

HANDLING CAPITAL CASES

RECURRING TRIAL ISSUES

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**OFFICIAL LEARNING
OBJECTIVE**

Identify and properly rule upon
recurring issues during the trial of
a capital case

UNOFFICIAL LEARNING OBJECTIVE

If you remember nothing else:

“BREAD”

AND

“DRINK”





TOPICS COVERED

- Defendant's Presence
- Self-Representation and Standby Counsel (Trial Issues)
- Evidentiary Issues, Defenses and Experts
- Jury Argument
- Jury Instructions and Verdict Forms

DEFENDANT'S PRESENCE



DEFENDANT'S PRESENCE

- Moody's case is called for trial. During jury selection, Moody says he is not feeling well. You tell him jury selection will continue, and that he must remain present to participate in the proceedings. Moody is adamant, however, and voluntarily agrees to waive his presence for jury selection and be returned to his cell for the rest of the day.
- Do you allow him to do so?



DEFENDANT'S PRESENCE

- Reference materials and other representative cases:
- Farb, Capital Case Law Handbook ("Farb"), pp. 70-75
- State v. Chapman, 342 N.C. 330 (1999)
- State v. Buchanan, 330 N.C. 202 (1991)
- State v. Lee, 335 N.C. 244 (1994)

SELF-REPRESENTATION & STANDBY COUNSEL: TRIAL ISSUES

- Standby counsel
- Hybrid representation
- Tactical decisions
- Removal of counsel during trial

SELF-REPRESENTATION & STANDBY COUNSEL: TRIAL ISSUES

- During trial, Clark (*pro se*) tells you he wants to appear for trial in his prison clothes. Standby counsel intervenes and objects, asking you not to grant the request because of the inherent prejudice to the defendant.
- What do you do?



STANDBY COUNSEL

- May be appointed to assist pro se ▲
- Discretionary matter for trial judge
- May not be appointed over ▲'s objection
- Standby counsel's role is limited to assisting defendant when called upon & to bring favorable matters to court's attention
- Procedure set forth in G.S. 15A-1243

STANDBY COUNSEL

- Court may not permit standby counsel to advocate position over ▲'s objection
- Court may not permit standby counsel to intervene over ▲'s objection even for limited purpose of litigating a single motion
- Standby counsel ≠ hybrid representation
- State v. Thomas, 346 N.C. 135 (1997)

HYBRID REPRESENTATION

- ▲ does not have a right to act as "co-counsel" when counsel is representing him.
- Standby counsel does not have authority to represent *pro se* defendant
- Defendant has only two choices: appearing *pro se* or by counsel
- State v. Thomas; State v. Williams, 319 N.C. 73 (1987)



STANDBY COUNSEL

The jury finds Clark guilty of first degree murder. Clark then requests that standby counsel “re-enter” the case and represent Clark for the penalty phase.

Q: Must you grant the request? Should you? What are your considerations?

STANDBY COUNSEL

- Practical pointer:
- Address this potential issue with defendant when discussing the consequences of his decision to waive counsel and proceed *pro se*.
- Foreseeability is key

EVIDENTIARY ISSUES AND DEFENSES

- *Corpus Delicti*
- Gruesome Photographs
- Defenses: Diminished Capacity, Voluntary Intoxication, Insanity
- Experts



EVIDENTIARY ISSUES:
CORPUS DELICTI

The State attempts to introduce Clark's confession into evidence. Clark objects, arguing that the State has failed to establish the *corpus delicti*.

CORPUS DELICTI

- Q: Prior to introducing a confession in a capital case, the *corpus delicti*:
- A. No longer needs to be established before introducing a confession in a capital case.
 - B. Always requires the State to produce a corpse.
 - C. Does not require proof that defendant was the perpetrator.
 - D. Requires proof of felonious intent.

CORPUS DELICTI

- Felonious intent is not an element of *corpus delicti*
- Proof that the defendant was the perpetrator of the crime is not an element of a corpus in North Carolina. State v. Parker, 315 N.C. 222 (1985).
- Parker also relaxed the corpus rule in non-capital cases.



CORPUS DELICTI

The State's burden is to establish the corpus with competent evidence which tends to show a death of one person by the criminal act or agency of another. State v. Cintron, 132 N.C. App. 605 (N.C. App.), *rev'd on other grounds*, 351 N.C. 39 (1999).

