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RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
(October 3, 1991 - June 2, 1992)

North Carolina Supreme Court

Capital Case Issues

Capital Defendant's Absence From Bench Conferences Did Not Violate His Federal Or State Constitutional Rights

State v. Buchanan, 330 N.C. 202, 410 S.E.2d 832 (1991). During defendant's capital trial, he was present in the courtroom but did not participate in bench conferences with the prosecutor, defense counsel, and the trial judge. Twelve of the eighteen bench conferences occurred during jury selection, and six occurred while court was receiving evidence in guilt phase of defendant's trial. None of the conferences were recorded. The court stated that conferences apparently dealt with legal issues such as scope of questions during voir dire of prospective jurors, excusing certain jurors for cause, timing of recesses during proceedings, and evidentiary questions (however, evidence was not heard from witnesses during these conferences). The court ruled that defendant's absence from these conferences did not prejudice him in defending himself and did not violate his federal confrontation and due process rights. The court also ruled that a defendant's state constitutional right to be present at all stages of a capital trial is not violated when, with the defendant in the courtroom, the trial judge conducts bench conferences (even though unrecorded) with both the prosecutor and defense counsel but without the defendant. If, however, the subject matter of a conference implicates the defendant's confrontation rights or defendant's presence would have a reasonably substantial relation to the opportunity to defend oneself, then the defendant would have a constitutional right to be present. Defendant has the burden to show the usefulness of his or her presence to prove a constitutional violation. If a violation is proven, then the state must show it is harmless beyond a reasonable doubt. The court concluded that defendant failed to prove a violation in this case.

Absence Of Capital Defendant And Attorney When Judge Considered Prospective Jurors' Excuses Before Selecting Grand Jury At Beginning Of Week Not Error

State v. Cole, 331 N.C. 272, 415 S.E.2d 716 (1992). Jury panel was present for trial of cases at beginning of week, 17 July 1989. The court announced first order of business was selection of grand jury and considered excuses from prospective jurors at bench and off the record without presence of capital defendant and defense attorney. Grand jury was then selected. The next day, 18 July 1989, the defendant's case was called for a capital trial and jury selection began. The following day, 19 July 1989, a second pool of prospective jurors reported for jury duty and the judge considered excuses at bench and off the record without presence of capital defendant and defense attorney. The court ruled that no error occurred on 17 July 1989 because capital

defendant's trial had not begun then (it was not a stage of the defendant's trial), but error occurred on 19 July 1989 because defendant's trial had already begun.

Defendant Need Not Object To Assert Error On Appeal When Trial Judge Fails To Conduct Individual Poll Of Jurors In Capital Sentencing Hearing

State v. Buchanan, 330 N.C. 202, 410 S.E.2d 832 (1991). Trial judge failed to conduct individual polling of capital sentencing jurors as required by G.S. 15A-2000(b). (Judge simply polled the jurors collectively.) The court ruled that defendant is entitled to new sentencing hearing because the judge's failure to follow statutory mandate is not waived by defendant's failure to object at trial.

At Resentencing Hearing, Prospective Juror's Knowledge Of Prior Death Sentence Not Automatically Disqualifying

State v. Simpson, 331 N.C. 267, 415 S.E.2d 351 (1992). At capital resentencing hearing, prospective jurors' knowledge that prior sentencing jury recommended death penalty need not automatically require that jurors be excused for cause. No error occurred in this resentencing hearing when defendant's motions to excuse jurors for cause were denied because trial judge established through individual, sequestered, and searching voir dire examination that prospective jurors could disregard prior knowledge, follow trial judge's instructions, and render impartial decision.

Error Requiring New Trial When Prosecutor Fails To Present Capital Aggravating Circumstance

State v. Case, 330 N.C. 161, 410 S.E.2d 57 (1991). Defendant was indicted for first-degree murder. State agreed to allow defendant to plead guilty to felony murder and agreed to present evidence of only one aggravating circumstance (heinous, atrocious, or cruel) even though there was evidence of two other aggravating circumstances (murder committed while engaged in kidnapping and murder committed for pecuniary gain). The court ruled that State erred in agreeing not to submit aggravating circumstances that were supported by the evidence. The death penalty law would be arbitrary and therefore unconstitutional if the state were permitted to do so. The court ordered a new trial in which neither the state nor the defendant are bound by this plea bargain. [The court noted that a prosecutor may properly announce that there is no evidence of aggravating circumstance(s) when there is a genuine lack of evidence of aggravating circumstance(s).]

Criminal Offenses

Voluntary Intoxication No Defense To First-Degree Murder By Lying In Wait, Poisoning, Etc.

State v. Baldwin, 330 N.C. 446, 412 S.E.2d 31 (1992). Voluntary intoxication is not a defense to first-degree murder by lying in wait, poisoning, imprisonment, torture, and starvation, since

intent to kill is not an element for these kinds of first-degree murder and voluntary intoxication is a defense only to specific intent crimes.

No Felony Murder When Robbery Victim Kills One Of The Robbers

State v. Bonner, 330 N.C. 536, 411 S.E.2d 598 (1992). Four people attempted to rob a restaurant. An off-duty police officer, acting as a security guard for the restaurant, shot and killed two of the robbers. The surviving two robbers were convicted of felony murder, based on the deaths of their accomplices during the commission of the robbery. The court, relying on State v. Oxendine, 187 N.C. 658, 122 S.E. 568 (1924) and other cases, rules that the common law theory of felony murder does not extend to the deaths of co-felons who are killed by their adversary.

Separate Convictions and Punishments For Drug Trafficking Offenses

State v. Steward, 330 N.C. 607, 411 S.E.2d 376 (1992), *affirming*, 102 N.C. App. 582, 403 S.E.2d 613 (1991) (unpublished opinion). The court, relying on State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986), rules that separate convictions and punishments are permitted for trafficking in cocaine by possession and trafficking in cocaine by transportation—based on the same cocaine.

Sufficient Evidence Of Felonious Breaking Or Entering

State v. Williams, 330 N.C. 579, 411 S.E.2d 814 (1992). Defendant was charged with breaking or entering the home of Wilma Bazemore with the intent to commit murder. (He was also charged with felony murder of Michael Bazemore and felonious assault of Delores Bazemore.) Defendant broke into Wilma Bazemore's home, where his girlfriend—Delores Bazemore—was staying and shot and killed Michael Bazemore (the brother of Delores Bazemore) and then feloniously assaulting her. (1) The court ruled that there was sufficient evidence of breaking or entering with intent to murder Michael Bazemore because the evidence of intent to murder may be inferred from acts the defendant committed after his breaking or entering the home. The court rejected defendant's argument that there was no evidence he had that intent (i.e., his purpose in entering the home was to confront his girlfriend); court noted that jury may find that defendant entered home with more than one purpose. (2) State did not present direct evidence that Wilma Bazemore did not consent to defendant's entering the home. The court ruled, however, that evidence that tended to show defendant broke down the locked front door to gain enter to the house was sufficient by itself to show lack of consent. In addition, Dolares Bazemore specifically told defendant that she did not want to talk with him and she did not open the door. The court rejected, as speculative and without evidentiary support, defendant's argument that Wilma Bazemore possibly gave consent to defendant to enter her home.

