Recent Cases Affecting Criminal Law and Procedure
(June 21, 2005 – October 18, 2005)

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North Carolina Supreme Court

Sentencing

(1) Overruling Ruling in *State v. Lucas* About What Constitutes "Statutory Maximum," Court Rules That Under *Blakely v. Washington* Other Than Fact of Prior Conviction, Any Fact That Increases Punishment for Crime Beyond Prescribed Presumptive Range Must Be Submitted to Jury and Proved Beyond Reasonable Doubt
(2) Overruling Ruling in *State v. Lucas,* Court Rules That Sentencing Factors That Might Lead to Sentencing Enhancement Are Not Required to Be Alleged in Indictment; Aggravating Factors Are Not Required to be Alleged in Indictment Under *Blakely*
(3) Court Rules that Provisions in G.S. 15A-1340.16 That Require Judge to Consider Existence of Aggravated Factors Not Admitted to By Defendant or Found By Jury and Permit Judge to Impose Aggravated Sentence After Judge's Finding Aggravating Factors by Preponderance of Evidence Violate Ruling in *Blakely v. Washington*
(4) Error in Failing to Submit Aggravating Factors to Jury Is Structural Error Under United States Supreme Court Rulings and Harmless Error Review Cannot Be Applied to Defendant's Sentence; Defendant Is Entitled to Resentencing Hearing
(5) Court's Rulings Apply to Cases in Which Defendants Have Not Been Indicted As of Certification Date of Opinion (July 21, 2005), and to Cases Now Pending on Direct Review or Are Not Yet Final

State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), *modifying and affirming*, 166 N.C. App. 139, 601 S.E.2d 299 (7 September 2004). The defendant was convicted by a jury of felonious child abuse inflicting serious bodily injury. At a sentencing hearing without a jury, a judge found an aggravating factor by a preponderance of evidence and sentenced the defendant in the aggravated range. The court stated that the primary question before it was whether sentencing errors that violate a defendant's Sixth Amendment right to a jury trial under Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), may be considered harmless. The court stated that preliminarily it must also examine the effect of *Blakely* on criminal sentencing in North Carolina, and it concluded that *Blakely* applies to the Structured Sentencing Act and provisions in G.S. 15A-1340.16, which is part of that act, violated the Sixth Amendment as interpreted in *Blakely*. What follows is a brief summary of the court's rulings in this case.

(1) Overruling a ruling in State v. Lucas, 353 N.C. 568, 548 S.E.2d 712 (2001), about what constitutes the "statutory maximum" for an offense, the court ruled that under *Blakely v. Washington* other than fact of prior conviction, any fact that increases punishment for crime beyond the prescribed presumptive range must be submitted to jury and proved beyond reasonable doubt.

(2) Overruling a ruling in State v. Lucas, 353 N.C. 568, 548 S.E.2d 712 (2001), that the factors constituting a firearm sentencing enhancement under G.S. 15A-1340.16A must be alleged in an indictment, the court ruled that sentencing factors that might lead to a sentencing enhancement are not required to be alleged in an indictment. The court concluded that aggravating factors are not required to be alleged in an indictment under *Blakely*. [Author's note: First, G.S. 15A-1340.16 was amended after the *Lucas* ruling to require the state to allege firearm sentencing enhancement factors in an indictment. Second, Session Law 2005-145 (House Bill 822), effective for offenses committed on or after June 30,

2005, requires that the state to allege non-statutory aggravating factors, see G.S. 15A-1340.16(d)(20), in an indictment. These statutory requirement remain the law notwithstanding the court's ruling that *Blakely* does not require an indictment under federal constitutional law. State statutes may provide greater protections for defendants than provided by federal constitutional law. Third, the court's ruling impacts the charging requirements for offenses not subject to the Structured Sentencing Act, such as DWI and commercial DWI. Under the court's ruling, neither grossly aggravating or aggravating factors need to be alleged in a criminal pleading charging these offenses. *See also* State v. Speight, 359 N.C. 602, 614 S.E.2d 262 (1 July 2005) (applying ruling in *State v. Allen* to DWI trial in superior court). Session Law 2005-145 only affects the charging requirements for offenses subject to the Structured Sentencing Act.]

(3) The court ruled that the provision in G.S. 15A-1340.16 that requires a judge to consider the existence of aggravated factors not admitted to by the defendant or found by the jury and permits a judge to impose an aggravated sentence after the judge finds aggravating factor(s) by a preponderance of evidence violates the ruling in *Blakely v. Washington.* [Author's note: The court clearly indicated that a defendant may admit to the existence of an aggravating factor.]

(4) The court ruled that the sentencing judge's error in failing to submit the aggravating factor in this case to the jury is structural error under United States Supreme Court rulings and harmless error review cannot be applied to the defendant's sentence. The court ruled that the defendant is entitled to a resentencing hearing.

(5) The court ruled that its rulings in this case applied to cases in which defendants have not been indicted as of the certification date of its opinion (July 21, 2005), and to cases now pending on direct review or are not yet final.

(1) Under Ruling in *State v. Allen*, Defendant in Superior Court Trial Was Entitled to Jury Determination of Aggravating Factors for Involuntary Manslaughter Convictions and (Non-Conviction) Grossly Aggravating and Aggravating Factors for DWI Conviction

(2) Under Ruling in *State v. Allen*, State Was Not Required to Allege Aggravating Factors in Indictments for Involuntary Manslaughter and Grossly Aggravating and Aggravating Factors in Indictment for DWI

State v. Speight, 359 N.C. 602, 614 S.E.2d 262 (1 July 2005), *modifying and affirming*, 166 N.C. App. 106, 602 S.E.2d 4 (7 September 2004) The defendant was convicted in a superior court trial of two counts of involuntary manslaughter and one count of DWI involving the crash of his vehicle into another vehicle, killing two of the other vehicle's occupants. At a sentencing hearing without a jury, the trial judge found both statutory and non-statutory aggravating factors by a preponderance of evidence and sentenced the defendant in the aggravated range for the two involuntary manslaughter convictions. At the same sentencing hearing without a jury, the judge found a non-conviction grossly aggravating factor (defendant caused serious injury to another person) and a non-conviction aggravating factor (defendant used a motor vehicle in the commission of a felony that led to the deaths of two people) and sentenced the defendant to a Level Two punishment for the DWI conviction. (1) The court ruled that under the ruling of State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), discussed above, the defendant in the superior court trial of the involuntary manslaughter and DWI offenses was entitled to a jury determination of the aggravating factors in the involuntary manslaughter cases and the (non-conviction) grossly aggravating and aggravating factors in the DWI case. [Author's note: Note that the DWI factors were non-conviction factors and thus subject to the *Blakely* ruling.] The court upheld the remand by the court of appeals to the trial court for resentencing for all three convictions that was consistent with the ruling in Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). (2) The court ruled that under the ruling of State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), discussed above, that the state was not required to allege the aggravating factors in the indictments for involuntary manslaughter and the grossly aggravating and aggravating factors in the indictment for DWI. [Author's note: (1) This ruling would clearly apply to a criminal pleading used by the state in prosecuting DWI in district court. (2) See the author's note in the discussion above in State v. Allen concerning Session Law 2005-145, which requires an indictment for

non-statutory aggravating factors in Structured Sentencing Act cases for offenses committed on or after June 30, 2005. DWI is not subject to the Structured Sentencing Act.]

(1) Trial Judge Erred Under *Blakely v. Washington* in Finding Aggravating Factor (Defendant Committed Offense While on Pretrial Release on Another Charge) and Sentencing Defendant to Aggravated Sentence—Ruling of Court of Appeals Is Affirmed
(2) Court Rules, Relying on Similar Ruling in *State v. Allen*, That It Has Constitutional Authority to Review Court of Appeals Ruling on Defendant's Motion for Appropriate Relief

State v. Blackwell, 359 N.C. 814, 618 S.E.2d 213 (19 August 2005), *modifying and affirming*, 166 N.C. App. 280, 603 S.E.2d 168 (7 September 2004) (unpublished opinion). (1) The defendant was convicted of second-degree murder and other felonies. The court ruled that the trial judge erred under Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), in finding an aggravating factor (defendant committed offense while on pretrial release on another charge) and sentencing the defendant to an aggravated sentence. (2) The court ruled, relying on a similar ruling in State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), that it has the constitutional authority under Art. IV, Sec. 2, Clause 1 of the Constitution of North Carolina to review a ruling of the North Carolina Court of Appeals on the defendant's motion for appropriate relief made in that court. G.S. 15A-1422(f) (ruling of court of appeals on motions for appropriate relief under G.S. 15A-1415(b) are final and not subject to further review) cannot restrict the supreme court's constitutional authority to do so.

Provision in G.S. 15A-1340.16(d) That Same Item of Evidence Shall Not Be Used to Prove More Than One Aggravating Factor Restricts Use of Same Facts, Not Same Source of Facts—Ruling of Court of Appeals Is Reversed

State v. Beck, 359 N.C. 611, 614 S.E.2d 274 (1 July 2005), *reversing*, 163 N.C. App. 469, 594 S.E.2d 94 (16 November 2004). The defendant was convicted of second-degree murder. At the sentencing hearing, the state presented a certified copy of a fugitive warrant from the State of Florida that stated: "Fugitive—FTA [failure to appear]—Burglary." The judge found two aggravating factors based on information in the fugitive warrant: (1) the defendant committed the murder while on pretrial release for another charge; and (2) the defendant was a fugitive from Florida because of his failure to appear for trial in that state. The court ruled that the provision in G.S. 15A-1340.16(d) that the same item of evidence shall not be used to prove more than one aggravating factor restricts the use of the same facts, not the same source of facts. Thus, the judge did not err in finding two aggravating factors from the same source of facts, the fugitive warrant in this case. The same facts were not used to prove both aggravating factors.

Trial Judge's Calculation of Defendant's Prior Record Level Was Proper, Based on Two Independent Grounds: (1) Defendant Stipulated to Prior Record Worksheet, and (2) Judge Used Reliable Method to Calculate Prior Record Level—Ruling of Court of Appeals Is Reversed

State v. Alexander, 359 N.C. 824, 616 S.E.2d 914 (19 August 2005), *reversing*, 167 N.C. App. 79, 604 S.E.2d 361 (2004). The defendant pled guilty to assault with a deadly weapon with intent to kill inflicting serious injury under a plea agreement for a presumptive sentence of 80 to 105 months' imprisonment, which constituted the minimum and maximum term of imprisonment in the presumptive range under Prior Record Level II for a Class C felony. The trial judge calculated the defendant's Prior Record Level as level II, based on a conviction of a Class A1 misdemeanor listed on the prior record level worksheet. Defense counsel remarked to the trial judge at the sentencing hearing that the defendant was a single man with no prior felony convictions, as indicated by the prior record worksheet. The court stated that counsel's statement indicated not only that he was cognizant of the contents of the worksheet, but also that he had no objections to it. He implicitly indicated that the defendant's prior misdemeanor conviction was properly reflected in the worksheet. The court ruled, relying on State v. Albert, 312 N.C. 567, 324

S.E.2d 233 (1985), that under these circumstances counsel's statement constituted a stipulation to the defendant's prior record level and thus it was properly found by the trial judge. The court also ruled that the trial judge properly calculated the defendant's prior record level because the judge used a "method found by the court to be reliable" under G.S. 15A-1340.14(f)(4)—relying on defense counsel's statements concerning the defendant's prior record level, counsel's invitation to consult the prior record worksheet, and the judge's knowledge of the plea agreement.