CORPUS DELICTI

To establish the corpus in a homicide cases, there must be a corpse, or circumstantial evidence so strong and cogent that there can be no doubt of the death. State v. Cintron, *supra*; State v. Dawson, 278 N.C. 351 (1971)

EVIDENTIARY ISSUES:
PHOTOGRAPHS

Moody's counsel offers to stipulate to cause of death and moves to exclude all autopsy photos. You:

- A. Compel the State to accept the stipulation and exclude the photos.
- B. May not compel State to accept stipulation, and photos come in if otherwise admissible.
- C. May only permit the photos to be used as demonstrative aids.



PHOTOGRAPHS

- Moody tells you he disagrees with his attorney’s strategy:
- “I don’t want my attorney stipulating to anything. If the State wants to kill me, they’re gonna have to prove their case without my help.”
- What if anything do you do?

PHOTOGRAPHS

- During trial, the State seeks to introduce thirty-five 8 x 10 color photos of the crime scene and autopsy. The State also seeks to display them as slides on a 3 x 5 foot screen during the testimony of several witnesses.
- How do you analyze this issue?

PHOTOGRAPHS

- Q. Generally, the court’s admission of gory or gruesome photos is:
- A. Necessary to keep the jurors awake.
 - B. Discretionary & will not be disturbed on appeal absent an abuse of discretion.
 - C. A mixed question of law & fact entitled to substantial deference on review.
 - D. A matter of law for *de novo* review on appeal.



PHOTOGRAPHS

A photo is relevant if it:

- Illustrates the testimony of a witness;
- Assists jury in understanding testimony;
- Bears on issue of premeditation, malice, intent, or nature & extent of violence.
State v. Skipper, 337 N.C. 1 (1994).

PHOTOGRAPHS

- If you find photos are relevant:
- Determine whether the content, number, or manner of presentation is so inflammatory as to create an undue prejudice in the minds of the jury & distract them from a fair consideration of the evidence.
- 403 balancing test.

PHOTOGRAPHS

- **Factors to consider in analysis:**
 1. What the photos depict (e.g., photos of scene taken from different angles, photos showing location of different wounds, nature & severity of injuries, pre-mortem v. post-mortem injuries)
 2. Level of detail in the photos (e.g., gruesome nature, color v. B & W, close-ups)



PHOTOGRAPHS

➤ **Factors to consider in analysis:**

3. Number & size of photos introduced (e.g., cumulative nature, excessive number)
4. The scope of the accompanying testimony (i.e., the extent to which the photo actually assists in explaining or illustrating the witness' testimony)

PHOTOGRAPHS

➤ **Factors to consider in analysis:**

5. Proffered relevance for each photo
6. Whether photos are unnecessarily duplicative of other evidence or testimony
7. Whether photos are introduced solely to arouse passions of jury
8. Manner and circumstances surrounding presentation of photos

PHOTOGRAPHS

Reference materials and representative cases:

- State v. Hennis, 323 N.C. 279 (1988)
- State v. Haselden, 357 N.C. 1 (2003)
- State v. Hyde, 352 N.C. 37 (2000)
- State v. Blakeney, 352 N.C. 287 (2000)
- G.S. §8C-1, Rule 403
- Farb, pp. 135-6
- Brandis & Broun, North Carolina Evidence, pp. 292-4 (6th Ed. 2004).



PHOTOGRAPHS

- Ways to minimize prejudicial impact:
 - Limit number of photos
 - Limit size of photos
 - Prohibit introduction of cumulative photos
 - Black & White v. Color

PHOTOGRAPHS

- Ways to minimize prejudicial impact:
 - Limit manner of presentation (e.g, photos v. overhead slide presentation)
 - Cropping photos
 - Discussing issue with jury during *voir dire* (preconditioning)
 - Limiting instruction at time of introduction

PHOTOGRAPHS

- Compare State v. Hennis, 323 N.C. 453 (1988)(35 photos of murder scene & autopsy excessive, particularly in light of projection of slides on screen above defendant's head) with
- State v. Dickens, 346 N.C. 26 (1997) (no error to admit 5 autopsy photos & 6 photos of body at crime scene) & with
- State v. Hyde, 352 N.C. 37 (2000)(no error to admit 51 photos of victim's body where photos corroborated details of defendant's confession)



PHOTOGRAPHS

- Practical Pointer:
- Make sure to mark all photographs for identification, whether admitted or excluded, to show appellate court the universe of photographs from which you made your determinations of relevance and relative prejudice.

INSANITY/DIMINISHED CAPACITY/VOLUNTARY INTOX.

