RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
(June 13, 1996 - November 8, 1996)

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NORTH CAROLINA SUPREME COURT

Arrest, Search, and Confession Issues

Warrantless Search under House to Search for Missing Person Was Constitutional

State v. Scott, 343 N.C. 313, 471 S.E.2d 605 (13 June 1996). An officer, responding to a report of a missing person, went to the defendant's home where the missing person lived. Two vehicles were in the driveway, but no one responded to the officer's knock on the front door. The officer noticed large green flies flying under the house through an air vent. He had previously seen this kind of flies on dead animals and people. He then went to the rear of the house, where he saw the flies at the access door to the crawl space under the house. He could smell the odor of decaying flesh. He saw a green carpet laying against the access door. When he moved the carpet, he saw the grass under it was green, indicating that the carpet had been placed there recently. He then opened the access door and shined his flashlight in the crawl space. He saw the body of a dead female there. After a warrantless search of the home for other possible victims or suspects, a search warrant was obtained and a thorough search of the home was made pursuant to the search warrant. The defendant argued that the warrantless search of the crawl space and home was unconstitutional. The court ruled, citing Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), that the warrantless search of the crawl space and the home was reasonable under the Fourth Amendment.

(1) No Constitutional Violation Caused by Delay in Taking Arrested Defendant to Magistrate
(2) No Statutory Violation Caused by Delay in Taking Arrested Defendant to Magistrate
(3) No Prejudice When Officers Failed to Tell Defendant of Right to Communicate with Friends
(4) Confession Was Not Involuntary Although Interrogating Officer Lied About Incriminating Evidence Against Defendant

State v. Chapman, 343 N.C. 495, 471 S.E.2d 354 (13 June 1996). On August 23, 1993, about 9:30 A.M., the defendant was arrested at a bank for attempting to cash a forged check. He waived his *Miranda* rights and admitted that he had attempted to cash a check that he had forged after taking it in a robbery. Officers took the defendant to a school to search for a purse that had been taken in the robbery. They then returned the defendant to the police station, where he confessed to forgery and uttering charges. A detective procured arrest warrants for these charges at 12:15 P.M. and served them on the defendant. The defendant then was questioned by another detective

who was investigating the robbery in which the checks were taken, and the defendant confessed to the robbery at 1:27 P.M. Officers prepared an arrest warrant to charge the robbery but it was not presented to the magistrate then. The defendant then was interviewed by another detective about a robbery and murder (not related to the crimes discussed previously). The detective put nine photos of the murder victim on the walls of the interrogation room and one photo of the victim on the floor directly in front of the chair in which the defendant sat during the interrogation. Thus the defendant saw a photo of the victim in every direction he turned. During the interview, the detective falsely implied to the defendant that a note found next to the victim's body had been the subject of handwriting analysis that showed it was the defendant's handwriting, and the defendant's fingerprints were on the note. The defendant confessed to the murder at about 7:05 P.M. and was taken to the magistrate about 8:00 P.M. (1) The court ruled that there was no unreasonable delay in a magistrate's determination whether there was probable cause to issue an arrest warrant. Distinguishing County of Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991) and Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), the court noted that the defendant was arrested at 9:30 A.M. without a warrant and a magistrate issued an arrest warrant based on probable cause at 12:30 P.M. This procedure satisfied the rulings in these cases that a magistrate promptly determine probable cause. The court noted that the defendant was then in lawful custody and could be interrogated about other crimes. (2) The court ruled that the defendant's statutory right under G.S. 15A-501(2) to be taken to a magistrate without unnecessary delay was not violated. The court noted that much of the time from the defendant's arrest at 9:30 A.M. until he was taken before a magistrate at 8:00 P.M. was spent interrogating the defendant about several crimes. The court stated that the officers had the right to conduct these interrogations and they did not cause an unnecessary delay by doing so. (3) The officers failed to advise the defendant of his right to communicate with friends in violation of G.S. 15A-501(5). The court ruled that, based on State v. Curmon, 295 N.C. 453, 245 S.E.2d 503 (1978), the defendant was not prejudiced by this violation, based on the facts in this case. (4) The court ruled that the defendant's confession was not involuntary. The placement of photos did not cause his free will to be overcome. Relying on State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983), the court stated that the detective's deceit about the defendant's handwriting and fingerprints on the note did not require the trial judge to find that the confession was not of the defendant's own free will, that it was the product of fear or hope of reward, or the deceit was calculated to produce an untrue statement.

Officers Had Probable Cause to Believe Defendant Was Inside His Home When They Executed Arrest Warrant for Him

State v. Workman, 344 N.C. 482, 476 S.E.2d 301 (11 October 1996). The court ruled that officers had probable cause to believe that the defendant was inside his home when they entered his home late at night to execute an arrest warrant for two murders, based on the following facts. His accomplice in the murders pointed out the trailer as the defendant's home. Officers maintained surveillance on the trailer while another officer obtained an arrest warrant. They did not see anyone leave the trailer. As the officers approached the trailer, they saw lights on and heard noises inside.

Juvenile Interrogation Warnings Were Properly Given and Defendant's Right to Have His Parent Present Was Adequately Protected

State v. Miller, 344 N.C. 658, 477 S.E.2d 915 (8 November 1996). Officers arrested a seventeen-year-old for murder. The officers could not find a juvenile rights form so they used an adult *Miranda* form and inserted an additional question, "Do you wish to answer questions without your parents/parent present?" The defendant waived all of his rights except he stated that he wanted his mother present. No questioning was conducted until his mother was present. During the questioning the defendant appeared embarrassed and ill at ease. An officer asked the defendant if he was comfortable talking in front of his mom or would he want her to step out of the room. He replied, "She might as well leave." His mother left the interrogation room and sat on a bench outside the open doorway where the defendant could see her if he leaned forward. She was told she could come back into the room at any time. The defendant then confessed to the murder. The court ruled that the additional language added to the adult *Miranda* form adequately conveyed the substance of the defendant's right to have his parent(s) present during questioning. It was clear that the defendant understood his rights because he asked that his mother be present, he did not give any statement until she arrived, and he answered questions in her presence. The court also ruled that the defendant's statements and conduct that resulted in his mother leaving the interrogation room were a knowing and intelligent waiver of his right to have her present during the custodial interrogation.

Capital Case Issues

Prosecutor's Pretrial and Trial Statements That State Was Not Seeking to Prove First-Degree Murder Based on Theory of Premeditation and Deliberation Did Not Bar Trial Judge From Submitting That Theory to Jury

State v. Hales, 344 N.C. 419, 474 S.E.2d 328 (6 September 1996). The prosecutor, at the pretrial conference and at the charge conference after all the evidence had been presented, stated that the state would not ask for a conviction of first-degree murder based on premeditation and deliberation. The prosecutor stated that it only sought a first-degree murder conviction based on the theory of felony murder. The trial judge stated, however, that it would submit both premeditation and deliberation and felony murder. The jury convicted the defendant of first-degree murder based on both theories. The court, distinguishing State v. Jones, 317 N.C. 487, 346 S.E.2d 657 (1986) and State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986) (state could not proceed with prosecution of a greater offense after it had announced that it would seek a conviction only of a lesser-included offense), ruled that the trial judge had the authority to submit premeditation and deliberation, despite the prosecutor's statements, when there was evidence to support that theory. The court noted that the evidence and defense tactics should have been the same whether or not premeditation and deliberation was submitted to the jury, and the defendant in this case did not show how she was prejudiced by the judge's decision to submit the theory.