Trial Judge Did Not Err in Finding as Non-Statutory Aggravating Factor That Defendant Joined With One Other Person in Committing Offense and Was Not Charged with Committing Conspiracy to Rob Victim—Ruling of Court of Appeals Is Reversed

State v. Hurt, 359 N.C. 840, 616 S.E.2d 910 (19 August 2005), *reversing*, 163 N.C. App. 429, 594 S.E.2d 51 (6 April 2004). The defendant was convicted of second-degree murder. The evidence showed that the defendant and one other person murdered and robbed the victim. The court ruled, relying on State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990), that the trial judge did not err in finding as a non-statutory aggravating factor that the defendant joined with one other person in committing the offense and was not charged with committing a conspiracy to rob the victim. The evidence supporting this aggravating factor was reasonably related to the purposes of sentencing. The court rejected the defendant's argument that such evidence was insufficient for a non-statutory aggravating factor because the legislature has already determined that increased culpability stems from a defendant's participation with "more than one other person" in committing an offense and not charged with conspiracy, a statutory aggravating factor under G.S. 15A-1340.16(d)(2).

Evidence

(1) Court Analyzes Term "Testimonial" Statement in *Crawford v. Washington*
(2) Court Rules That Assault Victim's Statement to Initial Responding Officer Was Not Testimonial—Ruling of Court of Appeals Is Reversed
(3) Court Rules That Victim's Later Identification of Defendant in Photo Lineup Conducted by Detective at Hospital Was Testimonial—Ruling of Court of Appeals Is Affirmed

State v. Lewis, 360 N.C. 1, 619 S.E.2d 830 (7 October 2005), *reversing and remanding*, 166 N.C. App. 596, 603 S.E.2d 559 (19 October 2004). The defendant was convicted of armed robbery, misdemeanor breaking and entering, and felonious assault of an elderly victim in her apartment. The first law enforcement officer to arrive took a statement from the victim describing how the crimes occurred. Later that evening at a hospital, the victim was presented with a photo lineup by a detective and identified the defendant as her assailant. The victim died before trial of causes unrelated to these offenses. The victim's statement to the first-arriving officer and the photo identification given to the detective at the hospital were admitted under the residual hearsay exception, Rule 804(b)(5). (1) The court reviewed the ruling in Crawford v. Washington, 541 U.S. 36 (2004), and analyzed the term "testimonial" statement with respect to a statement made in a preliminary hearing, grand jury testimony, prior trial testimony, and police interrogation. The court also discussed the declarant's state of mind in determining whether a statement is testimonial and forfeiture of the right of confrontation. (See the court's opinion for the discussion of all these issues.) (2) The court ruled that the assault victim's statement to the initial responding officer was not testimonial. The officer was a patrol officer rather than a detective. The officer focused in interviewing the victim on gathering as much preliminary information as possible about the alleged incident, to determine if a crime had been committed, to ascertain if medical attention was required, and to identify a potential perpetrator. The officer was the first responder to the scene and his presence did not create the formality, command, and thoroughness typically found in an interrogation setting. It was not structured police questioning. The court also stated that the victim's statement to the officer was not testimonial because a person in the victim's position would not or should not have reasonably expected

the statement to be used at trial. The court noted that neighbors called the police without any direction from the victim. She was interviewed in her home and the officer was not the only person present during the interview, thus diminishing any formality that might be created by a police interview. The victim was in a state of shock when the interview occurred, and she did not know the status of the investigation at that time. (3) The court ruled that the victim's identification of the defendant in a photo lineup conducted by a detective at a hospital about five hours after the responding officer's interview was testimonial. The court stated that the photo lineup constituted structured police questioning. The officer conducted the procedure to establish probable cause to obtain an arrest warrant for a person who had been effectively identified by a neighbor as the likely suspect. Also, when the photo lineup was conducted, the victim knew an investigation was underway, and a reasonable person in her position would expect her identification could be used at a later trial.

Trial Judge Did Not Err in First-Degree Murder Trial in Allowing State's Forensic Psychiatric Expert to Express Opinions About Defendant's Mental State Based in Part on SBI Blood Spatter Expert's Report

State v. Campbell, 359 N.C. 644, 617 S.E.2d 1 (19 August 2005). The court ruled that the trial judge did not err in a first-degree murder trial in allowing the state's forensic psychiatric expert to express opinions about defendant's mental state based in part on SBI blood spatter expert's report: for example, two locations of attack indicated less chance of panic and suggested an intent to kill.

Criminal Law and Procedure

G.S. 15-144, When Construed With G.S. 15-170, Authorizes Use of Short-Form Indictment to Charge Attempted First-Degree Murder—Ruling of Court of Appeals Is Reversed

State v. Jones, 359 N.C. 832, 616 S.E.2d 496 (19 August 2005), *reversing*, 165 N.C. App. 540, 598 S.E.2d 694 (20 July 2004). The court ruled that G.S. 15-144, when construed with G.S. 15-170, authorizes the use of the short-form indictment to charge attempted first-degree murder. Thus, the indictment in this case properly charged attempted first-degree murder: "did unlawfully, willfully, and feloniously of malice aforethought attempt to kill and murder [the victim]." [Author's note: This ruling effectively overrules State v. Watkins, 169 N.C. App. 518, 610 S.E.2d 746 (5 April 2005) (indictment for attempted first-degree murder must allege the element of specific intent to kill)].

Defendant Who Is Convicted in District Court and Placed on Probation and Appeals to Superior Court for Trial De Novo Is Not on Probation During Pendency of Appeal—Ruling of Court of Appeals Is Reversed

State v. Smith, 359 N.C. 618, 614 S.E.2d 279 (1 July 2005), *reversing*, 165 N.C. App. 256, 598 S.E.2d 408 (6 July 2004). The court ruled that a defendant who is convicted in district court and placed on probation and appeals to superior court for trial de novo is not on probation during the pendency of the appeal.

Evidence Was Sufficient to Prove Defendant's Constructive Possession of Cocaine to Support Conviction of Possession With Intent to Sell or Deliver Cocaine—Ruling of Court of Appeals Is Affirmed

State v. McNeil, 359 N.C. 800, 617 S.E.2d 271 (19 August 2005), *affirming*, 165 N.C. App. 777, 600 S.E.2d 31 (17 August 2004). An officer approached the defendant and another person to investigate a report of drug sales in the area. While frisking the other person, who was visibly nervous, the defendant shoved his right hand into his right front pocket. When the officer asked the defendant to remove his hand

from the pocket, the defendant fled the scene. The officer chased the defendant into a house (where the defendant did not live) to a room in the back, where the defendant went "over the top of [a] chair with his arm," according to the officer's testimony. The officer attempted to place him in custody there, but he escaped from the officer. The officer eventually subdued him in another part of the house. The officer returned to the room and found twenty-two rocks of cocaine individually wrapped in corners of plastic bags. On returning to his patrol car with the defendant, the officer discovered three bags with a powdered substance laying on the ground where the defendant had been located before the chase. The officer picked up the bags and said, "[O]h, look what we have here," to which the defendant responded that the crack found in the house was his, but the three bags were not. The court ruled, relying on State v. Butler, 356 N.C. 141, 567 S.E.2d 137 (2002), State v. Matias, 354 N.C. 549, 556 S.E.2d 269 (2001), and State v. Davis, 325 N.C. 693, 386 S.E.2d 187 (1989), that this evidence was sufficient to prove the defendant's constructive possession of the cocaine to support the defendant's conviction of possession with the intent to sell or deliver cocaine. The court also noted that this evidence was sufficient to prove the defendant's actual possession of cocaine, and that actual possession may be proved by circumstantial evidence.

Defendant's Conviction of Failing to Register as Sex Offender When He Moved from South Carolina to North Carolina Did Not Violate Due Process; Defendant Need Not Be Provided With Actual Notice of Duty to Register in North Carolina—Ruling of Court of Appeals Is Reversed

State v. Bryant, 359 N.C. 554, 614 S.E.2d 479 (1 July 2005), *reversing*, 163 N.C. App. 478, 594 S.E.2d 202 (6 April 2004). The defendant was convicted of failing to register as a sex offender under G.S. 14-208.11. Before his release from a South Carolina prison, he was informed of his duty to register as a sex offender with the appropriate sheriff in South Carolina and to notify the South Carolina sheriff if he moved out of state. After his release, he registered as a sex offender in South Carolina. He later moved to North Carolina but failed to register as a sex offender as required under G.S. 14-208.7(a). The court ruled, distinguishing Lambert v. California, 355 U.S. 225 (1957), that the defendant's conviction of failing to register as sex offender when he moved from South Carolina to North Carolina did not violate due process. The defendant need not be provided with actual notice of a duty to register as a sex offender in North Carolina.

Judge's Failure When Accepting Juvenile's Admission to Offense to Address Juvenile Concerning One of Six Issues Set Out in G.S. 7B-2407(a) Is Reversible Error Requiring Setting Aside Adjudication of Delinquency—Ruling of Court of Appeals Is Affirmed

In re T.E.F., 359 N.C. 570, 614 S.E.2d 296 (1 July 2005), *affirming*, 167 N.C. App. 1, 604 S.E.2d 348 (16 November 2004). At a hearing accepting the juvenile's admission to an offense, the judge failed to address the juvenile whether he was satisfied with the juvenile's representation, which is one of the six issues under G.S. 7B-2407(a) that a judge must address with the juvenile. The court ruled that the failure to do so is reversible error requiring the setting aside of the adjudication of delinquency. All six issues must be addressed in accepting a juvenile's admission. The court noted that the Administrative Office of the Courts has a form [AOC-J-410] incorporating the statutory requirement. The court rejected a totality of circumstances review when a judge fails to address one or more of these issues, noting the significant differences between adult criminal proceedings and juvenile proceedings.

Arrest, Search, and Confession Issues

Judge's Ruling on Suppression Motions Was Void Because Ruling Was Not Announced in Open Court or Entered During Session in Which Motion Was Heard and Judge Did Not Have Explicit Consent of Both Parties to Enter Ruling After Session Had Ended; Defendant Was Entitled to New Trial Without Consideration Whether Defendant Was Prejudiced By Admission of Evidence—Ruling of Court of Appeals Is Affirmed

State v. Trent, 359 N.C. 583, 614 S.E.2d 498 (1 July 2005), *affirming*, 166 N.C. App. 76, 601 S.E.2d 281 (7 September 2004). The defendant filed motions to suppress evidence. After hearing evidence and arguments of counsel on January 17, 2002, the trial judge stated that he would announce a ruling later. On August 26, 2002, the trial judge announced his ruling that the motions to suppress were denied. The court ruled that the judge's ruling on the suppression motions was void because it was not announced in open court or entered during the session in which motions were heard and the judge did not have explicit consent of both parties to enter the ruling after the session had ended. The defendant was entitled to a new trial without consideration whether the defendant was prejudiced by the admission of evidence that was subject to the suppression motions.

(1) Defendant Was Not Seized When Officer Approached Defendant and Conversed With Him
(2) Assuming Arguendo That Defendant Had Been Seized When Officer Asked Him to "Hold Up," Reasonable Suspicion Supported Seizure

State v. Campbell, 359 N.C. 644, 617 S.E.2d 1 (19 August 2005). An Aiken, South Carolina law enforcement officer arrived at a K-Mart parking lot in Aiken in response to an employee's report of a suspicion person (the defendant) whose car had been parked for three to four hours in the parking lot with the person inside the entire time. The employee pointed toward the car as it left the parking lot. The officer followed the car until it later stopped at a convenience store. The defendant got out of the vehicle and started walking toward the store. The officer pulled behind the defendant's vehicle and stopped without activating a siren or blue lights. She asked the defendant if she could speak with him. He walked toward her and a conversation ensued. The defendant told her that he had been sleeping in the K-Mart parking lot. He said that he had stopped in Aiken to take a nap, and he was driving home to North Carolina after finishing a job in Columbia, South Carolina. (Aiken is 45 miles west of Columbia.) Responding to the officer's request for his driver's license and car registration, the defendant said he did not have any identification, but he told her his name and date of birth. He said the car belonged to a friend, but he could not recall the friend's name. As a result of this conversation, the officer asked the defendant to "hold up and she would be back up with him." He was later arrested for driving without a license. (1) The court ruled, relying on Florida v. Bostick, 501 U.S. 429 (1991), and other cases, that the defendant was not seized under the Fourth Amendment when the officer approached him and conversed with him about his presence in the K-Mart parking lot and about his driver's license and car registration. (2) The court ruled, assuming arguendo that the defendant had been seized under the Fourth Amendment when the officer asked him to "hold up and she would be back up with him," reasonable suspicion of criminal activity supported the seizure based on the following facts: the defendant's activity in the K-Mart parking lot; his statement about going to North Carolina but stopping in Aiken which is not on the route to North Carolina; and the defendant not having a driver's license and not knowing the name of his friend to whom the car belonged.

