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

North Carolina Supreme Court

Criminal Law and Procedure

Felonious Assault Committed Against Murder Victim Was Properly Used As Felony in First-Degree Felony Murder When That Assault Did Not Result in Victim's Death

State v. Carroll, 356 N.C. 526, 573 S.E.2d 899 (20 December 2002). The defendant was convicted of first-degree murder based on premeditation and deliberation and felony murder, with felonious assault being the underlying felony. The evidence showed that the defendant struck the victim with a machete on her leg, face, and the back of her head. The defendant then strangled her with a sheet. The state's medical expert testified that the cause of death was ligature strangulation, and the machete wounds were not fatal. The court rejected the defendant's argument that using the felony assault with the machete as the underlying felony for the felony murder theory was prohibited by the merger doctrine. The court ruled—distinguishing a statement in footnote 3 in State v. Jones, 353 N.C. 159, 538 S.E.2d 917 (2000)—that the felony assault with the machete was a separate offense from the act that resulted in the murder and thus was properly used as a felony to support the felony murder theory.

(1) Court Sets Out Rules on Instructing on Lesser-Offenses of First-Degree Murder Involving Premeditation and Deliberation and Felony Murder
(2) Trial Judge Erred in Failing to Instruct on Second-Degree Murder As Lesser Offense of Premeditation and Deliberation Theory
(3) Court's Remedy for Instructional Error Results in New Capital Sentencing Hearing for One Count of First-Degree Murder and Arrest of Judgment for Other Count of First-Degree Murder

State v. Millsaps, 356 N.C. 556, 572 S.E.2d 767 (20 December 2002). The defendant was tried for two counts of first-degree murder. In each case, he was found guilty of first-degree murder based on both premeditation and deliberation and felony murder, with the murder of the other victim as the underlying felony. He was sentenced to death for each murder, based on the jury's finding in each case of aggravating circumstance G.S. 15A-2000(e)(5) (committing another murder during commission of murder). (1) The court reviewed its cases concerning when a judge must instruct on a lesser-included offense in a first-degree murder trial: (i) If evidence of the underlying felony supporting felony murder is conflicting and the evidence would support a lesser-included offense of first-degree murder, the trial judge must instruct on all lesser-included offenses supported by the evidence whether the state tries the case on both premeditation and deliberation and felony murder or on felony murder only; (ii) If the state tries a case on both premeditation and deliberation and felony murder theories and the evidence supports not only first-degree murder based on premeditation and deliberation but also second-degree murder or another lesser-included offense, the trial judge must submit the lesser-included offenses within the premeditation and deliberation theory regardless whether all the evidence supports the felony murder theory; (iii) If evidence of the underlying felony supporting the felony murder theory is not conflicting and all the evidence supports felony murder, the trial judge is not required to instruct on the lesser offenses of murder based on premeditation and deliberation if the case is submitted on felony murder

only. (2) The court ruled that the trial judge erred in failing to instruct on second-degree murder as lesser offense of premeditation and deliberation theory. The defense expert had testified that the defendant's psychosis prevented him from forming the specific intent to kill. (3) The court's remedy for the instructional error was as follows: Both first-degree murder convictions based on premeditation and deliberation are vacated. Because the defendant had not challenged the first-degree murder convictions based on the felony murder theory, they remain undisturbed. However, for sentencing purposes, the felony murder conviction involving victim A merged into the defendant's felony murder conviction involving victim B and thus the judgment for the murder conviction for victim A was arrested. The defendant is awarded a new capital sentencing hearing for the felony murder conviction involving victim B.

Sufficient Evidence of Impaired Driving in Habitual DWI Prosecution—Court of Appeals Ruling Reversed

State v. Scott, 356 N.C. 591, 573 S.E.2d 866 (20 December 2002), *reversing*, 146 N.C. App. 283, 551 S.E.2d 916 (18 September 2001). The court ruled, reversing the court of appeals, that the following evidence was sufficient to prove the element of impaired driving in a habitual DWI prosecution: (1) the defendant was traveling at a speed in excess of sixty miles per hour; (2) the defendant's vehicle had no motor vehicle tags; (3) the defendant did not immediately stop after the arresting officer activated his red and blue lights and did not do so until after the officer accelerated to keep up with the vehicle and activated his air horn more than once; (4) the defendant did not stop in the rightmost lane of the four-lane highway, but rather stopped at a "T" intersection in such a manner that the defendant's and the officer's cars blocked the intersection; (5) the defendant left his vehicle and started toward the officer's vehicle before being ordered to return to his vehicle; (6) upon approaching the defendant's vehicle, the officer smelled a strong odor of alcohol; (7) the officer observed an open container of beer in the passenger area of the defendant's vehicle; (8) the defendant's coat was wet from what appeared to the officer to be beer waste; (9) the defendant's speech was slurred; (10) the defendant refused to take the Alco-Sensor test; and (11) the defendant refused to take the Intoxilyzer test.

(1) Sufficient Evidence of Intent to Permanently Deprive Owner of Property to Support Armed Robbery Conviction
(2) Defendant Was Properly Convicted of Both Solicitation to Commit First-Degree Murder and First-Degree Murder Based on Acting in Concert

State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870 (20 December 2002). The defendant was convicted of the first-degree murder of her husband, conspiracy to commit first-degree murder, solicitation to commit first-degree murder, and armed robbery. The defendant asked A to kill her husband; he did not do so. The defendant then asked B to kill her husband. B did so, with the assistance of the defendant, who let B into the house. After the killing, B took the husband's vehicle and abandoned it three to four miles from the house—to make the crime scene look like a robbery. (1) The court ruled, relying on State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986), and State v. Mann, 355 N.C. 294, 560 S.E.2d 776 (2002), that the evidence was sufficient to show an intent to permanently deprive the husband of his property. The defendant showed a total indifference whether the owner ever recovered the vehicle. (2) The court rejected, distinguishing State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996) (solicitation to commit murder is lesser-included offense of first-degree murder committed as an accessory before the fact), the defendant's argument that the conviction for solicitation to commit first-degree murder merged with the conviction of first-degree murder based on acting in concert. Each crime has an element that is not contained in the other.

(1) Trial Judge Erred in Ruling That Defendant Had Not Shown Prima Facie Case of Racial Discrimination in Prosecutor's Use of Peremptory Challenges
(2) Prosecutor's Jury Argument Was Improper When Prosecutor Commented on Defendant's Failure to Call Wife to Testify

State v. Barden, 356 N.C. 316, 572 S.E.2d 108 (22 November 2002). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled that the trial judge erred in ruling that the defendant had not shown a prima facie evidence of racial discrimination under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), when objecting to the prosecutor's use of peremptory challenges. When the defendant asserted the *Batson* claim, the prosecutor had accepted only 28.6% of the African-American prospective jurors (peremptorily challenging five of seven eligible jurors) but had accepted 95% of the white jurors (peremptorily challenging only one of twenty eligible white jurors). The court stated that although a numerical analysis is not necessarily dispositive [it noted the various factors set out in State v. Quick, 341 N.C. 141, 462 S.E.2d 186 (1995)], it can be useful in determining whether a prima facie case has been made. The court also stated that the issue was a close one and noted that it had ruled in State v. Gregory, 340 N.C. 365, 459 S.E.2d 638 (1995), that a 37.5% acceptance rate of minority jurors had not established a prima facie case. (2) The court ruled, citing G.S. 8-57(a) and State v. Thompson, 290 N.C. 431, 226 S.E.2d 487 (1976), that the prosecutor's jury argument was improper when the prosecutor commented on the defendant's failure to call his wife to testify.

Court Adopts Court of Appeals Dissenting Opinion That Stated Jury Instruction on Deadly Weapon Was Not Fatally Ambiguous

State v. Lotharp, 356 N.C. 420, 571 S.E.2d 583 (22 November 2002), *reversing*, 148 N.C. App. 435, 559 S.E.2d 807 (5 February 2002). The court, per curiam and without an opinion, reversed the court of appeals for the reasons stated in the dissenting opinion. The dissenting opinion stated that the jury instruction on the element of a deadly weapon in a prosecution of assault with a deadly weapon inflicting serious injury was not fatally ambiguous ("the defendant's hands and feet and/or the chain were deadly weapons"). The instruction properly allowed the jury to chose between two instrumentalities as the deadly weapon: (1) hands and feet or (2) a chain.

Trial Judge Erred Under G.S. 15A-1335 in Imposing More Severe Sentence After Defendant's Guilty Plea and Sentence Had Been Set Aside on Motion for Appropriate Relief—Court of Appeals Ruling Reversed

State v. Wagner, 356 N.C. 599, 572 S.E.2d 777 (20 December 2002), *reversing*, 148 N.C. App. 658, 560 S.E.2d 174 (19 February 2002). The defendant pleaded guilty to attempted possession of cocaine and was sentenced pursuant to a plea bargain. Several months later, a judge granted the defendant's motion for appropriate relief and set aside the guilty plea and sentence because there was a mutual mistake between the state and the defendant about the defendant's proper record level for sentencing. The state then tried the defendant, the jury returned a guilty verdict, and the judge imposed a more severe sentence than had been imposed pursuant to the plea bargain. The court ruled, reversing the court of appeals and distinguishing State v. Wall, 348 N.C. 671, 502 S.E.2d 585 (1998), that the trial judge erred under G.S. 15A-1335 in imposing the more severe sentence. The provisions of G.S. 15A-1335 apply whether the defendant's original conviction resulted from a plea bargain or a jury verdict.

Capital Case Issues

(1) Court Reiterates Prior Ruling That Trial Judge Has No Authority to Order Non-Death-Qualified Jury to Try Guilt/Innocence Phase of First-Degree Capital Murder Trial and Then Order Death-Qualified Jury to Hear Capital Sentencing Hearing If Defendant Is Convicted of First-Degree Murder
(2) Trial Judge Did Not Err in Submitting Both Aggravating Circumstances G.S. 15A-2000(e)(4) (Murder Committed to Avoid or Prevent Lawful Arrest) and G.S. 15A-2000(e)(11) (Murder Part of Course of Conduct Involving Commission of Violence Against Another Person)
(3) Trial Judge Erred in Jury Instruction on Aggravating Circumstance G.S. 15A-2000(e)(11) (Murder Part of Course of Conduct Involving Commission of Violence Against Another Person)

State v. Berry, 356 N.C. 490, 573 S.E.2d 132 (20 December 2002). The defendant was convicted of first-degree murder of victim A and sentenced to death. (1) The court reiterated its prior ruling in State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983), that a trial judge has no authority to order a non-death-qualified jury to try the guilt/innocence phase of a first-degree capital murder trial and then to order a death-qualified jury to hear the capital sentencing hearing if the defendant is convicted of first-degree murder. (2) The court ruled that the trial judge did not err in submitting both aggravating circumstances G.S. 15A-2000(e)(4) (murder committed to avoid or prevent lawful arrest) and G.S. 15A-2000(e)(11) (murder part of course of conduct involving commission of violence against another person). The (e)(4) aggravating circumstance focused on the defendant's motive for killing victim A—to prevent her from talking about the defendant's murder of victim B that he had committed seven weeks earlier. The (e)(11) aggravating circumstance required the jury to review the objective facts of the two murders to determine whether the offenses constituted a course of conduct. (3) The court ruled that the trial judge erred in the jury instruction on aggravating circumstance G.S. 15A-2000(e)(11) (murder part of course of conduct involving commission of violence against another person). The instruction allowed the jury to find the aggravating circumstance without also finding that the murder of victim A was part of the course of conduct that included the earlier murder of victim B.

Prosecutor's Use of Biblical References During Jury Argument in Capital Sentencing Hearing Was Not So Grossly Improper That Trial Judge Erred in Failing to Intervene Ex Mero Motu, Although Court Strongly Encouraged Counsel to Base Jury Arguments Solely on Secular Law and Facts

State v. Haselden, 357 N.C. 1, 577 S.E.2d 594 (28 March 2003). The defendant was convicted of first-degree murder and sentenced to death. The prosecutor's jury argument in the capital sentencing hearing made several Biblical references in arguing for the death penalty. Defense counsel did not object to the prosecutor's jury argument. The court ruled the prosecutor's use of Biblical references was not so grossly improper that the trial judge erred in failing to intervene ex mero motu, although the court strongly encouraged counsel to base their jury arguments solely on secular law and facts. Jury arguments based on any of the world's religions inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials and sentencing hearings.

(1) Court Reiterates Distinctions Between "Value" and "Weight" Concerning Statutory and Nonstatutory Mitigating Circumstances
(2) Prosecutor's Jury Argument Based on Personal Attack on Defendant, Irrelevant Historical References, and Name-Calling Was Improper
(3) Court Reminds Parties to Make Proper Jury Arguments

State v. Walters, ___ N.C. ___, ___ S.E.2d ___ (2 May 2003). The defendant was convicted of two counts of first-degree murder and sentenced to death for each murder. (1) The court reiterated the distinctions between "value" and "weight" concerning statutory and nonstatutory mitigating circumstances, and ruled that the jury instructions on the statutory and nonstatutory mitigating circumstances in this case were not erroneous. (See the court's discussion in its opinion.) (2) The court ruled that the prosecutor's jury argument based on a personal attack on the defendant, irrelevant historical references, and name-calling was improper. For example, the prosecutor compared the defendant to Adolph Hitler. The court noted that although it stated in State v. Jones, 355 N.C. 117, 558 S.E.2d 97 (2002), that arguments "premised on matters outside the record" are inappropriate, it does not completely restrict jury argument to matters only in the court record to the exclusion of *any* (court's emphasis) historical references. However, an argument may not inflame the jury, directly or indirectly, by making inappropriate comparisons or analogies—which the prosecutor did by comparing the defendant to Hitler in the context of being evil. (3) The court stated: "It is the expressed intention of this Court to make sure *all* [court's emphasis] parties stay within the proper bounds of the laws and decisions of this Court relating to closing argument. The federal courts have consistently restricted closing argument, while our state jurisprudence has tended to give far greater latitude to counsel. There is a proper balance, and in *Jones,* we took great care to spell out the proper parameters. In this case, at one point in his argument, the prosecutor said, 'I hope the judge doesn't put me in jail for my language . . . .' While not inclined in this case to go that far, we once again remind counsel for all parties that improper argument in flagrant disregard of the limits placed on closing argument can and must be enforced by the courts."

