

2021 Evidence Update

[Evidence](#) > [Best Evidence Rule](#)

[State v. Waycaster](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018)

[Criminal Procedure](#) > [Habitual Felon](#) > [Evidence Issues](#)

The court held, over a dissent, that the trial court did not err when it allowed an ACIS printout to be admitted as proof of a prior conviction to establish the defendant's habitual felon status. On appeal the defendant argued that admission of the printout violated the best evidence rule. The court held that printouts from the ACIS database are admissible to prove a prior felony under G.S. 14-7.4 and are not barred by the best evidence rule.

[Evidence](#) > [Right to Present a Defense](#)

[State v. Bowman](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018)

[Evidence](#) > [Cross-Examination, Impeachment, Corroboration & Related Issues](#) > [Impeachment, Evidence of Bias](#)

In this murder, armed robbery, and possession of a firearm by a felon case, the court held, over a dissent, that the trial court committed reversible constitutional error in restricting the defendant's cross-examination of the State's principal witness. The defendant, Lakenda Malachi, and the victim were associates in a drug business. The charges in question arose out of an incident in which the defendant arrived at Malachi's house and confronted the victim about money allegedly owed to him. The victim ended up dead. The case was tried in Forsyth County. On appeal, the defendant argued that the trial court erred by limiting the scope of his cross-examination of Malachi, preventing him from adequately questioning her regarding pending drug charges in Guilford County for which she could receive a favorable plea offer contingent on her testimony against the defendant. The court agreed. Here, trial counsel argued that an email exchange between prosecutors established a possible reduction of drug trafficking charges against Malachi in Guilford County in exchange for her testimony against the defendant in Forsyth County. After a voir dire, the trial court ruled that it would allow defense counsel limited cross-examination of Malachi regarding her pending charges. However, before the jury, the trial court sustained the State's objection to defense counsel's cross-examination of Malachi, precluding defense counsel from establishing a possible bias in Malachi's testimony. Because the defendant presented evidence of communication between the districts, the trial court's limitation of Malachi's cross-examination was error. The court went on to conclude that the State cannot prove that the error was harmless beyond a reasonable doubt, noting in part that Malachi was the state's principal eyewitness. There were no other witnesses to the shooting and the other evidence provided by the State was tenuous. The court ordered a new trial. The dissenting judge concluded that any error was harmless beyond a reasonable doubt.

[State v. Jacobs](#), [_____ N.C. _____, 811 S.E.2d 579](#) (Apr. 6, 2018)

On discretionary review of a unanimous decision of the Court of Appeals, [___ N.C. App. _____, 798 S.E.2d 532](#) (2017), the court reversed, holding that at the trial court erred by excluding defense evidence of the victim's history of STDs. The case involved allegations that the defendant had sexual relations with the victim over a period of several years. Evidence showed that the victim had contracted *Trichomonas vaginalis* and the Herpes simplex virus, Type II, but that testing of the defendant showed no evidence of those STDs. At trial the defense proffered as an expert witness a doctor who was a certified specialist in infectious diseases who opined, in part, that given this, it was unlikely that the victim and the defendant had engaged in unprotected sexual activity over a long period of time. The trial court determined that the defendant could not introduce any STD evidence unless the State open the door. The defendant was convicted and appealed. The Court of Appeals rejected the defendant's argument that the trial court erred by excluding this evidence. The Supreme Court reversed and ordered a new trial. The Rule 412(b)(2) exception allows for admission of "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." The court concluded:

The proposed expert's conclusions regarding the presence of STDs in the victim and the absence of those same STDs in defendant affirmatively permit an inference that defendant did not commit the charged crime. Furthermore, such evidence diminishes the likelihood of a three-year period of sexual relations between defendant and [the victim]. Therefore, the trial court erred in excluding this evidence pursuant to Rule 412 and there is "a reasonable possibility that, had the error not been committed, a different result would have been reached at trial."

[State v. Phachoumphone](#), [_____ N.C. App. _____, 810 S.E.2d 748](#) (Feb. 6, 2018)

[Criminal Procedure](#) > [Witnesses](#) > [Remote Testimony](#)

In this child sexual assault case, although the trial court violated the procedural requirements of G.S. 15A-1225.1 by authorizing the victim's testimony to be offered remotely without holding a recorded evidentiary hearing on the matter or entering an appropriate order supporting its decision to allow the State's motion, the defendant was not entitled to relief. The defendant did not challenge the trial court's ultimate decision allowing the victim to testify remotely; he challenged only the procedure employed in authorizing her remote testimony. The court agreed that the trial court erred by failing to follow statutory procedure. However, for reasons detailed in the court's opinion, it rejected the defendant's challenge on the basis that he failed to demonstrate that he was prejudiced by these procedural errors.

