EVIDENCE UPDATE
JUNE 2008

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This summary includes cases discussing general evidence issues arising under the North Carolina Rules of Evidence. It does not include cases discussing the exclusionary rule arising from constitutional violations or exclusion of evidence as a discovery sanction and does not exhaustively discuss evidence issues related to confrontation clause claims. Cases decided between July 30, 2007 and May 21, 2008 are covered.

RULE 401

State v. Raines, 362 N.C. 179, 657 S.E.2d 374 (December 7, 2007)
Error to admit testimony by victim's sister about their mother's reaction to victim's death. Citing cases, the Court noted that "character evidence of a victim is usually irrelevant during the guilt-innocence portion of a capital trial, as is victim-impact evidence." However, no plain error and no prejudice in view of overwhelming evidence of defendant's guilt.

State v. Hope, ___ NCApp __, 657 S.E.2d 909 (March 18, 2008)
In murder trial, no error to admit testimony from victim's mother that victim had addiction issues with drugs and a photograph of the victim was properly admitted. The evidence concerning the victim's drug use was relevant to support the State's theory that the murder was drug-related, and a victim's photograph in a murder case is usually relevant to show his appearance and health before the murder. It was error, however, to allow cross-examination of defendant concerning whether tattoos and burn marks were indicative of defendant's gang membership, where no evidence that the murder was gang-related. Not prejudicial, given overwhelming evidence of defendant's guilt.

State v. Graham, ___ NCApp ___, 650 S.E.2d 639 (October 2, 2007)
Victim impact testimony by murder victim's mother concerning how murder affected her was irrelevant to guilt-innocence and should have been excluded. Accord, State v. Bowman, ___ NCApp ___, 656 S.E.2d 638 (February 20, 2008) *stay granted*, ___ NC ___, 2008 N.C. LEXIS 253 (March 11, 2008)(reversible error to allow previous victims of defendant's sex offenses to testify about emotional impact of crimes on them).

State v. Brockett, ___ NCApp ___, 647 S.E.2d 628, *disc. rev. denied*, 361 N.C. 697 (2007)
Tape recording of conversation between defendant and his brother was properly admitted. Even though it contained much profanity and irrelevant discussion, it did contain some statements by defendant indicating guilt and thus was relevant.

State v. Gayton, ___ NCApp ___, 648 S.E.2d 275 (August 7, 2007)
Evidence about defendant's gang membership, dangerousness of hollow point bullets, and law enforcement concerns about safety were not relevant in case concerning drug trafficking where none of those matters were of concern.

RULE 403

State v. Whaley, 362 N.C. 156, 655 S.E.2d 388 (January 25, 2008)
This is an unusual case because it actually reversed the trial court's ruling that certain evidence should be excluded under Rule 403. Ordinarily appellate courts give high deference to the trial court's discretion when reviewing Rule 403 determinations. In this case, the trial judge prohibited defense cross-examination of the victim in an assault case about the victim's answers to certain questions on a questionnaire she filled out for a counselor; her answers indicated she had difficulty recalling events. The Court ruled that especially where the witness is the only evidence against the defendant, the trial court should allow in any evidence relevant to the witness's credibility. The evidence at issue here directly went to the witness's ability to see, hear, know, and remember, even though it concerned her mental state on a date not the date or the crime and not the date of her testimony.

RULE 404(b)

State v. Peterson, 361 N.C. 587, 652 S.E.2d 216 (November 7, 2007)
Defendant charged with murdering wife. Evidence of death under similar circumstances of woman whose death financially benefited defendant was admissible.

State v. Carpenter, 361 N.C. 382; 646 S.E.2d 105 (June 28, 2007)
Minimal similarities are not enough to admit evidence of another criminal act under Rule 404(b). "The 1996 sale and the alleged 2004 possession with intent to sell differed in numerous material aspects. Neither the collective weight of the crack cocaine nor the unpackaged state of the rocks, whether considered as separate factors or together, makes the past crime and the instant offense 'similar' as we have interpreted that term in this context. Accordingly, defendant's 1996 sale of cocaine, as a prior bad act, did not constitute 'substantial evidence tending to support a reasonable finding by the jury that the defendant committed [a] *similar* act,' and hence was inadmissible under Rule 404(b)." The error was prejudicial, and a new trial was awarded.

State v. Daniels, ___ NCApp ___, 659 S.E.2d 22 (April 15, 2008)
In rape case, trial court properly admitted receipt to defendant for rental of pornographic movies found in van to show defendant had been in the van. Failure to give limiting instruction was not error where defendant did not ask for one. No error to admit evidence of prior assaults on victim which occurred immediately upon defendant's release from jail on domestic violence charges, since this was also true of the offense at issue and evidence was relevant to show plan, motive, and lack of consent.

State v. Bowman, ___ NCApp ___, 656 S.E.2d 638 (February 20, 2008), *stay granted*, ___ NC ___, 2008 N.C. LEXIS 253 (March 11, 2008)
Defendant charged with aiding and abetting statutory rape by allowing 24 year old male friend to have sex with young teenager in his house while he was present and after he provided alcohol. No error to admit evidence concerning circumstances surrounding defendant's previous abuse of two other victims because the similarities in the three incidents showed plan, motive, and intent. It was error to admit the facts of the underlying convictions for those crimes, however, but error was harmless given the admissibility of the underlying facts. The trial court also allowed the two previous victims to testify about the emotional and social problems the defendant's prior bad conduct had had on them. While relevant at sentencing, it was not relevant to any disputed issue concerning guilt or innocence. The Court found reversible error and a new trial was ordered.

