Rules of Evidence--700 Series

Rule 701. Opinion testimony by lay witness

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 702. Testimony by experts

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

(b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or

b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

(d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

(e) Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

(f) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis.

(g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

(h) Notwithstanding subsection (b) of this section, in a medical malpractice action against a hospital, or other health care or medical facility, a person may give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, about the standard of care among hospitals, or health care or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

(i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.

Rule 703. Bases of opinion testimony by experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. Opinion on ultimate issue

Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. Disclosure of facts or data underlying expert opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question.

Rule 706. Court appointed experts

(a) *Appointment.* -- The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall

be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) *Compensation.* -- Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) *Disclosure of appointment.* -- In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection.* -- Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Rule 701-Lay Opinion Testimony

Rule 701. Opinion testimony by lay witness

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

The commentary to this rule notes that lay opinion testimony is subject to two limitations: (a) it must be based upon firsthand knowledge or observation; and (b) the testimony must be helpful in resolving issues in the case. The first limitation is based upon the express requirement contained in Rule 602 that a witness must have personal knowledge of the matter to which he or she is testifying.

A note of the Advisory Committee states that: "[N]ecessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule."

Shorthand Statement of Facts

In *State v. Braxton*, the defendant objected to three pieces of officer testimony. First, the officer testified that the victim's screaming sounded like somebody fearing for his life and that the crime scene was worse than a hog killing. Second, officer testified that defendant looked guilty when, as defendant saw the officer approaching, he immediately raised his hands. Third, the testimony of two other witnesses that defendant appeared calm, relaxed, and without remorse. Defendant argued that this testimony was beyond the scope of that permitted under Rule 701. A witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." The Supreme Court held that Rule 701 permits such evidence that can be characterized as a "shorthand statement of fact."

State v. Braxton, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Trial court properly admitted, under G.S. 8C-1, Rule 701, lay opinion testimony of

various law enforcement officers that defendant "tried to kill" one of the responding officers because their testimony amounted to nothing more than shorthand statements of fact based on their knowledge and observations and did not implicate defendant's guilt, mental state, or intent. The officers' testimony was based on their perceptions after witnessing defendant shoot the officer, and was not objectionable merely because it embraced an ultimate issue to be decided by the trier of fact.

State v. McVay, 174 N.C. App. 335, 620 S.E.2d 883 (2005).

Police Officer Lay Opinions in Criminal Cases

Opinion as to Intoxication

[It] is a well-settled rule that a lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness's personal observation. *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000)., (citing State v. Lindley, 286 N.C. 255, 258, 210 S.E.2d 207, 209(1974)).

In the present case, Deputy Goodwin only testified that, based on his personal observations, he formed an opinion that defendant was impaired. Evidence that defendant was impaired is relevant to the issue of whether defendant was driving while impaired. Therefore, the trial court did not err in admitting Deputy Goodwin's testimony about defendant's field sobriety tests.

State v. Streckfuss, 171 N.C. App. 81, 614 S.E.2d 323 (2005).

In a case construing Rule 701 and dealing with opinion as to intoxication and the mental capacity of a defendant, where the voluntariness of a defendant's confession was at issue, a police officer who had observed the defendant over an extended period of time, interviewed the defendant, and observed the defendant speaking to other individuals was properly allowed to state his opinion as to whether defendant was intoxicated during their conversation.

State v. Patterson, 146 N.C. App. 113, 552 S.E.2d 246 (2001), *cert. denied*, 354 N.C. 578, 559 S.E.2d 549 (2001).

Officer allowed to give lay testimony concerning times and distances

In *State v. Johnson*, (unpublished), defendant contended that the trial court erred by overruling his objections to an officer's testimony about the time required to travel from the scene of the crime to the Pantry. He argues the testimony was irrelevant and speculative because there was no evidence that he actually traveled any of the three routes later testified to by the officer. "In a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible" *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). "Even though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the

abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). Detective Rogers' testimony as to the time required to travel from the crime scene to the Pantry was based upon first-hand observations. Those observations were helpful to a determination of a fact in issue -- that being whether defendant could have shot the victim and still arrive at the Pantry within the time frame of 6:16 a.m. and 6:29 a.m.

State v. Johnson, 2005 N.C. App. LEXIS 2078.

Officer Testimony Regarding Fingerprinting Technique

In *State v. Friend*, the defendant challenged the admission of lay witness testimony concerning fingerprinting techniques. Deputy J. D. Doughtie was in charge of the Criminal Investigations Division of the Dare County Sheriff's Department when the offenses took place. At trial, Doughtie was never qualified as an expert witness. However, lay witness may still testify to his opinions, which are rationally based on his perceptions and helpful to a clear understanding of his testimony of the determination of a fact in controversy. N.C. Gen. Stat. § 8C-1, Rule 701 (2003).

Although a lay witness is usually restricted to facts within his knowledge, "if by reason of opportunities for observation he is in a position to judge . . . the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion." *State v. Lindley*,286 N.C. 255, 257-58, 210 S.E.2d 207, 209 (1974) (citations omitted)(quoting *State v. Brodie*, 190 N.C. 554, 130 S.E.205 (1925)).

While testifying**,** Doughtie explained why it is rare to find useful fingerprints and why it is unnecessary to conduct a search for fingerprints when eyewitnesses are involved. As the officer in charge of the Criminal Investigations Division**,** Doughtie was in a position to review the surrounding facts more accurately than anyone else and his testimony aided the jury in understanding why fingerprints were not recovered from the stolen property in this case. As such, the trial court did not err in allowing Doughtie to present his lay opinion testimony regarding fingerprinting techniques.

State v. Friend, 164 N.C. App. 430, 596 S.E.2d 275 (2004) .

Officer Opinion on location of shell casings

In *State v. Fisher*, (unpublished) the officer testified regarding the location of shell casings when a bullet is fired from two different weapons. It was held that this testimony was based not upon any "specialized expertise or training," but merely upon his own personal experience and observations in firing different kinds of weapons. Having failed to qualify the officer as an expert in shell casing ballistics, the State was not prevented from eliciting lay opinion testimony from him.

State v. Fisher, 171 N.C. App. 201; 614 S.E.2d 428 (2005).

Officer Lay Opinion concerning characteristics of shoes

In the Supreme Court case of *State v. Shaw*, defendant contended that the trial court erred in allowing a law enforcement officer to express an opinion on a matter outside of his area of expertise. The officer was qualified as an expert in the field of identification and comparison of latent finger and palm prints. He later testified that he measured both the tennis shoes found behind the victim's home and those belonging to defendant, and found both to measure eleven inches in length. Defendant argued that the officer was not qualified as an expert in tennis shoe measurements and was incapable of rendering such an opinion. The Court held that this testimony was not an expert opinion. The officer merely stated the length of defendant's shoe. The measuring task performed by the officer required only modest skill. Because specialized knowledge was not needed to enable this witness to measure in inches the shoe of the defendant, this testimony amounted to nothing more than lay opinion. Defendant was free to cross-examine this witness concerning the accuracy of such a measurement and to expose any perceived scientific defects.

The officer also testified that each pair of shoes showed signs of wearing on the heel and ball areas were matters outside the expertise of this witness. No specialized expertise or training is required for one to determine that two shoes share wear patterns. Such a determination may be made by merely observing each pair. This opinion was lay opinion rationally based upon the perceptions of the witness under N.C.G.S. § 8C-1, Rule 701.

State v. Shaw, 322 N.C. 797, 370 S.E.2d 546 (1988).

In *State v. Mewborn,* a police officer testified comparing shoes on a videotape to the defendant's actual shoes, that the markings on the shoes worn by defendant when he was picked up for questioning were "very consistent" with the shoes worn by the perpetrator in the video of the robbery. Defendant argued such a comparison requires expert testimony. The Court held that lay opinion is admissible if the opinion or inferences are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (1996). Because the similarity between markings on shoes in a video image and markings on the actual pair of shoes can be made by "merely observing" the video and the shoes, the Court held this was an appropriate subject for lay opinion.

State v. Mewborn, 131 N.C. App. 495, 507 S.E.2d 906 (1998).

Officer's Lay Opinion on Drug Dealer Behavior

In *State v. Archie* (unpublished) defendant contended that the trial court erred by allowing an officer to offer improper "opinion" testimony regarding defendant's behavior. The trial court overruled an objection to the officer's interpretation of a hand motion made by defendant prior to his arrest as being that of a drug dealer eating his dope so that the

police court not find it. Defendant also contended that it was improper for the officer to express an opinion that the defendant had to go to a third party to get more drugs because he had "sold out of drugs that day". Defendant argued that the officer's testimony exceeded the limited scope of permissible lay opinion under N.C. R. Evid. 701, because it assumed facts outside of his personal knowledge. The Court of Appeals held that: "As long as the lay witness has a basis of personal knowledge for his opinion, the evidence is admissible." *State v. Bunch*, 104 N.C. App. 106, 110, 408 S.E.2d 191, 194 (1991). Moreover, "[i]t is appropriate for law enforcement officers to testify as to various customs and practices observed by them in the exercise of their duties as officers." *State v. Martin*, 97 N.C. App. 19, 29, 387 S.E.2d 211, 216 (1990).

The officer's years of experience with the methods of street-level drug offenders placed him in a better position than the jury to interpret defendant's behavior during and after his transactions with Cardwell. *See State v. Friend, 164 N.C. App. 430, 437, 596 S.E.2d 275, 281 (2004); Bunch*, 104 N.C. App. at 110, 408 S.E.2d at 194; *see also State v. McCoy*, 105 N.C. App. 686, 689, 414 S.E.2d 392, 394 (1992) (treating officer's specialized knowledge as expertise under N.C. R. Evid. 702(a), despite lack of formal tender as an expert witness). Inasmuch as Paul drew inferences only from acts of defendant that he observed firsthand, his testimony was admissible as lay opinion.

State v. Archie, 2006 N.C. App. LEXIS 2307.

In *State v. Drewyore,* a custom's agent testified that a boat which was parked in front of the beach cottage was a type of boat which is often used in drug smuggling; the presence of this boat indicated that a smuggling operation may have been taking place; the repeated travel by the Oldsmobile over the same roads indicated that it was involved in a smuggling operation; the use of a van by the suspects followed by the suspects' use of a U-Haul truck a few days later "was an indicator of suspicious activity"; U-Haul trucks can carry large loads of marijuana; and the agent could identify the smell of marijuana coming from the truck because he had many years of experience smelling marijuana. It was held that a non-expert witness is permitted to testify about opinions he has formed and inferences he has made if these opinions and inferences are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." G.S. sec. 8C-1, Rule 701. The Court of Appeals held that the opinions and inferences stated by the agent were rationally based on his perceptions, and we also find that these statements were helpful to a clear understanding of his testimony about the circumstances that were related to the investigation that resulted in defendant's arrest.

State v. Drewyore, 95 N.C. App. 283, 382 S.E.2d 825 (1989).

In *State v. Williams,* (unpublished) an officer testified concerning the general or normal actions employed by drug traffickers. He testified, over objection, that drug dealers will typically use counter-surveillance by "getting to a location in a timely manner. . . [and] going around the general area to see if they can locate us." He further testified to the counter-surveillance technique of "walking the general area to see if

anyone is in the immediate area that looks out of place;" that “cars coming in tandem typically could be involved;" and that because of "the increased robberies of drug dealers and whatnot, we['ve] started to see two or three cars come in." Finally, the officer testified that in narcotics transactions, weapons will be used. The Court held that such testimony is admissible as a lay opinion under N.C. Gen. Stat. § 8C-1, Rule 701. The testimony of police officers detailing indicators of drug-related activity is properly admissible and assists the jury in understanding the officers' actions.

State v. Williams, 2004 N.C. App. LEXIS 723.

Opinions on Drugs

In *State v. Rogers,* defendant argued that the trial court improperly overruled his objection to an officer testifying that from his examination of the white powder found in the five tinfoil packets, in his opinion the white powder contained heroin. The witness had approximately twenty-five hours training in the identification of controlled substances, both through the S.B.I. and the Federal Government, three and a half years experience "working with drugs on the street," and had examined heroin "numerous times." He was not asked, either on direct or on cross-examination, as to what his "examination" of the white powder consisted of, or as to what tests, if any, he made in the course of that "examination." Had such questions been asked, it would be easier to evaluate the witness's qualification to testify to the opinion called for, and the jury could have assessed more accurately the weight which it might give to the opinion expressed. In any event, in view of the subsequent testimony of the S.B.I. chemist, we find no prejudicial error in the court's ruling in the present case.

State v. Rogers, 28 N.C. App. 110, 113-14, 220 S.E.2d 398, 400-01 (1975).

In dicta, the Court of Appeals in *State v. Greenlee* held: "Furthermore, section 90-95(g) does not require a chemical analysis before an opinion on the nature of a substance will be admissible. Holden's testimony was proper under N.C. Gen. Stat. § 8C-1, Rule 701 as opinion testimony by a lay witness because it was based on his specialized training and work experience. *See* N.C. Gen. Stat. § 8C-1, Rule 701; *State v. Rich,* 132 N.C.App. 440, 521 S.E.2d 441 (1999), *aff'd,* 351 N.C. 386, 527 S.E.2d 299 (2000) (police officer who had years of experience in the enforcement of motor vehicle laws and investigated nearly 200 driving while impaired cases was competent to express an opinion that the defendant was under the influence of alcohol at the time of the accident). In any event, even if Holden's testimony were inadmissible, it would be harmless error because the report established the rock to be cocaine. The trial court therefore did not err in overruling Defendant's objections to Holden's testimony."

S*tate v. Greenlee*, 146 N.C. App. 729, 732, 553 S.E.2d 916, 918 (2001)

In a case where there was an independent laboratory report confirming that the substance was cocaine, the Court of Appeals held that the trial court properly allowed the arresting officer to testify that the substance seized was cocaine. The officer had been with the police department for eight years at the time, and had come into contact with crack

cocaine between 500 and 1000 times. The Court held that his testimony on this issue was helpful for a clear understanding of his overall testimony and the facts surrounding defendant's arrest.

State v. Freeman, -- N.C. App. --, 648 S.E.2d 876 (2007).