Trial Judge's Order Limiting Questioning of Prospective Jurors in Capital Case to One of Indigent Defendant's Two Lawyers Did Not Violate Defendant's Statutory Right to Two Counsel

State v. Fullwood, 343 N.C. 725, 472 S.E.2d 883 (31 July 1996). On the second day of jury selection in a capital case, the trial judge ordered that only one of the defendant's two attorneys could question prospective jurors during the remainder of the jury selection process. The court ruled that the trial judge's order did not violate the indigent defendant's statutory right to two counsel under G.S. 7A-450(b1). The court noted that the trial judge during jury voir dire did not prohibit or prevent the defendant's attorneys from communicating, prompting, or consulting one another. The court noted that the defendant failed to preserve for appellate review the defendant's argument that the judge's order violated his federal and state constitutional rights to effective assistance of counsel.

Throwing Burning Paper Bag and Gasoline into Occupied Convenience Store Was Sufficient Evidence of Aggravating Circumstance (e)(10) (Weapon or Device Normally Hazardous to Lives or More Than One Person)

State v. Norwood, 344 N.C. 511, 476 S.E.2d 349 (11 October 1996). The defendant threw a burning paper bag and gasoline into a convenience store during business hours while there were at least two people inside. The store exploded into flames after the defendant escaped. The court ruled that this evidence was sufficient to prove aggravating circumstance (e)(10) (weapon or device normally hazardous to lives of more than one person). The court stated that a can of gasoline, when used with a burning paper bag, constitutes a device that could kill more than one person.

When State and Defendant Stipulated That Defendant Had No Significant History of Prior Criminal Activity [G.S. 15A-2000(f)(1)], Trial Judge Erred in Failing to Give Mandatory Peremptory Instruction

State v. Flippen, 344 N.C. 689, 477 S.E.2d 158 (8 November 1996). At the defendant's capital sentencing hearing, the state and the defendant stipulated that the defendant had no significant history of prior criminal activity under G.S. 15A-2000(f)(1). The trial judge did not give a mandatory peremptory instruction, and the jury failed to find this mitigating circumstance. The court ruled that the trial judge erred in failing to instruct the jury that because of the stipulation, the jury must find the (f)(1) mitigating circumstance to exist and must also give the circumstance mitigating weight in its sentencing recommendation.

Defendant's General Request That Peremptory Instructions Be Given for Any Uncontroverted Mitigating Circumstances Was Insufficient to Require Judge to Give Peremptory Instruction

State v. Womble, 343 N.C. 667, 473 S.E.2d 291 (31 July 1996). At a capital sentencing hearing, the defendant made a general request that peremptory instructions be given for any uncontroverted mitigating circumstances. On appeal, the defendant argued that the trial judge

erred in failing to give a peremptory instruction for the nonstatutory mitigating circumstance that nothing was taken from the murder victim's residence. The court noted that the defendant failed to make a specific request that a peremptory instruction be given for this particular mitigating circumstance and ruled, relying on State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1994), that the trial judge did not error in failing to give a peremptory instruction for this circumstance.

Capital Defendant's Absence From Trial Because of Disruptive Behavior Was Harmless Error Beyond a Reasonable Doubt, Based on Facts in This Case

State v. Cunningham, 344 N.C. 341, 474 S.E.2d 772 (6 September 1996). During the defendant's capital trial, the trial judge ordered the defendant removed for short periods of time for disruptive behavior. During these absences, he was in his jail cell and was able to observe all the court proceedings by an audio-video hookup. When he returned, he was allowed to object to anything that occurred during his absence. Based on these facts, the court ruled that the defendant's exclusion from the courtroom was harmless error (the error was the violation of the defendant's unwaivable state constitutional right to be present at every stage of his trial) beyond a reasonable doubt.

Criminal Offenses

Use of Gasoline and Fire to Burn Mobile Home Was a Deadly Weapon Under First-Degree Felony Murder Based on Commission of Felony With a Deadly Weapon

State v. Hales, 344 N.C. 419, 474 S.E.2d 328 (6 September 1996). The defendant used gasoline and fire to burn an occupied mobile home, killing a person who was inside the mobile home. The defendant was convicted of first-degree murder based on felony murder, the theory being the commission of a felony with a deadly weapon—see statutory language in G.S. 14-17. Relying on State v. Riddick, 315 N.C. 749, 340 S.E.2d 55 (1986) (fire can be deadly weapon according to manner of its use), the court ruled that the use of gasoline and fire to burn an occupied mobile home was sufficient evidence of a deadly weapon.

(1) Sufficient Evidence of First-Degree Burglary When Defendant Broke and Entered Apartment Two Days After He Had Left His Wife and Children There
(2) Judge Did Not Err in Failing to Submit Misdemeanor Breaking and Entering as Lesser Offense of First-Degree Burglary, Based on Facts in This Case

State v. Singletary, 344 N.C. 95, 472 S.E.2d 895 (31 July 1996). The defendant was convicted of first-degree burglary of an apartment. (1) The defendant argued on appeal that the state failed to prove the element that he wrongfully entered the dwelling house *of another* because he, his wife, and their children lived in the apartment as a family until approximately two days before his entry into the apartment. The state's evidence showed that at the time of the defendant's entry, the apartment was in his wife's sole possession. In April 1994, his wife left Winston-Salem, where she had previously lived with the defendant, and obtained the apartment (in Greensboro) on her own. She was the sole lessee and owned most of the personal property in the apartment. The defendant moved in with her in May 1994. However, on August 29, 1994, the defendant moved

out of the apartment, took all or most of his belongings, and returned the key to the apartment to her. As of that date, she had exclusive possession of the apartment. Agreeing with State v. Cox, 73 N.C. App. 432, 326 S.E.2d 100 (1985), the court ruled that the marital relationship by itself does not constitute a complete defense to the offense of burglary, and the defendant was properly convicted of first-degree burglary, based on the facts in this case.

(2) The state's evidence showed that the defendant broke and entered the apartment with a gun and with the intent to commit a felonious assault. The defendant argued on appeal that the trial judge erred in failing to submit the lesser offense of misdemeanor breaking and entering. The defendant noted that his statement to the police said that he possessed the gun for protection, rather than to commit an assault. The court, citing State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), stated that an after-the-fact assertion by a defendant that his intention to commit a felony was formed after he broke and entered was insufficient to require an instruction on the lesser offense of misdemeanor breaking and entering unless there was "some before the fact evidence to which the defendant's statements afterwards could lend credence." The court reviewed the evidence in this case and ruled that it was insufficient to require an lesser-offense instruction.

Sufficient Evidence of Constructive Breaking for Burglary Offense

State v. Ball, 344 N.C. 290, 474 S.E.2d 345 (6 September 1996). The defendant rang the doorbell of the victims' home at 4:00 A.M. One of the victims, a minister, answered the door. The defendant said he needed help, and the minister let him into his house. Within minutes of entering the house, the defendant attacked the minister and his wife with a knife. The court ruled that the defendant's entry under a pretense that he was seeking help was sufficient evidence of a constructive breaking to support a burglary conviction.