Defendant's Statement Made in Response to Officer's Question About Location of Knife Was Admissible Under Public Safety Exception to *Miranda* Ruling

State v. Al-Bayyinah, 359 N.C. 741, 616 S.E.2d 500 (19 August 2005). The defendant robbed a grocery store owner with a knife that eventually resulted in the owner's death. Law enforcement officers

responded to a 911 call from the owner and began searching the area around the store for the person matching the description given by the owner. When an officer made eye contact with the defendant, he ran into the woods. Officers secured the perimeter and apprehended him after about an hour of searching. An officer with a tracking dog made the first contact with the defendant and asked him where the knife was. The defendant responded that he did not have a knife. A knife was later found nearby. The court ruled that the defendant's statement was admissible under the public safety exception to the *Miranda* ruling as set out in New York v. Quarles, 467 U.S. 649 (1984). The officer was alone and unarmed when he discovered the defendant. He knew the crime involved a stabbing and the defendant could possess a knife. His question was limited to determining the location of the knife and was necessary to secure the officer's safety.

Capital Case Issues

Defense Counsel's Apparent Admission at Capital Sentencing Hearing, Without Defendant's Consent, That Defendant Had Committed Prior Crimes Did Not Constitute Ineffective Assistance of Counsel

State v. Al-Bayyinah, 359 N.C. 741, 616 S.E.2d 500 (19 August 2005). The defendant was convicted of first-degree murder and sentenced to death. Defense counsel during jury argument at the capital sentencing hearing appeared to admit, without the defendant's consent, that the defendant had committed the crimes for which he had been previously convicted. The defendant was willing to allow defense counsel to admit that the defendant had been convicted, but not to admit he had committed the crimes. The court ruled that the defendant failed to show that the jury argument prejudiced his defense, and thus the defendant was not provided with ineffective assistance of counsel. The court stated that the state had the necessary proof of these convictions to support the aggravating circumstance of prior violent felony convictions. The court noted that the United States Supreme Court in Florida v. Nixon, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), ruled that whether or not a defendant expressly consented to counsel's argument was not dispositive in finding ineffective assistance of counsel. In addition, the court noted, citing State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995), that the ruling in State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985) (counsel's admission of defendant's guilt is per se ineffective assistance of counsel), does not apply to sentencing proceedings.

North Carolina Court of Appeals

Criminal Law and Procedure

(1) Crime Against Nature Statute Is Not Unconstitutional on Its Face Under *Lawrence v. Texas* and May Be Used to Prosecute Conduct Involving Minor, Conduct Involving Non-Consensual or Coercive Sexual Acts, Conduct Occurring in Public Place, or Conduct Involving Prostitution or Solicitation

(2) Trial Judge Erred Under *Lawrence v. Texas* in Jury Instruction on Crime Against Nature Involving Two Adults Committing Sex Act in Private Residence in Not Requiring State To Prove That Offense Was Committed Without Alleged Victim's Consent

(3) Collateral Estoppel Barred Retrial of Defendant For Crime Against Nature When Defendant Had Been Found Not Guilty of Second-Degree Sexual Offense, Considering Jury Instructions and Facts in This Case

State v. Whiteley, 172 N.C. App. 772, 616 S.E.2d 576 (16 August 2005). The state's evidence showed that the defendant performed an act of cunnilingus on the alleged victim (who was unconscious from alcohol or a drug, or both) while in his apartment. Both the defendant (age 22) and the alleged victim (age

18) were adults. The defendant's evidence showed that the act was consensual and the victim was an active participant. The defendant was convicted of crime against nature. The trial judge's jury instruction did not require the state to prove that the act of cunnilingus was committed without the alleged victim's consent. The defendant was found not guilty of second-degree sexual offense for the same act of cunnilingus. The jury instruction for this offense required the state to prove that the alleged victim was physically helpless and the defendant knew or reasonably should have known she was physically helpless. (1) The court ruled that the crime against nature statute is not unconstitutional on its face under Lawrence v. Texas, 539 U.S. 558 (2003), and may be used to prosecute conduct involving a minor, conduct involving non-consensual or coercive sexual acts, conduct occurring in a public place, or conduct involving prostitution or solicitation. (2) The court ruled that the trial judge erred under *Lawrence v. Texas* in his jury instruction on crime against nature involving these two adults in not requiring the state to prove that offense was committed without the alleged victim's consent. (3) The court ruled, relying on Ashe v. Swenson, 397 U.S. 436 (1970), that collateral estoppel barred the retrial of the defendant for crime against nature when the defendant had been found not guilty of second-degree sexual offense, considering the jury instructions and facts in this case. The court noted that no evidence was presented that the act was committed by force, as evidenced by the jury instruction that focused only on physical helplessness. The court stated that the only rationally conceivable issue in dispute before the jury was whether the sexual act was committed while the alleged victim was physically helpless, and thus without her consent. The jury's verdict of not guilty of second-degree sexual offense determined that the evidence did not show beyond a reasonable doubt that the act was non-consensual; that is, that the alleged victim was physically helpless and thus unable to consent to the act of cunnilingus. Because the issue of non-consent was determined adversely to the state, collateral estoppel barred the state from retrying the offense of crime against nature.

Use of Hands, Fists, and Feet Do Not Constitute "Other Dangerous Weapon, Implement or Means" to Support Conviction of Armed Robbery Under G.S. 14-87

State v. Duff, 171 N.C. App. 662, 615 S.E.2d 373 (19 July 2005). The court ruled that a robber's use of hands, fists, and feet do not constitute "other dangerous weapon, implement or means" to support a conviction of armed robbery under G.S. 14-87. The court stated that a robber must possess, use, or threaten to use some external weapon or instrument during the robbery. The court reversed the defendant's armed robbery conviction and remanded the case for entry of judgment for common law robbery.

Fists May Be Considered Deadly Weapon in Assault Cases (1) Depending on Manner in Which They Were Used, and (2) Size and Strength of Defendant Compared to Victim; State Must Present Sufficient Evidence on Both Issues

State v. Lawson, 173 N.C. App. 270, 619 S.E.2d 410 (20 September 2005). The defendant was convicted of assault with a deadly weapon inflicting serious injury, with the defendant's use of his fists constituting the deadly weapon. The court ruled that fists may be considered a deadly weapon in assault cases (1) depending on the manner in which they were used, and (2) the size and strength of defendant compared to victim, and, relying on State v. Archbell, 91 N.C. 537, 51 S.E. 801 (1905), and other cases, the state must present sufficient evidence on both issues. The court ruled that although the state presented sufficient evidence on the manner in which the defendant's fists were used, the state did not present sufficient evidence about the defendant's size or condition compared to that of the victim. The court rejected the state's argument that mere observation by the jury of the victim and the defendant constituted sufficient evidence concerning the second issue.

Use of Hands or Feet Was Sufficient Evidence to Constitute "Deadly Weapon" in Felonious Assault Conviction

State v. Yarrell, 172 N.C. App. 135, 616 S.E.2d 258 (2 August 2005). The court ruled, relying on State v. Rogers, 153 N.C. App. 203, 569 S.E.2d 657 (2003) and other cases, that the defendant's use of hands or feet was sufficient evidence to constitute a "deadly weapon" in a felonious assault conviction. The victim was hit in the head from behind and dragged to the ground, where he was then kicked. The victim suffered knots in the back of his head and required stitches above his right eye.

Double Jeopardy Does Not Bar Defendant's Convictions of Attempted First-Degree Murder and Assault With Deadly Weapon With Intent To Kill Inflicting Serious Injury Based On Same Assault Of Victim

State v. Bethea, 173 N.C. App. 43, 617 S.E.2d 687 (6 September 2005). The court ruled, relying on State v. Tirado, 358 N.C. 551, 599 S.E.2d 515 (2004), and other cases, that double jeopardy did not bar the defendant's convictions of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury based on the same assault of the victim. Each offense has an element that is not in the other offense.

(1) Based on Same Assaultive Conduct, Defendant May Not Be Convicted of Both Assault Inflicting Serious Bodily Injury (G.S. 14-32.4) and Assault with Deadly Weapon Inflicting Serious Injury [G.S. 14-32(b)]
(2) Based on Same Assaultive Conduct, Defendant May Not Be Convicted of Both Assault With Deadly Weapon Inflicting Serious Injury [G.S. 14-32(b)] and Misdemeanor Assault Inflicting Serious Injury [G.S. 14-33(c)(1)]

State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863 (18 October 2005). (1) The court ruled, relying on State v. Ezzell, 159 N.C. App. 103, 582 S.E.2d 679 (2003), that based on the same assaultive conduct, a defendant may not be convicted of both assault inflicting serious bodily injury (G.S. 14-32.4), a Class F felony, and assault with a deadly weapon inflicting serious injury [G.S. 14-32(b)], a Class E felony. G.S. 14-32.4 contains language effectively barring punishment under that statute if the conduct is covered under some other law providing greater punishment. The court ruled, relying on the rationale of State v. Ezzell, that based on the same assaultive conduct, a defendant may not be convicted of both assault with deadly weapon inflicting serious injury [G.S. 14-32(b)], a Class E felony, and misdemeanor assault inflicting serious injury [G.S. 14-33(c)(1)], a Class A1 misdemeanor. G.S. 14-33(c) contains language effectively barring punishment under that statute if the conduct is covered under some other law providing greater punishment.

Sufficient Evidence to Support Defendant's Conviction of First-Degree Felony Murder When Defendant Shot and Killed Accomplice During Armed Robbery

State v. Torres, 171 N.C. App. 419, 615 S.E.2d 36 (5 July 2005). The defendant was convicted of first-degree murder based on the theories of felony murder and premeditation and deliberation. During an armed robbery by the defendant and two accomplices of a person selling seafood from his truck, one of the accomplices became separated from the defendant. When the defendant saw someone approaching him without knowing his identity, the defendant shot and killed him. The dead person was an accomplice. The court ruled, distinguishing State v. Bonner, 330 N.C. 536, 411 S.E.2d 598 (1992) (felony murder rule inapplicable when victim kills accomplice) and relying on two cases from other jurisdictions, that the defendant's killing of the accomplice during the armed robbery was within the felony murder rule.