[Evidence](#) > [Crawford Issues & Confrontation Clause](#) > [Testimonial/Nontestimonial Distinction](#)

[State v. Miller](#), [_____ N.C. _____, _____ S.E.2d _____](#) (June 8, 2018)

On discretionary of a unanimous decision of the Court of Appeals, [___ N.C. App. _____, 801 S.E.2d 696](#) (2017), in this murder case the court reversed, holding that the Court of Appeals erred by concluding that certain evidence was admitted in violation of the defendant's confrontation rights. The defendant was charged with murdering his estranged wife. Approximately 9 months before the murder, an officer responded to a

call at the victim's apartment regarding a domestic dispute. The officer made initial contact with the victim at a location outside of her apartment. The victim told the officer that the defendant entered her apartment through an unlocked door and kept her there against her will for two hours. The victim said that during this period she and the defendant argued and that a physical struggle occurred. Although the officer did not recall seeing any signs that the victim had sustained physical injury, he noticed a tear and stress marks on her shirt. The officer accompanied the victim to her apartment to check the premises to make sure the defendant was not still there. The defendant was later charged and convicted of domestic criminal trespass. At the defendant's murder trial the trial court admitted, over the defendant's confrontation clause objection, the officer's testimony about the statements the victim made to him in the incident 9 months before the murder. The Court of Appeals found, among other things, that the victim's statements were testimonial. The Supreme Court disagreed, finding that the victim's statements were nontestimonial. The victim made the statements during an ongoing emergency caused by the defendant's entry into her apartment and decision to both detain and physically assault her. The information she provided to the officer caused him to enter the apartment to ensure that the defendant, whose location was unknown, had departed and no longer posed a threat to the victim's safety. The victim's statements to the officer "served more than an information-gathering purpose." Additionally, the conversation was informal and took place in an environment that cannot be described as tranquil.

[Evidence](#) > [Prior Acts--404\(b\) Evidence](#) > [Evidence Admissible](#) > [Defendant's Miscellaneous Other Acts](#)

[State v. Reed](#), ___ N.C. ___, ___ S.E.2d ___ (May. 11, 2018)

In a case where the defendant was convicted of misdemeanor child abuse and contributing to the delinquency of a minor, the court reversed the opinion below, ___ N.C. App. ___, 789 S.E.2d 703 (2016), for the reasons stated in the dissent. The case involved the drowning of a child under the defendant's supervision in 2013. A majority of the Court of Appeals panel determined that evidence of a prior incident involving the drowning of a child under the defendant's supervision in 2010 was properly admitted under Rule 404(b). The majority went on to conclude, however, that the State used the 404(b) evidence "far beyond the bounds allowed by the trial court's order" based on extensive references to the evidence, and that this constituted reversible error. The dissenting judge agreed that the 404(b) evidence was properly admitted but disagreed that the State's use of that evidence warranted reversal. According to the dissent, the defendant's argument regarding the State's use of the 404(b) evidence should be treated as a challenge to jury argument in the absence of an objection, a claim assessed under the gross impropriety standard, which the defendant could not meet.

DAUBERT

[State v. Shore](#), ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 3, 2018)

In this child sexual assault case, the trial court did not abuse its discretion by allowing Kelli Wood, an expert in clinical social work specializing in child sexual abuse cases, to

testify that it is not uncommon for children to delay disclosure of sexual abuse and to testify to possible reasons for delayed disclosures. At issue was whether the testimony satisfied Rule 702. The defendant did not dispute either Wood's qualifications or the relevance of her testimony. Rather, he asserted that her testimony did not meet two prongs of the Rule 702 *Daubert* reliability test. First, he asserted, Wood's testimony was not based on sufficient facts or data, noting that she had not conducted her own research and instead relied upon studies done by others. The court rejected this argument, finding that it directly conflicted with Rule 702, the *Daubert* line of cases and the court's precedent. Among other things, the court noted that as used in the rule, the term "data" is intended to encompass reliable opinions of other experts. Here, Wood's delayed disclosure testimony was grounded in her 200 hours of training, 11 years of forensic interviewing experience, conducting over 1200 forensic interviews (90% of which focused sex abuse allegations), and reviewing over 20 articles on delayed disclosures. Wood testified about delayed disclosures in general and did not express an opinion as to the alleged victim's credibility. As such, her testimony "was clearly" based on facts or data sufficient to satisfy the first prong of the reliability test.

Second, the defendant argued that Wood's testimony was not the product of reliable principles and methods. Specifically, he asserted that the delayed disclosure research she relied upon was flawed: it assumed the participants were honest; it did not employ methods or protocols to screen out participants who made false allegations; and because there was no indication of how many participants might have lied, it was impossible to know an error rate. The defendant also argued that when Wood provided a list of possible reasons why an alleged victim might delay disclosure, she did not account for the alternative explanation that the abuse did not occur. The court rejected this contention, pointing to specific portions of direct and cross-examination where these issues were addressed and explained. The court found that the defendant failed to demonstrate that his arguments attacking the principles and methods of Wood's testimony were pertinent in assessing its reliability. It thus held that her testimony was the product of reliable principles and methods sufficient to satisfy the second prong of the reliability analysis.

