RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
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Robert L. Farb
Institute of Government

NORTH CAROLINA SUPREME COURT

Criminal Offenses

Court Upholds Self-Defense Instruction That Defendant Must Reasonably Believe that It Was Necessary to *Kill* Victim and Disavows Dicta in *State v. Watson* On the Necessity to Modify the Instruction under Some Circumstances

State v. Richardson, 341 N.C. 585, 461 S.E.2d 724 (8 September 1995), *reversing*, 112 N.C. App. 252, 435 S.E.2d 84 (1993). The defendant was convicted of two counts of second-degree murder and one count of felonious assault. The issue in this case was the propriety of the judge's self-defense instruction that followed the four-part test set out in State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981) and State v. McAvoy, 331 N.C. 583, 417 S.E.2d 489 (1992), particularly the wording of the first part:

> (1) it appeared to defendant and he believed it to be necessary *to kill* the deceased in order to save himself from death or great bodily harm [emphasis added];

The court extensively discussed the four-part test, particularly the relationship between parts two and four (the court stated that the focus of part two is the reasonableness of the defendant's apprehension of death or great bodily harm, not the reasonableness of the force used in self-defense, which the jury is specifically instructed to consider under part four). The court rejected the modification of the instruction—required in the Court of Appeals opinion in this case—that would substitute "to shoot [or use deadly force against]" for "to kill." The court noted that in State v. Watson, 338 N.C. 168, 449 S.E.2d 694 (1994) it had stated in dicta that it would be appropriate to instruct a jury on the need "to use deadly force" rather than "to kill" if the evidence supported such an instruction. The court expressly disavowed the dicta in *Watson*. Thus, the instruction, which uses the term "to kill," did not need to be modified.

The court also stated that the self-defense instruction—given with the second-degree murder instruction in this case—did not improperly impose a "specific intent to kill" requirement into self-defense that is not an element of second-degree murder. Simply because the defendant admitted intentionally committing an act resulting in death does not mean that the defendant has admitted forming a specific intent to kill.

Trial Judge Did Not Err in Refusing to Instruct Jury on Imperfect Self-Defense on First-Degree Felony Murder Charge

State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (6 October 1995). The trial judge instructed the jury on perfect and imperfect self-defense on the charge of first-degree murder under the premeditation and deliberation theory. However, when the trial judge instructed the jury on first-degree felony murder, he limited the self-defense instruction to perfect self-defense for the underlying felonies (as set out in N.C.P.I.—Crim. 308.45). The court ruled that the trial judge did not err in his jury instructions and stated that self-defense, perfect or imperfect, is not a defense to first-degree felony murder, and only perfect self-defense is applicable to the underlying felonies in first-degree felony murder. [The court noted that the defendant relied on State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994) (court identified three circumstances in which the defendant is entitled to self-defense instruction in felony murder case), and stated that "self-defense is available in felony murder cases only to the extent that self-defense relates to applicable underlying felonies . . . ." However, the court did not overrule *Bell*.]

Trial Judge Did Not Err in Refusing to Instruct Jury on Attempted Second-Degree Rape

State v. Nelson, 341 N.C. 695, 462 S.E.2d 225 (6 October 1995), *reversing*, 114 N.C. App. 341, 442 S.E.2d 333 (1994). The defendant was convicted of second-degree rape. The victim testified that the defendant had forcible vaginal intercourse with her. The defendant testified that the victim rubbed his back and shoulders. He then felt her rubbing his private parts, after which she unzipped his pants and attempted to have vaginal intercourse with him. She began rubbing his penis against her vagina, but never got it inside her vagina. In sum, the defendant's testimony was that the event was consensual. The defendant asserted on appeal that the trial judge erred in not instructing on attempted second-degree rape. The court ruled that the trial judge did not err because a defendant's denial that he committed a crime is insufficient to require submission of a lesser-included offense. The court noted that in State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985) it said that "[h]ad the defendant unequivocally denied the essential element of penetration," the trial judge should have submitted attempted first-degree rape to the jury. The court's only comment on this statement in *Williams* was: "That language was appropriate in the context of that case but it is not applicable here."

(1) Sufficiency of Indictment Charging Discharging Firearm into Occupied Property
(2) Three Separate Shots into Occupied Vehicle Supported Three Separate Convictions of Discharging Firearm into Occupied Property

State v. Rambert, 341 N.C. 173, 459 S.E.2d 510 (28 July 1995), *reversing*, 116 N.C. App. 89, 446 S.E.2d 599 (1994). The defendant fired three distinct shots into a car occupied by the victim. The defendant was charged with three identically-worded indictments with discharging a firearm into occupied property (G.S. 14-34.1). (1) The court clearly indicated that the indictments were sufficient, although identically worded, because G.S. 15A-924 does not require that an indictment contain any information beyond the specific facts that support the elements of a crime. (2) The court ruled that it was not a violation of the double jeopardy clause or the North Carolina

Constitution for the defendant to be convicted of three offenses based on the three distinct shots into the car.

Diminished Capacity Is Not a Defense to First-Degree Sexual Offense

State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (28 July 1995). The court ruled that diminished capacity is not a defense to first-degree sexual offense, which is not a specific-intent crime.

Court Rejects Imperfect Defense of Habitation

State v. Lyons, 340 N.C. 646, 459 S.E.2d 770 (28 July 1995). The defendant was tried for the murder of a law enforcement officer who was entering the defendant's home to execute a search warrant. The trial judge instructed the jury on the defense of habitation. However, the judge refused to give the defendant's proposed instruction on imperfect defense of habitation, which would make the defendant guilty of voluntary manslaughter if he *unreasonably* defended his home. The court upheld the trial judge, and stated that it rejects the theory of imperfect defense of habitation.

Evidence

Chain of Custody Was Sufficient Although There Was No Direct Evidence About Who Drew Blood At Autopsy

State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (8 September 1995). Blood was drawn from the murder victim at an autopsy; the blood was later tested and used as a basis of expert testimony. The defendant objected to the expert testimony on the ground that the state failed to offer evidence concerning who drew the blood from the victim, and therefore there was an insufficient chain of custody of the blood. The court, relying on State v. Grier, 307 N.C. 628, 300 S.E.2d 351 (1983), noted that the person who drew blood need not testify to establish a proper foundation for admission of the evidence. The court stated that there was sufficient evidence to permit the inference that the blood was drawn by the doctor who performed the autopsy (who was never questioned about drawing the blood sample at trial) or the autopsy assistant, and the blood was then given to the law enforcement officer who was present during the autopsy. The officer testified that he received two vials of the victim's blood directly from the doctor and autopsy assistant. The defendant, however, noted that the doctor did not recall seeing the officer at the autopsy. The court stated that this did not preclude the inference that the autopsy assistant gave the officer the blood, which was withdrawn by either the doctor or the autopsy assistant. The court concluded that any weakness in this chain of custody affected the weight, not the admissibility, of evidence concerning the blood sample.

Defendant Must Offer Evidence That His Mental Illnesses Were Hereditary Before Offering Evidence of Mental Illness in His Family

State v. Lynch, 340 N.C. 435, 459 S.E.2d 679 (28 July 1995). The defendant asserted defenses of insanity and diminished capacity. The court ruled that the trial judge did not err in prohibiting evidence of the defendant's dysfunctional family, because the defendant failed to establish that his particular mental illnesses were hereditary before offering evidence of the history of mental illness in his family. The court cited its ruling in State v. Wade, 296 N.C. 454, 251 S.E.2d 407 (1979).