Sufficient Evidence of Aggravating Circumstance G.S. 15A-2000(e)(9) (Murder Was Especially Heinous, Atrocious, or Cruel)

State v. Barden, 356 N.C. 316, 572 S.E.2d 108 (22 November 2002). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the evidence was sufficient to support aggravating circumstance G.S. 15A-2000(e)(9) (murder was especially heinous, atrocious, or cruel). The defendant bludgeoned the victim in the head many times, apparently changing weapons during the course of the attack, and the defendant acknowledged that the victim may have been alive after the attack but took no steps to assist him. In addition, the defendant instituted the attack only after the victim, who had already loaned the defendant money once that night, refused to make a second loan of twenty dollars. The defendant's attack began after the victim had turned his back to the defendant to resume his work duties.

(1) Trial Judge Did Not Err in Declining to Submit Mitigating Circumstance G.S. 15A-2000(f)(6) (Defendant's Capacity to Appreciate Criminality of Conduct or To Conform Conduct to Requirements of Law Was Impaired)
(2) Court Rules That Death Sentence Was Disproportionate Under G.S. 15A-2000(d)(2)

State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870 (20 December 2002). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled that the trial judge did not err in declining to submit mitigating circumstance G.S. 15A-2000(f)(6) (defendant's capacity to appreciate criminality of conduct or to conform conduct to requirements of law was impaired). The court noted that the judge submitted mitigating circumstance G.S. 15A-2000(f)(2) (murder committed under influence of mental or emotional disturbance). The court stated that the evidence showed that the defendant was depressed and suffering from borderline personality disorder and thus was under the influence of a mental

or emotional disturbance. However, the defendant's expert testified that this disturbance did not prevent the defendant from appreciating the criminality of her conduct or controlling her conduct as required by law. (2) The court ruled that the defendant's death sentence was disproportionate under G.S. 15A-2000(d)(2). (See the court's discussion of the facts supporting its ruling.)

State Properly Proved Florida Robbery Conviction to Support Aggravating Circumstance G.S. 15A-2000(e)(3) (Prior Violent Felony Conviction)

State v. Carroll, 356 N.C. App. 526, 573 S.E.2d 899 (20 December 2002). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the state properly proved a Florida robbery conviction to support aggravating circumstance G.S. 15A-2000(e)(3) (prior violent felony conviction). The court noted that the rules of evidence do not apply in a capital sentencing hearing. The state called a North Carolina deputy clerk who identified several documents as certified copies of Florida court records involving a person with a name different than the defendant. The documents included a set of fingerprints from the person who had been convicted of robbery in Florida. The state called a fingerprint expert who had compared those fingerprints with a set of the defendant's North Carolina fingerprints and testified that they were made by the same person. The court noted that even if the rules of evidence were applicable, the Florida documents would be admissible under Rule 902 (self-authenticating documents), and the fingerprint card would have been admissible as a business record under hearsay exception, Rule 803(6).

Evidence

Court Adopts Court of Appeals Dissenting Opinion That Although Defendant's Prior Illegal Drug Activity Was Properly Admitted in Drug Trafficking Trial, Trial Judge Erred in Admitting Evidence That Defendant Had Been Convicted of That Prior Illegal Drug Activity

State v. Wilkerson, 356 N.C. 418, 571 S.E.2d 583 (22 November 2002), *reversing*, 148 N.C. App. 310, 559 S.E.2d 5 (5 February 2002). The court, per curiam and without an opinion, reversed the court of appeals for the reasons stated in the dissenting opinion. The dissenting opinion stated that although the defendant's prior illegal drug activity was properly admitted in a drug trafficking trial, the trial judge erred in admitting evidence that the defendant had been convicted of that prior illegal drug activity.

Court Adopts Court of Appeals Dissenting Opinion That Admission of Defendant's Temporally Remote Driving Record to Prove Malice in Second-Degree Vehicular Murder Trial Was Prejudicial Error Requiring New Trial

State v. Goodman, 357 N.C. 43, 577 S.E.2d 619 (28 March 2003), *reversing in part*, 149 N.C. App. 57, 560 S.E.2d 196 (5 March 2002). The court, per curiam and without an opinion, reversed the court of appeals for the reasons stated in the dissenting opinion. The defendant was convicted of second-degree vehicular murder. The trial judge allowed the state under Rule 404(b) to introduce the defendant's driving record—violations occurring up to 37 years before the charged offense—to prove malice. The dissenting opinion stated that many of the convictions lacked temporal proximity to the offense charged, particularly for convictions that were more than sixteen years old [see State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201 (2001)]. The error in admitting these convictions was sufficiently prejudicial to require a new trial.

Trial Judge Did Not Err Under Rule 404(b) in Admitting Evidence of Defendant's Commission of Another Murder to Show Defendant's Intent, Motive, and Knowledge in Murder Being Tried

State v. Berry, 356 N.C. 490, 573 S.E.2d 132 (20 December 2002). The defendant was convicted of first-degree murder in killing victim A on or about November 5, 1998. The court ruled that the trial judge did

not err under Rule 404(b) in admitting evidence of the defendant's commission of another murder (victim B) on or about September 17, 1998, to show the defendant's intent, motive, and knowledge in the murder being tried. The defendant had commented to others that he had killed victim A to prevent her from talking about the murder of victim B.

Trial Judge Did Not Err in Admitting Murder Victim's Statements Under Hearsay Rule 803(3) (Declarant's Then Existing State of Mind)

State v. Carroll, 356 N.C. 526, 573 S.E.2d 899 (20 December 2002). The defendant was convicted of first-degree murder. The defendant and the murder victim lived together in the victim's trailer. The state introduced statements of the murder victim made a few days before the murder that the defendant was a crack head, she was tired of his taking her money to buy drugs, and she wanted him to leave. The court ruled that the trial judge did not err in admitting the murder victim's statements under the hearsay exception, Rule 803(3) (declarant's then existing state of mind). The court stated that the statements demonstrated that the victim was upset and wanted him to leave, and directly concerned the circumstances leading to the confrontation with the defendant that led to her murder.

North Carolina Court of Appeals

Criminal Law and Procedure

(1) Crime of Attempted Voluntary Manslaughter Exists, But Defendant Was Not Entitled to Jury Instruction in This Case
(2) Assault with Deadly Weapon Inflicting Serious Injury Is Not Lesser Offense of Attempted First-Degree Murder

State v. Rainey, 154 N.C. App. 282, 573 S.E.2d 25 (3 December 2002). The defendant was convicted of attempted first-degree murder. (1) The court ruled, distinguishing State v. Coble, 351 N.C. 448, 527 S.E.2d 45 (2000) (attempted second-degree murder is not a crime), that the crime of attempted voluntary manslaughter exists, but the defendant was not entitled to a jury instruction in this case. (2) The court ruled that assault with a deadly weapon inflicting serious injury is not a lesser offense of attempted first-degree murder. Attempted first-degree murder does not require the state to prove the use of a deadly weapon.

(1) Sufficient Evidence to Support Defendant's Conviction of Stalking
(2) Sufficient Evidence to Support Defendant's Conviction of Communicating Threats Even Though Defendant Did Not Directly Communicate Threats to Victim

State v. Thompson, ___ N.C. App. ___, ___ S.E.2d ___ (20 May 2003). (1) The court ruled that the following evidence was sufficient evidence to support the defendant's conviction of stalking: The defendant made threatening comments to the victim. The victim's employer told the defendant that he was no longer permitted on business property, and the victim contacted law enforcement. After express warnings that the defendant's presence was not welcome, the defendant thereafter drove up and down the isolated, dead-end dirt road leading to the victim's residence. The defendant later went to the business where the victim worked and violated a restraining order that prohibited him from being with a certain number of feet from the business or the victim. (2) The court ruled that there was sufficient evidence to support the defendant's conviction of communicating threats even though the defendant did not directly communicate threats to the victim. In this case, the defendant told a third party that he was going to shoot the victim and other people. The third party then told the victim and the other people what the defendant had said. The victim took the threats seriously.

Indictment Did Not Properly Allege Attempted First-Degree Murder Because It Omitted the Words "Of Malice Aforethought"

State v. Bullock, 154 N.C. App. 234, 574 S.E.2d 17 (3 December 2002). The defendant was convicted of attempted second-degree murder. (1) The court ruled that the indictment did not properly allege attempted first-degree murder because it omitted the words "of malice aforethought." Thus it failed to allege the element of malice. The court arrested the judgment on conviction of attempted first-degree murder and remanded for sentencing and entry of judgment for attempted voluntary manslaughter, which the court noted was recognized as an offense in State v. Rainey, 154 N.C. App. 282, 573 S.E.2d 25 (3 December 2002).

Indictment Charging Assault with Firearm on Law Enforcement Officer Did Not Need to Allege That Defendant Knew or Had Reasonable Grounds to Believe Victim Was Law Enforcement Officer

State v. Thomas, 153 N.C. App. 326, 570 S.E.2d 142 (15 October 2002). The court ruled, relying on the reasoning in State v. Baynard, 79 N.C. App. 559, 339 S.E.2d 810 (1986), that an indictment charging assault with a firearm on a law enforcement officer did not need to allege that the defendant knew or had reasonable grounds to believe that the victim was a law enforcement officer. The indictment's allegation that the defendant committed the assault "willfully" effectively alleges that the defendant knew that the person he was assaulting was a law enforcement officer.

Sufficient Evidence of Armed Robbery to Support Its Submission as Felony Under Felony Murder Theory

State v. Earwood, ___ N.C. App. ___, 574 S.E.2d 707 (21 January 2003). The defendant was convicted of first-degree felony murder of his mother, with armed robbery of his mother's car being the underlying felony (that is, the murder was committed during the perpetration of a robbery). The court ruled, distinguishing State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980), that the following evidence was sufficient to support the submission of armed robbery as the underlying felony. The defendant resided in his mother's home and had argued with his mother on the day of the murder about the mother's purchasing a vehicle for the defendant. Noises resembling the firing of a weapon were heard the night of the murder. Later that evening the defendant approached law enforcement officers after wrecking his mother's vehicle. The defendant possessed the murder weapon. The court stated that a reasonable inference existed that the defendant was not going to get a vehicle on his own and killed his mother to take the vehicle. The taking of the vehicle did not appear to be an afterthought, as in the *Powell* case.

(1) Sufficient Evidence of Defendant's Possession of Firearm to Support Armed Robbery Conviction
(2) Armed Robbery Indictment Sufficiently Alleged Owner of Property Taken During Robbery

State v. Bartley, ___ N.C. App. ___, 577 S.E.2d 319 (18 March 2003). The defendant was convicted of armed robbery of a convenience store. (1) The victim testified that he saw the robber (the defendant) with his hand in his coat pocket as if he was brandishing a gun in the pocket. The victim immediately raised his hands over his head. The defendant began screaming, "give me the money, give me the money," and the victim ran to the front counter with his hands still over his head. The defendant continued to act as if he was brandishing a gun inside his coat pocket. The victim gave money from the cash register to the robber. The court ruled, citing State v. Thompson, 297 N.C. 285, 254 S.E.2d 526 (1979), and other cases, that this was sufficient evidence of the defendant's possession of a firearm to support the armed robbery conviction. (2) The armed robbery indictment alleged the owner of the property as "Crown Fast Fare

#729." The court ruled, citing State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972), and other cases, that this allegation was sufficient because it shows that the defendant was not taking his own property.

Sufficient Evidence to Support Conviction of Felony Child Abuse Inflicting Serious Injury

State v. Liberato, ___ N.C. App. ___, 576 S.E.2d 118 (18 February 2003). The defendant was convicted of felony child abuse inflicting serious injury under G.S. 14-318.4(a). The court ruled that the following evidence was sufficient to support the conviction: Two doctors testified that the child's injuries were intentionally inflicted. They opined that the amount of force required to cause the injuries was greater than would have resulted from the child falling off either a mattress or a chair, which was the defendant's explanation. Moreover, the defendant testified that (1) her boyfriend was not alone long enough to inflict any injuries to the child, and (2) the child was in the defendant's sole custody the entire time during which the child was injured.

No Error When State Prayed Judgment for Assault Convictions After Related Attempted Second-Degree Murder Convictions Had Been Vacated

State v. Lea, ___ N.C. App. ___, 576 S.E.2d 131 (18 February 2003). The defendant was convicted of three counts of attempted second-degree murder, one count of assault with a deadly weapon inflicting serious injury, and two counts of assault with a deadly weapon. The judge sentenced the defendant for the convictions of attempted second-degree murder and entered a prayer for judgment continued for each of the assault convictions. When the North Carolina Supreme Court later ruled that the crime of attempted second-degree murder did not exist, a judge vacated those convictions and entered judgment on the assault convictions. The court ruled that the judge did not err in doing so. The court rejected the defendant's argument that the five year period from imposition of the PJCs to sentencing was unreasonable and had prejudiced him.

(1) Habitual Misdemeanor Assault Statute Does Not Violate Double Jeopardy
(2) State Failed to Prove That New Jersey Convictions Were Felony Convictions for Habitual Felon Law

State v. Carpenter, ___ N.C. App. ___, 573 S.E.2d 668 (31 December 2002). The defendant was convicted of habitual misdemeanor assault and then adjudicated a habitual felon. (1) The court ruled, relying on its ruling in State v. Vardiman, 146 N.C. App. 381, 552 S.E.2d 697 (2001) (habitual DWI statute does not violate double jeopardy), that the habitual misdemeanor statute does not violate double jeopardy. The defendant is being punished for the current offense and is not being punished a second time for the five prior convictions that are elements of the substantive offense of habitual misdemeanor assault. (2) The court ruled, relying on State v. Lindsey, 118 N.C. App. 549, 455 S.E.2d 909 (1995), that the state failed to prove that two New Jersey convictions were felony convictions for the habitual felon law. The New Jersey judgments did not state that the defendant was convicted of a felony or sentenced as a felon. An official did not certify that the two offenses were felonies in New Jersey. The court rejected the state's argument that the defendant could have received sentences exceeding one year for each of the convictions, offenses punishable by more than one year in prison constitute common law felonies under New Jersey law, and thus this was sufficient evidence to prove that they were felony convictions.