(1) No Fatal Variance in Alleging Ownership in Larceny Indictment
(2) Only One Larceny Committed Pursuant to Breaking and Entering When Larceny of Firearm and Other Property

State v. Adams, 331 N.C. 317, 416 S.E.2d 380 (1992). (1) Larceny indictment alleged that pistol was property of Lina Hildreth. Testimony revealed that pistol belonged to George Hildreth. The

court ruled that there was no fatal variance because Hildreths jointly possessed pistol, which was kept in chest of drawers in couple's bedroom, thereby giving Lina Hildreth a sufficient special property interest in pistol to support allegation of ownership in indictment. (2) Defendant was convicted of one count of felonious larceny of firearm and one count of felonious larceny of property (which included the firearm) pursuant to breaking or entering; convictions arose from one breaking and entering and larceny. Agreeing with the ruling in State v. Boykin, 78 N.C. App. 572, 337 S.E.2d 678 (1985) (court vacates convictions of three felony larcenies for each of three firearms stolen; court upheld conviction for one larceny, which included the stolen firearms), the court ruled that only one larceny is committed during one continuous act or transaction, and therefore it vacates one of the convictions.

(1) Sufficient Evidence of Kidnapping During Armed Robbery
(2) Felonious Restraint Was properly Not Submitted as Lesser Offense of Kidnapping, Based on Facts in This Case
(3) No State's Election Required When Evidence Supported Three Different Felonies as Purpose of Kidnapping

State v. Pigott, 331 N.C. 199, 415 S.E.2d 555 (1992). (1) The following evidence was sufficient for kidnapping conviction when defendant restrained victim by binding his hands and feet for purpose of facilitating commission of armed robbery. Defendant first threatened victim with gun and then forced him to lie on stomach and tied his hands behind his back. This restraint was sufficient to enable defendant to search office and adjoining apartment for money. Defendant returned and asked victim if he had any more money; victim said no. Defendant then secured victim's feet to his hands, rendering him utterly helpless, shot him, and continued the search for money. The court ruled that all the restraint necessary and inherent to commit armed robbery was exercised by threatening victim with the gun. Defendant's binding of victim's hands and feet exposed victim to greater danger than inherent in the armed robbery itself. This increased the victim's helplessness and vulnerability beyond initial threat with the gun, and constituted additional restraint to support kidnapping conviction. (2) Trial judge properly refused to submit false imprisonment as a lesser offense of kidnapping when the only purpose for the unlawful restraint in this case was armed robbery, which was only purpose submitted for kidnapping. (3) The court noted that the state alleged in indictment three felonies as purposes of the restraint constituting kidnapping and, had it not elected to submit only armed robbery as the purpose, the state would have been permitted to rely on all three felonies either alternatively or conjunctively (i.e., proving only one felony would have been sufficient); state's election is not required when evidence is sufficient to support the felonies alleged.

Kidnapping Victim Was Not Released In Safe Place

State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991). The release of the victim in a safe place under first-degree kidnapping requires a defendant's conscious, willful action to assure a victim's release in a place of safety. The court ruled that victim was not released in a safe place when defendant removed victim from trailer while holding a shotgun, shot her outside the trailer, and drove off in his vehicle.

Evidence

Acquittal Of Offense Automatically Disqualifies Use of That Offense At Later Trial (With One Limited Exception)

State v. Scott, 331 N.C. 39, 413 S.E.2d 787 (1992). Defendant was tried for rape and other offenses. His defense was consent. The state was permitted to offer testimony of another woman who said that the defendant had raped her two years earlier under similar circumstances; however, the defendant had been tried and acquitted of that offense. The trial judge admitted her testimony on the issue of the defendant's intent, knowledge, plan, scheme, or design. The court ruled that evidence that defendant committed an offense for which he had been acquitted may not be admitted in a later trial for a different offense when its probative value depends on the defendant's having committed the prior crime; the admission of such evidence violates, *as a matter of law*, Rule 403. The court distinguished State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990), which permits evidence of an offense for which the defendant was previously acquitted when the conduct underlying that offense was part of the same "chain of circumstances" that included the present offense for which the defendant was being tried. Thus, this is the only circumstance in which an acquittal is admissible at trial.

Defendant Improperly Denied Admission Of Co-Defendant's Statements At Joint Trial

State v. Tucker, 331 N.C. 12, 414 S.E.2d 548 (1992). Defendant and co-defendant were tried jointly for murder. Co-defendant did not testify. The court ruled that defendant should have been allowed to introduce the following pretrial statements made by the co-defendant: (1) a 15 April 1988 statement in which the co-defendant admitted using illegal drugs, but the defendant was not the source of these drugs; this statement was admissible under Rule 804(b)(3) (statement against penal interest) because it tended to corroborate defendant's testimony that defendant did not deal in drugs; and (2) statements on 22 February and 25 February 1988 in which the co-defendant said that the defendant, not the co-defendant, killed the victim; although these statements were inculpatory as to the defendant, they supported his defense that the co-defendant planned and executed the murder without defendant's involvement and over time conspired to implicate defendant to get a deal with the state; because the defendant did not offer these statements to prove truth of matters asserted in them (i.e., that defendant committed murder) but to discredit the state's theory of the case, the statements are not inadmissible hearsay; trial judge erroneously apply *Bruton* rule to defendant's prejudice by precluding him from presenting evidence in his defense.

Scope Of Defense Psychologist's Testimony Properly Limited

State v. Baldwin, 330 N.C. 446, 412 S.E.2d 31 (1992). Defendant was tried for murder. Trial judge ruled that defense expert psychologist could not testify about the substance of any self-serving, exculpatory statements made to him by the defendant unless or until the defendant testified about those statements. The court ruled that Rule 705 does not *automatically* make admissible by the proponent of evidence the bases of an expert's opinion (in this case, the defendant's statements to the psychologist); the bases are automatically admissible only if sought

by the adversary party on cross-examination. The court also ruled that trial judge properly excluded such defense evidence under Rule 611 and balancing test of Rule 403: defendant's statements to psychologist were self-serving about several defenses, including self-defense, coercion, intimidation, and duress. When defendant sought to elicit these statements from the psychologist, no evidence had been presented to establish any of these defenses. The court noted that the psychologist was expressly permitted to testify about his evaluation and opinions and conclusions resulting from the evaluation; the substance of the defendant's statements were not necessary to explain this testimony, and therefore the exclusion of this hearsay evidence did not improperly force the defendant to testify to support the expert's conclusions.

Defendant May Cross-Examine Key State's Witness About Prior Mental Problems And Drug Abuse Under Rule 611

State v. Williams, 330 N.C. 711, 412 S.E.2d 359 (1992). Trial judge prohibited defendant from impeaching key state's witness in murder prosecution by cross-examining witness about his past drug habit, attempted suicides, and psychiatric history. Trial judge ruled that such evidence was not admissible under Rule 608(b) because such evidence was not probative of truthfulness. The court stated that although that trial judge was correct about Rule 608(b), Rule 611(b) ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility") governs this case, and it was error to prohibit the defendant's cross-examination. The proposed cross-examination was proper, based on the facts of this case (court makes clear that its ruling is limited to when a witness is a *key* prosecution witness), in order to cast doubt on the capacity of the witness to observe, recollect, and recount—and it was properly the subject of cross-examination. The court rejected state's argument that evidence of a witness suffering from mental illness or drug addiction should be limited to illness or addiction that actually affected the mental capacity of the witness at the time of the commission of the crime or testimony at trial (in this case, the illness and addiction began two years before the crime).