Sufficient Evidence of Rape and Sexual Offense Committed Against Prostitute

State v. Penland, 343 N.C. 634, 472 S.E.2d 734 (31 July 1996). The defendant was convicted of first-degree rape and sexual offense as well as other offenses, including first-degree murder. The victim was a prostitute who willingly entered the defendant's truck and asked for money. However, the defendant then drove the truck at a high rate of speed, swore and slapped her, and commanded her to put on handcuffs. The victim was scared and pleaded, "Please, mister, don't." The defendant responded that he was responsible for the death of "all them black girls that got killed out there." Various sexual acts then occurred among the defendant, an accomplice, and the victim. The court noted that while the victim did not offer any physical resistance to the sexual acts, evidence of physical resistance is unnecessary to prove lack of consent. The victim's fear of the defendant was specifically related to the events leading to the defendant's sexual assaults and murder.

Sufficient Evidence of Defendants' Constructive Presence to Support Convictions under Aiding and Abetting Theory

State v. Vanhoy, 343 N.C. 476, 471 S.E.2d 404 (13 June 1996). The defendants hired a person (Shankle) to murder the victim by promising $15,000 and a truck for the killing. As the defendants drove Shankle to the trailer where the victim lived, they gave him instructions on how

to enter the trailer, where the victim would be located there, and other pertinent information. After letting Shankle out of the vehicle, the defendants drove away. After Shankle killed the victim in the trailer, he ran outside and across a field. The defendants arrived in their vehicle, picked Shankle up, drove away, and gave Shankle $30 for a motel room to ensure that he would not be discovered by the police in the hours immediately following the murder. The court ruled that this evidence was sufficient to show the defendants' constructive presence to support their murder convictions under the aiding and abetting theory. The court stated the jury could reasonably infer that the defendants were constructively present because they remained in close proximity to the trailer to render assistance to Shankle, should it become necessary, and the defendants communicated this intent to him through their actions and words. The evidence showed that the defendants fully orchestrated and directed the victim's murder.

Harmless Error in Failing to Submit Voluntary Manslaughter When Conviction of First-Degree Murder Was Based on Felony Murder Theory and Second-Degree Murder Was Submitted

State v. Price, 344 N.C. 583, 476 S.E.2d 317 (11 October 1996). The trial judge submitted four verdicts to the jury: (1) first-degree murder based on premeditation and deliberation; (2) first-degree murder based on felony murder; (3) second-degree murder; and (4) not guilty. The jury convicted the defendant of first-degree murder based solely on the felony murder theory. The defendant argued on appeal that the trial judge erred in failing to submit the verdict of voluntary manslaughter. The court noted that it had previously ruled in several cases [see, for example, State v. Young, 324 N.C. 489, 380 S.E.2d 94 (1989)] that the allegedly erroneous failure to submit voluntary or involuntary manslaughter was harmless error when the jury had convicted the defendant of first-degree murder based on premeditation and deliberation, and the trial judge had also submitted second-degree murder as a possible verdict. The court, relying on the reasoning of Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), ruled that the trial judge's failure to submit voluntary manslaughter, assuming it was error, was harmless in this case (in effect, the court extended its prior rulings to a verdict of first-degree murder based solely on the felony murder theory).

Sufficient Evidence of Forseeability to Support Proximate Cause in Involuntary Manslaughter Conviction

State v. Cole, 343 N.C. 399, 471 S.E.2d 362 (13 June 1996). A mother attempted to stop the defendant from assaulting her daughter. The defendant stabbed the mother twice and also hit her. She died a short time later. The medical examiner determined that she had severe coronary atherosclerosis. The cause of death was cardiac arrhythmia, and the severe coronary disease was a major factor in her death. The stress on her heart was caused by receiving blunt-force injuries—blows to her lips, chest, head, right breast, and left arm. The defendant was convicted of involuntary manslaughter. The court rejected the state's contention that forseeability was not an essential element of proximate cause [see State v. Powell, 336 N.C. 762, 446 S.E.2d 26 (1994)], but it also ruled that there was sufficient evidence of forseeability in this case. The court noted that it was not necessary that the defendant foresee that the victim would die from the assault, just that he foresee that some serious injury might result. The defendant was well aware of the state of

health of the victim, who was fifty-seven years old. The court stated it was reasonable that the defendant would have foreseen that two stab wounds to a person of her age and health would seriously injure her.

Evidence

Mental Health Expert Was Properly Prohibited from Testifying in First-Degree Murder Trial That Defendant Was Not Acting With "Cool State of Mind" When Committing Murders

State v. Boyd, 343 N.C. 699, 473 S.E.2d 327 (31 July 1996). The trial judge in a first-degree murder trial ruled that a mental health expert's proposed testimony that the defendant did not act with a "cool state of mind" in committing the murders was inadmissible under Rule 403 because the testimony would confuse the jury about the legal import of the phrase. The trial judge explained the legal meaning of the term to the expert, who conceded that the legal and medical definitions of the term differed. The trial judge advised the expert that he could use other terminology to convey his opinion to the jury. The court, relying on its ruling in State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988), ruled that the trial judge did not err in his ruling.

Evidence of Prior Bad Acts Occurring Ten Years Before Crime Being Tried Was Properly Admitted Under Rule 404(b), Based on the Facts in This Case

State v. Penland, 343 N.C. 634, 472 S.E.2d 734 (31 July 1996). The defendant was convicted of first-degree murder and other offenses, including sexual assaults against the murder victim. The victim was forced to put on handcuffs, sexually assaulted, tied to a tree, and stabbed to death. The state was permitted to offer the following evidence under Rule 404(b) that occurred ten years before this trial to prove the defendant's modus operandi and common plan and scheme: He often used a rope to bind a woman (not the murder victim in this trial) to a tree in the woods, and he sometimes used the handcuffs, rope, and knife together on her. After tying her to a tree, he would verbally abuse her, slap her, and throw knives at her. He also held several knives to her throat. She suffered black eyes and a torn lip on one occasion. The court ruled that this evidence was properly admitted. The court stated that given the commonality of the distinct and bizarre behaviors, the ten-year gap between the incidents did not negate the plausibility of the existence of an ongoing and continuous plan to engage in such activities.

Proposed Testimony of Defense Expert Witness on Proper Police Procedures Was Properly Barred, Based on Facts in This Case

State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (11 October 1996). The defendant was tried for the murders of two law enforcement officers who were attempting to arrest him. He asserted that he acted in self-defense. The court ruled that the trial judge did not err in excluding proffered expert testimony about whether the officers were following proper arrest procedures when they were murdered. The court noted that when the officers first approached the defendant, he started backing up and then ran because he thought he possessed crack cocaine. The court stated that the defendant clearly was not responding reasonably to the arrest and the defense expert's opinion

about proper arrest procedures was irrelevant in this case. The court noted that the expert was not offering to testify that the officers used excessive force in making the arrest.

Abuse Shelter's Intake Form Completed by Abused Person Was Properly Admitted as a Business Record under Rule 803(6)

State v. Scott, 343 N.C. 313, 471 S.E.2d 605 (13 June 1996). A woman became a resident of a shelter for abused women and children. She completed an intake application form at the request of a shelter employee. The form consisted of such matters as the abused person's background and condition. The form was filled out in the shelter's regular course of business and was used by the counselors when working with residents. The form was kept as a regular practice of the shelter's activity. The court rejected the defendant's argument that because the intake form was personally completed by the woman, rather than an employee, it was not admissible under Rule 803(6). Reviewing all the facts surrounding the form, the court ruled that it was admissible under Rule 803(6) as a business record made in the ordinary course of business.