(1) Bloodstain Pattern Interpretation Is Sufficiently Reliable To Be the Subject of Expert Testimony
(2) Expert Was Properly Permitted to Offer Opinion Testimony That Lack of Blood on the Defendant Was Not Necessarily Exculpatory

State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (8 September 1995). The defendant was tried for the beating and stabbing deaths of two people; the murders were allegedly committed by the defendant and two other people. (1) The court ruled that bloodstain pattern interpretation is sufficiently reliable to be the subject of expert testimony. It also ruled that the state's expert in this case was properly qualified to testify on this subject. (2) The court ruled that the expert was properly permitted to offer opinion testimony—based on the items of evidence, the crime scene, and the autopsy—that the lack of blood on the defendant did not preclude him from having inflicted at least some of the injuries on the victims.

Murder Victim's Statements Were Admissible as Excited Utterances under Rule 803(2)

State v. Littlejohn, 340 N.C. 730, 459 S.E.2d 629 (28 July 1995). Statements made by the victim during an armed robbery and additional statements made by the victim (who had been stabbed) during an ambulance ride to the hospital shortly after the robbery were admissible under Rule 803(2) as excited utterances, based on the facts in this case.

Murder Victim's Statements Were Admissible under Rule 803(3)

State v. Lambert, 341 N.C. 173, 460 S.E.2d 123 (28 July 1995). The defendant testified at trial that her marital relationship with her husband, the murder victim, was excellent. (The court noted that this testimony indicated that she had no reason to kill the victim.) On rebuttal, the state offered testimony of witnesses that the victim had told them that his marriage "wasn't getting along like it should" and that he was leaving the defendant, his wife. The court ruled that this evidence was admissible under Rule 803(3) to show the victim's mental condition at the time he made the statements, and the evidence was relevant to contradict the defendant's trial testimony.

Expert Was Properly Permitted to Testify about DNA Results Based on Test Performed by Another Person Under Expert's Supervision

State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (28 July 1995). The court stated that inherently reliable information is admissible to show the basis for an expert's opinion, even if the

information would otherwise be inadmissible hearsay; the court cited State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984) and Rule 703. Therefore, when SBI agent Matthews performed DNA analysis under SBI agent Boodee's direct supervision and Boodee reviewed Matthews' final report, Boodee was properly permitted to testify about the results of the DNA testing and the statistical significance of the results even though Boodee did not personally perform the tests.

Defendant Was Properly Cross-Examined under Rule 608(b) About Prior False Statements Made After an Assault

State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (8 September 1995). The defendant was tried for the beating and stabbing deaths of two people. Based on the standard for the admissibility of evidence under Rule 608(b) set out in State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986), the court ruled that the trial judge properly permitted the state to ask the defendant on cross-examination whether he lied to hospital personnel and to his commanding officer about what had occurred during a prior, unrelated assault (but the trial judge excluded any reference to the assault). False statements are indicative of the defendant's truthfulness or untruthfulness.

State Was Properly Permitted to Question Defense Psychiatrist About Why He Had Not Considered Statements of Accomplices in Forming Opinion on Defendant's Impaired Capacity

State v. Gregory, 340 N.C. 365, 459 S.E.2d 638 (28 July 1995). The defense psychiatrist testified during the capital sentencing hearing about the defendant's impaired mental capacity. The psychiatrist testified that he had reviewed statements of the accomplices (which were inconsistent with the defendant's statement), but had not used them as a basis of his opinion testimony. The trial judge refused to allow the prosecutor to introduce the accomplices' statements as substantive evidence or as nonsubstantive basis-of-opinion evidence under Rule 705. However, the judge permitted the prosecutor to question the psychiatrist about his reasons for reviewing these statements but not using them as a basis of his opinion testimony, including the psychiatrist's knowledge that the accomplices' statements about the murders were different from the defendant's statement. The court ruled that prosecutor was properly permitted to do so to impeach the psychiatrist's credibility under Rule 611(b).

Prosecutor Was Surprised By Change of Testimony by State's Witness and Therefore Was Properly Allowed to Impeach the Witness with Prior Inconsistent Statements

State v. Williams, 341 N.C. 1, 459 S.E.2d 208 (28 July 1995). A state's witness testified on direct examination that the defendant told her that Wilson shot the victim. The prosecutor was then allowed to impeach the witness with her prior inconsistent statements that the defendant told her that he (the defendant) shot the victim. The court ruled that the prosecutor was properly permitted to impeach the witness, since up to the time of the trial the prosecutor believed the witness would testify consistently with her prior statements. The prosecutor was surprised by her trial testimony. See generally State v. Miller, 330 N.C. 56, 408 S.E.2d 846 (1991); State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989). The court stated that the fact that the prosecutor knew

that the witness had visited the defendant in jail and had ridden home with the defendant's mother during trial did not show that the prosecutor knew that the witness would change her testimony.

Codefendant's Confession Was Not Properly Redacted Because of Reference to the Defendant, Even Though Not Named in Redacted Confession

State v. Littlejohn, 340 N.C. 730, 459 S.E.2d 629 (28 July 1995). The defendant was tried jointly with his codefendant for murder, armed robbery, and assault. The state introduced the codefendant's confession and deleted all references to the defendant. The court noted that in State v. Hayes, 314 N.C. 460, 334 S.E.2d 741 (1985) and State v. Gonzalez, 311 N.C. 80, 316 S.E.2d 229 (1984) it had ruled that the introduction of a nontestifying defendant's confession that does not mention the codefendant could implicate the defendant and violate the *Bruton* [Bruton v. United States, 391 U.S. 123 (1968)] if the confession clearly refers to the codefendant. In this case, the defendant's redacted confession said that after the criminal events, the defendant and four others went to a motel room. Two accomplices (who were named and did not include the codefendant) left the room while the three remaining (which included the codefendant) divided the robbery money. The court agreed with the defendant that, based on the facts in this case, the reference to three people should not have been admitted into evidence because the reference had to include the defendant. However, the court ruled that the error was harmless beyond a reasonable doubt.

Defendant's Prior Assaults On Mother of Murder Victim Were Admissible Under Rule 404(b)

State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (8 September 1995). The defendant was tried for the murder of a four-month old child. The child suffered multiple fractures and bruises. (The child's mother and the defendant lived together in a trailer, where the child was killed when the defendant was the only adult in the trailer.) The state was permitted to offer testimony under Rule 404(b) from the child's mother and others about the defendant's prior assaults on the child's mother, which caused bruises unusually similar to those suffered by the child. Also, the child's injuries were caused by acts unusually similar to the acts the defendant had committed against the mother. The court ruled that this evidence was properly admitted under the rule to prove the identity of the person who murdered the child.

State Did Not Open the Door to Permit the Admission of the Defendant's Exculpatory Statement During the State's Case

State v. Vick, 341 N.C. 569, 461 S.E.2d 655 (8 September 1995). The state offered evidence that during processing of the defendant after his arrest, the defendant volunteered a statement in which he asked why wasn't his accomplice here, since she was with him that night (when the murders were committed). On cross-examination, the defendant attempted to elicit testimony that ten to fifteen minutes later, after the defendant had been brought into an officer's office and given *Miranda* warnings, the defendant stated that his arrest was a mistake. The court ruled that the trial judge properly refused to admit this exculpatory statement into evidence. First, the defendant's statement during processing was not part of the same verbal transaction as the later

exculpatory statement in the officer's office. Second, the state did not open the door by introducing the defendant's statement during processing to permit the defendant to introduce his later exculpatory statement; the court cited State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995). The first statement did not raise specific issues or evidence about a particular fact or transaction that was discussed in the later statement.

Evidence of Victim's Character Is Irrelevant in Homicide Case When Defense of Accident Is Asserted

State v. Goodson, 341 N.C. 619, 461 S.E.2d 740 (8 September 1995). The court ruled under Rule 404 that evidence of a victim's violent character is irrelevant (that is, it is not pertinent) in a homicide case in which the defendant relies on the defense of accident.