(1) When Only One Store Employee Was Object of Armed Robbery, Defendants Could Only Be Convicted of One Count of Armed Robbery Even Though Money Was Taken From Both Employee and Store
(2) Person Who Was Acting in Concert With Accomplice Who Actually Committed Armed Robbery Was Not Criminally Liable for Sexual Assault of Robbery Victim, Because Based on Facts in This Case the Sexual Assault Was Not Natural or Probable Consequence of Robbery
(3) Use of Gun to Spread Labia of Victim Was Sufficient Evidence of Penetration to Support Conviction of First-Degree Sexual Offense

State v. Bellamy, 172 N.C. App. 649, 617 S.E.2d 81 (16 August 2005). Defendants A and B were both convicted of two counts of armed robbery that occurred in a McDonald's restaurant and one count of first-degree sexual offense of the robbery victim, a female restaurant employee. Defendant A was convicted on the theory of acting in concert. He worked at the McDonald's, knew that defendant B was going to commit the robbery, and was there as an employee when the robbery occurred (the restaurant had closed), but he did not participate in actually robbing the victim. Defendant B confronted the victim in an office in the McDonald's and put a gun to the side of her head. He took personal cash from her and the restaurant's deposit money. He then forced her to undress, stooped down to inspect her genitals, and used the barrel of the gun to pull her labia apart. When he noticed that she had a tampon inserted, he told her she was "lucky." (1) The court ruled, relying on State v. Suggs, 86 N.C. App. 588, 359 S.E.2d 24 (1987), that when only one store employee is the object of an armed robbery, the defendants could only be convicted of one count of armed robbery even though money was taken from both the robbery employee and store. (2) The court ruled that defendant A, the person who was acting in concert with defendant B who actually committed armed robbery, was not criminally liable for sexual assault of the robbery victim, because based on the facts in this case the sexual assault was not a natural or probable consequence of the robbery. The court declined to adopt a per se rule that any sexual assault committed during the course of a robbery is a natural or probable consequence of a planned crime. Instead, this determination must be made in each case depending on the facts. The appropriate standard is an objective one, not based on the defendant's subjective state or mind or intent. (3) The court ruled that defendant B's use of a gun to spread the labia of the victim was sufficient evidence of penetration to support his conviction of first-degree sexual offense.

Sufficient Evidence to Support Armed Robbery Conviction Even Though Victim Fled Store Immediately After Defendant Pointed Gun at Her

State v. Tuck, 173 N.C. App. 61, 618 S.E.2d 265 (6 September 2005). The defendant approached a store while the victim, an employee, was in the rear office. When she later opened the door after hearing the bell chime, she saw the defendant, who was wearing a mask and pointed a gun at her. She immediately ran out of the store. The defendant went into the store and took money from the cash register. The court ruled that this was sufficient evidence to support the defendant's armed robbery conviction because the jury could find that the defendant took property from her person or in her presence, despite her flight during the incident.

Fatal Variance Existed When Indictment Charging Possession of Firearm by Felon Alleged Weapon as Handgun and Evidence Showed Weapon Was Sawed-Off Shotgun

State v. Langley, 173 N.C. App. 194, 618 S.E.2d 253 (6 September 2005). The court ruled, distinguishing State v. Pickens, 346 N.C. 628, 488 S.E.2d 167 (1997), that a fatal variance existed when an indictment charging possession of firearm by felon alleged the weapon as a handgun and the evidence showed that the weapon was a sawed-off shotgun.

Double Jeopardy Did Not Bar Retrial After Defendant Was Granted New Trial by Appellate Court on Ground That There Was Fatal Variance Between Indictment's Allegations and Evidence Offered at Trial

State v. Mason, 174 N.C. App. 206, 620 S.E.2d 285 (18 October 2005). The indictment for possession of firearm by felon alleged the felony conviction as possession with intent to sell and deliver a counterfeit controlled substance. At the request of the state, the defendant stipulated at trial that the felony conviction was sale and delivery of a counterfeit controlled substance. The defendant was convicted of possession of a firearm by a felon and appealed to the North Carolina Court of Appeals, which reversed the defendant's conviction because of a fatal variance between the indictment's allegations and evidence at trial concerning the felony conviction. In determining whether the defendant's counsel was ineffective at the retrial for not moving to dismiss the charge on double jeopardy grounds, the court ruled that double jeopardy did not bar a retrial because the conviction had not been reversed solely on insufficient evidence. The court stated that the ground for reversal was procedural one rather than a substantive evidentiary one.

(1) Trial Judge Erred in Dismissing Habitual Felon Indictment
(2) Double Jeopardy Did Not Bar State's Appeal of Judge's Dismissal of Habitual Felon Indictment Because Double Jeopardy Did Not Bar State From Prosecuting Defendant After Dismissal of Indictment

State v. Marshburn, 173 N.C. App. 749, 620 S.E.2d 282 (18 October 2005). The defendant was indicted for possession of cocaine and being an habitual felon. After the defendant was convicted of possession of cocaine and before the habitual felon hearing had begun, the trial judge dismissed the indictment on the ground that the defendant had not been properly arraigned under G.S. 15A-928(c). The state appealed the dismissal of the indictment to the North Carolina Court of Appeals. (1) The court ruled that the trial judge erred in dismissing the indictment. Habitual felon indictments are governed by G.S. 14-7.3, not G.S. 15A-928. (2) The court ruled, relying on State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610 (1994), and other cases, that double jeopardy did not bar the state's appeal of the judge's dismissal of the habitual felon indictment because double jeopardy did not bar further prosecution of the defendant for habitual felon.

Indictment Was Fatally Defective Because It Failed to Allege Correct Name of Schedule I Controlled Substance

State v. Ledwell, 171 N.C. App. 328, 614 S.E.2d 562 (5 July 2005). The indictment charging the defendant with felonious possession of a Schedule I controlled substance described the substance as "methylenedioxyamphetamine (MDA)." The court ruled that the indictment was fatally defective because no such controlled substance is listed in Schedule I. [Author's note: Apparently the state had intended to allege "3, 4-methylenedioxyamphetamine."]

(1) Sufficient Evidence to Support Convictions of Trafficking in Marijuana by Manufacture Based on Packaging Marijuana
(2) Insufficient Evidence to Support Convictions of Trafficking in Marijuana by Transportation

State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337 (21 June 2005). (1) The court ruled that there was sufficient evidence to support the two defendants' convictions of trafficking in marijuana by manufacture. The evidence consisted of packaging the marijuana. (2) The court ruled that there was insufficient evidence to support the two defendants' convictions of trafficking in marijuana by transportation. The court rejected the state's argument that testimony showed that the defendants stored the marijuana at a house and used an apartment for distribution, thus implying that the defendants had to

move the marijuana from the house to the apartment. The court ruled the state must show that the defendants actively moved or carried the marijuana.

Sufficient Evidence to Support Conviction of Maintaining Dwelling for Keeping and Selling Cocaine

State v. Shine, 173 N.C. App. 699, 619 S.E.2d 895 (18 October 2005). The court ruled that there was sufficient evidence to support the defendant's conviction of maintaining a dwelling for keeping and selling cocaine. The state's evidence showed that he kept or maintained the dwelling: he occupied the property for a period of time, paid for cable services, and his probation officer visited the dwelling and the defendant confirmed that it was his residence. There was evidence showing that cocaine was being sold from the residence: digital scales found near two plastic bags of cocaine and an apparent list of customers and their orders or debts.

Sufficient Evidence of Defendant's Purpose of Arousing or Gratifying His Sexual Desire to Support Defendant's Indecent Liberties Conviction

State v. Verrier, 173 N.C. App. 123, 617 S.E.2d 675 (6 September 2005). The court ruled that there was sufficient evidence of the defendant's purpose of arousing or gratifying his sexual desire to support the defendant's indecent liberties conviction under G.S. 14-202.1(a)(1). The court stated that the evidence showed that the defendant touched the victim inappropriately in her "private" area on the pretext of tickling her.

No Violation of Defendant's Right to Unanimous Jury Verdict Involving Multiple Convictions of Sex Offenses with Child

State v. Brewer, 171 N.C. App. 686, 615 S.E.2d 360 (19 July 2005). The court ruled that the defendant's right to unanimous jury verdicts concerning his convictions of three counts of first-degree sexual offense and three counts of indecent liberties was not violated, considering the indictments, evidence, jury instructions, and verdict sheets. (See the court's discussion of the detailed facts in this case.)

Evidence Supported Only One Conviction of Felonious Possession of Stolen Goods, Not Five Convictions

State v. Phillips, 172 N.C. App. 143, 615 S.E.2d 880 (2 August 2005). The defendant was convicted of five counts of felonious possession of stolen goods. The court ruled, relying on the reasoning in State v. White, 322 N.C. 770, 370 S.E.2d 390 (1988), that as part of one continuous act or transaction a perpetrator comes into possession of several stolen items at the same time and place, only one conviction of possession of stolen goods is permitted. In this case, the defendant came into the possession of five stolen ATVs at the same time, and thus the defendant could not be convicted of more than one count of possession of stolen goods.

Sufficient Circumstantial Evidence to Support Defendant's Conviction of Conspiracy to Commit First-Degree Murder

State v. Brewton, 173 N.C. App. 323, 618 S.E.2d 850 (20 September 2005). The court ruled, relying on State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807 (2000), and distinguishing State v. Merrill, 138 N.C. App. 215, 530 S.E.2d 608 (2000), that there was sufficient circumstantial evidence to support the defendant's conviction of conspiracy to commit first-degree murder. There was a mutual, implied understanding between the defendant and another person to commit murder. (See the court's discussion of the evidence in its opinion.)

(1) State's Evidence in DWI Trial Satisfied Corpus Delecti Rule
(2) State's Evidence Supported DWI Conviction When Defendant Had Been Impaired by Pain Medication
(3) Defendant Was Not Entitled to Jury Instruction on Involuntary Intoxication When He Voluntarily Had Taken Pain Medication

State v. Highsmith, 173 N.C. App. 600, 619 S.E.2d 586 (4 October 2005). The defendant was convicted of DWI. A trooper saw the defendant's truck cross the center line several times, once running off the left side of the road. After stopping the defendant, the trooper saw that his movements were sluggish and speech slurred, but did not smell alcohol on him. The defendant said that he was on his way home from the dentist and was on a pain medication called Floricet. The trooper did not administer an Intoxilyzer or blood test to the defendant. A state's witness, an expert in pharmaceuticals, testified about the impairing effects of Floricet. (1) The court rejected, relying on State v. Parker, 315 N.C. 222, 337 S.E.2d 487 (1985), the defendant's argument that the admission of his statements to the trooper about his pain medication violated the corpus delecti rule. The court ruled that the state's expert's testimony and the trooper's testimony about the defendant's behavior corroborated the defendant's statement about taking Floricet. (2) The court rejected, relying on State v. Rose, 312 N.C. 441, 323 S.E.2d 339 (1984), the defendant's argument that the state failed to present evidence that the defendant knowingly consumed an impairing substance. The court stated that the defendant knew or should have known that a prescription medication such as Floricet could impair him, and was on notice that by driving after taking Floricet, he risked crossing over the line into the territory of proscribed conduct. (3) The court ruled that the defendant was not entitled to a jury instruction on involuntary intoxication when he voluntarily had taken pain medication, even if he did not know it caused impairment.

(1) State's Evidence in DWI Trial Satisfied Corpus Delecti Rule
(2) State's Evidence Did Not Support Conviction of Driving While License Revoked Because State Failed to Prove Defendant Knew His License Was Revoked: State Failed to Show License Revocation Notice Had Been Mailed to Defendant's Address

State v. Cruz, 173 N.C. App. 689, 620 S.E.2d 251 (18 October 2005). (1) The defendant was convicted of DWI. The court ruled, relying on State v. Trexler, 316 N.C. 528, 342 S.E.2d 878 (1986), and State v. Parker, 315 N.C. 222, 337 S.E.2d 487 (1985), that the state's evidence satisfied the corpus delecti rule. The state offered corroborating evidence in addition to the defendant's statements. Several officers and witnesses testified about the defendant's drinking and impairment. A car similar to the one owned and operated by the defendant was seen traveling down a road, just as defendant confessed to doing. (See additional facts in the court's opinion.) (2) The court ruled that the state's evidence did not support the defendant's conviction of driving while license revoked because the state failed to prove the defendant knew his license was revoked: the state failed to show that the license revocation notice had been mailed to the defendant's address as provided in G.S. 20-48.