(1) Evidence Was Insufficient to Support Admission as Dying Declaration
(2) Appellate Review Barred If Theory for Admission of Evidence Not Asserted at Trial

State v. Sharpe, 344 N.C. 190, 473 S.E.2d 3 (31 July 1996). The defendant was tried and convicted of first-degree murder. (1) The trial judge ruled inadmissible a defense witness's proposed testimony that Damien Smith (who was not the defendant) told the witness that he had killed the murder victim. Smith confessed to the witness several times and said that he would kill himself before he would go to jail for the murder. Smith committed suicide twenty-seven days after the murder. However, the court noted that nothing in the circumstances surrounding the confessions suggested that he was in immediate danger of being arrested, and thus it was not established that Smith believed that his death was imminent when he made these confessions. Also, the court reviewed the evidence and concluded that it was unclear whether Smith's suicide was precipitated by his purported killing of the victim or an unrelated cause. The court ruled that the trial judge did not err in not admitting Smith's confessions as dying declarations. (2) The defendant argued at trial that the testimony described above was admissible under either the dying declaration or state-of-mind hearsay exceptions. On appeal, the defendant abandoned the argument based on the state-of-mind hearsay exception and argued for the first time that it was admissible as a statement against penal interest. Citing several prior cases, including State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988), the court ruled that the defendant could not argue the statement-against-penal-interest hearsay exception for the first time on appeal.

Witnesses' Opinion Testimony About Relationship Between Defendant and Younger Brother Was Admissible, Based on the Facts in This Case

State v. Bishop, 343 N.C. 518, 472 S.E.2d 842 (31 July 1996). The defendant was convicted of first-degree murder and other crimes in which his younger brother (Kaiser) was an accomplice. Kaiser was a state's witness at the trial. The trial judge admitted testimony from two state's witnesses that the defendant and Kaiser had a codependent relationship, like father-son, and the defendant dominated Kaiser. The defendant argued on appeal this testimony was inadmissible

expert opinion. Relying on State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993), the court ruled that the testimony was admissible under Rule 701 (opinion testimony by lay witnesses). The witnesses worked with the defendant and Kaiser, saw them interact, and heard their conversations. The testimony was also helpful to a clear understanding of a fact in issue, the acting in concert theory: whether Kaiser acted at the defendant's direction when he committed the murder and other crimes with the defendant.

Miscellaneous

When Defendant Said He Would Represent Himself If Superior Court Judge Would Not Appoint Counsel He Requested, Defendant Waived His Right to Counsel

State v. Cunningham, 344 N.C. 341, 474 S.E.2d 772 (6 September 1996). The defendant, charged with first-degree murder, stated that he did not want anyone from the public defender's office or anyone suggested by that office to represent him. The public defender gave the defendant the names of two attorneys who were on the capital list for the county. The defendant said that he would not accept either of these attorneys. He named a lawyer from Michigan as the person he wanted appointed; the superior court judge refused to do so. The defendant signed two separate forms that stated that the defendant waived his right to counsel after being fully advised of his rights and fully understanding the consequences (as required by G.S. 7A-457 and 15A-1242). The court ruled that when the defendant said he would represent himself if the superior court judge would not appoint counsel he requested, the defendant waived his right to counsel. The court noted that an indigent defendant does not have the right to an attorney of his or her choice. When the defendant refused to accept available counsel, the superior court judge was not required to appoint counsel of the defendant's choosing.

Trial Judge Erred in Failing to Grant Defendant's Ex Parte Motion for Psychiatric Assistance under *Ake v. Oklahoma,* Based on the Facts in This Case

State v. Jones, 344 N.C. 722, 477 S.E.2d 147 (8 November 1996). The defendant was tried for first-degree murder. The court ruled that a judge erred in failing to grant the defendant's pretrial ex parte motion for psychiatric assistance under Ake v. Oklahoma, 470 U.S. 68 (1985). The defendant's counsel clearly demonstrated that the only defense he intended to raise or could raise was that at the time of the killing, the defendant suffered from diminished capacity and therefore may not have acted with premeditation and deliberation or the specific intent to kill. The counsel also presented a doctor's statement about the defendant's treatment for depression and suicidal tendencies in the months before the murder. In addition, evidence showed that the defendant had no history of violence or criminal activity. The counsel presented his own affidavit that the defendant admitted that he was not in control of his mental processes at the time of the murder and had advised counsel that he did not have a premeditated intent to kill.

Judge Did Not Err in Failing to Have Recusal Motion Heard by Another Judge and Failing to Recuse Himself from Presiding over Defendant's Trial

State v. Scott, 313 N.C. 313, 471 S.E.2d 605 (13 June 1996). The defendant was charged with the murder of a woman with whom he lived for about twenty-one years. The court reviewed the facts alleged in the defendant's motion for recusal, which included allegations that the judge had expressed a strong opinion about the woman's credibility and the defendant's relationship with her. The court ruled that because no facts were presented to cause a reasonable person to doubt the trial judge's impartiality [court cited standard from State v. Crabtree, 66 N.C. App. 662, 312 S.E.2d 219 (1984)], the judge did not err in failing to refer the recusal motion to another judge. The court also ruled that the defendant did not present substantial evidence of the judge's partiality or an appearance of partiality, and therefore the judge did not err in denying the recusal motion.

Defendant's Motion for Appropriate Relief Based on Alleged Juror Misconduct Was Properly Denied

State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (31 July 1996). The defendant was sentenced to death at a capital resentencing hearing. During jury selection for the resentencing hearing, defense counsel informed prospective jurors that the defense contended that the defendant was a paranoid schizophrenic. During the resentencing hearing, a juror who was attending a graduate course in developmental psychology (the jury was not sequestered) asked his professor if paranoid schizophrenics were violent. The professor replied that they were not. After the defendant was sentenced to death, defense counsel received a phone call from another student in the class informing them of the question and answer. Based on this information, the defendant filed a motion for appropriate relief seeking a new trial for juror misconduct. The defendant asserted that (1) the juror's misconduct violated the defendant's Sixth Amendment right to confront the witnesses and evidence against him; and (2) the juror learned extraneous information [as set out in evidence Rule 606(b)] that contradicted the defense position, thereby prejudicing him and entitling him to a new trial. The court examined the testimony of the juror at the hearing on the motion and ruled that the juror's contact with his professor was neither "extraneous information" under Rule 606(b) nor a "matter not in evidence" implicating the defendant's confrontation rights within the meaning of G.S. 15A-1240(c)(1). The court noted that during the class in question, the professor lectured on schizophrenia, delusions, and hallucinations. During the colloquy discussed above, the juror did not ask any further questions, nor did he mention the defendant or the pending case. No defense expert had yet testified at the resentencing hearing. The court also noted that the juror's question was a logical one arising from the natural sequence of class events; it did not deal with the defendant or any events arising from the resentencing hearing, nor did the juror mention the incident to other jurors. At the resentencing hearing, the state's mental health expert testified that paranoid schizophrenics are not classically violent. The defendant's mental health expert never testified to the contrary. The court stated that the defendant had the opportunity to present and challenge precisely the information conveyed by the professor to the juror and thus the classroom incident cannot be considered a matter not in evidence under G.S. 15A-1240.