Capital Case Issues

Jury Must Be Unanimous As To Answer "No" As Well As "Yes" to Issues One, Three, and Four on Issues and Recommendation Form

State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (8 September 1995). After deliberating for several hours, the capital sentencing jury sent a written inquiry to the trial judge concerning Issue Three on the issues and recommendation form. (Issue Three asks: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by one or more of you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found unanimously by you in issue one?) The jury asked the judge whether its answer, "yes" or "no," must be unanimous. The judge instructed the jury that it must be unanimous for either answer. The defendant requested that the judge amend the instruction so the jury must answer "no" (thus recommending a life sentence) if it could not unanimously agree whether the mitigating circumstances were insufficient to outweigh the aggravating circumstances. The judge denied this request. The court ruled that, under the North Carolina Constitution and G.S. 15A-2000, any issue that is "outcome determinative" of the sentence in a capital trial must be answered unanimously by the jury. Thus, the jury must answer Issues One, Three, and Four on the issues and recommendation form unanimously "yes" or unanimously "no." [The court noted that Issue Two, the determination of mitigating circumstances, is not outcome determinative and, in any event, unanimity in finding mitigating circumstances was found unconstitutional in McKoy v. North Carolina, 494 U.S. 433 (1990).]

The court stated that requiring unanimity for either "yes" or "no" answers for Issues One, Three, and Four "ensures that the jury *properly* fulfills its duty to deliberate *genuinely* for a *reasonable* period of time in reaching a unanimous sentencing recommendation, as required by the Constitution of North Carolina and by our death penalty statute itself [emphasized words are in the court's opinion]." The court also stated that if the jury is unable to agree unanimously as to one of these issues, it should simply report that fact to the trial judge, whose duty would be to impose a sentence of life imprisonment. However, the jury should not initially be made aware of the law about their inability to agree unanimously, because to do so "would be an open invitation to the jury—or a single juror—to avoid its responsibility to *fully* deliberate and to force a recommendation of life [imprisonment] by the simple expedient of disagreeing [emphasized word

is in the court's opinion]." Instead, the judge must inform the jurors that their inability to reach unanimity "should not be their concern but should simply be reported to the court" *only if* the jury makes an inquiry about this issue. Otherwise, no instruction is warranted.

The court examined the facts in this case and ruled that the trial judge did not err in failing to advise the jury of what would happen if it did not reach a unanimous decision on Issue Three, because the jury's inquiry did not concern that issue. Instead, the jury sought guidance on the procedure for giving an answer to Issue Three.

Trial Judge Did Not Coerce Verdict in His Instructions to Jury When It Indicated It Was Divided Eleven to One On Issue Four on Issues and Recommendation Form

State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (8 September 1995). On the second day of a capital sentencing jury's deliberations, the jury sent a note to the trial judge indicating it was divided eleven to one on its recommendation as to punishment. The trial judge instructed the jury that its answer to Issue Four, whether "yes" or "no," must be unanimous. The court noted, based on its ruling in State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (8 September 1995), discussed above, that this instruction was proper. After examining the judge's instructions, the court ruled, distinguishing State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987), that they were not coercive.

Defendant's Stipulation at First Capital Sentencing Hearing to Admission of a Prior Violent Felony Conviction Was Properly Admitted At Second Capital Sentencing Hearing Over Defendant's Objection

State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (8 September 1995). The defendant was convicted of first-degree murder and sentenced to death. During the sentencing hearing, the defendant stipulated that he had previously been convicted of involuntary manslaughter and that act involved the use of violence, thereby establishing the aggravating circumstance of a prior violent felony conviction, G.S. 15A-2000(e)(3). The North Carolina Supreme Court ordered a new sentencing hearing, based on an error in jury instructions. At the beginning of the new sentencing hearing, the defendant moved to withdraw the stipulation. Without an objection from the state, the judge allowed the withdrawal. However, during the sentencing hearing, the state sought to reintroduce the stipulation after it presented eyewitness testimony about the circumstances of the shooting that led to the conviction. The court ruled that the stipulation was properly admitted into evidence. The court rejected the defendant's argument that it was an impermissible stipulation about a matter of law. The court concluded that although the stipulation used the language "involved the use of violence," this language addressed the factual circumstances supporting the prior conviction, rather than a legal standard.

District Court Judge's Excusal of Prospective Jurors Was Not a Stage of a Capital Trial and Therefore Defendant's Absence Did Not Violate the Defendant's Federal or State Constitutional Rights

State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (8 September 1995). A superior court judge ordered a special venire from another county for the defendant's first-degree murder trial. A district court judge in the other county, acting under G.S. 9-6(b), excused twenty-three

prospective jurors and deferred seven during the screening process, which was completed on 28 August 1992. On 2 September 1992, the defendant moved to quash the venire because neither the defendant nor his attorney had been present when the district court judge had excused and deferred jurors. The trial judge denied the motion. The defendant's trial began on 8 September 1992. The court, relying on State v. Cole, 331 N.C. 272, 415 S.E.2d 716 (1993), ruled that the defendant did not have a constitutional right to be present during pretrial jury selection matters. It was irrelevant that the jury venire was picked specifically for the defendant's trial.

Judge Properly Did Not Submit G.S. 15A-2000(f)(1) (No Prior Significant Criminal History)

State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (28 July 1995). Evidence of the defendant's prior criminal history included defendant's many beatings of the victim, defendant's shooting an acquaintance in the leg, a conviction for driving under the influence, and a conviction of assault inflicting serious injury (the defendant hit a man in the head with a large stick, causing a concussion, a broken jaw, and broken ribs). The court ruled that the judge properly determined that no reasonable juror could have found that the defendant's criminal history was insignificant, and therefore properly did not submit G.S. 15A-2000(f)(1).

Judge's Peremptory Instruction for Nonstatutory Mitigating Circumstance Was Proper

State v. Lynch, 340 N.C. 435, 459 S.E.2d 679 (28 July 1995). The court ruled that the following peremptory instruction for a nonstatutory mitigating circumstance was proper:

> All of the evidence tends to show [name the mitigating circumstance]. Accordingly, as to this mitigating circumstance, I charge that if you find the facts to be as all the evidence tends to show, you will answer "Yes" as to the mitigating circumstance number [give number] on the issues and recommendation form if one or more of you deems it to have mitigating value.

Arrest, Search, and Confession Issues

Officers' Failure to Electronically Record Defendant's In-Custody Statements Was Not a Violation of Federal or State Constitutions

State v. Thibodeaux, 341 N.C. 53, 459 S.E.2d 501 (28 July 1995). The court rejected the defendant's argument that the officers' failure to electronically record the defendant's in-custody statements was a violation of the due process rights of the defendant under federal and state constitutions.

Defendant's Confession Was Voluntary, Based on the Facts in this Case

State v. McCullers, 341 N.C. 19, 460 S.E.2d 163 (28 July 1995). Officers were investigating a murder in which several people beat, killed, and robbed the victim. The defendant, who was eighteen years old and was working toward his GED, agreed to come to the police station for

questioning. He was given his *Miranda* warnings and waived them. The defendant was alert and not under the influence of drugs or alcohol. One officer stated to the defendant that it would be better for the defendant if he said that he did not mean to kill the man than for him to keep denying that he did it. He also swore at the defendant on two occasions. Two other officers then took a statement from the defendant, who stated that no one had threatened him or made him say anything he did not want to say. The trial judge found that no officer made any threats or promises or created any coercive atmosphere near the defendant. No physical or verbal activity by officers induced the defendant to make his statements. (The defendant did not testify at the suppression hearing.) The trial judge ruled that the confession was voluntarily made. The court, distinguishing State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975), State v. Fuqua, 269 N.C. 223, 152 S.E.2d 68 (1967), and State v. Stevenson, 212 N.C. 648, 194 S.E. 81 (1937) and relying on State v. Smith, 328 N.C. 99, 400 S.E.2d 712 (1991) and State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983), upheld the trial judge's ruling. The court noted that the officer did not accuse the defendant of lying, but rather informed him of the crime and urged him to tell the truth and think about what would be better for him. The court also noted that the defendant's contention that he was intimidated or coerced by the officer's profanity was not persuasive in light of the defendant's own use of profanity during the interrogation. Under the totality of circumstances, the officer's isolated statements did not support the defendant's contention that his statement was made involuntarily based on fear or hope.

