RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
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NORTH CAROLINA SUPREME COURT

Capital Case Issues

Court, Disavowing Prior Case Law, Rules That Double Jeopardy Does Not Bar Submission of Aggravating Circumstance at Capital Resentencing Hearing Even Though It Was Not Submitted or Found at Prior Capital Sentencing Hearing

State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133 (24 July 1997). At the defendant's first capital sentencing hearing, aggravating circumstance G.S. 15A-2000(e)(5) (murder committed during rape) was not submitted; the trial judge had excluded portions of the defendant's confession when he confessed to raping the victim. At the defendant's second capital sentencing hearing, the defendant's brother testified that the defendant admitted he raped the victim before killing her, and the defense mental health expert testified that the defendant told her he had raped the victim. The prosecutor requested that this aggravating circumstance be submitted, but the trial judge refused to submit it. At the defendant's third capital sentencing hearing, the trial judge submitted this circumstance after the state presented evidence that the defendant raped the victim before he killed her. The defendant argued that the submission of this aggravating circumstance at the third capital sentencing hearing violated double jeopardy principles. The court, disavowing statements in State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981) (state could not rely on aggravating circumstance rejected by jury at prior sentencing hearing or for which insufficient evidence was presented) that were contrary to the ruling in the later case of Poland v. Arizona, 467 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986) (failure to find aggravating circumstance is not equivalent to acquittal under double jeopardy principles), ruled that jeopardy attaches in a capital sentencing hearing only after there has been a finding that no aggravating circumstance is present (that is, when life imprisonment must be imposed). The court noted that each of the juries in the first and second capital sentencing hearings found at least one aggravating circumstance to exist and recommended the death sentence. Thus, double jeopardy did not bar the trial judge from submitting aggravating circumstances at the third capital sentencing hearing that were supported by the evidence. What occurred at the first and second hearings was irrelevant. Thus the trial judge did not violate the defendant's double jeopardy rights by submitting G.S. 15A-2000(e)(5) (murder committed during rape) at the third capital sentencing hearing.

(1) State at Second Capital Sentencing Hearing Was Not Bound by Stipulation at First Capital Sentencing Hearing That Aggravating Circumstance Did Not Exist, When Evidence Supported Its Submission at Second Sentencing Hearing; In Addition, Double Jeopardy Clause Did Not Bar Its Submission
(2) Defendant Was Not Entitled, Under Collateral Estoppel Doctrine, to Jury Instruction at Second Capital Sentencing Hearing That Mitigating Circumstance Unanimously Found by Jury at First Capital Sentencing Hearing Was Established As Matter of Law
(3) Inadvertent Reference at Second Capital Sentencing Hearing to Defendant's Having Been on Death Row Did Not Require Mistrial, Based on Facts in This Case

State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (5 September 1997). The defendant was sentenced to death at a second capital sentencing. (1) At the first capital sentencing hearing, the state had stipulated that there was insufficient evidence of the capital aggravating circumstance, G.S. 15A-2000(e)(5) (murder committed during commission or attempted commission of rape). At the second capital sentencing hearing, the state advised the judge that it had sufficient evidence of this aggravating circumstance. The judge allowed the evidence of the circumstance to be submitted to the jury under State v. Case, 330 N.C. 161, 410 S.E.2d 57 (1991) (state cannot agree with defendant not to submit aggravating circumstance supported by sufficient evidence). The court ruled that the trial judge's ruling was correct; the state was not bound by its prior stipulation. The court also ruled, relying on State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133 (24 July 1997), that the trial judge's ruling did not violate the double jeopardy principles. (2) The court ruled, relying on Poland v. Arizona, 467 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986) (failure to find aggravating circumstance is not equivalent to acquittal under double jeopardy principles), that the defendant was not entitled, under the collateral estoppel doctrine, to a jury instruction at the second capital sentencing hearing that a mitigating circumstance unanimously found by the jury at the first capital sentencing hearing was established as matter of law. Double jeopardy principles do not preclude the relitigation of the existence of mitigating circumstances. (3) During the state's cross-examination of a defense witness at the second capital sentencing hearing, the witness inadvertently revealed that the defendant had been on death row. The court ruled that the trial judge correctly denied the defendant's motion for a mistrial because the state did not elicit this fact from the witness, as well as other factors discussed in the court's opinion.

Trial Judge Did Not Err in Prohibiting Defense Counsel During Jury Voir Dire From Questioning Prospective Jurors About Their Understanding of Life Without Parole

State v. Neal, 346 N.C. 608, 487 S.E.2d 734 (24 July 1997). The court ruled, citing cases involving the former parole provisions for a life sentence for first-degree murder, that the trial judge did not err in prohibiting defense counsel during jury voir dire from questioning prospective jurors about their understanding of a sentence of life without parole. See also State v. Page, 346 N.C. 689, 488 S.E.2d 225 (24 July 1997) (similar ruling).

(1) Judge's Passing of Note to Alternate Juror During Capital Trial Without Revealing Its Contents to Defendant or Counsel Violated Unwaivable Right to Be Present, But Error Was Harmless
(2) Judge Erred in Failing to Submit Statutory Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History)

State v. Jones, 346 N.C. 704, 487 S.E.2d 714 (24 July 1997). (1) During the defendant's capital murder trial, the trial judge passed a note to an alternate juror without revealing its contents to the defendant or his counsel. The court ruled the defendant's state constitutional right to be present at all stages of his capital trial was violated. However, the court also ruled that the violation was harmless beyond a reasonable doubt, because the record indicated that the note involved a personal matter—passing keys to another person who was in the courthouse. (2) The defendant at his capital sentencing hearing argued against the submission of the statutory mitigating circumstance, G.S. 15A-2000(f)(1) (no significant prior criminal history), and the judge did not submit it. The court ruled that trial erred because the following evidence was evidence to support its submission. In 1988 the defendant was convicted of four misdemeanor larcenies, which involved stealing from his employer over a period of four or five years. In 1993 the defendant was convicted of two or three felony larcenies for stealing jewelry from a motel in which he worked. The defendant did not receive a prison sentence for any of these convictions. He had smoked marijuana since middle school and had used cocaine since 1988. There was no evidence that he had committed any violent crimes before the murder of the victim in 1993.