In a recent case finding no error by the trial court in allowing an officer to testify that a substance was cocaine based solely upon his visual observation, the Court of Appeals stated: "Were we confronting this issue anew, we would be inclined to reach a different interpretation of Rule 701 than that reached by the Freeman panel." The Court further held: "The implication of *Rogers* is that a law enforcement officer's training and experience alone do not qualify that officer to give an opinion concerning the chemical makeup of a white powder. Indeed, while training and experience are relevant to the qualification of a witness as an expert, *see* N.C. Gen. Stat. § 8C-1, Rule 702 (2007) ("[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion."), we question whether they are "perceptions" of the witness. It seems to us that to allow a lay witness, even a police officer with extensive training and experience, to render an opinion that white powder is cocaine based solely upon the witness's visual examination, is little more than speculation, and is not based on perception, for the visual characteristics of cocaine in powder form are not unique to that substance alone."

State v. Llamas-Hernandez, 2008 N.C. App. LEXIS 714 (2008).

Officer allowed to testify that in his opinion, defendant pretended to be asleep

In *State v. Woodard*, the officer testified that the defendant "pretended" to be asleep. It was held that this was a permissible lay opinion under Rule 701.

State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1991).

Officer can give lay opinion as to age of defendant

In the Supreme Court case of *State v. Banks*, an officer testified in a statutory sex offense case that in his opinion defendant appeared to be between 29 and 30 years of age. The officer had ample opportunity to observe defendant both during the booking process and while they were together in the courtroom. Thus his opinion of defendant's age was rationally based on his perception of defendant, and it was helpful to the jury in determining the age requirements of the crimes charged. It, therefore, comported with the requirements of Rule 701.

State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Testimony of Abused Child

In State v. Wallace, defendant contended that the trial court erred by allowing an officer to offer an expert opinion in support of a witness's credibility. Although a lay

witness is usually restricted to facts within his knowledge, "if by reason of opportunities for observation he is in a position to judge . . . the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion." *State v. Friend,* 164 N.C. App. 430, 437, 596 S.E.2d 275, 281 (2004).

Defendant objected to the officer's testimony as training and coaching a sexual abuse victim:

> [i]t's been my experience that if a child has the same exact story every time, then the story . . . has usually been coached. Most of the time, through my experience, with sexual assault victims and with children is there will be something that [sic] will come up later. The story will not every time be exactly the same.

The officer then testified about the procedure he uses for questioning child witnesses, who complain of sexual abuse. This testimony constitutes permissible lay witness testimony. The officer's nine years experience with law enforcement, and four years in the special victims unit dealing with rape, child molestation, and domestic violence victims supports his testimony on the procedure he uses for questioning child witnesses. The officer did not offer an opinion on the witness' credibility. The trial court did not err in admitting the testimony.

State v. Wallace, 635 S.E.2d 455 (2006).

Non-Officer Opinion Testimony on Drugs

State v. Yelton involved lay opinion testimony from a methamphetamine addict. Alley (the addict) testified that when she "walked outside [she] seen [defendant] hand [Hodge] an eightball, and [Hodge] put it in his sock." She further testified that she later smoked the substance, which she saw Hodge take directly from his sock, and that it was methamphetamine. Defendant argued that Alley lacked the requisite personal knowledge to give her opinion regarding what was exchanged between defendant and Hodge because her understanding of what an "eightball" originated from other people. Alley admitted that she did not know how much an "eightball" typically costs or how many grams of methamphetamine are actually in an "eightball" and that she only knew that the item handed to the victim was an "eightball" because "that's what [Sims] and them told [her]." Alley's testimony as a whole, however, indicates no lack of knowledge that the substance was methamphetamine, but only that the particular amount was called an "eightball." The State established that Alley had extensive personal knowledge of methamphetamine. At the time of trial, she had been smoking methamphetamine for six years and was able to describe, in great detail, the method by which one smokes methamphetamine. Alley's identification of the substance that she smoked -- and that had been received from defendant -- as methamphetamine was based on that personal experience. *See State v. Drewyore*, 95 N.C. App. 283, 287, 382 S.E.2d 825, 827 (1989) (permitting lay testimony of a customs agent who identified a smell coming from a truck as marijuana based on his years of experience smelling marijuana). With respect to the final element, defendant does not dispute that Alley's testimony on this issue was helpful for a clear understanding of her testimony or to the determination of a fact in issue. The Court held that the trial

court did not abuse its discretion by admitting Alley's testimony identifying the substance given by defendant to Hodge as methamphetamine.

State v. Yelton, 175 N.C. App. 349, 623 S.E.2d 594 (2006).

Cases Where Lay Opinion Testimony was Excluded

Error to admit testimony not rationally based upon perceptions

In *State v. White*, an officer testified that in his opinion the Zenith Two Model television found in Carter's possession was "more than probably the television from Easom's residence." The Court of Appeals held that since the qualification of a witness as an expert depends upon their "knowledge, skill, experience, training or education," a witness may be an expert on some issues and classified as a layman on other issues. N.C. Gen. Stat. § 8C-1, Rule 702. There was no indication here of special training or other qualifications which would elevate the officer's conclusion regarding the original ownership of the television to that of an expert's opinion. The record was devoid of any indication that the trial court found the officer to be an expert witness.

As a layman, the officer's testimony must have been rationally based on his perception and helpful to the jury. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (2001). The testimony that the recovered television was "more than probably" Easom's television was not based upon his perception. The officer was in no better position than the jury to deduce whether the television found with Carter was Easom's television. The jury is charged with drawing its own conclusions from the evidence, and without being influenced by the conclusion of the officer. It was error to admit this testimony.

State v. White, 154 N.C. App. 598, 572 S.E.2d 825 (2002).

Requirement of a Foundation of Opinion

In a non-officer case, the Court of Appeals held that in the absence of a witness's observation of the City Fire Department's response to a fire at a nursing home, under the conditions posited in a hypothetical question, it was improper for the witness to express a lay opinion. "As there was no foundation showing that the opinion called for was rationally based on the witness's perception, the opinion was inadmissible."

Matheson v. City of Asheville, 102 N.C. App. 156, 402 S.E.2d 140 (1991).

In *State v. Najewicz*, defendant contended that the trial court erred in sustaining the State's objection to the following question posed to the defendant's supervisor:

> "In your opinion, with your knowledge of Mr. Najewicz, do you believe he's capable of raping anyone?"

The Court made two holdings under Rule 401: First, while a lay witness may testify in the form of an opinion which embraces an ultimate issue to be decided by the jury, N.C.R. Evid. 704; *Mobley v. Hill*, 80 N.C. App. 79, 86, 341 S.E.2d 46, 50 (1986)

(incorrectly stated in S.E.2d), a lay opinion must be both (1) rationally based upon the witness' perception and (2) helpful to a clear understanding of the witness' testimony. N.C.R. Evid. 701. In the present case, there is no foundation showing the opinion called for was rationally based upon the perception and observations of the witness, defendant's supervisor. Further, assuming *arguendo* such an opinion would properly be the subject of expert testimony, there is no indication Ms. Stephenson was qualified to testify on such matters as an expert. *See Matheson v. City of Asheville*, 102 N.C. App. 156, 173-74, 402 S.E.2d 140, 150 (1991); *State v. Bowman*, 84 N.C. App. 238, 243-44, 352 S.E.2d 437, 440 (1987). Second, the Court held that while opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness. *State v. Rose*, 327 N.C. 599, 602-04, 398 S.E.2d 314, 315-17 (1990) (expert may not testify defendant was "capable of premeditating"). "Rape" is a legal term of art and accordingly Ms. Stephenson's opinion testimony concerning whether defendant was "capable of rape" was properly excluded.

State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132, (1993).

The trial court properly refused to admit testimony by an officer about the trajectory of a bullet fired from defendant's pistol without some showing that the witness was qualified to testify, either as a lay witness or as an expert.

State v. Washington, 141 N.C. App. 354, 540 S.E.2d 388 (2000), *cert. denied*, 353 N.C. 396, 547 S.E.2d 427 (2001).

Opinions of Sanity

A police officer characterized defendant's behavior as "paranoia." Defendant objected, and the court responded and inquired: "Well, I think that's a shorthand statement. Overruled. You're [sic] don't literally mean paranoia; you mean it in a descriptive way?" the officer explained his statement to include more specific observations of how defendant looked all around the area, circling 360 degrees, several times. N.C. Rule of Evidence 701 limits lay opinion testimony to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of fact in issue." The officer was not qualified as an expert in the field of psychology, and should not have testified to defendant's "paranoia." After being questioned by the trial court, the officer explained to the jury exactly what he meant by the term "paranoia." The Court of Appeals found that any error was harmless.

State v. Carmon, 156 N.C. App. 235, 576 S.E.2d 730 (2003),

Defendant contended that the trial court erred by admitting testimony by the State's witnesses, Terry Mack Alton and Sam Roberts, that defendant and his younger brother, Kenneth Kaiser, had a codependent relationship, that it was like a father/son relationship, and that defendant dominated Kaiser. Defendant argues that this testimony amounts to expert opinion from persons who are not qualified by any psychiatric or psychological training to give such opinions. The Supreme Court held that this testimony meets the requirements of parts (a) and (b) of Rule 701. The testimony was rationally based on the

perception of the witnesses. The witnesses worked with defendant and Kaiser, saw them interact, and heard their conversations. The testimony was rationally based on these observations. The testimony was also helpful to a clear understanding of a fact in issue: whether Kaiser acted at the direction of defendant when he committed the crimes with defendant. This fact was in issue because it supported the "acting in concert" theory of the State's case. The testimony was therefore admissible opinion testimony by lay witnesses under Rule 701.

State v. Bishop, 343 N.C. 518, 472 S.E.2d 842 (1996), *cert. denied*, 519 U.S. 1097, 117 S. Ct. 779, 136 L. Ed. 2d 723 (1997).

Implicit Finding of Lay Witness as an Expert

In *State v. Greime*, the defendant contended that a police officer, who was neither tendered as nor expressly found to be an expert in investigating arson or other fires, was a lay witness, qualified to offer only "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (1989). Defendant contended that the trial court erroneously allowed the officer to offer expert testimony as to whether he detected the odor of kerosene; whether he conducted an arson investigation; the characteristics of a kerosene fire; and how long the fire burned. The Court of Appeals held that the trial court implicitly found the officer to be an expert, but that holding that the record in the case supported such a finding, It went on to hold that it would have been better practice for the State to have tendered the officer as an expert, in the circumstances disclosed by the record, any error in permitting the witness to state opinions as an expert was harmless. *State v. Perry*, 275 N.C. 565, 572, 169 S.E.2d 839, 844 (1969)*; see also State v. Jenerett*, 281 N.C. 81, 90, 187 S.E.2d 735, 741 (1972)*;*and *State v. Cates*, 293 N.C. 462, 471-72, 238 S.E.2d 467, 472 (1977).

State v. Greime, 97 N.C. App. 409, 388 S.E.2d 594 (1990).

In *State v. Kandies*, a police officer testified that he examined the inside of defendant's truck and found some red dots in the cab to be red oxide primer (as opposed to blood). Defendant contended that the officer was not qualified to give this testimony because he was not a chemical expert. Rule 701 permits a lay witness to testify to opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. N.C.G.S. § 8C-1, Rule 701 (1992). The officer testified that the spots in defendant's truck looked peculiar, so he sanded a spot with a knife and discovered it to be red oxide primer. He also testified that he held a part-time job doing car repair and body shop work. The Court held that based on his experience, it is likely that the officer could perceive the difference between blood and red oxide primer. The testimony that it was paint rather than blood contradicted defendant's statement that he hit Natalie with his truck and that she was bleeding when he put her in the truck. Thus, the testimony was helpful to a determination of a fact in issue. *State v. Kandies*, 342 N.C. 419, 467 S.E.2d 67 (1996), *cert. denied*, 519

U.S. 894, 117 S. Ct. 237, 136 L. Ed. 2d 167 (1996).

Lay opinion of nurse as to effects of drugs

In *State v. Smith,* a nurse testified concerning the effects of ten milligrams of Valium. Defendant, in an attempt to negate the *mens rea* required for first-degree murder, argued that he was under the influence of a combination of drugs at the time he murdered the victim and thus was not capable of premeditation and deliberation. In his statement to police, defendant stated that on the morning of the murder, he "took some pills, 2 Valium, ten milligrams, 3 Klonopins, ten milligrams, 2 Xanax, number 10's." The Supreme Court held that the witness did not have sufficient specialized knowledge, training, or experience necessary to testify as an expert regarding the effects of ten milligrams of Valium. However her testimony was still admissible under N.C.G.S. § 8C-1, Rule 701 as a nonexpert's opinion, based on her reasonable perceptions.

The nurse gave extensive testimony as to defendant's physical condition at the time she treated him at the hospital. She testified that his temperature, pulse rate, respiration, blood pressure, and oxygen saturation levels were all in the normal range for a man of his age and size. She additionally testified that his pupils reacted normally to light and he did not appear intoxicated or otherwise impaired.

The Supreme Court held that the nurse's testimony regarding the effects of two ten-milligram Valium was rationally based on her perceptions while working as a nurse over a number of years. She testified that she had seen the effects of Valium on patients in her care. It further held that the testimony was admissible as a nonexpert opinion under Rule 701 because the testimony was helpful in the determination of a fact in issue. The nurse's testimony was helpful to the jury in determining whether defendant was so impaired when he killed the victim that he could not have killed with premeditation and deliberation.

State v. Smith, 357 N.C. 604, 588 S.E.2d 453 (2003).

Opinion of Value of Personal Property

While normally we do not think of valuation issues occurring in the context of criminal cases, judges are frequently called upon to decide the appropriate amount of restitution under the provisions of G.S. 15A-1340.35(a)(2)b.

"[A] non-expert witness who has knowledge of value gained from experience, information, and observation may give his opinion of the value of personal property." *Williams v. Hyatt Chrysler-Plymouth, Inc.*, 48 N.C. App. 308, 317, 269 S.E.2d 184, 190, *disc. review denied*, 301 N.C. 406, 273 S.E.2d 451 (1980). Where the witnesses testified that they were personally acquainted with each item of property missing, this testimony furnished ample foundation upon which to base the opinions of these witnesses as to the

fair market value of the missing personal property.