Recording of Defendant's Telephone Conversation Did Not Violate Defendant's Fifth Amendment Rights

State v. Powell, 340 N.C. 674, 459 S.E.2d 219 (28 July 1995). The defendant was arrested for murder and asserted his right to counsel during custodial interrogation. He was placed in jail. Later, the defendant made a telephone call to two people (Weathers and Yelton), who recorded the conversation and gave the recording to the police. Weathers testified that he recorded the conversation for "personal reasons." He also testified that no officer had requested them to record conversations with the defendant, although they had been told that any information they had concerning the murder would help the police. The court ruled that the defendant's Fifth Amendment rights were not violated because Weathers and Yelton did not make the recording as agents of the police.

Defendant's Statement Was Neither Product of Interrogation Nor Assertion of Right to Silence

State v. Lambert, 341 N.C. 36, 460 S.E.2d 123 (28 July 1995). The defendant was in jail and requested that an officer come to speak to her. After the defendant spoke with her father, she approached the officer and told him that she had "blacked out" and could not remember anything. The court ruled that her statement was admissible under *Miranda* because (1) it was not made as a result of interrogation, and (2) it was not an invocation of the right to silence (her specific request to speak to the officer and this statement indicated a desire *not* to remain silent).

Since Defendant Was Not in Custody When He Requested Counsel, *Miranda* Protections Were Inapplicable

State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (28 July 1995). The defendant voluntarily went with two officers to the police station to be questioned about a murder. The officers advised the defendant that he was not under arrest and could leave at any time. One officer advised the defendant of his *Miranda* rights as a precaution. The defendant waived those rights. After some conversation between the officers and the defendant, the defendant said, "I think I need to speak to a lawyer." One officer handed the defendant the telephone directory opened to the yellow pages with attorney listings. As he did so, the officer told the defendant that he could talk to a lawyer and continue to talk to the officers if he wished. The defendant briefly looked at the yellow pages and then told the officers that he was willing talk to the officers. One officer reminded the defendant of his rights to remain silent and to an attorney; the defendant indicated that he understood his rights. The defendant had not been placed under arrest. He then confessed. The court ruled that since the defendant was not in custody when he requested an attorney, his rights under *Miranda* and Edwards v. Arizona, 451 U.S. 477 (1981) were inapplicable. Therefore, the court did not need to decide whether the trial judge had erred in concluding that the defendant had voluntarily reinitiated interrogation after requesting an attorney.

Thirteen-Hour Delay Between Defendant's Arrest and Appearance Before Magistrate Was Not Unnecessary Delay under G.S. 15A-501(2)

State v. Littlejohn, 340 N.C. 730, 459 S.E.2d 629 (28 July 1995). The defendant was arrested for murder and other offenses, interrogated for ten hours during which time he confessed, and then taken to the magistrate. The total period of time from the arrest and appearance before the magistrate was thirteen hours. The court ruled, based on these and other facts (for example, the officers advised him of his constitutional rights before they began interrogation), the delay did not violate G.S. 15A-501(2) (duty to take arrestee before magistrate without unnecessary delay).

Although Officers Executing a Search Warrant Announced Their Identity and Purpose, Their Entry by Force Could Be Justified By Exigent Circumstances Under G.S. 15A-251(2)

State v. Lyons, 340 N.C. 646, 459 S.E.2d 770 (28 July 1995). Officers executing a search warrant of an apartment to search for drugs announced their identity and purpose while using a battering ram to enter the apartment, even though—based on the facts in this case—they did not need to make such an announcement under G.S. 15A-251(2) (forcible breaking and entering to execute warrant is authorized if officer has probable cause to believe that giving of notice would endanger life). The court ruled that the fact that officers announced their identity and purpose did not mean that entry by force was not justified under G.S. 15A-251(2). In this case, the court noted that the following evidence supported a forcible entry under G.S. 15A-251(2): the officers believed that a firearm was inside the defendant's apartment; the defendant would not cooperate; the area outside the defendant's door was so small that even though officers felt the situation was dangerous, their weapons were not drawn because of the fear of harming other officers and bystanders; and one officer heard two arguing voices within the apartment.

(1) Forcible Entry into Home to Execute Arrest and Search Warrants Was Proper
(2) Search Warrant Was Properly Executed
(3) Even If Entry into Home Was Unconstitutional, Confession Obtained at Police Station Was Admissible

State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (28 July 1995). The murder victim was stabbed twenty-seven times, castrated, and his penis inserted in his mouth. Officers went to the defendant's home to execute arrest and search warrants for this murder. They knocked on the front door several times and announced, "Police! Search warrant!" at least two or three times. After waiting thirty to sixty seconds and hearing no response from inside the residence, the officers used a battering ram to open the door. They entered the residence, conducted a quick sweep for weapons, and arrested the defendant. The defendant was taken to the police station, where he confessed to his participation in the murder and also told the officers where one of the knives used in the murder was located in this house. (1) The court ruled that the officers' forcible entry into the premises was reasonable under the Fourth Amendment [see Wilson v. Arkansas, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995)] and complied with the provisions of Chapter 15A. They had probable cause to believe that further delay in entering the residence or the giving of more specific notice would endanger their own safety or other occupants of the residence. They knew that the defendant was dangerous, armed with a hunting knife and possibly firearms; there was at least one other suspect who had not been arrested; they were concerned about the safety of a woman and her children inside the residence, who might become hostages; and if the entry was not forced, it would not be safe. (2) The search warrant was located at the residence when it was entered by the officers and was read to the defendant about ten minutes after the entry into the residence and after the initial sweep, but before any search was undertaken. The court ruled that the execution of the search warrant complied with the provisions of Chapter 15A. (3) The court ruled, citing New York v. Harris, 495 U.S. 14 (1990) (confession is not to be suppressed even though officers made unconstitutional entry into home to arrest defendant, when officers had probable to arrest and the confession was taken outside home), that even assuming the forcible entry was unconstitutional, the defendant's confession at the police station was still admissible. The confession was not the fruit of the alleged illegal entry into the home, when the confession was taken at another location and the officers had probable cause to arrest him in any event.

Homeowner's Consent to Search Residence for a Gun Included Pile of Clothes in a Room in Residence

State v. Garner, 340 N.C. 573, 459 S.E.2d 718 (28 July 1995). A homeowner consented to a search of her residence after officers said that they were looking for a pistol involved in a shooting. An officer saw a pile of men's and women's clothes in a room. He picked them up and squeezed them to see if he could find a weapon. He found a weapon in a man's jacket (the officer was unaware to whom the jacket belonged), which later was determined to be the defendant's. The court ruled that the homeowner's consent was valid under United States v. Matlock, 415 U.S. 164 (1974).