- Burden of production and entitlement to jury instruction
- Burden of persuasion
- Applicability to premeditated murder and felony murder theories
- Expert testimony

INSANITY

- Test: Whether, at the time of the alleged act, defendant was:
 1. Laboring under such a defect of reason;
 2. from a disease or deficiency of the mind;
 3. as to be incapable of knowing the nature and quality of his act; or
if he did know this, was incapable of distinguishing between right and wrong in relation to such act.
- State v. Evangelista, 319 N.C. 152 (1987)



INSANITY

- Insanity defense “excuses” defendant from criminal responsibility
- Defense unrelated to the existence or nonexistence of the elements of the offense
- Burden of production (of insanity defense) on defendant
- Burden of persuasion (of insanity defense) on defendant

INSANITY

- Burden remains on State to prove defendant's guilt by establishing each element of the crime beyond a reasonable doubt.
- If the State has established defendant's guilt beyond a reasonable doubt, then burden shifts to the defendant to prove, “to the jury's satisfaction,” his insanity.

VOLUNTARY INTOXICATION and DIMINISHED CAPACITY

- Burden of production on defendant
- Burden of persuasion on State
- Jury must determine: if State meets its burden of proof, did the evidence create a reasonable doubt whether defendant's voluntary intoxication or other mental or emotional condition prevented him from forming the specific intent to kill



VOLUNTARY INTOXICATION

- Entitlement to instruction: Defendant must present substantial evidence that he was “so intoxicated and overthrown that he was utterly incapable of forming the specific intent to kill.”
- State v. Mash, 323 N.C. 339 (1988); State v. Clark, 324 N.C. 146 (1989)

VOLUNTARY INTOXICATION

- Did Defendant meet production burden?
 - Nature/amount of intoxicant
 - Degree of impairment
 - Contemporaneous behavior
 - Capacity to form intent (lay & expert testimony)
 - Defendant’s memory of incident
 - Evidence of other disorders
- Evidence must be viewed in light most favorable to defendant

DIMINISHED CAPACITY

- Entitlement to instruction: There must be sufficient evidence of defendant’s mental condition “reasonably to warrant inference of the fact at issue.”
- To cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the specific intent to kill
- State v. Clark, 324 N.C. 146 (1989)



DIMINISHED CAPACITY

- Lay testimony allowed?
- No cases directly on point, *but see* State v. Evangelista, 319 N.C. 152 (1987); State v. Stokes, 308 N.C. 634 (1983)
- Lay testimony permitted for insanity and voluntary intoxication. Same rationale should apply to diminished capacity.



	INSANITY	VOLUNTARY INTOXICATION	DIMINISHED CAPACITY
BURDEN OF PRODUCTION	On def. to establish insanity	Substantial evid. that def. "utterly incapable" of forming required state of mind*	Sufficient evidence "reasonably to warrant inference of the fact at issue."
BURDEN OF PERSUASION	On def. to prove insanity "to jury's satisfaction"	On State to disprove vol. intox. beyond reasonable doubt	On State to disprove dim. cap. beyond reasonable doubt
COMPLETE DEFENSE TO 1ST DEG. PREM. MURD.	Yes- def. avoids criminal liability	No. Only negates an element of 1 st degree murder	No. Only negates an element of 1 st degree murder

	INSANITY	VOLUNTARY INTOX	DIMINISHED CAPACITY
DEFENSE TO 1ST DEGREE FELONY MURDER	Yes	Defense allowable only if underlying felony requires specific intent*	Defense allowable only if underlying felony requires specific intent*
DEFENSE TO 2ND DEGREE MURDER?	Yes	No. 2 nd degree does not require specific intent to kill	No. 2 nd degree does not require specific intent to kill
LAY OPINION TESTIMONY ALLOWED?	Yes- e.g., right v. wrong	Yes- nature and extent of intoxication	Not yet decided- would seem likely to be allowed



EXPERTS

- Expert may render opinions on subjects within the scope of the witness' expertise, but this generally may not include the use of precise legal terms
- Expert may express opinion even if it embraces an ultimate issue
- State v. Shank, 322 N.C. 243 (1988)
- Rule 704

EXPERTS

- Examples of opinions held inadmissible:
- Defendant's ability to "premeditate" or "deliberate"
- Whether defendant acted in a "cool state of mind"
- Whether defendant acted under a "suddenly aroused state of passion"

EXPERTS

- Examples of opinions held admissible:
- Defendant's ability to make or carry out plans
- Whether defendant was under the influence of a mental or emotional disturbance
- Lay descriptions of defendant's actions evidencing ability/inability to premeditate or deliberate
- Whether defendant had specific intent to kill



EXPERTS

- State v. Allison, 307 N.C. 411 (1983):
- If expert's opinion is admissible, he may testify to the information relied upon in forming that opinion, including (generally) statements made by the defendant to the expert