State Complied With *Brady v. Maryland* By Providing Exculpatory Information During Trial, Based on Facts in This Case

State v. Taylor, 344 N.C. 31, 473 S.E.2d 596 (31 July 1996). The defendants argued on appeal that the state failed to comply with Brady v. Maryland, 373 U.S. 83 (1963) by providing exculpatory information (a law enforcement officer's notes) during trial instead of before trial. The court noted that it has previously ruled, citing State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983), that due process and *Brady* are satisfied by the disclosure of exculpatory evidence at trial, as long as disclosure is made in time so defendants may effectively use the evidence. In this case, the state provided the evidence four days before it had completed the presentation of its evidence. The state also provided the defendants with telephone numbers so the defendants could contact the witness. The defendants did not ask for a continuance or in any way indicate that they were having trouble locating the witness. Based on these facts, the court ruled that the defendants constitutional rights had not been violated.

Trial Judge Properly Barred Defendant's Jury Argument That Defendant Should Be Allowed to Plead Guilty to Second-Degree Murder Like His Accomplices Were

State v. Roseborough, 344 N.C. 121, 472 S.E.2d 763 (31 July 1996). The defendant was tried for first-degree murder. The state allowed two accomplices to plead guilty to second-degree murder in return for their testimony. The defendant was allowed to comment in jury argument on the impact of the plea agreements on their credibility as witnesses. However, the trial judge prohibited the defendant from arguing to the jury that if the accomplices were allowed to plead to second-degree murder and they were as or more culpable than the defendant, then why shouldn't the defendant be allowed to plead to second-degree murder? The court ruled that the trial judge properly prohibited the defendant's argument, noting prior case law had recognized that a prosecutor has the authority to prosecute criminal charges and enter into plea agreements. The court stated that the jury has no role in plea agreements.

Trial Judge in Second-Degree Murder Case Properly Found Use of Nine-Millimeter Pistol As Hazardous Weapon Statutory Aggravating Factor

State v. Bruton, 344 N.C. 381, 474 S.E.2d 336 (6 September 1996). The defendant was convicted of second-degree murder. The evidence showed that the defendant fired more than one shot from a nine-millimeter, semiautomatic pistol in the direction of the murder victim and another person. The court noted that a semiautomatic pistol is normally used to fire several bullets in rapid succession and in its normal use is hazardous to the lives of more than one person. The court ruled that the trial judge properly found the hazardous weapon statutory aggravating factor [G.S. 15A-1340.4(a)(1)(g) under Fair Sentencing Act; G.S. 15A-1340.16(d)(8) under Structured Sentencing Act]. The court also rejected the defendant's argument that the evidence used to prove this aggravating factor was necessary to prove second-degree murder based on the acting-in-concert theory (and thus in violation of the statutory prohibition of using the same evidence to prove an element of an offense as well as to prove an aggravating factor). The court noted that the state, in proving second-degree murder, was not required to prove that the defendant used a hazardous weapon as set out in G.S. 15A-1340.4(a)(1)(g).

NORTH CAROLINA COURT OF APPEALS

Arrest, Search, and Confession Issues

Stopping Defendant's Vehicle at Roadblock for License and Registration Check Without Reasonable Suspicion or Probable Cause Did Not Violate Defendant's Constitutional Rights

State v. Barnes, 123 N.C. App. 144, 472 S.E.2d 784 (2 July 1996). A Highway Patrol sergeant, who was acting shift supervisor, decided to organize a roadblock to check licenses and vehicle registrations. He considered the likelihood of detecting people who were violating motor vehicle laws, the traffic conditions, the traffic volume that would pass through the roadblock, and the convenience of the public. Patrol officers intended to stop all vehicles that approached the roadblock from either direction to detect driver's license and registration violations as well as other motor vehicle violations, including impaired driving. A roadblock was established on a road at about 12:45 A.M., taking into account that there is a higher incidence of impaired driving on weekend early morning hours. The sergeant's unmarked patrol car was parked in the paved median dividing the lanes of the road, and another unmarked patrol car was parked on the road's shoulder. At least one of the patrol cars had its blue lights on. The defendant's car was stopped and the defendant was asked to show his license and registration; his conduct led to his arrest and conviction for impaired driving. The court noted the provisions of G.S. 20-16.3A (impaired driving roadblocks) and State Highway Patrol Directive No. 63. The directive requires that "[a]ll roadblocks shall be marked by signs, activated emergency lights, marked Patrol vehicles parked in conspicuous locations, or other ways to assure motorists are aware that an authorized roadblock is being conducted. A blue light on at least one Patrol vehicle shall be operated at all times." Reviewing the facts set out above, the court ruled the roadblock substantially complied with G.S. 20-16.3A and Directive 63 [the court noted its ruling in State v. Sanders, 112 N.C. App. 477, 435 S.E.2d 842 (1993)], and the stopping of the defendant's car did not violate the Fourth Amendment.

(1) Officer Had Reasonable Suspicion to Stop Defendant for DWI
(2) Officer Had Probable Cause to Arrest Defendant for DWI, Which Included Evidence of Alco-Sensor Test

State v. Rogers, 124 N.C. App. 364, 477 S.E.2d 221 (5 November 1996). An officer was directing traffic with hand signals when the defendant's vehicle approached the intersection where the officer was located. Instead of turning left as the officer directed, the defendant stopped his vehicle in the intersection. The officer approached the vehicle and noticed a strong odor of alcohol on the defendant's breath. The officer directed the defendant to drive to the shoulder of the road, and the defendant complied with that directive. The officer then administered an Alco-Sensor test, which revealed a reading of 0.13, and the officer arrested the defendant for impaired driving. (1) The court upheld the trial judge's ruling that the officer had reasonable suspicion, based on the strong odor of alcohol on the defendant's breath, to stop the defendant's vehicle. (2) The trial judge also ruled that the strong odor of alcohol was sufficient to establish probable cause

to arrest the defendant for impaired driving. The judge declined to base a finding of probable cause on the Alco-Sensor test reading because the officer failed to give a second test in what the judge stated was a violation of G.S. 20-16.3(b). The court upheld the trial judge's ruling that there was probable cause to arrest the defendant for DWI. The court noted the evidence of the strong odor of alcohol on the defendant's breath, but also stated that the evidence of the Alco-Sensor reading could also be considered in establishing probable cause, even though the failure to give a second test violated G.S. 20-16.3(b). The court stated, "There is no prohibition against the results of this test being used by the officer to form probable cause, although this evidence may not have been admissible at trial."

[Note: The Alco-Sensor is an approved screening test. G.S. 20-16.3(c) provides that "[n]o screening test for alcohol concentration is a valid one . . . unless . . . the screening test is conducted in accordance with the applicable regulations . . . as to the manner of its use." Rule 19B.0502(b)(2) provides that "[u]nless the driver volunteers the information that he has consumed an alcoholic beverage within the previous 15 minutes, the officer shall administer a screening test as soon as feasible. If a test made without observing a waiting period results in an alcohol concentration reading of 0.08 or more, the officer shall wait five minutes and administer an additional test. If the results of the additional test show an alcohol concentration reading more than 0.02 under the first reading, the officer shall disregard the first reading."

Note also that G.S. 20-16.3(d) provides that the results of an alcohol-screening test or a driver's refusal to submit to the test may be used by a law enforcement officer in determining if there are reasonable grounds for believing that the driver committed an implied-consent offense. With a limited exception not applicable to this case, the results of an alcohol screening test may not be admitted in evidence in court.]

