RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE (June 7, 1994 - October 18, 1994)

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NORTH CAROLINA SUPREME COURT

Arrest, Search, and Confession Issues

(1) Officer's Walking Over To Defendant (Who Was Sitting In His Vehicle) Was Not A Seizure, Based On The Facts In This Case
(2) Officer's Shining Flashlight Into Car's Interior Was Not A Search
(3) Defendant Was Not In Custody To Require Officer To Give *Miranda* Warnings; In Any Event, Question Was Permissible Under *New York v. Quarles*
(4) Search Incident To Arrest May Precede Arrest When Arrest Was Made Contemporaneously With The Search
(5) Suppression Of Evidence In Federal Court Prosecution Did Not Require Suppression Of Same Evidence In State Court Prosecution

State v. Brooks, 337 N.C. 132, 446 S.E.2d 579 (29 July 1994), *reversing*, 111 N.C. App. 558, 432 S.E.2d 900 (1993). An SBI agent accompanied other law enforcement officers in executing a search warrant for a nightclub to search for illegal drugs. On arriving at the nightclub, the agent saw a vehicle parked in the parking lot with the defendant sitting in the driver's seat. The agent walked over to the driver's side of the vehicle and shined his flashlight into the car's interior. He saw on the passenger side of the bucket seats an empty unsnapped holster within the defendant's reach. The agent asked the defendant, "Where is your gun?" The defendant replied, "I'm sitting on it." The agent was unable to see the gun although he shined his light all about the vehicle. He requested the defendant to get out of the vehicle; the defendant reached under his right thigh and handed the gun to the agent. The agent did not place the defendant under arrest for carrying a concealed weapon, but eventually obtained permission to search the vehicle and found cocaine in a nylon pouch there. (1) The court ruled, relying on Florida v. Bostick, 501 U.S. 429 (1991), that the agent's initial encounter with the defendant was not a seizure under the Fourth Amendment and therefore did not require justification, such as reasonable suspicion. There was no evidence tending to show that the agent made a physical application of force or that the defendant submitted to any show of force. Further, there was no indication that a reasonable person in the defendant's position would have believed he or she was not free to leave or otherwise terminate the encounter. (2) The court ruled that the officer's shining his flashlight into the car's interior was not a search, citing Texas v. Brown, 460 U.S. 730 (1983) and State v. Whitley, 33 N.C. App. 753, 236 S.E.2d 720 (1977). (3) The court ruled that the defendant was not in custody when the agent asked the defendant, "Where is your gun," and therefore *Miranda* warnings were not required. In any event—even if the defendant was in custody—*Miranda* warnings were not required because the agent was permitted to ask that question for his own safety; see New York v. Quarles, 467 U.S. 649 (1984). (4) The court upheld the search of the nylon pouch as a proper

search incident to the arrest of the defendant for carrying a concealed weapon: The agent had probable cause to arrest the defendant and the search may be made before the actual arrest and still be justified as a search incident to arrest when, as here, the agent made the search contemporaneously with the arrest; see Rawlings v. Kentucky, 448 U.S. 98 (1980). (5) The defendant had previously been prosecuted in federal court on federal drug charges arising from the same search. A federal judge had ruled that the search violated the Fourth Amendment and suppressed the cocaine that had been seized. The court ruled that the federal court suppression of the cocaine did not collaterally estop the state from introducing the same evidence in state court. Collateral estoppel does not apply, under either federal or state constitutions, to criminal cases in which separate sovereigns are involved in separate proceedings and there is no privity between the two sovereigns in the first proceeding. The state was not in privity with the federal government concerning federal charges simply because it may have deferred to having federal prosecution begin first.

Officer Had Reasonable Suspicion To Make Investigative Stop Of Vehicle When He Corroborated Anonymous Tip, Based On Facts In This Case

State v. Watkins, 337 N.C. 437, 446 S.E.2d 67 (29 July 1994), *reversing*, 111 N.C. App. 766, 433 S.E.2d 817 (1993). An officer received a transmission on an official radio frequency stating that there was a "10-50" (suspicious vehicle) behind a well drilling company. The officer arrived there and got out of his car. The officer saw a car with its lights off moving out of the company parking lot. It was 3:00 A.M., the area was generally rural, and the location was a business that the officer knew to normally be closed then. The officer got in his car and stopped the car on the highway. The court ruled, based on these facts and comparable cases of State v. Fox, 58 N.C. App. 692, 294 S.E.2d 410 (1982), *aff'd per curiam*, 307 N.C. 460, 298 S.E.2d 388 (1983) and State v. Tillett, 50 N.C. App. 520, 274 S.E.2d 361 (1981), that the officer had a reasonable suspicion to stop the car. The court noted, citing *Alabama v. White*, 496 U.S. 325 (1992), that an anonymous tip may provide reasonable suspicion when corroborated by independent law enforcement work.

Court Affirms Court Of Appeals Opinion That Search Of Defendant's Pocket During Frisk Was Unconstitutional

State v. Beveridge, 336 N.C. 601, 444 S.E.2d 223 (17 June 1994). The court, per curiam and without an opinion, affirms the Court of Appeals opinion, 112 N.C. App. 688, 436 S.E.2d 912 (7 December 1993) that is discussed below.

While Officer Johnson was arresting a driver for impaired driving, Officer Gregory (while securing the car) asked the defendant, a passenger, to get out. Officer Gregory noticed a strong odor of alcohol about the defendant, who also was acting "giddy." The officer believed, based on the facts in this case, that the defendant was under the influence of alcohol and a controlled substance. He told the defendant he was going to pat him down for weapons. During the pat down, the officer noticed that there was a cylindrical-shaped rolled-up plastic bag in his front pocket. The officer asked him what it was, and the defendant started laughing and pulled out some money. However, the officer could still see the long cylindrical bulge he had in his pocket. He asked the defendant what it was. The defendant then stuck his hand in his pocket and tried to

palm what he had. The officer asked him what he was trying to hide, and the defendant rolled open his hand and showed the officer a white plastic bag with a white powdery substance in it. The officer believed that the substance was cocaine and then arrested him for possession of cocaine. The court ruled that Officer Gregory was justified in conducting a limited pat down of the defendant to determine whether the defendant was armed, but once he concluded that there was no weapon, he could not continue to search "or question" the defendant to determine whether the bag contained illegal drugs. (That part of the court's ruling in quotation marks in the preceding sentence does not appear consistent with prevailing federal constitutional law.) The court ruled that the search exceeded the scope of the frisk under Minnesota v. Dickerson, 113 S.Ct. 2130, 124 L.Ed.2d. 334 (1993), because it was not immediately apparent that the item in the defendant's pocket was an illegal substance.

Evidence Of Defendant's Silence During Custodial Interrogation Was Improperly Admitted

State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (29 July 1994). Five law enforcement officers were questioning the defendant about a murder. They informed him that he was not under arrest and was free to leave at any time. The officers gave him *Miranda* warnings and obtained a waiver. The defendant denied his involvement in the murder. During the interview an officer received a telephone call from the SBI lab that the defendant's fingerprints had been found in an ashtray in the victim's home. Another officer told the defendant that he was under arrest for first-degree murder. The officer then made accusatory remarks to the defendant, including asking him how it felt to have killed a seventy-eight year old helpless man. The trial judge permitted the officer to testify how the defendant reacted to these accusatory remarks: "He had no reaction. He acted like I was talking about the weather." Relying on State v. Hoyle, 325 N.C.. 232 (1989) and Doyle v. Ohio, 426 U.S. 610 (1976), the court ruled that this evidence impermissibly referred to the defendant's exercise of his right to remain silent. The court also ruled that the state's cross-examination of the defendant (which again elicited the defendant's silence in response to the officer's accusation) was improper.

Criminal Offenses

Defendant May Be Separately Convicted And Punished For Trafficking By Possessing Cocaine And Possession Of Cocaine Under G.S. 90-95(a)(3) Based On The Same Cocaine

State v. Pipkins, 337 N.C. 431, 446 S.E.2d 360 (29 July 1994), *reversing*, 111 N.C. App. 458, 434 S.E.2d 251 (1993). The defendant was convicted of trafficking in cocaine by possession [G.S. 90-95(h)(3)(a)] and felonious possession of cocaine [G.S. 90-95(a)(3)] based on the same 53.8 grams of cocaine found in a closet. The court ruled that an examination of the language and history of the controlled substances statutes shows that the legislature intended that these offenses may be punished separately at the same trial, even when the offenses are based on the same conduct. Unlike G.S. 90-95(a)(3), which combats the perceived evil of individual possession of controlled substances, the drug trafficking statute is intended to prevent the large-scale distribution of controlled substances to the public. To the extent that this ruling conflicts with the following court of appeals cases, the court overruled them: State v. Hunter, 107 N.C. App. 402,

420 S.E.2d 700 (1992) (separate punishments for misdemeanor possession of cocaine and trafficking by possessing the same cocaine were unconstitutional); State v. Mebane, 101 N.C. App. 119, 398 S.E.2d 672 (1990) (separate punishments for possession with intent to sell and deliver and trafficking by possessing the same cocaine were unconstitutional); State v. Williams, 98 N.C. App. 405, 390 S.E.2d 729 (1990); State v. Oliver, 73 N.C. App. 118, 325 S.E.2d 682 (1985).

Jury Instructions On Acting In Concert Were Error When Applied To First-Degree Murder Based On Theory Of Premeditation and Deliberation

State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (9 September 1994). [Note: This case was later prospectively overrruled in State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997); the *Blankenship* ruling only applies to offenses committed on or after September 29, 1994, and before March 3, 1997.] The defendant was convicted of two counts of first-degree murder based on theories of felony murder and premeditation and deliberation. He also was convicted of two counts of first-degree kidnapping. The evidence showed that after robbing and killing a man, the defendant and his accomplice, Tony Slidden, kidnapped two boys (the man's sons) and drove them into a wooded area. The defendant asked Slidden what they were going to do with the boys. Slidden told the defendant that we've got to shoot them. Slidden then shot each of the boys in the head, killing both. The trial judge gave the acting-in-concert instruction with both the felony murder and the premeditated and deliberate first-degree murder instructions. The instruction for premeditated and deliberate first-degree murder indicated that the elements of intent to kill, premeditation, and deliberation could be satisfied when the defendant "or someone acting in concert with him" met these elements.