Sufficient Evidence to Support Defendant's Stalking Conviction

State v. Borkar, 173 N.C. App. 162, 617 S.E.2d 341 (6 September 2005). The court ruled that there was sufficient evidence to support the defendant's stalking conviction under G.S. 14-277.3(a)(1). The defendant assaulted the victim while both were medical school students. The school advised the defendant not to have contact with the victim. The victim was concerned about being assaulted by the defendant. After the victim's graduation from medical school, the defendant traveled to her home town and hid in the woods and watched her home. When the defendant was stopped in his vehicle by a law enforcement officer, guns and ammunition were found in his vehicle. The defendant stated in jail that he intended to kill the victim and her family.

Department of Correction's Untimely Notification to Defendant of Duty to Register as Sex Offender Was Not Ground for Dismissing Charge of Failure to Register as Sex Offender

State v. Harris, 171 N.C. App. 127, 613 S.E.2d 701 (21 June 2005). The defendant was convicted of failing to register as a sex offender. Five days before the defendant's release from prison, a Department of Correction's official notified the defendant of his duty to register as a sex offender after his release from prison. G.S. 14-208.8 requires the notification to occur at least ten days but not earlier than thirty days before release. The court ruled that the untimely notification was not a ground for dismissing the charge of failing to register as a sex offender.

Trial Judge Did Not Err in Instructing Jury About Deadly Weapon and Serious Injury in Felonious Assault Trial

State v. Caudle, 172 N.C. App. 261, 616 S.E.2d 8 (2 August 2005). The defendant was convicted of assault with a deadly weapon inflicting serious injury. The victim was stabbed eleven times with a knife, her wounds required approximately thirty to forty stitches, and she was hospitalized for two days. The court ruled, relying on State v. Torain, 316 N.C. 111, 340 S.E.2d 465 (1986), that the trial judge did not err in instructing the jury that the knife was a deadly weapon. The court also ruled, relying on State v. Hedgepeth, 330 N.C. 38, 409 S.E.2d 309 (1991), that the trial judge did not err in instructing the jury that the wounds suffered by the victim would be a serious injury.

Embezzlement Under G.S. 14-92 Is Not Applicable to Local ABC Employee; Appropriate Embezzlement Charge Is Under G.S. 14-90

State v. Jones, 172 N.C. App. 308, 615 S.E.2d 896 (2 August 2005). The court ruled that embezzlement under G.S. 14-92 is not applicable to a local ABC employee and reversed the defendant's conviction under that statute. The court stated that the appropriate embezzlement charge is under G.S. 14-90, as provided in G.S. 18B-702(f).

Sufficient Evidence of "Burning" of Mobile Home to Support First-Degree Arson Conviction When Vinyl Exterior Was Melted by Fire

State v. Norris, 172 N.C. App. 722, 617 S.E.2d 298 (16 August 2005), *reversed on other grounds*, 360 N.C. 507, 630 S.E.2d 915 (30 June 2006). The court ruled, relying on the reasoning in State v. Oxendine, 305 N.C. 126, 286 S.E.2d 546 (1982), that there was sufficient evidence of "burning" of mobile home to support a first-degree arson conviction when the vinyl exterior of the mobile home was melted by the fire. The melting of the vinyl is the equivalent of the charring of wood (burning) element of arson.

Defendant in Habitual Felon Hearing Could Not Collaterally Attack Prior Felony Conviction on Ground That District Court Did Not Have Jurisdiction to Accept Defendant's Guilty Plea to Felony

State v. Flemming, 171 N.C. App. 413, 615 S.E.2d 310 (5 July 2005). The court ruled, relying on State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771, affirmed per curiam, 346 N.C. 165, 484 S.E.2d 525 (1997), that the defendant in a habitual felon hearing could not collaterally attack a prior felony conviction on the ground that the district court did not have jurisdiction to accept the defendant's guilty plea to the felony.

Probation Revocation Provisions in G.S. 15A-1344(f) Are Applicable to Probation Under G.S. 90-96, and Judge Did Not Have Jurisdiction to Revoke Probation Without Making Required Finding Under G.S. 15A-1344(f), When Probation Hearing Was Conducted After Probation Had Expired

State v. Burns, 171 N.C. App. 759, 615 S.E.2d 347 (19 July 2005). On January 20, 2000, the defendant pled guilty to a drug offense and was placed on probation for 18 months under G.S. 90-96(a). On March 1, 2001, the defendant's probation officer filed a probation violation report and an order for arrest was issued on March 6, 2001. The defendant was not arrested until March 18, 2004. The defendant was never served with the violation report before his arrest. The probation revocation hearing was not held until April 21, 2004, more than three years after the defendant's probation had expired. The court stated that in the absence of a contrary provision and except when specifically excluded, the general provisions in Article 82 of Chapter 15A apply to probation under G.S. 90-96. The court ruled that because the defendant's probationary period had expired, the trial judge did not have jurisdiction to revoke the defendant's probation because the judge did not make the required finding under G.S. 15A-1344(f) that the state had made a reasonable effort: (1) to notify the defendant of its intent to conduct a probation revocation hearing, and (2) to conduct the hearing earlier.

Trial Judge Erred in Trial of Felony Computer Damage Under G.S. 14-455 in Not Instructing Jury on Element Whether Damage to Computer Was More Than $1,000

State v. Johnston, 173 N.C. App. 334, 618 S.E.2d 807 (20 September 2005). The court ruled that the trial judge erred in the trial of felony computer damage under G.S. 14-455 in not instructing jury on element whether the damage to the computer was more than $1,000.

Defendant Was Entitled to Last Jury Argument Because He Did Not Introduce Evidence

State v. Wells, 171 N.C. App. 136, 613 S.E.2d 705 (21 June 2005). The court ruled, relying on State v. Shuler, 135 N.C. App. 449, 520 S.E.2d 585 (1999), and distinguishing State v. Macon, 346 N.C. 109, 484 S.E.2d 538 (1997), that the defendant was entitled to the last jury argument because he did not introduce evidence under Rule 10 of the General Rules of Practice for the Superior and District Courts. Defense counsel cross-examined a state's witness about inconsistencies between two statements that he gave about a shooting. Defense counsel had one of the statements marked for identification and had moved to introduce it, but after a colloquy with the prosecutor and judge, the statement was never introduced. Defense counsel read the entire statement, line by line, and asked the witness if he agreed with each sentence. The court noted, in distinguishing the *Macon* ruling, that the witness in this case was questioned about a matter directly related to the witness's own testimony on direct examination.

Seizing Defendant's Out-of-State Driver's License in Conjunction With Pretrial Thirty-Day Revocation Under G.S. 20-16.5 Was Not Punishment Under Double Jeopardy Clause to Bar Later Prosecution of DWI

State v. Streckfuss, 171 N.C. App. 81, 614 S.E.2d 323 (21 June 2005). The court ruled that seizing the defendant's out-of-state driver's license in conjunction with the pretrial thirty-day revocation under G.S. 20-16.5 was not punishment under Double Jeopardy Clause to bar later prosecution of DWI.

Sufficient Evidence to Support Defendant's Conviction of Obtaining Advances Under Promise for Work, G.S. 14-104

State v. Octetree, 173 N.C. App. 228, 617 S.E.2d 356 (6 September 2005). The court ruled that there was sufficient evidence to support the defendant's conviction of obtaining advances under the promise for work, G.S. 14-104. The victim hired that defendant to do yard work over a two-day period and paid him for the work at the end of both days. The victim was satisfied with the defendant's work and asked him to replace the wooden floor of his backyard shed the following day. The defendant agreed to do the work and told the victim that he would procure the plywood for the repair. The victim gave the defendant

$100.00 to purchase the plywood. The defendant never returned to replace the wooden floor and failed to refund the money. The court ruled that this evidence was sufficient to prove the defendant's intent to defraud the victim of his money.

Juvenile Was Not Entitled to New Adjudicatory Hearing Because of Incomplete Transcript

In re S.W., 171 N.C. App. 335, 614 S.E.2d 424 (5 July 2005). The juvenile was adjudicated delinquent of possessing marijuana with the intent to sell or deliver. Portions of the transcript contained the word "inaudible," indicating sections of missing testimony. Relying on State v. Neely, 26 N.C. App. 707, 217 S.E.2d 94 (1975), the court ruled that the there is a presumption of regularity in a trial, and to overcome this presumption, a defendant must include or direct an appellate court's attention to matters that constitute material and reversible error in the record on appeal. A mere allegation that an error occurred is insufficient to obtain a new adjudicatory hearing. Because there was no specific, affirmative showing that error occurred in the inaudible portions of the transcript, the juvenile was not entitled to a new adjudicatory hearing.

Evidence

Child's Statements to Foster Parent About Sexual Abuse Committed by Natural Mother and Her Husband Were Not Testimonial Under *Crawford v. Washington*

State v. Brigman, 171 N.C. App. 305, 615 S.E.2d 21 (5 July 2005). The defendant was convicted of multiple counts of first-degree sexual offense with her three children in which her husband was also involved. Responding to a call about unattended children playing in a street, a law enforcement officer found the three boys, dirty and playing in the street, and reported the incident to county child protective services. Protective services conducted an investigation and, based on finding of child neglect, removed the boys from the defendant's home and placed them in foster care. Two boys (J.B. and A.B.) were placed with Ms. M. The third child (N.B.) was placed with Mr. and Mrs. A. When Ms. M. noticed the two boys talking and acting out in a sexual manner, she spoke to them and learned that their mother and her husband had committed sexual acts with them. Ms. M. reported to the county department of social services that she thought something more than child neglect had occurred. After talking with social services, Ms. M. continued to talk with the boys and attempted to tape-record the conversations. The tape was inaudible, but Ms. M. wrote notes of the conversations immediately after they occurred. Mr. and Mrs. A. noticed unusual sexual conduct by N.B. and learned more about the sexual abuse from conversations with him. They began to take notes of their observations. [Author's note: This case was tried before the ruling in Crawford v. Washington, 124 S. Ct. 1354 (2004), so the judge and attorneys were of course unaware of *Crawford*; *Crawford* is applicable to this case because it was on direct appeal when *Crawford* was decided.] The trial judge conducted a voir dire hearing and determined that hearsay statements by J.B. to Ms. M. were admissible under Rule 804(b)(5); the judge ruled that J.B. was unavailable as a witness because he had testified that he did not remember the subject matter of his statement. [Author's note: Compare the trial judge's ruling with United States v. Owens, 484 U.S. 554 (1988) (Confrontation Clause does not bar testimony concerning prior, out-of-court identification when identifying witness is unable to explain basis for identification due to memory loss). See review of case law on availability in Fowler v. State, 829 N.E.2d 459 (Ind. 2005) and pages 28-30 of Jessica Smith, "*Crawford v. Washington*: Confrontation One Year Later," (School of Government, April 2005), available at http://www.iog.unc.edu/pubs/electronicversions/pdfs/crawford.pdf.] The trial court found that A.B. and N.B. did not fit within the definitions of unavailability, but admitted their hearsay statements to Ms. M. and Mr. and Mrs. A. under the residual hearsay exception, Rule 803(24). None of the children testified at trial. The defendant argued on appeal that the children's hearsay statements were testimonial and thus inadmissible under *Crawford* because they were elicited in a manner similar to formalized law enforcement questioning. The defendant referred to the tape-recording by Ms. M. that was provided to

social services and police investigators and the note-taking by Mr. and Mrs. A that were provided to the prosecution.