(1) Indictment That Failed to Use Word "Feloniously" or Alternatively Set Out Statutory Section Indicating Felonious Nature of Charge Was Fatally Defective; State May Elect to Re-Indict
(2) Habitual Felon Indictment Returned Two Weeks Before Substantive Felony Indictment Was Valid

State v. Blakney, ___ N.C. App. ___, 577 S.E.2d 387 (18 March 2003). (1) An indictment purported to charge the defendant with felonious possession of marijuana (by alleging possession of more than one and one-half ounces of marijuana) but failed to use the word "feloniously." The court, distinguishing State v. Callett, 211 N.C. 563, 191 S.E. 27 (1937), stated that an indictment that fails to use the word "feloniously" is not fatally defective if it gives notice of the statute denominating the alleged crime as a felony. However, the reference to G.S. 90-95(a)(3) in this indictment did not provide the defendant with specific notice of the statute that charged him with a felony—which is G.S. 90-95(d)(4). Thus, the indictment was fatally defective. The court noted, citing State v. 263 N.C. 536, 138 S.E.2d 138 (1964), that the state may elect to re-indict the defendant. (2) The court ruled that a habitual felon indictment returned two weeks before the substantive felony indictment was valid. None of the defendant's notice and procedural rights was violated by the order of the indictments in this case.

(1) State Established Prima Facie Evidence of Prior Violent Felony Convictions in Violent Habitual Felon Hearing
(2) Reclassification of Felony Offense After It Was Committed So It Became Violent Felony Under Violent Habitual Offender Statute Did Not Violate Ex Post Facto Clause

State v. Wolfe, ___ N.C. App. ___, 577 S.E.2d 655 (1 April 2003). The defendant was convicted of second-degree murder and found to be a violent habitual felon. (1) The defendant's name was Eldridge Frank Wolfe. The state introduced certified copies of two judgments entered on felony convictions of a person named "Eldridge Frank Wolfe." The court ruled that this established prima facie evidence of the prior felony convictions under G.S. 14-7.10. The court noted that any discrepancies in other details in the judgments (for example, one of the judgments noted that the person's race as black, while the defendant is white) are for the jury to consider in weighing the evidence. (2) The court ruled, relying on State v. Mason, 126 N.C. App. 318, 484 S.E.2d 818 (1997), that the reclassification of a felony offense after it was committed so it became a violent felony under the violent habitual offender statute did not violate the Ex Post Facto Clause. Thus, although the defendant's 1987 voluntary manslaughter was a Class F felony, it had been reclassified as a Class D felony thereafter and was properly considered as a violent felony (author's note: Class A through E felonies are violent felonies). See G.S. 14-7.7(b)(2).

Defendant May Not Collaterally Attack Prior Conviction Based on Allegation of Ineffective Assistance of Counsel

State v. Hensley, ___ N.C. App. ___, 577 S.E.2d 417 (18 March 2003). The defendant was convicted of a felony and found to be a habitual felon. At the habitual felon hearing, the defendant sought to attack one of the predicate convictions used to prove habitual felon status. For that conviction, he was appointed counsel, the counsel later withdrew, and the defendant signed a waiver of counsel. The defendant asserted that the waiver was not knowing or voluntary because the defendant later hired another attorney who failed to appear on the date he was sentenced. The court noted that the essence of the defendant's claim was not the state's failure to appoint counsel, but the counsel procured by the defendant provided ineffective assistance by failing to appear. Although a indigent defendant may collaterally attack a prior conviction because the defendant was not appointed counsel, the court ruled, citing Custis v. United States, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), a defendant may not collaterally attack a prior conviction based on an allegation of ineffective assistance of counsel.

Trial Judge Erred in Entering Sentencing Judgments on Finding of Habitual Felon Status Because Sentencing Judgments Must Instead Be Entered on Underlying Substantive Felony Convictions as Class C Felonies

State v. Taylor, ___ N.C. App. ___, 576 S.E.2d 114 (18 February 2003). The court ruled that the trial judge erred in entering judgments on a finding of habitual felon status because sentencing judgment must instead be entered on the underlying substantive felony convictions as Class C felonies. The court also noted that the state brought twenty habitual felon indictments in this case when only one indictment was necessary, citing State v. Patton, 342 N.C. 633, 466 S.E.2d 708 (1996).

No Requirement That Defendant Be Given Copy of Intoxilyzer Rights Form Before Administering Intoxilyzer

State v. Thompson, 154 N.C. App. 194, 571 S.E.2d 673 (19 November 2002). An officer placed the Intoxilyzer rights form in front of the defendant so he could follow as the officer read the rights to the defendant. The defendant then signed a copy of the rights form and requested that a witness be present before the Intoxilyzer was administered. After the defendant's witness arrived, the officer administered the test and gave the defendant a copy of the Intoxilyzer rights. The court rejected the defendant's argument that G.S. 20-16.2(a) requires that an officer must physically hand a defendant a copy of the Intoxilyzer rights form before administering the test.

(1) In Drug Prosecution Involving SBI Lab Testing of Alleged Controlled Substance, State Was Required Under G.S. 15A-903(e) to Provide Defendant With False Positives at SBI Lab, Lab Protocol Documents, and Lab Employee Credentials
(2) Trial Judge Erred in Allowing State to Call As Its Witnesses Defense-Retained Nontestifying Consultative Experts to Testify About Experts' Testing of Alleged Controlled Substance—Defendant's Sixth Amendment Right to Counsel and Work Product Privilege Were Violated

State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650 (19 November 2002). The state's evidence showed that a law enforcement officer made a controlled buy of a substance from the defendant. A forensic drug analyst from the SBI laboratory testified that the substance twice tested negative for heroin and twice tested positive for heroin. Over the defendant's objection, the state called as its witnesses defense-retained nontestifying consultative experts who testified for the state that their testing of the substance showed that it was a 90 percent or greater match for heroin. (1) The defendant requested under G.S. 15A-903(e) a variety of documents from the SBI laboratory. The state supplied some of the requested documents, but did not supply any documents concerning false positives at the SBI lab, lab protocol documents, or credentials of lab employees involved in this case. The court ruled, relying on State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992), and cases from other jurisdictions, that the trial judge erred in not requiring the state to supply these documents to the defendant under G.S. 15A-903(e). (2) The court ruled, citing United States v. Walker, 910 F. Supp. 861 (N.D.N.Y. 1995) and other cases, that the trial judge erred in allowing the state to call as its witnesses defense-retained nontestifying consultative experts to testify about the experts' testing of the alleged controlled substance. The trial judge's ruling violated the defendant's Sixth Amendment right to effective assistance counsel and the defendant's work product privilege. The court noted that the defendant had not planned to call these witnesses on his behalf.

Sufficient Evidence of Defendant's Constructive Possession of Cocaine and Firearm to Support Convictions of Cocaine Offenses and Possession of Firearm by Convicted Felon

State v. Boyd, 154 N.C. App. 302, 572 S.E.2d 192 (3 December 2002). The defendant was convicted of trafficking in cocaine by transportation, trafficking in cocaine by possession, and possession of a firearm by a convicted felon. An officer stopped a car which was occupied by the driver and the defendant, who

was a front seat passenger. The officer noticed that the defendant was acting unusually nervous, and he had his hands under his legs and was reaching toward the end of the seat area in front of him. A plastic bag containing cocaine was found under the driver's seat, and a .45 caliber handgun was found under the passenger's seat. The driver pled guilty to cocaine offenses and testified for the state. He said that the defendant was the only person who could have placed the drugs where they were found (see additional facts recited in the court's opinion). He also testified that before he and the defendant were arrested he had seen the handgun in the defendant's mother's house and no one else but the defendant could have put the gun in the car. The court ruled, relying on State v. Matias, 354 N.C. 549, 556 S.E.2d 269 (2001), that the evidence was sufficient to support an inference that the defendant constructively possessed the cocaine. The court also ruled, distinguishing State v. Alston, 131 N.C. App. 514, 508 S.E.2d 315 (1998), that the evidence was sufficient to support an inference that the defendant constructively possessed the handgun.

Sufficient Evidence to Support Four Convictions of Attempted Trafficking in 28 or More Grams of Cocaine When Defendant Accepted Purchaser's Order for One Ounce (28.35 Grams) of Cocaine and Possessed, Transported, Sold, and Delivered Slightly Less Than 28 Grams

State v. Shook, ___ N.C. App. ___, 573 S.E.2d 249 (31 December 2002). The court ruled that there was sufficient evidence to support four convictions of attempted trafficking in 28 or more grams of cocaine when the defendant accepted the purchaser's order for one ounce (28.35 grams) of cocaine and possessed, transported, sold, and delivered slightly less than 28 grams (that is, 27.1 grams). The court stated that the sole reason that the defendant did not deliver the amount ordered was that she "shorted" the purchaser, an undercover law enforcement officer.

Entire Weight (5.4 Grams) of Oxycontin Tablets Was Properly Admitted to Prove Drug Trafficking Amount, Even Though Tablets Contained Only 1.6 Grams of Controlled Substance Oxycodone, Because Tablet Is "Mixture" Under Statute

State v. McCracken, ___ N.C. App. ___, ___ S.E.2d ___ (6 May 2003). The defendant was convicted of three trafficking offenses involving Oxycontin tablets, which contained the Schedule II controlled substance oxycodone. G.S. 90-95(h)(4) provides that more than four grams or more of opium or opiate or any "mixture" containing such a substance is a trafficking offense. The court ruled that the entire weight (5.4 grams) of Oxycontin tablets was properly admitted to prove the drug trafficking amount, even though the tablets contained only 1.6 grams of the controlled substance oxycodone, because a tablet is a "mixture" under the statute.

(1) Sufficient Evidence of Conspiracy to Traffic in Cocaine by Transportation
(2) Trial Judge Was Not Required to Prohibit Confidential Informant from Testifying as State's Witness Because State Violated Discovery Statute

State v. Batchelor, ___ N.C. App. ___, ___ S.E.2d ___ (6 May 2003). (1) A confidential informant told a law enforcement officer that the defendant had agreed to sell cocaine to her at a shopping center. The defendant called and told her he was on his way there with the cocaine. Officers conducted surveillance and stopped a vehicle occupied by the defendant and Harris. They did not find cocaine on either person. Both were transported to the police station. After arriving there, an officer conducted a thorough search of his patrol car and found cocaine under the seat where Harris had been sitting. The court ruled that this evidence was sufficient to support the defendant's conviction of conspiracy to traffic in cocaine by transportation. (2) The state violated G.S. 15A-903(a)(2) by failing to timely provide the defendant with the substance of his oral statements to the confidential informant; however, the state provided this information in oral form (although not in written or recorded form as required by the statute) to the defendant before trial. The court rejected the defendant's argument that the last sentence of the

subdivision ("If disclosure of the substance of defendant's oral statement to an informant whose identity is or was a prosecution secret is withheld, the informant must not testify for the prosecution at trial") requires the trial judge to prohibit the confidential informant from testifying. The court ruled that because the state provided the defendant with the information before trial, the trial judge had the discretion to determine what sanction, if any, to impose on the state.

Indictment Charging Felonious Possession of Marijuana Was Fatally Defective Because It Failed to Allege Amount of Marijuana Possessed—Court Remands Case for Imposition of Judgment for Class 3 Misdemeanor Possession of Marijuana

State v. Partridge, ___ N.C. App. ___, ___ S.E.2d ___ (6 May 2003). The court ruled that an indictment charging felonious possession of marijuana was fatally defective because it failed to allege amount of marijuana possessed. Thus the indictment could not support a felony marijuana conviction even though the state proved that the defendant possessed more than 1.5 ounces of marijuana. The erroneous indictment deprived the court of jurisdiction over this offense. The court remanded the case for the imposition of a judgment for Class 3 misdemeanor possession of marijuana (which does not require the state to prove a particular amount of marijuana).

Insufficient Evidence to Support Conviction of Maintaining Dwelling to Keep Controlled Substance

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (20 May 2003). The court ruled, relying on State v. Bowens, 140 N.C. App. 217, 535 S.E.2d 870 (2000), that there was insufficient evidence to support the defendant's conviction of maintaining a dwelling for keeping a controlled substance. The state presented evidence that the defendant was seen several times over a period of two months at the dwelling in which the controlled substance was found and an officer had spoken to the defendant twice during that time. There was no other evidence linking the defendant to the dwelling apart from the defendant's personal property being found in the bedroom. At most, this evidence supported a finding that the defendant occupied the dwelling from time to time. None of the defendant's personal papers listed the duplex as the defendant's address. There was no evidence that the defendant owned the dwelling, bore any expenses of renting or maintaining the property, or took any other responsibility for the property.

(1) Neither G.S. 15-11.1 Nor G.S. 90-112 Bar North Carolina State or Local Law Enforcement Officer from Delivering Evidence to Federal Authorities
(2) Party May Not Thwart Federal Forfeiture By Collateral Attack in North Carolina State Courts

State v. Hill, 153 N.C. App. 716, 570 S.E.2d 768 (5 November 2002). A local law enforcement agency lawfully seized illegal drugs and currency from the defendants' residences. After the search and before a hearing on the defendants' motion for return of the currency, the currency was turned over to the federal Drug Enforcement Agency for in rem forfeiture under federal law. The court noted that G.S. 90-112 involves an in personam forfeiture (no forfeiture unless there is a criminal conviction of the property owner). Thus, there is no application of the rule that when two in rem actions are pending, the court that first had dominion or control of the res retains exclusive jurisdiction. The court ruled that (1) neither G.S. 15-11.1 nor G.S. 90-112 bar North Carolina state or local law enforcement officers from delivering evidence to federal authorities, and (2) once a federal agency has adopted a state seizure, a party may not attempt to thwart the forfeiture by collateral attack in North Carolina state courts, because exclusive original jurisdiction is then vested in the federal court under 28 U.S.C. § 1355. The court relied on the rulings in United States v. Winston-Salem/Forsyth Bd. of Educ., 902 F.2d 267 (4th Cir. 1990), and Michigan State Police v. 33rd Dist. Court, 360 N.W.2d 196 (Mich. App. 1984).