Prosecutor's Cross-Examining Defendant About Prior Assaults Was Permissible under Rules 404(a)(1) and 405, Based on Facts in This Case

State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991). Defendant in homicide trial testified on direct examination the he had previously pled guilty to two charges of assaulting the homicide victim. He also testified about his good character and devotion to the victim and their child, suggesting that the victim was the troublemaker in their relationship. Prosecutor, on cross-examination, questioned defendant in detail about the two assault convictions, specifically requiring defendant to read the charging language from the arrest warrants. The court ruled that requiring defendant to read the charging language exceeded the scope of cross-examination under Rule 609. However, prosecutor properly was permitted to probe the details of the assaults under Rule 404(a)(1) and Rule 405 because defendant on direct examination put into evidence a pertinent trait of his character—peacefulness—which the prosecutor may rebut. The court noted, however, that the better practice is to limit cross-examination to questions about the prior conduct itself, rather than requiring a defendant to read to the jury the charging language of the arrest warrant.

(1) Evidence Of Victim's Peacefulness Must Be Presented After Evidence of Victim Being Aggressor
(2) Aggressor Under Rule 404(a)(2) Includes Committing Sexual Assault

State v. Faison, 330 N.C. 347, 411 S.E.2d 143 (1991). (1) The court ruled that, under Rule 404(a)(2), the state may not present evidence of victim's peacefulness until evidence (which does *not* include defense attorney's opening statement) is presented that the victim was the aggressor. (2) The court also ruled that defendant's evidence of victim being the aggressor by committing sexual assault permits state to offer evidence of victim's peacefulness—"aggressor" is not limited under the rule to a person who commits non-sexual assault.

(1) Marital Communications Privilege: Spouse May Not Disclose Communication Over Objection Of Other Spouse
(2) Testimony About Act Intended As Communication Is Included Within Privilege

State v. Holmes, 330 N.C. 826, 412 S.E.2d 660 (1992), *affirming*, 101 N.C. App. 229, 398 S.E.2d 873 (1990). (1) The court interpreted G.S. 8-57 to provide that spouse (in this case, spouse testifying for the state) may not testify about communication included within marital communications privilege over objection of other spouse (in this case, defendant was the other spouse). (2) The court ruled that an act (in this case, taking gun out of kitchen cabinet in spouse's presence and leaving with it) is included within privilege if it is intended to be a communication and is type of act induced by the marital relationship.

Evidence Of Post-Traumatic Stress Disorder Inadmissible As Evidence That Rape Occurred

State v. Hall, 330 N.C. 808, 412 S.E.2d 883 (1992), *reversing*, 98 N.C. App. 1, 390 S.E.2d 169 (1990). Trial judge admitted evidence that prosecuting witness suffered a conversion reaction and post-traumatic stress disorder following an alleged rape by her stepfather. The court ruled that admission of this evidence was error when it was offered for substantive purpose of proving that a rape in fact occurred. However, court rules that such evidence is admissible for corroborative purposes (e.g., credibility of prosecuting witness; explaining delays in reporting crime; refuting defense of consent; explaining post-assault behavior patterns of prosecuting witness). Trial judge should determine whether admission of evidence for corroborative purposes would be helpful to trier of fact under Rule 702, and trial judge should conduct balancing test of Rule 403. If such evidence is admitted, trial judge must explain to jury the limited uses for which evidence is admitted (and that evidence is not admissible substantively for purpose of proving that rape or sexual abuse in fact occurred).

Officer Using Interpreter During Interrogation May Testify At Trial About Defendant's Responses Without Interpreter Also Testifying

State v. Felton, 330 N.C. 619, 411 S.E.2d 193 (1992). Defendant, a deaf mute, was interrogated by an officer with the use of an interpreter. Trial judge permitted officer to testify about defendant's responses during interrogation even though the interpreter did not testify. The court

ruled that trial judge did not err, based on the facts in this case, since (1) interpreter was both qualified and competent, (2) interpreter did not have motive to shift suspicion of crime to defendant or to misrepresent defendant's responses during translation, and (3) defendant did not assert that officer's account of defendant's responses to interpretation was incorrect. The court noted that preferable procedure is to have interpreter testify in addition to interrogating officer.

Hospital Blood Alcohol Test Evidence Admissible In DWI Prosecution

State v. Drdak, 330 N.C. 587, 411 S.E.2d 604 (1992), *reversing*, 101 N.C. App. 659, 400 S.E.2d 773 (1991). Defendant crashed his vehicle into a tree and was taken to a hospital. Doctor at hospital ordered routine series of hospital tests, including one for blood alcohol level. Hospital phlebotomist withdrew blood from defendant and hospital lab technician analyzed blood alcohol level at 0.17. The court ruled that (1) state presented sufficient foundation to admit test result, and (2) evidence was admissible under G.S. 20-139.1(a), which permits the introduction of other competent evidence of the defendant's alcohol concentration, including other chemical tests (i.e., other than under the implied consent statutes). The court rejected defendant's arguments that (1) blood must be obtained under G.S. 20-16.2(a) and must meet requirements of G.S. 20-139.1 to be admissible; and (2) hospital's destruction of blood sample violated defendant's due process rights, noting Arizona v. Youngblood, 488 U.S. 51 (1988).

Arrest, Search, and Confession Issues

Officer Had Authority To Stop And Frisk Drug Suspect

State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992). The court upheld officer's stop and frisk of drug suspect by citing these factors: (1) officer saw defendant in midst of group of people congregated on corner known as a "drug hole;" (2) officer had had the corner under daily surveillance for several months; (3) officer knew corner to be center of drug activity because he had made four to six drug-related arrests there in past six months; (4) officer was aware of other arrests there as well; (5) defendant was a stranger to officer; (6) when defendant made eye contact with uniformed officers, he immediately left corner and walked away, behavior that is evidence of flight; and (7) officer's experience was that people involved in drug traffic are often armed. The court stated that, in considering legality of frisk, officer was entitled to formulate "common-sense conclusions" about "the modes or patterns of operation of certain kinds of lawbreakers" [citing from United States v. Cortez, 449 U.S. 411, 101 S. Ct. 690, 66 L.Ed.2d 621 (1981)] in concluding that the defendant, reasonably suspected of drug trafficking, might be armed.

Officer Obtained Defendant's Statements By Violating Defendant's Fifth And Sixth Amendment Rights To Counsel

State v. Tucker, 331 N.C. 12, 414 S.E.2d 548 (1992). The defendant was indicted for murder on 18 April 1988. On 20 April 1988, the defendant made his first appearance in district court and a lawyer was appointed to represent him. He met with his appointed lawyer later that day, who told the defendant not to talk with anyone without counsel. On 21 April 1988, the investigating officer met with the defendant (*not* at the defendant's initiative) in the county jail and stated that he

wanted the defendant to go with him to another county to look for the murder victim's body. The defendant told the officer what his lawyer had said. The defendant also tried twice unsuccessfully to call his lawyer. The officer told the defendant they needed to hurry and commented that he was after the defendant's accomplice, not necessarily the defendant. The officer later obtained incriminating statements from the defendant, which were introduced at his murder trial. The court ruled that the defendant's Sixth Amendment right to counsel for the murder chare attached at the district court first appearance (in fact, it had attached earlier, when he had been indicted), and he clearly invoked that right when he requested and received appointment of counsel then; see Patterson v. Illinois, 487 U.S. 285, 108 S. Ct. 2389, 101 L.Ed.2d 261 (1988). Therefore, the officer could not—under Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404, 89 L.Ed.2d 631 (1986)—initiate interrogation, and the court ruled that the evidence clearly showed that the officer did so in this case. Therefore, the defendant's later waiver of his right to counsel was invalid, and the defendant's incriminating statements were inadmissible.

The court also ruled that the officer violated the defendant's Fifth Amendment right to counsel. Although under McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) the defendant's request for counsel at the first appearance was not considered an assertion of the Fifth Amendment right to counsel, the court ruled that the defendant invoked his Fifth Amendment right to counsel by informing the officer of his desire to call his lawyer and in attempting to do so. Thus, under Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the officer could not interrogate the defendant unless the defendant initiated communication with the officer. The officer's continued interrogation of the defendant after he invoked his Fifth Amendment right to counsel violated *Edwards*, and the defendant's later waiver of the right to counsel was invalid, Therefore, the incriminating statements were inadmissible.