(1) In Deciding Whether to Submit Statutory Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History), Judge Properly Considered Defendant's Commission of Murder Hours Before Two Murders For Which Defendant Was Being Sentenced
(2) Judge Did Not Err in Failing to Submit Statutory Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History)

State v. Sidden, 347 N.C. 218, 491 S.E.2d 225 (3 October 1997). The defendant murdered a father and his two sons. The father was murdered several hours before the two sons were murdered. The defendant was tried only for the murders of the two sons and was convicted. (1) At the death sentencing hearing, the trial judge considered the murder of the father in determining whether to submit the statutory mitigating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history) in sentencing the defendant for the murder of the two sons. The court, relying on State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994) [only crimes committed before the murder being sentenced may be considered in deciding whether to submit G.S. 15A-2000(f)(1)], ruled that the judge properly considered the murder of the father in considering this mitigating circumstance. The court rejected the defendant's argument that the father's murder could not be considered because it was part of the course of conduct during which the two sons were murdered. (2) The court ruled that the judge acted properly in not submitting G.S. 15A-2000(f)(1) because, in addition to the defendant's murder of the father, the defendant had been involved in the illegal sale of alcohol and drugs during his entire adult life.

Sufficient Evidence to Submit Aggravating Circumstance (e)(11) (Murder Part of Course of Conduct Involving Crimes of Violence Against Others)

State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (24 July 1997). The defendant was convicted of first-degree murder for a killing (victim A) that occurred during an armed robbery on April 22, 1994. At the capital sentencing hearing, the state offered evidence of aggravating circumstance G.S. 15A-2000(e)(11) (murder part of course of conduct involving crimes of violence against others). The evidence was based on a pending charge of murder (victim B) that occurred on April 19, 1994. The court ruled that there was sufficient evidence of the murder and a sufficient link between the murders to support aggravating circumstance (e)(11). Both murders occurred within several days of each other. The evidence showed that both murders were committed to obtain money for cocaine. Both murders involved elderly victims. In addition, evidence showed that after the killing of victim B, the defendant stole the van that he used to drive to the place where he murdered victim A. The defendant had a plan involving the murders of both victims.

(1) Four Prior Unadjudicated Sexual Assaults Were Properly Admitted to Show Intent in Proving G.S. 15A-2000(e)(5) (Murder Committed During Attempted Rape), and Defendant's Offer to Stipulate to Intent to Commit Rape Did Not Bar State From Offering Evidence
(2) Directed Verdict Is Not Appropriate for Statutory Mitigating Circumstance; Court Effectively Disavows Dicta in Prior Case
(3) Trial Judge Did Not Err in Reopening Voir Dire after Jury Had Been Impaneled When Information Indicated That Juror Had Not Been Candid About Death Penalty Views
(4) Prosecutor's Jury Argument About Defendant's Quality of Life In Prison Was Proper
(5) Jury Instruction on G.S. 15A-2000(e)(3) (Prior Conviction of Felony Involving Use or Threat of Violence) Was Erroneous in Describing Felony

State v. Holden, 346 N.C. 404, 488 S.E.2d 514 (24 July 1997). The defendant was sentenced to death at a capital resentencing hearing. (1) The court ruled that four prior unadjudicated sexual assaults, virtually identical to the circumstances surrounding the attempted rape of the victim in the murder that was the subject of the resentencing hearing, was properly admitted to show intent in proving G.S. 15A-2000(e)(5) (murder committed during attempted rape). The court also ruled that the defendant's offer to stipulate to intent to commit rape did not bar the state from offering this evidence. (2) The court, relying on State v. Carter, 342 N.C. 312, 464 S.E.2d 272 (1995), ruled that a directed verdict is not appropriate for a statutory mitigating circumstance; the court effectively disavowed contrary dicta in State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994). A peremptory instruction is the appropriate instruction when there is uncontradicted evidence supporting a mitigating circumstance. (3) The court ruled that the trial judge did not err in reopening voir dire after the jury had been impaneled when the prosecutor informed the judge that he had received specific information (described in the court's opinion) from an unnamed "officer of the court" that indicated that juror had not been candid about her death penalty views. (4) A prison guard testified during the resentencing rehearing that the defendant was permitted to watch television, play cards, lift weights, play basketball, go the music room, and eat lunch with other inmates. The court ruled, relying on State v. Alston, 341 N.C. 198, 461 S.E.2d 687 (1995), that the prosecutor was properly permitted to comment during jury argument on the quality of life the defendant would have in prison. The court noted that it was reasonable to infer that the defendant would continue to enjoy these privileges if sentenced to life imprisonment. (5) The

state introduced a judgment and commitment showing the defendant's prior conviction of attempted second-degree rape to prove aggravating circumstance G.S. 15A-2000(e)(3) (prior conviction of felony involving use or threat of violence). However, the state did not offer any additional evidence of this circumstance. Therefore, the judge's jury instruction on this aggravating circumstance was erroneous when it described the felony as involving the use of violence, leaving out the words "or threat" of violence. Attempted rape does not always constitute a felony involving the use of violence; depending on the evidence, it may only involve the threat of violence.

Court Reaffirms Ruling That G.S. 15A-2000(e)(3) (Prior Conviction of Felony Involving Use or Threat of Violence) Includes Offense Committed Before First-Degree Murder For Which Defendant Is Being Sentenced, Even Though Conviction of That Offense Occurred After Commission of First-Degree Murder

State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (7 November 1997). The court reaffirmed prior rulings that G.S. 15A-2000(e)(3) (prior conviction of felony involving use or threat of violence) includes an offense committed before the commission of the first-degree murder for which the defendant is being sentenced, even though conviction of that offense occurred after commission of the first-degree murder. The court disavowed contrary dictum in State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994).

Trial Judge Had Inherent Authority During Capital Sentencing Hearing to Grant State's Request for Nontestifying Defense Psychologist's Report To Use in Cross-Examination of Defense Psychiatrist, When Psychiatrist Had Reviewed But Not Relied on Report in Forming His Opinion

State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (7 November 1997). After the defendant conclusively determined that a defense psychologist would not testify at his capital sentencing hearing, the state made a motion for discovery of the psychologist's report to use in its cross-examination of another defense mental health expert, a psychiatrist. The judge denied the state's motion. The psychiatrist then testified on the defendant's behalf about the defendant's mental status. The psychiatrist told the jury that before forming his expert opinion, he had examined all possible information about the defendant, including past tests done by psychologists, psychiatrists, and any mental health workers who may have been in contact with the defendant. After his direct examination, the judge elicited voir dire testimony from the psychiatrist that although he had read the psychologist's report, the psychiatrist had not examined her raw data and had not relied on anything in the report in reaching his expert opinion. The trial judge then granted the state's motion for discovery of the psychologist's report for use in cross-examining the psychiatrist . The court upheld the judge's ruling. The court first noted that the defendant did not assert that this report was privileged work product. The court then noted that although the state had no pretrial statutory right of discovery of the report, it ruled, citing State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977), that a trial judge has inherent authority to order discovery during a trial or sentencing hearing. The court stated that the issue in this case was whether the judge possessed inherent authority to compel disclosure of a nontestifying psychologist's report to the state after the defendant had admitted guilt, and after the capital sentencing proceeding

was underway. The court concluded that the trial judge did not abuse his discretion in compelling the defendant to disclose the psychologist's report to the state.