Sufficient Evidence of Constructive Possession of Firearm Based on Acting in Concert in Committing Burglary and Armed Robbery to Support Defendant's Conviction of Possession of Firearm by Convicted Felon When Accomplice Possessed Firearm

State v. Walker, ___ N.C. App. ___, 572 S.E.2d 866 (17 December 2002). The defendant and three others broke into a house and committed an armed robbery. The defendant was convicted of possession of a firearm by a convicted felon based on a firearm possessed by an accomplice during the commission of the crimes. The court ruled that there was sufficient evidence to support the defendant's constructive possession of the firearm based on the theory of acting in concert.

Sufficient Evidence of Force to Support Stepfather's Conviction of Second-Degree Forcible Sexual Offense Committed Against Stepdaughter

State v. Corbett, ___ N.C. App. ___, 573 S.E.2d 210 (17 December 2002). The court ruled, relying on State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987), and State v. Hardy, 104 N.C. App. 226, 409 S.E.2d 96 (1991), that there was sufficient evidence of force to support the defendant-stepfather's conviction of second-degree forcible sexual offense committed against his stepdaughter. The defendant's abuse of his stepdaughter began when she was twelve years old and continued just before she turned sixteen. She lived with the defendant from the age of five or six until she was twenty-four. She testified, "I knew it was uncomfortable, but I mean I was only a young child" and "I felt that it was wrong, but whenever he tells you that it's okay because he is your father figure and you're only a young child, I mean, what are you supposed to believe?" The court found there was sufficient evidence from which a reasonable jury could conclude that the defendant used his position of power to force his stepdaughter to engage in sexual acts.

Attempted Statutory Sexual Offense Is a Crime

State v. Sines, ___ N.C. App. ___, ___ S.E.2d ___ (20 May 2003). The defendant placed his penis in front of the victim's face, demanded that the victim perform fellatio on him, but the victim refused. The court ruled that attempted statutory sexual offense under G.S. 14-27.7A(a)(2) is a crime. The court rejected the defendant's argument that it is logically impossible to have the specific intent to commit a strict liability offense that does not have a specific intent. The court noted that the intent required for attempted statutory sexual offense is the intent to engage in a sexual act, not the intent to engage in a sexual act with an underage person.

Sufficient Evidence of Conviction of Felony Child Abuse Inflicting Serious Physical Injury When Child Victim Was in Defendant's Care When Injury Occurred

State v. Chapman, 154 N.C. App. 441, 572 S.E.2d 243 (3 December 2002). The defendant was convicted of felony child abuse inflicting physical serious injury. The child victim suffered severe internal abdominal injuries. There was no direct evidence of how the injuries were inflicted. The state's pediatric surgeon testified that the child's injuries were caused by trauma, and could have been caused by a severe motor vehicle accident (for which there was no evidence in this case) or intentional child abuse. The child was in the defendant's care when the injuries apparently occurred. Based on this and other evidence, the court ruled there was sufficient evidence to support the defendant's conviction.

Double Jeopardy Clause Does Not Bar Convictions for Both Felony Child Abuse and Assault With Deadly Weapon Inflicting Serious Injury, Based on Same Act

State v. Carter, 153 N.C. App. 756, 570 S.E.2d 772 (5 November 2002). The defendant intentionally kicked his son in the abdomen and lacerated his pancreas. The court ruled that there was no double

jeopardy bar to convictions for both felony child abuse and assault with a deadly weapon inflicting serious injury, based on the same act. Each offense has an element that is not contained in the other offense.

(1) No Double Jeopardy Violation When Defendant Is Convicted and Punished for Both Assault with Firearm on Law Enforcement Officer and Discharging Firearm into Occupied Property Based on Same Act
(2) Directed Verdict for Defendant on Not Guilty by Reason of Insanity Is Not Authorized

State v. Sellers, ___ N.C. App. ___, 574 S.E.2d 101 (31 December 2002). (1) The defendant shot at an officer while he was in a car. The court ruled that there is no double jeopardy violation when a defendant is convicted and punished for both assault with firearm on law enforcement officer and discharging a firearm into occupied property based on same act. Each offense has an element that is not included in the other. (2) Bound by the ruling in State v. Dorsey, 135 N.C. App. 116, 519 S.E.2d 71 (1999), the court ruled that if evidence of insanity is offered by the defendant, even when it is uncontroverted, the jury must decide that credibility of that testimony. A directed verdict for the defendant on that issue is not authorized.

(1) Felonious Assault Indictment Was Defective Because It Failed to Name Deadly Weapon
(2) Trial Judge Erred in Allowing State to Amend Count of Indictment Alleging Misdemeanor Eluding Arrest to Add Allegation of Aggravating Factor That Changed Offense to Felony Eluding Arrest
(3) Use of Bottle Was Dangerous Weapon to Support Armed Robbery Conviction

State v. Moses, 154 N.C. App. 332, 572 S.E.2d 223 (3 December 2002). (1) The felonious assault indictment alleged that the defendant assaulted the victim with a deadly weapon and the assault resulted in serious injury, knocking out his teeth. The court ruled, relying on State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977) and other cases, that the indictment failed to charge assault with a deadly weapon inflicting serious injury because it did not name the deadly weapon. (2) The court ruled that the trial judge erred in allowing the state to amend a count of an indictment alleging misdemeanor eluding arrest [G.S. 20-141.5(a)] to add an allegation of an aggravating factor (the indictment had alleged only one aggravating factor, when two are required) that changed the offense to felony eluding arrest [G.S. 20-141.5(b)]. The amendment impermissibly changed the nature of the charged offense. (3) The victim was struck in the back of his head with a glass bottle. The blow caused him to fall to the ground and he was then kicked in the face. The court ruled that while the victim did not actually suffer life-threatening injuries (the victim suffered serious injuries to his teeth and mouth), the jury could still reasonably find the bottle to be a dangerous weapon.

Jury Instruction in Felonious Assault Prosecution That Broken Wine Bottle Was a Deadly Weapon Was Not Error

State v. Morgan, ___ N.C. App. ___, 577 S.E.2d 380 (18 March 2003). The defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. The defendant used a one and one-half pint wine bottle made of thick glass to strike the victim's head with sufficient force that it broke on impact. The defendant continued to strike the victim with the broken bottle in the head and face, requiring staples and stitches to close the wounds. The court ruled that, based on these facts, the trial judge did not err in stating in the jury instruction that the broke wine bottle was a deadly weapon.

Sufficient Evidence of Discharging Firearm into Occupied Property When Defendant, While in His Apartment, Discharged Shotgun, and Shotgun Round Went Through Apartment's Common Wall into Another Apartment While It Was Occupied

State v. Cockerham, ___ N.C. App. ___, 574 S.E.2d 694 (21 January 2003). The defendant, while in his apartment, discharged his shotgun into the common wall of the adjoining apartment resulting in a round entering that apartment while it was occupied. The court ruled that this was sufficient evidence of discharging a firearm into occupied property under G.S. 14-34.1. An apartment is an "enclosure" as set out in the statute.

(1) Fatal Variance Existed Between Name of Purchaser of Marijuana Alleged in Indictment and Evidence at Trial
(2) Defendant Did Not Possess Firearm at His Home to Be Within Exception in G.S. 14-415.1(a) to Offense of Possession of Firearm by Convicted Felon

State v. Smith, ___ N.C. App. ___, 573 S.E.2d 618 (31 December 2002). (1) The indictment alleged that the defendant sold marijuana to A. A and B went to the defendant's place to purchase marijuana and B went into the building to purchase the marijuana on their behalf, but there was no evidence that the defendant knew B was making the purchase on A's behalf. Thus there was insufficient evidence that the defendant knowingly sold marijuana to A. The court ruled, relying on State v. Wall, 96 N.C. App. 45, 384 S.E.2d 581 (1989), there was a fatal variance between the name of the purchaser of the marijuana alleged in the indictment and the evidence at trial. (2) The court ruled that the defendant did not possess the firearm at his home to be within the exception in G.S. 14-415.1(a) to the offense of possession of a firearm by a convicted felon. The defendant testified that he lived in the building and considered it a hangout or pool club. The defendant said that he slept on the sofa and showered at the homes of his girlfriend, mother, or daughter. He testified that the property was deeded to his daughter and that he did not own the building. There was no evidence that he paid rent to his daughter. There were no items of personal clothing, bed, or other indication that the building was being used by someone as a home.

Sufficient Evidence to Support Second-Degree Kidnapping Committed During Armed Robbery

State v. McNeil, ___ N.C. App. ___, 574 S.E.2d 145 (31 December 2002). The defendant pointed a gun at the store employee and forced him to go to the rear of the store and took the employee's wallet. Then the defendant, with the gun at the employee's back, forced him to the front of the store, opened the cash register, and took money. The defendant then forced the employee to the rear of the store and left. The court ruled that this last act—forcing the employee to the rear of the store after the defendant had taken money from the cash register—sufficiently established an additional restraint beyond that necessary to commit the robbery, and thus supported the defendant's conviction of second-degree kidnapping (the restraint was for the purpose of facilitating flight from the commission of the robbery).

Sufficient Evidence to Support Second-Degree Kidnapping

State v. Washington, ___ N.C. App. ___, ___ S.E.2d ___ (6 May 2003). The defendant's car collided with the victim's car. The defendant yelled at the victim to get out of his car and shattered the victim's window. The defendant grabbed the victim while he was seated inside his car, threw him to the ground, and then knocked the victim onto the hood of his car. The victim could not flee from the defendant because the defendant continued to hold the victim while assaulting him. The victim testified that he was scared and tried to escape from the defendant. The court ruled that this evidence was sufficient to support second-degree kidnapping: (1) the restraint of the victim was separate from the assault; and (2) the evidence was sufficient to prove that the purposes of the restraint were (i) to terrorize the victim and (ii)

to inflict serious bodily harm to the victim. It was irrelevant that the victim did not suffer serious bodily harm; the state was only required to prove the defendant's intent to do so.

Sufficient Evidence to Support First-Degree Kidnapping Committed by Fraud

State v. Davis, ___ N.C. App. ___, ___ S.E.2d ___ (20 May 2003). The defendant was convicted of first-degree murder and first-degree kidnapping. The court ruled, relying on State v. Cobb, 150 N.C. App. 31, 563 S.E.2d 600 (2002) and other cases, that the following evidence was sufficient evidence to support the defendant's conviction of first-degree kidnapping committed by fraud. The defendant obtained consent from the victim by falsely telling the victim in a convenience store that he was stranded and needed a ride. The defendant confessed that he had tricked the victim into giving him a ride. The evidence showed that the scene of the shooting was not a place to which the victim would normally have gone willingly absent the defendant's fraudulent representations. Thus, the fraud induced the victim to be removed to a place other than where the victim intended to be.

(1) Sufficient Evidence to Support Convictions of Possession of Stolen Goods (G.S. 14-71.1) and Possession of Stolen Motor Vehicle (G.S. 20-106)
(2) Legislature Did Not Intend Defendant To Be Convicted of Both Possession of Stolen Goods (G.S. 14-71.1) and Possession of Stolen Motor Vehicle (G.S. 20-106) Based on Same Act of Possessing One Motor Vehicle

State v. Bailey, ___ N.C. App. ___, 577 S.E.2d 683 (1 April 2003). The defendant was convicted of both possession of stolen goods (G.S. 14-71.1) and possession of a stolen vehicle (G.S. 20-106). Both convictions were based on the same act of possessing one motor vehicle. (1) The court ruled that there was sufficient evidence to support both convictions: (i) the defendant was found driving the vehicle several hours after it had been stolen and possessed the victim's group of keys; (ii) the defendant claimed the vehicle belonged to a "friend," but would not give the friend's name; and (iii) the victim testified that he had not given anyone permission to drive the vehicle. (2) The court ruled, relying on State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982), that the legislature did not intend a defendant to be convicted of both offenses.

Sufficient Evidence of Larceny "By Trick" Theory to Support Larceny Conviction

State v. Barbour, 153 N.C. App. 500, 570 S.E.2d 126 (15 October 2002). The defendant was convicted of felony larceny. He went to a car dealer and asked to test drive a truck. He was told to return the truck by 5:00 p.m. He never returned it. An officer saw him driving the truck several days later. There also was evidence that the defendant had been convicted of two similar crimes in which he drove vehicles from dealership lots with permission to take them for a test drive but then failed to return them. The court noted that larceny involves a trespass, either actual or constructive. A constructive trespass occurs when possession of property is fraudulently obtained by a trick or artifice—commonly known as larceny by trick, which is not a different crime than larceny but simply a way to prove the element of trespass in common law larceny. The court ruled that the evidence proved this element to support the felony larceny conviction (felony larceny was proved because the value of the truck was more than $1,000).

(1) Only One Larceny Was Committed When Defendant Stole Personal Property From Several Company Vans During Continuous Transaction
(2) Defendant May Not Be Convicted of Both Larceny and Possession of Same Goods

State v. Hargett, ___ N.C. App. ___, ___ S.E.2d ___ (1 April 2003). The defendant was convicted of multiple counts of breaking and entering a motor vehicle, misdemeanor larceny, and possession of stolen property. The defendant broke into several company vans on the company parking lot and then stole

personal property from each. (1) The court ruled, relying on State v. Marr, 342 N.C. 607, 467 S.E.2d 236 (1996), that the defendant may be convicted of only one larceny. [Author's note: The defendant's convictions of three counts of breaking and entering of a motor vehicle were left undisturbed.] (2) The court ruled, relying on State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982), that a defendant may not be convicted of both larceny and possession of the same goods.