Suspect In Back Of Patrol Car Was In "Custody" To Require *Miranda* Warnings

State v. Washington, 330 N.C. 188, 410 S.E.2d 55 (1991), *reversing*, 102 N.C. App. 535, 402 S.E.2d 851 (1991). The court, *per curiam* and without its own opinion, reverses majority opinion of Court of Appeals (that had ruled that defendant was not "in custody" to require *Miranda* warnings) for the reasons stated in the dissenting opinion of Court of Appeals. (*The following discussion is based on the majority and dissenting opinions of the Court of Appeals*.) Officer saw defendant driving car with a broken headlight and other damage indicating it had recently been involved in an accident. Officer suspected car had been involved in a hit-and-run accident and stopped it. Defendant got out of car and met officer in front of patrol car. Defendant did not have license, and officer placed him in back of patrol car while he checked his identity with Division of Motor Vehicles. When returning to defendant's car, officer saw bullet on floorboard. Officer then returned to patrol car and asked defendant, still sitting inside, where the gun was located. [Neither the majority nor dissenting opinions provide the time that elapsed from when the defendant was placed in back of patrol car to when the officer asked the defendant a question.] After defendant denied there was a gun in the car and denied the car was his, he also told the officer that he could search the car. Officer then searched car and found a bag with smaller bags inside containing white powdery substance (which later was determined to be cocaine). Officer showed the bag to defendant and said, "Look what I found." Defendant responded that it was only baking soda that he and a friend had been flaking. Officer asked defendant what flaking meant and defendant

responded that he had bagged up baking soda to look like cocaine in order to sell it and to make a profit. Officer then placed defendant under arrest.

The dissenting opinion stated that the facts of this case differ significantly from routine traffic stop cases in which custody did not exist, citing State v. Seagle, 96 N.C. App. 318, 385 S.E.2d 532 (1989) and Pennsylvania v. Bruder, 488 U.S. 9 (1988). When defendant in this case was stopped and placed in the back seat of the patrol car, he was not free to leave at will (the inside door handles of back seat doors did not work). He was, "in effect, incarcerated on the side of the road" and therefore was "in custody" when he made statements to the officer. Dissenting opinion also concluded that officer's act of showing defendant the bag and his words, "Look what I got," was "interrogation" under the test set out in Rhode Island v. Innis, 446 U.S. 291 (1980). Thus, the officer was required to give *Miranda* warnings before questioning the defendant.

(1) Murder Suspect Was In "Custody" To Require Miranda Warnings
(2) Suspect's Inquiry About Need For Attorney Was Request For Counsel

State v. Torres, 330 N.C. 517, 412 S.E.2d 20 (1992), *reversing*, 99 N.C. App. 364, 393 S.E.2d 535 (1990). Defendant shot and killed her husband in their home in the early evening. Deputy sheriffs arrived to investigate the shooting. A deputy sheriff transported the defendant and her close friend to the sheriff's department. From 7 p.m. to 10 p.m. she was in the department's conference room with that deputy sheriff (during this time she was informed that her husband had died). Sometime during this period, she asked the sheriff whether she needed a lawyer and was told that she did not need a lawyer right now. About 10 p.m., she was taken to the sheriff's office, where she was told that she would be interviewed by two other officers. Although she was never informed she was under arrest, she also was never told that she was free to leave. (1) The court ruled that a reasonable person in the defendant's position, knowing she had just shot her spouse, brought to the sheriff's department by a deputy, kept under constant supervision there, and never informed that she was free to leave, would feel compelled to stay; therefore, she was in custody under *Miranda*. (2) The court rejected the state's argument that defendant could not have invoked her right to counsel because she was not being questioned when she asked about a lawyer. The court ruled that a defendant in custody may assert her right to have counsel present during her impending interrogation before *Miranda* warnings are given and interrogation begins. [The court distinguished contrary dicta in McNeil v. Wisconsin, 111 S. Ct. 2204, 115 L.Ed.2d 158 (1991), by noting that the U.S. Supreme Court suggested that one cannot anticipatorily invoke *Miranda* rights when one is not in custody.] (3) The court rejected the state's argument that a defendant's invocation of the right to counsel must be precise and unequivocal. The court stated that the crucial determination is whether the defendant has indicated in any manner a desire to have the assistance of a lawyer during custodial interrogation; thus, a court must examine not only the defendant's spoken words but also the context in which they are spoken. The court ruled, based on facts of this case, that defendant indicated a desire, at least once, to have an attorney during interrogation. Even if defendant's statements are construed to be an equivocal request for counsel (in which case officers must immediately stop interrogation except for questions narrowly designed to clarify the defendant's actual intent), the result remains the same because the officers did not seek to clarify the defendant's intent. Instead, they dissuaded the defendant from exercising her right to have a lawyer present during custodial interrogation. The court concluded that defendant invoked her right to counsel and the subsequent officer-initiated custodial

interrogation violated her *Miranda* rights. Therefore her statements are inadmissible as substantive evidence at trial.

Confession After Proper Miranda Warnings Was Admissible Although Prior Statements Were Obtained In Violation of Miranda

State v. Barlow, 330 N.C. 133, 409 S.E.2d 906 (1991), *reversing*, 103 N.C. App. 276, 405 S.E.2d 372 (1991). Assuming without deciding that one set of statements were obtained from defendant as a result of *Miranda* violations (but the statements were not coerced from defendant), the court rules, relying on Oregon v. Elstad, 470 U.S. 298 (1985), that a subsequent confession obtained in compliance with *Miranda* was admissible.

Miscellaneous

Non-Capital Trial In Defendant's Absence Was Not Error In This Case

State v. Richardson, 330 N.C. 174, 410 S.E.2d 61 (1991), *reversing*, 99 N.C. App. 496, 393 S.E.2d 333 (1990). On 17 April 1989, with defendant and his counsel present, jurors for defendant's non-capital trial were selected but not impaneled. Defendant was told to return the following morning at 9:30 a.m. when trial was to begin. Defendant failed to appear. Defense counsel told judge that trial spectator had seen defendant walking from this home toward courthouse that morning; trial judge then requested sheriff's department to locate defendant. Judge refused to continue case, impaneled jury, and trial began at 10:00 a.m. During examination of first witness, defense counsel handed judge a note from court clerk stating a person identifying himself as defendant's friend had phoned at 10:10 a.m. to say that he was taking defendant to hospital with back problems. Judge denied continuance, noting that defendant had failed to contact either his counsel or court directly and had ample opportunity to do so. At 2:00 p.m., defense counsel informed judge that defendant had called clerk's office during lunch recess and indicated he was at local hospital. Judge gave defense counsel brief recess to allow him to call hospital and confirm defendant's whereabouts, but counsel was unsuccessful. District attorney informed judge that sheriff's deputies had reported seeing defendant at two other locations during the day. Judge again denied defendant's request for continuance. Defendant was convicted.

The court ruled that in non-capital trials, defendant's voluntary unexplained absence from court after trial begins is a waiver of the personal constitutional right to confront witnesses. For purpose of this rule, trial begins when the case is reached on the calendar and jurors are called into the jury box to be examined about their qualifications (which occurred in this case). Defendant must explain his absence to the court's satisfaction. The court ruled that uncorroborated explanations provided to court by third parties in this case did not satisfy defendant's burden and therefore trial judge did not abuse his discretion in continuing the trial in defendant's absence.

