car had been moved, the victim had been stabbed, and that defendant said he strangled the victim. The court concluded: "In light of the similarities between the lyrics and the facts surrounding the charged offense, the lyrics were relevant to establish identity, motive, and intent, and their probative value substantially outweighed their prejudicial effect to defendant."

### Opinions

[State v. Davis](#), \_\_\_ S.E. 2d \_\_\_, \_\_\_ N.C. App. \_\_\_ (Mar. 3, 2015). In this child sexual abuse case, the State's treating medical experts did not vouch for the victim's credibility. The court noted that defendant's argument appears to be based primarily on the fact that the experts testified about the problems reported by the victim without qualifying each reported symptom or past experience with a legalistic term such as "alleged" or "unproven." The court stated: "Defendant does not cite any authority for the proposition that a witness who testifies to what another witness reports is considered to be 'vouching' for that person's credibility unless each disclosure by the witness includes a qualifier such as 'alleged.' We decline to impose such a requirement."

[State v. Hayes](#), \_\_\_ S.E. 2d \_\_\_, \_\_\_ N.C. App. \_\_\_ (Mar. 3, 2015). In this homicide case where the defendant was charged with murdering his wife, that the trial court did not err by allowing the State's expert witness pathologists to testify that the victim's cause of death was "homicide[.]" It concluded:

The pathologists in this case were tendered as experts in the field of forensic pathology. A review of their testimony makes clear that they used the words "homicide by unde[te]rmined means" and "homicidal violence" within the context of their functions as medical examiners, not as legal terms of art, to describe how the cause of death was homicidal (possibly by asphyxia by strangulation or repeated stabbing) instead of death by natural causes, disease, or accident. Their ultimate opinion was proper and supported by sufficient evidence, including injury to the victim's fourth cervical vertebra, sharp force injury to the neck, stab wounds, and damage to certain "tissue and thyroid cartilage[.]" Accordingly, the trial court did not err by admitting the pathologists' testimony.

### Confrontation Clause Issues

[State v. Hayes](#), \_\_\_ S.E. 2d \_\_\_, \_\_\_ N.C. App. \_\_\_ (Mar. 3, 2015). In this homicide case where the defendant was charged with murdering his wife, the confrontation clause was not violated when the trial court allowed forensic psychologist Ginger Calloway to testify about a report she prepared in

connection with a custody proceeding regarding the couple's children. Defendant argued that Calloway's report and testimony violated the confrontation clause because they contained third party statements from non-testifying witnesses who were not subject to cross-examination at trial. The court rejected this argument concluding that the report and testimony were not admitted for the truth of the matter asserted but to show "defendant's state of mind." In fact, the trial court gave a limiting instruction to that effect, noting that the evidence was relevant "only to the extent it may have been read by . . . defendant" and "had some bearing" on how he felt about the custody dispute with his wife.

### **Arrest, Search and Investigation Checkpoints**

[\*State v. McDonald\*](#), \_\_\_ S.E. 2d \_\_\_, \_\_\_ N.C. App. \_\_\_ (Mar. 3, 2015). Although the trial court properly found that the checkpoint had a legitimate proper purpose of checking for driver's license and vehicle registration violations, the trial court failed to adequately determine the checkpoint's reasonableness. The court held that the trial court's "bare conclusion" on reasonableness was insufficient and vacated and remanded for appropriate findings as to reasonableness.