(1) Defendant Did Not Present Sufficient Evidence to Require Jury Instruction on Affirmative Defense of Automatism
(2) Trial Judge Properly Instructed Jury on Transferred Intent in Prosecution of Attempted First-Degree Murder

State v. Andrews, ___ N.C. App. ___, 572 S.E.2d 798 (17 December 2002). The defendant was convicted of two counts of attempted first-degree murder and felonious assault. He deliberately drove his car at his estranged wife, who was accompanied by a male companion, hitting both of them and causing serious injuries. (1) The court ruled that the defendant did not present sufficient evidence to require a jury instruction on the affirmative defense of automatism. The court stated that although the defense expert responded "Yes" to the question of whether serotonergic syndrome (the result of taking two drugs to treat bipolar disorder) can cause a person to act unknowingly, his testimony as a whole showed that he was not referring to one's awareness or control of actions, but rather to awareness of the significance of the action. This evidence was insufficient to infer that the defendant acted unconsciously or was unable to control his actions. (2) The court ruled, relying on State v. Locklear, 331 N.C. 239, 415 S.E.2d 726 (1999), that the trial judge properly instructed the jury on transferred intent in the prosecution of attempted first-degree murder of the male companion. Because the defendant acted with the specific intent to kill his estranged wife, evidence of that intent could properly serve to support the intent element of the offense against the male companion.

Trial Judge Erred in Allowing State to Introduce Citation into Evidence and Publishing It to Jury, and Error Was Prejudicial Requiring New Trial

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (6 May 2003). The defendant was tried for felony eluding arrest, displaying a fictitious registration plate, and resisting a public officer. The court ruled, relying on G.S. 15A-1221(b), that the trial judge erred in allowing the state to introduce the citation charging displaying a fictitious registration plate and resisting a public officer and publishing it to the jury. The court also ruled that the error was prejudicial requiring a new trial.

Evidence Showed That Pheiffer University Is a Religious Institution and State's Authorizing University Employee to Be a Law Enforcement Officer Violated First Amendment's Establishment Clause

State v. Jordan, ___ N.C. App. ___, 574 S.E.2d 166 (31 December 2002). The court ruled, relying on State v. Pendleton, 339 N.C. 379, 451 S.E.2d 274 (1994), that the evidence showed that Pheiffer University is a religious institution and the state's authorizing a university employee to be a law enforcement officer violated the First Amendment's Establishment Clause. Thus the trial judge did not err in dismissing the defendant's DWI charge that had resulted from a vehicle stop effectuated by a university police officer.

Trial Judge Did Not Err in Removing Defendant's Retained Counsel from Representing Defendant When Counsel Had Actual Conflict of Interest Because He Had Previously Represented Victim in Divorce Action

State v. Taylor, ___ N.C. App. ___, 574 S.E.2d 58 (31 December 2002). The state moved before trial to disqualify the defendant's retained counsel. The court ruled that the trial judge did not err in removing the defendant's retained counsel and disqualifying all members of his firm from representing the defendant when counsel had an actual conflict of interest because he had previously represented the victim in a divorce action. (See the court's detailed discussion of the facts in its opinion.)

Sufficient Evidence to Support Adjudication of Delinquency of Disorderly Conduct at School, G.S. 14-288.4(a)(6)

In re M. G., ___ N.C. App. ___, 576 S.E.2d 398 (4 March 2003). The juvenile, a middle school student, yelled "shut the fuck up" to a group of students in a hallway. Classes were in session in four classrooms on the hallway. The hallway should have been empty then (that is, students should not have been there). A teacher who heard the juvenile's statement was on his way to cafeteria duty and took the juvenile to the school's detention center and relayed what had happened. The teacher was away from his assigned duties for at least several minutes. The court ruled, relying on In re Pineault, 152 N.C. App. 196, 566 S.E.2d 854 (2002), that this evidence was sufficient to support the juvenile's adjudication of delinquency of disorderly conduct at school, G.S. 14-288.4(a)(6).

(1) Discovered-Property Taxation Statute, G.S. 105-312(e), Is Inapplicable to Date of Listing of Video Gaming Machines in Prosecution under G.S. 14-306.1(a)
(2) Trial Judge Did Not Err in Refusing to Give Defendant's Proposed Jury Instruction That Firearm Must Be Pointed At or Toward Officers in Prosecution of Assault with Firearm on Law Enforcement Officer

State v. Childers, 154 N.C. App. 375, 572 S.E.2d 207 (3 December 2002). The defendant was convicted of illegal possession of video gaming machines and assault with a firearm on a law enforcement officer. (1) The court ruled that the discovered-property taxation statute, G.S. 105-312(e) (late listing of property relates back to January listing period), is inapplicable to the date of the listing of video gaming machines in a prosecution under G.S. 14-306.1(a). The criminal statute permits possession of video gaming machines only if they were listed by January 31, 2000, for ad valorem taxation for the 2000-2001 tax year. The court rejected the defendant's argument that the video gaming machines did not have to be listed by January 31, 2000, because of G.S. 105-312(e). (2) The court ruled that the trial judge did not err in refusing to give the defendant's proposed jury instruction that a firearm must be pointed at or toward an officer in a prosecution of an assault with a firearm on a law enforcement officer. Citing State v. Haynesworth, 146 N.C. App. 523, 553 S.E.2d 103 (2001), the court ruled that the state need not prove that the defendant pointed a firearm at a law enforcement officer, but only that he effected a show of force or violence sufficient to place a person of reasonable firmness in fear of immediate injury. In this case, the defendant, when told that his video gaming machines were to be seized, slammed down a revolver on the counter and challenged the officers to come behind the counter and get him. The defendant then cursed the officers and waved the gun around while the officers were talking with him.

No Due Process Violation When Prosecutor Decides Which Prior Convictions to Use to Establish Habitual Felon Status and Which Prior Convictions to Use to Establish Prior Record Level

State v. Cates, ___ N.C. App. ___, 573 S.E.2d 208 (17 December 2002). The court ruled that there is no due process violation when a prosecutor decides which prior convictions to use to establish habitual felon status and which prior convictions to use to establish a defendant's prior record level.

State Was Not Collaterally Estopped from Using Prior Felony Convictions in Establishing Prior Record Level Although Defendant Had Previously Been Acquitted of Being a Violent Habitual Felon Based on Those Same Convictions

State v. Safrit, ___ N.C. App. ___, 572 S.E.2d 863 (17 December 2002). The defendant was convicted of felonious assault and adjudicated a violent habitual felon. On appeal, State v. Safrit, 145 N.C. App. 541, 551 S.E.2d 516 (2001), the court reversed the adjudication of violation habitual felon because the state was collaterally estopped from seeking violent habitual felon status based on the same two felony convictions in which a prior jury had acquitted the defendant of being a violent habitual felon. On remand from that ruling, the judge at a sentencing hearing found those same two felony convictions in sentencing the defendant in Prior Record Level VI. The court ruled that the state was not collaterally estopped from using the felony convictions in establishing the defendant's prior record level. The court reasoned that the standard of proving violent habitual felon status is beyond a reasonable doubt, while the standard of proving a conviction to establish a prior record level is only a preponderance of evidence. The differences in the burdens of proof precluded the application of collateral estoppel.

(1) Trial Judge Did Not Err in Denying Defendant's Pretrial Motion to Require State to Learn Names of Any Mental Health Professionals Who Had Treated State's Witness
(2) Trial Judge Did Not Err in Not Providing Defendant With Jail's Psychiatric Records of State's Witness Because Judge's In Camera Review for Exculpatory Evidence Was Sufficient to Satisfy Due Process

State v. Lynn, ___ N.C. App. ___, 578 S.E.2d 628 (15 April 2003). The defendant was convicted of conspiracy to commit first-degree murder, attempted first-degree murder, and felonious assault. The victim's wife was the defendant's accomplice in committing these crimes. Before the defendant's trial, she pleaded guilty to several offenses and testified for the state. (1) The defendant in a pretrial motion requested the trial judge to order the state to determine the identities of any mental health professional who had treated the victim's wife for mental health problems so the defendant could subpoena their records for the judge's in camera inspection for exculpatory evidence. The court noted, citing State v. Williams, 330 N.C. 711, 412 S.E.2d 359 (1992), that a witness's mental health problems may affect his or her credibility by casting doubt on the capacity to observe, recollect, and recount events—thus this impeachment evidence may be exculpatory. However, the court stated that the defendant did not assert that any of the victim's mental health information was possessed by the state or someone acting on the state's behalf. Citing State v. Chavis, 141 N.C. App. 553, 540 S.E.2d 404 (2000) and State v. Smith, 337 N.C. 658, 447 S.E.2d 376 (1994), the court noted that the state is not required to conduct an independent investigation to locate evidence favorable to the defendant. The court ruled that the judge did not err in denying the defendant's motion. The court also reviewed the evidence in this case and stated that the denial of the motion did not prevent the defendant from exploring the issue with the victim's wife at trial. (2) The court ruled, citing Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987), that the trial judge did not err in not providing the defendant with the jail's psychiatric records of the victim's wife because the judge's in camera review for exculpatory evidence was sufficient to satisfy due process.

Defendant's Failure to Request Arraignment Under G.S. 15A-941(d) Waived Prohibition in G.S. 15A-943 of Trying Defendant in Same Week in Which He Is Arraigned (In Counties Where Arraignment Is Required)

State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592 (5 November 2002). The court ruled that the defendant's failure to request his arraignment under G.S. 15A-941(d) (defendant must file written request for arraignment not later than 21 days after service of indictment, or if defendant is not required to be served, not later than 21 days from return of indictment) waived the prohibition in G.S. 15A-943 of trying

a defendant in the same week in which the defendant is arraigned (in counties where arraignment is required).

Trial Judge Erred in Denying Defendant's Motion for Continuance Because Defendant Needed Additional Time to Hire Blood Spatter Expert to Respond to Report of State's Blood Spatter Expert

State v. Barlowe, ___ N.C. App. ___, 578 S.E.2d 660 (15 April 2003). The defendant was convicted of first-degree murder. The court ruled that the trial judge erred in denying the defendant's motion for a continuance because the defendant needed additional time to hire a blood spatter expert to respond to the report of the state's blood spatter expert. (See the court's detailed discussion of the facts in its opinion.) The blood spatter evidence was critical to the state's case because it was the only physical evidence potentially placing her at the murder scene. It also contradicted the defendant's testimony. In addition, the defendant was provided with the state's report shortly before trial and had contacted blood spatter experts, but none of them could be available to testify at trial with such short notice.

Delay of 940 Days from Arrest to Trial While Defendant Remained Incarcerated Did Not Deny Speedy Trial

State v. Strickland, 153 N.C. App. 581, 570 S.E.2d 898 (5 November 2002). The defendant was convicted of second-degree rape of his divorced wife. The court ruled, applying the four factors set out in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), ruled that a delay of 940 days from the defendant's arrest to trial while he remained incarcerated did not deny his constitutional right to a speedy trial. The court noted that the defendant did not allege any prejudice created by the delay other than prolonged anxiety and concern. He did not show any loss of evidence or witnesses.

Definition of Malice in P.J.I.—Crim. 213.20, Malicious Damage to Occupied Real Property By Use of Incendiary Device, Is Correct

State v. Sexton, 153 N.C. App. 641, 571 S.E.2d 41 (5 November 2002). The court ruled that the definition of malice in P.J.I.—Crim. 213.20, malicious damage to occupied real property by the use of an incendiary device, is correct. The definition is the same as for murder.

Sufficient Evidence of to Support Conviction of Possessing Alcoholic Beverages for Sale Without Permit

State v. Reed, 153 N.C. App. 462, 570 S.E.2d 116 (15 October 2002). The court ruled that there was sufficient evidence to support the defendant's conviction of possessing alcoholic beverages for sale without a permit. Three prior searches of the defendant's house resulted in the seizure of quantities of spirituous liquor that were substantial enough to establish a prima facie case under G.S. 18B-304(b). Although the amount seized in this case did not establish a prima facie case, there was substantial evidence to support the conviction. Officers found about five liters of spirituous liquor stored in various closets and refrigerators, approximately $946.00 in small bills, packaging items, 78 cans of beer, a box of business cards, and a copy of "Harry's house rules," which indicated that nothing was "free."

Trial Judge Did Not Err in Allowing State's Mental Health Expert to Testify About Defendant's Mental State At Time of Shooting—No Violation of Defendant's Sixth Amendment Right to Counsel and Testimony Did Not Exceed Scope of Evaluation of Defendant

State v. McClary, ___ N.C. App. ___, 577 S.E.2d 690 (1 April 2003). The defendant was tried for first-degree murder and convicted of second-degree murder. The defendant filed a motion to continue the trial

based on the results of a psychiatric examination by his own expert that showed he may not be competent to stand trial. The trial judge found that this issue was properly raised and granted the motion to continue. The judge then on his own motion ordered the defendant committed to Dorothea Dix Hospital for evaluation of his capacity to proceed. The defendant and his counsel were present and did not object to the judge's order, and the defendant later submitted to an examination by Dr. Rollins at the hospital. At trial, the defendant offered expert testimony on the issue of the defendant's diminished mental capacity—his specific intent to kill was substantially reduced. Dr. Rollins testified for the state on rebuttal that the defendant did not lack the mental capacity to form the specific intent to kill. The court ruled, relying on State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), and distinguishing Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), that the defendant's Sixth Amendment right to counsel was not violated by the admission of Dr. Rollins's testimony. The court also rejected the defendant's argument that the testimony was inadmissible because it exceeded the scope of evaluation by Dr. Rollins of the defendant's capacity to proceed.

Trial Judge Erred in Finding That Juvenile's Refusal During Court-Ordered Therapeutic Treatment to Admit to Offenses For Which He Had Been Adjudicated Delinquent Was a Factor Justifying Continued Custody Pending Appeal

In re Lineberry, 154 N.C. App. 246, 572 S.E.2d 229 (3 December 2002). The court ruled that the trial judge erred in finding that the juvenile's refusal during court-ordered therapeutic treatment to admit to the offenses for which he had been adjudicated delinquent was a factor justifying his continued custody pending his appeal to the court of appeals. The court ruled that the trial judge violated the juvenile's Fifth Amendment privilege against compelled self-incrimination in relying on this factor.