Maintenance Equip. Co. v. Godley Bldrs., 107 N.C. App. 343, 420 S.E.2d 199 (1992), *cert. denied*, 333 N.C. 345, 426 S.E.2d 707 (1993).

In *State v. Freeman*, two methods were offered to determine the issue of damages at trial and during the sentencing hearing. The tract at bar was five acres, with approximately 4.6 acres of merchantable timber. Cain testified at trial that he had sold a similar, although slightly larger, tract of land with approximately 6.2 acres of cuttable timber in 2002. This tract contained large, longleaf, southern yellow pine trees that were "substantially similar" to the timber removed from the tract at bar. During the sentencing hearing, Cain testified he received $ 15,000.00 from the sale. Using this evidence, the trial court calculated an amount of $ 11,129.00 for the 4.6 acres of timber cut from Cain's property. The State also submitted at the sentencing hearing a report taken by a JMG Forestry agent ("forestry report"), which Cain had obtained in April 2000 as a result of discussions with defendant. The forestry report estimated the tract had a market value of approximately $ 13,545.00.

The trial court averaged the value it calculated from Cain's testimony and the value set forth in the forestry report. The trial court ordered restitution in the amount of $12,837.00, including $ 500.00 Cain had paid to obtain the forestry report. The trial court did not err in averaging the two values, which were both supported by evidence and authorized under N.C. Gen. Stat. § 15A-1340.35, and ordering the averaged amount as restitution.

State v. Freeman, 164 N.C. App. 673, 596 S.E.2d 319 (2004).

Rule 702-Expert Testimony

Rule 702. Testimony by experts.

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

(b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or

b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

(d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

(e) Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

(f) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis.

(g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

(h) Notwithstanding subsection (b) of this section, in a medical malpractice action against a hospital, or other health care or medical facility, a person may give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and

experience, about the standard of care among hospitals, or health care or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

(i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.

General Standard for Admission of Expert Testimony

In *State v. Locklear,* the Supreme Court stated: "It is undisputed that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified." *State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370, 376 (1984); *see* N.C.G.S. § 8C-1, Rule 702(a) (Supp. 1997). Dr. Thompson testified that the shot pattern that corresponded with firing the shotgun from the three-foot range most closely matched the wound in the victim's back. He also rendered his expert medical opinion as to the effect on the body such a shot would have produced. Dr. Thompson performed the autopsy on the victim, examined and measured the wounds, and reviewed and measured the shotgun-pellet test patterns, allowing him to form an opinion as to which shot pattern most closely matched the gunshot wound in the victim's back. By giving his opinion based on his experience as a pathologist and his personal observation of the gunshot wounds, Dr. Thompson was undoubtedly in a position to assist the jury in determining the distance from which the fatal shots were fired. Dr. Thompson's testimony illustrating the effect such a shot would have had on the human body was likewise appropriate to assist the jury in understanding the evidence. The trial court did not err in overruling defendant's objection to this testimony. *State v. Locklear* 349 N.C. 118, 505 S.E.2d 277 (1998).

Howerton v. Arai Helmet/Goode and Daubert v. Merrell Dow Pharmaceuticals

In *Howerton v. Arai Helmet, Ltd.,* the Supreme Court clearly stated that North Carolina does not follow the mode of analysis under Rule 702 set forth in the U.S. Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals* 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993).

Under *Daubert*, the trial court is instructed to preliminarily determine "whether the reasoning or methodology underlying the [expert] testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93, 125 L. Ed. 2d at 482. The focus of the trial court's inquiry in this regard "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595, 125 L. Ed. 2d at 484. In particular, the Supreme Court articulated five factors it considered important measures of scientific reliability: (1) Whether the scientific theory or technique upon which the expert's opinion is based "can be (and has been) tested." *Id.*

at 593, 125 L. Ed. 2d at 483. (2) Whether the theory or technique employed by the expert "has been subjected to peer review and publication." *Id.* (3) The "known or potential rate of error" of the scientific technique. *Id.* 125 L. Ed. 2d at 483. (4) The "existence and maintenance of standards controlling the technique's operation." *Id.* (5) Whether the theory or technique is generally accepted within its relevant scientific community. *Id.* The Court noted that use of these factors was to be "flexible." *Id.* at 594, 125 L. Ed. 2d at 483-84.

The North Carolina Supreme Court rejected this approach, instead relying upon prior case law developed in this state, and holding that it is well established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. N.C.G.S. § 8C-1, Rule 104(a) (2003). When making such determinations, trial courts are not bound by the rules of evidence. *Id.* In this capacity, trial courts are afforded "wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion. *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548, 109 S. Ct. 513 (1988); *Bullard*, 312 N.C. at 144, 322 S.E.2d at 378; *State v. Moore*, 245 N.C. 158, 164, 95 S.E.2d 548, 552 (1956) ("This Court has uniformly held that the competency of a witness to testify as an expert is a question primarily addressed to the court, and his discretion is ordinarily conclusive, that is, unless there be no evidence to support the finding, or unless the judge abuses his discretion.").

This analysis relied primarily upon the most recent North Carolina case prior to *Daubert* to comprehensively address the admissibility of expert testimony under Rule 702, *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995). *Goode* set forth a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? *Id.* at 527-29, 461 S.E.2d at 639-40. (2) Is the witness testifying at trial qualified as an expert in that area of testimony? *Id.* at 529, 461 S.E.2d at 640. (3) Is the expert's testimony relevant? *Id.* at 529, 461 S.E.2d at 641.

The Supreme Court then amplified upon the three-step Goode test.

First Step of the Goode Analysis

In the first step of the *Goode* analysis, the trial court must determine whether the expert's method of proof is sufficiently reliable as an area for expert testimony. *Id.* at 527-29, 461 S.E.2d at 639-40. As discussed in *Goode*, the requirement of reliability is nothing new to the law of scientific and technical evidence in North Carolina and, indeed, pre-dates the federal court's adoption of the *Daubert* standard. *See id.*; *see also State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990) ("A new scientific method of proof is admissible at trial if the method is sufficiently reliable."); *Bullard*, 312 N.C. at 149-53, 322 S.E.2d at 381-84 (discussing factors relevant in determining whether scientific

methods in their infancy are reliable); *State v. Crowder*, 285 N.C. 42, 53, 203 S.E.2d 38, 46 (1974) (expert testimony based on scientific tests "competent only when shown to be reliable"), *vacated in part on other grounds*, 428 U.S. 903, 49 L. Ed. 2d 1207, 96 S. Ct. 3205 (1976). Under *Goode*, to determine whether an expert's area of testimony is considered sufficiently reliable, "a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two." 341 N.C. at 530, 461 S.E.2d at 641. Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable. Although North Carolina does not exclusively adhere to the *Frye* "general acceptance" test, *Pennington*, 327 N.C. at 98, 393 S.E.2d at 852, when specific precedent justifies recognition of an established scientific theory or technique advanced by an expert, the trial court should favor its admissibility, provided the other requirements of admissibility are likewise satisfied. *See, e.g., State v. Williams*, 355 N.C. 501, 553-54, 565 S.E.2d 609, 640 (2002) (recognizing the admissibility of DNA evidence and upholding its use as the basis of an opinion by a properly qualified expert in forensic DNA analysis), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808, 123 S. Ct. 894 (2003); *Goode*, 341 N.C. at 530-31, 461 S.E.2d at 641-42 (reliability of bloodstain pattern interpretation supported in part by prior appellate acceptance of such technique in North Carolina and other jurisdictions); *State v. Barnes*, 333 N.C. 666, 680, 430 S.E.2d 223, 231 (1993) (recognizing the long-established admissibility of the results of blood group testing for identification purposes), *cert. denied*, 510 U.S. 946, 126 L. Ed. 2d 336, 114 S. Ct. 387 (1993); *Pennington*, 327 N.C. at 100, 393 S.E.2d at 854 (finding persuasive authority in other jurisdictions' acceptance of DNA profiling); *State v. Rogers*, 233 N.C. 390, 397-98, 64 S.E.2d 572, 578 (1951) (recognizing that fingerprint evidence is an established and reliable method of identification), *overruled on other grounds by State v. Silver*, 286 N.C. 709, 213 S.E.2d 247 (1975).

Conversely, there are those scientific theories and techniques that have been recognized by this Court as inherently unreliable and thus generally inadmissible as evidence. *See, e.g., State v. Hall*, 330 N.C. 808, 820-21, 412 S.E.2d 883, 890 (1992) (concluding that "evidence that a prosecuting witness is suffering from post-traumatic stress syndrome should not be admitted for the substantive purpose of proving that a rape has in fact occurred" because of the unreliability of underlying psychiatric procedures used to diagnosis the condition); *State v. Peoples*, 311 N.C. 515, 533, 319 S.E.2d 177, 188 (1984) (holding that "hypnosis has not reached a level of scientific acceptance which justifies its use for courtroom purposes"); *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983) (holding that polygraphs are inadmissible in any trial, even if otherwise stipulated to by the parties).

Where, however, the trial court is without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques, a different approach is required. Here, the trial court should generally focus on the following nonexclusive "indices of reliability" to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable: "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked

'to sacrifice its independence by accepting [the] scientific hypotheses on faith,' and independent research conducted by the expert." *Pennington*, 327 N.C. at 98, 393 S.E.2d at 852-53 (quoting *Bullard*, 312 N.C. at 150-51, 322 S.E.2d at 382), *quoted in Goode*, 341 N.C. at 528, 461 S.E.2d at 640.

Within this general framework, reliability is thus a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony. This assessment does not, however, go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence. In this regard, we emphasize the fundamental distinction between the admissibility of evidence and its weight, the latter of which is a matter traditionally reserved for the jury. *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940) ("The competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight are matters for the jury. This principle is so well settled we do not think it necessary to cite authorities.").

Therefore, once the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility. *See, e.g., Barnes*, 333 N.C. at 680, 430 S.E.2d at 231 (holding that a forensic serologist's failure to conduct or provide for additional, independent testing of blood samples went to the weight of the evidence, not its admissibility); *McLean v. McLean*, 323 N.C. 543, 556, 374 S.E.2d 376, 384 (1988) (concluding that deficiencies in the expert's methodology were relevant in considering the expert's credibility and the weight to be given his testimony, but that they did not render his opinion inadmissible). Here, we agree with the United States Supreme Court that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596, 125 L. Ed. 2d at 484; *accord Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 244, 311 S.E.2d 559, 571 (1984) ("It is the function of cross-examination to expose any weaknesses in [expert] testimony . . . .").

Second Step of the Goode Analysis

In the second step of analysis under *Goode*, the trial court must determine whether the witness is qualified as an expert in the subject area about which that individual intends to testify. 341 N.C. at 529, 461 S.E.2d at 640. Under the North Carolina Rules of Evidence, a witness may qualify as an expert by reason of "knowledge, skill, experience, training, or education," where such qualification serves as the basis for the expert's proffered opinion. N.C.G.S. § 8C-1, Rule 702(a). As summarized in *Goode*, "It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession." "It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.'" 341 N.C. at 529, 461 S.E.2d at 640 (citations omitted). "Whether a witness has the requisite skill to qualify as an expert in a given area is chiefly a question

of fact, the determination of which is ordinarily within the exclusive province of the trial court." *State v. Goodwin*, 320 N.C. 147, 150, 357 S.E.2d 639, 641 (1987).

As pertains to the sufficiency of an expert's qualifications, we discern no qualitative difference between credentials based on formal, academic training and those acquired through practical experience. In either instance, the trial court must be satisfied that the expert possesses "scientific, technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702(a); *see* 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 184, at 44-45 (6th ed. 2004) ("[A] jury may be enlightened by the opinion of an experienced cellar-digger, or factory worker, or shoe merchant, or a person experienced in any other line of human activity. Such a person, when performing such a function, is as truly an 'expert' as is a learned specialist . . . ." (footnotes omitted)).

Third Step of the Goode Analysis

The third and final step under *Goode* concerns the relevancy of the expert's testimony. The trial court must always be satisfied that the expert's testimony is relevant. *Goode*, 341 N.C. at 529, 461 S.E.2d at 641. To this end, we defer to the traditional definition of relevancy set forth in the North Carolina Rules of Evidence: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2003). As stated in *Goode*, "in judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified than the jury to draw such inferences." 341 N.C. at 529, 461 S.E.2d at 641.

We further note that, in addition to the foregoing principles of reliability under Rule 702, a trial court has inherent authority to limit the admissibility of all evidence, including expert testimony, under North Carolina Rule of Evidence 403, which provides that relevant evidence may nonetheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2003); *see State v. Mackey*, 352 N.C. 650, 657, 535 S.E.2d 555, 559 (2000) ("Under Rule 403 even relevant [expert] evidence may properly be excluded by the trial court if its probative value is outweighed by the danger that it would confuse the issues before the court or mislead the jury." (citations omitted)); *Newton v. New Hanover County Bd. of Educ.*, 342 N.C. 554, 565, 467 S.E.2d 58, 66 (1996) ("The expert's testimony, even if relevant, must also have probative value that is not substantially outweighed by the danger of unfair prejudice, confusion, or undue delay."). Whether to exclude expert testimony under Rule 403 is within the sound discretion of the trial court and will only be reversed on appeal for abuse of discretion. *Anderson*, 322 N.C. at 28, 366 S.E.2d at 463.

Based on our review of these well-settled principles of North Carolina law governing the

admissibility of expert testimony under North Carolina Rule of Evidence 702, we are satisfied that our own approach is distinct from that adopted by the federal courts. Contrary to the conclusion of the Court of Appeals, it is not "eminently clear" that North Carolina adopted the *Daubert* standard. Such a bold proposition is neither confirmed by the case law of this Court nor buttressed by the "express holding" of the lower court in *State v. Bates*, 140 N.C. App. 743, 748, 538 S.E.2d 597, 600 (2000), *disc. rev. denied*, 353 N.C. 383, 547 S.E.2d 19, 547 S.E.2d 20 (2001), which was nothing more than a passing citation parenthetical suggesting without analysis or discussion that this Court had adopted *Daubert* in the *Goode* opinion.