The court ruled that although this instruction was not error when used for the felony murder theory, it was error when used in instructing on first-degree theory based on premeditation and deliberation, because the "only common purpose shared between defendant and Tony Slidden was to kidnap the boys and when only Tony Slidden actually murdered the boys with the requisite specific intent to kill after premeditation and deliberation. In other words, the instructions permit defendant to be convicted of premeditated and deliberated murder when he himself did not inflict the fatal wounds, did not share a common purpose to murder with the one who did inflict the fatal wounds and had no specific intent to kill the victims when the fatal wounds were inflicted. The doctrine of acting in concert does not reach so far." The court stated that under the acting-in-concert doctrine, when "a single crime is involved, one may be found guilty of committing the crime if he is at the scene with another with whom he shares a common plan to commit the crime, although the other person does all the acts necessary to effect commission of the crime . . . . [When] multiple crimes are involved, when two or more persons act together in pursuit of a common plan, all are guilty only of those crimes included within the common plan committed by any one of the perpetrators. As a corollary to this latter principle, one may not be criminally responsible under the theory of acting in concert for a crime like premeditated and deliberated murder, which requires a specific intent, unless he is shown to have the requisite specific intent. The specific intent may be proved by evidence tending to show that the specific intent crime was a part of the common plan. Although a common plan for all crimes committed may exist at the outset of the criminal enterprise, its scope is not invariable; and it may evolve according to the course of events. Thus, where a series of crimes is involved, all of which are part of the course of

criminal conduct, the common plan to commit any one of the crimes may arise at any time during the conduct of the entire criminal enterprise." [The court then discusses with approval the ruling in State v. Joyner, 297 N.C. 349, 255 S.E.2d 390 (1979), which upheld the defendant's convictions based on acting in concert.] The court stated that the foregoing principles governing the acting-in-concert doctrine are necessary to insure that a defendant is not convicted of any crime for which he did not have the requisite mens rea; the court discusses with approval the ruling in State v. Reese, 319 N.C. 110, 353 S.E.2d 352 (1987). The court disavows contrary dicta in State v. Erlewine, 328 N.C. 626, 403 S.E.2d 280 (1991) and State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Evidence Was Sufficient To Prove Serious Injury In Felonious Assault Prosecution

State v. Alexander, 337 N.C. 182, 446 S.E.2d 83 (29 July 1994). The court ruled that the following evidence was sufficient to support the element of serious injury in a felonious assault prosecution: The force of shotgun blasts into a truck drove shards of glass into the victim's arm and shoulder. He had blood on his arm and was treated for the injury. An officer testified that when he arrived at the hospital, the victim "appeared to be very shaken. He had some blood, I believe it was on his left arm, I could see he was pretty shaken up."

Defendant Was Not Entitled To Second-Degree Murder Instruction Simply Because He Presented Evidence Of Insanity At Time Of Killing

State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (29 July 1994). The defendant was convicted of first-degree murder committed by an unprovoked beating to death of an elderly man with an ax handle. (He also was convicted at the same trial of first-degree murder of the man's wife, committed in a similar manner.) The court ruled that the trial judge did not err in refusing to submit second-degree murder to the jury. The defendant had offered expert testimony that he was in a psychotic state when he committed the murder, but the court noted that although that testimony questioned the defendant's ability to distinguish right from wrong (i.e., an insanity defense), it never indicated that he was unable to plan his actions or that he lacked the ability to premeditate or deliberate.

Felonious Assault Of Third Person Was Sufficient Evidence To Support Felony Murder Conviction When Assault Was Committed During Same Chain Of Events Of Murder

State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (9 September 1994). The defendant shot A twice, seriously injuring him. He then shot B three times, killing him. He then shot C once, killing him. The defendant fired all six shots in less than two seconds. For the killing of C, the defendant was convicted of first-degree murder based on felony murder, the felony being the felonious assault of A (based on the phrase "or other felony committed or attempted with the use of a deadly weapon" in G.S. 14-17). The court rejected the defendant's argument that the felony murder theory is inapplicable because the "the homicide was not done to escape or to complete the assault and there was no causal relationship between the assault and the homicide." The court ruled that there only needs to be an interrelationship between the felony and the murder, which clearly existed in

this case—the assault of A and the killing of C were part of an unbroken chain of events all of which occurred within two seconds.

When Evidence Was In Conflict On First-Degree Murder By Lying In Wait, Trial Judge Erred In Not Submitting Second-Degree Murder

State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (29 July 1994). The defendant was tried for first-degree murder solely on the theory of the murder being committed by lying in wait. Since the defendant's evidence showed that he did not lie in wait for the murder victim, the court ruled that the trial judge erred in not submitting second-degree murder. The court also ruled, based on the defendant's evidence which showed that the victim initially attacked him, that the trial judge should also have submitted voluntary manslaughter. The court concludes that the defendant had a federal constitutional due process right to have submitted to the jury all lesser-included offenses encompassed by the indictment and supported by the evidence.

Court Disavows Dicta In Prior Case Implying That All Underlying Felony Convictions Must Be Arrested When There Is A Felony-Murder Conviction

State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (29 July 1994). The court stated when a defendant is convicted of first-degree murder based on the felony murder theory only, and the defendant also is convicted of more than one of the underlying felonies that supported the felony murder theory, the sentencing judge is required to arrest judgment for only one of the convictions of the underlying felonies. The court disavows contrary dicta in State v. Pakulski, 326 N.C. 434, 390 S.E.2d 129 (1990).

Insufficient Evidence Was Presented To Support Voluntary Intoxication Instruction In First-Degree Murder Prosecution

State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (29 July 1994). The defendant was tried for first-degree murder. The court ruled that the following evidence was insufficient to support an instruction on voluntary intoxication affecting the defendant's capacity to think and plan (to permit the jury to convict the defendant of the lesser offense of second-degree murder): the defendant had been drinking for some time during the day of the murder, and he did not want to drive because he had been drinking. The court noted there was no evidence that the defendant looked drunk, how much he had drunk, or that he was having difficulty speaking or walking.

Sufficient Evidence Of Kidnapping Committed During Armed Robbery

State v. Johnson, 337 N.C. 212, 446 S.E.2d 92 (29 July 1994). The defendant was convicted of two charges of kidnapping (the victims were a husband and wife) during the course of a robbery. He was also convicted of armed robbery and other offenses. The defendant threatened to kill the husband with a lug wrench (the husband was in a bedroom then). At the same time, accomplice A jumped on the wife's chest, restraining her and covering her mouth and nose (the wife was in the living room). The defendant then removed the husband from his bedroom to the living room sofa, called accomplice B in, handed her the lug wrench, and instructed her to guard the husband. The

husband's hands were taped together. The defendant next bound the wife's hands and feet. After the wife fell silent (she died there), the husband attempted to get up and help her, but someone struck him on the head with the lug wrench. Thereafter, his hands and feet were tied. The defendant and his accomplices then stole various items in the bedroom and elsewhere. The court stated that the key issue in determining whether kidnapping convictions may be upheld along with armed robbery convictions is whether the victim is exposed to greater danger than that inherent in armed robbery itself or is subjected to the kind of danger and abuse the kidnapping statute was designed to prevent. The court upheld the conviction for kidnapping the husband; it concludes that all the restraint necessary and inherent to the armed robbery was exercised by the defendant's threatening the husband with the lug wrench. It was not necessary to remove him from the bedroom to the living room to commit the robbery; court distinguished State v. Irwin, 304 N.C. 503, 243 S.E.2d 338 (1981) (no kidnapping when defendant removed victim to place where he stole drugs). The husband was exposed to further danger by his removal from the bedroom and further restraint in the living room, where he was struck in the head when he attempted to help his wife. The court upheld the conviction for kidnapping the wife; it noted that in light of her physical condition (she slept in a hospital bed in the living room due to serious ailments), the multiple restraints used on her exposed her to greater danger, even death, than that inherent in the armed robbery.

Dog Owner Properly Convicted Of Involuntary Manslaughter In Death of Jogger By His Two Dogs

State v. Powell, 336 N.C. 762, 446 S.E.2d 26 (29 July 1994). The defendant was convicted of involuntary manslaughter in the death of a jogger by his two Rottweiler dogs, "Bruno" and "Woody." The dogs were away from the defendant's property and had been loose earlier that day. There also was evidence of the dogs' aggressive behavior and their running loose in the neighborhood before the date of the offense. The conviction was based on the defendant's culpable negligence by violating a Winston-Salem ordinance in leaving his dogs unattended when not restrained and restricted to the defendant's property by a fence adequate to keep the resident dogs on the defendant's lot. The court: (1) ruled that the ordinance was a safety ordinance designed to protect both people and property; (2) ruled that the defendant willfully, wantonly, or intentionally violated the ordinance; (3) rejected defendant's argument that the state must prove the defendant knew of his dogs' vicious propensities to establish the jogger's death was foreseeable; the state presented sufficient evidence that the defendant's intentional, willful, or wanton violation of the safety ordinance was the proximate cause of the jogger's death.

Evidence

Trial Judge Has No Authority To Order Victim To Submit To Psychological Examination, Even When The Victim's Mental Status Is An Element Of The Charged Offenses

State v. Horn, 337 N.C. 449, 446 S.E.2d 52 (29 July 1994). The defendant was indicted for sexual assaults against a nineteen-year-old mentally handicapped female. The state provided the defendant with psychological evaluations that showed the victim's mental deficiencies. Before trial, a judge granted the defendant's motion for appointment of an independent psychologist and

directed the psychologist to examine the victim and testify about her mental capacity. The state sought and was granted review of the judge's order by the supreme court. The court ruled, citing several of its prior rulings [e.g., State v. Looney, 294 N.C. 1, 240 S.E.2d 612 (1978)], that the trial judge had no authority to order the victim to submit to a psychological examination (the defendant argued that the examination was necessary to his defense since the victim's mental deficiency was an element in this case of the charges of second-degree rape and second-degree sexual offense). The court stated that such an examination would violate the public policy designed to protect victims from further intrusion into their private lives and would discourage victims of crimes from reporting such offenses.

The court noted that the trial judge has several available alternatives to ordering the victim to submit to an examination. The defendant may employ (or if indigent, be appointed) a mental health expert to interpret and to dispute the findings of psychological evaluations already performed on the victim. Or the judge may deny the admission of the state's proffered psychological evidence showing the victim's mentally deficient status. Further, the judge may consider dismissing the case against the defendant if the defendant's right to adequately present a defense is imperiled.

(1) State Was Properly Permitted To Cross-Examine Defendant Under Rule 609 About Guilty Pleas For Which Prayer For Judgment Had Been Continued For Sentencing After The Pending Trial
(2) Defendant's Statement Was Not Admissible As Excited Utterance Under Rule 803(2)
(3) Pretrial Statement Of State's Witness Contained Significant Discrepancies From Witness's Trial Testimony And Should Not Have Been Admitted As Corroborative Evidence

State v. Sidberry, 337 N.C. 779, 448 S.E.2d 798 (6 October 1994). The defendant was indicted for first-degree murder. (1) Before the murder trial, the defendant pled guilty to two unrelated charges of sale and delivery of cocaine. Prayer for judgment was continued for these cases pending the disposition of the murder charge. The court ruled that the state was properly permitted under Rule 609 to cross-examine the defendant at trial about these drug pleas. The guilty pleas were equivalent to convictions under Rule 609(a). The court noted that the defendant was told by his attorney and by the judge during the guilty plea hearing for the drug offenses that the entry of the pleas had potential consequences in his pending murder trial and could also be used to enhance punishment under the Fair Sentencing Act if he was convicted of less than first-degree murder. The judge determined that the defendant understood the impact of his guilty pleas and then accepted the pleas. (2) The court ruled that the defendant's exculpatory statement to his aunt was not admissible as an excited utterance under Rule 803(2). After the shooting, the defendant first talked to his aunt on the telephone from his grandmother's house. He did not mention the shooting on the telephone. Instead, he waited until after he had ridden home, an hour after the shooting, to tell her what had happened. The court stated that these facts indicate a lapse of time sufficient to manufacture a statement and that the statement lacked spontaneity. (3) The court ruled that the trial judge erred in permitting a pretrial statement to be admitted as corroborative evidence when there were two significant discrepancies between the pretrial statement of a state's witness and his trial testimony (whether the defendant handed the gun to the accomplice just before the accomplice shot the victim and whether the next day the accomplice

had said to the defendant that he should not have listened to the defendant about shooting the victim). However, the court finds the error to be harmless, based on the evidence in this case.