Defendant's *Cofield* Motion Was Not Timely

State v. Pigott, 331 N.C. 199, 415 S.E.2d 555 (1992). Defendant at arraignment was given twenty-one days to file motions. Defendant filed *Cofield* [320 N.C. 297 (1987)] motion

challenging selection of grand jury foreman after that time period expired (in this case, five months later). The court ruled that trial judge properly denied motion as being untimely under G.S. 15A-952(c) and properly exercised discretion under G.S. 15A-952(c) to not grant relief from failure to file motion timely.

(1) Reasonable Doubt Instruction Was Constitutional
(2) Defendant Had No Right To Enforce Proposed Plea Bargain
(3) Trial Judge Erred In Implementing Electronic Coverage of Trial

State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992). (1) Reasonable doubt instruction was not constitutionally infirm under Cage v. Louisiana, 111 S. Ct. 328, 112 L.Ed.2d 339 (1990), when it used phrase "honest, substantial misgiving" in context of entire instruction. (2) Defendant was not entitled to enforcement of terms of plea bargain he had accepted when prosecutor withdrew the offer before entry of guilty plea and defendant had not detrimentally relied on the plea bargain (state withdrew offer on 1 August 1986 and trial began on 9 February 1987). (3) Trial judge erred (but not to the defendant's prejudice) when he (i) failed to instruct jury that electronic coverage of them was expressly prohibited; (ii) failed to ensure that electronic equipment was completely obscured from view within courtroom; and (iii) permitted a microphone to be placed at the bench to allow coverage of bench conferences.

Defendant Was Not Entitled To Withdraw Guilty Plea Before Sentencing Hearing

State v. Meyer, 330 N.C. 738, 412 S.E.2d 339 (1992). On 16 May 1988, defendant entered guilty pleas to two counts of first-degree murder, which were accepted by the trial judge. On 3 June 1988, a jury was impaneled for a capital sentencing hearing. On 12 June 1988, during presentation of defendant's evidence, defendant escaped from the county jail. Trial judge declared a mistrial. Defendant was apprehended on 19 June 1988. On 6 September 1988, before a new sentencing hearing, defendant moved to withdraw his guilty pleas on the sole ground of "change of circumstances" (because of his escape from jail, media coverage of the case and escape was extensive). Trial judge denied motion. Court, applying principles of State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990) (presentence motion to withdraw guilty plea should be allowed for any fair and just reason) to facts in this case, rules that defendant was not entitled to withdraw guilty pleas. None of factors outlined in *Handy* favoring withdrawal were present in this case. The court rejected defendant's argument that motion to withdraw must be granted unless state can show concrete prejudice to its case; the state need not address this issue until defendant has asserted a fair and just reason for withdrawing guilty plea (which was not done in this case).

Transferred Intent Instruction Was Proper

State v. Locklear, 331 N.C. 239, 415 S.E.2d 362 (1992). Jury instruction on transferred intent stated: "Considering the defendant's intent, the jury is instructed that if the defendant intended to harm one person, but actually harmed a different person, the legal effect would be the same as if he had harmed the intended victim. This is called the doctrine of transferred intent." The court ruled that this instruction did not unconstitutionally shift to defendant the burden of persuasion on the element of specific intent to kill for felonious assault. The instruction simply stated the

substantive law; it did not require or permit one fact to be presumed based on the finding of another fact.

Proper Non-Statutory Aggravating Factor For Felonious Assault Conviction

State v. Reeb, 331 N.C. 159, 415 S.E.2d 362 (1992). Trial judge properly found as nonstatutory aggravating factor in felonious assault conviction that defendant, after shooting victim, mercilessly left her bleeding and in great pain without rendering any kind of assistance to her.

Prosecutor's Statement About Defendant's Prior Convictions Was Not Sufficient Evidence To Support Aggravating Factors In FSA Sentencing Hearing

State v. Canady, 330 N.C. 398, 410 S.E.2d 875 (1991), *reversing*, 99 N.C. App. 189, 392 S.E.2d 457 (1990). Prosecutor stated at Fair Sentencing Act (FSA) hearing that defendant had prior convictions for various offenses. Defense counsel stated to trial judge that "[t]hese charges and convictions now against him are out of character and not consistent with what he's been involved in the past." The court ruled that defense counsel's statement was too equivocal to serve as an admission of the prior convictions, and defendant's failure to object to prosecutor's statement at the hearing does not bar appellate review. The court remanded for new sentencing hearing because evidence was insufficient to support judge's finding of convictions as aggravating factors.

Disjunctive Jury Instruction Violated Defendant's Right To Unanimous Verdict

State v. Lyons, 330 N.C. 298, 412 S.E.2d 308 (1991). Indictment for secret assault charged defendant with committing offense against persons A and B. Trial judge charged jury that defendant may be found guilty if it finds that he secretly assaulted A *and/or* B. The court ruled, relying on State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1990), that jury charge violated defendant's state constitutional right to unanimous verdict by permitting jury to convict defendant of two separately punishable crimes in one verdict (i.e., secret assault of A and secret assault of B) without instructing the jurors that all twelve must find that defendant assaulted one particular individual (or both).

State's Immediate Appeal Of Order For New Trial For Newly Discovered Evidence

State v. Monroe, 330 N.C. 433, 410 S.E.2d 913 (1991), *reversing*, 102 N.C. App. 567, 402 S.E.2d 850 (1991). State has right to appeal immediately a superior court order granting a criminal defendant a new trial on ground of newly discovered evidence [see G.S. 15A-1445(a)(2)].

North Carolina Court of Appeals

Evidence Cases

Testimony Of Witness Found Incompetent Inadmissible Under Rule 804(b)(5)

State v. Stutts, 105 N.C. App. 557, 414 S.E.2d 61 (1992). Defendant was tried for indecent liberties with four-year-old girl. Trial judge found the girl was unavailable to testify because she could not understand the difference between truth and falsehood and because of her inability to understand "what is reality and what is imagination." The court ruled that the girl's out-of-court statements did not possess guarantees of trustworthiness to be admissible under Rule 804(b)(5) based on the trial judge's finding that she was unable to tell truth from fantasy.

But see **State v. Holden**, 106 N.C. App. 244, 416 S.E.2d 415 (1992). The court distinguished *Stutts* and upholds admission of child victim's statements under Rule 803(24). Trial judge found victim unavailable due to fear and trepidation, but stated at hearing that victim "did not seem to understand the consequences of not telling the truth." Trial judge made detailed findings why victim's statements were trustworthy, and court rules that judge's comment at hearing, which was not included in his written order, was insufficient to overcome other competent evidence that supported admissibility of statements. The court noted that trustworthiness factor focuses on the circumstantial guarantees of reliability that surround the declarant when the statements were made and not on the witness' competence when the hearing was held.

Similar Break-In Admissible Under Rule 404(b)

State v. Reid, 104 N.C. App. 334, 410 S.E.2d 67 (1991). **(Note: the Supreme Court later reversed the defendant's conviction, 334 N.C. 551, 434 S.E.2d 193 (1993), but the reversal involved a different issue than the issue discussed here.)** Defendant was being tried for break-in of Granite Falls drug store about 2 a.m. on 1 February 1988 in which a hole was knocked out of back of store through which intruder entered; a sledge hammer was found at the crime scene. Evidence was admitted under Rule 404(b) that about 3:49 a.m. on 3 January 1989 a Winston-Salem officer responded to an activated alarm call at Winston-Salem hardware store, noted hole knocked out of back of building, and then discovered defendant in the building; a sledge hammer was found at the crime scene. The court upheld admission of this evidence for purpose of showing *modus operandi* in case being tried, noting similarity of crimes and that the lapse of eleven months between two crimes was not so remote to make evidence inadmissible. The court stated that it is reasonable to conclude that person with particular *modus operandi* will continue that pattern whether or not there was been long lapse of time between crimes.