Miscellaneous

Defendant Failed to Establish Prima Facie Case Under *Batson*

State v. Quick, 341 N.C. 141, 459 S.E.2d 786 (28 July 1995). The defendant, who was black, was charged with several sexual offenses against the victim, who was white. The racial composition of the original twelve prospective jurors called to the jury box was three black females, one black male, five white females, and three white males. When the prosecutor completed his questioning of these jurors, he peremptorily challenged a black female juror and the black male juror. The defendant objected to the challenges on *Batson* grounds, but the trial judge ruled that the defendant had failed to make a prima facie case that the prosecutor's peremptory challenges were based on race or motivated by racial considerations. The judge noted that the state had accepted two of the four black jurors from the original panel. The court upheld the trial judge's ruling, relying on its ruling in State v. Ross, 338 N.C. 280, 449 S.E.2d 556 (1994) and the relevant factors set out in that case in analyzing the prima facie issue. The court noted that there were no statements or questions by the prosecutor that would raise an inference of racial discrimination. In addition, the prosecutor only used two of his peremptory challenges. The mere fact that he used them against two prospective black jurors did not establish a pattern of strikes or show a disproportionate number of peremptory challenges against black jurors; the state accepted fifty percent (two of the four) of the prospective black jurors. The jury eventually selected was composed of two black jurors accepted by the state and ten white jurors. The black female juror excused by the prosecutor had been the victim of a recent crime. Two white jurors who had been victims of recent crimes also were excused by the prosecutor.

State Was Entitled to Statutory Discovery of Defendant's Individual Answers to MMPI Test Administered by Defense Expert, Based on Facts in This Case

State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (8 September 1995). Pursuant to the state's request for discovery under G.S. 15A-905(b) (which allows, in the part pertinent to this case, the state's discovery of tests or examinations that were prepared by a witness whom the defendant intends to call at trial, when the results relate to the witness's testimony), the trial judge ordered the defendant to produce all results of physical and mental examinations in the defendant's possession. The defendant specifically objected to the production of the defendant's answers to the MMPI (Minnesota Multiphasic Inventory Test), because the defendant did not complete the test and did not intend to introduce its results, and the defense expert psychologist did not rely on the test in forming her expert opinion. The court ruled that the judge's order was proper. Although the defense expert did not score or interpret the entire test, her testimony revealed that she considered the answers and the defendant's inability to complete the test in formulating her final opinion about the defendant. Thus, the state was properly permitted the opportunity to discover the test and to cross-examine the expert on that subject.

Judge's Did Not Err in Refusing to Rule In Advance on Propriety of State's Cross-Examination of Proposed Defense Witness

State v. Hightower, 340 N.C. 735, 459 S.E.2d 739 (28 July 1995). The court ruled that the trial judge did not err in refusing to rule, in advance of the testimony of a defense witness (the former wife of the defendant), on the defendant's motion to prohibit the state from cross-examining his former wife about the defendant's prior assaultive conduct toward her. The defendant's decision not to call her as a defense witness was purely a tactical decision that did not implicate any of the defendant's constitutional rights; the court distinguished its ruling in State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988), since that case involved the *defendant's* decision whether to testify.

Judge Was Not Required to Recuse Himself at Trial of Defendant After Presiding at Trial of Accomplice

State v. Vick, 341 N.C. 569, 461 S.E.2d 655 (8 September 1995). Two people were charged with committing two murders. Defendant A was tried first. The jury convicted defendant A of two counts of accessory after the fact of murder. The trial judge during sentencing found as a mitigating factor that defendant A acted under the duress of defendant B. Defendant B moved before his trial that the trial judge (the same judge who tried defendant A) recuse himself from presiding at his trial. The motion was heard by another judge and was denied. The court ruled that the trial judge was not required to recuse himself. Distinguishing State v. Fie, 320 N.C. 626, 359 S.E.2d 774 (1987), the court concluded that the defendant B did not present substantial evidence of partiality or the appearance of partiality by the trial judge. The judge had not made any comments on the credibility of any witnesses or the validity of the charges against defendant B. The jury's verdict as to defendant A (in effect, that defendant B was the principal) was the jury's finding, not the trial judge's. Also, the judge's finding of the mitigating factor was supported by the evidence and did not suggest partiality. The court also rejected the defendant's argument that, in high-profile capital cases, a judge should recuse himself or herself from all other cases of codefendants.

Trial Judge Erred in Not Requiring All Jurors to Return to Courtroom When Jury Had Questions About Which Exhibits It Wished to See

State v. Nelson, 341 N.C. 695, 462 S.E.2d 225 (6 October 1995). The jury sent, through the bailiff, a note to the trial judge about some exhibits it wanted to see. The trial judge announced to the prosecutor and defense counsel that he was only going to ask the jury foreperson to come out. A discussion occurred about the exhibits in the absence of the other jurors, and exhibits were sent to the jury room with the foreperson. The trial judge noted for the record that this "was done in accordance with the procedure suggested by" defense counsel. The defendant contended on appeal that the absence of the other jurors violated G.S. 15A-1233 and the unanimous verdict requirement of the North Carolina Constitution. First, the court noted that the defendant may raise this issue on appeal without having objected at trial [State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985)] and that the trial judge's statement about defense counsel's position, set out above, was insufficient to show that the defendant consented to the procedure. However, the court found

that the trial judge's error in not having all the jurors present when this issue was discussed was harmless beyond a reasonable doubt, based on the facts in this case.

(1) Court Need Not Consider Defendant's Ability to Pay When Recommending Restitution as Condition of Parole or Work Release
(2) Prosecutor's Unsworn Statement Is Insufficient to Support Amount of Restitution Ordered

State v. Wilson, 340 N.C. 720, 459 S.E.2d 192 (28 July 1995). The defendant was convicted of first-degree murder and felonious assault. The trial judge recommended, based on the prosecutor's unsworn statement, that the defendant pay restitution of $4,000 for funeral expenses as a condition of work release or parole. The court ruled: (1) a trial judge need not consider the defendant's ability to pay when recommending that the defendant pay restitution as a condition of work release or parole; and (2) a prosecutor's unsworn statement that funeral expenses were $4,000 was insufficient evidence to support the judge's recommendation of the amount of restitution.

NORTH CAROLINA COURT OF APPEALS

Arrest, Search, and Confession Issues

(1) Officers Had Reasonable Suspicion to Stop Defendant for Possession of Drugs
(2) Officer's Application of Pressure to Defendant's Throat to Prevent Him from Swallowing Drugs Was Reasonable

State v. Watson, 119 N.C. App. 395, 458 S.E.2d 519 (5 July 1995). Three officers approached a convenience store at night. Officer A had made fifty or more arrests for possessing cocaine in this area. Officer A knew the defendant had previously been arrested for drug charges. The defendant, on seeing the officers, put items in his mouth and started to go back into the store. Officer A grabbed the defendant's jacket, and the defendant then attempted to drink a soft drink. The officer took the drink away, ordered the defendant to spit out the objects in his mouth, and applied pressure to the defendant's throat so he would spit out the items. The defendant did spit out three baggies containing crack cocaine. (1) Based on this and other evidence (for example, officers testified at the suppression hearing that drug dealers will attempt to conceal or to swallow drugs when they see officers), the court ruled that the officers had reasonable suspicion to stop the defendant; the court cited State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992). (2) The court also ruled that exigent circumstances supported the reasonableness of the officer's actions in applying pressure to the defendant's throat so he would not swallow the drugs he had placed in his mouth (considering the officers' training and experience, their familiarity with the area, the defendant, and the practice of drug dealers to hide drugs in their mouth to elude detection).