(1) Evidence Admissible Under Rule 404(b) Despite No Probable Cause Finding For Crime
(2) Court Sets Out Calculation Of Ten-Year Period Of Rule 609 And Also Rules That Aggravated Robbery Conviction Was Admissible To Impeach Under Rule 609 Although Over Ten Years Old
(3) PJC Was Not Conviction Under Rule 609

State v. Lynch, 337 N.C. 415, 445 S.E.2d 581 (29 July 1994). The defendant was convicted of first-degree murder in the stabbing death of his estranged wife on 21 June 1986. (1) The state offered evidence of the defendant's breaking and entering into his estranged wife's house on 19 May 1986 to show, under Rule 404(b), the defendant's malice, intent, and ill will toward his wife. The defendant, relying on State v. Scott, 331 N.C. 39, 413 S.E.2d 787 (1992) [court ruled that, with one exception, evidence of prior offense offered under Rule 404(b) that resulted in acquittal is always irrelevant under Rule 403], argued that this breaking and entering was inadmissible because a district court judge found no probable cause. The court ruled that *Scott* is distinguishable since a finding of no probable cause does not prevent the state from prosecuting the defendant. (2) The defendant was convicted of aggravated robbery in Colorado on 14 June 1974, and he was released from prison and parole on 19 July 1982. The murder trial began on 17 August 1992. Under the terms of Rule 609, the ten years began to run on 19 July 1982. The court appears to rule that the beginning of the trial is the ending date for calculating Rule 609's ten-year period when a conviction is automatically admissible (if it is within ten years of the later of specified events), since it accepts the fact that the conviction was *over* ten years old under the rule. The court then ruled that the trial judge did not err in allowing the state to impeach the defendant with this conviction, because the probative value of attacking the defendant's credibility (the court appears to recognize that robbery is a crime of dishonesty because it involves taking someone's property) outweighed the danger of prejudice to the defendant. (3) The defendant asked a state's witness if he had been convicted of assault. The witness replied that he had not been convicted—he had been found not guilty. The defendant then attempted to introduce the court record. It showed that the witness had pled not guilty, and no verdict was recorded but the notation was "PJ cont and costs remitted." It also said "[h]ave no contact with each other." The defendant argued that the court could not have ordered a prayer for judgment continued unless it had found the defendant guilty. The court, citing G.S. 15A-101(4a) (definition of entry of judgment, which provides that prayer for judgment continued on payment of costs, "without more," does not constitute entry of judgment), stated that this entry was not a conviction and therefore the defendant could not impeach the state's witness with it. The court stated that the phrase "[h]ave no contact with each other" was ambiguous and was not something "more" under the definition to constitute entry of judgment. If the phrase meant that the defendant and prosecuting witness should not contact each other, the court could not bind the prosecuting witness not to contact the defendant.

(1) Five-Year-Old Was Competent To Testify About Events That Occurred When She Was Two-And-One-Half Years Old
(2) Five-Year-Old Was Properly Permitted To Sit On Her Stepmother's Lap While Testifying
(3) Prosecutor Was Properly Permitted To Cross-Examine Expert About Defendant's Prior Crimes When Expert Used Them To Form Opinion

State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (6 October 1994). The defendant was convicted of first-degree murder and sexual assault and sentenced to death. (1) The court ruled that the evidence in this case supported the trial judge's findings that a five-year-old, a witness to the murder of her mother, was competent to testify about the murder that had occurred when she was two-and-one-half years old. (2) The court ruled that the trial judge properly permitted the five-year-old to testify while sitting in her stepmother's lap. Before the child's testimony, the trial judge instructed the stepmother that she must not intimate in any way to the child about how she should testify. After the testimony was complete, the trial judge found that the stepmother had followed the court's instructions. The court noted that implicit in the trial judge's ruling was a finding that the child would be more at ease and be able to testify better if she sit in her stepmother's lap. The court also stated that although a trial judge should be cautious in allowing this procedure, it was not error in this case. (3) A defense psychiatrist offered his opinion that the defendant suffered from substance and alcohol abuse, had borderline personality disorder and organic brain syndrome, and suffered from sexual paraphilia. He said that one fact on which he based his opinions was about eight months after he had murdered the victim in this case, he had kidnapped, raped, and cut a woman in Virginia. The prosecutor on cross-examination asked the psychiatrist whether the defendant had told him about two other rapes of women and whether the psychiatrist had considered those crimes in forming his opinions. The psychiatrist said, "Yes, I did." The trial judge allowed this evidence with a limiting instruction that it was only to be considered as it affected the psychiatrist's opinion about the defendant's mental and emotional condition. The court ruled that this evidence was admissible under Rule 705 and the trial judge did not abuse his discretion in allowing the evidence under Rule 403.

(1) Defendant's Cross-Examination Opened The Door To Question Of Doctor On Redirect Examination
(2) State's Witness Improperly Permitted To Testify About Child Victim's Prior Acts Indicating Truthfulness

State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (29 July 1994), *affirming on other grounds*, 108 N.C. App. 476, 424 S.E.2d 141 (29 July 1994). The defendant was convicted of various sex offenses against a nine-year-old female. (1) A medical doctor, a state's witness, testified on direct examination that before she conducted a physical examination of the child, she discussed with a counselor on the child sexual abuse team a videotape interview that the counselor had with the child. The doctor also testified that her examination revealed a strong indication of sexual abuse. The defendant on cross-examination—in an effort to undermine the doctor's credibility, particularly her reliance on the history given by the child in the videotaped interview—attempted to leave the impression that the child had been coached by her relatives or social workers involved in the case. On redirect examination, the doctor was permitted to testify that she had not learned

anything that would suggest that someone had told the victim what to say or that the victim had been coached. The court ruled that the redirect examination was proper, because the defendant's cross-examination on this issue had opened the door to the doctor's testimony (that otherwise would have been inadmissible). (2) The court ruled that the child's school teacher, a state's witness, was improperly permitted under Rule 608 to testify to specific prior acts of conduct of the child that indicated her truthfulness about the charges against the defendant. For example, the teacher testified that the child might mention that she had been shopping and later she would be wearing new clothes, so the witness knew that it was true; the witness never had any reason to doubt what the child told her was not true. [Note: The witness could have offered *opinion* or *reputation* evidence about the child's truthfulness, since the child testified at trial.]

Witness's Description Of Defendant During Assault Was Admissible As Shorthand Statement Of Fact Under Rule 701

State v. Eason, 336 N.C. 730, 445 S.E.2d 917 (29 July 1994). The defendant was convicted of first-degree murder and two counts of felonious assault. An assault victim, while testifying how the defendant attacked him, said in response to a prosecutor's question about how many times do you remember being cut that evening: "I just sort of went blank. . . .I just kept seeing him in front of me, and he had this grin on his face. He was enjoying what he was doing." The court noted that Rule 701 permits a lay witness to offer an opinion, which include shorthand statements of fact. The court ruled that the comment "he was enjoying what he was doing" was an instantaneous conclusion of the witness based on his perception of the defendant's appearance, facial expressions, mannerisms, etc.—it was an admissible shorthand statement of fact.

Defendant's Communications To Attorney Were Made Solely To Facilitate Defendant's Safe Surrender To Law Enforcement Authorities And Therefore Were Not Within Attorney-Client Privilege

State v. McIntosh, 336 N.C. 517, 444 S.E.2d 438 (17 June 1994). The sheriff's office received a call that an officer was needed at a lawyer's office in reference to a shooting. A deputy sheriff went to the lawyer's office, and the lawyer told the deputy that a person (the defendant) had come to his office to turn himself in concerning a shooting. The defendant went with the deputy and made incriminating statements. The defendant moved to suppress his statements and the lawyer's statements, asserting that they were a product of the lawyer's violation of the attorney-client privilege. The trial judge suppressed the use of the lawyer's statement but allowed the state to introduce the defendant's statements. The court noted that the uncontroverted evidence showed that the defendant consulted with the lawyer solely to facilitate the defendant's safe surrender; therefore, the defendant necessarily authorized the lawyer to inform law enforcement authorities that the defendant had come to his office to turn himself in. Thus, that portion of the defendant's communication was not intended to be confidential, because it was given to the lawyer to convey to law enforcement for surrender. Therefore, the information was not privileged and the lawyer did not violate the attorney-client privilege. (The court also noted that the lawyer's statements to the deputy were not privileged and therefore were admissible.)

(1) Officer's Opinion About Defendant's Capacity To Waive *Miranda* Rights Was Inadmissible
(2) Mental Health Expert May Offer Opinion On Defendant's Mental Status Without Personally Interviewing Defendant

State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (29 July 1994). (1) During a suppression hearing challenging the defendant's mental capacity to waive *Miranda* rights, the defense called a law enforcement officer who observed the defendant immediately after the defendant's interrogation by other officers. The defense asked the officer whether the defendant "could have waived" his *Miranda* rights and whether the defendant understood the *Miranda* waiver form. The court ruled that the trial judge properly sustained the state's objections to these questions, since they called for a legal conclusion whether the defendant had the capacity to waive his rights. The court noted that the defense did not ask whether the defendant had the capacity to understand keys words used, such as "right," "attorney," "waiver," etc. (implying that such questions would be permissible). (2) The state called a psychiatric expert during a capital sentencing hearing who diagnosed the defendant as having an antisocial personality disorder. The expert did not personally interview the defendant. Instead, her opinion was based on her review of the evaluations of other doctors who had interviewed the defendant; a personal discussion with a doctor who had cared for the defendant; and interviews of the defendant's friends, employers, and family. The court ruled that an expert's opinion based on this information could assist the jury in understanding the evidence and is not inherently unreliable. Therefore the opinion was properly admitted under Rule 702 even though it was not based on a personal interview of the defendant.

Defendant's Sixth Amendment Right To Cross-Examine State's Witness Was Violated When Witness Refused To Answer Questions Based On Fifth Amendment Self-Incrimination Privilege

State v. Ray, 336 N.C. 463, 444 S.E.2d 918 (17 June 1994). The defendant was convicted of first-degree murder that was drug-related. During direct examination of a state's witness—an eyewitness to the murder—the state asked the witness about his and the murder victim's involvement with drug dealing. On cross-examination, the witness refused to answer some questions about drug dealing, asserting his Fifth Amendment privilege against compelled self-incrimination. The trial judge found that some of the answers to the cross-examination questions could be incriminating and that the witness had a right to refuse to answer those questions. After the witness had completed his testimony, the defendant requested the trial judge to direct the witness to answer the questions to which he had invoked the privilege or to strike the witness's entire testimony. The court noted that the issue of whether the witness was properly allowed to assert the privilege was not raised on appeal. However, the court ruled that the defendant's right to confront witnesses through cross-examination was unreasonably limited by the witness's assertion of the testimonial privilege. The court discusses several cases, particularly United States v. Cardillo, 316 F.2d 606 (2d Cir. 1963), and noted that courts have distinguished between the assertion of the privilege preventing inquiry into matters about which the witness testified on direct examination (if so, the defendant's motion to strike the testimony should be granted) and the assertion of the privilege preventing inquiry into collateral matters, such as the credibility of the witness (if so, the defendant's motion to strike the testimony should be denied). The court

examines the facts in this case and ruled that the trial judge erred in not striking the testimony of the witness because the prohibited inquiry on cross-examination involved matters discussed on direct examination—drug dealing that was the basis of the relationship between the victim, defendant, and the witness. [However, the court finds that the error was harmless beyond a reasonable doubt.]