(1) Arrest Warrants Properly Admitted to Prove Aggravating Circumstance G.S. 15A-2000(e)(8) (Murder Committed Against Witness)
(2) Same Evidence Was Not Improperly Used to Support Aggravating Circumstances G.S. 15A-2000(e)(7) (Murder Committed to Disrupt Exercise of Governmental Function) and G.S. 15A-2000(e)(8) (Murder Committed Against Witness)
(3) Sufficient Evidence Supported Aggravating Circumstance G.S. 15A-2000(e)(7)
(4) Sufficient Evidence Supported Aggravating Circumstance G.S. 15A-2000(e)(8)

State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (3 October 1997). The defendant was convicted of murdering his wife, whom he had assaulted many times before he murdered her. (1) At the capital sentencing hearing, the state was allowed to introduce four misdemeanor warrants that the victim had taken out against the defendant. Responding to the defendant's argument that the warrants were hearsay, the court noted that the rules of evidence do not apply to a capital sentencing hearing. The court ruled that the evidence was admissible to show that charges were pending against the defendant and that his wife would be a witness against him, and thus it was relevant to prove aggravating circumstance G.S. 15A-2000(e)(8) (murder committed against witness).

(2) The court ruled that the same evidence was not improperly used to support both G.S. 15A-2000(e)(7) (murder committed to disrupt exercise of governmental function) and G.S. 15A-2000(e)(8) (murder committed against witness). Aggravating circumstance (e)(7) was supported by evidence that the defendant had been served with a show cause order for an accounting of marital monies in a divorce action. The order was returnable a few days after the murder of the defendant's wife. On the other hand, aggravating circumstance (e)(8) was supported by evidence that the defendant murdered a witness in a criminal case: four criminal warrants had been served on the defendant, and his wife was to be a witness against him.

(3) The court ruled that sufficient evidence supported aggravating circumstance (e)(7) that the murder was committed to disrupt or hinder the lawful exercise of a governmental function. The defendant and his wife were involved in a divorce action. The defendant had refused to answer interrogatories concerning the parties' finances and had been served with an order to answer the interrogatories or show cause why he should not be held in contempt. Discovery was to have been competed one week after the defendant killed his wife. The evidence showed that the defendant was determined that his wife would get nothing from the marriage; he had liquidated marital property and put the proceeds in his name. The court ruled that the jury could reasonably find that one reason he killed his wife was to stop the divorce action against him.

(4) The court ruled that sufficient evidence supported aggravating circumstance (e)(8) that the murder was committed because of the murder victim's role as a witness. The court stated that the jury could find from the evidence that the victim had procured arrest warrants against the defendant or that she was waiting to testify against him, which would make her a witness against him. The jury also could find that one of the reasons the defendant killed her was because she had arrest warrants issued against him. The court ruled that procuring an arrest warrant and waiting to testify constitute the performance of an official duty as a witness.

(1) Wife's Testimony About Assault Conviction in Which Husband Was Victim Was Admissible Under G.S. 15A-2000(e)(3) (Prior Conviction of Felony Involving Use or Threat of Violence)
(2) Evidence Was Insufficient to Submit G.S. 15A-2000(f)(2) (Defendant Under Influence of Mental or Emotional Disturbance)
(3) Evidence Was Insufficient to Submit G.S. 15A-2000 (f)(6) (Defendant's Impaired Capacity)

State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (24 July 1997). (1) At a capital sentencing hearing, the state offered a wife's testimony about a defendant's prior felony assault conviction under G.S. 15A-2000(e)(3) (prior conviction of felony involving use or threat of violence) in which her husband was the victim. Most of her testimony described the circumstances of the defendant's assault on her husband based on her observations of the assault. She also testified that she was afraid that the defendant would have cut her with the knife if given the chance and that she is reminded daily of the assault. The court ruled, relying on State v. Mosely, 336 N.C. 710, 445 S.E.2d 906 (1994), that the wife's testimony described in the preceding sentence was proper to establish for the jury the severity of the defendant's attack on the husband and the fear that the defendant caused. (2) The court ruled that the evidence was insufficient to submit G.S. 15A-2000(f)(2) (defendant under influence of mental or emotional disturbance). After examining the evidence (the defendant shot the victim because he was angry), the court noted that it had previously ruled, citing State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994), that an inability to control one's temper is neither a mental nor an emotional disturbance under this mitigating circumstance. (3) The court ruled that the evidence was insufficient to submit G.S. 15A-2000 (f)(6) (defendant's impaired capacity). The court noted that mere evidence that a defendant has consumed alcohol or drugs before the murder does not constitute substantial evidence supporting this mitigating circumstance. The court stated that there was no evidence that the defendant's consumption of alcohol so impaired him to prevent his understanding of the criminality of his conduct or that the consumption of alcohol affected his ability to control his actions.

(1) Evidence Was Insufficient to Submit G.S. 15A-2000(f)(2) (Defendant Under Influence of Mental or Emotional Disturbance)
(2) Evidence Was Insufficient to Submit G.S. 15A-2000 (f)(6) (Defendant's Impaired Capacity)

State v. Hill, 347 N.C. 275, 493 S.E.2d 264 (7 November 1997). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled that the evidence was insufficient to submit G.S. 15A-2000(f)(2) (defendant under influence of mental or emotional disturbance). The defendant's expert witnesses did not provide a nexus between the defendant's personality characteristics and the crimes he committed. The manner of the killing and the defendant's later actions indicated that he was not under the influence of a mental or emotional disturbance at the time of the killing. The evidence showed that the defendant raped the victim and deliberately set fire to her body to destroy the evidence. The defendant then returned to the house where he had attacked the victim and set the house on fire. Later, the defendant drove to a pond, where he threw the gun used in the murder into the water. (2) The court ruled that the evidence was insufficient to submit G.S. 15A-2000 (f)(6) (defendant's impaired capacity). The defendant's expert testimony did not establish that his personality characteristics affected his

ability to understand and control his actions. The court noted that, in fact, they testified to the contrary.

(1) Separate Evidence Supported Aggravating Circumstances G.S. 15A-2000(e)(2) (Conviction of Capital Felony) and G.S. 15A-2000(e)(3) (Prior Conviction of Felony Involving Use or Threat of Violence)
(2) Admitting Evidence of Felony Indictments to Prove Aggravating Circumstances in Capital Sentencing Hearing Does Not Violate G.S. 15A-1221(b)

State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (5 September 1997). A capital sentencing jury found aggravating circumstances G.S. 15A-2000(e)(2) (conviction of capital felony), based on a prior first-degree murder conviction in which the death penalty could have been imposed, and G.S. 15A-2000(e)(3) (prior conviction of felony involving use or threat of violence), based on five other violent felony convictions arising from the same trial in which the first-degree murder conviction had occurred. The court ruled that separate evidence properly supported these two aggravating circumstances. The court rejected the defendant's argument that the same evidence was used to support both aggravating circumstances because the first-degree murder and the other five felonies arose from the same transaction. (2) The court rejected the defendant's argument that the trial judge erred under G.S. 15A-1221(b) (indictment may not be read to prospective jurors or jury during jury selection or trial) in admitting defendant's prior felony indictments into evidence to support both of the aggravating circumstances. The court ruled that G.S. 15A-1221(b) does not prevent the admissibility during the sentencing hearing of indictments from other cases not currently before the jury.