(1) Officers Had Reasonable Suspicion to Stop Vehicle for Drug Investigation
(2) Officers Had Authority to Search Vehicle for Weapons
(3) Arrest of Vehicle Occupants Allowed Warrantless Search of Ashtray Incident to Arrest

State v. Clyburn, 120 N.C. App. 377, 462 S.E.2d 538 (3 October 1995). Officers were conducting surveillance at night at a place which had a reputation for drug activity and where officers had previously made drug arrests. Officers saw three males in front of a vacant duplex. Individuals would approach one of the males, who would disappear behind the duplex with each individual. The other two males remained in front of the duplex as if acting as lookouts. Each time the defendant reappeared, the other two males conferred with him. Based on the officers' training and experience with similar activity, they believed that drug transactions were being conducted. After one such activity, one of the males and a female got into a car and drove away. The car was stopped and the male (the defendant) and female were frisked. An officer searched the passenger area of the car and found a .357 Magnum in the glove compartment. The male was arrested for carrying a concealed weapon. Following the arrest, the car was searched and crack cocaine was found in an ashtray. The court ruled: (1) the officers had reasonable suspicion to stop the car to investigate drug activity; (2) the search of the car for weapons was proper under Michigan v. Long, 463 U.S. 1032 (1983); after the defendant had been frisked, he had become belligerent and the officers could reasonably believe that the defendant was potentially dangerous and may be armed because of his involvement in drug trafficking; the court also cited State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992); (3) the search of the ashtray was permissible as a search incident to the arrest of a vehicle occupant under New York v. Belton, 453 U.S. 454 (1981).

Officer Had Reasonable Suspicion to Stop Car to Investigate Armed Robbery

State v. Jordan, 120 N.C. App. 364, 462 S.E.2d 234 (3 October 1995). An officer received a call that two black males, one wearing dark clothing and the other wearing a green jacket, had just left a Pick-N-Pay shoe store after committing an armed robbery. The officer saw a small blue car come from behind Revco Drugs in the shopping center as he drove toward the shoe store. The area from which the car came was not used for public parking. The blue car contained three black males. The officer saw no other black people in the area. The officer followed the car and noticed that the back seat passenger kept looking back at his police vehicle. When he saw an arm reach out of the passenger window and drop two small card-like objects, he stopped the car. The court ruled that the officer had reasonable suspicion to stop the car to investigate the armed robbery.

(1) Defendant Was Not Seized When Officer Asked For Permission to Frisk
(2) Court Rejects Defendant's Argument That Ruling in *California v. Hodari D.* Should Not Be Adopted Under North Carolina Constitution

State v. West, 119 N.C. App. 562, 459 S.E.2d 55 (18 July 1995). Two officers, dressed in civilian clothes, were at an airport with a drug interdiction unit. They noticed two suspicious males at the terminal and followed them to the parking lot. They approached the defendant and his acquaintance as they stood on each side of a parked car. Officer Black presented his credentials, identified himself as a police officer, and requested to speak to the defendant. The defendant provided to the officer, at the officer's request, his airline ticket and identification. The

defendant was extremely nervous and his hands were shaking. Black told the defendant that he was investigating drugs and asked the defendant for his consent to search his luggage. The defendant agreed and handed it to Black. As the defendant gave his luggage to Black, Black noticed the defendant's hands trembling and jerking back briefly. This jerking motion startled Black. Concerned for his safety, Black asked the defendant for permission to frisk him before checking his luggage. Without responding to Black, the defendant ran. (The defendant later threw down a bag containing crack cocaine.) The court ruled that, based on this evidence, the defendant was not seized under the Fourth Amendment. Applying the principles of California v. Hodari D., 499 U.S. 621 (1991) that a seizure does not occur until there is a physical application of force or the submission to a show of authority, the court ruled that neither had occurred at the time the defendant ran from the officers. The court noted that while there was testimony that Black may have reached for the defendant, there was no evidence indicating that Black physically applied force or that the defendant submitted to any show of force. When Black had asked for permission to frisk the defendant, the encounter was consensual and did not require reasonable suspicion. (2) The court rejected that defendant's argument that the ruling in *Hodari D.* should be rejected under the North Carolina Constitution.

Search Warrant and Search of People on City Block Violated Fourth Amendment

Barnett v. Karpinos, 119 N.C. App. 719, 460 S.E.2d 208 (15 August 1995). This case was before the court on the plaintiff's appeal of the trial judge's grant of summary judgment for the civil defendants. (Thus, for purposes of this appeal, the plaintiffs' allegations are assumed to be true.) A search warrant authorized a search for cocaine, drug paraphernalia, currency, and drug transaction records in buildings at 107 and 115 Graham Street and people congregating in the block of Graham Street between W. Franklin and W. Rosemary streets in Chapel Hill. The court ruled that, based on the facts in this case, the search warrant was invalid as a general warrant that was not supported by probable cause. The court also ruled that the defendants' decision to detain and frisk all people found within the block was not supported, based on the facts in this case, by individualized justification under the Fourth Amendment.

(1) Evidence of Controlled Buy from House By Informant Acting under Officer's Supervision, Occurring within Six Days of Application for Search Warrant, Was Sufficient Probable Cause for Search Warrant
(2) Typographical Error in Application for Search Warrant Was Not Fatal

State v. Ledbetter, 120 N.C. App. 117, 461 S.E.2d 341 (5 September 1995). The affidavit for a search warrant described an informant's controlled buy of cocaine under an officer's supervision from a house on 25 Monmouth Street, Winston-Salem. The controlled buy was made within six days of the application for the search warrant to search the house for cocaine. (1) The court ruled that this information provided a substantial basis for concluding that probable cause existed to search the house for cocaine. The court noted that the reliability of the informant was not pertinent in this case because the focus of the information was on the controlled buy made under the officer's supervision. The court also rejected the defendant's argument that the passage of six days from the controlled buy made the information too stale to establish probable cause; the court noted that drug selling is ordinarily a continuing activity. (2) The application for the search

warrant referred to the seizure of the "Schedule II controlled substance marijuana" when it should have stated "cocaine." The court noted that the affidavit referred to cocaine and ruled that this error was not fatal to the validity of the search warrant.

(1) Officer's Question to Defendant After He Asserted His Right to Counsel Violated *Edwards v. Arizona*
(2) Admission of Illegally-Obtained Confession at Trial Did Not Improperly Induce Defendant to Testify

State v. Easterling, 119 N.C. App. 22, 457 S.E.2d 913 (6 June 1995). The defendant was tried and convicted of multiple counts of rape and sexual offense that he committed with his accomplice, Sherman White. (1) After a detective gave the defendant his *Miranda* warnings, the defendant asserted his right to counsel. The detective later informed the defendant that he would be taken to the magistrate's office to be served with arrest warrants. The detective then said, "Who was Sherman?" The defendant said "White." Just a few moments later the defendant indicated that he wanted to talk about the case. The detective then gave him *Miranda* warnings, obtained a waiver, and the defendant gave an incriminating statement that was introduced in the state's case-in-chief at trial. The court ruled that the detective's question constituted interrogation because it was designed to elicit an incriminating response, and therefore was improper under *Edwards v. Arizona*, 384 U.S. 436 (1981) because it was made after the defendant's assertion of his right to counsel. In addition, the defendant's statement a few moments later that he was willing to talk about the case was a continuation of the improper interrogation (that is, it was not simply the defendant's initiation of communication with the detective). Thus, the trial judge erred in admitting the defendant's confession. (2) The court ruled that, based on the state's overwhelming evidence against the defendant in this case, the defendant was not induced to testify in his behalf because of the introduction in the state's case-in-chief of this illegally-obtained confession; see generally Harrison v. United States, 392 U.S. 219 (1968). The court also ruled that the introduction of the confession was harmless error beyond a reasonable doubt.