Officer Was Not Justified in Frisking the Defendant for Weapons

State v. Artis, 123 N.C. App. 114, 472 S.E.2d 169 (2 July 1996). An officer was part of a drug interdiction task force at an airport. He saw the defendant operating a video game machine in the airport game room, a location that had a reputation for drug activity. The game room was located in a place before a person had to go through the airport's metal detectors. The officer approached the defendant, identified himself, and learned that the defendant intended to take a departing flight. The officer saw a large crescent-shaped bulge in the defendant's left front pocket that appeared to be either brass knuckles or a weapon's handgrip. When the officer asked the defendant several times if he was carrying any weapons or drugs, the defendant responded each time by asking, "Why would I carry weapons or drugs?" The officer then told the defendant that he thought the defendant was carrying a weapon in his left front pocket. He informed the defendant that he wanted to pat the area down to satisfy himself that the object was not a weapon. As he made this statement, the officer reached for the pocket. The defendant, however, turned away from the officer and attempted to take a step backwards. The officer placed his hand on the object as the defendant stepped back, and captured it with his hand inside the defendant's pants pocket. The officer thought it was brass knuckles. The defendant attempted to reach into the pocket despite the officer's request not to do so. The officer reached into the pocket to get control of the suspected weapon and removed a clear plastic bag that contained crack cocaine. The court ruled that the officer's frisk violated the Fourth Amendment. The court stated that the officer had only a generalized suspicion to conduct the frisk. It was not reasonable to infer that

the bulge in the defendant's pants pocket was a weapon simply because the defendant had not yet passed through the airport's metal detectors. Also, the officer had no apparent need to check that the defendant was armed with a weapon that could be used against him or others. When the officer approached the defendant, he was merely operating a video game machine.

Defendant's Question, "Do I Need a Lawyer?" Was Not Clear Assertion of Right to Counsel Under *Miranda* and Therefore Officer Was Not Required To Stop Questioning

State v. Davis, 124 N.C. App. 93, 476 S.E.2d 453 (15 October 1996). The defendant was given his *Miranda* warnings and properly waived them. Before questioning began, the defendant requested and was allowed to make a phone call. After the phone call, the defendant told a law enforcement officer that "somebody at [his] office told [him he] needed a lawyer." The officer responded, "Well, that's your decision." The defendant then asked, "Do I need a lawyer?" and the officer replied, "That is your decision; I can't make that decision for you." The defendant did not respond and followed the officer into an office to be questioned. He eventually confessed. The court ruled, relying on State v. Barber, 335 N.C. 120, 436 S.E.2d 106 (1996) (defendant did not invoke right to counsel when she asked officer if she needed a lawyer), that the defendant did not invoke his right to counsel based on the facts in this case. [Note: Although not cited in the court's opinion, see also Davis v. United States, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) (if defendant makes ambiguous or equivocal reference to counsel, officer is not required to stop interrogation to clarify defendant's reference to counsel).]

Defendant Was Not in Custody to Require Officers to Give Him *Miranda* Warnings, Based on Facts in this Case

State v. Sanders, 122 N.C. App. 691, 471 S.E.2d 641 (18 June 1996). The court ruled that the following evidence supported the trial judge's ruling the defendant was not in custody to require officers to give *Miranda* warnings. The defendant agreed to accompany the officers to the police station. Two officers were in the interview room with the defendant during the entire period of the interview, which lasted about two hours, and were joined briefly by a third officer. The defendant was never threatened or promised that he would not be prosecuted or would obtain a lesser sentence by cooperating with the officers. He was allowed to go to the bathroom on request and allowed a twenty-minute smoking break outside the room. The defendant was told he was free to leave. He asked to call his wife and was told he could do so later. The officers confronted him with physical evidence that in fact had been found at the crime scene. The officers falsely told him that the victim had identified him as the person who beat and robbed him. The defendant admitted robbing and beating the victim but consistently denied that he had used a weapon.

Officer's Taking Photograph of Thirteen-Year-Old Juvenile Suspect With His Consent But Without a Nontestimonial Identification Order Violated G.S. 7A-596

State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (5 November 1996). A law enforcement officer took a photograph of a thirteen-year-old juvenile suspect with his consent but without a nontestimonial identification order. The court noted that the detective's action violated G.S. 7A-

596 because a nontestimonial identification order had not been obtained (that is, the juvenile's consent did not alleviate the obligation to obtain the order).

Criminal Offenses

Proper to Use Conviction to Determine Prior Record Level Even Though It Had Been Consolidated for Judgment with Another Conviction That Was Used to Establish Habitual Felon Status

State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (20 August 1996). The defendant had previously been convicted of two felonies on October 18, 1988, two felonies on June 14, 1991, and four felonies on June 25, 1992. The state used one conviction from each of these three days to prove the defendant's habitual felon status. The trial judge then used another conviction from each day to determine the defendant's prior record level. The defendant argued on appeal that the judge could not use convictions consolidated with other convictions used to establish habitual felon status to determine his prior record level. The court rejected this argument. The court noted that G.S. 14-7.6 prohibits using the *same* conviction to establish both habitual felon status and prior record level, and G.S. 15A-1340.14(d) prohibits the use of more than one conviction obtained during the same calendar week to increase the defendant's prior record level. The court concluded, however, that these statutes do not prohibit a trial judge from using one conviction obtained in a single calendar week to establish habitual felon status and using another *separate* conviction obtained the same week to determine prior record level, even if the convictions were consolidated for judgment.

Proper to Use Same Convictions to Prove Offense of Habitual Impaired Driving As Well As Habitual Felon Status

State v. Misenheimer, 123 N.C. App. 156, 472 S.E.2d 191 (2 July 1996). The defendant was convicted of habitual impaired driving in which the three prior convictions were habitual impaired driving on May 26, 1993, July 29, 1994, and September 8, 1994. At a hearing to prove the defendant's status of habitual felon, the state relied on a felony cocaine conviction and two of the habitual impaired driving convictions used in the habitual impaired driving prosecution. The court ruled that the legislature has not prohibited the state from using convictions that are elements of habitual impaired driving to also establish a defendant's status as an habitual felon. The court noted that G.S. 14-7.6 only prohibits the use of convictions establishing habitual felon status to determine the defendant's prior record level.

Same Convictions Used to Establish Habitual Felon Status May Be Used Again to Establish Habitual Felon Status for Subsequent Prosecution

State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771 (6 August 1996). After being convicted of various felony drug offenses, the jury found the defendant to be an habitual felon. The defendant argued on appeal that because the same convictions used to establish habitual felon status in this case had been previously used to establish habitual felon status in an earlier prosecution, the

defendant's double jeopardy rights were violated. The court, relying on State v. Smith, 112 N.C. App. 512, 436 S.E.2d 160 (1993), ruled that there was no double jeopardy violation.

Sufficient Evidence to Support Kidnapping Committed During Armed Robbery

State v. Warren, 122 N.C. App. 738, 471 S.E.2d 667 (18 June 1996). The defendant was convicted of one count of armed robbery and two counts of kidnapping. The defendant and three other accomplices entered a store and physically attacked the store employee and a customer. The defendant and one other accomplice forced both victims to storage areas in the rear of the store where the employee was assaulted again. Meanwhile, two accomplices took money and money orders from the cash register in the front of the store. The defendant argued on appeal that the kidnapping convictions should be set aside because the restraint and removal of the victims were an inherent part of the armed robbery; see generally State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981). Relying on State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991) and State v. Davidson, 77 N.C. App. 540, 335 S.E.2d 518 (1985), the court ruled that removal of the victims was not an integral part of the armed robbery nor necessary to facilitate the robbery. As in *Joyce*, the rooms where the victims were taken did not contain property that was taken. In addition, the victims were exposed to greater danger than inherent in the armed robbery itself and subjected to the kind of danger that the kidnapping statute was designed to prevent.