Sentence of Life Imprisonment Without Parole Does Not Violate North Carolina Constitution

State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (24 July 1997). The court ruled that a sentence of life imprisonment without parole does not violate the Constitution of North Carolina.

Criminal Offenses

Court Upholds Physical Child Abuse Killing Under Theories of First-Degree Murder by Torture and Felony Murder, With Felonious Child Abuse as Underlying Felony

State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (24 July 1997). The defendant and his girlfriend physically abused a two-and-one-half year old child that resulted in her death. The court reviewed the evidence in this case and upheld a first-degree murder conviction based on the theories of (1) first-degree murder by torture, and (2) first-degree felony murder, with felonious child abuse as the underlying felony. The court ruled that the defendant's hands, used to physically abuse the child, constituted a deadly weapon under the first-degree felony murder theory set out in G.S. 14-17.

Diminished Capacity Defense Inapplicable to G.S. 14-34.2 (Assault with Firearm on Law Enforcement Officer)

State v. Page, 346 N.C. 689, 488 S.E.2d 225 (24 July 1997). The court ruled, relying on State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (1995) (diminished capacity defense inapplicable to general intent required for conviction of first-degree sexual offense), that the diminished capacity defense is inapplicable to G.S. 14-34.2 (assault with firearm on law enforcement officer) because it is a general-intent offense.

No Fatal Variance Between Indictment, Which Alleged Defendant Fired Into Occupied Dwelling with Shotgun, and Evidence at Trial, Which Showed Weapon Was Handgun

State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (24 July 1997). The indictment for discharging a firearm into occupied property alleged in part that the defendant discharged a shotgun, a firearm, into an occupied dwelling. The evidence showed that the weapon was a handgun. The court noted that to constitute a fatal variance, the defendant must show a variance regarding an essential element of the offense. In this case, the essential element of discharging a *firearm* was alleged. The specification of the shotgun was not necessary, making it mere surplusage. Thus, there was not a fatal variance between the indictment and evidence at trial.

Evidence

Murder Victim's Statements Were Admissible Under Rule 803(3) (Then Existing State of Mind)

State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (3 October 1997). The defendant was convicted of murdering his wife, whom he had assaulted many times before he murdered her. The state offered the testimony of four witnesses, who testified about the victim's statements to them about her fear of the defendant. The court ruled, distinguishing State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994), that the statements were properly admitted under Rule 803(3) (then existing state of mind). The court noted that it had ruled in *Hardy* that the victim's diary entries were inadmissible because they contained a mere recitation of facts and were totally without emotion; the diary did not have statements such as "I'm frightened." On the other hand, the witnesses in this case each testified about the victim's state of mind: she was in fear of her life. The factual circumstances that were included in the victim's emotional statements were properly admitted because they demonstrated the basis for her emotions.

(1) Murder Victim's Statements Were Admissible Under Rule 803(3) (Then Existing State of Mind)
(2) Defendant's Explanation of Her Prior Convictions on Direct Examination "Opened the Door" To the State's Cross-Examination About Details Of Prior Offenses Under Rule 609
(3) State's Cross-Examination of Defendant's Theft of Money Was Proper Under Rule 608(b), Based on Facts in This Case

State v. Bishop, 346 N.C. 365, 488 S.E.2d 769 (24 July 1997). The defendant was convicted of first-degree murder of a person with whom the defendant had had a financial relationship and had owed money. (1) Several of the murder victim's statements to other people expressed her concern about the defendant's handling of her real estate transactions and her intent to document the defendant's debt to the victim, to seek repayment, and to confront the defendant about her concern that the defendant had stolen money from her. The court ruled that these statements were properly admitted under Rule 803(3) (then existing state of mind). They bore directly on the relationship between the victim and the defendant when the killing occurred and were relevant to show a motive for the killing—the defendant was indebted to the victim, refused to repay the amount owed or reimburse her for money taken, and the victim insisted that the defendant repay her. (2) On direct examination, defense counsel asked the defendant whether she had been convicted of any crimes. She answered affirmatively and then volunteered information about the nature and circumstances of her convictions. For example, she suggested that her insurance fraud convictions resulted from a mere failure to report two premiums. The court ruled that her testimony was misleading and "opened the door" to the state's questions on cross-examination that involved details of the prior offenses. (3) The defendant argued that the state exceeded the scope of Rule 608(b) by asking her whether she had taken money from her former boyfriend. The taking of money involved the allegation that the defendant forged his name on both a loan application and a check, and that she cashed the check without his permission. The court ruled that this conduct was indicative of the defendant's character for untruthfulness and was permissible under Rule 608(b).

(1) Trial Judge Did Not Abuse Discretion in Prohibiting Defendant from Calling Witness Before Jury to Assert Fifth Amendment Privilege, Based on Facts in This Case
(2) Accomplice's Letter Taking Responsibility for Murder Was Inadmissible Under Rule 804(b)(3)
(3) Statements Made By Crime Scene Witnesses Were Properly Admitted Under Rules 803(1) and 803(2) and Did Not Violate Defendant's Confrontation Rights

State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (24 July 1997). The defendant and his accomplice were charged with first-degree murder. The evidence at trial showed they acted in concert in shooting into an occupied dwelling, which resulted in the death of the victim. (1) The accomplice pled guilty to second-degree murder under a plea agreement with the state. At the time of the defendant's second trial, the accomplice had been released from prison. The defendant informed the trial judge that he intended to call the accomplice as a witness. During a hearing in the jury's absence, the accomplice's attorney informed the judge that the accomplice intended to assert his Fifth Amendment privilege not to testify. The trial judge ruled that the accomplice properly asserted the privilege based on the possibility of perjury charges or federal

prosecution for other crimes and did not permit the defendant to call the accomplice to the witness stand to assert the privilege in the jury's presence. (However, the judge allowed the defendant to introduce into evidence a transcript of the accomplice's plea of guilty to murder.) Because the defendant at trial lodged only a general objection to the judge's ruling on the accomplice's claim of privilege and the defendant appeared to concede the possibility of future federal prosecution for other crimes, the court upheld the trial judge's ruling that the accomplice's claim of privilege was proper. Distinguishing State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992) (trial court did not err by allowing prosecutor to call witness to stand, knowing that witness would invoke Fifth Amendment privilege), the court ruled that the trial judge did not err in prohibiting the defendant from calling his accomplice to the stand to assert the privilege in the jury's presence. The court discussed United States v. Vandetti, 623 F.2d 1144 (6th Cir. 1980), on which the *Thompson* ruling relied, and stated that the balancing of the factors under Rule 403 in deciding this issue is within the trial judge's discretion. The court noted that the probative value of the accomplice's asserting of the privilege in the jury's presence was substantially less than in *Thompson* and also noted that the trial judge in this case allowed the defendant to introduce a transcript of the accomplice's guilty plea—thereby allowing the defendant to present the substance of his desired evidence.