Defendant Was Not in Custody to Require *Miranda* Warnings During Interview or Polygraph Test, Based on Facts in This Case

State v. Soles, 119 N.C. App. 375, 459 S.E.2d 4 (5 July 1995). Officers took the defendant, with his consent, to Gastonia for questioning. The defendant was not handcuffed during a four-hour interview, was left alone, and was allowed to use the vending machines. The defendant conceded on appeal that he was free to leave and voluntarily gave a statement to the officers. The court ruled that the defendant was not in custody to require *Miranda* warnings. At a second interview, a polygraph examiner confronted the defendant about patterns of deception and questioned him in addition to the polygraph testing. The operator had given *Miranda* warnings to the defendant and obtained a waiver before the testing. In any event, the court that ruled that the defendant was not in custody to require *Miranda* warnings, since the defendant had voluntarily come to the police station for the polygraph and was free to leave at any time. The court also ruled, based on the facts in this case, the defendant's statement was voluntarily given.

Criminal Offenses

Conspiracy Conviction of Defendant Was Upheld Even Though Only Other Conspirator Was Acquitted At Later Separate Trial

State v. Soles, 119 N.C. App. 375, 459 S.E.2d 4 (5 July 1995). The defendant was convicted of conspiracy to commit murder. At a later separate trial, the other conspirator (there were no others) was acquitted of that conspiracy charge. The court, distinguishing State v. Raper, 204 N.C. 503, 168 S.E.2d 831 (1933) (defendant's conspiracy conviction must be set aside when all co-conspirators had been acquitted at same trial or prior trial), ruled that the defendant's conviction remained valid, because the acquittal of the co-conspirator occurred at a later separate trial.

(1) Indictment for Possession of Firearm By Convicted Felon Was Sufficient
(2) Possessing Firearm at Home or Business Is Not Element Unless Defendant Presents Evidence To Come Within Exception
(3) Whether Out-Of-State Felony Is "Substantially Similar" to North Carolina Crime Is a Determination for a Judge, Not a Jury

State v. Bishop, 119 N.C. App. 695, 459 S.E.2d 830 (1 August 1995). The defendant was convicted of possession of a firearm by a convicted felon (G.S. 14-415.1). The court ruled: (1) the indictment does not have to allege that (i) the firearm was not possessed in the defendant's home or business, or (ii) the defendant's prior Florida felony conviction was "substantially similar" to a North Carolina crime; (2) the exception from the statute's prohibition for possessing a firearm in one's home or business is not an element of the crime that the state must prove unless the defendant offers evidence that he or she possessed the weapon there; and (3) whether an out-of-state felony is "substantially similar" to a North Carolina crime is a determination of law to be made by a judge, not a jury.

Inoperable Gun Is a Gun Under G.S. 14-269.2 (Weapon on Educational Property)

In re Cowley, 120 N.C. App. 274, 461 S.E.2d 804 (19 September 1995). The court ruled that inoperable gun is a gun under G.S. 14-269.2 (weapon on educational property).

DWI Arrestee's Refusal to Follow Officer's Instructions in Taking Intoxilyzer Was a Willful Refusal, Based on the Facts in This Case

Tedder v. Hodges, 119 N.C. App. 169, 457 S.E.2d 881 (6 June 1995). The court ruled that the following evidence of the DWI arrestee's failure to follow the Intoxilyzer operator's instructions was sufficient in this case to support a finding of a willful refusal to submit to a chemical analysis. After the officer requested the arrestee to take the test, the arrestee put his fingers in his mouth and the officer had to restart the observation period. The officer told the arrestee that if he did it again he would be written up as a refusal. During the testing period, the arrestee blew into the instrument five or six times, but he would stop blowing each time the tone would start. The officer had previously told the arrestee that he would have to blow hard enough to start the tone

and to blow until the officer told him to stop. In addition, the arrestee kept leaning over and putting his fingers in his mouth.

Joinder of Defendants Charged With Drug Trafficking Offenses Was Proper

State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (5 September 1995). Defendant A was charged with a drug trafficking conspiracy. Defendant B also was charged with that offense as well as trafficking by possession, sale, delivery, and transportation. The state's motion to join defendants and all offenses for trial was granted. The state presented eight days of testimony concerning the conspiracy charge against both defendants. The state then presented about two days of testimony concerning the charges against defendant B. Distinguishing State v. Wilson, 108 N.C. App. 575, 424 S.E.2d 454 (1993), the court ruled that joinder of the defendants did not deprive either a fair trial. The court particularly noted, as to defendant A, that the structure of the trial and the limiting instructions given during the testimony (limiting evidence to use against defendant B only) limited any prejudice to her.

Officer Sufficiently Gave Defendant Written Notice of His Rights under G.S. 20-16.2 While Defendant's Hands Were Strapped Down in His Hospital Bed

State v. Lovett, 119 N.C. App. 689, 460 S.E.2d 177 (1 August 1995). The defendant committed an impaired driving offense. He was injured and in a hospital bed when he agreed to give a blood sample under the implied consent statute (G.S. 20-16.2). The officer who orally informed the defendant of his rights and obtained a waiver placed the written rights form with the defendant's emergency room chart—the defendant was incapable of signing or receiving the form since his hands were strapped down and tubes were in both of his arms. The court ruled that the officer sufficiently complied with the statute's command to give the defendant notice in writing of his rights.

(1) Jury Instruction Failed to Conform to Allegation in Indictment
(2) No Fatal Variance Between Indictment and Proof

State v. Rhome, 120 N.C. App. 278, 462 S.E.2d 656 (3 October 1995). (1) The defendant, a magistrate, was indicted for a violation of G.S. 14-230 (willfully failing to discharge duties). The indictment alleged that "failing to issue a warrant" was the duty that the magistrate failed to discharge. The court ruled that the trial judge in his jury instruction erred in not including this duty as the one that the state had to prove to obtain a conviction. See, e.g., State v. Davis, 253 N.C. 86, 116 S.E.2d 365 (1960). (2) The defendant was also indicted for obtaining property by false pretenses. The indictment alleged that the defendant obtained and attempted to obtain money in the amount of $55 from Deborah Johnson by a false pretense and collected a total of $260-270 from Essie McCarter [misspelled as McCotter] as payment for a worthless check drawn on Cooperative Savings and Loan and issued by Deborah Johnson to Radio Shack. The defendant contended that there was a fatal variance between the proof at trial and the indictment. First, the check was drawn on Wachovia Bank, not Cooperative Savings and Loan. The court ruled that this was not a fatal variance, because the name of the bank on which the check was drawn did not comprise an element of the crime. Second, the evidence at trial showed that the defendant

contacted Johnson to inform her that her check had been presented to the magistrate's office as a worthless check and needed to be taken care of. The defendant actually received payment for the check from McCarter. The court ruled that there was no fatal variance, because the elements of the offense were satisfied by establishing that the defendant *attempted* to obtain money by means of a false pretense that he had made to Johnson.

Evidence

Trial Judge Did Not Err in Excluding Expert Psychologist's Testimony Based on Penile Plethysmograph

State v. Spencer, 119 N.C. App. 662, 459 S.E.2d 812 (1 August 1995). The defendant was being tried for sexual assaults on a child. The trial judge refused to allow an expert psychologist to testify about her opinions that were based on the administration of a penile plethysmograph on the defendant. (The test formed the basis of the expert's opinion that the defendant was not sexually aroused by children, thereby making it less likely that he committed the charged crimes.) The court examined the testimony of the experts for the state and the defendant on this issue and agreed with the trial judge that the evidence did not establish the reliability of the penile plethysmograph; there is a substantial difference of opinion within the scientific community concerning its reliability to measure sexual deviancy. The court cited appellate cases from other jurisdictions in support of its ruling. The court also ruled that the trial judge was correct in finding under Rule 403 that any probative value the expert's testimony had was substantially outweighed by the risk that the testimony could mislead the jury, confuse the issues, and suggest a decision on an improper basis—that is, the results of the test.