Insufficient Evidence to Support Kidnapping Allegedly Committed During Armed Robbery

State v. Weaver, 123 N.C. App. 276, 473 S.E.2d 362 (6 August 1996). The defendants and accomplices planned to take the victim's car keys and steal her vehicle. One accomplice (Taylor) pointed a gun at the victim in a hotel parking lot and demanded her car keys and money. The victim told Taylor that her keys and money were in her hotel room. She was led to her room and gave him her keys and money. The robbers then left her there and drove her car away. The court ruled, relying on State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981), that there was insufficient evidence to support the defendants' kidnapping convictions because a kidnapping conviction requires restraint or removal that is more than an inherent or inevitable part of the commission of another felony. The court noted that in this case that the victim was forcibly moved to her hotel room only to complete the underlying felony of robbery.

(1) Insufficient Evidence of Armed Robbery When Victim Was Asleep During Taking of Property
(2) Evidence Supported Conviction of Only One Conspiracy to Commit Rape

State v. Dalton, 122 N.C. App. 666, 471 S.E.2d 657 (18 June 1996). The defendant and three other people agreed to go find a woman to rape. They went to four different homes where women lived, but for various reasons they did not enter the homes to rape the women inside. The defendant and one other person entered a fifth home and picked up a knife from the kitchen counter. They entered the living room where a woman was asleep on the sofa. The defendant picked up a purse beside the sofa and left the house. After rummaging through the purse, the defendant threw it aside and re-entered the house. He then attempted to rape her while

threatening her with the knife. (1) The court ruled, relying on State v. Gibbons, 303 N.C. 470, 302 S.E.2d 799 (1983), that there was insufficient evidence of armed robbery because the victim was asleep during the taking of the purse. Although the defendant possessed a knife, he did not use it during the taking of the victim's purse. The court rejected the state's contention that the threatened use of the knife in the attempted rape was so joined by time and circumstances with the taking of the purse to be part of one continuous transaction. Distinguishing State v. Olson, 330 N.C. 557, 411 S.E.2d 592 (1992), the court noted that the facts in this case did not support such a contention—the defendant took the purse, left the house, disposed of the purse, and re-entered the house before he decided to rape the victim. (2) The court ruled that the evidence supported a conviction of only one conspiracy to commit second-degree rape. Only one objective existed among the four men: to find a woman and rape her. They did not plan or agree to rape a specific woman or women. The time interval of their criminal activity was only a few hours, the number and identity of the participants remained the same throughout, and only one meeting occurred among the conspirators. That single plan continued as they approached several houses to look for a woman to rape. Thus, the evidence supported a single agreement that could justify only one conspiracy conviction, not multiple conspiracy convictions for each woman they contemplated raping.

Defendant's Tossing Cocaine from Car So Law Enforcement Officers Could Not Find It Was Sufficient Evidence of Trafficking By Transporting Cocaine

State v. Wilder, 124 N.C. App. 136, 476 S.E.2d 394 (15 October 1996). The defendant was in a car stopped by a law enforcement officer. He threw a package of cocaine from the car into the bushes in an apparent attempt to prevent the officer from discovering it. The court ruled, relying on State v. Greenidge, 102 N.C. App. 447, 402 S.E.2d 639 (1991), that there was a substantial movement of the cocaine to support the conviction of trafficking by transporting cocaine.

Defendant's Right to Unanimous Verdict Was Not Violated By Jury Instruction on Sale of Two Obscene Magazines During Single Transaction

State v. Johnston, 123 N.C. App. 292, 473 S.E.2d 25 (6 August 1996). The defendant was convicted of one charge of disseminating obscenity based on the defendant's selling two magazines to an undercover law enforcement officer during a single transaction. The defendant argued on appeal that the trial judge's jury instructions were erroneous in not requiring the jury to be unanimous in finding at least one of the magazines to be obscene (that is, the jury instructions permitted some of the jurors to find one magazine obscene and the rest of the jurors to find the other magazine obscene). Relying on State v. Hartness, 326 N.C. 551, 391 S.E.2d 177 (1990), the court ruled the jury instructions were not erroneous. The court noted that, based on State v. Smith, 323 N.C. 439, 373 S.E.2d 435 (1988), a defendant may not be convicted of more than one obscenity offense no matter how many obscene materials are sold during a single transaction. Thus, this case involved alternative methods (the two magazines) of proving a single offense of disseminating obscenity, and unanimity was not required as to the obscenity of one of the magazines.

Sufficient Evidence of Abandonment of Supporting Spouse Under G.S. 14-322(b) When Defendant Constructively Abandoned His Wife

State v. Talbot, 123 N.C. App. 698, 474 S.E.2d 143 (3 September 1996). The defendant was convicted of abandonment by a supporting spouse in violation of G.S. 14-322(b). His wife was a full-time student and the defendant was the supporting spouse. The defendant had been physically abusive toward her throughout their marriage. On October 6, 1994, the defendant left the marital residence and took some of his belongings. The next day he returned to the residence to gather his remaining belongings. He never left any money for his wife's support. The wife obtained a domestic violence protective order (DVO) on October 18, 1994, ordering the defendant to stay away from the marital residence for one year. The court ruled that there was sufficient evidence to support a conclusion that the defendant constructively abandoned his wife before the entry of the DVO, because constructive abandonment may consist of affirmative acts of cruelty. The evidence showed that the defendant's violence toward his wife made it impossible for her to continue living with the defendant. The court rejected the defendant's contention that abandonment could not be proven because his wife, by seeking the DVO, consented to his departure. The court noted that the defendant's misconduct caused his wife to obtain the DVO because of her fear of further abuse.

Evidence

Evidence of Chain of Custody for Blood Sample Was Sufficient Despite Lack of Evidence of Who Drew Blood

State v. Hairston, 123 N.C. App. 753, 475 S.E.2d 242 (17 September 1996). The defendant was brought to a hospital for the collection of specimens for a rape suspect evaluation kit. A doctor testified that he collected various specimens from the defendant, including a blood sample. At trial, the doctor testified that he recognized his signature on the blood sample and that typically he drew the blood when he has signed a sample. However, if he did not draw the blood personally, then sometimes an attending nurse would draw the blood and place it in the collection box. The court stated that this and other testimony indicated that either the doctor or nurse drew the blood from the defendant and that the doctor did not draw the blood of any other person during the time when the defendant was with the doctor. The court, citing State v. Grier, 307 N.C. 628, 300 S.E.2d 351 (1983), noted that a person who draws a blood sample is not always required to testify to establish a proper foundation to admit a blood sample. The court ruled that in this case any doubt about the blood collection procedure and any weakness in the chain of custody of the blood sample affected only the weight of the evidence and not its admissibility.