Evidence Of Thirteen-Year-Old Robbery Admissible Under Rule 404(b)

State v. Wilson, 106 N.C. App. 342, 416 S.E.2d 603 (1992). Defendant was being tried for series of armed robberies over two week period. State offered evidence of defendant's committing armed robbery thirteen and one-half years ago for showing modus operandi, motive, and identity; robbery was committed in similar manner to those being tried—defendant was armed, wore ski mask and gloves, ordered people present to lie face down on floor, and took cash. Evidence was

not too remote in time—defendant was in prison for eight years between prior robbery and robberies being tried; court relies on State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

Evidence Of Revoked License And Pending DWI Charge Admissible In Second-Degree Murder By Vehicle Prosecution

State v. Byers, 105 N.C. App. 377, 413 S.E.2d 586 (1992). Defendant was prosecuted for second-degree murder for killing two people in a vehicular accident. The court ruled that (1) evidence that the defendant's knew that his license was revoked at the time of the accident was admissible on the issue of malice—that is, whether defendant acted with a mind regardless of social duty and with recklessness of consequences; and (2) evidence of an impaired driving charge pending at the time of the vehicular homicide was relevant to defendant's mental state.

Hearsay On Hearsay Inadmissible Under Business Records Hearsay Exception

State v. Reeder, 105 N.C. App. 343, 413 S.E.2d 580 (1992). Assuming without deciding that medical report was admissible as a business record under Rule 803(6), it was error to admit that part of the report that included what the child-victim told the doctor because it was hearsay on hearsay.

Not Reversible Error When Rule 404(b) Admitted For Two Purposes, One Proper And One Improper

State v. Haskins, 104 N.C. App. 675, 411 S.E.2d 376 (1991). It is not reversible error when trial admits Rule 404(b) evidence for two purposes, when one purpose is proper (here, attempted robbery committed same evening admissible to show motive for robbery being tried) and the other purpose is improper (here, attempted robbery committed same evening inadmissible to show identity because it was not sufficiently similar to robbery being tried).

(1) Requiring Defendant To Model Mask Was Not Error
(2) Defense Eyewitness Identification Expert Properly Excluded As Witness

State v. Suddreth, 105 N.C. App. 122, 412 S.E.2d 126 (1992). (1) Victim was attacked by person wearing executioner's hood with slits for eyes and mouth. Victim recognized her attacker's voice as the defendant's and identified the color of his eyes. Trial judge ordered defendant to don black executioner's mask while standing for jury; state had purchases mask, which was similar to one worn by attacker. The court, relying on State v. Perry, 291 N.C. 284, 230 S.E.2d 141 (1976), ruled that defendant's Fifth Amendment rights were not violated and demonstration was properly conducted to aid jury in determining whether victim could see color of defendant's eyes; the fact mask was not exact mask worn by attacker did not preclude its use.

See also **State v. Summers**, 105 N.C. App. 420, 413 S.E.2d 299 (1992) (requiring defendant to show his teeth to jury did not violate his Fifth Amendment rights). (2) Relying on State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985), and State v. Cotton, 99 N.C. App. 615, 394 S.E.2d 456 (1990), the court upheld trial judge's decision not to admit testimony of defense identification expert—judge found that evidence was not case-specific, did not have sufficient

probative value, would confuse the jury, and would not assist the jury in understanding the evidence or determining the facts in this case. Expert did not interview victim, did not visit scene of the crime, and did not observe the victim testify.

Drug Cases

(1) Sufficient Evidence Of Drug Activity Within 300 Feet Of School Property
(2) Two Separate Purchases Within Short Time Period Supports Two Convictions

State v. Ussery, 106 N.C. App. 371, 416 S.E.2d 610 (1992). Defendant was convicted of two charges of possession with intent to sell or deliver and two charges of sale of cocaine for two separate drug transactions made at grocery store within 300 feet of boundary of middle school property. (1) School administrators testified that they had reviewed the plats and deed descriptions of the school property and had measured (with law enforcement officers) the distance from the school's boundary to the spot where the drug transactions were made, and the distance was 242 feet. The court ruled that evidence was sufficient to support distance-element of crime. (2) Two separate purchases of cocaine, made by law enforcement informant at officers' direction, supported two separate convictions even though they were made within a short period of time of each other.

Jurisdiction Existed To Try Drug Trafficking Conspiracy

State v. Drakeford, 104 N.C. App. 298, 409 S.E.2d 319 (1991). Undercover officer negotiated to purchase cocaine from Simpkins, a Wake County cocaine dealer. Simpkins telephoned defendant at his home in Maryland; defendant told him to come to Maryland and they would find some cocaine. After they obtained cocaine in New York and returned to Maryland, Simpkins told defendant that he would split the profit with him if he sold the cocaine. Simpkins returned to North Carolina and sold the cocaine. The court ruled that North Carolina had jurisdiction to try defendant for drug trafficking conspiracy—overt acts were committed in North Carolina in furtherance of the common design to transport cocaine into the state.

Evidence In Trial For Maintaining Residence For Keeping And Selling Drugs

State v. Crawford, 104 N.C. App. 591, 410 S.E.2d 499 (1991). In trial for maintaining a residence for keeping and selling a controlled substance: (1) evidence that people were arrested for possessing drugs while leaving the residence was admissible; but (2) evidence of the reputation of defendant's neighborhood (as a place where drugs are sold) was inadmissible hearsay.

Trial Judge's Determination of "Substantial Assistance" Under G.S. 90-95(h)(5)

State v. Wells, 104 N.C. App. 274, 410 S.E.2d 393 (1991). On remand for resentencing after State v. Hamad and Wells, 92 N.C. App. 282, 374 S.E.2d 410 (1988), *affirmed per curiam*, 325 N.C. 544, 385 S.E.2d 144 (1989), trial judge found defendant did not render "substantial assistance" for two trafficking convictions but reduced a sentence for another trafficking conviction after finding that defendant did render "substantial assistance." The court noted that a

trial judge's finding of "substantial assistance" is discretionary, and even if the trial judge makes such a finding, the decision to reduce the sentence is also discretionary. The court ruled that trial judge properly exercised his discretion at the resentencing hearing in determining that defendant's offer to testify against his co-defendant at his retrial was not "substantial assistance."

Arrest, Search, and Confessions

Probable Cause Existed To (1) Arrest Defendant And Search Him Incident To Arrest, and (2) Search Defendant Based On Exigent Circumstances

State v. Mills, 104 N.C. App. 724, 411 S.E.2d 193 (1991). At about 11 p.m., two officers (Cruz and Brigman) in an unmarked car approached intersection in undercover attempt to purchase drugs. Another officer (Foster) followed the car at a distance. (Foster and Cruz had seen prior drug sales at the intersection. Based on their prior personal observations, drug dealers approached cars at that intersection when a driver of a car pulled to the side of the road and turned off the headlights.) Cruz and Brigman approached the intersection, turned off the headlights, and saw the defendant and another man standing at the corner. Foster had seen the defendant at the corner with other persons soliciting cars parked at the intersection about five previous times and twice had seen defendant approaching cars. Foster also recognized defendant's companion as a lookout for drug dealers. When defendant approached within one and one-half feet of the parked car of Cruz and Brigman, his companion shouted a warning that they were the police. The defendant then turned and walked quickly away from the car. Foster blocked defendant with his car and noticed that the defendant was "almost shaking" and acting very nervous. Foster searched defendant's pockets and found a crack pipe and a ten dollar bill with crack cocaine inside. The court upheld the search on two independent grounds: (1) the officer had probable cause to arrest the defendant and the search was incident to arrest (a search may precede a formal arrest if probable cause to arrest exists before the search and the evidence seized is not considered in establishing probable cause); court notes as factors in considering probable cause—the time of day, defendant's suspicious behavior, flight from the officers, and knowledge of defendant's past criminal conduct; and (2) probable cause existed to search the defendant for cocaine and exigent circumstances permitted the search without a search warrant.