Howerton v. Arai Helmet, Ltd. 358 N.C. 440, 597 S.E.2d 674 (2004).

In the Supreme Court case of *State v. Goode*, defendant contended that the trial court erred in admitted expert testimony by SBI Special Agent Duane Deaver on bloodstain pattern interpretation. Defendant's specific assignments of error regarding the expert testimony are (1) that the trial court erred in qualifying Agent Deaver as a purported bloodstain pattern interpretation expert, and (2) that the admission of this testimony constituted an alleged due process violation. However, defendant also contended in his brief that "blood spatter interpretation" is not an appropriate area for expert testimony, as it has not been established as scientifically reliable.

A new scientific method of proof is admissible at trial if the method is sufficiently reliable." *Pennington*, 327 N.C. at 98, 393 S.E.2d at 852 (citing *Bullard*, 312 N.C. at 148, 322 S.E.2d at 381). As stated above, in determining reliability, a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two. *Bullard*, 312 N.C. at 148, 322 S.E.2d at 381 (quoting 1 *Brandis on North Carolina Evidence* § 86, at 323). In the present case, Agent Deaver, a forensic serologist, testified extensively on *voir dire* concerning the reliability of bloodstain pattern interpretation.

Agent Deaver testified that bloodstain pattern interpretation is a "specialized crime scene technique" wherein a specially trained individual studies the blood and the types of stains at the scene of the crime, and then, based upon his knowledge of similar bloodstain characteristics and reproductions of the crime scene, he forms an opinion about "what actually occurred [at] the crime scene." In order to determine what occurred at the crime scene using this method of proof, experts rely upon specific categories of bloodstains that are defined by the way in which they are made. These categories can be established through observation and reconstruction, as similar stains are produced under similar circumstances. Further, Agent Deaver testified that the expert in the field of bloodstain pattern interpretation would reproduce the bloodstains in order to determine whether their observations and interpretations were correct. Agent Deaver's testimony established that bloodstain pattern interpretation is an appropriate area for expert testimony.

The Supreme Court implicitly accepted bloodstain pattern interpretation as a scientific method of proof in *State v. Daughtry*, 340 N.C. 488, S.E.2d , 1995 WL 444437 (1995), as did the Court of Appeals in *State v. Willis*, 109 N.C. App. 184, 426 S.E.2d 471,

disc. rev. denied, 333 N.C. 795, 431 S.E.2d 29 (1993). Appellate courts in other jurisdictions have reached the same conclusion and result in finding bloodstain pattern interpretation as an appropriate area for expert testimony. *State v. Rodgers*, 119 Idaho 1047, 812 P.2d 1208 (1991); *Fox v. State*, 506 N.E.2d 1090 (Ind. 1987); *State v. Hall*, 297 N.W.2d 80 (Iowa 1980), *cert. denied*, 450 U.S. 927, 67 L. Ed. 2d 359, 101 S. Ct. 1384 (1981); *Farris v. State*, 670 P.2d 995 (Okla. Crim. App. 1983); *State v. Melson*, 638 S.W.2d 342 (Tenn. 1982), *cert. denied*, 459 U.S. 1137, 74 L. Ed. 2d 983, 103 S. Ct. 770 (1983); *Compton v. Commonwealth*, 219 Va. 716, 250 S.E.2d 749 (1979).

The Court then addressed defendant's specific assignment of error relating to the qualification of Agent Deaver as a purported expert in bloodstain pattern interpretation. Agent Deaver's qualifications show that he was properly qualified as an expert to testify in this area. The record indicates that Agent Deaver has extensive experience in the field of bloodstain pattern interpretation.

State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995).

Police/Laboratory Experts

Officer's testimony concerning crime scene

In *State v. Jones*, the Supreme Court held under a plain error standard that there was no error concerning the testimony from an officer concerning the crime scene.

Lieutenant Sutherland testified that he was a forensic investigator for three and a half years with the Onslow County Sheriff's Department. His duties included conducting crime scene investigations, preserving physical evidence, and assisting in analysis and presentation of the evidence for court. Sutherland testified that he had investigated over five hundred cases, ten to fifteen of which were homicide cases. In addition to his on-the-job training, his formal education included basic law enforcement school and classroom training.

Although Lieutenant Sutherland was never formally tendered as an expert witness, such a tender is not required. *State v. White*, 340 N.C. 264, 293, 457 S.E.2d 841, 858, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436, 116 S. Ct. 530 (1995). The trial court implicitly found Sutherland to be an expert in crime scene investigation and admitted his testimony under N.C.G.S. § 8C-1, Rule of Evidence 702(a). Sutherland's experience, the nature of his job, and his personal investigation of the crime scene at issue here qualified him to offer expert testimony to demonstrate how the crime scene was found after the police arrived.

The transcript showed that Lieutenant Sutherland opined that the blood on Benita's socks originated from Marvin or that Benita was shot first. Sutherland testified that "neither the blood on either of [Benita's] socks, either the drops or the transfer blood, are consistent with having originated from her injuries." This neither implies nor suggests that the blood on Benita's socks originated from Marvin. This testimony merely states that the blood on

Benita's socks did not originate from her own injuries. This testimony was proper because as an expert witness, Sutherland is permitted to offer "scientific, technical or other specialized knowledge" to "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.*

State v. Jones, 358 N.C. 330, 595 S.E.2d 124 (2004).

Officer allowed to give expert opinion concerning time of death

In *State v. Steelmon*, the defendant argued the trial court erred in allowing the jury to hear the expert testimony of Officer Yoder, contending Officer Yoder testified outside of his area of expertise concerning lividity of the body and approximate time of death. Defendant argues that only a medical expert may make determinations concerning lividity and time of death. Officer Yoder has a degree in criminal justice and training in the areas of crime scene investigation and homicide, along with his many years of experience as an officer. The trial court determined that Officer Yoder's expertise in death scene investigations puts him in a better position to give an opinion on the subjects of lividity and approximate time of death than the trier of fact.

Under the abuse of discretion standard, the trial court is given much deference to determine whether a witness is qualified as an expert. The trial court in this case did not abuse its discretion when allowing Officer Yoder to testify as a witness. The State offered ample evidence to support the trial court's finding that Officer Yoder, because of his expertise, was better qualified to give his opinion on the subject than the trier of fact. Therefore, Officer Yoder was qualified to give an expert opinion on lividity of the body and approximate time of death, even though he was not a medical expert, as our standard does not require an expert to be licensed or a specialist in the field in which he testifies.

State v. Steelmon, 177 N.C. App. 127, 627 S.E.2d 492 (2006).

Officer as Expert in Accident Reconstruction

In *State v. Holland*, the Court stated that it could not hold that there is a "complete lack of evidence" to support the trial court's acceptance of Trooper Hiatt as an expert in accident investigation and reconstruction. Trooper Hiatt's testimony established that he possessed both formal training and a fair amount of experience in investigating accidents, specifically with regard to accident reconstructions. Trooper Hiatt testified that he had been a State Trooper for sixteen years; that in 1992 he completed a six-week course in accident investigation and reconstruction for which he received a certificate entitled "Traffic Accident Reconstruction"; and that he has attended various other training programs in the area of accident investigation, including both a basic and advanced program on the inspection and investigation of commercial vehicle accidents, and a training course in the use of a device used to take measurements at accident scenes. In addition, Trooper Hiatt testified that he has investigated somewhere between 2,000 and 2,500 automobile accidents, and he has conducted approximately thirty to forty accident reconstructions. We hold that the trial court did not abuse its discretion in ruling that

Trooper Hiatt was more qualified than the jury on the subject at hand, and that his testimony would assist the jury in understanding the evidence.

The Court also rejected the defendant's contention that Trooper Hiatt's testimony should have been excluded because it failed to meet the reliability requirements of *Daubert v. Merrell Dow*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), as interpreted by our Supreme Court in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995). As with the decision on who qualifies as an expert, the decision on what expert testimony to admit is within the wide discretion of the trial court. *See State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001).

Expert testimony in the field of accident reconstruction has been widely accepted as reliable by the courts of this State. *See, e.g., Griffith v. McCall*, 114 N.C. App. 190, 194, 441 S.E.2d 570, 573 (1994) (upholding admission of accident reconstruction expert testimony to assist jury in understanding central issues and noting that it is the function of cross- examination to expose any weaknesses in the expert testimony); *State v. Purdie*, 93 N.C. App. 269, 276, 377 S.E.2d 789, 793 (1989) (expert testimony on accident reconstruction admissible where based on expert's review of accident report, an interview with the investigating officer, photographs of the accident scene, and review of witness' testimony, because such information is that which is reasonably relied upon by experts in the field; where dispute existed over sequence of events, expert's testimony would clearly assist jury in interpreting physical evidence). Under our decision in *Taylor*, this alone sufficiently supports the admission of Trooper Hiatt's testimony, as defendant failed to set forth any new evidence calling the reliability of the methods of accident reconstruction into question.

Trooper Hiatt's testimony regarding his reconstruction methods and his analysis established a sufficient level of reliability to support the trial court's discretionary admission of his expert testimony. "Our Rules of Civil Procedure make clear that expert testimony may be based not only on scientific knowledge, but also on technical or other specialized knowledge not necessarily based in science." *Taylor*, 149 N.C. App. at 272, 560 S.E.2d at 239 (citing N.C. Gen. Stat. § 8C-1, Rule 702(a) (1999)). Trooper Hiatt's testimony revealed that the techniques he employed in performing reconstructions are established techniques; he possessed extensive background in accident investigation and reconstruction; and he employed the use of several photographic exhibits to assist in illustrating his testimony for the jury. Defense counsel vigorously cross-examined Trooper Hiatt on his findings and conclusions. Although Trooper Hiatt did not testify as to any independent research that he has conducted in the area, there was evidence to support the trial court's ruling, and as such, it was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. *See Miller*, 142 N.C. App. at 444, 543 S.E.2d at 207.

State v. Holland, 150 N.C. App. 457, 566 S.E.2d 90 (2002).

Officer permitted to testify as expert in bloodstain pattern interpretation

In *State v. Morgan,* the record reveals that Agent Garrett possessed sufficient knowledge, experience, and training in the field of bloodstain pattern interpretation to warrant his qualification as an expert in that field. Agent Garrett testified that he had completed two training sessions on bloodstain pattern interpretation, had analyzed bloodstain patterns in dozens of cases, and had previously testified in a homicide case as a bloodstain pattern interpretation expert. In addition, Agent Garrett described in detail to the judge and jury the difference between blood spatter and transfer stains and produced visual aids to illustrate his testimony.

Based on this testimony, the trial court reasonably could have determined that Agent Garrett was in a better position to have an opinion on bloodstain pattern interpretation than the trier of fact. There is more than one road to expertise that assists a jury in understanding the evidence or determining a fact at issue, and Agent Garrett's qualifications are not diminished, as defendant suggests, by the fact that he has never written an article, lectured, or taken a college-level course on bloodstain or blood spatter analysis. The trial court did not abuse its discretion in qualifying Agent Garrett as an expert.

State v. Morgan, 359 N.C. 131, 604 S.E.2d 886 (2004).

Officer permitted to testify concerning broken glass samples

In *State v. McVay,* the trial court conducted *voir dire* examination to determine whether Investigator French was an expert and whether the substance of his testimony would be admissible. The court heard evidence on indicia of the evidence's reliability. Investigator French's testimony revealed in detail his testing methods as performed under controlled circumstances. The standard for the tests was the broken glass samples taken from Morningside, and the unknown was the glass removed from defendant's boot. He first conducted a visual test comparing the glass samples for the following: any color coating or tinted sheet on the glass, if the glass was colored when it was made, the thickness of the glass, and if there was any texture to it. An ultraviolet test was taken for any fluoresces. He then tested the density of the glass in a test tube by varying the density of a solution in which the samples were placed. He then observed whether the standard and the unknown stayed suspended at the same level as each other in the varying densities of solution. And lastly, under a microscope, he tested and graphed the refractive indexes of the standard and the unknown by heating the samples separately at various temperatures in an oil for which the refractive indexes at varying temperatures were known. Using the known index of the oil, Investigator French was able to compare the indexes of the standard and the unknown at different heats. Finding the standard and the unknown to be consistent, he stated that "[he] [could] not rule out that the particle did not come from that source."

The extensive *voir dire* testimony of Investigator French was sufficient to support the trial court's discretionary determination to admit the evidence of the consistency of the

glass samples pursuant to the reliability of the tests. This is true especially in light of Investigator French's professional qualifications, a factor supporting both the indicia of reliability of his tests *and* qualifying him as an expert for purposes of his testimony. *See below*. Other jurisdictions have allowed similar testimony. *See also Wheeler v. State*, 255 Ind. 395, 400, 264 N.E.2d 600 (1970) (where the court allowed expert testimony to establish a strong likelihood that the sliver of glass found in defendant's shoe sole came from the broken eyeglasses belonging to the victim); *State v. Wright*, 619 S.W.2d 822, 823 (Mo. Ct. App. 1981) (where a glass shard found in defendant's trousers matched the refractive indexes and density of a piece of broken glass from the broken door, and could be used to show there was a reasonable possibility that the glass shard came from the same source as the glass from the scene).

State v. McVay, 167 N.C. App. 588, 606 S.E.2d 145 (2004).

Drug Cases

In *State v. Moore*, the court, based upon the length of employment of the witness as a narcotics officer, as well as his knowledge of cocaine manufacturing, the division and packaging of the drug, and his extensive knowledge of illegal drug operations, all provided him with the requisite expertise to testify to a hypothetical question based on the facts of this case. Accordingly, his answer to the hypothetical, "I would conclude that that was a drug operation," was helpful to the trier of fact and did not invade the province of the jury.

State v. Moore, 152 N.C. App. 156, 566 S.E.2d 713 (2002).

In the Court of Appeals case of *State v. White*, a chemical analyst was asked if he had an opinion as to the contents of the cellophane package found in the black glove under the defendant's seat. He said that he had formed only a preliminary opinion as to what the package contained. The prosecutor asked him for his preliminary opinion, and the defendant's attorney generally objected. The trial court overruled the general objection and allowed the analyst to testify that based upon a positive response to the preliminary testing, the package "could" contain cocaine.