(2) The court upheld the trial judge's ruling that a letter written by the accomplice that included the statement, "Don't worry about the murder case because I did it and you didn't have nothing to do with it," was inadmissible under Rule 804(b)(3) (statement against interest). The court noted that it was not a statement against penal interest because the letter was written after the accomplice had already entered his guilty plea and was serving his sentence. Also, there were no corroborating circumstances to indicate that the letter was trustworthy.

(3) Two law enforcement officers arrived at the crime scene shortly after the murder had occurred. One officer testified that a person screamed at him that the defendant had shot the victim. The court noted that this person had just witnessed the shooting and was still experiencing the effects of the extremely startling event; the court ruled that this statement was properly admitted under Rule 803(2) (excited utterance). The other officer testified that several people identified the defendant as the person who shot the victim. The court noted that the evidence showed that these people's statements were made contemporaneously with their viewing of the events; the court ruled that they were admissible under Rule 803(1) (present sense impression). The court also ruled that the admission of all these statements did not violate the defendant's confrontation rights, because both hearsay exceptions are firmly-rooted—the court cited several of its prior cases.

Defendant's Physical Abuse of Child Occurring Six Months Before Committing Murder By Physically Abusing Another Child Was Properly Admitted Under Rule 404(b) to Show Motive and Absence of Mistake

State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (24 July 1997). The defendant was tried for the murder of a two-and-one-half old child by physically abusing her (his girlfriend participated in some of the physical abuse). The court ruled that the state was properly permitted under Rule 404(b) to introduce evidence that six months before the murder the defendant picked up his girlfriend's four-year-old son, shook him hard, and threw him down on a wooden chair with enough force to make the chair slide and hit the wall. In the statements made after the defendant took the murder victim to the hospital, the defendant implied that he shook her in an attempt to

revive her. The court stated that the defendant's relatively recent treatment of the boy was sufficiently similar to the defendant's conduct in the murder case to contradict the suggestion that the defendant inflicted the murder victim's injuries while attempting to revive her. The abuse of the boy was also relevant to show the defendant's motive and intent in shaking the murder victim and to show the absence of mistake.

Officers Did Not Offer Inadmissible Character Evidence When They Testified That Person Whom Defendant Had Implicated in Murder Had Told the Truth During Officers' Investigation

State v. Richardson, 346 N.C. 520, 488 S.E.2d 148 (24 July 1997). The defendant was tried for first-degree murder. During its case-in-chief, the state introduced the defendant's statements to law enforcement officers, which were exculpatory to the extent that they named another person (Hedgepeth) as the actual killer (the defendant did admit he was at the murder scene). The state called Hedgepeth as a witness to refute the defendant's accusation. Investigating officers also testified that that they had checked out Hedgepeth's story and that Hedgepeth had told the truth. The court ruled that the officers' testimony was not inadmissible character testimony under Rules 405(a) and 608, because it was an explanation of their investigation following defendant's implication of Hedgepeth. Their testimony was not a comment on Hedgepeth's general credibility; it merely told the jury that Hedgepeth had told the truth during the investigation. The court noted that once the defendant's accusation of Hedgepeth had been admitted into evidence, the state had to explain to the jurors why Hedgepeth had been eliminated as a suspect.

Defense Evidence of Murder Victim's Prior Assault and Threats Were Inadmissible Because There Was No Evidence of Self-Defense—Defendant's Defense Was Accidental Shooting

State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (24 July 1997). The defendant was on trial for murder. The defendant was barred from eliciting testimony of (1) the victim's wife that the victim had assaulted the wife a few months before the killing and that the defendant knew of this assault; and (2) the defendant's girlfriend about the victim's threat to assault the defendant on the night of the killing. The court ruled that this evidence was inadmissible because there was no evidence that the defendant shot the victim in self-defense. The defendant's defense was that the defendant had pointed a gun at the victim to persuade him to leave the defendant's home and the gun accidentally fired.

Defendant's Letter to District Attorney Was Admissible and Not Barred By G.S. 15A-1025

State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (5 September 1997). The defendant, charged with first-degree murder, wrote a letter to the district attorney that essentially admitted his guilt, expressed a desire that his codefendants not be tried for murder, requested that his counsel be removed from representing him, and mentioned the possibility of a plea bargain. The letter did not state what plea the defendant may have wanted to make or any other specifics. The district attorney did not respond to the defendant's letter and did not engage in plea discussions with him. The court ruled that the trial judge properly admitted the letter into evidence. It was not barred by G.S. 15A-1025 (plea discussions are inadmissible).

Arrest, Search, and Confession Issues

Officers Did Not Violate Fourth Amendment When They Used "Knock and Talk" Procedure: They Approached House and Asked Consent to Search Although They Did Not Have Probable Cause to Search House

State v. Smith, 346 N.C. 794, 488 S.E.2d 210 (24 July 1997), *reversing*, 123 N.C. App. 162, 472 S.E.2d 610 (1996) (unpublished opinion). Officers received information that illegal drugs were located in a suitcase in a bedroom in the defendant's house. The source of the information, the defendant's girlfriend who shared a bedroom with the defendant, told the officers that she would consent to a search. Officers decided to seek consent to search the house because they believed that they lacked probable cause to obtain a search warrant—officers referred to the procedure of approaching a house to ask consent to search as "knock and talk." Officers arrived at the house with a drug dog. One of the residents (a person who lived there, but who was not the girlfriend or the defendant) let them into the house. The girlfriend allowed the officers' entry into and search of the bedroom she shared with the defendant. The drug dog alerted, and the officers seized illegal drugs there. The court, relying on Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), reversed the Court of Appeals and ruled that officers who approach a residence with the intent to obtain consent to conduct a warrantless search do not violate the Fourth Amendment by simply using such a procedure. (Note: This ruling would apply whether or not the officers had probable cause to obtain a search warrant; see the court's excerpt from *Scknecklоth* included in its opinion.) The court also noted that the officers' subjective state of mind in using such a procedure is irrelevant, citing Whren v. United States, 517 U.S. ___, 116 S. Ct. 1769, 135 L. Ed. 2d. 89 (1996). The court remanded the case to superior court so the judge could make specific factual findings on the voluntariness of the consent given to the officers.