Stop And Frisk Of Drug Suspect Was Not Supported by Reasonable Suspicion

State v. Fleming, 106 N.C. App. 165, 415 S.E.2d 782 (1992). Officers at 12:10 a.m. were in a housing project area where illegal drug activity was common. An officer saw defendant and companion, strangers to the area, standing in open area between two apartment buildings. The two men watched the officer for a few minutes and began walking on a sidewalk away from him. The officer drove around to where they were walking, got out of his car, and commanded them to come to him. They hesitated a minute and then approached him. The defendant acted "real nervous." As the officer was questioning the defendant about why he was in this area (to which the defendant responded that a friend had dropped him off and he was walking through), the officer frisked him and found crack cocaine. The court ruled, relying on Brown v. Texas, 443 U.S. 47 (1979), that officer's stop and frisk of defendant was not supported by reasonable suspicion of criminal activity.

Investigatory Stop Of Vehicle Was Supported by Reasonable Suspicion

State v. McDaniels, 103 N.C. App. 175, 405 S.E.2d 358 (1991), *aff'd*, 331 N.C. 112, 413 S.E.2d 799 (1992). The court ruled that officers had reasonable suspicion to stop a vehicle as it was driving away from the Raleigh-Durham (hereafter, RDU) airport when they had reliable information that (1) the driver and passenger (both were males) of the stopped vehicle, using fictitious names, had chartered a plane to fly late at night to the New York City area, a source of about ninety percent of the illegal drugs brought into central North Carolina, (2) the two occupants of the vehicle had made an identical trip the prior weekend from RDU, (3) they paid $1,270 in cash for their flight; (4) they were dressed in "shiny," "silky," "flashy" business suits; (5) they gave the charter service two telephone numbers that could not be verified; (6) the car had a license plate in the name of a woman but it was assigned to a different car, and the car's vehicle identification number was registered to an owner whose name was neither of the names given to the charter service; (7) one of the men had carried a briefcase on the flight to the New York City area late Saturday night, which suggested a business transaction but seemed to the officers an unusual time to conduct business when combined with other suspicious factors in the case; and (8) after their arrival at RDU airport, the two men in the car (which had heavily tinted glass) circled the parking area, which the officers believed meant that the occupants were watching out for law enforcement. The court noted that the facts known to officers at the time of the stop must be viewed through the eyes of reasonable officers on the scene, guided by the officers' experience and training.

Investigatory Stop Of Vehicle Was Supported by Reasonable Suspicion

State v. Cornelius, 104 N.C. App. 583, 410 S.E.2d 504 (1991). Officer received call from police radio dispatcher that a black male in a black BMW with temporary license tag was selling controlled substances from car on Meridan Street (street was in neighborhood with reputation as high crime area for selling drugs—the court ruled that reputation evidence is admissible in determining reasonable suspicion to stop). Officer arrived at that street within a minute and saw a black BMW with a temporary license tag being driven by a black male. Officer was unable to see temporary tag's effective dates. Based on his training and experience, his practice was to stop such a car to inquire about registration and insurance coverage. Officer stopped vehicle based on radio dispatch and possible illegal tag. The court ruled that officer, based on these facts, had reasonable suspicion to stop car to investigate illegal drug activity (and therefore court does not decide whether stop for possible illegal tag was pretextual).

***Miranda* Warnings Not Required For Brief Detention In Patrol Car**

State v. Beasley, 104 N.C. App. 529, 410 S.E.2d 236 (1991). Trooper stopped speeding car. When defendant-driver stepped out of car, trooper noticed strong odor of alcohol on his breath and also saw three or four empty beer cans on car's floorboard. Defendant also swayed as he stood and his eyes appeared red and glassy. Trooper told defendant to have seat in patrol car and informed defendant why he had been stopped. He asked defendant how much he had been drinking; defendant replied that he had one drink. Trooper then told defendant that he was under

arrest for impaired driving. The court ruled that defendant was not in custody under *Miranda* until he was informed he was under arrest: during a traffic stop, a driver is not in custody when he is asked a moderate number of questions and when he is not informed that his detention will be other than temporary.

Miranda Warnings Required When Defendant Handcuffed During Search Warrant Execution

State v. Beckham, 105 N.C. App. 214, 412 S.E.2d 114 (1992). During execution of drug search warrant for house, officers pushed the defendant to the floor and handcuffed him. The officers read the search warrant to him and gave him a copy of the warrant. An officer began questioning the defendant without giving *Miranda* warnings. The court ruled that defendant was in custody to require *Miranda* warnings before questioning could begin.

Indictments

Dates Of Child Sexual Abuse Indictments Were Sufficiently Precise

State v. Hardy, 104 N.C. App. 226, 409 S.E.2d 96 (1991). The court ruled that indictments alleging various child sexual abuse offenses occurred between July 1989 and 22 October 1989 were sufficiently precise even though child could not identify specific dates on which offenses occurred. However, child testified that assaults did not begin until she moved into a new trailer, which occurred in mid-July or early August. See also State v. Quarg, 106 N.C. App. 106, 415 S.E.2d 578 (1992) (indictment charging four counts of indecent liberties on or about the same four specific dates in each of four counts, and victim could not testify about any specific date, was not prejudicial to defendant—who did not testify and did not present an alibi defense).

Indictment Properly Amended to Substitute "Knife" for "Firearm" in Armed Robbery Charge

State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991). Trial judge properly permitted prosecutor to amend armed robbery indictment to substitute "knife" for "firearm" in the charge, since the amendment did not substantially alter the charge.

Miscellaneous

Hands Were Deadly Weapon During Felonious Assault By One Adult Against Another

State v. Grumbles, 104 N.C. App. 766, 411 S.E.2d 407 (1991). Defendant was convicted of assault with deadly weapon inflicting serious injury based on jury instruction that his hands could be considered a deadly weapon. Defendant, who weighed 175 pounds, assaulted his girlfriend, who weighed 107 pounds, by beating her about her head with his fists, breaking her jaw, requiring extensive hospitalization. He also choked her three separate times. The court ruled this was sufficient evidence of defendant's hands being a deadly weapon.

No Double Jeopardy Violation With Separate Trials

State v. Evans, 105 N.C. App. 236, 412 S.E.2d 146 (1992). On 2 August 1988, defendant was involved in high speed chase with law enforcement officers which began in Orange County and continued into Durham County, where a running road block brought defendant's car to a halt. Defendant then ignored officers' order to get out of his car and attempted to run over an officer with his car. Defendant was first tried and convicted in Orange County of traffic offenses that occurred in Orange County. He then was tried and convicted in Durham County of felonious assault on a law enforcement officer under G.S. 14-34.2. The court ruled that there was no double jeopardy violation under Grady v. Corbin, 110 S. Ct. 2084, 109 L.Ed.2d 548 (1990) (note that *Grady v. Corbin* was later overruled by the United States Supreme Court) because none of defendant's conduct proved in the first prosecution was necessary to prove the elements of the felonious assault in the second prosecution.