Under N.C.G.S. § 8C-1, Rule 702 (1988), "[t]he test for admissibility [of an expert's opinion] is whether the jury can receive 'appreciable help' from the expert witness." *State v. Knox*, 78 N.C. App. 493, 495, 337 S.E.2d 154, 156 (1985) (citation omitted). "While baseless speculation can never 'assist' the jury under Rule 702," *Cherry v. Harrell*, 84 N.C. App. 598, 605, 353 S.E.2d 433, 438, *disc. rev. denied*, 320 N.C. 167, 358 S.E.2d 49 (1987), an expert's opinion need not be positive to be admissible. *State v. Robinson*, 310 N.C. 530, 537-38, 313 S.E.2d 571, 576-77 (1984) (evidence that "male sex organ could" have penetrated vagina admissible though use of "could" significantly weaker than "probably"); *State v. Ward*, 300 N.C. 150, 153-54, 266 S.E.2d 581, 583-84 (1980) (firearms expert allowed to testify that bullet "could have" been fired from defendant's gun); *State v. Benjamin*, 83 N.C. App. 318, 319-20, 349 S.E.2d 878, 879 (1986) (opinion concerning how victim "could have gotten" gunshot residue on his hands admissible). If

the expert has a positive opinion, however, the expert is allowed to express that opinion. *Ward*, 300 N.C. at 153-54, 266 S.E.2d at 584. That an expert's "could" or "might" opinion may have "little probative value goes to the question of its weight and sufficiency, not its admissibility." *Id.* at 154, 266 S.E.2d at 584.

Though not a positive opinion that the substance in the cellophane package contained cocaine, the analyst's opinion that the substance "could" contain cocaine was properly admissible. The opinion was not based upon mere speculation, instead it was based upon a preliminary color test with a positive result. *See State v. McDougall*, 308 N.C. 1, 10, 301 S.E.2d 308, 314, *cert. denied*, 464 U.S. 865, 78 L.Ed.2d 173 (1983) (trial court admitted results of initial screening test of blood showing positive reaction for cocaine). That the analyst's opinion was based upon a positive preliminary test result and not upon a complete analysis goes not to the admissibility of the opinion, but to its weight and sufficiency on an issue. *See Hinson v. National Starch & Chem. Corp.*, 99 N.C. App. 198, 201, 392 S.E.2d 657, 659 (1990) (addressing sufficiency of evidence not threshold question of admissibility of 'might or could' opinion evidence).

State v. White, 104 N.C. App. 165, 408 S.E.2d 871 (1991).

In *State v. Chisolm*, the evidence of record in the case *sub judice* clearly supports the trial court's findings that Officer Couch, through and including his length of employment as a vice officer, his training, knowledge, and the number of drug purchases he had participated in as a vice officer, provided him with the requisite expertise to testify as to the recognition of narcotic drugs and the use and packaging of marijuana. Officer Couch's opinion testimony did not invade the province of the jury to pass upon the credibility of the witnesses and to decide the guilt or innocence of the defendant. The import of Officer Couch's testimony simply corroborated Miller's testimony on the *collateral* issue that the marijuana was for private use. Any bearing it might have had on the issue of Miller's credibility was purely incidental. Also, although the hypothetical question asked of Officer Couch did not include each and every fact available, it did not present a state of facts so incomplete that his testimony would have been unreliable, and therefore, excluded.

State v. Chisolm, 90 N.C. App. 526, 369 S.E.2d 375 (1988).

In *State v. Diaz*, defendant objected to Bissett's testimony concerning "special focus" on hotels in Greensboro for drug interdiction purposes. The nature of Bissett's job and his experience make him better qualified than the jury to form the opinion that "a large influx of narcotics . . . have come into the city" by "individuals [who] were utilizing hotels and motels within the city limits to distribute narcotics." Bissett's testimony was correctly allowed.

State v. Diaz, 155 N.C. App. 307, 575 S.E.2d 523 (2002).

Firearms expert permitted to testify as to whether ammunition could have caused victim's injuries

In *State v. Holmes*, defendant assigned as error that the trial court erred in overruling his objection to testimony from the State's firearm analysis and identification expert, Agent Thomas Trochum of the State Bureau of Investigation, regarding whether the ammunition he examined could have caused Creech's injuries. Defendant contends that this testimony was outside the expert's area of expertise.

Subsequent to testimony regarding Trochum's extensive experience and education, the trial court received him, without objection by defendant, as "an expert in the field of firearm analysis and identification." Trochum thereafter testified, again without objection from defendant, that the bullet located in the barn and the fragments taken from Creech's body were fired from one weapon and that the three fired cartridges found in Creech's trailer were fired from one weapon. Although he could not determine whether the weapon that fired the bullets was the same weapon that expended the cartridges or whether the bullets came from those cartridges, Trochum noted that the bullets and the cartridges were consistent in caliber, design, and manufacture and could have been fired from the same firearm. Trochum also described the mass and velocity of this ammunition, concluding that such bullets are "excellent penetrators."

State v. Holmes, 355 N.C. 719, 565 S.E.2d 154 (2002).

Expert testimony on DNA profiles permitted

In *State v. Williams*, defendant contended that the trial court erred by denying his objections and motions to strike the testimony of David Spittle concerning DNA profiles and his conclusions. David Spittle, a special agent with the North Carolina State Bureau of Investigation assigned to the forensic crime lab in Raleigh, was called as a witness by the State and accepted as an expert in forensic DNA analysis by the trial court. Agent Spittle conducted DNA analysis in the Audrey Hall case by using blood samples from defendant and blood samples and vaginal material from Hall. In his testimony, Agent Spittle stated:

My conclusion is as follows, the DNA profile obtained from the male fraction of the vaginal swab item 5C has more than one contributor. Evidence of DNA carryover from the victim's profile was observed. Assuming a single semen donor, the DNA banding pattern is consistent with a mixture of the victim's[,] that would be Audrey Marie Hall[,] and [defendant's] DNA profile.

Defendant contends that this conclusion was based on the inaccurate premise that there was only one male donor of semen and that it is therefore, inadmissible.

Throughout his testimony, Agent Spittle stated that the DNA banding pattern consisted of more than one contributor. Agent Spittle concluded that the DNA banding pattern reflected a mixture of defendant's DNA and Hall's DNA. Defense counsel asked Agent

Spittle on cross-examination whether it was possible that there could have been another male donor. Agent Spittle answered that there could have been more than one donor, but the donor "would have to have the same DNA profile or contain the same DNA results."

DNA evidence is admissible in North Carolina, *State v. Pennington,* 327 N.C. 89, 100-101, 393 S.E.2d 847, 854 (1990), and Agent Spittle was giving his opinion of the testing results based upon his expertise in the field of forensic DNA analysis. This opinion was not based upon an inaccurate premise, but rather upon Agent Spittle's analysis of the testing results and his experience in doing so. Furthermore, defendant was able to cross-examine Agent Spittle as to whether there was a possibility that there could have been another male donor. Defendant did not specify the reasons for his objections to Agent Spittle's testimony with regard to this matter. Agent Spittle's testimony was not based on an inaccurate premise and that the trial court did not err in overruling defendant's objections and motions to strike Agent Spittle's testimony concerning the DNA evidence.

State v. Williams, 355 N.C. 501, 565 S.E.2d 609 (2002).

Expert Testimony on Gunshot Residue

In the Court of Appeals case of *State v. Benjamin,* the defendant argued that the trial court committed reversible error by permitting a State Bureau of Investigation laboratory technician to testify that the high level of gunshot residue found on the victim's hands could have been caused by the victim's bringing his hand up between his body and the gun in a defensive posture. He argues that this testimony was inadmissible because the SBI technician's "opinions were mere speculation and amounted to allowing the State's witness to impeach his own test results."

The SBI technician in this case, who had performed "many thousands" of gunshot residue tests prior to trial, was accepted by the court as an expert in the field of forensic chemistry. He testified that in his opinion the accumulation of gunshot residue on the victim's hands was inconsistent with his having recently fired the defendant's .357 magnum revolver. Under these circumstances, the witness' opinion as to how the victim could have gotten this residue on his hands would assist the trier of fact to determine a fact in issue, whether the victim had intentionally or accidentally shot himself or whether he had been shot by the defendant.

The defendant also argued that the same witness was improperly permitted to testify concerning his opinion that the failure of the defendant's gunshot residue tests to provide conclusive results could have been caused by the passage of three and a half hours since the time of the shooting and by activity on the part of the defendant during that period. Again, we disagree. The witness testified that although there was gunshot residue on the defendant's left hand, the residue concentrations were not significant enough or consistent enough with the results of controlled tests to permit him to form an opinion of whether the defendant had recently fired his revolver. He then offered his opinion of what circumstances could affect these tests and lead to inconclusive results. This testimony was properly admitted to assist the jury in understanding the inconclusive results of the

defendant's gunshot residue tests.

State v. Benjamin, 83 N.C. App. 318, 349 S.E.2d 878 (1986).

Exclusion of Expert Testimony

Failure of the Trial Court to Find Witness to be an Expert

In *State v. Wise*, the Supreme Court held that the trial court did not err in allowing Gail Mason, the counselor, to testify as an expert when in fact she was never properly qualified as an expert. Initially, Mason was not offered by the State as an expert witness, and it was not until redirect examination of Mason by the State that defense counsel objected to testimony that she gave that constituted an expert opinion.

The Supreme Court held that the trial court's overruling of defense counsel's objection to the opinion testimony constituted an implicit finding that the witness was an expert. In *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984), the court held that the trial court did not err in permitting an anthropologist to testify as an expert in bare footprint comparison, where the trial judge implicitly found that the witness was qualified when he overruled defense counsel's objection to the State's offer of the witness as an expert in the comparison of footprint impressions and where there was evidence to support a finding by the trial judge that the witness was qualified to testify as an expert in footprint comparison.

The Court further held that there was no need for the court to make a formal ruling that the witness was an expert because her qualifications had already been presented to the court, citing *State v. Aguallo*, 322 N.C. 818, 370 S.E.2d 676 (1988), which held that the trial court properly admitted testimony of a law enforcement officer and a Department of Social Services worker who gave opinions as to characteristics of abused children. The Court found that "[i]t is evident that the nature of their jobs and the experience which they possessed made them better qualified than the jury to form an opinion as to the characteristics of abused children." *Id.* at 821, 370 S.E.2d at 677. That Court relied on *State v. Phifer*, 290 N.C. 203, 225 S.E.2d 786 (1976), *cert. denied*, 429 U.S. 1123, 51 L. Ed. 2d 573 (1977), in which two agents for the State Bureau of Investigation who had not been formally qualified as experts were nevertheless permitted to give their opinions concerning a gun residue test because the nature of their jobs and their experience made them better qualified than the jury to form an opinion on this matter.

It was held that the litany of Mason’s qualifications and experience affirmatively shows that she was better qualified than the jury to form an opinion as to, and to testify about, the characteristics of abused children.

State v. Wise, 326 N.C. 421, 390 S.E.2d 142 (1990).

Expert testimony on bloodstains should have been excluded

In *State v. Zuniga,* the Supreme Court held that a forensic pathologist was in no better position than the jury to determine the cause of bloodstains.

The rule governing the admissibility of expert testimony is set out in Rule 702 of the Rules of Evidence. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion. N.C.G.S. § 8C-1, Rule 702(a) (1986).

While Dr. Butts was properly qualified as a forensic pathologist to testify to the nature of the wounds inflicted on April and to the cause of her death, he was not qualified as an expert on the pattern that a knife blade makes when it is wiped on a shirt. This is a matter of common sense, best left to the jury.

While the Court held that the trial court erred, it held that any error was not prejudicial.

In a second holding under Rule 702, it held that an the trial court did not err in qualifying an SBI Special Agent as a "fracture match" expert that a piece of newspaper found under the body of the victim had once been joined with a piece of newspaper found some one hundred fifty to two hundred feet from the victim's body. This second piece of newspaper had on it the number of the post office box rented to defendant. The agent testified that in his nine years of experience as a forensic chemist, he had made many fracture match comparisons of hair and other fibrous material, that he had testified in more than one hundred cases where fracture matching was involved, and that he had participated in in-house training on fracture match comparisons. His testimony that the two pieces of paper were at one time joined was therefore based upon his training and experience in forensics. Since there is evidence to support the trial judge's conclusion that Agent Worsham is an expert in fracture match comparisons, there was no abuse of discretion in the admission of his testimony.

State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987).

Defendant's proffered testimony on undercover police procedures properly excluded

In the Supreme Court of *State v. Mackey,* the Supreme Court affirmed the trial court's exclusion of defendant's proffered evidence. The roles of Manning and the Sheriff require no expert explanation. The jury was perfectly capable of interpreting the State's evidence about the actions of defendant and the undercover officer. The Court of Appeals correctly determined that the jury had the ability, on its own, to assess the evidence, and that the trial court, therefore, did not abuse its discretion in excluding the testimony of Johnson. *Mackey*, 137 N.C. App. at 737, 530 S.E.2d at 309. Moreover, the expert's testimony would not have assisted the jury and might have confused the issues and resulted in a trial within a trial. As the Court of Appeals majority correctly stated:

The only purpose for admitting the proposed testimony was to challenge the undercover procedures used by Manning in obtaining the drugs from the defendant. However, the record already contained evidence that Manning used the drugs from the buys and evidence regarding the procedures used in the undercover drug operation. The jury had the ability, on its own, to assess Manning's credibility given this evidence.

Defendant was charged with several violations of N.C.G.S. § 90-95(a)(1), which makes it unlawful for any person to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." N.C.G.S. § 90-95(a)(1) (1999). The essential elements of N.C.G.S. § 90-95(a)(1) were established by the State's proof of the following facts: Defendant asked Manning if he wanted to purchase drugs. Thereafter, defendant sold two pieces of rock-like substance to Manning for forty dollars. Later that evening, defendant sold Manning five pieces of rock-like substance in exchange for one hundred dollars. The substances obtained from each transaction were later determined to be crack cocaine, a controlled substance.