Murder Witness's Out-Of-Court Statement To Officer Was Admissible Under Residual Hearsay Exception, Rule 804(b)(5)

State v. Peterson, 337 N.C. 384, 446 S.E.2d 43 (29 July 1994). The state was allowed to introduce a witness's out-of-court statement to a law enforcement officer, in which the witness described a homicide. [The witness was unavailable under Rule 804(a) because, even though she knew that she would be held in contempt if she did not testify, she still refused to testify.] The trial judge found that her statement was taken under circumstances that assured her personal knowledge of the homicide; the substance of the statement contained statements against her penal interest (she referred to her use of illegal drugs and participation in prostitution); she had no motivation other than to speak the truth; and over a two-year period she never recanted her statement. The court also noted that the statement was made to a law enforcement officer and recorded. The court ruled that the statement was properly admitted under Rule 804(b)(5) and the confrontation clause, based on the standards of State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986) and Idaho v. Wright, 497 U.S. 805 (1990). The statement possessed sufficient guarantees of trustworthiness to be constitutionally admissible.

(1) Defendant's *Brady* Motion Seeking Impeaching Information About State's Witnesses Was Properly Denied, Based On The Facts In This Case
(2) Defendant's Proffered Evidence Of Murder Victim's Prior Criminal Conduct Was Inadmissible Under Rule 404(b)

State v. Smith, 337 N.C. 658, 447 S.E.2d 376 (9 September 1994). The defendant was convicted of first-degree murder of a resident of a trailer park which the defendant owned and operated. His defense was self-defense. (1) Before trial, the defendant requested the state to produce information of (i) any internal investigation of any law enforcement officer whom the state intended to call as a witness and (ii) records revealing any defect or deficiency of any witness to observe, remember, or recount events. The state responded that the request exceeded the scope of Brady v. Maryland, 373 U.S. 83 (1963), that it had complied with statutory discovery, and the state did not possess any of the records the defendant sought. The trial judge ruled that before it would require the state to produce any internal affairs information, a voir dire of a witness could be conducted, on request, to determine if any potentially impeaching evidence existed, was relevant, and was admissible. At trial, after the direct examination of a civilian state's witness, the defendant renewed his motion for disclosure of impeaching information about whether the witness suffered from any mental defect or history of substance abuse that might affect her ability to recollect or to recount the events occurring on the night of the homicide. In denying the motion, the judge noted that counsel could question the witness concerning these matters, within reason, but refused to order the state to inquire into the background of its witnesses. On appeal, the defendant contended that his specific request for discovery triggered the state's duty to determine

if such impeachment evidence existed and, if so, to disclose the information to the defendant. The court rejected the defendant's argument. It noted that nothing in the record reveals that the state suppressed material evidence. The state informed both the trial judge and defendant that it had produced all discoverable materials in its possession, and the defendant failed to show otherwise. The court also ruled that the information requested exceeded the scope of *Brady* and statutory discovery. The state is not required to conduct an independent investigation to determine possible deficiencies suggested in the state's evidence; the defendant's motion was a fishing expedition for impeachment evidence. (2) The defendant at trial sought under Rule 404(b) to introduce evidence of the victim's 1983 conviction for assault with a deadly weapon (not committed against the defendant), the victim's prison disciplinary infractions, and the victim's three prior New Jersey convictions for burglary in 1988 and 1989. (The trial judge found that there was no commonality between the victim's prior criminal conduct and the victim's actions toward the defendant in this case.) The defendant contended that the evidence was relevant to (i) whether the victim was the aggressor and (ii) the defendant's state of mind when the victim threatened to attack him in the same manner he had attacked another on a prior occasion. The court ruled, relying on State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986), that the evidence was inadmissible. The defendant was not aware of the victim's criminal past; thus it was not relevant to the defendant's belief about the apparent necessity to defend himself. The defendant was also attempting to show that the victim must have been the aggressor in the altercation with the defendant because the victim had a propensity for violence—his history of criminal convictions and disciplinary infractions. However, the court stated Rule 404(b) expressly prohibits the admission of evidence for this purpose.

(1) Assuming It Was Error To Exclude Rule 412 Evidence, Error Was Harmless
(2) State's Cross-Examination Was Improper Under Rules 404(b) And 608(b)

State v. McCarroll, 336 N.C. 559, 445 S.E.2d 18 (17 June 1994), *reversing*, 109 N.C. App. 574, 428 S.E.2d 229 (1993). (1) The Court of Appeals in this case had ruled that the trial judge had erred in excluding defendants' proffered testimony about the prosecuting witness's alleged false accusation of sexual activity. The Supreme Court ruled, assuming without deciding that it was error, that the error was harmless beyond a reasonable doubt. (2) The prosecuting witness testified that she had been sexually abused on another occasion (other than the acts being tried) when she was living with her family in Kansas. The state cross-examined one of the defendants (the witness's mother) about her relationship to the man who the witness testified had molested her. The state questioned the defendant about whether she was having an affair with that man. It was not probative of the defendant's truthfulness or untruthfulness under Rule 608(b) and it was not admissible under Rule 404(b), based on the facts in this case. [However, the court finds this error was not prejudicial.]

Capital Case Issues

(1) Evidence Was Sufficient For Aggravating Circumstance Of Especially Heinous, Atrocious, Or Cruel
(2) Proper To Submit Mitigating Circumstance Of No Significant Prior Criminal History

State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (29 July 1994). (1) The defendant was convicted of first-degree murder committed by an unprovoked beating to death of an elderly man with an ax handle. (He also was convicted at the same trial of first-degree murder of the man's wife that was committed in a similar manner.) The defendant argued that because the evidence showed that the murder victim was unaware of his presence and was rendered unconscious by the first blow, he did not suffer any of the physical or psychological torture that would cause his murder to be considered sufficient evidence of the aggravating circumstance of especially heinous, atrocious, or cruel. The court rejected this argument, noting that this circumstance does not entirely depend on the experience endured by the victim during the killing. The court stated that when a murderer attacks an elderly victim by surprise and repeatedly hits him in the head with an ax handle without the slightest provocation, it is inferable that the murder was conscienceless and pitiless. Evidence that the defendant committed a similar set of murders six weeks later, after a boastful discussion of his murderous capabilities, is further evidence of a lack of pity for his victims. The facts of this murder suggest a depravity of mind not easily matched by even the most egregious of slayings, as well as a level of brutality that exceeds that ordinarily present in first-degree murder. (2) The court ruled that the trial judge properly submitted the mitigating circumstance of no significant history of prior criminal activity: Evidence of the defendant's prior criminal history consisted principally of his use of illegal drugs and that his aunt "took out warrants on him" for communicating threats and trespassing.

(1) Challenge Of Juror And Denial Of Defense Request To Rehabilitate Juror Was Not Error
(2) Denial Of Information To Jury About Parole Eligibility Was Proper Under *Simmons v. South Carolina*
(3) Proper Not To Submit Mitigating Circumstance Of No Significant Prior Criminal History
(4) Pattern Jury Instruction Was Proper On Individual Juror Consideration Of Mitigating Circumstances In Weighing Aggravating And Mitigating Circumstances

State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (29 July 1994). The defendant was being tried capitally for first-degree murder. (1) The prosecutor and trial judge questioned the prospective juror extensively about her ability to follow the law on capital punishment. Although the juror stated that she could impose the death penalty under some circumstances, she also affirmatively responded three times that she would be substantially impaired in following the law because of her scruples and Christian beliefs. The judge excused the juror for cause and also in his discretion denied the defendant an opportunity to rehabilitate her. The court upheld both rulings. While the juror's answers were not entirely equivocal, they were sufficiently equivocal to justify excusal for cause in the trial judge's discretion. And defense questioning of the juror would have made the situation more confusing. (2) The court reaffirms prior rulings and ruled that the trial judge

correctly denied defendant's proposed jury instruction explaining parole eligibility for life imprisonment imposed for first-degree murder and correctly instructed the jury when it inquired about parole eligibility ("life imprisonment means . . . imprisonment for life in the state's prison"). The court noted and distinguished Simmons v. South Carolina, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (error not to instruct that defendant was ineligible for parole) since defendant in this case would have been eligible for parole if he had been given life imprisonment. See also State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (29 July 1994) (similar ruling); State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (9 September 1994) (similar ruling); State v. Price, 337 N.C. 756, 448 S.E.2d 827 (6 October 1994). (3) The court ruled that the trial judge did not err in refusing to submit the mitigating circumstance of no significant prior criminal history [G.S. 15A-2000(f)(1)]. The defendant had been convicted of assault with a deadly weapon inflicting serious injury in 1978, 1982, and 1984. The court concludes that the defendant's record of three violent felonies, similar to the crime being tried, in the twelve years before this particular crime showed that the defendant had a significant record. No rational juror could have found this mitigating circumstance. (4) The court rejected the defendant's argument that the jury instructions were erroneous because, during the weighing of aggravating and mitigating circumstances, a juror was prohibited by the instruction from considering a mitigating circumstance found by another juror. The court characterizes (and rejected) the defendant's argument as once one juror finds a mitigating circumstance to exist and to have value, all twelve must consider that circumstance when reaching their decision, even if a juror did not believe that the mitigating circumstance existed.

The Only Evidence Of Criminal Activity To Be Considered Under The Capital Statutory Mitigating Circumstance Of No Significant Prior Criminal History Is Criminal Activity Committed Before Date Of Murder For Which Defendant Is Being Sentenced

State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (17 June 1994). The court ruled that the only evidence of criminal activity that may be considered under the capital statutory mitigating circumstance of no significant prior criminal history [G.S. 15A-2000(f)(1)] is criminal activity committed before the date of the murder for which the defendant is being sentenced.