The court ruled that the defendant's *Crawford* argument only pertains to the statements made by J.B. because he was the only witness determined to be unavailable by the trial judge. The court noted that the trial judge had ruled that A.B. and N.B. were not unavailable to testify, and a defendant may waive the right to confront a witness by simply failing to exercise that right at trial. The court stated: "In this present case, A.B. and N.B. were 'available' to testify, although neither the State nor defendant called them to testify." [Author's note: The court did not indicate in what way A.B. and N.B. were available in this case. For example, were they physically present in the courtroom? Assuming they were in the courtroom, would that be sufficient to satisfy *Crawford*'s requirement of availability for cross-examination? *Compare* Bratton v. State, 156 S.W.2d 689 (Tex. Crim. App. 2005) (defendant does not waive right to confrontation by failing to call witness; it is state's duty to show unavailability of witness when seeking to admit witness's statements), *and* State v. Cox, 876 So. 2d 932 (La. Ct. App. 2004) (similar ruling), *with* State v. Starr, 604 S.E.2d 297 (Ga. Ct. App. 2004) (record revealed witness was available for cross-examination because prosecutor stated that witness was in courthouse and available if necessary), discussed on page 29 of Jessica Smith, "*Crawford v. Washington*: Confrontation One Year Later," (School of Government, April 2005), available at http://www.iog.unc.edu/pubs/electronicversions/pdfs/crawford.pdf.]

The court ruled that J.B.'s statements to Ms. M. were not testimonial because they did not constitute formal statements to law enforcement or other government officers. The statements were not procured by a government officer. They were made spontaneously to a person closest to him, his foster mother (Ms. M.), and without a reasonable belief that the statements would be used at a later trial. (See the court's detailed discussion of the content of the statements and relevant case law.)

The court concluded that the trial judge did not err in admitting the statements of the three children as hearsay exceptions.

Statement by Assault Witness to Assault Victim Identifying Person Who Assaulted Victim Was Not Testimonial Under *Crawford v. Washington*

State v. Lawson, 173 N.C. App. 270, 619 S.E.2d 410 (20 September 2005). The defendant was convicted of a felonious assault of the victim. The victim did not know who assaulted him. A witness to the assault told the victim, while the victim was being transported to a hospital, who assaulted him. The court ruled that the statement was not testimonial under Crawford v. Washington, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The court noted that the statement was not made during a police investigation, rather it was made during a private conversation between the witness and victim and outside the presence of a law enforcement officer. In addition, it was unlikely under these circumstances that the witness would reasonably expect her statement to be used prosecutorially. [Author's note: The court went on to rule that the statement was not admissible under Ohio v. Roberts, 448 U.S. 56 (1980).]

Witnesses' Statements Made During Interview by Law Enforcement Officer Twenty Minutes After Shootings Had Been Committed Were Testimonial Under *Crawford v. Washington*

State v. Allen, 171 N.C. App. 71, 614 S.E.2d 361 (21 June 2005). Two murders were committed in an apartment. The first law enforcement officer arrived within ten minutes and encountered two witnesses, who were crying and unable to speak English. A Spanish-speaking officer arrived ten minutes later and interviewed the two witnesses, who described what had occurred. Neither witness testified at the defendant's trial. Relying on State v. Sutton, 167 N.C. App. 242, 609 S.E.2d 270 (15 March 2005), and distinguishing State v. Forrest, 164 N.C. App. 272, 596 S.E.2d 22 (2004), *affirmed*, 359 N.C. 424, 611 S.E.2d 833 (5 May 2005), the court ruled that the statements of the two witnesses were testimonial under Crawford v. Washington, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The twenty minutes between the shootings and the officer's arrival provided enough time for the witnesses to reflect on the shootings

before they spoke to the officer. The statements were not given during the criminal incident itself, but rather after the apartment had been secured and the threat of danger to the witnesses was no longer immediate. The officer's primary focus was to investigate the crimes and he would have had "an eye toward trial" when questioning them. The questioning amounted to interrogation, and the witnesses reasonably believed that their statements would be used prosecutorially. Although the trial judge had admitted the statements as excited utterances, the court noted that whether a statement qualifies as an excited utterance is not a factor in Confrontation Clause analysis. Based on the particular circumstances of a case, statements that could be characterized as being excited utterances may or may not be testimonial.

Murder Witness's Statement Made During Interview by Law Enforcement Officer on Day of Murder Was Admitted in Violation of *Crawford v. Washington*

State v. Champion, 171 N.C. App. 716, 615 S.E.2d 366 (19 July 2005). An officer interviewed a witness to a murder on the day the murder was committed. The witness later died before trial. The witness's statement was admitted at the defendant's trial. The defendant never had an opportunity to cross-examine the witness. The court ruled that this testimonial statement was admitted in violation of the ruling in Crawford v. Washington, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

SBI Lab Analyst's Expert Opinion Testimony That Substances Were Marijuana and Opium, Based on Analysis of Drugs Performed by Another SBI Lab Analyst Who Did Not Testify at Defendant's Trial, Did Not Violate *Crawford v. Washington*

State v. Delaney, 171 N.C. App. 141, 613 S.E.2d 699 (21 June 2005). The court ruled that an SBI lab analyst's expert opinion testimony that that the substances were marijuana and opium, based on an analysis of the drugs that was performed by another SBI lab analyst who did not testify at the defendant's trial, did not violate Crawford v. Washington, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). An expert may base an opinion on tests performed by others, and the defendant had the opportunity to cross-examine the testifying agent about the basis of his opinion. See also State v. Watts, 172 N.C. App. 58, 616 S.E.2d 290 (2 August 2005) (similar ruling involving DNA expert opinion testimony offered by lab analyst based on testing performed by another lab analyst); State v. Bethea, 173 N.C. App. 43, 617 S.E.2d 687 (6 September 2005) (similar ruling involving forensic firearms examiner opinion testimony offered by lab analyst based on testing performed by another lab analyst).

(1) Drug Lab Report of Non-Testifying Analyst Was Properly Admitted As Basis of Expert Opinion Testimony by Analyst's Supervisor and Did Not Violate *Crawford v. Washington*
(2) Law Enforcement Exception in Rule 803(8) (Public Records Hearsay Exception) Does Not Restrict Admission of Evidence Under Rule 803(6) (Business Records Hearsay Exception) Concerning Purely Ministerial Observations

State v. Lyles, 172 N.C. App. 323, 615 S.E.2d 890 (2 August 2005). (1) The defendant was convicted of cocaine offenses. The analyst who examined the evidence and determined it was cocaine did not testify at trial. However, his report was admitted into evidence, and his supervisor testified that the evidence was cocaine based on the analyst's test results reflected in the report. The court ruled, relying on a similar ruling in State v. Delaney, 171 N.C. App. 141, 613 S.E.2d 699 (21 June 2005), that the defendant's confrontation rights were not violated under the ruling in Crawford v. Washington, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). (2) The court ruled, relying on State v. Smith, 312 N.C. 361, 323 S.E.2d 316 (1984), that the law enforcement exception in Rule 803(8) (public records hearsay exception) does not restrict the admission of evidence under Rule 803(6) (business records hearsay exception) concerning purely ministerial law enforcement observations.

Admission of Fingerprint Card Without Testimony of Officer Who Impressed Defendant's Fingerprints on Card Did Not Violate *Crawford v. Washington* Because Fingerprint Card Was Admissible As Business Record

State v. Windley, 173 N.C. App. 187, 617 S.E.2d 682 (6 September 2005). An officer obtained several latent fingerprints at the crime scene and compared them to fingerprints contained in AFIS (Automated Fingerprint Identification System), which referenced the defendant. The officer then compared one of the latent fingerprints to the defendant's actual fingerprint card that had been kept in the normal course of business in police record files. The court ruled that the admission of the fingerprint card without the testimony of the officer who impressed the defendant's fingerprints on the card did not violate Crawford v. Washington, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), because the fingerprint card was admissible as a business record. The court noted that *Crawford* had indicated that business records were not testimonial.

(1) Witness's Identification of Defendant in Photo Lineup Was Testimonial Under *Crawford v. Washington*
(2) Defendant's Prior Sexual Assaults of Two Other Women Were Properly Admitted as Rule 404(b) Evidence in Defendant's Rape Trial
(3) Evidence of Pornographic Magazines Found in Defendant's Motel Room Where Rape Occurred Was Inadmissible

State v. Moore, 173 N.C. App. 494, 620 S.E.2d 1 (4 October 2005). The defendant was convicted of two counts of rape involving L.S. (1) The state presented evidence of a prior rape of T.M. as Rule 404(b0 evidence. T.M. did not testify at trial. The state offered testimony that T.M. identified the defendant in a photo lineup conducted by a detective. The court ruled, relying on State v. Lewis, 166 N.C. App. 596, 603 S.E.2d 559 (2004), *reversed on other grounds*, 360 N.C. 1, 619 S.E.2d 830 (7 October 2005), that this identification was testimonial under Crawford v. Washington, 541 U.S. 36 (2004), and was improperly admitted. (2) The court ruled that the defendant's prior sexual assaults of two other women were properly admitted as Rule 404(b) evidence in the defendant's trial. (See the court' discussion in its opinion of the facts of the prior sexual assaults.) (3) The court ruled, relying on State v. Smith, 152 N.C. App. 514, 568 S.E.2d 289 (2002), the evidence of pornographic magazines found in the defendant's motel room where the rape occurred was inadmissible. There was no evidence that the defendant viewed the magazines with the victim or had asked the victim to look at the magazines.

Sixth Amendment Right to Confrontation Ruling in *Crawford v. Washington* Is Inapplicable to Admission of Evidence in Hearing to Terminate Parental Rights

In re D. R., 172 N.C. App. 300, 616 S.E.2d 300 (2 August 2005). The court ruled that the Sixth Amendment right to confrontation ruling in Crawford v. Washington, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), is inapplicable to the admission of evidence in a hearing to terminate parental rights because the hearing is a civil action.

(1) Defendant's Confrontation Rights Were Not Violated When Officer Testified About Defendant's Gait That Officer Observed in Videotape Even Though Videotape Had Been Lost Before Trial
(2) Officer's Opinion Testimony About Defendant's Gait That Officer Observed in Videotape Was Admissible Even Though Videotape Had Been Lost Before Trial

State v. Thorne, 173 N.C. App. 393, 618 S.E.2d 790 (20 September 2005). The defendant was convicted of armed robbery. A surveillance videotape recorded a robbery of a credit union. A law enforcement officer watched the videotape and informed detectives that the characteristics of the robber's walk was similar to that of the defendant. Later, the police department lost the videotape (the defendant conceded

that the videotape was not lost in bad faith). The officer testified at trial that the gait of the defendant was similar to that of the person seen robbing the bank on the videotape. (1) Relying on Delaware v. Fensterer, 474 U.S. 15 (1985), and State v. Zinsli, 156 Or. App. 245, 966 P.2d 1200 (1998), the court ruled that the defendant's confrontation rights under the United States and North Carolina constitutions were not violated even though the videotape was not available to play before the jury. The court stated that the defendant had ample opportunity to cross-examine the officer about the quality of the videotape, his viewing of it, and his personal knowledge of the defendant's gait. (2) The court ruled that the officer's opinion testimony under Rule 701 about the defendant's gait in the videotape was admissible even though the videotape had been lost before trial. The court noted the officer's training and experience concerning the differences in the way people walk. The court also ruled that the trial judge did not err in admitting the officer's testimony under the balancing test of Rule 403.

State's DNA Expert Was Properly Permitted to Testify About Population Statistics

State v. Watts, 172 N.C. App. 58, 616 S.E.2d 290 (2 August 2005). The court ruled, relying on State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993), and other cases, that the state's DNA expert was properly permitted to testify about population statistics: (1) the profile from the male faction of the DNA taken from the minor victim's underwear was 4.48 million trillion times more likely to be from the defendant than from another unrelated individual within North Carolina's Caucasian population; and (2) it was scientifically unlikely that the semen found on the minor victim's underwear originated from anyone other than the defendant.