Defendant intended to have Johnson testify regarding the standards of an undercover operation and proper investigative techniques. Defendant did not, however, intend to elicit testimony from the proposed expert witness addressing either material elements of the offenses charged or a material defense. Based on the above facts, the proposed testimony is irrelevant. Pursuant to Rule 702, no expert testimony as to the credibility of Manning would assist the trier of fact to understand the evidence or to determine a fact in issue. Moreover, "this Court has repeatedly held that N.C.G.S. § 8C-1, Rule 608 and N.C.G.S. § 8C-1, Rule 405(a), when read together, forbid an expert's opinion testimony as to the credibility of a witness." *State v. Jones*, 339 N.C. 114, 146, 451 S.E.2d 826, 843 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873, 115 S. Ct. 2634 (1995); *see State v. Aguallo*, 318 N.C. 590, 598, 350 S.E.2d 76, 81 (1986).

The fact at issue in the instant case was whether defendant violated N.C.G.S. § 90-95(a)(1). None of the proposed expert testimony would have been directed at the proof of this relevant fact. Moreover, no expert opinion on drug investigation standards was needed to show that a sale of cocaine took place. Rather, the proposed testimony would have shifted the focus of the trial from defendant's activities and sale of drugs to an irrelevant investigatory process that would potentially confuse the issues to the jury. We note that the trial court pointed out that Manning was permitted to testify, not as an expert, but because he observed the cocaine transactions that led to the arrest of defendant. Therefore, the trial judge properly recognized that defendant's challenge to the supposed deficiencies of the techniques used by Manning did not relate to any consequential fact in this case. Assuming *arguendo* that the expert testimony is the sort permitted under Rule 702, the trial judge properly exercised his discretion. As we stated in *Anderson*, "the trial court is afforded wide discretion" in determining the admissibility of expert testimony and "will be reversed only for an abuse of that discretion." *Anderson*, 322 N.C. at 28, 366 S.E.2d at 463. No abuse of that discretion took place in this case. The trial court's decision was justified on the grounds that the testimony would not be helpful to the jury's understanding; it was irrelevant; it had insufficient probative value on the

facts to be proved; and it violated the rule prohibiting expert testimony on a witness' credibility.

State v. Mackey, 352 N.C. 650, 535 S.E.2d 555 (2000).

In the Supreme Court case of *State v. Harden,* the trial court's exclusion of Ronald Guerrette's testimony was affirmed. The trial court acted well within its discretion in excluding the proffered expert testimony on the ground that it would not assist the jury in understanding the evidence or determining a fact in issue. The evidence in this case tended to show that when the officers first approached defendant, he started backing up and then ran because he thought he had crack cocaine in his possession. Clearly, defendant was not responding reasonably to the arrest procedures. Therefore, Guerrette's opinion about what the proper arrest procedures might have been was irrelevant to the circumstances in this case.

Further, defendant's offer of proof regarding Guerrette's testimony did not reveal that Guerrette would testify that the officers used excessive force in attempting to make the arrest. Thus, his testimony could only have directed the jury's attention away from defendant's actual conduct and confused it with evidence unrelated to the legality of the arrest or the force the officers used in attempting to apprehend defendant.

State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (1996).

Defendant's proffered expert testimony on profiles of domestic violence victims properly excluded

In *State v. Owen,* Jennifer Herman, the Executive Director of a non-profit domestic violence corporation, was called by the defense to offer expert testimony concerning the profile evidence or the characteristics of domestic violence victims and predators. Ms. Herman had never met defendant and defendant had never used the domestic violence facilities operated by Ms. Herman. The trial court excluded this evidence, ruling that under Rule 403 the evidence's probative value was outweighed by the possibility of undue prejudice and confusion of the issues. The facts indicate that the trial court properly excluded this evidence since the testimony would have been prejudicial and done little to appreciably help the jury. Ms. Herman did not know defendant and had no knowledge of the events that occurred on the day of the rape.

Dr. Hood, a psychologist hired by the defense, gave defendant a psychological evaluation to measure her intellectual cognitive functioning and her emotional adjustment. Dr. Hood was called to offer expert testimony for corroborative purposes concerning defendant's passive role during the rape of the victim. After a *voir dire* hearing, the trial court ruled that the testimony was too prejudicial and likely to result in a confusion of the issues. While Dr. Hood testified that defendant told him of sexual abuse, he admitted that his research failed to find a specific domestic violence profile. Furthermore, when asked if defendant reported any physical coercion on the part of her husband on the day of the rape, Dr. Hood replied that he did not recall any physical coercion at that time. This

testimony does little to corroborate defendant's claims of physical and sexual abuse or threats of abuse at the hands of her husband. Therefore, it was not an abuse of discretion for the trial court to exclude this evidence.

State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159 (1999).

Admission of expert testimony on memory factors upheld

In *State v. Cole*, the Court of Appeals held that the admission of expert testimony regarding memory factors is within the trial court's discretion, and the appellate court will not intervene where the trial court properly appraises probative and prejudicial value of the evidence under Rule 403 and the Rules of Evidence. *State v. Cotton*, 99 N.C. App. 615, 621, 394 S.E.2d 456, 459 (1990), *affirmed*, 329 N.C. 764, 407 S.E.2d 514 (1991)(*citing State v. Knox*, 78 N.C. App. 493, 495-96, 337 S.E.2d 154, 156 (1985)). A review of the trial court's findings reveals that it considered Dr. Hunt's testimony and found that any probative value was outweighed by the risk of confusing the jury. The trial court did not abuse its discretion in not allowing Dr. Hunt's proffered testimony.

S*tate v. Cole*, 147 N.C. App. 637, 556 S.E.2d 666 (2001).

Testimony concerning forensic psychiatry properly admitted

In the Supreme Court case of *State v. Campbell*, defendant contended that the trial court erred by overruling his objections to portions of the testimony of the State's expert witness, Robert Brown, M.D. Dr. Brown was certified by the trial court as an expert in the field of medicine, specifically forensic psychiatry. Defendant complains that Dr. Brown was allowed to testify over defendant's objections about the meaning of locations of blood spatter in the victim's home. Defendant contends that the doctor was not qualified to interpret bloodstain pattern evidence and that his testimony based on the location of blood spatter in the victim's home was improperly allowed.

Expert testimony is admissible "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702(a) (2003). In determining the admissibility of expert opinion, we consider "whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978); *see also State v. Gainey*, 355 N.C. 73, 88, 558 S.E.2d 463, 474, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165, 123 S. Ct. 182 (2002). The trial court has broad discretion in determining whether to admit the testimony of an expert. *Gainey*, 355 N.C. at 88, 558 S.E.2d at 474.

Arguing that Dr. Brown was not qualified to testify as an expert in blood spatter interpretation, defendant asserts that Dr. Brown should not have been allowed to testify about the implications of the SBI blood spatter report or of the location of blood spatter and smears at the crime scene. Defendant points to five portions of the doctor's testimony

as constituting inadmissible testimony: (i) that the attack on the victim occurred in two different areas of the residence; (ii) that two areas of attack suggested intent on defendant's part; (iii) that two areas of attack were inconsistent with acting in a state of panic; (iv) that the victim's being attacked while lying prone on the floor was consistent with specific intent to kill; and (v) that the location of certain bloodied items in two different rooms of the house demonstrated that defendant had not panicked but had walked through the house after the attack.

Having been qualified as an expert, Dr. Brown was entitled to testify as to information and data on which he relied to form his expert opinion regarding whether defendant acted in a state of panic. *State v. Jones*, 358 N.C. 330, 348, 595 S.E.2d 124, 136, *cert. denied*, 543 U.S. 1023, 160 L. Ed. 2d 500, 125 S. Ct. 659 (2004). Shortly before this testimony, Dr. Brown testified that "if the forensic evidence indicates that there was only one location where blows were delivered to the head of the victim, that means one thing; if there were two locations, that tends to mean another thing. Two locations means less chance of panic, at least, in my opinion." Thus, Dr. Brown's testimony, which defendant now argues was inadmissible, showed the basis for Dr. Brown's determination concerning defendant's behavior at the time of the crime. Dr. Brown was not interpreting blood spatter but rather expressing his conclusions as to defendant's mental state based in part on the blood spatter expert's report.

Witness Special Agent Dennis Honeycutt later described the SBI report in detail. Agent Honeycutt described the same two areas where a large amount of blood was found, the couch and an area on the floor where the victim was found. Agent Honeycutt testified that the amount of blood on the couch suggested that the victim spent some time on the couch before moving to the floor. Therefore, defendant's contention on this issue has no merit.

Defendant argued that Dr. Brown should not have been allowed to testify that two areas of attack suggested intent. Dr. Brown testified that he had studied panic disorders, and he was accepted by the trial court as an expert in forensic psychiatry. As such Dr. Brown was competent to evaluate the evidence and to give an opinion as to what defendant's mental state might have been at the time of the crime. Moreover, defendant's objection was based on the two locations of assault not being in evidence. As noted earlier, Dr. Brown relied on the SBI report, and that report was admitted into evidence as part of Dennis Honeycutt's testimony. The testimony was not improperly allowed.

Defendant then complains that Dr. Brown should not have been allowed to give his opinion as to defendant's state of mind based on the fact that the victim was found lying prone on the floor. The prosecutor asked Dr. Brown, "Assuming that the victim, Buddy Hall, is laying [sic] on the floor of his own home for at least one of those blows being dealt, is that also consistent with the specific intent to kill?" Dr. Brown was given a specific fact and asked if it suggested intent on the part of defendant. As a psychiatrist, Dr. Brown is trained to recognize links between behavior and a person's state of mind. Therefore, Dr. Brown had "specialized knowledge [to] assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702(a).

This testimony was not improperly allowed.

State v. Campbell, 359 N.C. 644, 617 S.E.2d 1 (2005).

Expert testimony contradicting defendant's version of events admissible

In the Supreme Court case of *State v. Saunders,* defendant contended that the trial court erred in overruling his objections to the testimony of Dr. William Armstrong, an expert in pathology, that defendant's account of the manner in which the shooting "went down" was inconsistent with the type of wound suffered by victim, and that the wound was not a self-defense type wound. Defendant argued that the expert witness' testimony expressed an opinion on the issues to be decided by the jury, and therefore invaded the jury's province.

In *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E. 2d 905, 911 (1978), the Court held that admissibility of expert opinion depends not on whether it would invade the jury's province, but rather on "whether the witness . . . is in a better position to have an opinion . . . than is the trier of fact."

Dr. Armstrong's expert testimony is evidence properly admitted under this rule. His opinion as to the nature of the deceased's wound was based upon his examination of the entrance wound in the deceased's head and the path the shotgun pellets traveled after entry. As the pathologist who performed the autopsy, Dr. Armstrong was clearly in a position to assist the jury in understanding the nature of the deceased's wound and in determining whether defendant, in fact, acted in self-defense when he shot the deceased. Therefore, he was properly allowed to testify to these matters in the form of an opinion. This is true even though self-defense was an ultimate issue in the case. N.C.G.S. § 8C-1, Rule 704 (Cum. Supp. 1985).

State v. Saunders, 317 N.C. 308, 345 S.E.2d 212 (1986).

Error to exclude expert testimony as to whether defendant lacked the capacity to form the specific intent to kill

In *State v. Daniel,* expert testimony that, as a result of his chronic alcohol abuse, the defendant suffered from organic impairment of brain functioning and from a loss of brain tissue which impaired his ability to think, plan, or reflect could assist the jury in determining a fact at issue -- whether the defendant had premeditated and deliberated. *See Shank*, 322 N.C. at 248, 367 S.E.2d at 643. Dr. Brown's testimony that, in his expert opinion, the defendant lacked the capacity to form the specific intent to kill at the time of the shooting also could help the jury determine whether the defendant had premeditated and deliberated before killing Florence. *See State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). Likewise, the tendered testimony of Dr. Brown that the defendant was unable to form a specific intent to kill at the time of the shootings in question here could assist the jury in determining whether the defendant intended to kill Horner when he shot and wounded him. A specific intent to kill is an essential element of assault with a

deadly weapon with intent to kill inflicting serious injury. N.C.G.S. § 14-32(a) (1986); *see State v. Meadows*, 272 N.C. 327, 331, 158 S.E.2d 638, 640-41 (1968). Such expert opinion testimony is not rendered inadmissible on the basis that it embraces the issues of premeditation and deliberation and specific intent to kill, which are ultimate issues to be determined by the jury. N.C.G.S. § 8C-1, Rule 704 (1992); *Shank*, 322 N.C. at 249, 367 S.E.2d at 643. The State argues that the testimony of Dr. Brown that the defendant was incapable of forming a specific intent to kill was inadmissible, nevertheless, because it was testimony that a precise legal standard had been met. It is true that we have held that testimony by medical experts relating to precise legal terms such as "premeditation" or "deliberation," definitions of which are not readily apparent to such medical experts, should be excluded. *State v. Weeks*, 322 N.C. 152, 166-67, 367 S.E.2d 895, 902-903 (1988). However, the term "specific intent to kill" is not one of those precise legal terms with a definition that is not readily apparent. Consequently, we have concluded previously that a medical expert may properly be allowed to testify to his or her opinion that a defendant could not form the specific intent to kill. *Rose*, 323 N.C. at 458, 373 S.E.2d at 428. The State's argument in this regard is, therefore, unpersuasive. Furthermore, the probative value of the expert's testimony was not substantially outweighed by any danger of confusing the issues, misleading the jury, or wasting time; therefore, this testimony was not excludable under Rule 403. N.C.G.S. § 8C-1, Rule 403 (1992); *see Shank*, 322 N.C. at 248-49, 367 S.E.2d at 643.

Because the excluded testimony of the psychiatric expert was relevant and was not rendered inadmissible by any of the North Carolina Rules of Evidence or by any other statutory or constitutional provision, the trial court erred in sustaining the prosecutor's objection to this testimony. The issue of the defendant's state of mind comprised his only defense, and the exclusion of this evidence substantially reduced his ability to defend himself against the charges of first-degree murder and assault with a deadly weapon with intent to kill. Although there was evidence that the defendant disliked Stanley Horner and that the defendant shot Alton Florence, the murder victim, after telling him he would "blow him away" if "the law came," such evidence would not preclude a reasonable jury's finding that the defendant lacked the capacity either to form a specific intent to kill or to premeditate and deliberate. The trial court's error in excluding expert testimony concerning the defendant's mental capacity was prejudicial.