EXPERTS

- Such statements are not admissible as substantive evidence, but to establish basis of expert's opinion
- However, court may exclude defendant's statements under 403 analysis
- State v. Baldwin, 330 N.C. 446 (1992)

EXPERTS

- Such statements are generally admissible if:
- Defendant's statements serve to explain the basis of the expert's opinion; and
 - The statements shed light on the defendant's claimed mental health defense
 - Court has discretion to control mode and order of presentation of testimony
 - Rule 611



DEFENSES and EXPERTS

- Reference materials:
- John Rubin, "The Diminished Capacity Defense", 1992
- John Rubin, "The Voluntary Intoxication Defense", 1993
- www.ioq.unc.edu/programs/crimlaw

JURY ARGUMENT



Counselor! Please refer to the charge as "murder", not "thinning out the herd."

JURY ARGUMENT

- Defense Counsel Conceding Guilt
- Court's Limitations on Closing
- Improper Closing Argument

Defense Counsel Conceding Guilt

State v. Harbison, 315 N.C. 175 (1985)
Counsel cannot concede guilt in opening or closing without defendant's consent
➤ *Per se* ineffective assistance of counsel: prejudice irrelevant

Defense Counsel Conceding Guilt

- Cannot concede guilt to crime charged or to a lesser-included offense without defendant's authorization. Decision must be made exclusively by defendant.
- State v. Matthews, 358 N.C. 102 (2004)
- Equivalent of defense counsel entering a guilty plea for client without client's consent

Defense Counsel Conceding Guilt

- What does Harbison permit without obtaining defendant's express consent?
- "My client is innocent but if he's guilty of anything, he's guilty of lesser crime of second degree murder." State v. Gainey, 355 N.C. 73 (2002); State v. Harvell, 334 N.C. 356 (1993)



Defense Counsel Conceding Guilt

- “The difference between first and second degree murder is specific intent, and the state has failed to prove specific intent.”
State v. Campbell, 359 N.C. 644 (2005).

- *Cf. Harbison*: “I don’t feel that he should be found innocent. I think you should find him guilty of manslaughter, not first degree murder.”

Defense Counsel Conceding Guilt

- Where a defendant stipulates that the elements of a lesser offense have been proven, defense counsel may infer consent & argue guilt of the lesser to the jury.
- State v. McNeil, 346 N.C. 233 (1997)
- Better practice: get explicit consent

Defense Counsel Conceding Guilt

Practical Pointers:

- Address issue in pretrial conference
- If counsel advises that defendant consents to strategy:
 - Get it in writing
 - Colloquy defendant on record



Defense Counsel Conceding Guilt

- Establish “signal” from defendant if counsel exceeds scope of consent
- Ratification after counsel concludes argument
- State v. McDowell, 329 N.C. 363 (1991); State v. Thompson, 359 N.C. 77 (2004)(regarding proper colloquy and procedure to follow)

Court’s Limitations on Closing

- Court may not limit:
 - Number of attorneys who can address jury
 - Number of times attorneys may address jury
 - Length of time attorneys may address jury
- Only exception: Can limit to 3 the number of attorneys (per side) permitted to address jury

Court’s Limitations on Closing

Court’s refusal to permit more than 1 attorney to make closing argument is *per se* error, requiring new trial. State v. Eury, 317 N.C. 511 (1986); State v. Mitchell, 321 N.C. 650 (1988)

- G.S. 7A-97



Improper Closing Argument

General principles regarding closing:

1. Arguments of counsel are left largely to the control & discretion of the trial judge
2. Prosecutors have a duty to advocate zealously
3. Attorneys are given particularly wide latitude in “hotly-contested cases.” State v. McCollum, 334 N.C. 208 (1993)

Improper Closing Argument

General principles regarding closing:

4. Attorneys, on the basis of their analysis of the evidence, may argue any position or conclusion regarding a matter in issue. G.S. §15A-1230
5. Absent an objection, the court is not obligated to intervene *ex mero motu* unless the argument is “grossly improper.” State v. Davis, 349 N.C. 1 (1998).

Improper Closing Argument

> Attorneys may NOT:

1. Engage in name-calling or denigrating
2. Inject personal experiences
3. Seek to arouse jury passion or prejudice
4. Express personal opinions or beliefs regarding the evidence or defendant
5. Argue matters outside the record



Improper Closing Argument

➤ Other areas to be watchful of:

1. Biblical references (generally discouraged but often upheld on the basis that counsel did not object & argument was not “grossly improper”)

See, e.g., State v. Williams, 350 N.C. 1 (1999); State v. Bond, 345 N.C. 1 (1997); State v. Haselden, 357 N.C. 1 (2003); State v. Gell, 351 N.C. 192 (2000).