[State v. Gray](#), N.C. App. , S.E.2d (May. 1, 2018)

[Evidence](#) > [Opinions](#) > [Expert Opinions](#) > [Procedure](#)

In this drug case, the trial court did not commit plain error by admitting the expert opinion of a forensic chemist. On appeal, the defendant argued that the expert's testimony failed to demonstrate that the methods she used were reliable under the Rule 702. Specifically, he argued that the particular testing process used by the Charlotte-Mecklenburg Police Department Crime Lab to identify cocaine creates an unacceptable risk of a false positive and that this risk, standing alone, renders expert testimony based on the results of this testing process inherently unreliable under Rule 702(a). The court declined to consider this argument, concluding that it "goes beyond the record." The defendant did not object to the expert's opinion at trial. The court concluded that because the defendant failed to object at trial, the issue was unpreserved. However, because an unpreserved challenge to the performance of a trial court's gatekeeping function under Rule 702 in a criminal trial is subject to plain error review, the court reviewed the case under that standard. The court noted that its "jurisprudence wisely

warns against imposing a Daubert ruling on a cold record” and that as a result the court limits its plain error review “of the trial court’s gatekeeping function to the evidence and material included in the record on appeal and the verbatim transcript of proceedings.” (quotation omitted). Here, the defendant’s false positive argument “is based on documents, data, and theories that were neither presented to the trial court nor included in the record on appeal.” The court determined that its plain error review of the defendant’s Rule 702 argument “is limited solely to the record on appeal and the question of whether or not an adequate foundation was laid before [the] expert opinion was admitted.” Here, an adequate foundation was laid. The witness, tendered as an expert in forensic chemistry, testified that she had a degree in Chemistry and over 20 years of experience in drug identification. She also testified about the type of testing conducted on the substance in question and the methods used by the Crime Lab to identify controlled substances. The witness testified that she tested the seized substance, that she used a properly functioning GCMS, and that the results from that test provided the basis for her opinion. Furthermore, her testimony indicates that she complied with Lab procedures and the methods she used were “standard practice in forensic chemistry.” This testimony was sufficient to establish a foundation for admitting her expert opinion under Rule 702.

The court also rejected the defendant’s argument that the trial court erred “by failing to conduct any further inquiry” when the witness’s testimony showed that she used scientifically unreliable methods, stating: “While in some instances a trial court’s gatekeeping obligation may require the judge to question an expert witness to ensure his or her testimony is reliable, sua sponte judicial inquiry is not a prerequisite to the admission of expert opinion testimony.”

State v. Fincher, N.C. App. , S.E.2d (Apr. 17, 2018)

In this DWI case the trial court did not abuse its discretion by admitting an officer’s expert testimony that the defendant was under the influence of a central nervous system depressant. On appeal the defendant argued that the State failed to lay a sufficient foundation under Rule 702 to establish the reliability of the Drug Recognition Examination to determine that alprazolam was the substance that impaired the defendant’s mental or physical faculties. The defendant also argued that the officer’s testimony did not show that the 12-step DRE protocol was a reliable method of determining impairment. The court rejected these arguments, noting that pursuant to Rule 702(a1)(2), the General Assembly has indicated its desire that Drug Recognition Evidence, like that given in the present case, be admitted and that this type of evidence already has been determined to be reliable and based on sufficient facts and data. Accordingly, the trial court properly admitted the testimony.

State v. McPhaul, N.C. App. , 808 S.E.2d 294 (Nov. 7, 2017) review granted, N.C. , S.E.2d (May 9 2018) 54 In this attempted murder and robbery case, the court applied the Daubert test for expert testimony and held that trial court abused its discretion by allowing the State’s expert witness to testify that latent fingerprints found on the victim’s truck and on evidence seized during a home search matched the defendant’s known fingerprint impressions. The court held that the witness’s testimony failed to satisfy Rule 702(a)(3). To meet the requirements of the rule, an expert witness must be able to explain not only the abstract methodology

underlying the opinion, but also that the witness reliably applied that methodology to the facts of the case. Here, the witness testified that during an examination, she compares the pattern type and minutia points of the latent print and known impressions until she is satisfied that there are “sufficient characteristics in sequence of the similarities” to conclude that the prints match. However, she provided no such detail in testifying about how she arrived at her actual conclusions in this case. The court concluded: without further explanation for her conclusions, the expert implicitly asked the jury to accept her expert opinion that the prints matched. Since she failed to demonstrate that she applied the principles and methods reliably to the facts of the case as required by Rule 702(a)(3) the trial court abused its discretion by admitting this testimony. The court went on to find that the error was not prejudicial.