Miranda Warnings Were Not Improper Despite Officer's Remarks About Cost of Attorney

State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (24 July 1997). While advising the defendant of his *Miranda* rights, an officer marked out the words "at no cost" in a sentence that read, "If you want a lawyer before or during questioning but cannot afford to hire one, one will be appointed to represent you *at no cost* before any questioning. The officer explained to the defendant, "I don't know why they put in this at no cost. If you are found innocent, it is no cost, but if you are found guilty, there is a chance the state will require you to reimburse them for the attorney fees." The officer then explained that he was going to cross it off and initial it because he didn't want to mislead the defendant. The court ruled that the officer gave the defendant a fully effective equivalent of *Miranda* rights. The court noted that the officer's additional information about the cost of an attorney was accurate.

Miscellaneous

(1) Trial Judge Properly Found Defendant Competent to Waive Counsel and Represent Himself
(2) Trial Judge Did Not Err in Failing to Revoke Defendant's Right to Represent Himself Because of His Conduct at Capital Sentencing Hearing

State v. Legrande, 346 N.C. 718, 487 S.E.2d 727 (24 July 1997). (1) The court ruled that the trial judge did not err in finding that the defendant was competent to proceed and to waive counsel and represent himself. The trial judge relied on a forensic psychiatrist's report (the defendant had been committed to Dorothea Dix Hospital for evaluation) in making his findings, as well as the judge's observations of the defendant in court. The forensic psychiatrist's report concluded that the defendant was competent to proceed to trial and to waive representation by an attorney. (2) During the capital sentencing hearing the defendant berated the jury and said that the jurors could "pull the switch and let the good times roll," and that he would meet them in hell where they would be required to worship him. The court ruled that the trial judge did not err in failing to revoke the defendant's right to represent himself based on this conduct.

Trial Judge Did Not Err in Failing to Appoint Forensic Psychiatrist, Based on Facts in This Case

State v. Page, 346 N.C. 689, 488 S.E.2d 225 (24 July 1997). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial judge did not err in failing to appoint a forensic psychiatrist, based on the facts in this case. The court noted that the defendant had both a psychiatric and psychological expert present evidence for him at trial. Both had treated the defendant over an extended period before the murder and had made similar diagnoses. The state's psychiatrist was in accord with their diagnoses except she did not believe that the defendant suffered from post-traumatic stress disorder. The court concluded that the defendant had substantial assistance from mental health experts in preparing and conducting his defense. The court stated that mere suspicion that the state psychiatrist's classification as a *forensic* psychiatrist made her better equipped than the defendant's psychiatrist was insufficient to require that the defendant be given a court-appointed forensic expert. See also State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (24 July 1997) (trial judge did not err in denying motions for psychiatrist, pathologist, and medical expert in child abuse, based on the facts in this case).

Defense Counsel Did Not Admit Defendant's Guilt in Violation of *Harbison* Ruling

State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (24 July 1997). The court ruled that defense counsel's statements during jury selection that the defendant was holding the gun that killed the victim when the victim was shot was not a concession of guilt in violation of State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985). The court noted that the uncontroverted evidence was that the defendant had been holding the gun when the victim was shot. The counsel's statement was not an admission of the defendant's guilt of any offense, based on the facts in this case.

No Violation of Speedy Trial Provisions of G.S. 15A-711 (Confined Defendant Demanding Trial)

State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (24 July 1997). The defendant alleged that his speedy trial rights under G.S. 15A-711 (confined defendant demanding trial) were violated. The court noted with apparent approval the ruling in State v. Hege, 78 N.C. App. 435, 337 S.E.2d 130 (1985), that a defendant's failure to serve a motion under G.S. 15A-711 [requiring service in the manner provided under Rule 5(b) of Rules of Civil Procedure] bars relief. In this case, the defendant admitted during a hearing that he had failed to properly serve a copy of his motion on the district attorney. Thus the court ruled defendant was not entitled to relief. The court also ruled that even if the motion had been properly served, the defendant's rights were not violated because he was returned for trial within six months of filing his request, citing State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

NORTH CAROLINA COURT OF APPEALS

Criminal Offenses

(1) Attempted First-Degree Felony Murder Is Not a Crime
(2) When Jury Did Not Indicate on Verdict Sheet Whether It Found Premeditation and Deliberation Theory of Attempted First-Degree Murder But Did Indicate It Found Another Theory of Attempted First-Degree Murder For Which Appellate Court Found Insufficient Evidence, New Trial May Be Conducted on Premeditation and Deliberation Theory

State v. Lea, 126 N.C. App. 440, 485 S.E.2d 874 (17 June 1997). The defendant was tried for events involving a high-speed car chase with another vehicle. He fired shots into the other vehicle, causing the other vehicle to have an accident that resulted in serious injury to three people. The trial judge submitted a verdict sheet that listed three verdicts: attempted first-degree murder, attempted second-degree murder, and not guilty. In addition, if the jury answered "yes" to attempted first-degree murder, it was asked to indicate whether the attempted first-degree murder verdict was based on (a) premeditation and deliberation, or (b) first-degree felony murder, or both. The jury answered "yes" to a verdict of attempted first-degree murder and "yes" to (b) first-degree felony murder. The jury left blank the space next to (a) premeditation and deliberation. (1) The court ruled, citing cases from other states, that attempted first-degree felony murder is not a crime. The court noted that such a charge is a logical impossibility because it would require a defendant to intend what is by definition an unintended result. (2) The court also ruled, citing State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993), that the jury's non-answer to attempted first-degree murder based on premeditation and deliberation was not an acquittal of that theory, and therefore the defendant may be retried for attempted first-degree murder based on that theory.

(1) Evidence Supported Only One Kidnapping Conviction
(2) Evidence Did Not Support Jury's Finding That Victim Was Not Released in Safe Place

State v. White, 127 N.C. App. 565, 492 S.E.2d 48 (4 November 1997). The defendant and an accomplice removed the victim from her vehicle and forced her into their vehicle, forced her to withdraw money from her ATM, sexually assaulted her in a park and later at a house, and then gave her money to make a phone call and took her to a motel parking lot where they released her. (1) The court ruled that the trial judge improperly submitted three counts of kidnapping. The defendant committed only one act of kidnapping, which encompassed the period when she was forced from her vehicle until she was released in the motel parking lot. (2) The court ruled, distinguishing State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992), that the victim was released in a safe place and therefore the defendant's first-degree kidnapping conviction could not be supported by this evidence.