State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993).

Experts in Child Sex Abuse Cases.

In *State v. Parks*, the Court of Appeals ruled on a defendant’s challenge to the qualification of two witnesses, a child sexual abuse counselor and a social worker, as experts in child sexual abuse. Defendant contended that the admission of their opinion testimony was error in that such testimony was of no assistance to the jury as a fact finder.

Rule 702 of the North Carolina Rules of Evidence governs the admissibility of expert testimony. It states: “If scientific, technical or other specialized knowledge will assist the

trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (1988). Our courts construe this rule to admit expert testimony when it will assist the jury "in drawing certain inferences from facts, and the expert is better qualified than the jury to draw such inferences." *State v. Anderson*, 322 N.C. 22, 366 S.E.2d 459 (1988), *cert. denied*, 488 U.S. 975, 109 S.Ct. 513, 102 L.Ed.2d 548 (1989) (citations omitted). A trial court is afforded wide latitude in applying Rule 702 and will be reversed only for an abuse of discretion. *Id.* Moreover, the determination whether the witness has the requisite level of skill to qualify as an expert witness is ordinarily within the exclusive province of the trial judge, and "[a] finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it." *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984) (citation omitted).

The trial court did not err in qualifying the witnesses as experts in child sexual abuse and admitting their testimony. Both witnesses testified to receiving advanced degrees in psychology and counseling, to having extensive experience in evaluating victims of child abuse, and to having testified on numerous prior occasions before the courts of this State as experts in the field of child sexual abuse. This evidence clearly suffices to support the trial court's determination that the witnesses possessed the requisite level of skill to qualify as experts in child sexual abuse. *State v. Bullard, supra*. Moreover, the witnesses explained to the jury, in clear terms, the accepted profile of indicators of child sexual abuse, how this profile was applied to evaluate the victim in this case, and how the victim's behavior was consistent with this profile. "The nature of the sexual abuse of children . . . places lay jurors at a disadvantage." *State v. Oliver*, 85 N.C. App. 1, 354 S.E.2d 527, *cert. denied*, 320 N.C. 174, 358 S.E.2d 64 (1987). The testimony under scrutiny here was clearly instructive and helpful to the jury. This assignment of error is overruled.

State v. Parks, 96 N.C. App. 589, 386 S.E.2d 748 (1989).

Ruling on Defendant's Request for Funds in Criminal Cases and Rule 702

In *State v. Abraham*, the Supreme Court held that the trial court did not err in denying defendant's motion for an expert on eyewitness identification. In *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985), the United States Supreme Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Id.* at 74, 84 L. Ed. 2d at 60. *See also Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985). While *Ake* dealt specifically with expert psychiatric assistance in the evaluation of the defendant, its rationale has been extended to other areas of expert assistance. *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988)(fingerprint expert); *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986)(pathologist); State v. Johnson, 317 N.C. 193, 344 S.E.2d 775 (1986)(medical expert); *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986).

Pursuant to *Ake,* and subsequent state court decisions under *Ake,* defendant is required to make "'an ex parte threshold showing' that the matter subject to expert testimony is 'likely to be a significant factor' in the defense." *Moore,* 321 N.C. at 344, 364 S.E.2d at 656-57. Defendant must show that an expert would assist him materially in the preparation of his defense or that the denial of expert assistance would deprive him of a fair trial. *Moore,* 321 N.C. at 344, 364 S.E.2d at 656-57; *Penley,* 318 N.C. at 52, 347 S.E.2d at 795.

We find defendant has failed to show how an expert would have assisted him materially. His pretrial motion was based solely on his perceived need to show the unreliability of the identification of defendants at the 26 September 1989 shooting. Defendant argued an eyewitness identification expert would assist in showing the jury the unreliability of this identification because of factors such as the time of observation, the distance of observation and the age of the eyewitnesses. Defendant noted certain inconsistencies between the accounts of the 26 September incident and the limited opportunity the witness had to view defendants.

This is not a case involving the uncorroborated identification of a single eyewitness. Both defendants had been identified by a number of witnesses who knew them, including the victims Foster and Hardin. Defendants' presence at the scene of the shooting seemed not to be a major issue at trial. Regarding the 26 September incident, identification by the victim William Johnson of defendants was corroborated by his observance of the blue Cadillac common to both incidents and by the ballistics evidence of bullet casings matching casings found at the 29 November crime scene.

Further, the identification issues for which defendant Cureton sought expert assistance involved matters within the scope of the jury's general capability and understanding. *See State v. Jackson*, 320 N.C. 452, 460, 358 S.E.2d 679, 683 (1987)(expert's testimony only admissible where it informs jury about matters not within full understanding of lay persons). Defendant had opportunity during cross-examination, which he exercised, to emphasize any inconsistencies in testimony as well as to underscore other factors such as lighting conditions or distance that would have affected the accuracy or credibility of the identifications. The assistance of an expert would have been of marginal additional value as to these points.

Defendant further contends an expert in eyewitness identification would have afforded him a mechanism for conveying to the jury the unreliability of Hardin's testimony. Defendant argues an expert would have provided specialized knowledge necessary to understand and evaluate Hardin's testimony in light of Hardin's use of alcohol, marijuana and cocaine on the evening of the incident, his previous false statements to police and his apparently limited mental capacity. No such argument, however, was presented at the motion hearing.

Based on defendant's showing at trial, we conclude the trial court acted properly in denying defendant's motion for an expert in eyewitness identification. No particularized need for an identification expert was demonstrated. Indeed, to require such an expert in

this case would mean entitlement to an identification expert in every case where eyewitness identification evidence is offered no matter how crucial or strongly corroborated the identification.

State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

Rule 703-Bases of Opinions

Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704- Opinion on Ultimate Issue

Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Expert Testimony not Excluded because embraces ultimate issue.

In *Mobley v. Hill*, the Court of Appeals held that : G.S. 8C-1, R.Ev. 704 does allow admission of lay opinion evidence on ultimate issues, but to qualify for admission the opinion must be helpful to the jury. R.Ev. 701. "[M]eaningless assertions which amount to little more than choosing up sides" are properly excludable as lacking helpfulness under the Rules. *Id.*, Commentary; *see Owen v. Kerr-McGee Corp.*, 698 F. 2d 236 (5th Cir. 1983) (under identical federal rules) (affirming exclusion of question "do you have any opinion as to the cause of the accident").

Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

In the Supreme Court case of *State v. Boyd,* the Court held that defendant correctly argues that expert opinion testimony is not rendered inadmissible on the basis that it embraces ultimate issues to be determined by the jury. N.C.G.S. § 8C-1, Rule 704 (1992). Further, "expert opinion testimony concerning a defendant's state of mind is admissible to negate the first-degree murder elements of premeditation and deliberation." *State v. Baldwin*, 330 N.C. 446, 460, 412 S.E.2d 31, 39 (1992); *State v. Shank*, 322 N.C. 243, 248-49, 367 S.E.2d 639, 643 (1988). Nevertheless, we have held previously that a trial court does not abuse its discretion by preventing an expert witness from testifying that a defendant did not act in a cool state of mind. *State v. Weeks*, 322 N.C. 152, 167, 367 S.E.2d 895, 904 (1988). *Weeks* held that such testimony embraces precise legal terms, definitions of which are not readily apparent to medical experts. What defendant sought to accomplish with this testimony was to have the experts tell the jury that certain legal standards had not been met. . . . Having the experts testify as requested by defendant would tend to confuse, rather than help, the jury in understanding the evidence and determining the facts in issue. *Id.* at 166-67, 367 S.E.2d at 904.

State v. Boyd, 343 N.C. 699, 473 S.E.2d 327 (1996).

Expert Testimony Excluded as embracing legal standard.

In *Hajmm v. House of Raeford,* the Supreme Court held that there are limits on the admissibility of expert opinion testimony. The advisory committee note to Rule 704 states:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact,

> and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurance against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria.
>
> N.C.G.S. § 8C-1, Rule 704 advisory committee's note.

North Carolina cases interpreting Rule 704 are to the same effect. "[U]nder the . . . rules of evidence, an expert may not testify that a particular legal conclusion or standard has or has not been met, at least where the standard is a legal term of art which carries a specific meaning not readily apparent to the witness." *State v. Ledford*, 315 N.C. 599, 617, 340 S.E.2d 309, 321 (1986) (error, but not prejudicial, to admit expert opinion that certain injuries were the "proximate cause" of death).

The distinction between legal standards and conclusions about which testimony may not be admitted, and ultimate facts about which testimony is admissible, is often difficult to draw. The advisory committee's note to Rule 704 gives a helpful example of the difference:

[T]he question, "Did [the testator] have capacity to make a will?" would be excluded, while the question, "Did [the testator] have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. N.C.G.S. § 8C-1, Rule 704 advisory committee's notes. This example illustrates the kind of opinion testimony, expert or not, that should be excluded by the rules as well as the kind of testimony that should be admitted under them. The term "'"[testamentary capacity]" is a conclusion which the law draws from certain facts as premises.'" *In re Will of Tatum*, 233 N.C. 723, 728, 65 S.E.2d 351, 354 (1951) (quoting *In re Will of Lomax*, 224 N.C. 459, 462, 31 S.E.2d 369, 370 (1944)). In the example given, opinion testimony would be allowed regarding the underlying *factual premises* the jury must consider in determining whether testamentary capacity exists, facts including the testator's ability to know the nature and extent of his property, to know the natural objects of his bounty, and to formulate a rational distribution scheme. Opinion testimony could not be offered on whether the *legal conclusion* that testamentary capacity existed should be drawn.

There is a distinction between a legal standard, or conclusion, and its factual premises in other contexts. *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988), held that it was reversible error for the trial court to exclude evidence offered by the defendant's expert that the "defendant's diminished mental capacity affected his ability to make and carry out plans." *Id.* at 246, 367 S.E.2d at 643. This testimony was directed to facts, even if regarded as ultimate facts, which were relevant to whether the legal conclusion that defendant premeditated and deliberated should be drawn. *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988), held that the trial court correctly excluded a psychiatrist's testimony that the defendant was incapable of "premeditation and deliberation" because the proffered evidence went to whether a legal conclusion should be drawn. *See also*

State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988). *See generally* Note, *Mental Impairment and Mens Rea: North Carolina Recognizes the Diminished Capacity Defense in State v. Shank and State v. Rose*, 67 N.C.L. Rev. 1293 (1989).

There are two overriding reasons for excluding testimony that suggests whether legal conclusions should be drawn or whether legal standards are satisfied. The first is that such testimony invades not the province of the jury but "the province of the court to determine the applicable law and to instruct the jury as to that law." *F.A.A. v. Landy*, 705 F.2d 624, 632 (2d Cir. 1983), *cert. denied*, 464 U.S. 894, 78 L. Ed. 2d 232 (1983). It is for the court to explain to the jury the given legal standard or conclusion at issue and how it should be determined. To permit the expert to make this determination usurps the function of the judge. The second reason is that an expert is in no better position to conclude whether a legal standard has been satisfied or a legal conclusion should be drawn than is a jury that has been properly instructed on the standard or conclusion.

Ultimate jural relationships at issue are like legal standards and conclusions. It is improper to admit expert opinion testimony as to whether these relationships exist. "[W]here the legal relations growing out of the facts are in dispute, and the witness's words appear to describe the relations themselves, the same words may be objectionable." 1 H. Brandis, *Brandis on North Carolina Evidence* § 130 (3d ed. 1988). The expert may, however, give testimony regarding the existence of the underlying factual component of the relationship. The jury, after hearing the opinion testimony and upon proper instructions from the court, is in as good a position as the expert to say whether the relationship exists.

A fiduciary relationship "may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Stone v. McClam*, 42 N.C. App. 393, 401, 257 S.E.2d 78, 83, *disc. rev. denied*, 298 N.C. 572, 261 S.E.2d 128 (1979) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). Business partners, for example, are each other's fiduciaries as a matter of law. *Casey v. Grantham*, 239 N.C. 121, 79 S.E.2d 735 (1954). In less clearly defined situations the question whether a fiduciary relationship exists is more open and depends ultimately on the circumstances. Courts have historically declined to offer a rigid definition of a fiduciary relationship in order to allow imposition of fiduciary duties where justified. *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896. Thus, the relationship can arise in a variety of circumstances, *id.*, and may stem from varied and unpredictable factors.

A qualified expert such as Dr. Baarda should be permitted under Evidence Rule 704 to give an expert opinion regarding the existence of these factors. For example, the expert witness may give an opinion that under the circumstances one party has reposed special confidence in another party, or that one party should act in good faith toward another party, or that one party must act with due regard to the interests of another party. However, the witness may not opine that a fiduciary relationship exists or has been breached. The trial judge should instruct the jury with regard to factors that give rise to

the relationship. The jury so instructed is then in as good a position as the expert to consider the factors and determine whether the fiduciary relationship exists.

Likewise, the discretion vested in a board of directors arises from a variety of sources and circumstances, including statutes, corporate charters, bylaws, resolutions and agreements. Whether such discretion has been abused depends on numerous factors. One such factor prominent in the case before us was the availability of funds with which to retire plaintiff's certificate. Experts may give opinions regarding the existence of these underlying factors, such as, for example, the availability of funds, but they may not opine whether a board abused its discretion. Again the trial court should instruct on the legal significance of the underlying factors to which testimony has been offered. The jury so instructed is then in as good a position as the expert to consider the factors before it and determine whether the abuse of discretion standard has been satisfied.

Dr. Baarda should not have been permitted to give his opinion that there was a fiduciary relationship between plaintiff and defendants, that the defendants breached their fiduciary duty, and that the Raeford board abused its discretion. Whether there was a fiduciary relationship was the ultimate jural relationship at issue. Whether the fiduciary duty was breached was the ultimate legal conclusion, and whether the board abused its discretion involved the satisfaction or not of the ultimate legal standard. The jural relationship, the legal conclusion and the legal standard each have various underlying factual components, the existence of which were the proper subject of expert opinion testimony. The jury heard this fact-oriented testimony and, having been properly instructed on the legal significance of the underlying factual components, were in as good a position as the expert to determine whether the jural relationship existed, whether the legal conclusion should be drawn, and whether the legal standard was satisfied.