Arrest, Search, and Confession Issues

Officer May Lawfully Establish License Checkpoint Even Though Officer Does Not Have Supervisory Approval and Officer's Agency Does Not Have Written Plan Setting Out Criteria to Establish or Operate Checkpoint

State v. Mitchell, 154 N.C. App. 186, 571 S.E.2d 640 (19 November 2002). **(Note: The North Carolina Supreme Court has granted the defendant's petition to review this ruling.)** An officer set up a license checkpoint with the assistance of other officers but without supervisory approval or his agency having a written plan setting out criteria to establish or operate a checkpoint. The checkpoint stopped every car approaching the checkpoint to check driver's licenses and registrations. The court ruled, citing State v. VanCamp, 150 N.C. App. 347, 562 S.E.2d 921 (2002), and other cases, that the checkpoint did not violate the Fourth Amendment. [Author's note: A plan is required to conduct a DWI checkpoint under G.S. 20-16.3A.]

Reasonable Suspicion Supported Investigative Stop of Vehicle for DWI

State v. Thompson, 154 N.C. App. 194, 571 S.E.2d 673 (19 November 2002). Two officers estimated the speed of the defendant's vehicle to be about 15 to 20 m.p.h. over the speed limit. They saw the vehicle weave within his lane and touch the left line separating the two eastbound lanes at least twice with both left tires. The court ruled, citing State v. Watson, 122 N.C. App.596, 472 S.E.2d 28 (1996), the officers had reasonable suspicion to make an investigative stop of the defendant's vehicle for DWI.

(1) Reasonable Suspicion Supported Investigative Stop of Vehicle for Possible Criminal Activity
(2) Officer's Frisk of Driver of Vehicle Was Proper

State v. Martinez, ___ N.C. App. ___, ___ S.E.2d ___ (20 May 2003). (1) The court ruled that reasonable suspicion supported an officer's investigative stop of a vehicle for possible criminal activity. At 2:00 a.m., Officer A was on routine patrol in a marked vehicle when he saw and drove past a male pedestrian. The officer immediately turned around and pulled over on the side of the road behind the pedestrian who, on seeing the officer, ran towards the woods in the direction of a mobile home park. About four minutes later, while the officer was driving through the mobile home park in an unsuccessful attempt to locate the pedestrian, Officer B contacted Officer A by radio and informed him that there was a motor vehicle parked on the right shoulder of the road near the mobile home park. Officer A then drove out of the mobile home park and saw a white vehicle leaving the right shoulder of the road near the mobile home park. This vehicle was located about fifty yards from where the officer had seen the pedestrian flee from him earlier. The officer then stopped the vehicle. The court stated that it was reasonable for the officer to infer that the person who had fled from him was in some way related to the stopped vehicle located a mere fifty yards from the fleeing pedestrian. The fact that the stop occurred around 2:00 a.m. when there was generally no foot traffic and no vehicles on the road except this vehicle and the patrol vehicles contributed to the officer's suspicion. (2) The court ruled that the frisk of the driver of the stopped vehicle was proper. After presenting the officer with a Maryland driver's license, the defendant began digging in the glove compartment and then reaching around to several areas in the vehicle's interior, including behind the passenger seat toward the floorboard. The defendant exhibited a significant degree of nervousness. Concerned for his safety, the officer asked the defendant to exit the vehicle. The defendant did not respond when asked if he had any weapons. During the pat-down for weapons, the officer felt a large bulge in the defendant's right front pants' pocket and asked the defendant what the object was. The defendant responded, "dope." The officer retrieved a large amount of currency and two bags of cocaine from the pocket. The court ruled that the defendant's non-response to the question about weapons and the nervous digging in the vehicle supported the frisk. Relying on State v. Benjamin, 124 N.C. App. 734, 478 S.E.2d 651 (1996) (*Miranda* warnings not required before question asked during frisk), the court also ruled that the officer's brief inquiry during the frisk was not improper.

(1) Probable Cause Supported Stop of Vehicle for Violation of G.S. 20-152 (Following Too Closely)
(2) Reasonable Suspicion Supported Detention of Defendants After Officer Issued Warning Ticket

State v. Wilson, ___ N.C. App. ___, 574 S.E.2d 93 (31 December 2002). A trooper saw a vehicle driven by defendant A (in which codefendant B was a passenger) less than one car length behind another vehicle while traveling 69 m.p.h. The trooper stopped the car and issued a warning ticket for G.S. 20-152 (following too closely). Later, the defendant consented to a search of the vehicle, and cocaine was found in the vehicle's battery. (1) The trial judge ruled that reasonable suspicion supported the stop of the vehicle. The court, relying on a concurring opinion in State v. Young, 148 N.C. App. 462, 559 S.E.2d 814 (2002), that stated probable cause is required for investigative stops of some traffic violations (for example, a readily observed violation such as speeding or running a red light) while only reasonable suspicion is required for investigative stops of other traffic violations (for example, offenses that can only be verified by stopping a vehicle, such as DWI or driving while license revoked), stated that probable cause was required to stop the defendant's vehicle for a violation of G.S. 20-152. The court ruled that the trooper had probable cause to stop the vehicle for this violation. [Author's note: This ruling is not supported by any ruling of the United States Supreme Court, North Carolina Supreme Court, or a court in any other jurisdiction of which the author is aware. It is extremely unlikely that the United States Supreme Court would rule that probable cause is required for a readily observed traffic violation. Reasonable suspicion is the standard under the Fourth Amendment for *any* investigative stop—probable cause is not required.] (2) The court ruled that reasonable suspicion supported the detention of the defendants after the trooper issued the warning ticket. The court stated that the evidence established that

(i) the vehicle had a strong odor of air freshener; (ii) an atlas was seen in the back seat and screws were missing from the dashboard; (iii) the vehicle was registered in Florida, but the defendant was from Ohio; (iv) there were discrepancies in the descriptions by the defendant and codefendant of a vehicle left in Florida; and (v) the defendant was very nervous—tapping his hands and feet while in the trooper's car. In addition, the trooper had special knowledge of illegal drugs and knew that the defendant's actions were consistent with those of a drug trafficker.

Reasonable Suspicion Supported Detention After Traffic Stop Had Concluded

State v. Bell, ___ N.C. App. ___, 576 S.E.2d 695 (4 March 2003). Trooper A stopped a vehicle for speeding that was driven by the defendant's brother; the defendant was a passenger in the front seat. Many personal belongings filled the back seat. After the stop, Trooper B arrived and assisted Trooper A. When the driver offered a New York learner's permit and a rental agreement for the vehicle, Trooper A asked him to come back to the patrol car to check the permit and tag, and he questioned him there. Trooper B questioned the defendant while he was in the vehicle. The driver and the defendant told different stories to the troopers about their itinerary. Trooper B also noticed that the defendant's eyes wandered while he talked, resisting eye contact with the trooper. Upon considering that the back seat was filled with personal belongings, including stereo equipment, indicating that the trunk was full, and that the men told inconsistent stories, Trooper A became suspicious about illegal drugs, based on his experience and training in drug interdiction. After issuing a citation to the driver for speeding in a work zone and returning his learner's permit, Trooper A asked Trooper B to request the defendant's consent to search the vehicle because his name appeared on the rental agreement. The court ruled that even if, as the defendant asserted, the traffic stop had concluded when the trooper asked for consent to search the vehicle, reasonable suspicion of criminal activity supported the detention. The court relied on State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999).

Release of Lawfully-Seized Evidence from One Law Enforcement Agency to Another for Testing and Further Analysis Is Not Search or Seizure Requiring Fourth Amendment Justification

State v. Motley, 153 N.C. App. 701, 571 S.E.2d 269 (5 November 2002). A detective investigating a felonious assault learned that another law enforcement agency had lawfully seized a rifle and ammunition from the defendant's truck during the investigation of unrelated crimes. The detective obtained the evidence from the other agency, and it was analyzed by the State Bureau of Investigation laboratory and introduced in the felonious assault trial. The court ruled, relying on State v. Barkley, 144 N.C. App.514, 551 S.E.2d 131 (2001), that the release of lawfully-seized evidence from one law enforcement agency to another for testing and further analysis is not a search or seizure requiring Fourth Amendment justification. The defendant no longer possessed a reasonable expectation of privacy in the rifle once it was lawfully obtained by law enforcement. The court noted that the defendant never made a request or motion that the rifle be returned to him.

Inevitable Discovery Doctrine Supported Officer's Seizure of Keys from Defendant's Pocket Even If Officer's Knowledge of Keys Resulted from Statement Obtained through *Miranda* Violation

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (20 May 2003). An officer was executing a search warrant for drugs, which named to be searched a dwelling and the person of the defendant. The officer obtained keys to a truck after the officer asked the defendant if he had any keys, and the defendant acknowledged that he had keys in his pocket. The keys were then used to open a locked toolbox on the side of the truck that contained cocaine. The court ruled that the inevitable discovery doctrine supported the officer's seizure of the keys from the defendant's pocket and cocaine from the truck even if the officer's knowledge of the keys resulted from a statement obtained through a *Miranda* violation. Because

the search warrant authorized the search of the person of the defendant, the officer would have inevitably located the keys even without the defendant's acknowledgement that the keys were in his pocket.

(1) Defendant Was Not In Custody to Require *Miranda* Warnings, and Request for Attorney Did Not Trigger *Miranda* Protections
(2) Officers Had Probable Cause and Exigent Circumstances to Conduct Gunshot Residue Test Without Search Warrant
(3) Evidence of Defendant's Refusal to Submit to Gunshot Residue Test Was Admissible at Trial

State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592 (5 November 2002). (1) Responding to a call that the defendant was involved in a shooting, officers handcuffed the defendant to frisk him for weapons and then removed the handcuffs. They asked him if he would voluntarily accompany them to the police station so they could continue their investigation. He agreed to go with the officers; he was not questioned or handcuffed during the ride to the station. He was questioned at the station without being given *Miranda* warnings. He was informed several times that he was free to leave, including after he indicated interest in having an attorney present, but made no effort to do so. The court ruled, citing State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), that the defendant was not in custody to require *Miranda* warnings. The court also ruled that because he was not in custody, his request for an attorney did not trigger *Miranda* protections. (2) The officers asked the defendant to submit to a gunshot residue test, but he refused. The state was permitted to introduce evidence of this refusal at trial. The court ruled, citing State v. Coplen, 138 N.C. App. 48, 530 S.E.2d 313 (2000), that the officers had probable cause and exigent circumstances to conduct the gunshot residue test without a search warrant. Information from witnesses to the shooting provided probable cause. Testimony by an officer that a gunshot residue test must be conducted within three or four hours of a shooting provided exigent circumstances. (3) The court noted appellate cases that have ruled that evidence of a defendant's refusal to submit to a lawful testing or identification procedure is circumstantial evidence of guilt, and ruled that the admission of the defendant's refusal to submit to the gunshot residue test was not error.

Defendant Was in Custody Under *Miranda* When He Was Handcuffed and Placed in Back Seat of Patrol Car

State v. Johnston, 154 N.C. App. 500, 572 S.E.2d 438 (3 December 2002). A sheriff's department received a 911 call that a male, driving a gray car, fired shots into an occupied vehicle with a sawed-off shotgun. A few hours later, at the place where the shooting occurred, officers saw a gray car driving along the side of the road. With guns drawn, the officers stopped the car, asked the defendant to step out of the car, handcuffed him, and placed him in the back seat of a patrol car. The officers informed the defendant that he was not under arrest, but only in "secure custody" for the defendant's safety and the safety of others. The court ruled that defendant was in custody under *Miranda*—his freedom of movement was restrained to the degree associated with a formal arrest [see State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (2001)], and a reasonable person under these circumstances would believe he was under arrest.

Defendant Was in Custody Under *Miranda* When He Was Handcuffed as a Burglary Suspect

State v. Crudup, ___ N.C. App. ___, ___ S.E.2d ___ (20 May 2003). In response to a reported break-in at a house, Officer A—along with five or six other officers—went there to investigate. As Officer A prepared to enter, the defendant exited the front door. Three officers handcuffed the defendant and detained him as a burglary suspect. Thereafter, the Officer A and another officer searched the house and found cocaine, but no other suspects. Officer A then asked the defendant, without giving *Miranda* warnings, if he resided in the house, was the only resident, and owned the possessions found on the premises. The court ruled, using the definition of custody in State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (2001), that the defendant was in custody to require *Miranda* warnings before the officer's

questioning of the defendant. While handcuffed, the defendant was questioned while four officers surrounded him. The defendant's freedom of movement was restrained to the degree associated with a formal arrest. A reasonable person under these circumstances would believe he was under arrest. The court ruled that the defendant's responses to the questions must be suppressed.

Defendant Was Not in Custody Under *Miranda* When He Was Questioned About Shooting Incident in His Apartment

State v. Cockerham, ___ N.C. App. ___, 574 S.E.2d 694 (21 January 2003). Officers were investigating the discharge of a firearm from the defendant's apartment, resulting in a shotgun round going through the common wall and into the adjoining apartment. The defendant let an officer into his apartment. The defendant—who was not patted down, searched, or handcuffed—sat in his living room while two officers observed holes in the walls of both apartments and found a shotgun in the defendant's apartment. One officer then asked the defendant what had happened. The defendant replied that some people had tried to break into his apartment. The officer then asked the defendant why he had shot at the wall. The court ruled, relying on the definition of custody in State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (2001), that the defendant was not in custody to require *Miranda* warnings when the officer asked these two questions. There was no formal arrest of the defendant or restraint on his freedom of movement of the degree associated with a formal arrest.