(1) Sufficient Evidence to Support Kidnapping Committed During Armed Robbery
(2) Judge's Instructions Violated *Blankenship* Ruling on Acting in Concert
(3) Evidence Did Not Support Firearm Enhancement for Kidnapping Conviction

State v. Brice, 126 N.C. App. 788, 486 S.E.2d 719 (15 July 1997). The defendants were convicted of kidnapping A and armed robbery of B and C. (1) While one defendant threatened A with a gun and forced her to lie on the living room floor, another defendant went into the bedroom and robbed B and C. The court upheld the kidnapping conviction, relying on State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991) and State v. Brayboy, 105 N.C. App. 370, 413 S.E.2d 590 (1992; the court stated that the jury could reasonably find that the restraint of A was not necessary to carry out the robbery of B and C. (2) The offenses were committed on July 13, 1995, and the court therefore applied the *Blankenship* ruling [State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994)] to the judge's instructions on kidnapping and armed robbery. [Note: The *Blankenship* ruling, although overruled in State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), still applies to offenses committed on or after September 29, 1994 and before March 3, 1997.] The court found *Blankenship* error in the kidnapping instruction, but not the armed robbery instruction. (3) The court ruled that the sentencing judge erred in applying the firearm enhancement statute (G.S. 15A-1340.16A] to the kidnapping sentence, because a firearm was used to commit the kidnapping offense and therefore was a necessary element of that offense. [Note: The court did not discuss State v. Evans, 125 N.C. App. 301, 480 S.E.2d 435 (1997), which upheld the firearm enhancement to a kidnapping sentence.]

Judge's Instructions Did Not Violate *Blankenship* Ruling on Acting in Concert

State v. Woods, 126 N.C. App. 581, 486 S.E.2d 255 (1 July 1997). The defendant was convicted of three counts of assault with a deadly weapon inflicting serious injury and one count of attempted armed robbery. The defendant argued that the judge's instructions on acting in concert violated State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994). The court noted that the *Blankenship* ruling only applied to specific intent crimes. Thus the ruling did not apply to the defendant's convictions of assault with a deadly weapon inflicting serious injury, because that offense is not a specific-intent offense; see State v. Curie, 19 N.C. App. 17, 198 S.E.2d 28 (1973). The court examined the jury's instruction concerning attempted armed robbery, which is

a specific intent offense, and ruled it did not violate *Blankenship*. The instruction clearly stated that the defendant could be found guilty of that offense only if that offense was part of a common plan of the defendant and his two accomplices—the court noted that *Blankenship* ruled that specific intent could be proved by evidence tending to show that the specific intent was part of the common plan. The court also stated that additional instructions in this case clearly required proof that the defendant had the specific intent to commit attempted armed robbery.

Defendant's Mere Refusal to Give Social Security Number to Officer Is Not Sufficient Evidence of Probable Cause to Arrest Defendant for Resisting Officer Under G.S. 14-223

Roberts v. Swain, 126 N.C. App. 712, 487 S.E.2d 760 (15 July 1997). The court ruled that a defendant's mere refusal to give his social security number is not sufficient evidence of probable cause to arrest the defendant for resisting an officer under G.S. 14-223.

Judge Did Not Err in Refusing to Instruct on Felonious Restraint in Kidnapping Prosecution, Based on Facts in This Case

State v. Stinson, 127 N.C. App. 252, 489 S.E.2d 182 (19 August 1997). The state's evidence showed that the defendant restrained the victim in his car for the purpose of sexually assaulting her. The defendant denied restraining the victim for any purpose. The judge submitted first- and second-degree kidnapping, but refused to instruct on felonious restraint. The court ruled that the judge did not err, because there was no evidence presented by either the state or the defendant that the victim was restrained for any other purpose than a sexual assault.

Firearm Sentence Enhancement Was Improper When Evidence Conclusively Showed That Object Displayed Was Not a Firearm, Although It Appeared to Be a Firearm When Offense Was Committed

State v. Williams, 127 N.C. App. 464, 490 S.E.2d 583 (7 October 1997). The defendant was convicted of second-degree kidnapping, and the trial judge imposed a firearm sentence enhancement under G.S. 15A-1340.16A. At the time of the offense, it appeared to the victim that the defendant displayed a gun. However, the victim testified at trial that the object displayed by the defendant was merely a cigarette lighter shaped like a gun. The court ruled that because the evidence conclusively showed that the object was not a firearm, the judge erred in imposing the firearm sentence enhancement.

Use of 0.10 Stock Solution to Calibrate Intoxilyzer Was Proper

State v. Phillips, 127 N.C. App. 391, 489 S.E.2d 890 (2 September 1997). The court ruled that the use of 0.10 stock solution during simulation testing that yielded a 0.10 reading showed that the machine was operating accurately. It was irrelevant that at the time of testing, the DWI law only required a 0.08 or more reading to constitute an element of the offense.

Assault on Female Is Not Lesser-Included Offense of Indecent Liberties

State v. Love, 127 N.C. App. 437, 490 S.E.2d 249 (16 September 1997). The court ruled, relying on State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982) and State v. Holman, 94 N.C. App. 361, 380 S.E.2d 128 (1989), that assault on a female is not a lesser-included offense of indecent liberties, G.S. 14-202.1

Offense of Possessing Illegal Slot Machines Is Not Unconstitutionally Vague

State v. Crabtree, 126 N.C. App. 729, 487 S.E.2d 575 (15 July 1997). The court ruled that the offense of possessing illegal slot machines (G.S. 14-306) is not unconstitutionally vague.

Trial Judge Erred in Finding Victim's Age (Victim Was Very Old) as Statutory Aggravating Factor [G.S. 15A-1340.16(d)(11)]

State v. Deese, 127 N.C. App. 536, 491 S.E.2d 682 (21 October 1997). The defendant was convicted of second-degree murder for shooting the victim, a seventy-three-year-old who was arguing with the defendant. The victim was advancing toward the defendant when the defendant shot the victim. The court ruled, relying on State v. Rios, 322 N.C. 596, 369 S.E.2d 576 (1988) and State v. Hines, 314 N.C. 522, 335 S.E.2d 6 (1985), that the trial judge erred in finding the victim's age (victim was very old) as a statutory aggravating factor [G.S. 15A-1340.16(d)(11)]. There was no evidence in this case that the defendant targeted the victim because of his age or that the victim's age caused the victim to be more vulnerable to the crime committed against him.

Evidence

Judge Erred Under Sixth Amendment's Confrontation Clause in Relying on Corroborative Evidence in Admitting Statement Under Residual Hearsay Exception, Rule 804(b)(5)

State v. Downey, 127 N.C. App. 167, 487 S.E.2d 831 (5 August 1997). The court ruled, relying on State v. Tyler, 346 N.C. 187, 485 S.E.2d 599 (1997) and Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), that the trial judge erred under the Sixth Amendment's Confrontation Clause in relying on corroborative evidence in admitting a statement under the residual hearsay exception, Rule 804(b)(5). The statement must possess indicia of reliability by its inherent trustworthiness, not by reference to other evidence at trial. The court should consider (1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination. The court also ruled that the error was not harmless beyond a reasonable doubt and ordered a new trial.