Proper Not To Submit No Significant History Of Prior Criminal Activity

State v. Sexton, 336 N.C. 321, 444 S.E.2d 879 (17 June 1994). The evidence of the defendant's prior criminal activity was a conviction of forgery and uttering on May 1, 1989 and a conviction for two counts of assault on a female on October 22, 1989. The court noted that one of these counts was the assault by choking of a female that occurred less than one year before the strangulation of the murder victim; the defendant testified he did not remember choking the assault victim, a circumstance strikingly similar to his professed lack of memory about the details of the strangulation of the murder victim. The court stated that "[g]iven the nature and recency of his record of assault, we cannot say that the trial court erred in determining that no reasonable juror could have concluded defendant's criminal history was insignificant." Therefore, the trial judge did not err in failing to submit the mitigating circumstance [G.S. 15A-2000(f)(1)]. [However, compare the ruling in this case with State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992) (error not to submit this mitigating circumstance when defendant had no prior convictions and the prior criminal history included use of illegal drugs and theft of money and credit cards to

support drug habit); State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988) (error not to submit this mitigating circumstance when defendant had prior felony conviction for second-degree kidnapping of former wife—who was not the murder victim—committed four years before murder being tried, had stored illegal drugs in his shed, and had participated in theft with murder victim); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1988) (trial judge did not err in submitting this mitigating circumstance when defendant had seventeen prior felony convictions); State v. Lloyd, 321 N.C. 301, 364 S.E.2d 316 (1988) (trial judge did not err in submitting this mitigating circumstance when defendant had two felony convictions about twenty years before the murder and had seven alcohol-related misdemeanor convictions over an eleven-year period up to the time of the murder).]

Error Not To Submit Mitigating Circumstance Of No Significant Prior Criminal History

State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (29 July 1994). Evidence presented by the state in its case-in-chief and during cross-examination of the defendant showed that he had used drugs illegally and had been convicted of larceny, receiving stolen goods, and forgery. The court ruled, relying on State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992) and State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988), that the trial judge erred in not submitting the mitigating circumstance of no significant prior criminal history [G.S. 15A-2000(f)(1)].

Testimony About Deceased Victim Was Not Error, Based On Facts In This Case

State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (6 October 1994). The defendant was convicted of first-degree murder and sentenced to death. The state offered evidence at the sentencing that the victim "was a very good person. She always went to church. She loved her children. She was a good wife and mother. And she was just a very good person, would do anything for anybody, and she died not knowing what happened to her two-and-a-half-year-old child." The court ruled that this evidence: (1) did not violate the United States Constitution—see Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); and (2) was relevant under Rule 402 and its exclusion was not required under the United States or North Carolina constitutions, federal or state statutes, or rules of evidence. The court stated that "[w]hile evidence of a victim's character may not by the strictest interpretation be relevant to any given issue, the State should be given some latitude in fleshing out the humanity of the victim so long as it does not go too far. The State should not be permitted to ask for the death sentence because the victim is a 'good person,' any more than a defendant should be entitled to seek life imprisonment because the victim was someone of 'bad character.' The State did not do so in this case."

Court Clarifies Composition Of Proportionality Pool When Death-Sentenced Defendants Receive Post-Conviction Relief

State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (29 July 1994). The court clarifies cases that are included in the proportionality pool [court's duty under G.S. 15A-2000(d)(2) to determine if death sentence is disproportionate to penalty imposed in similar cases] when a death-sentenced defendant receives post-conviction relief. If post-conviction relief (federal or state) determines that the state may not prosecute the defendant for first-degree murder or results in a retrial at

which the defendant is convicted or found guilty of a lesser-included offense, the case is removed from the pool, since the pool only includes first-degree murder convictions. When a post-conviction proceeding results in a new capital trial or sentencing proceeding that then results in a life sentence for a death-eligible defendant, the case is treated as a "life" case for proportionality review (a "life" case also includes when a defendant is sentenced to life imprisonment at a resentencing hearing ordered in a post-conviction proceeding). A case of a defendant who is either convicted of first-degree murder and sentenced to death at a new trial or sentenced to death in a resentencing hearing ordered in a post-conviction proceeding, and the death sentence is affirmed by the court, is treated as a "death-affirmed" case.

Miscellaneous

Burden Of Proof By Preponderance And Burden Of Proof To Jury's Satisfaction Are Equivalent

State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (9 September 1994). The court ruled that the burden of proof to the jury's satisfaction denotes a burden of proof consistent with a preponderance of evidence.

Felonious Assault Indictment Properly Was Amended Because Amendment Did Not Substantially Change Nature Of Offense Charged

State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (6 October 1994), *reversing*, 110 N.C. App. 314, 430 S.E.2d 313 (1993) (unpublished opinion). The original felonious assault indictment charged the defendant with assaulting the victim with the defendant's "fists, a deadly weapon, by hitting [the victim] over the body with his fists and slamming his head against the cell bars and floor." The indictment also alleged that the victim's broken neck and paralysis resulted from the assault. The state was permitted to amend the indictment so the pertinent new language stated that the defendant assaulted the victim with "fists by hitting [the victim] over the body with his fists and slamming his head against the cell bars, a deadly weapon, and floor." The defendant objected to the amendment, arguing that he was not prepared to show that the jail cell and floor were not deadly weapons. The court ruled that the amendment to the indictment was permissible because it did not substantially alter the charge in the original indictment [see State v. Price, 310 N.C. 596, 313 S.E.2d 556 (1984)]—the original indictment was sufficient to allege that the cell floor and bars were deadly weapons. Identifying fists as a deadly weapon did not preclude the state from identifying at trial other items as deadly weapons when the indictment both described them and necessarily demonstrated their deadly characters. See State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

(1) Retroactivity Standard Of *Teague v. Lane* Is Adopted For Federal Constitutional Issues Raised In Hearings For Motions For Appropriate Relief
(2) Ruling In *McKoy v. North Carolina* Is Applied Retroactively To Capital Cases That Became Final Before *McKoy* Was Decided, When Defendant Properly Raised Issue At Trial

State v. Zuniga, 336 N.C. 508, 444 S.E.2d 443 (17 June 1994). In 1985 the defendant was convicted of first-degree murder and sentenced to death. The trial judge instructed the jury that it could not consider any mitigating circumstance that it did not find unanimously. The defendant objected to this instruction and assigned it as error on appeal to the supreme court. The court rejected the assignment of error and affirmed the conviction and death sentence. On November 16, 1987, the United States Supreme Court denied defendant's petition for a writ of certiorari. The defendant then filed a motion for appropriate relief in state court, again alleging error in the jury instruction. While the motion was pending, the United States Supreme Court ruled in McKoy v. North Carolina, 494 U.S. 433 (1990) the instruction was unconstitutional. Relying on Teague v. Lane, 489 U.S. 288 (1989), the superior court judge refused to give McKoy retroactive application and denied the defendant's motion.

[*Teague v. Lane* provides that the new rules of federal constitutional criminal procedure will apply retroactively to cases on direct review, but they generally will not be applied retroactively to cases on collateral review (i.e., federal habeas corpus)—with two exceptions: the new rule will be applied retroactively if (1) the new rule places an entire category of primary conduct beyond the reach of criminal law; or prohibits imposition of a certain type of punishment for a class of defendants based on their status or offense; or (2) the new rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.]

(1) The court noted that the *Teague* ruling applies only in federal habeas corpus proceedings. However, the court adopts the *Teague* ruling as the test for retroactivity for new federal constitutional rules of criminal procedure for state collateral review (e.g., motions for appropriate relief).

(2) Following the ruling in Williams v. Dixon, 961 F.2d 448 (4th Cir. 1992), the court ruled that, assuming without deciding that *McKoy* was a new rule, it came within the second *Teague* exception (see discussion above) and therefore it retroactively applied to the defendant's death sentence. The court noted that because the defendant objected to the *McKoy*-flawed instructions at trial and assigned them as error on appeal, the defendant did not waive the right to assert *McKoy* error. The court grants the defendant a new sentencing hearing because the *McKoy* error was not harmless beyond a reasonable doubt. [The court specifically does not decide whether a defendant who did not assign the instruction as error on direct review waived the right to assert the *McKoy* error in a motion for appropriate relief.]

Superior Court Judge Properly Disbarred Attorney Who Was Convicted Of Two Felonies

In re Delk, 336 N.C. 543, 444 S.E.2d 198 (17 June 1994), *reversing*, 110 N.C. App. 310, 429 S.E.2d 595 (1993). A licensed attorney was convicted of two felonies. The judge presiding at the trial did not enter an order of professional discipline then. (1) The North Carolina State Bar sought an order to the lawyer requiring him to appear in Graham County on a specific date to show cause why he should not be disciplined. A superior court judge holding court in

Mecklenburg County, without consent of the parties, issued a show cause order *ex parte*. The court ruled that the show cause order was validly issued. A show cause order does not substantially affect a party's rights. As long as the controversy is heard in the proper county, it is irrelevant that a show cause order is issued in another county. (2) The court ruled that the question of disbarring the attorney was not part of the criminal case against the attorney and did not have to be determined when the criminal case was tried. It could be determined later. (3) The court rejected the attorney's argument that the North Carolina State Bar violated its own ruled when it asked the judge to disbar him. Since this disciplinary hearing was conducted under the court's inherent authority to discipline attorneys, the court was not bound by the State Bar's rules. (4) The court ruled that if a superior court judge finds that court records disclose that a person has been convicted of a crime showing that he or she is unfit to practice law, that is a sufficient finding of fact to support disbarment. (5) The court rejected the attorney's argument that this proceeding was a civil action that required compliance with the rules of civil procedure, including filing of a complaint and issuance of a summons. The court stated that the show cause order notified the attorney of the nature, date, time, and place of hearing, which adequately protected the attorney's due process rights.

North Carolina Supreme Court Reverses Its Prior Ruling, In Light Of Remand From United States Supreme Court, And Finds Jury Instruction On Reasonable Doubt To Be Constitutional

State v. Bryant, 337 N.C. 298, 446 S.E.2d 71 (29 July 1994). On remand from the United States Supreme Court, the court reversed its prior ruling in this case at 334 N.C. 333, 432 S.E.2d 291, and finds that the trial judge's instruction on reasonable doubt (for text of instruction, see the prior ruling) to be constitutional, in light of *Victor v. Nebraska*, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). The instruction did not contain the constitutional errors found in *Cage v. Louisiana*, 498 U.S. 39 (1991), although it used the terms "moral certainty" and "honest substantial misgiving."

[Note: Judges should avoid using the term "moral certainty" because the United States Supreme Court indicated in *Victor* that it may find in a future case that the use of that term with other inappropriate language may result in an unconstitutional instruction.]

Prosecutor's Jury Argument Improperly Commented On Defendant's Failure To Testify

State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (29 July 1994), *affirming on other grounds*, 108 N.C. App. 476, 424 S.E.2d 141 (29 July 1994). The defendant was on trial for several sex offenses against a nine-year-old female. The defendant did not testify. During jury argument, the prosecutor stated in effect: we don't know how many times the child was sexually assaulted; the defendant knows, but he's not going to tell you. The court ruled that the prosecutor's comment was obviously intended to disparage the defendant for failing to testify and therefore was improper.

Defendant's Introduction Of Photograph During Cross-Examination Of State's Witness Gave State The Opening And Closing Jury Argument Under Rule 10

State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (29 July 1994). The defendant attempted to offer a photograph of the crime scene to help illustrate a state witness's testimony during cross-examination. The trial judge sustained the state's objection to the use of the photograph before the jury unless it was introduced into evidence. The defendant then moved to introduce the photograph into evidence; the judge asked the defendant if he understood that he was now offering evidence, and he responded yes. The photograph was admitted into evidence and used while the witness answered defense questions and to impeach the witness. Under these circumstances, the court ruled that the defendant offered evidence under Rule 10 of the General Rules of Practice for the Superior and District Courts and lost the right to open and close jury argument.