Marine Corps Platoon Commander Was Required to Give *Miranda* Warnings to Marine Corps Defendant Because Commander Was Conducting Custodial Interrogation When Questioning Defendant

State v. Davis, ___ N.C. App. ___, ___ S.E.2d ___ (20 May 2003). [Author's note: One judge of the three-judge panel disagreed with this ruling, but because the court ruled that the erroneous admission of the statements was harmless beyond a reasonable doubt and upheld the defendant's conviction, wrote an opinion concurring in the result instead of a dissenting opinion.] The defendant was serving in the Marine Corps and stationed in California. While on leave in North Carolina, he committed a murder but was not arrested then. He returned to his Marine Corps base in California. He told his sergeant that he needed to telephone a lawyer. The sergeant asked why, but the defendant refused to talk about it. The sergeant took the defendant to his platoon sergeant, who then took the defendant to the platoon commander. The platoon sergeant told the commander that the defendant had received a phone call indicating that the sheriff's department was on the way to arrest him and that the commander would want to hear what the defendant had to say. The defendant confirmed to the commander that his mother had called and warned that a detective from North Carolina was coming to California because the defendant was a suspect in a murder case. The commander asked the defendant if he was involved in the murder and the defendant replied, "sort of." The commander then said, "Well, are you involved or not involved? Yes or no question." The defendant replied, "Yes, I am involved." The defendant explained that he did not know the murdered man, but that he had been told that the man raped his wife in North Carolina while the defendant had been in California. The defendant was then allowed to make his telephone call. The court ruled, citing cases from other jurisdictions, that the commander was conducting custodial interrogation, and the defendant's statements were inadmissible because *Miranda* warnings had not been given and waived.

Arresting Officer's Statement to Defendant About Need to Inform Officer If He Possessed Any Illegal Substance or Weapons Because It Was Automatic Felony to Possess Them in Jail Was Interrogation Under *Miranda*

State v. Phelps, ___ N.C. App. ___, 575 S.E.2d 818 (18 February 2003). (Author's note: There was a dissenting opinion in this case, but not on the issue discussed below.) A law enforcement officer arrested

the defendant based on two outstanding arrest warrants. The officer did not administer *Miranda* warnings. While at the parking lot of the county jail before taking him into the building for processing, the officer told the defendant that he needed to inform the officer if he possessed any illegal substance or weapons because it was an automatic felony to possess them in jail. The court ruled that this statement was interrogation under *Miranda* because the officer knew or should have known that his statement to the defendant was reasonably likely to elicit an incriminating response—see Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

Defendant's Confession About Sexually Assaulting His Daughter Was Voluntary Even Though Officer Falsely Told Defendant That His Daughter Was Pregnant

State v. Barnes, 154 N.C. App. 111, 572 S.E.2d 165 (19 November 2002). The defendant voluntarily came to the sheriff's department to discuss an investigation against him concerning his alleged sexual assault of his daughter. The investigating officer falsely told the defendant that his daughter was pregnant. The court noted, citing State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983), that deception is only one factor in examining the totality of circumstances surrounding the voluntariness of a confession. The court noted that the defendant was not tricked about the nature of the crime or the possible punishment. The officer did not subject the defendant to threats of harm, rewards for a confession, or deprivation of freedom of action. There was not an oppressive environment during the officer's questioning of the defendant. The court ruled that the confession was voluntary.

Prosecutor's Cross-Examination of Defendant and Jury Argument Impermissibly Commented on Defendant's Right to Remain Silent

State v. Shores, ___ N.C. App. ___, 573 S.E.2d 237 (31 December 2002). The defendant was arrested for murder, given *Miranda* warnings, gave a brief statement asserting self-defense, and exercised his right to remain silent from then until trial. The defendant testified on direct examination at trial and added details about the alleged victim's actions toward him. The prosecutor's cross-examination repeatedly questioned the defendant whether he had ever informed law enforcement about these details. The prosecutor also mentioned this matter in jury argument. The court ruled, relying on Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240 , 49 L. Ed. 2d 91 (1976), State v. Hoyle, 325 N.C. 232, 382 S.E.2d 752 (1989), and State v. Lane, 301 N.C. 382, 271 S.E.2d 273 (1980), that the prosecutor's cross-examination of the defendant and jury argument impermissibly commented on defendant's right to remain silent.

Sixteen-Year-Old Mentally-Retarded Defendant Was Not in Custody During Interrogation and His Confession Was Voluntarily Given

State v. Jones, 153 N.C. App. 358, 570 S.E.2d 128 (15 October 2002). The defendant, sixteen years old and mentally retarded, was convicted of first-degree murder and other offenses. The court ruled that he was not in custody during interrogation by law enforcement officers and his confession was voluntarily given. (See the detailed facts discussed in the opinion.) The court relied on State v. Sanders, 122 N.C. App. 691, 471 S.E.2d 641 (1996), State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983), and other cases.

Evidence

DWI Is Equivalent of Class 1 Misdemeanor Under Rule 609(a) So State Properly Impeached Defendant With Prior DWI Conviction

State v. Gregory, ___ N.C. App. ___, 572 S.E.2d 838 (17 December 2002). The court ruled that DWI is the equivalent of a Class 1 misdemeanor under Rule 609(a) so the state could impeach the defendant at trial with his prior DWI convictions. The court noted that Rule 609(a) allows impeachment by evidence

that a witness has been convicted of a felony or a Class A1, Class 1, or Class 2 misdemeanor. G.S. 20-138.1 states that DWI is a misdemeanor. G.S. 15A-1340.23(a) provides that if an offense is a misdemeanor for which there is no classification, it is as classified in G.S. 14-3, which provides that any misdemeanor that has a specific punishment, but is not assigned a classification by the General Assembly, is a Class 1 misdemeanor if the maximum punishment is more than six months' imprisonment. The maximum punishment for a misdemeanor DWI is imprisonment for not less than 30 days and a maximum term of not more than 24 months. The court concluded from a review of these statutes that a DWI conviction is effectively a Class 1 misdemeanor under Rule 609(a).

(1) State Was Properly Permitted Under Rule 806 to Impeach Under Rule 609 Defendant's Hearsay Statement Introduced Through Testimony By Defense Witness By Asking Defense Witness About Defendant's Prior Robbery Conviction
(2) No Balancing Under Rule 403 Is Required for Admission Under Rule 609(a) of Conviction Less Than Ten Years Old

State v. McConico, 153 N.C. App. 723, 570 S.E.2d 776 (5 November 2002). Rule 806 provides (in pertinent part to this case) that when a hearsay statement is admitted into evidence, the declarant's credibility may be attacked by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Defense counsel on direct examination of a defense alibi witness asked the witness what the defendant did when he brought her car home. She testified, "[h]e told me he was going to the studio." On cross-examination, the witness testified that the defendant had previously convicted of forcible robbery. The court ruled that the defendant's statement was hearsay statement under Rule 806 because it was offered to prove the truth of the matter asserted. The court also ruled that the testimony of the defendant's prior conviction was not inconsistent with Rule 609(a) (impeachment by prior conviction) because it was properly elicited from the defense witness, who took the place of the defendant's offering trial testimony. (2) The court ruled that no balancing under Rule 403 is required for the admission under Rule 609(a) of conviction less than ten years old. The court noted the that the rule states that the evidence "shall" be admitted.

(1) Witness's Videotaped Statement to Law Enforcement Officers Was Properly Admitted Under Rule 804(b)(5) (Residual Hearsay Exception) and Did Not Violate Defendant's Confrontation Rights
(2) Accomplice's Letters to Girlfriend Urging Her to Lie About What She Knew About Charged Crimes Was Properly Admitted Under Rule 804(b)(3), or Alternatively, Rule 804(b)(5), and Did Not Violate Defendant's Confrontation Rights

State v. Carter, ___ N.C. App. ___, 577 S.E.2d 640 (18 March 2003). The defendant was convicted of first-degree murder and other crimes, which he committed with an accomplice. The crimes were committed in early December 1996. (1) Shortly after the defendant committed the crimes, he told a female friend what had happened. The defendant and the female friend were married one week later. She told law enforcement officers in an October 1999 videotaped interview about the defendant's conversation with her in early December—before they were married. At trial, she asserted the spousal privilege not to testify against her husband, the defendant. The court ruled that her videotaped statement to law enforcement officers was properly admitted under Rule 804(b)(5) (residual hearsay exception) and did not violate defendant's confrontation rights. (See the court's detailed discussion of the facts and law.) (2) The court ruled that the accomplice's letters to his girlfriend urging her to lie about what she knew about charged crimes was properly admitted under Rule 804(b)(3), or alternatively, Rule 804(b)(5). (See the court's detailed discussion of the facts and law.)

Rape Victim's Statement to Detective Was Properly Admitted Under Rule 804(b)(5) (Residual Hearsay Exception) After Rape Victim Refused to Testify for State at Trial

State v. Finney, ___ N.C. App. ___, ___ S.E.2d ___ (15 April 2003). The defendant was convicted of first-degree rape. A detective took a statement from the rape victim a day after the rape occurred. The state did not learn that the victim would refuse to testify for the state until the first day of trial. The state then gave notice to the defendant that it would seek to admit the victim's statement to the detective under Rule 804(b)(5) (residual hearsay exception). The trial judge conducted the six-part inquiry under the rule and admitted the statement. The court upheld the trial judge's ruling. The court noted that all of the victim's accounts of the rape to the detective and others were consistent and she never recanted. (See the court's detailed discussion of the facts in its opinion.)

Domestic Violence Victim's Statement to Law Enforcement Officer Was Properly Admitted as Past Recollection Recorded, Rule 803(5)

State v. Love, ___ N.C. App. ___, 576 S.E.2d 709 (4 March 2003). The defendant was convicted of communicating threats. Officers responded to a domestic violence call and talked with the victim, the defendant's wife. She explained what had happened. After she had calmed down, an officer used his laptop computer to write her statement. The statement ended with the following: "Officer D. L. Phillips read this statement to me and everything is accurate." At trial, the victim testified that she could recall calling the police and being upset, but she could not recall any events concerning the defendant. She admitted that one of the officers had talked to her and read back what she had said to him; everything was fresh in her mind when she gave the statement; and she told him what had happened with the defendant. She was shown a computer printout of her statement that had been recorded on the officer's laptop computer. She said that her memory was not refreshed by the statement, but when she talked to the officer shortly he had arrived, she had remembered everything. The trial judge then allowed the officer to read the statement under Rule 803(5), past recollection recorded. The court ruled that the judge did not err in admitting the statement under this hearsay exception. The court rejected, citing United States v. Payne, 492 F.2d 449 (4th Cir. 1973), the defendant's argument that the victim had to sign the statement to make the statement admissible under this hearsay exception. The court also noted that the officer gave the victim an opportunity to edit statement, which she declined—thereby adopting it.

Evidence of Defendant's Long Term Physical Abuse of His Divorced Wife, Victim in Rape Prosecution, Was Properly Admitted Under Rule 404(b)

State v. Strickland, 153 N.C. App. 581, 570 S.E.2d 898 (5 November 2002). The defendant was convicted of second-degree rape of his divorced wife. The court ruled that evidence of the defendant's prior physical abuse of her that occurred from period of twelve years before trial and up to one year before the rape being tried, was properly admitted under Rule 404(b). The court rejected the defendant's argument that because the physical abuse was not sexual, it was not relevant in the rape prosecution. The court noted that the defendant had a history of attacking the victim and asserting his physical power over her, which was relevant to prove his pattern of intimidating her.

Evidence of Domestic Violence Protection Orders Obtained by Defendant's Spouse Against Defendant Was Properly Admitted Under Rule 404(b) in Prosecution of Defendant for Assaulting His Spouse

State v. Morgan, ___ N.C. App. ___, 577 S.E.2d 380 (18 March 2003). The defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury involving his spouse. The court ruled that evidence of domestic violence protection orders obtained by the defendant's spouse against the defendant was properly admitted under Rule 404(b) to show the defendant's intent to kill his spouse.

Trial Judge Erred in Drug Prosecution in Admitting Defendant's Prior Drug Convictions under Rule 404(b) When State Failed to Introduce Any Evidence of Underlying Facts or Circumstances Involving Those Convictions

State v. Hairston, ___ N.C. App. ___, 576 S.E.2d 121 (18 February 2003). The defendant was on trial for possession of cocaine. The state offered purported Rule 404(b) evidence through a superior court deputy clerk that about four years before the offense being tried the defendant had been convicted of possession of cocaine with intent to sell and deliver and sale of cocaine. The court ruled, relying on State v. Wilkerson, 356 N.C. 418, 571 S.E.2d 583 (2002), that the trial judge erred in admitting the defendant's prior drug convictions when state failed to introduce any evidence of underlying facts or circumstances involving those convictions.

Trial Judge Erred in Drug Prosecution in Admitting Defendant's Prior Drug Transaction Under Rule 404(b) When Similarity to Drug Offense on Trial Was Nonexistent

State v. Williams, ___ N.C. App. ___, 577 S.E.2d 143 (18 March 2003). The defendant was convicted of possession of cocaine for constructively possessing tissue paper containing 0.1 gram of cocaine base when the defendant was a passenger in a vehicle. This offense was committed was August 14, 2000. The trial judge allowed the state to offer as Rule 404(b) evidence the defendant's sale on April 22, 2000, of crack cocaine to an informant. After reviewing the facts of each offense, the court ruled that the trial judge erred in admitting this evidence because the similarity between the drug offenses was nonexistent.

Evidence of Defendant's DWI Convictions in 1984 and 1990 Were Not Too Remote to Be Admissible Under Rule 404(b) to Prove Malice in Second-Degree Vehicular Murder Prosecution When Offense Was Committed in 2001

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (6 May 2003). The court ruled, relying on State v. Rich, 351 N.C. 386, 527 S.E.2d 299 (2000), that evidence of the defendant's DWI convictions in 1984 and 1990 were not too remote to be admissible under Rule 404(b) to prove malice in a second-degree vehicular murder prosecution. The offense was committed on January 16, 2001.

State Was Properly Permitted Under Rule 405(a) to Cross-Examine Defense Character Witness About Defendant's Thirty-Year-Old Conviction

State v. Hargett, ___ N.C. App. ___, 577 S.E.2d 703 (1 April 2003). The defendant was tried for multiple counts of breaking and entering a motor vehicle, misdemeanor larceny, and possession of stolen property. A defense character witness testified to the defendant's character for truthfulness and that he had no doubts about the defendant's integrity. On cross-examination, the witness admitted the he did not know that the defendant had been previously convicted of breaking and entering and larceny from an automobile about thirty years ago. The court ruled, relying on State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72 (2002), that this cross-examination was permissible under Rule 405(a) and there is no time limit on the defendant's conduct under the rule. The court also ruled that the trial judge did not abuse his discretion under Rule 403 in allowing the cross-examination.