Defendant's Evidence Showing Guilt of Another Was Inadmissible

State v. Wright, 127 N.C. App. 592, 492 S.E.2d 365 (4 November 1997). The defendant was convicted of first-degree burglary and the jury failed to reach a verdict on a murder charge. The

court ruled, relying on State v. McNeill, 326 N.C. 712, 392 S.E.2d 78 (1990), that the trial judge did not err in prohibiting the defendant from offering the testimony of five witnesses to show that another person, not the defendant, committed the murder. The court noted that such evidence must point directly to the guilt of the other person and be inconsistent with the defendant's guilt. Reviewing the proffered evidence, the court noted that the proffered testimony only created a mere conjecture that the other person may have had a motive to commit the murder. There was no evidence linking the other person to a murder weapon or in any way linking the person to the murder. Further, the evidence was not inconsistent with the defendant's guilt.

Adult Witness' Evidence of Alleged Repressed Memories of Childhood Sexual Abuse Is Inadmissible Without Accompanying Expert Testimony on Phenomenon of Memory Repression

Barrett v. Hyldberg, 127 N.C. App. 95, 487 S.E.2d 803 (5 August 1997). Plaintiff, approximately forty-five years old, brought a civil lawsuit against her father for causes of action relating to alleged sexual abuse by her father when she was a child. She alleged that she did not recover memories of these incidents until 1993, about forty years after the alleged sexual abuse. The court ruled, relying on appellate cases from other jurisdictions, that she could not offer evidence of her alleged repressed memories of childhood sexual abuse without accompanying expert testimony on the phenomenon of memory repression. The court, which heard this matter by writ of certiorari reviewing a pretrial motion in limine, remanded the case for further proceedings. (Note: The scientific reliability of such evidence was not an issue in this appeal.)

Trial Judge Did Not Abuse Discretion in Excluding Defendant's Hearsay Statements to Psychologist Under Rule 403

State v. Ballard, 127 N.C. App. 316, 489 S.E.2d 454 (2 September 1997), *reversed on other grounds*, 349 N.C. 286, 507 S.E.2d 38 (6 November 1998). In the prosecution of the defendant for second-degree (vehicular) murder, the defendant presented the testimony of an expert psychologist who testified that the defendant suffered from chronic alcoholism and poly-substance abuse and was suffering from drug and alcohol addiction at the time of the accident. He also stated that the defendant's state of mind immediately before the accident was frightened and panicked. The trial judge refused, however, to allow the psychologist to testify about the defendant's hearsay statements to him explaining his version of the accident. The trial judge reasoned, under Rule 403, that the defendant's exculpatory statements were prejudicial to the state (which could not cross-examine the defendant about these statements) and outweighed any helpfulness to the jury. The court ruled that the trial judge did not abuse his discretion in excluding the defendant's statements. See generally State v. Baldwin, 330 N.C. 446, 412 S.E.2d 31 (1992).

Arrest, Search, and Confession Issues

Asking Questions of Detained Bingo Hall Employees During Execution of Search Warrants in Bingo Hall Was Not Improper Execution of Search Warrants

State v. Crabtree, 126 N.C. App. 729, 487 S.E.2d 575 (15 July 1997). While executing search warrants of a bingo hall to seize evidence being used to operate illegal gambling, officers asked questions of detained bingo hall employees. The court ruled that the officers acted within their authority under G.S. 15A-256 and the manner in which they executed the search warrants did not convert them into general search warrants.

Miscellaneous

(1) State Was Not Required to Request District Court Judge to Make Findings of Fact and Conclusions of Law When Appealing Judge's Ruling That Dismissed Criminal Charges
(2) Superior Court, When Reviewing State's Appeal of District Court Judge's Dismissal of Criminal Charge, Must Conduct De Novo Hearing and Either Affirm or Reverse District Court Judge's Dismissal

State v. Ward, 127 N.C. App. 115, 487 S.E.2d 798 (5 August 1997). A district court judge dismissed criminal charges before trial began (and thus double jeopardy did not prevent the state's appeal), and the state gave notice of appeal to the superior court under G.S. 15A-1432(a)(1). (The court noted that although the state filed a document entitled "Notice of Appeal," instead of a motion as specified by statute, the superior court had jurisdiction to hear the appeal.) The superior court judge summarily reversed the district court judge's ruling without a hearing and remanded the charges to district court. (1) The court ruled, relying on State v. Garganus, 71 N.C. App. 95, 321 S.E.2d 923 (1984), that the state was not required to request the district court judge to make findings of fact and conclusions of law when appealing the judge's ruling dismissing the criminal charges. (2) The court also ruled that the superior court must conduct a hearing on the appeal for de novo review (that is, the court is not bound by the district court's findings) and must issue an order either reversing or affirming the district court's dismissal of the charges.

Double Jeopardy Clause and North Carolina Constitution Did Not Bar Criminal Prosecution After North Carolina ABC Commission's Administrative Action Against Defendant

State v. Wilson, 127 N.C. App. 129, 488 S.E.2d 303 (5 August 1997). The defendant was the holder of an off-premises malt beverage permit. He sold a malt beverage to a person under 21. The North Carolina Alcoholic Beverage Control (ABC) Commission suspended his permit for fifteen days, but suspended the suspension on the payment of $400 and other conditions. The court ruled, relying on the reasoning of United States v. Halper, 430 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989) and other state appellate cases, that neither the Double Jeopardy Clause nor the state constitution barred the state from later prosecuting the defendant for the criminal offense of selling a malt beverage to a person under 21. The court noted that the ABC

commission's administrative penalties did not constitute punishment under the Double Jeopardy Clause or the state constitution.

County Ordinance Regulating Location of Adult and Sexually-Oriented Businesses Is Constitutional

Maynor v. Onslow County, 127 N.C. App. 102, 488 S.E.2d 289 (5 August 1997). The court ruled that an Onslow County ordinance regulating the location of adult and sexually-oriented businesses was constitutional.

Federal Court Conviction of Conspiracy to Possess With Intent to Distribute Marijuana Was Crime of Moral Turpitude to Justify License Revocation

Dew v. State ex rel. N.C. Dept. of Motor Vehicles, 127 N.C. App. 309, 488 S.E.2d 836 (19 August 1997). The Commissioner of Motor Vehicles revoked the plaintiff's motor vehicle dealer's license and motor vehicle salesman's license because he was convicted in federal court of conspiracy to possess with intent to distribute marijuana, a felony. The court ruled, relying on cases from other jurisdictions, that this offense was a felony involving moral turpitude under G.S. 20-294(9) and justified the revocation.