Officer in DWI Trial Was Properly Permitted to Offer Testimony About Defendant's Conduct During Field Sobriety Tests

State v. Streckfuss, 171 N.C. App. 81, 614 S.E.2d 323 (21 June 2005). An officer stopped the defendant for speeding and smelled a strong odor of alcohol emanating from the vehicle. The officer administered field sobriety tests to the defendant. After a voir dire on the officer's training and qualifications in administering field sobriety tests, the trial judge ruled that the officer could not testify that he administered standardized field sobriety tests and could not testify that he believed the defendant to be impaired because the defendant failed the tests. However, the officer could testify what he asked the defendant to do and the defendant's conduct in response thereto. He could also testify that he formed an opinion that the defendant was impaired when the defendant started to hop and then fell over when asked to stand on one leg. The court noted that the officer was permitted to testify as a lay witness, rather than an expert witness, and a lay witness may give an opinion whether a person is impaired as long as the opinion is based on personal observation. The court ruled that the trial judge did not err in admitting the officer's testimony about the defendant's conduct during the field sobriety tests. The court rejected the defendant's argument that the trial judge erred in allowing the officer to testify about the defendant's conduct during the field sobriety tests when the state had failed to establish both that the officer was qualified to properly administer or interpret the tests, and that the tests had been properly administered.

Officer's Testimony That Neighborhood Where Defendant Was Arrested Had Reputation as Heavy Area for Drug Use and Sales Was Offered for Non-Hearsay Purpose and Thus Was Admissible

State v. English, 171 N.C. App. 277, 614 S.E.2d 405 (5 July 2005). The defendant was convicted of drug offenses involving a sale of cocaine to an undercover law enforcement officer. The state on direct examination asked the officer why he was in the neighborhood as an undercover officer soliciting drugs. The officer testified that the neighborhood had a reputation as a heavy area for drug use and sales. Distinguishing State v. Williams, 164 N.C. App. 638, 596 S.E.2d 313 (2004) (evidence of reputation of place or neighborhood is ordinarily inadmissible), the court ruled that the officer's testimony was offered for the non-hearsay purpose to explain why the officer was in the neighborhood, and not as an assertion

that the neighborhood was, in fact, known for its heavy drug traffic. Thus, the officer's testimony was not hearsay and was admissible.

Although Officer's Testimony Was Admissible Under Rule 404(b) About Facts Underlying Prior Assault of Victim in Current Assault Trial Involving Same Victim, Fact of Conviction for This Prior Assault Was Not Admissible Under Rule 404(b)

State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863 (18 October 2005). The defendant was convicted of multiple assaults and kidnappings of the same victim. (Although the victim testified at the trial, she recanted prior statements to others describing the assaults.) An officer testified about the underlying facts of an assault committed by the defendant on the same victim that occurred about seven years before the assaults being tried. The state then introduced a certified copy of the defendant's conviction for this assault. The court ruled that although the officer's testimony was admissible under Rule 404(b) about the facts underlying the prior assault, the fact of conviction for the prior assault was not admissible under Rule 404(b). The court relied on the dissenting opinion in State v. Wilkerson, 148 N.C. App. 310, 559 S.E.2d 5 (2002), which was adopted per curiam by the North Carolina Supreme Court at 356 N.C. 418, 571 S.E.2d 583 (2002).

Admission of Probation Officer's Testimony in Drug Trial That Defendant Lived in Dwelling Was Properly Admitted Under Rule 404(b)

State v. Shine, 173 N.C. App. 699, 619 S.E.2d 895 (18 October 2005). The defendant was convicted of drug offenses. No one was present when officers executed a search warrant of a residence for drugs, although they found some items tying the defendant to the residence. A probation officer testified that the defendant was his probationer, and the defendant had given him the address of this residence as his home. In addition, when the probation officer visited the residence, the defendant answered the door and verified that it was his residence. The defendant never notified the officer of a change of address. The probation officer did not testify about the reason why the defendant was on probation. The testimony was offered to show that the defendant occupied and controlled the residence and his knowledge of the drugs there. The court ruled that testimony was properly admitted under Rule 404(b).

(1) In Trial of Defendant for Sexual Abuse of Granddaughter, Trial Judge Erred in Admitting Evidence Under Rule 404(b) That Defendant Sexually Abused Niece 23 Years Earlier When It Was Offered to Show Common Scheme or Plan
(2) Trial Judge Erred in Admitting Evidence That Defendant Possessed Pornographic Magazines and Women's Underwear When There Was No Evidence to Show Items Were Used During Offenses

State v. Delsanto, 172 N.C. App. 42, 615 S.E.2d 870 (2 August 2005). **[Author's note: There was a dissenting opinion in this case, but not on the rulings discussed below.]** The defendant was convicted of sexual offenses with his granddaughter. (1) The court ruled, relying on State v. Jones, 322 N.C. 585, 369 S.E.2d 822 (1988), and distinguishing State v. Jacob, 113 N.C. App. 605, 439 S.E.2d 812 (1994), that the trial judge erred in admitting evidence under Rule 404(b) that the defendant sexually abused his niece 23 years earlier, when the evidence was offered to show a common scheme or plan. The court noted that whether the evidence was admissible under Rule 404(b) to show identity and intent was not properly before it, because the state did not assert that ground at trial. (2) The court ruled, relying on State v. Smith, 152 N.C. App. 514, 568 S.E.2d 289 (2002), that the trial judge erred in admitting evidence that the defendant possessed pornographic magazines and women's underwear. The court noted that the state presented no evidence that the defendant's possession of these items played any part in the alleged offenses. For example, the defendant did not show the victim the pornography or otherwise use it during the alleged offenses.

(1) Similar Robbery Occurring Two Days After Robbery Being Tried Was Properly Admitted Under Rule 404(b)
(2) State Was Properly Permitted to Impeach Its Witnesses With Prior Inconsistent Statements
(3) Co-Defendant's Statement Was Sufficiently Redacted Under *Bruton v. United States* To Be Admitted at Defendant's Trial

State v. Jacobs, 174 N.C. App. 1, 620 S.E.2d 204 (18 October 2005). **(Author's note: There was a dissenting opinion in this case, but not on the issues discussed below.)** The defendant was convicted of armed robbery, burglary, and other offenses, in which he and others impersonated law enforcement officers to gain entry into a dwelling and then robbed people inside. (1) The court ruled that a similar robbery (in which the defendant and others impersonated law enforcement officers) occurring two days after the robbery being tried was properly admitted under Rule 404(b). (2) The court ruled that the state was properly permitted to impeach two of its witnesses with their prior inconsistent custodial statements made to law enforcement officers. The court stated that both witnesses testified contrary to the state's expectations, and there was no indication that the state called the witnesses or used their impeachment as a mere subterfuge to present evidence that was otherwise inadmissible. The court noted that the trial judge instructed the jury that it could not consider the prior inconsistent statements for the truth of the matter asserted. (3) The court ruled that a co-defendant's statement was sufficiently redacted under G.S. 15A-927(c)(1) and Bruton v. United States, 391 U.S. 123 (1968), to remove references to the defendant so the statement was properly admitted at the defendant's trial. The court stated that the use of the pronoun "we" in the redacted statement did not clearly implicate the defendant because it followed and was included in sentences that discussed the location and activity of several other people involved in the charged crimes.

Statements of Two Child Sex Abuse Victims to Registered Nurses Were Properly Admitted Under Rule 803(4) (Medical Diagnosis or Treatment) in Compliance With *State v. Hinnant* Standard

State v. Lewis, 172 N.C. App. 97, 616 S.E.2d 1 (2 August 2005). The defendant was convicted of two counts of indecent liberties involving his daughter and son. The court ruled that the statements of the two children to registered nurses (in separate interviews) were properly admitted under Rule 803(4) (medical diagnosis or treatment) in compliance with the ruling in State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000). [Author's note: Although the children testified at trial, the videotapes of the interviews were admitted for substantive evidence under Rule 803(4).] Five months after the alleged abuse, the interviews with the nurses took place in a medical center immediately before an examination by a doctor. The daughter was nine years old and the son was eight years old. Both children signed forms stating that they understood that the registered nurse would share their statements with a medical doctor. Both registered nurses testified that they also explained to the children that their discussions would be shared with a doctor, who would then perform a medical examination. The court stated that the evidence showed that both children had the requisite intent to make their statements for a medical purpose, the first part of the *Hinnant* standard. The fact that the interviews took place in a child-friendly room did not adversely affect this finding. The court also stated that the children's statements, including identifying their father as the abuser, were reasonably pertinent to diagnosis or treatment, the second part of the *Hinnant* standard. (See the court's discussion of the evidence concerning this issue.)

(1) Forensic Pathologists' Testimony in Child Abuse Murder Trial That Child's Injuries Were Not Accidentally Inflicted Was Properly Admitted
(2) Trial Judge Did Not Err in Not Admitting Proposed Testimony of Defense Character Witnesses for Defendant's Character Trait for Peacefulness That Defendant Had Not Abused Other Children

State v. Murphy, 172 N.C. App. 734, 616 S.E.2d 567 (16 August 2005). The defendant was convicted of second-degree murder involving the child abuse killing of a three year old child. (1) The court ruled, relying on State v. McAbee, 120 N.C. App. 674, 463 S.E.2d 281 (1995), and State v. West, 103 N.C. App. 1, 404 S.E.2d 191 (1991), that the forensic pathologists' testimony that the child's injuries were not accidentally inflicted was properly admitted. (2) The court ruled, relying on State v. Hoffman, 95 N.C. App. 647, 383 S.E.2d 458 (1989), that the trial judge did not err in not admitting the proposed testimony of defense character witnesses for the defendant's character trait for peacefulness that the defendant had not abused other children. Under Rule 405, the direct examination of a character witness is limited (with exceptions in Rule 405(b) not relevant to this trial) to testimony in the form of reputation or opinion. Specific incidents of conduct may be explored only on cross-examination.

SBI Agent in Trial Involving Methamphetamine Lab Was Properly Permitted to Offer Expert Opinion About Use of Police Scanner and Police Frequency Book Found During Search of Lab

State v. Alderson, 173 N.C. App. 344, 618 S.E.2d 844 (20 September 2005). The defendant was convicted of various drug offenses arising from her involvement with a methamphetamine lab. During the execution of a search warrant of the lab, officers found a police scanner and police frequency book containing a list of local law enforcement channels. A SBI agent, an expert in drug chemistry and who had been involved in clandestine laboratory investigations, was allowed to giver her expert opinion why the seizure of the police frequency book was important. She testified that finding a police frequency book and a radio scanner can indicate those acting illegally may have a "jumpstart" if they know which police frequencies to monitor. The court ruled that this testimony was admissible to assist the jury in inferring why such evidence was important and why it was seized during the search of the lab.

Trial Judge During Defendant's Drug Trial Erred in Allowing State to Offer Character Evidence of Two People Involved in Drug Offense Who Did Not Testify

State v. McBride, 173 N.C. App. 101, 618 S.E.2d 754 (6 September 2005). The defendant was on trial for various drug offenses. The state's evidence tended to show that two other people were involved with illegal drugs when the drug offenses were committed. These two people were not on trial with the defendant and did not testify at the defendant's trial. The state was allowed to offer character evidence in the form of the reputation of these two people, one as a user of illegal drugs and the other as a dealer of illegal drugs. The court ruled that the trial judge erred in allowing this testimony under evidence Rule 404(a) because it impermissibly showed that these two people were acting in conformity with their reputations in the company of the defendant. The court also noted that the testimony was not admissible under any exceptions set out in Rule 404(a).