Business Card Found in Search of Defendant's House Was Properly Authenticated and Admitted Under Rule 801(d) (Admission of Party-Opponent)

State v. Reed, 153 N.C. App. 462, 570 S.E.2d 116 (15 October 2002). The defendant was convicted of possessing alcoholic beverages for sale without a permit. Officers found in the defendant's house approximately five liters of spirituous liquor stored in various closets and refrigerators, approximately $946.00 in small bills, packaging items, 78 cans of beer, a box of business cards, and a copy of "Harry's

house rules," which indicated that nothing was "free." Each business card contained the defendant's address, telephone number, and the statement, "Harry's open house for alcohol, food, and fun[.]" The court ruled that the card was properly authenticated under Rule 901(b)(4) based on its "distinctive characteristics, taken in conjunction with circumstances," which included (1) the card was one of many identical business cards found in a box in the defendant's bedroom; (2) the card contained the defendant's name, address, and telephone number; and (3) the defendant was the sole occupant of the house where the card was found—the court cited State v. Mercer, 89 N.C. App. 714, 367 S.E.2d 9 (1988). The card was admissible as an admission of the defendant, a party-opponent, under Rule 801(d).

(1) In-Court Identifications of Defendant by Two Witnesses Were Properly Admitted
(2) Trial Judge Did Not Err in Prohibiting Testimony by Proposed Defense Expert Witness on Witness Identification

State v. Lee, 154 N.C. App. 410, 572 S.E.2d 170 (3 December 2002). The defendant was convicted of armed robbery. Two witnesses participated in a showup identification procedure with the defendant shortly after the robbery and identified the defendant in court. (1) After discussing the facts and the law governing in-court identifications after a showup, the court ruled that the in-court identifications of the defendant by the two witnesses were properly admitted. (2) The court ruled, relying on State v. Cole, 147 N.C. App. 637, 556 S.E.2d 666 (2001) and other cases, that the trial judge did not err in prohibiting testimony by a proposed defense expert witness on witness identification.

Trial Judge Did Not Err in Allowing Officer to Illustrate His Testimony Concerning Crack Cocaine Usage By Using Drugs and Drug Paraphernalia That Was Not Found at Defendant's Residence

State v. Hyman, 153 N.C. App. 396, 570 S.E.2d 745 (15 October 2002). The defendant was convicted of delivery of cocaine to a minor under 13 years old. The defendant had the minor inhale smoke from crack cocaine through a plastic tube. The court ruled, distinguishing State v. Moctezuma, 141 N.C. App. 90, 539 S.E.2d 52 (2000), that the trial judge did not err in allowing an officer to illustrate his testimony concerning crack cocaine usage by using drugs and drug paraphernalia that was not found at the defendant's residence.

Sentencing

(1) Trial Judge Did Not Have Authority to Impose Two Consecutive Five-Year Probationary Sentences at Sentencing Hearing
(2) Trial Judge Did Not Err in Ordering Defendant to Pay Restitution in Amount Up to $2,000 for Future Treatment of Victims

State v. Canady, 153 N.C. App. 455, 570 S.E.2d 262 (15 October 2002). The defendant was convicted of four counts of indecent liberties. (1) The court ruled that under G.S. 15A-1346 the trial judge did not have the authority to impose two consecutive five-year probationary sentences at the sentencing hearing. A sentence of probation must run currently with any other probation sentences imposed on a defendant. However, the court noted that under G.S. 15A-1346, a trial judge may impose a probationary sentence to run at the end of a prison sentence. (2) The court ruled that the trial judge did not err in ordering the defendant to pay restitution in amount up to $2,000 for the future treatment of the victims. The victims had already accumulated $680 in treatment bills, which was the subject of a separate order of restitution. There was evidence that the victims were still undergoing treatment as a result of the defendant's crimes and that the treatment would be needed for an appreciable time period.

Prior Record Level Worksheet Without Further Documentation or Defense Stipulation Is Insufficient Evidence to Establish Prior Record Level

State v. Smith, ___ N.C. App. ___, 573 S.E.2d 618 (31 December 2002). The court ruled, relying on State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196 (2002), that a prior record level worksheet submitted to the sentencing judge by the state without further documentation or defense stipulation is insufficient evidence to establish the defendant's prior record level.

Prosecutor's Statement Announcing Defendant's Sentencing Points and Prior Record Level at Sentencing Hearing Without Documentation or Defense Stipulation Was Insufficient to Establish Prior Record Level IV

State v. Bartley, ___ N.C. App. ___, 577 S.E.2d 319 (18 March 2003). The prosecutor at the sentencing hearing stated that the defendant had 11 prior sentencing points, which placed him in prior record level IV. The prosecutor did not provide any documentation nor was there a defense stipulation to the prior record level. The court ruled that under G.S. 15A-1340.14(f) the prosecutor's statement was insufficient to support the judge's finding of this prior record level.

Restitution May Not Be Ordered for Victim's Pain and Suffering

State v. Wilson, ___ N.C. App. ___, ___ S.E.2d ___ (3 June 2003). The court ruled that restitution may not be ordered for a victim's pain and suffering.

Trial Judge Did Not Err Under G.S. 15A-1335 in (1) Imposing Consecutive Life Sentences After Two Death Sentences Had Been Reduced to Life Sentences, and (2) Replacing Vacated Death Sentence with Second Life Sentence to Run Consecutively to Another Life Sentence

State v. Oliver, ___ N.C. App. ___, 573 S.E.2d 257 (31 December 2002). Defendants A and B were convicted of killing two people. Defendant A was originally sentenced to two death sentences, which were not imposed consecutively. Defendant B was originally sentenced to a death sentence and a life sentence, which were not imposed consecutively. The court ruled that the trial judge did not err under G.S. 15A-1335 in imposing (1) for defendant A, consecutive life sentences after the two death sentences had been reduced to life sentences, and (2) for defendant B, replacing the vacated death sentence with a second life sentence to run consecutively to the life sentence originally entered. The court, relying on State v. Ransom, 80 N.C. App. 711, 343 S.E.2d 232 (1986), noted that G.S. 15A-1335 does not prohibit a trial judge from replacing concurrent sentences with consecutive sentences on resentencing if neither the individual sentences nor the aggregate sentence exceeds that imposed at the original sentencing hearing. The court stated that any number of life sentences, even if imposed consecutively, cannot be considered a greater sentence than even one death sentence.

(1) Trial Judge Did Not Err in Finding Statutory Aggravating Factor G.S. 15A-1340.16(d)(8) (Risk of Death to More Than One Person By Weapon Normally Hazardous to Lives of More Than One Person)
(2) Trial Judge Erred in Finding Statutory Aggravating Factor G.S. 15A-1340.16(d)(12) (Committing Offense While on Pretrial Release)

State v. Sellers, ___ N.C. App. ___, 574 S.E.2d 101 (31 December 2002). (1) The defendant was convicted of several offenses involving his shooting at law enforcement officers with a semi-automatic pistol. The court ruled that the trial judge did not err in finding statutory aggravating factor G.S. 15A-1340.16(d)(8) (risk of death to more than one person by weapon normally hazardous to lives of more than one person). The finding did not violate the statutory provision that evidence necessary to prove an

element of an offense may not be used to prove an aggravating factor. The state only needed to prove that a firearm was used to prove the offenses; it did not need to prove that the defendant used a weapon that was normally hazardous to the lives of more than one person. (2) The court ruled that the trial judge erred in finding statutory aggravating factor G.S. 15A-1340.16(d)(12) (committing offense while on pretrial release). The state's evidence showed that an officer had arrested the defendant two months before the shootings and was released pending trial. The court stated that proof of the arrest and the absence of proof that a trial occurred was not sufficient evidence to conclude that the defendant was on pretrial release when the shootings occurred.

Trial Judge Erred in Finding Aggravating Factor G.S. 15A-1340.16(d)(2) (Defendant Joined with More Than One Other Person in Committing Offense and Was Not Charged with Conspiracy) When Defendant Committed Offense with Only One Other Person

State v. Moses, 154 N.C. App. 332, 572 S.E.2d 223 (3 December 2002). The defendant was convicted of armed robbery in which there was only one accomplice. The court ruled that the trial judge erred in finding aggravating factor G.S. 15A-1340.16(d)(2) (defendant joined with more than one other person in committing offense and was not charged with conspiracy) when the defendant committed offense with only one other person.

Trial Judge Erred in Finding Aggravating Factor G.S. 15A-1340.16(d)(15) (Defendant Took Advantage of Position of Trust) When State Used Parental Relationship to Prove Force in Prosecution of Second-Degree Forcible Sexual Offense

State v. Corbett, ___ N.C. App. ___, 573 S.E.2d 210 (17 December 2002). The court ruled that the trial judge erred in finding aggravating factor G.S. 15A-1340.16(d)(15) (defendant took advantage of position of trust) when the state used the parental relationship (defendant was victim's stepfather) to prove force in a prosecution of second-degree forcible sexual offense.

(1) No Gain Time Credit Is Applied to Parole Eligibility Date of Structured Sentencing Act Class C Life Sentence
(2) Parole Commission Properly Determined Prisoner's Parole Eligibility Date

Teasley v. Beck, ___ N.C. App. ___, 574 S.E.2d 137 (31 December 2002). (1) The court ruled, reviewing statutes and the Secretary of Correction's not issuing regulations providing for gain time credit for a Structured Sentence Act (SSA) Class C life sentence, that no gain time credit is applied to the parole eligibility date of a SSA Class C life sentence. (2) The plaintiff prisoner received a SSA Class C life sentence for second-degree murder and a 15-year consecutive sentence for first-degree burglary. The court ruled, distinguishing Robbins v. Freeman, 127 N.C. App. 162, 487 S.E.2d 771 (1997), that the Parole Commission did not err by applying all time credits available to the life sentence and all time credits available to his burglary sentence and then aggregating those sentences to determine his parole eligibility date.

(1) No Good Time or Gain Time for Class B Felony Sentence Under Fair Sentencing Act
(2) No Ex Post Facto or Due Process Violations When Agency Recalculated Inmate's Parole Eligibility, As Required by Appellate Court Ruling, That Resulted in Longer Term of Imprisonment Before Inmate Became Parole Eligible

Price v. Beck, 153 N.C. App. 763, 571 S.E.2d 247 (5 November 2002). (1) Inmate, serving a sentence of life imprisonment for a Class B felony imposed under the Fair Sentencing Act (as well as a consecutive prison term for a kidnapping conviction), alleged that the Parole Commission had incorrectly calculated his parole eligibility by failing to include good time and gain time credits toward the minimum term

(twenty years) of his Class B felony sentence. The court ruled that the Secretary of Correction did not abuse his discretion in not promulgating regulations concerning good time and gain time deductions from sentences for Class A, B, and C felonies under the FSA. (2) Based on Robbins v. Freeman, 127 N.C. 162, 487 S.E.2d 771 (1997) (requiring that parole eligibility for prisoner serving consecutive sentences be calculated as if inmate was serving single sentence; court reversed agency policy of calculating parole eligibility separately for each sentence), the prisoner's parole eligibility was recalculated. The recalculation resulted in a longer term of imprisonment before the inmate became parole eligible. The court, citing Rogers v. Tennessee, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001), and Glenn v. Johnson, 761 F.2d 192 (4th Cir. 1985), rejected the inmate's argument that the recalculation violated ex post facto or due process provisions.

Trial Judge Erred in Assigning Additional Point Under G.S. 15A-1340.14(b)(7) (Offense Committed While Serving Sentence of Imprisonment) When Defendant Was In Juvenile Training School (Now Known as Youth Development Center) When Offense Was Committed

State v. Tucker, ___ N.C. App. ___, 573 S.E.2d 197 (17 December 2002). The court ruled that the trial judge erred in assigning an additional point under G.S. 15A-1340.14(b)(7) (offense committed while serving sentence of imprisonment) when the defendant was in a juvenile training school (now known as a youth development center) when the offense was committed.

Trial Judge Erred in Setting Probationary Term Without Required Finding Under G.S. 15A-1343.2(d)(1), and Defendant's Failure to Object at Sentencing Hearing Did Not Bar Appellate Review of Error

State v. Love, ___ N.C. App. ___, ___ S.E.2d ___ (4 March 2003). The defendant was convicted of communicating threats, and the trial judge sentenced the defendant to community punishment with a probationary term of twenty-fourth months—without making a finding required by G.S. 15A-1343.2(d)(1) why a longer period beyond eighteen months was necessary. The court ruled that the judge erred in setting the probationary term without required statutory finding, and the defendant's failure to object at the sentencing hearing did not bar appellate review of this error.

(1) Defendant Serving Active Sentence in County Jail as Special Condition of Probation Must Obey Rules and Regulations of Department of Correction (DOC)
(2) Defendant Was Properly Informed of DOC Rules and Regulations

State v. Payne, ___ N.C. App. ___, 577 S.E.2d 166 (18 March 2003). The defendant was convicted of two felonies and placed on probation, with a condition of special probation that he serve 90 days imprisonment in the Buncombe County Jail. The judgment provided as a regular condition of probation that the defendant, if required to serve an active sentence as a special condition of probation, must obey the rules and regulations of the Department of Correction (DOC). He violated a rule and his probation was revoked. (1) The court ruled, citing G.S. 15A-1351(a) and G.S. 15A-1343(b)(11), that DOC rules and regulations properly applied to the defendant. (2) The court ruled that the defendant was properly informed of DOC rules and regulations because when the defendant became an inmate of the county jail, he was shown a videotape advising him of the jail's rules and was provided with a copy of them. These rules include a prohibition against using threatening or abusive language toward staff members (the rule the defendant violated). DOC rules contained a similar prohibition.