Hajmm v. House of Raeford, 328 N.C. 578, 403 S.E.2d 483 (1991).

In *Smith v. Childs,* the Court of Appeals held that in determining whether particular expert testimony should be admitted, "the inquiry should be not whether it invades the province of the jury, but whether . . . the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978); Rule 704 official commentary. *There are, nevertheless, limitations on the admissibility of expert opinion testimony*. An expert is not allowed to testify that a particular legal standard, or legal term of art, has been met. *HAJMM*, 328 N.C. at 586, 403 S.E.2d at 488. Terms such as, "testamentary capacity," and "premeditation and deliberation" are legal conclusions premised upon particular underlying facts. When the expert witness is *an expert legal witness*, the avoidance of testimony regarding legal conclusions can be problematical since attorneys deal with legal terms of art on a daily basis. However, while an expert may testify to the existence of the factual components, he may not testify as to the legal conclusions; such testimony invades the court's province to determine the applicable law and to instruct the jury on that law. *HAJMM*, 328 N.C. at 586-87, 403 S.E.2d at 488-89. The official commentary following Rule 704 provides a helpful example of this distinction:

[T]he question "*Did T have capacity to make a will*?" would be excluded, while the question, "*Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution*?" would be allowed. (emphasis added).

Other difficulties may also arise because of the nature of the action. Proof of legal malpractice necessitates an attempt to show what should have occurred without some error on the part of the attorney. Mallen & Smith, *Legal Malpractice* § 27.7 (1989). Accordingly, these cases often involve interpreting *the law itself* and posing such questions as "*Did the attorney make an error of law*?" Unlike most other experts, the legal expert is well versed in the law and has knowledge of the *legal issues* facing the court. However, while the legal expert may testify regarding the factual issues facing the jury, he is *not allowed* to either *interpret the law* or *to testify as to the legal effect of particular facts. See Wise v. Wise*, 42 N.C. App. 5, 7, 255 S.E.2d 570, 572, *disc. review denied*, 298 N.C. 305, 259 S.E.2d 300 (1979). Allowing expert testimony on these matters would amount to a jury instruction on the applicable law, thereby improperly invading the province of the court. *Williams v. Sapp*, 83 N.C. App. 116, 119-120, 349 S.E.2d 304, 306 (1986); *see also Board of Transportation v. Bryant*, 59 N.C. App. 256, 260-61, 296 S.E.2d 814, 817 (1982)

Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

Testimony excluded in Criminal Case.

In the Court of Appeals case of *State v. Najewicz*, the Court held that while a lay witness may testify in the form of an opinion which embraces an ultimate issue to be decided by the jury, N.C.R. Evid. 704; *Mobley v. Hill*, 80 N.C. App. 79, 86, 341 S.E.2d 46, 50 (1986) (incorrectly stated in S.E.2d), a lay opinion must be both (1) rationally based upon the witness' perception and (2) helpful to a clear understanding of the witness' testimony. N.C.R. Evid. 701. In the present case, there is no foundation showing the opinion called for was rationally based upon the perception and observations of the witness, defendant's supervisor. Further, assuming *arguendo* such an opinion would properly be the subject of expert testimony, there is no indication Ms. Stephenson was qualified to testify on such matters as an expert. *See Matheson v. City of Asheville*, 102 N.C. App. 156, 173-74, 402 S.E.2d 140, 150 (1991); *State v. Bowman*, 84 N.C. App. 238, 243-44, 352 S.E.2d 437, 440 (1987).

Second, while opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness. *State v. Rose*, 327 N.C. 599, 602-04, 398 S.E.2d 314, 315-17 (1990) (expert may not testify defendant was "capable of premeditating"). "Rape" is a legal term of art and accordingly Ms. Stephenson's opinion testimony concerning whether defendant was "capable of rape" was properly excluded. *See State v. Smith*, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985).

State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993).

Expert permitted to testify as to whether injuries intentionally inflicted.

In *State v. Murphy*, Dr. Deborah Radisch ("Dr. Radisch"), a forensic pathologist who performed an autopsy on Brian, testified to several head injuries sustained by Brian prior to his death. Dr. Radisch testified concerning the victim's injuries that "at least two of them have the potential to cause unconsciousness and death. It's difficult just by looking at the contusions to tell how severe the injury was, and I can't tell by the brain examination which one of those or which one of any of them caused the brain injury; but there are indications on the scalp that two of them were severe scalp -- at least severe scalp contusions."

Dr. Aaron Gleckman ("Dr. Gleckman"), a second forensic pathologist who consulted on Brian's autopsy, testified that he concurred with Dr. Radisch and was clear that the cause of death was from blunt force head trauma.

Defendant contends that this evidence should have been suppressed because it "allowed the doctors to tell the jury that the State had met its burden of proof on one of the elements necessary to the murder charge, that the injuries leading to death were inflicted intentionally." However, N.C. Gen. Stat. § 8C-1, Rule 702(a) provides that "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion."

Both Dr. Radisch and Dr. Gleckman offered evidence via testimony and opinion consistent with the testimony and opinion previously allowed by this Court. *See State v. McAbee*, 120 N.C. App. 674, 686, 463 S.E.2d 281, 288 (1995) (holding that the trial court did not abuse its discretion by allowing two pathologists to offer their opinion as to whether child's injuries were intentionally or accidentally inflicted), *disc. review denied*, 342 N.C. 662, 467 S.E.2d 730 (1996); *State v. West*, 103 N.C. App. 1, 8, 404 S.E.2d 191, 197 (1991) ("Our appellate courts have held that, based on a child's clinical presentation and history, a medical expert may testify that the wounds presented are inconsistent with accidental origin. The question and answer in this case falls under this general rule." (citations omitted)). Dr. Radisch and Dr. Gleckman both based their opinions upon their years of experience as pathologists, during which they performed and consulted on numerous autopsies. Dr. Radisch explained that she based her determination on the location of Brian's injuries, noting that the curvature of Brian's skull would have prevented the four distinct areas of contact on Brian's scalp from occurring as a result of an accidental fall. Dr. Radisch testified that she believed Brian suffered at least two "separate" injuries, or at least two "impacts," and that the lack of any distinct contrecoup brain contusions led to her conclusion that Brian had not been injured by a fall. As detailed above, Dr. Gleckman based his conclusion on his recognition that children do not die from ground level falls, and that the amount of injuries to Brian's head prevented him from determining that Brian had fallen from a height significant enough to kill him. In light of the foregoing, we conclude that the trial court did not err by allowing

the doctors to testify that, in their opinion, Brian suffered intentionally, rather than accidentally, inflicted injuries.

State v. Murphy, 172 N.C. App. 734, 616 S.E.2d 567 (2005).

Impermissible for officer to testify that defendant was guilty

In *State v. Carillo,* Sergeant White's and Agent Doherty's testimony informed the jury how drugs are sent through a chain of drug handlers. The Court of Appeals held that the trial court erred in allowing the officers to offer their opinions of whether defendant was guilty. *See State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274, 120 S. Ct. 351 (1999) ("The trial judge . . . has the duty to supervise and control a defendant's trial . . . to ensure fair and impartial justice for both parties."); *but see State v. Crawford*, 329 N.C. 466, 477, 406 S.E.2d 579, 585 (1991) ("Rule 704 provides that 'testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.' N.C.G.S. § 8C-1, Rule 704 (1988).").

Evidence at trial showed that the package was intercepted by the U.S. Customs agents and contained three ceramic turtles with a substantial amount of cocaine concealed inside. The package was mailed from a location in Mexico that U.S. Customs agents had identified as a mail origination point for cocaine sent to the United States. The package was addressed to defendant at his residence. Defendant accepted the package. It was found inside his residence minutes after he had taken possession of it. Broken pieces of similar turtles containing traces of cocaine were also found inside his apartment.

Although it was error to allow the law enforcement officers to provide their opinions regarding defendant's guilt, defendant has failed to show that without this testimony the jury would have reached a different verdict.

State v. Carillo, 164 N.C. App. 204, 595 S.E.2d 219 (2004).

Rule 705-Facts Underlying Expert Opinion

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question.

In *State v. Smith,* the Supreme Court stated that N.C.G.S. § 8C-1, Rule 705, eliminates the requirement that experts' opinion testimony be in response to a hypothetical question. Rule 704 provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." In this case, an "ultimate issue" was whether the victims' injuries were caused by a male sex organ. As to Gloria, Dr. Woodworth testified that, in his opinion, the injuries were caused by "a male penis."

We hold that Dr. Woodworth's failure to qualify his opinion by the words "could" or "might" did not render this testimony as to an ultimate issue improper. On cross-examination, Dr. Woodworth agreed that the injuries he observed during his examination of Gloria could have been caused by some other object the same size and shape as a penis. Dr. Woodworth did not testify that Gloria had been raped, nor that the defendant raped her. The rule that an expert may not testify that such a particular legal conclusion or standard has or has not been met remains unchanged by the new Evidence Code, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. 3 D. Louisell & C. Mueller, Federal Evidence § 395 (1979). *See also State v. Robinson,* 310 N.C. 530, 538, 313 S.E. 2d 571, 577 (1984).

State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

In *State v. Lyons,* the Supreme Court stated:

Rule 705 of the North Carolina Rules of Evidence provides in pertinent part:
The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. *The expert may in any event be required to disclose the underlying facts or data on cross examination.*
N.C.G.S. § 8C-1, Rule 705 (1992) (emphasis added).

Dr. Hoover testified on direct examination that he had obtained records from nine sources as part of his forensic psychological evaluation of the defendant. Dr. Hoover also testified that symptoms of the defendant's bipolar disorder included episodic run-ins with the law.

On cross-examination, Dr. Hoover testified that he used records from the South Carolina Department of Corrections as a basis for formulating his opinions. Evidence regarding defendant's behavior while incarcerated in South Carolina was contained in those records. Therefore, pursuant to Rule 705, it was proper for the prosecutor, during cross-examination, to question Dr. Hoover regarding those records, as they were used to formulate his opinion that defendant was suffering from bipolar disorder. The trial court's rulings were in all respects proper.

State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996).

In *State v. Gary*, the defendant argued that it was error to admit the opinion of an SBI lab analyst that mass spectra of residues found in the pool hall indicated the presence of cocaine, on the ground that the tests were performed by someone else. In order to be a proper basis for expert opinion, such test results, if otherwise inadmissible, must be "of a type reasonably relied upon by experts in the particular field." G.S. 8C-1, R. Ev. 703; W. Blakey, Examination of Expert Witnesses in North Carolina, 61 N.C.L. Rev. 1, 20-32 (1982) (equivalence with "inherently reliable" standard). When testifying, the expert need not identify the basis of the opinion testimony beforehand, absent a specific request. G.S. 8C-1, R. Ev. 705. Defendant did not challenge the technique of mass spectrometry itself in the trial court, nor does he do so here. It appears to be generally recognized as reliable. *See United States v. Distler*, 671 F. 2d 954 (6th Cir.), *cert. denied*, 454 U.S. 827, 70 L.Ed. 2d 102, 102 S.Ct. 118, *reh'g denied*, 454 U.S. 1069, 70 L.Ed. 2d 604, 102 S.Ct. 619 (1981); *People v. DeZimm*, 112 Misc. 2d 753, 447 N.Y.S. 2d 585 (1981), *aff'd*, 102 A.D. 2d 633, 479 N.Y.S. 2d 859 (1984); *Bostic v. State*, 173 Ga. App. 494, 326 S.E. 2d 849 (1985). He does not argue that the expert herself was not qualified to rely on the test data to give opinion testimony. *See State v. Hunt*, 305 N.C. 238, 287 S.E. 2d 818 (1982) (must be specific request for qualification). Nothing else appearing, the fact that the expert did not perform the tests herself does not require exclusion of the evidence. R. Ev. 705. While the question is not squarely before us at this time, we believe a party who fails to request the specific basis for expert testimony at trial under R. Ev. 705 should have difficulty sustaining a hearsay objection on appeal.

State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

In *State v. White*, defendant contended that during the penalty phase of the trial, the trial court erred by allowing the State to cross-examine the defense's expert witness in psychiatry, Dr. John Billinsky, about the work of Dr. William Varley, upon which Billinsky had relied. Dr. Varley is a clinical psychologist who conducted psychological testing on defendant and reported his conclusions to Dr. Billinsky. The prosecutor questioned Dr. Billinsky about a conclusion drawn by Dr. Varley with which Dr. Billinsky disagreed. Defendant argues that such cross-examination was improper because it allowed the prosecutor to introduce into evidence Varley's conclusions without the defense having an opportunity to cross-examine Varley, thereby violating defendant's constitutional right to confrontation.

This type of cross-examination is proper under Rule 705 of the Rules of Evidence. *See*

State v. Simpson, 341 N.C. 316, 354-55, 462 S.E.2d 191, 213 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996); *State v. Allen*, 322 N.C. 176, 183, 367 S.E.2d 626, 629-30 (1988). Rule 705 provides in pertinent part:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination.
>
> N.C.G.S. § 8C-1, Rule 705 (1992).

In *Allen* 322 N.C. 176, 367 S.E.2d 626, the defense's expert witness relied upon material in a prior psychiatric report, yet the expert witness disagreed with the ultimate diagnosis in this report and formed his own. Cross-examination by the State concerning the previous, differing diagnosis was proper, as Rule 705 provides for cross-examination on the underlying facts and data used by an expert in reaching his expert opinion.

Because Dr. Billinsky relied on the work of Dr. Varley, Rule 705 permitted the prosecutor to cross-examine Dr. Billinsky about Dr. Varley's conclusions, including those with which Dr. Billinsky disagreed.

State v. White, 343 N.C. 378, 471 S.E.2d 593 (1996).

Rule 706-Court Appointed Experts

Rule 706. Court appointed experts.

(a) *Appointment.* -- The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) *Compensation.* -- Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) *Disclosure of appointment.* -- In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection.* -- Nothing in this rule limits the parties in calling expert witnesses of their own selection.