Alleged Child Sexual Abuse Victim's Statements Were Not Admissible As Excited Utterance

State v. Thomas, 119 N.C. App. 708, 460 S.E.2d 349 (15 August 1995). The defendant was tried for sexual offenses against his child. Meadows was allowed to testify that her daughter (A) attended the same kindergarten class as the alleged victim, and A told Meadows that the victim (while under obvious stress) told A that the victim's father had committed a sex offense with her about four or five days earlier. Eubanks was allowed to testify that her daughter (B) told her what essentially was the same story that A told her mother, Meadows. The alleged victim, A, and B did not testify at trial. The court ruled that the alleged victim's statements to A and B qualified as excited utterances under Rule 803(2). The several-day gap between the event and the making of the statements, and the fact that the alleged victim made the statements in response to questions by A and B, did not disqualify them under the rule. However, since the mothers of A and B testified about these statements, not A and B, the hearsay rule must also be satisfied as to A's and B's statements to their mothers for the mothers' testimony to be admissible. Based on the facts in this case, the court ruled that the statements of A and B to their mothers, made several hours after the victim's statements to A and B, did not qualify under Rule 803(2) because the conversations between each girl and her mother was simply a reporting of the day's events. The children's statements to their mothers were not made under the influence of apparent distress caused by the receipt of information from the alleged victim. Neither child was crying or appeared emotionally

moved. Thus, the statements of the mothers, Meadows and Eubanks, were not admissible under Rule 803(2). The court ruled that the erroneous admission of the statements required a new trial.

Prosecutor's Cross-Examination of Defendant About Consuming Alcohol on Day of Sexual Assault Was Permissible Under Rule 611(b)

State v. Alkano, 119 N.C. App. 256, 458 S.E.2d 258 (20 June 1995). The defendant was tried for a sexual assault allegedly committed at a nightclub where alcohol was served. The court ruled, citing State v. Williams, 330 N.C. 711, 412 S.E.2d 359 (1992), that the prosecutor's questioning of the defendant about his consumption of alcohol on the evening of the sexual assault was permissible for impeachment purposes under Rule 611(b) to determine whether his use of alcohol impaired his mental or physical ability to observe and remember events. The court noted that the prosecutor did not ask the defendant questions about addiction to or habitual use of alcohol.

Homicide Victim's Violent Acts Against Third Person Were Not Admissible to Support Defendant's Assertion of Self-Defense, When Defendant Did Not Know About These Violent Acts

State v. Brown, 120 N.C. App. 276, 462 S.E.2d 655 (19 September 1995), *prior appeal*, 116 N.C. App. 445, 448 S.E.2d 131 (1994). The defendant was being tried for murder of her husband. She was not permitted to offer evidence of violent acts committed by her husband against his ex-girlfriend. The defendant asserted on appeal that this evidence was admissible to support her defense of self-defense. The court ruled that since there was no evidence that the defendant knew of her husband's prior violent acts when she killed him, the evidence she wanted to offer was not relevant to the reasonableness of her apprehension of bodily harm.

Evidence of Victim's Post-Traumatic Stress Order Was Improperly Admitted as Substantive Evidence

State v. Hensley, 120 N.C. App. 313, 462 S.E.2d 550 (3 October 1995). The court ruled that the state was improperly permitted to offer evidence of the victim's post-traumatic stress order as substantive evidence. It may only be admitted as corroborative evidence, subject to the balancing test of Rule 403; see State v. Hall, 330 N.C. 808, 412 S.E.2d 883 (1992).

Miscellaneous

(1) Judge Had Authority to Permit Children To Testify By Closed-Circuit Television
(2) Testimony By Closed-Circuit Television Did Not Violate Defendant's Federal or State Confrontation Rights
(3) Judge's Findings Were Sufficient To Support Testimony By Closed-Circuit Television

In re Stradford, 119 N.C. App. 654, 460 S.E.2d 173 (1 August 1995). The defendant was being tried for sexual offenses against two minor children. The trial judge permitted the children to testify by closed circuit television outside the defendant's presence. The court ruled: (1) the judge had the authority to permit testimony in this manner even absent specific legislative authority to

do so; (2) the procedure did not violate the defendant's federal or state constitutional confrontation rights [see generally Maryland v. Craig, 497 U.S. 836 (1990) and State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988)]; and (3) the judge's findings were sufficient to support the procedure; the children's clinical therapist testified it would be "further traumatizing" if they were subject to face-to-face confrontations with the defendant.

Defendant's Conviction, Based on an Inconsistent Verdict, Was Proper

State v. Burton, 119 N.C. App. 625, 460 S.E.2d 181 (1 August 1995). Defendant was involved in shooting of victim with codefendant, who fired the fatal bullet. At their joint trial, the codefendant was convicted of second-degree murder and defendant was convicted of voluntary manslaughter as an aider and abettor to his codefendant. The court ruled, relying on State v. Reid, 335 N.C. 647, 440 S.E.2d 776 (1994), that inconsistent verdicts are permissible as long as the evidence is sufficient to support a jury's verdict.

Even Assuming Error When District Attorney Did Not Make Written Application for Reconvening Grand Jury and Trial Judge Did Not Issue Written Order, No Prejudicial Error Requiring Dismissal of Indictment

State v. Parker, 119 N.C. App. 328, 459 S.E.2d 9 (5 July 1995). The trial judge denied the defendant's motion to dismiss bills of indictments returned by a grand jury that had been reconvened under G.S. 15A-622(g) pursuant to the district attorney's oral application to a superior court judge (also, the judge had not issued a written order to reconvene the grand jury). The defendant contended that the district attorney's application and the judge's order must be in writing. Assuming without deciding that the defendant's contention was correct, the court ruled that the defendant was not prejudiced by the assumed errors and therefore was not entitled to the dismissal of the indictments.

Sentencing

Error Under Fair Sentencing Act to Consider As an Aggravating Factor a Prior Conviction That Was On Direct Appeal at the Time of Sentencing

State v. Dammons, 120 N.C. App. 182, 461 S.E.2d 6 (5 September 1995). The court ruled that under the Fair Sentencing Act the trial judge erroneously considered as an aggravating factor a prior conviction that was on direct appeal at the time of the sentencing hearing. [Note: For what constitutes a prior conviction under the Structured Sentencing Act, see G.S. 15A-1340.11(7).]

Faxed Copy of Police Record Check Was Sufficient Evidence of a Prior Conviction under the Fair Sentencing Act

State v. Jordan, 120 N.C. App. 364, 462 S.E.2d 234 (3 October 1995). The court ruled that a faxed copy of a Connecticut police record check was properly admitted at a Fair Sentencing Act sentencing hearing to prove a prior conviction. The defendant did not argue that the record check was unreliable, incomplete, or inaccurate.

Evidence Was Sufficient That 9mm Semi-Automatic Handgun Was Weapon Normally Hazardous to Lives of More Than One Person Under G.S. 15A-1340.4(a)(1)g.

State v. Burton, 119 N.C. App. 625, 460 S.E.2d 181 (1 August 1995). A 9mm semi-automatic handgun was fired toward several people. This type of handgun will hold between eight and sixteen bullets, depending on the manufacturer, and will fire bullets as fast as the shooter can pull the trigger. The court ruled that the trial judge properly found the aggravating factor that the defendant knowingly created a great risk of death to more than one person by means of a weapon or device that would be hazardous to the lives of more than one person [G.S. 15A-1340.4(a)(1)g.].

Error to Allow Victim's Attorney to Address Court at Sentencing Hearing, Based on Facts in This Case

State v. Jackson, 119 N.C. App. 284, 458 S.E.2d 235 (20 June 1995). Relying on G.S. 15A-1334(b) (no person other than defendant, defendant's counsel, prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by defendant, prosecutor, or court), the court ruled that the trial judge erred in allowing the victim's attorney to address the court during the sentencing hearing.