(1) Probable Cause For Arrest And Criminal Charge Existed As A Matter Of Law To Support Defendant's Motion For Directed Verdict On Plaintiff's Malicious Prosecution Claim

(2) Court Rejects Argument That State's Voluntary Dismissal Of Criminal Charge Without Explanation Is Prima Facie Showing Of Absence Of Probable Cause In Malicious Prosecution Claim

Best v. Duke University, 337 N.C. 742, 448 S.E.2d 506 (6 October 1994). An officer saw plaintiff's vehicle enter Duke Faculty Club driveway at 5:00 A.M., turn its lights off, and continue down the driveway. Ten or fifteen minutes later, the officer saw plaintiff's vehicle exit the driveway and go toward the rear of the Washington-Duke Hotel. The officer knew that the hotel was having problems with thefts. He decided to stop the vehicle by blocking it. However, the plaintiff drove his vehicle around the officer and sped away. Plaintiff did not stop even when the officer pulled beside him, rolled down his window, and flashed his badge. Eventually, the plaintiff's vehicle stopped. The officer saw wrought-iron furniture inside. Plaintiff said to another officer (Russell) there that he was taking the furniture to a friend's house. A check of the Faculty Club then indicated that there was no missing furniture. Plaintiff was allowed to leave. The next day Russell learned that furniture similar in description to plaintiff's furniture had in fact been stolen from the Faculty Club the previous night. Arrest warrants for larceny and trespass were obtained and plaintiff was arrested. At the criminal trial, the state at the close of the state's evidence took a voluntary dismissal of the trespass charge without an explanation, and the judge found the defendant not guilty of the larceny charge.

Plaintiff sued defendant Duke University for malicious prosecution (and other torts) based on his arrest and prosecution for trespass and larceny. (1) The court examines the evidence and ruled that probable cause existed as a matter of law for plaintiff's arrest for trespass and larceny and his later prosecution for larceny; thus, defendant's motion for a directed verdict on the malicious prosecution claim should have been granted at trial. (2) The court rejected the plaintiff's argument that the state's voluntary dismissal of a criminal charge without an explanation is a prima facie showing of absence of probable cause in a malicious prosecution claim. The court distinguished its ruling in Pitts v. Village Inn Pizza, Inc., 296 N.C. 81, 249 S.E.2d 375 (1978) (disputed issue of whether probable cause existed in malicious prosecution claim when evidence

showed prosecutor had voluntarily dismissed criminal charge before trial) because in *Pitts* the only evidence presented was the issuance of an arrest warrant charging a criminal offense and the prosecutor's dismissal of that charge. In this case, uncontroverted evidence established probable cause as a matter of law; thus the prosecutor's voluntary dismissal was not sufficient evidence of a lack of probable cause to establish a question of fact for the jury. The court stated that it disapproves *Pitts* to the extent that it may be read to suggest otherwise. The court also noted that, unlike in *Pitts*, the prosecutor in this case had prosecuted the plaintiff on a second charge—the larceny charge.

Sentencing Issues

Proper To Find Non-Statutory Aggravating Factor For Felonious Assault Conviction That Victim Sustained "Extremely Severe And Permanent Injuries"

State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (6 October 1994), *reversing*, 110 N.C. App. 314, 430 S.E.2d 313 (1993) (unpublished opinion). The court ruled that the trial judge properly found as a non-statutory aggravating factor for a felonious assault conviction that the victim sustained "extremely severe and permanent injuries." The evidence concerning the victim's broken neck, aside from the evidence concerning the resulting permanent paralysis, was sufficient to establish the element of serious injury. The non-statutory aggravating factor rested solely on the resulting permanent paralysis, and thus the finding of this factor did not violate the provision in G.S. 15A-1340.3(a)(1) that evidence necessary to prove an element of an offense may not be used to prove an aggravating factor. See State v. Blackwelder, 309 N.C. 410, 306 S.E.2d 783 (1983).

Court Upholds Various Statutory And Nonstatutory Aggravating Factors In Second-Degree Sexual Offense And Indecent Liberties Cases And Disavows Reasoning Of Court Of Appeals

State v. Farlow, 336 N.C. 534, 444 S.E.2d 913 (17 June 1994), *reversing*, 110 N.C. App. 95, 429 S.E.2d 181 (1993). This case involved sentencing of a defendant for illegal sex acts with two young male victims.

(1) The defendant plead guilty to two counts each of second-degree sexual offense and taking indecent liberties with an eleven-year-old male. The trial judge found as a nonstatutory aggravating factor for the indecent liberties conviction that the victim's age made him particularly vulnerable. The trial judge found as a statutory aggravating factor for the sexual offense conviction that the victim was "very young" (i.e., the victim's age). The court noted that G.S. 15A-1340.4(a) provides that evidence necessary to prove an element of the offense may not be used to prove an aggravating factor.

Statutory aggravating factor that victim was "very young." The court reviewed its case law on the statutory aggravating factor [G.S. 15A-1340.4(a)(1)j] that the victim was very young, very old, or mentally or physically infirm—State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983), State v. Long, 316 N.C. 60, 340 S.E.2d 392 (1986), State v. Hines, 314 N.C. 522, 335 S.E.2d 6 (1985), State v. Thompson, 318 N.C. 395, 348 S.E.2d 798 (1986), State v. Sumpter, 318 N.C. 102, 347 S.E.2d 396 (1986)—and restated the general rules: When age is an element of an offense (e.g., indecent liberties) and the evidence shows that the victim's age caused the victim to

be more vulnerable to the crime committed than he or she otherwise would have been, the trial judge may properly find the statutory aggravating factor based on age. Since the victim's being "very young" is not necessary to prove indecent liberties, the same evidence is not being used to prove the offense of indecent liberties and the statutory aggravating factor.

Nonstatutory aggravating factor of young victim's vulnerability. The court noted that trial judge may also find nonstatutory aggravating factors supported by the evidence. The court ruled that the Court of Appeals erred in ruling that since evidence of the victim's age was necessary to prove the indecent liberties offenses, that evidence may not be used to prove an aggravating factor. The court also expressly disavowed similar dictum in State v. Vanstory, 84 N.C. App. 535, 353 S.E.2d 236 (1987). The court ruled that the trial judge did not err in finding as a nonstatutory aggravating factor for the indecent liberties conviction that the defendant's "actions at the age of the victim in this offense made that victim particularly vulnerable to the offense committed." Evidence showed the defendant increased the victim's vulnerability by bestowing gifts on him.

Aggravating factor when joined offenses. The court also overruled the Court of Appeals ruling that the trial judge erred in finding—for the second-degree sexual offense conviction—the statutory aggravating factor that the victim was "very young" because it was an element of the joined indecent liberties offense. The court noted its prior ruling, State v. Wright, 319 N.C. 209, 353 S.E.2d 214 (1987), that the rule barring the use of joinable convictions as an aggravating factor does not apply to the use of a fact needed to prove an *element* of a contemporaneous conviction. The court also noted that if the trial judge properly found this factor, it could be used for both the indecent liberties and second-degree sexual offense convictions.

Other nonstatutory aggravating factors. The court also upheld, for the indecent liberties convictions, the trial judge's finding of the nonstatutory aggravating factors that the (i) victim suffered severe mental and emotional injury that is in excess of that associated with these offenses, and (ii) the defendant engaged in a course of criminal conduct over many years, involving the commission of sexual offenses against very young children.

(2) The defendant pleaded guilty to two counts of second-degree sexual offense and four counts of indecent liberties with a nine-year-old male. The court ruled that the trial judge properly found the statutory aggravating factor that the "defendant took advantage of a position of trust or confidence to commit" these offenses. The defendant befriended the victim and took him on trips and other outings. Gradually, the victim spent more and more time at the defendant's home and essentially lived with the defendant while the victim's mother was away. Under these circumstances, the defendant took advantage of a position of trust or confidence to commit the offenses.

Trial Judge Erred In Finding Two Aggravating Factors Based On The Same Evidence

State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (17 June 1994). The court ruled that the trial judge erroneously used the same evidence [see G.S. 15A-1340.4(a)(1) (same evidence may not be used to prove more than one factor in aggravation)]—the defendant had conspired with others to murder a law enforcement officer who was interfering with their drug trade—to find two aggravating factors: (1) the offense was committed to *disrupt* the lawful exercise of a governmental function or the enforcement of laws, and (2) the offense was committed to *hinder* the lawful exercise of a governmental function or the enforcement of laws [both aggravating factors found are contained in G.S. 15A-1340.4(1)d].

Trial Judge Erred In Finding "Course Of Violent Conduct" As Non-Statutory Aggravating Factor Under Fair Sentencing Act

State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (9 September 1994). The defendant was convicted of first-degree murder, second-degree murder, and felonious assault. In the sentencing for the second-degree murder conviction, the court found as a non-statutory aggravating factor that the murder was part of a course of violent conduct that included violent crimes against others. Relying on State v. Westmoreland, 314 N.C. 442, 334 S.E.2d 223 (1985) (sentencing for conviction of offense subject to Fair Sentencing Act may not be aggravated by contemporaneous convictions of offenses joined with that offense) , the court ruled that this finding was error, since this factor was based on joined offenses (first-degree murder and felonious assault) for which the defendant was convicted contemporaneously with the second-degree murder conviction.

Defendant Is Entitled To Credit For Incarceration Served Under Term Of Special Probation When Probation Is Later Revoked And Active Imprisonment Is Imposed

State v. Farris, 336 N.C. 552, 444 S.E.2d 182 (17 June 1994), *affirming*, 111 N.C. App. 254, 431 S.E.2d 803 (1993). The court ruled that under G.S. 15-196.1 a defendant is entitled to credit for incarceration served under a term of special probation when probation is later revoked and active imprisonment is imposed. The court distinguished G.S. 15A-1351(a), which permits a judge—when imposing a sentence of special probation—to elect to credit time already served by a defendant to either a suspended sentence or any imprisonment required for special probation. The court stated that this statute does not apply to sentencing when probation is revoked; instead, G.S. 15-196.1 controls.

NORTH CAROLINA COURT OF APPEALS

Criminal Offenses

Use Of Pellet Gun Was Sufficient Evidence Of Dangerous Weapon To Support Armed Robbery Conviction, Based On Facts In This Case

State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24 (18 October 1994). During the robbery of a convenience store, the defendant pointed a pistol at the employee and demanded money. He pressed the pistol to her lower back near her kidney and marched her to the cash register. The defendant emptied the cash register and left. The pistol was a Crossman .177 caliber pistol capable of firing either pellets or BBs at 450 feet per second. The trial judge submitted both armed robbery and common law robbery to the jury, and the defendant was convicted of armed robbery. The court ruled that sufficient evidence showed that the pistol was actually capable of threatening or endangering the employee's life. A projectile from the pistol was capable of totally penetrating a quarter-inch of plywood and would have resulted in a life-threatening injury to the employee had the defendant fired it. The court disavowed any interpretation of State v. Summey, 109 N.C. App. 518, 428 S.E.2d 245 (1993), that a pellet gun is not, as a matter of law, a dangerous weapon.