Proper To Require Defense List Of Potential Witnesses For Jury Voir Dire

State v. Ussery, 106 N.C. App. 371, 416 S.E.2d 610 (1992). Trial judge did not err in requiring defendant to provide state with list of potential defense witnesses for jury voir dire; see State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987).

Civil Contempt Finding In Criminal Case Immediately Appealable

State v. Mauney, 106 N.C. App. 26, 415 S.E.2d 208 (1992). In criminal prosecution in district court for nonsupport of illegitimate child, district court judge ordered defendant to submit to blood tests under G.S. 8-50.1. Judge found defendant in indirect civil contempt for refusing to submit to testing. The court ruled that (1) defendant's appeal of finding of civil contempt goes directly to Court of Appeals under G.S. 5A-24; (2) appeal is not interlocutory and therefore is immediately appealable; and (3) judge's order to submit to blood test did not violate defendant's due process or Fourth Amendment rights.

Sufficient Evidence Of Kidnapping As Separate Offense During Robbery

State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991). The court, distinguishing State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981) and relying on State v. Davidson, 77 N.C. App. 540, 335 S.E.2d 518 (1985), ruled that evidence was sufficient to support convictions of kidnapping as well as robbery when victims, after being robbed in one room, were removed to another room where they were confined. The removals were not an integral part of the robberies nor necessary to facilitate the robberies, since the rooms where the victims were ordered to go did not contain safes, cash registers, or lock boxes which held property to be taken.

Insufficient Evidence To Support More Than One Conspiracy Conviction

State v. Wilson, 106 N.C. App. 342, 416 S.E.2d 603 (1992). Defendant and another committed series of robberies during two week period and was convicted of four conspiracy to commit robbery charges. Relying on State v. Medlin, 86 N.C. App. 114, 357 S.E.2d 174 (1987) and State

v. Rozier, 69 N.C. App. 38, 316 S.E.2d 893 (1984), court rules that conversations between the two conspirators clearly showed that there was common scheme of single conspiracy to commit armed robberies to acquire cash. The court noted fact that in two of the robberies a third person was involved was inconsequential; entering and exiting of various participants in otherwise ongoing plan to commit particular felonious act does not convert single conspiracy into several, citing State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982).

State v. Jacobs, 105 N.C. App. 83, 411 S.E.2d 630 (1992). Defendant and others stole a car and burned it. Defendant was convicted of several offenses, including (1) conspiracy to commit larceny of the car, and (2) conspiracy to burn personal property (the car). The court ruled, relying on State v. Rozier, 69 N.C. App. 38, 316 S.E.2d 893 (1984), that only one conspiracy conviction can be upheld because the evidence did not establish two *separate* agreements.

District Court Judge Had No Authority to Consider Defendant's Motion for Appropriate Relief After Superior Court's Remand To District Court For Compliance

State v. Huntley, 105 N.C. App. 709, 414 S.E.2d 380 (1992). Defendant in superior court moved to remand DWI case for compliance with the judgment and with condition that case not be appealed again to superior court. Superior court judge ordered the case remanded under the conditions set out in the motion. Defendant in district court then make motion for appropriate relief to have judgment set aside and dismissed based on State v. Knoll, 322 N.C. 535 (1988); district court judge dismissed DWI charge. Superior court judge then set aside dismissal by district court judge and ordered defendant to comply with DWI judgment. The court ruled that superior court judge's ruling was correct; district court judge had jurisdiction under remand order only to permit compliance with district court judgment.

Failure To Preserve Sample And Test Ampoules Does Not Violate State Constitution

State v. Jones, 106 N.C. App. 214, 415 S.E.2d 774 (1992). The court ruled that state's failure to preserve sample and test ampoules used in Breathalyzer testing of DWI defendant does not violate federal [California v. Trombetta, 467 U.S. 479 (1984)] or state constitutions.

Confusion About Bail Conditions Set for DWI Charge Was Not Prejudicial To Defendant

State v. Ham, 105 N.C. App. 658, 414 S.E.2d 577 (1992). Defendant was charged with DWI, and magistrate at 4:00 a.m. set conditions of release: $300 secured bond, which would be reduced to $100 if a sober, responsible adult with valid driver's license appeared at jail willing to assume custody of him; however, he could be released at 9:00 a.m. solely on posting a $100 bond. There was some confusion about the conditions of release, but the court rules, after reviewing facts in this case, the confusion originated with the defendant. Although the defendant was entitled to release at 9:00 a.m. and was confined until 10:00 a.m., the court ruled that defendant failed to establish prejudice by showing that valuable evidence was lost by the untimely release. Defendant was not deprived of access to friends and witnesses or of an opportunity to gather evidence.

Sentencing

Supreme Court Affirms Ruling About Using Non-Statutory Aggravating Factor

State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757, *affirmed*, 331 N.C. 379, 416 S.E.2d 3 (1992). Defendant was indicted for first-degree murder, first-degree burglary, accessory after the fact to murder, and other charges. Defendant, pursuant to plea bargain, pled guilty to first-degree burglary and accessory after fact to murder; the other charges were dismissed. Trial judge found as non-statutory aggravating factor for charge of accessory after fact to murder that defendant had aided and abetted the murder. The court ruled that trial judge properly found this non-statutory aggravating factor, relying on State v. Abee, 308 N.C. 379, 302 S.E.2d 230 (1983), State v. Mann, 317 N.C. 164, 345 S.E.2d 365 (1986), State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988), and other cases. The court determined that rulings in State v. McGuire, 78 N.C. App. 285, 337 S.E.2d 620 (1985) and State v. Puckett, 66 N.C. App. 600, 312 N.C. App. 207 (1984) are inconsistent with Supreme Court rulings and declines to follow them. The court noted that trial judge may properly use in aggravation (1) evidence showing that defendant committed a related bad act that did not result in a charge, or (2) a joined offense which was dismissed and did not therefore result in a conviction. The court also ruled that trial judge may use aiding and abetting murder as an aggravating factor even though defendant could not have been convicted of both murder and accessory after fact to murder.

(1) Monetary Damage As Non-Statutory Aggravating Factor For Assault Conviction (2) Shooting Twice Into House As Non-Statutory Aggravating Factor

State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991). (1) The financial burden imposed on the victim may be used as a non-statutory aggravating factor in sentencing for a felonious assault conviction. However, the court rules, based on the facts in this case, that there was insufficient evidence to support this factor because medical expenses ($4,700) incurred by the victim did not exceed those normally incurred for felonious assaults. (2) Shooting into house twice is proper non-statutory aggravating factor in sentencing for conviction of discharging firearm into occupied property. Only one shot is required to prove offense.

Prosecutor's Statement That Defendant Was Convicted Is Insufficient Evidence

State v. Gordon, 104 N.C. App. 455, 410 S.E.2d 4 (1991). Prosecutor's unsworn oral statement at FSA sentencing that defendant had prior convictions is insufficient evidence to support prior convictions as statutory aggravating factors, even though defendant did not object to prosecutor's statement.

Use of Deadly Weapon Not Proper Aggravating Factor When Defendant Convicted of Second-Degree Rape in First-Degree Rape Trial

State v. Ward, 104 N.C. App. 550, 410 S.E.2d 210 (1991). Defendant was tried for first-degree rape, but jury convicted him of second-degree rape. Relying on State v. Marley, 321 N.C. 415, 364 S.E.2d 133 (1988), court ruled that judge erred in finding as an aggravating factor that

defendant used deadly weapon during rape: in finding defendant not guilty of first-degree rape, jury rejected theory that defendant used deadly weapon.