Defendant Must Testify To Preserve for Appellate Review the Assertion That the State Improperly Impeached Defendant Under Rule 609(b)

State v. Hunt, 123 N.C. App. 762, 475 S.E.2d 722 (17 September 1996). In a trial for first-degree sexual offense, first-degree burglary, and felonious assault, the trial judge denied the defendant's motion in limine to prohibit the state from cross-examining the defendant about a fourteen-year-old Florida conviction for involuntary sexual battery and burglary. The defendant

did not testify at trial. The court adopted for North Carolina courts the ruling in Luce v. United States, 469 U.S. 38, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984), that in federal court a defendant must testify to preserve for appellate review the assertion that the government improperly impeached the defendant under Federal Rule 609(a). See North Carolina Evidence Rule 609(b) (court must conduct balancing test to determine whether party may impeach a witness for a conviction that is more than ten years old). The court disavowed contrary dicta in State v. Lamb, 84 N.C. App. 569, 353 S.E.2d 857 (1987). The court also stated that the defendant's testimony is necessary so an appellate court may review the required balancing test under Rule 609(b). In the absence of a defendant's testimony, any potential harm to the defendant's case is purely speculative.

Miscellaneous

Court Ruled That Defendant May Not Collaterally Attack Prior Conviction That Is Basis of Habitual Felon Indictment [But See G.S. 15A-980 and Discussion in *Custis v. United States*]

State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771 (6 August 1996). After the defendant was convicted of various felony drug offenses, the jury found the defendant to be an habitual felon. During the habitual felon hearing, the defendant objected to the use of one of the convictions to establish habitual felon status on the grounds that he did not have counsel or that counsel was ineffective. Relying on cases such as State v. Stafford, 114 N.C. App. 101, 440 S.E.2d 846 (1994) [no collateral attack on prior conviction permitted on *Boykin* grounds—Boykin v. Alabama, 395 U.S. 238 (1969) requires certain warnings to be given to a defendant before pleading guilty], the court ruled that the defendant could not collaterally attack the prior conviction in the habitual felon hearing. The court ruled that the defendant could challenge the prior conviction only by a motion for appropriate relief under Article 89 of Chapter 15A.

[Note: To the extent the court's ruling bars a collateral attack on a prior conviction based on an alleged violation of the right to counsel, it is in direct conflict with the provisions of G.S. 15A-980 and federal constitutional law. G.S. 15A-980 permits a collateral attack on a prior conviction for a violation of the right to counsel if the use of the conviction will "[r]esult in a sentence that otherwise would not be imposed" or "[r]esult in a lengthened sentence of imprisonment." There is also a federal constitutional right to collaterally attack a prior conviction based on an alleged violation of the federal constitutional right to counsel. See the discussion in *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994). To the extent the court's ruling bars a collateral attack on a prior conviction based on *Boykin* grounds or ineffective assistance of counsel, it is supported by the *Stafford* and *Custis* rulings.]

(1) When There Is No Objection, Evidence at Speedy Trial Suppression Hearing May Consist of Oral Statement By Counsel
(2) Defendant Was Denied Constitutional Right to Speedy Trial

State v. Chaplin, 122 N.C. App. 659, 471 S.E.2d 653 (18 June 1996). Before trial, the judge denied the defendant's motion for the dismissal of his drug trafficking charge on the ground that his constitutional right to a speedy trial had been violated. The defendant then was tried and

convicted. (1) During the hearing on the speedy trial motion, the judge heard oral statements from the prosecutor and defense counsel. The court ruled that when there is no objection, evidence at the hearing may consist of oral statements by the attorneys in support of and in opposition to the motion. (2) The court ruled that the defendant's motion should have been granted based on the four factors that must be considered in adjudicating a speedy trial dismissal motion: (i) the *length of delay* from arrest to trial was nearly three years; (ii) the state offered no *reason for the delay*; the case was calendared thirty-one times and never called for trial during the three years and the record did not show that the defendant ever asked for a continuance; this was prima facie evidence that the state was either negligent or willful in failing to call the case for trial; (iii) the defendant did not formally *assert his right to a speedy trial* until two years and ten months had elapsed from his arrest and his trial was held within thirty days of his assertion; and (iv) the defendant suffered great *prejudice* from the delay; not only had he been required to travel from New York to North Carolina thirty-one times during the course of three years to respond to the case being on the calendar, but he also lost the ability to locate a key witness that would have testified that the drugs were solely the witnesses (the court described this evidence in detail in its opinion). The court concluded that the substantial prejudice to the defendant, the state's conduct, and the lengthy delay far outweighed the defendant's failure to formally assert his right to a speedy trial. Since the defendant's constitutional right to a speedy trial had been violated, the court remanded the case to superior court for the dismissal of the charge.

Defendant Could Not Assert Double Jeopardy Violation on Appeal When He Failed to Object When Trial Judge Had Declared Mistrial on His Own Motion

State v. Sanders, 122 N.C. App. 691, 471 S.E.2d 641 (18 June 1996). A judge during a trial declared a mistrial on his own motion. The defendant did not object to the declaration of the mistrial. When new charges were brought, the defendant moved to dismiss them on double jeopardy grounds and alleged that the judge failed to make findings of fact supporting the grounds for mistrial as required by G.S. 15A-1064. The judge denied the motion and then entered findings of fact supporting his prior declaration of mistrial. The court noted that the trial judge did not make the requisite findings of fact before granting the mistrial, and the court's later findings were too late to remedy this error. However, the court ruled that the defendant's failure to object to the judge's declaration of mistrial, when there was ample opportunity for the defendant to do so, failed to preserve this issue for appellate review as required by Rule 10(b) of the North Carolina Rules of Appellate Procedure.

After New Trial Was Ordered by Appellate Court, Trial Exhibits Returned by Court Clerk to District Attorney in Preparation for New Trial Were Not Public Records Available for Inspection By Newspaper

Times-News Publishing Company v. State of North Carolina, 124 N.C. App. 175, 476 S.E.2d 450 (15 October 1996). The court ruled, distinguishing News and Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992) and relying on G.S. 132-1.4, that trial exhibits returned by the clerk of court to the district attorney after an appellate court had ordered a new trial were not public records available for inspection by a newspaper, when the district attorney was planning to use the exhibits in preparing for a new trial.

In Civil License Revocation Proceeding for Refusal to Submit to Breath Test After DWI Arrest, Division of Motor Vehicles Is Collaterally Estopped from Relitigating Finding of No Probable Cause to Arrest in Prior Criminal DWI Prosecution

Brower v. Killens, 122 N.C. App. 685, 472 S.E.2d 33 (18 June 1996). The defendant was arrested for DWI and refused to submit to a breath test. The Division of Motor Vehicles (DMV) administratively revoked the defendant's license for the refusal. The defendant then filed a civil action in superior court for review of the administrative license revocation. While this civil action was pending, the defendant was criminally prosecuted for the DWI. The trial judge ruled that the arresting officer did not have probable cause to arrest the defendant, suppressed tainted evidence, and dismissed the DWI charge. The defendant then amended his civil action to assert collateral estoppel as an affirmative defense to DMV's license revocation. The trial judge agreed with the collateral estoppel argument. The court affirmed the trial judge's ruling. The court distinguished State v. O'Rourke, 114 N.C. App. 435, 442 S.E.2d 137 (1994) (state in criminal DWI prosecution was not collaterally estopped from introducing evidence of the defendant's refusal to submit to breath test even though DMV had previously concluded defendant did not willfully refuse the breath test, because prosecutor and DMV were not in privity), and relied on State v. Lewis, 311 N.C. 727, 319 S.E.2d 145 (1984) (defendant was estopped from denying paternity in state-instituted civil proceeding seeking indemnification for public assistance when defendant had previously been adjudicated father in criminal action instituted by state). The court stated that "[o]ur holding is a narrow one. Indeed, by finding privity in the present case, we do not imply DMV is collaterally estopped from relitigating any other issue previously determined in a criminal trial for driving while impaired."