Defendant's Failure To Object To Second-Degree Murder Instruction Bars Appellate Review Of Defendant's Argument That The Instruction Should Not Have Been Given

State v. Blue, 115 N.C. App. 108, 443 S.E.2d 748 (7 June 1994). At jury charge conference, the trial judge informed the state and defense counsel that he would submit first-degree murder, second-degree murder, and not guilty. Defense counsel did not object during the charge conference or before the jury retired to consider its verdict. The court noted that if an objection had been properly made, the court would be required to reverse the defendant's conviction under State v. Arnold, 329 N.C. 128, 404 S.E.2d 822 (1991). The court stated, "But to allow a defendant who does not so object to then use his choice at trial to gain reversal on appeal would afford a criminal defendant the right to appellate review, predicated on invited error." The court ruled that under these circumstances the defendant may not assign error on appeal on this issue.

"Intent" Felony Specified In First-Degree Burglary Indictment Was Surplusage, Permitting Jury Instruction On Another Felony

State v. Roten, 115 N.C. App. 118, 443 S.E.2d 794 (7 June 1994). First-degree burglary indictment alleged that the breaking and entering was committed with the intent to commit first-degree sexual offense. The judge instructed the jury on the intent to commit second-degree sexual offense. The court ruled that since the indictment need not allege the specific felony, State v. Worlsey, 336 N.C. 268, 443 S.E.2d 68 (6 May 1994), the indictment's allegation was surplusage that may be disregarded.

(1) Defendant's Punch To Victim's Head Was A Proximate Cause Of Death
(2) Defendant Was Responsible For Unforseeable Consequences Of His Assault
(3) Forseeability Is Not Component Of Proximate Cause When Wound Was Intentionally Inflicted

State v. Lane, 115 N.C. App. 25, 444 S.E.2d 233 (7 June 1994). The defendant hit the victim in the head with his fist, and the victim fell on the cement on the edge of a street. An officer discovered the victim later, saw no sign of external injuries, but took him to jail because he was intoxicated. Later he was found unconscious in jail and was taken to the hospital (he had a 0.34 blood alcohol concentration) where he died. The autopsy revealed no external injuries, but did reveal brain swelling and other conditions. The medical examiner's opinion was that the victim died as a result of blunt force injury to the head. The defendant was convicted of involuntary manslaughter. (1) The court ruled that the alleged police negligence in failing to take the victim for medical attention was not the sole cause of death; since the defendant's punch to the victim's head was *a* proximate cause, the defendant was criminally responsible for the victim's death since his act caused or directly contributed to the death. (2) The court rejected the defendant's contention that he was not the proximate cause of the victim's death because of the unforseeable consequences of the defendant's assault (alcoholics like the victim are more susceptible to brain swelling than nondrinkers). (3) Distinguishing State v. Hall, 60 N.C. App. 450, 299 S.E.2d 680 (1983) and State v. Mizelle, 13 N.C. App. 206, 185 S.E.2d 317 (1971), the court ruled that when a wound is intentionally inflicted, forseeability is not a component of proximate cause.

Moving Victim Into Restroom In Back Of Store Where Rape Was Committed Was Sufficient Evidence To Support Convictions Of Kidnapping And Rape, Based On The Facts In This Case

State v. Hill, 116 N.C. App. 573, 449 S.E.2d 573 (18 October 1994). The defendant was convicted of first-degree rape and second-degree kidnapping. The defendant pulled a gun on the victim, a store employee, while she was behind the counter in the front of the store. He told her he was going to tie her up and rob her. He then forced her into the restroom, tied her hands behind her back, and raped her. Relying on State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987), the court ruled that the evidence was sufficient to support both convictions. Although the defendant could have committed the rape in the front of the store, he forced the victim into the store restroom as described above. At that time, the crime of kidnapping was complete, irrespective of the fact that the defendant thereafter committed rape.

Habitual Impaired Driving Under G.S. 20-138.5 Is A Felony Offense For Which The Superior Court Has Original Jurisdiction

State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610 (19 July 1994). The court ruled that habitual impaired driving under G.S. 20-138.5 is a felony offense for which the superior court has original jurisdiction. The court rejected the defendant's argument that the statute is merely a punishment enhancement provision for a misdemeanor DWI offense.

Arrest, Search, and Confession Issues

Officer's Walking Over To Defendant (Who Was Standing By His Vehicle) Was Not A Seizure, Based On The Facts In This Case

State v. Johnston, 115 N.C. App. 711, 446 S.E.2d 135 (2 August 1994). An officer was conducting a license check at an intersection. He saw the defendant turn off into an apartment complex parking lot about 200 yards before the intersection, and the defendant remained seated there about five minutes. The officer drove over to the defendant's car. As the officer got out of his car, the defendant got out of his car. The officer noticed that the defendant was unsteady on his feet. The officer walked over to the defendant and asked him why he turned off the road before the license check. The defendant responded that he lived there. The officer noticed a strong odor of alcohol about the defendant's breath; he asked him for his driver's license. The defendant was unable to produce a license. The officer then asked him to step back to his vehicle; he eventually arrested him for impaired driving. The court ruled that the officer did not seize the defendant when he approached him and asked him for his driver's license, citing Florida v. Bostick, 501 U.S. 429 (1991) that a seizure does not occur simply when an officer approaches a person and asks a few questions. Once the defendant admitted that he did not have a license, the officer had probable cause to arrest him. While the officer could have arrested him, he chose to ask the defendant to step back to his vehicle so he could investigate further. He then arrested the defendant after he failed field sobriety tests. The court concludes that the officer's actions were consistent with the Fourth Amendment.

Warrantless Search Of Residential Crime Scene Was Constitutional

State v. Williams, 116 N.C. App. 225, 447 S.E.2d 817 (6 September 1994). Officers responded to an emergency call directing them to the defendant's residence. They found the defendant pacing in the front yard and another male person lying wounded in the doorway of the residence. The defendant told the officers that a man had shot his wife and was fleeing through the woods. The officers radioed for emergency personnel and then entered the residence to check for other victims or suspects. They found the defendant's wife lying dead on a couch in the den, with a gunshot wound above her left ear. They conducted a sweep of the residence. They found a pistol near the kitchen and ammunition casings and a white, rock-like substance on a stereo in the den. Having conducted a thirty-second sweep, they then left the house and secured it against intruders. No one was allowed to enter the residence until investigators arrived fifteen minutes after the first officers had arrived. The investigators entered the house without consent or a search warrant and continued to search the premises. Distinguishing *Thompson v. Louisiana*, 469 U.S. 17 (1984), the court ruled that the search by investigators was constitutional. Here, the investigators arrived shortly (fifteen minutes) after the initial thirty-second sweep by the first responding officers. Responding to the ongoing emergency, the investigators conducted a more complete search of the premises that could have revealed additional victims or hiding suspects. In *Thompson*, the investigators arrived thirty-five minutes after the first officers on the scene had already searched the home, secured the scene, and sent the defendant to the hospital for medical treatment. The court stated that if it ruled that the search in this case was unconstitutional, it would mean that "once any law enforcement officer makes an initial sweep through a home no matter how hurried or brief it may be, no other officers may search the home until a search warrant is obtained. Such a rule ignores the fact that the first responding officers making a quick initial search of a home may overlook a victim or suspect located in less obvious places."

[Note: Although the warrantless search by the investigators in this case may have been consistent with the Fourth Amendment, cautious law enforcement officers should strongly consider obtaining a search warrant or consent to search before conducting a similar search.]

Probable Cause Did Not Exist To Support Search Warrant To Search Home

State v. Styles, 116 N.C. App. 479, 448 S.E.2d 385 (4 October 1994). The court ruled that the following affidavit did not support a search warrant (dated 11 September 1992) to search the defendant's home:

> I [name of officer] being first duly sworn, do hereby swear the following to be true to the best of my knowledge and based upon personal knowledge and upon information I received from a confidential informant. That [defendant] is a known felon with a large criminal record. He has been convicted of possession of marijuana in the past two years and [has] been reported to me before on many occasions for selling controlled substances. In addition to this I received information today that [defendant] has a large quantity of marijuana in his possession today. This was relayed to me by a confidential reliable informant who stated that two other men had been to the apartment on 9-10-92 and saw

> large quantities of marijuana in the apartment. This informant has given me reliable information in the past which led to arrests.

The court concludes that the affiant did not adequately explain why the double hearsay was credible: "[t]he deputy only states that the informant has given the deputy reliable information in the past. The magistrate had no way of knowing whether the informant was with the two men, if he observed the two men, or if the two men told the informant what happened."

Evidence

DNA Evidence Was Admissible

State v. Hill, 116 N.C. App. 573, 449 S.E.2d 573 (18 October 1994). The defendant was convicted of first-degree rape and second-degree kidnapping. SBI Agent Mark Boodee was accepted by the trial judge as an expert in the fields of molecular genetics and forensic analysis. (1) Boodee testified that he performed DNA tests and six autorads produced visual matches with the defendant and two autorads produced inconclusive results. He characterized the four matches as an extremely rare result. The court rejected defendant's argument that Boodee in effect improperly stated his opinion that the defendant was the person who committed the rape. (2) Boodee testified that the possibility of selecting another unrelated individual having the same profile as the defendant was approximately 1 in 2.6 million for the North Carolina white population. The court rejected the defendant's argument that the database was too small to permit the use of statistical analysis concerning the probability estimate. Relying on State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993) and State v. Pennington, 327 N.C. 89, 393 S.E.2d 847 (1990), the court noted that the trial testimony showed that Boodee had the requisite skill to form an opinion concerning the statistical probability of DNA matching. (3) The court ruled that Boodee was properly permitted to testify that Dr. Bruce Weir determined that 500 samples were a representative sample on which the North Carolina population frequency database was developed. Boodee testified in detail about Dr. Weir's professional background and the results of the statistical testing to which Dr. Weir had subjected the SBI database. Boodee was familiar with Dr. Weir's analysis of the SBI database and the results, particularly since Boodee used the database himself when making his statistical calculations for this case. The court noted that Rule 703 permits an expert to base an opinion on facts or data perceived before the hearing if it is of a type reasonably relied on by experts in the field. Rule 703 also permits an expert to rely on an out-of-court communication as a basis for an opinion; see State v. Jones, 322 N.C. 406, 368 S.E.2d 844 (1988); State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

(1) Defendant's Threat To Victim That Included Reference To Another Crime For Which He Later Was Acquitted Was Admissible, Based On The Facts In This Case
(2) Trial Judge Properly Excluded Testimony Of Defendant's Expert Psychologist On Suggestibility Of Child Witnesses

State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (21 June 1994). The defendant was convicted of attempted first-degree statutory rape and attempted first-degree sexual offense of a twelve-year-old girl. (1) The victim testified that during the commission of the sexual acts the

defendant threatened her by saying, "[I]f [she] told anybody what he [defendant] was going to do, he was going to hurt [her] like he hurt Koda." When these offenses occurred, the defendant was charged and on pretrial release for the murder of Aileen Koda Smith. The defendant was acquitted of that charge before the trial of these offenses. The defendant contended that trial judge should have excluded her reference to "Koda" under Rule 403, based on State v. Scott, 331 N.C. 39, 413 S.E.2d 787 (1992) (evidence that defendant committed a prior offense for which he was tried and acquitted may not be admitted under Rule 403 in a later trial for a different offense when its probative value depends on the proposition that the defendant in fact committed the prior crime). The court distinguished *Scott* by noting that the probative value of the defendant's statement was to show that the victim was scared of the defendant as well as why she did not scream or make any noise; the statement does not depend on the proposition that the defendant in fact hurt Koda. The court also ruled that the statement was admissible, under State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990), as part of the "chain of circumstances" establishing the context of the charged crime. (2) The court ruled that the trial judge did not err in excluding the testimony of the defendant's expert psychologist on the suggestibility of child witnesses. The expert would have testified that suggestibility is significant in young children or intellectually-impaired people; the defendant offered the testimony to show the victim's memory may have been created or altered through suggestion. However, the expert admitted that he had not examined or evaluated the victim or anyone else connected with this case. The court ruled that the trial judge could properly conclude that the probative value of the expert's proposed testimony was outweighed by its potential to prejudice or to confuse the jury, and the proposed testimony would not have "appreciably aided" the jury since he had never examined or evaluated the victim; see State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985).