Camera's Videotape of Parking Lot Activity After Robbery Was Committed Inside McDonald's Was Properly Authenticated to Be Admitted as Substantive Evidence

State v. Bellamy, 172 N.C. App. 649, 617 S.E.2d 81 (16 August 2005).An armed robbery and sexual assault occurred in a McDonald's restaurant. A store next to the McDonald's had a surveillance camera that faced in the direction of McDonald's. The camera's videotape showed a light-colored car (which was inferentially tied to the robber by other evidence) leaving the area approximately when the assailant left the McDonald's. The court ruled, relying on State v. Mewborn, 131 N.C. App. 495, 507 S.E.2d 906

(1998), that the videotape was properly authenticated to be admitted as substantive evidence. The state presented testimony that the camera's video recorder was in working order; it was recording the night of the robbery; it was viewed the following day; it had not been altered before trial; and the chain of custody had not been broken.

Arrest, Search, and Confession Issues

Law Enforcement Officer Who Was Assigned as Full-Time School Resource Officer Lawfully Searched Student Under *New Jersey v. T.L.O.* Standard

In re S.W., 171 N.C. App. 335, 614 S.E.2d 424 (5 July 2005). The juvenile was adjudicated delinquent of possessing marijuana with the intent to sell or deliver. The juvenile, a high school student, walked by a deputy sheriff who was assigned as a full-time school resource officer at the high school. The deputy noticed a strong odor of marijuana emanating from the juvenile. The deputy located two school administrators and in their presence asked the juvenile if he could search him. The juvenile agreed to the search, and the search revealed ten small plastic bags of marijuana. The court noted that the deputy was exclusively a school resource officer, assisted school officials with school discipline, was present in the school hallways during school hours, and was advancing the school's educational related goals when he stopped the juvenile. The deputy was not conducting an investigation at the behest of an outside law enforcement officer who was investigating a non-school related crime. The court ruled, relying on In re J.F.M., 168 N.C. App. 143, 607 S.E.2d 304 (18 January 2005), that the deputy lawfully searched the juvenile under New Jersey v. T.L.O., 469 U.S. 325 (1985) (applying reasonable grounds to suspect as the standard for searches by school officials) and thus did not violate the United States or North Carolina constitutions. The court noted that the deputy did not need the juvenile's consent to conduct the search under the *T.L.O.* standard.

When Officer Had Probable Cause to Stop Vehicle for Readily Observed Traffic Violation, His Failure to Charge That Violation Is Irrelevant to Validity of Stop

State v. Baublitz, 172 N.C. App. 801, 616 S.E.2d 615 (16 August 2005). An officer was conducting drug surveillance at a residence. The defendant and another person got into a vehicle and drove away. The officer followed the vehicle and saw it twice cross the center line of the highway. The officer stopped the vehicle, conducted a consent search, discovered cocaine in the vehicle, and arrested the defendant for possession of cocaine. He did not charge the defendant with the traffic violation. The court ruled that the officer had probable cause to stop the vehicle for the readily observed traffic violation under G.S. 20-146(a) (vehicle must be driven on right side of highway). The court noted that under State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999), the ulterior motive of the officer is irrelevant when there are objective circumstances justifying the officer's action. The court also ruled that the officer's failure to charge the defendant with the traffic violation was irrelevant to the validity of the stop.

Interrogation of Defendant About Different Offense From First Interrogation in Which Defendant Asserted Right to Remain Silent Was Proper Under *Michigan v. Mosley*

State v. Jacobs, 174 N.C. App. 1, 620 S.E.2d 204 (18 October 2005). **(Author's note: There was a dissenting opinion in this case, but not on the issue discussed below.)** The defendant was arrested for the armed robbery of James Morgan and committed to jail. On August 6, 2002, after officer A gave *Miranda* warnings to the defendant, the defendant asserted his right to remain silent and no interrogation was conducted about the robbery of Morgan. The defendant did not assert his right to counsel, however. On August 8, 2002, officer B initiated interrogation about a different armed robbery case (the victims were Mr. and Mrs. Chavis) after giving *Miranda* warnings and obtaining a proper waiver. The defendant made statements that were introduced at the trial involving Mr. and Mrs. Chavis. The court ruled that the

second interrogation was proper under Michigan v. Mosley, 423 U.S. 96 (1975), because the officers had "scrupulously honored" the defendant's assertion of his right to remain silent. (Author's note: For a discussion of the distinction between a defendant's assertion of the right to remain silent and the right to counsel under *Miranda*, see Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, pp. 203-206 (3d. ed. 2003).]

Sentencing

Aggravating Factors Must Be Proved Before Jury Under *Blakely v. Washington*: (1) Defendant Committed Offense While on Pretrial Release on Another Charge: (2) Defendant Joined With More Than One Other Person in Committing Offense and Was Not Charged with Committing Conspiracy; (3) Defendant Had Previously Been Adjudicated Delinquent for Offense That Would Be Class A Through E Felony If Committed By Adult

State v. Yarrell, 172 N.C. App. 135, 616 S.E.2d 258 (2 August 2005). The court ruled that the following aggravating factors must be proved before a jury (unless admitted by the defendant) under Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004): (1) the defendant committed the offense while on pretrial release on another charge; (2) the defendant joined with more than one other person in committing the offense and was not charged with committing conspiracy; and (3) the defendant had previously been adjudicated delinquent for an offense that would be a Class A, B, B1, B2, C, D, or E felony if committed by an adult. The court stated that factors (1) and (2) were not prior convictions excepted from the *Blakely* ruling. The court stated that factor (3) is not a prior conviction under the statutory language in G.S. 7B-2412 ("adjudication that a juvenile is delinquent . . . shall neither be considered conviction of any criminal offense nor cause the juvenile to forfeit any citizenship rights.") [Author's note: The ruling concerning the aggravating factor in (3) above effectively invalidates the provision in Session Law 2005-145 (House Bill 822), effective for offenses committed on or after June 30, 2005, that would permit the determination of that aggravating factor by a judge instead of by a jury. See G.S. 15A-1340.16(d), as amended by the session law.]

Under *Blakely v. Washington*, Defendant Has Right to Jury Determination Concerning Assigning One Point to Prior Record Level Under G.S. 15A-1340.14(b)(7) (Offense Committed While Defendant on Probation, Parole, Etc.)

State v. Wissink, 172 N.C. App. 829, 617 S.E.2d 319 (16 August 2005). The court ruled that under Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), a defendant has the right to a jury determination concerning the assignment of one point to a defendant's prior record level under G.S. 15A-1340.14(b)(7) (offense committed while defendant was on probation, parole, etc.). [Author's note: Session Law 2005-145 (House Bill 822), effective for offenses committed on or after June 30, 2005, is consistent with this ruling.]

Neither *Blakely v. Washington* Nor *State v. Allen* Bar Sentencing Judge from Finding One Point Under G.S. 15A-1340.14(b)(6) (All Elements of Present Offense Are Included in Prior Offense For Which Defendant Was Convicted) in Calculating Defendant's Prior Record Level

State v. Poore, 172 N.C. App. 839, 616 S.E.2d 639 (16 August 2005). The court ruled that neither Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), nor State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), bar a sentencing judge from finding one point under G.S. 15A-1340.14(b)(6) (all elements of present offense are included in prior offense for which defendant was convicted) in calculating the defendant's prior record level. The court stated that this finding is akin to the judge's determination that the defendant had in fact been convicted of a prior offense. Thus, a defendant is not entitled to a jury trial on this issue. [Author's note: Session Law 2005-145 (House Bill 822), effective for

offenses committed on or after June 30, 2005, would permit the determination of the point by a judge instead of by a jury. See G.S. 15A-1340.14(a), as amended by the session law.]

(1) Defendant's Stipulation to Aggravating Factor at Sentencing Hearing Held Before Rulings in *Blakely v. Washington* and *State v. Allen* Was Insufficient Admission to Aggravating Factor
(2) Court Under Ruling in *State v. Allen* Remands Case for Resentencing Hearing

State v. Everette, 172 N.C. App. 237, 616 S.E.2d 237 (2 August 2005). **[Author's note: There was a dissenting opinion in this case, but not on these rulings.]** (1) The defendant was convicted of various offenses. At a sentencing hearing conducted before the rulings in Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), there was a colloquy that included a stipulation by defense counsel to the aggravating factor that the defendant was on pretrial release when committing the offenses for which he was convicted. The court noted that the defendant was not aware of his right to have a jury determine the existence of aggravating factors, and thus the defendant's stipulation to the aggravating factor was not a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. The court ruled that the defendant did not knowingly and effectively stipulate to this aggravating factor nor waive his right to a jury trial on this issue. See also State v. Meynardie, 172 N.C. App. 127, 616 S.E.2d 21 (2 August 2005) (similar ruling); State v. Wissink, 172 N.C. App. 829, 617 S.E.2d 319 (16 August 2005) (similar ruling). (2) The defendant argued that the case should not be remanded for a new sentencing hearing because there are no statutory provisions by which a jury can determine whether aggravating factors exist. Instead, the defendant argued, the defendant should be resentenced at not greater than the mitigated range because the trial judge had correctly found a mitigating factor. The court ruled that the North Carolina Supreme Court in *State v. Allen* had stated that the proper procedure when appellate review reveals a *Blakely* error is to simply remand for resentencing. The court therefore remanded the case for resentencing. [Author's note: In State v. Norris, 172 N.C. App. 722, 617 S.E.2d 298 (16 August 2005), *reversed on other grounds*, 360 N.C. 507, 630 S.E.2d 915 (30 June 2006), the court stated that on remand for resentencing for *Blakely* error, the trial court is instructed to submit any aggravating factor to the jury for proof beyond a reasonable doubt. If the jury finds an aggravating factor, the trial court may then balance aggravating and mitigating factors and impose a sentence.]

No Error Under *Blakely v. Washington* or *State v. Allen* When Trial Judge Found Aggravating Factor and Sentenced Defendant in Aggravated Range Based on Defendant's Oral Stipulation and Written Plea Agreement That He Would Be Sentenced in Aggravated Range

State v. Dierdorf, 173 N.C. App. 753, 620 S.E.2d 305 (18 October 2005). At the defendant's guilty plea hearing, he orally stipulated that he would be sentenced in the aggravated range for the three convictions to which he had pled guilty. The defendant's written plea agreement stated that upon the defendant's guilty pleas, he stipulated that he shall be sentenced in the aggravated range for each of the three convictions. The court quoted from language in State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005) (allowing a sentence in the aggravated range to be based on the defendant's admission to an aggravating factor), and discussed the ruling in State v. Alexander, 359 N.C. 824, 616 S.E.2d 914 (2005), about what constitutes a stipulation to a prior record level. The court noted that the defendant did not object to the state's summation of the facts nor to the trial judge's finding of an aggravating factor. The court ruled that because the defendant agreed to be sentenced in the aggravated range and did not object to the trial judge's finding of an aggravating factor, the defendant stipulated to the existence of the aggravating factor. Thus, the defendant's sentence in the aggravated range was not error under Blakely v. Washington, 542 U.S. 296 (2004), and State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005). [Author's note: Compare this ruling with rulings in State v. Everette, 172 N.C. App. 237, 616 S.E.2d 237 (2 August 2005) (stipulation to aggravating factor when neither *Blakely* nor *Allen* had been decided was not knowing and effective stipulation); State v. Meynardie, 172 N.C. App. 127, 616 S.E.2d 21 (2 August 2005) (similar

ruling); and State v. Wissink, 172 N.C. App. 829, 617 S.E.2d 319 (16 August 2005) (similar ruling concerning stipulation to probationary status when offense committed).]