Improper Closing Argument

➤ Other areas to be watchful of:

2. Improper characterization of defendant:

- “Wild hogs on the taste of blood and power over their victims.” State v. Roache, 358 N.C. 243 (2004)
- “Monster”, “Demon” “Man without morals”, “mean S.O.B.”. State v Matthews, 358 N.C. 102 (2004); State v. Maske, 358 N.C. 40 (2004)

Improper Closing Argument

➤ Other areas to be watchful of:

3. Disparaging defense counsel or defense theory

e.g., Defense theory is “bull crap”
State v. Matthews, 358 N.C. 102 (2004)



Improper Closing Argument

- Other areas to be watchful of:
 - 4. Improper comparisons of case to other infamous events
e.g., comparing defendant's actions to Columbine shooting, Oklahoma City bombing or 9/11 disaster.
State v. Jones, 355 N.C. 117 (2002)

Improper Closing Argument

- Jones: Argument shifted focus from facts of case to prosecutor's opinion & appeal to passion & prejudice
- Court recognizes reluctance of opposing counsel to interrupt adversary during closing for fear of incurring jury disfavor
- Underscores judge's obligation

Improper Closing Argument

- Incumbent upon trial court to:
 - Monitor vigilantly the arguments of counsel
 - Intervene as warranted without objection
 - Entertain objections
 - Impose appropriate remedies (instructions to jury, requiring attorney to retract argument)



Improper Closing Argument

- Judge as “Gatekeeper”:
- Diligently ensure that attorneys honor their professional obligations
- Take appropriate action against attorneys who purposely violate courtroom protocol
- Treat rules as a floor, not a ceiling

Improper Closing Argument

- Reference materials:
 - G.S. 15A-1230
 - Rule 12, General Rules of Practice for Superior and District Courts
 - Professional Conduct Rule 3.4(e)

Improper Closing Argument

- Intervening without objection:
- Court not required to intervene *ex mero motu* unless the argument is “grossly improper”
- On appeal, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.
- State v. Thompson, 359 N.C. 77 (2004)



Improper Closing Argument

- On appeal, court will consider nature & weight of evidence. Closer the case, more likely the improper argument will be found prejudicial.
- Closer the case, more likely counsel is to engage in improper argument.
- Underscores need to carefully listen to closing argument

JURY INSTRUCTIONS

- Lesser Included Offenses
- Verdict Forms and Findings

JURY INSTRUCTIONS: LESSERS

- Q: Defendant's defense is alibi. Defendant does not contest the State's proof of 1st degree murder. Defendant requests an instruction on the lesser of 2nd degree murder. The State objects. You:
- A. Give the instruction on 2nd degree murder
 - B. Deny the instruction on 2nd degree murder
 - C. Hope somebody mistries the case during closing so you don't have to decide.



JURY INSTRUCTIONS: LESSERS

- Lesser-included offenses of first-degree murder charged in a short-form indictment are:
 - Second-degree murder
 - Voluntary manslaughter
 - Involuntary manslaughter
- When causation is at issue the additional lessers are attempted first-degree murder and attempted voluntary manslaughter.

JURY INSTRUCTIONS: LESSERS

- Felonious assaults (e.g., assault with a deadly weapon with intent to kill) are not lesser offenses of 1st degree murder, & must be indicted separately. State v. Collins, 334 N.C. 54 (1993).

JURY INSTRUCTIONS: LESSERS

- A defendant is entitled to an instruction on a lesser included offense if there is any evidence to support it. Beck v. Alabama, 447 U.S. 625 (1980); State v. Conaway, 339 N.C. 487 (1995)



JURY ISSUES: VERDICT

A verdict form which allows jurors to specify which theory (premeditation or felony-murder) they relied upon:

- A. Is now required under statute
- B. Is now prohibited under statute
- C. Is encouraged by the Sup. Ct.
- D. May be helpful in the penalty phase

JURY ISSUES: VERDICT

- If verdict form does not provide for jury to indicate which theory it relied upon, or if a general verdict is returned (i.e., no indication of which theory jury relied upon), court must treat verdict as one based upon felony-murder theory.

JURY ISSUES: VERDICT

- As a consequence:
 - Defendant cannot be sentenced for underlying felony because the felony is merged into the murder conviction
 - Underlying felony cannot be used as an aggravating circumstance at the penalty phase. State v. Silhan, 302 N.C. 223 (1981)