(1) Prior Sexual Behavior Evidence Between Alleged Rape Victim And Defendant That Was Otherwise Admissible Under Rule 412(b)(1) Was Properly Excluded Under Rule 403

(2) Trial Judge Failed To Make Proper Findings Before Excluding Bystanders Under G.S. 15-166

State v. Jenkins, 115 N.C. App. 520, 445 S.E.2d 622 (19 July 1994). The defendant was convicted of first-degree rape and second-degree kidnapping. (1) The defendant's defense was consent and he sought to introduce, under Rule 412(b)(1), his prior sexual activity between the alleged victim and himself. The trial judge allowed the admission of some prior sexual activity and excluded other prior sexual activity because it was irrelevant or highly prejudicial. The court affirms the trial judge's ruling, noting that the judge admitted prior sexual activity relevant to the defendant's consent defense and the excluded evidence was irrelevant to that defense. (2) The court ruled that in deciding whether to exclude bystanders from the trial under G.S. 15-166, the exclude bystanders has advanced an overriding interest that is likely to be prejudiced by an open courtroom. The closure order must be no broader than necessary to protect that interest, and the judge must consider reasonable alternatives to closure and make adequate findings to support the closure. The court ruled in this case that the trial judge failed to make proper findings.

Expert Was Improperly Permitted To Offer Opinion That Children Were Sexually Abused By Defendant

State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (16 August 1994). The defendant was on trial for sexually abusing three children. The court ruled that a state's expert was improperly permitted to offer his opinion that two of the children were sexually abused by the defendant. The court noted that an expert may properly offer an opinion that a child was sexually abused [citing State v. Richardson, 112 N.C. App. 58, 434 S.E.2d 657 (1993) and other cases]. However, the opinion that the child was sexually abused *by the defendant* did not relate to a diagnosis of the children during treatment and thus constituted improper opinion testimony about the credibility of the children's testimony in violation of Rules 405(a), 608(a), and 702. Note, however, that the court upheld other testimony by health professionals under Rule 803(4) (hearsay statement during medical diagnosis and treatment), in which the children during their psychological treatment identified the defendant as the perpetrator; see, for example, State v. Bullock, 320 N.C. 780, 360 S.E.2d 689 (1987).

Officer's Opinion About Pellet Gun's Force And Damage It May Cause Was Admissible

State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24 (18 October 1994). A pellet gun was used in an armed robbery, and the state offered an officer's opinion testimony about the force of the pellet gun and the damage to the human body that could be caused by a projectile fired from it. The officer saw the firing of a comparable pellet gun and witnessed its destructive force. The court ruled that this observation, coupled with the officer's experience with firearms and their capabilities, provided the officer with sufficient facts and data on which to form an expert opinion. There was no error in allowing the officer to conclude that the pellet gun used at point-blank range was a life-threatening weapon.

Defendant May Not Collaterally Attack Prior DWI Conviction Used For Sentencing

State v. Muscia, 115 N.C. App. 498, 445 S.E.2d 86 (5 July 1994). The court ruled, relying on *State v. Stafford*, 114 N.C. App. 101, 440 S.E.2d 846 (1994) (defendant may not collaterally attack prior DWI conviction used in proving element of habitual impaired driving offense), that the defendant was properly denied collateral attack of a prior DWI conviction used in sentencing for a DWI offense.

Sentencing Issues

Committing Offense While On Pretrial Release Properly Found As Aggravating Factor Even Though Defendant Was Acquitted Of Offense For Which He Was On Pretrial Release

State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (21 June 1994). The court ruled that the trial judge properly found as a statutory aggravating factor that the defendant committed the offense while on pretrial release for another offense [G.S. 15A-1340.4(a)(1)k] even though he was found not guilty of the offense for which he was on pretrial release.

Guilty Plea Agreement That Maximum Sentence Would Not Exceed Forty Years Was Plea Arrangement About Sentence, Which Did Not Require Findings Of Aggravating Or Mitigating Factors And Barred Appeal Of Sentence Under Fair Sentencing Act

State v. Williams, 116 N.C. App. 354, 447 S.E.2d 437 (6 September 1994). The defendant pled guilty to armed robbery and conspiracy to commit armed robbery, and the plea arrangement provided that the charges would be consolidated for sentencing with "exposure . . . limited to 40 years." The court ruled, relying on State v. Simmons, 64 N.C. App. 727, 308 S.E.2d 95 (1983), that this was a plea arrangement about a sentence [see G.S. 15A-1340.4(b)], which does not require the sentencing judge to make findings of aggravating or mitigating factors and does not allow the defendant the right to appeal the sentence. See also State v. Washington, 116 N.C. App. 318, 447 S.E.2d 799 (6 September 1994) (similar ruling).

Miscellaneous

Drug-Selling Offenses That Occurred One Month Apart Were Properly Joined For Trial

State v. Styles, 116 N.C. App. 479, 448 S.E.2d 385 (4 October 1994). On 11 September 1992, officers found ten bags of marijuana in the defendant's home. He was charged with possession with intent to sell and deliver and maintaining a dwelling for keeping and selling controlled substances. On 11 October 1992, the defendant allegedly sold marijuana at his home to a person under 16 and was charged the next day with sale or delivery of controlled substance to a person under 16. The court ruled that that the trial judge did not abuse his discretion in joining these offenses for trial under G.S. 15A-926(a). The "common thread" was the selling and distribution of marijuana, and the "scheme" was to sell the marijuana for profit.

Break-Ins That Occurred One Month Apart Were Properly Joined For Trial

State v. Howie, 116 N.C. App. 609, 448 S.E.2d 867 (18 October 1994). Evidence at trial showed that the defendant committed two similar break-ins in the same community, one at the residence of victim A on 7 July 1992 and another at the residence of victim B on 5 August 1992. In each case, the defendant saw the victim using her ATM card at a NationsBank at Watauga Village and attempted to memorize the card number. He then followed the victim home, broke into the house, and stole the victim's purse. The court ruled that the trial judge properly joined the offenses for trial. The court rejected the defendant's contention that the lapse of time between the two break-ins was sufficiently long to break any transactional connection between them. The court noted that the offenses were not only similar, but they involved the same pattern of operation.

Trial Judge's Midtrial Dismissal Of Criminal Charge Because Superior Court Lacked Jurisdiction Of The Offense Did Not Prohibit State's Appeal Of Dismissal And Retrial Of The Offense

State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610 (19 July 1994). At the close of the evidence for habitual impaired driving (G.S. 20-138.5) in superior court, the trial judge ruled that superior court did not have jurisdiction over the offense and dismissed the charge (the judge erroneously believed that the statute was a punishment enhancement provision for misdemeanor DWI). The state appealed to the North Carolina Court of Appeals. The court noted that under G.S. 15A-1445(a) that the state may appeal a dismissal of a charge only if further prosecution would not be prohibited by the double jeopardy clause. The court ruled, based on United States v. Scott, 437 U.S. 82 (1978), that the double jeopardy clause would not prohibit reprosecution because the trial judge's dismissal was not based on grounds of factual guilt or innocence. Therefore, the state had the right to appeal and also had the right to reprosecute the defendant (the court also ruled that the trial judge's dismissal was error since habitual impaired driving is a felony).

Trial Judge Erred In Turning His Back To The Jury During The Defendant's Testimony On Direct Examination

State v. Jenkins, 115 N.C. App. 520, 445 S.E.2d 622 (19 July 1994). The court ruled, based on the facts in this case, that the trial judge improperly expressed an opinion in the presence of the jury when he turned his back to the jury for forty-five minutes during the defendant's testimony on direct examination.

(1) Defendant Had No Right To Appeal Ruling On Motion For Appropriate Relief, Based On Facts In This Case
(2) Resentencing Of Defendant After Original Judgments Were Set Aside Did Not Violate G.S. 15A-1335

State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (7 June 1994). (1) The defendant had no right to appeal the judge's ruling on motion for appropriate relief because the time for appeal of the original conviction had expired and no appeal was pending; see G.S. 15A-1422(c)(3). (2) Distinguishing State v. Hemby, 333 N.C. 331, 426 S.E.2d 77 (1993), the court ruled that the trial judge did not violate G.S. 15A-1335 (prohibiting greater sentence after appeal or collateral attack) in resentencing the defendant. Although the trial judge removed one of the offenses from the original sentence (14 years' imprisonment) in consolidating offenses during resentencing, the new sentence (14 years' imprisonment) was less than the presumptive term for the most severe sentence, and therefore the *Hemby* ruling did not apply. The court also noted that the length of the new sentence complied with the plea agreement negotiated before the original sentence was entered, and the judge was simply correcting an administrative error in the original sentencing judgment.

Trial Judge Erred In Refusing To Allow Defendant To Make Offer Of Proof About Proposed Testimony Of Witness, Based On Facts In This Case; Court Remands Case To Superior Court For Evidentiary Hearing

State v. Brown, 116 N.C. App. 445, 448 S.E.2d 131 (20 September 1994). The defendant was convicted of second-degree murder of her husband. The state's evidence showed that on 2 May 1992 the defendant shot her husband at a range of less than six inches. The defendant testified at trial that she fired her gun because she believed that her husband was about to shoot her. She also described her abusive marriage: among other things, her husband regularly threatened to kill her if they separated. The defendant attempted to call as a witness a former girlfriend of the defendant's husband. According to defendant's counsel, the girlfriend would testify how the defendant's husband treated her while the two were living together for three years (1983-1986). The trial judge sustained the state's objection that this proposed testimony was irrelevant as improper character evidence, and it was not probative since six years had elapsed since they had lived together. The trial judge refused to allow the defendant to make an offer of proof of the girlfriend's proposed testimony. (The defendant contended that the evidence would have been relevant to the defendant's knowledge of her husband's violence and to her apprehension or fear of him.) The court ruled that the trial judge erred by refusing to allow the defendant to make an offer of proof. Instead of reversing the conviction and ordering a new trial, the court, relying on State v. Thomas, 327 N.C. 630, 397 S.E.2d 79 (1990), remanded the case to superior court for an evidentiary hearing to record the proposed testimony and to certify the transcript of that testimony to the Court of Appeals. The court then will consider whether the defendant was prejudiced by the trial judge's refusal to allow the girlfriend to testify.