State v. Mack, ___ NCApp ___, 656 S.E.2d 1 (February 5, 2008)
Similar drug deals properly admitted. They occurred six weeks apart at the same general location and involved a similar method of sale, where one person approached the car to make the deal and the other person held the drugs nearby. The fact that defendant's role was different on the two occasions did not make the two events so different as to require exclusion.

State v. Simpson, ___ NCApp ___, 653 S.E.2d 249 (December 4, 2007)
In kidnapping and attempted rape case, trial court properly allowed victim in another attempted rape 20 days later to testify. "The two incidents demonstrated many specific similarities, including that both incidents occurred in the early morning hours, defendant told both victims that his vehicle would not start, defendant told Payne he would let her live if she stopped struggling and told Farmer he would kill her if she made any noise, defendant told Payne he was 'out of his head' and told a law enforcement officer that he 'wasn't in [his] right mind' after the incident involving Farmer, defendant tried to restrain and silence both victims, and defendant ceased his efforts when the victims forcefully resisted his advances." The similarities in the incidents supported an inference that the same person committed both the earlier and later acts. Thus, the trial court did not abuse its discretion in admitting the testimony of the second victim.

State v. Goodwin, ___ NCApp ___, 652 S.E.2d 36 (November 6, 2007)
In murder case, defendant testified and claimed self-defense. Error to allow state to cross-examine defendant about two previous events where defendant assaulted someone and claimed self-defense. "All the jury could possibly draw from the evidence of the 1997 and 2001 incidents, as it was presented, was defendant's propensity for violence. Thus, we are left with the admission of evidence which could only be considered as proof of defendant's violent disposition, and specifically his propensity to attack others on slight provocation and then to claim self-defense without justification. . . . The theory of relevancy articulated by the State on this appeal is plainly prohibited by the express terms of Rule 404(b) disallowing '[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith.'"

State v. Petrick, ___ NCApp ___, 652 S.E.2d 688, (November 6, 2007), *disc.rev. denied,* 362 N.C. 242 (2008)
Defendant accused of murdering his wife due to financial and marital problems. Evidence about "defendant's financial dealings with other people, depletion of the victim's bank accounts, violent

acts toward the victim, and his adulterous relationships" was admitted. No error. "This evidence tended to show defendant's motive, intent, preparation, plan, absence of mistake, and knowledge. The relevancy of this evidence outweighs its danger of unfair prejudice."

State v. Brockett, ___ NCApp ___, 647 S.E.2d 628, *disc. rev. denied*, 361 N.C. 697 (2007)
Defendant charged and convicted of first degree murder and other assaults. State offered evidence that before the murder, defendant participated in three armed robberies where the same gun was used that was later used in the murder. State offered this through accomplice testimony and defendant's guilty pleas to the armed robberies. Even though the crimes weren't similar, there was no error. "From this testimony, it is clear that the evidence regarding Defendant's participation in the armed robberies established more than that Defendant had the propensity to break the law. This evidence . . . also demonstrated that Defendant had used or had access to the *same* firearm within two months of the shootings. At a minimum, this evidence was relevant to prove identity and plainly supports 'a *reasonable* inference that the same person committed both the earlier and later acts.'"

State v. Lloyd, ___ NCApp ___, 652 S.E.2d 299 (November 6, 2007)
In second degree murder case arising out of DWI, circumstances of previous DWI conviction were admissible to show defendant knew his license was suspended, thus tending to prove malice.

RULE 412

State v. Harris, ___ NCApp ___, 657 S.E.2d 701 (March 4, 2008)
In sexual assault case, defendant's testimony that he had seen victim on many previous occasions offer to trade sex for drugs was properly excluded under the rape shield rule, Rule of Evidence 412. While perhaps the excluded evidence offered some support for defendant's version that victim was raped while he was not in hotel room by someone victim had offered to exchange sex for drugs, the rape shield rule only allows evidence of the victim's prior sexual conduct in four specific situations and otherwise expressly excludes evidence of the victim's prior sexual conduct. None of the exceptions apply here. The trial court also did not err in excluding defendant's testimony that he and the victim had previously traded sex for drugs, since the defendant did not contend that he had done that with the victim on the date in question.

CHARACTER EVIDENCE

State v. Valdez-Hernandez, ___ NCApp ___, 646 S.E.2d 579 (July 3, 2007)
Character evidence offered by defendant about victim/witness's character for truthfulness improperly excluded. "The proper foundation for the admission of opinion testimony as to a witness's character for truthfulness or untruthfulness is personal knowledge . . . Because Defendant established that the witnesses had personal knowledge of the complaining witness, the trial court prejudicially erred by excluding their opinions regarding the complaining witness's character for truthfulness or untruthfulness."

The trial judge had ruled in part that the testimony of the three defense witnesses should be excluded because none of the witnesses could say that the complaining witness had ever told an untruth to the witnesses. The Court of Appeals held that "such a foundation is not required for opinion testimony as to a witness's character for truthfulness or untruthfulness, nor must a witness be shown to have been untruthful on a particular occasion in order to allow such testimony. Rather, Defendant needed to show only that each of the three witnesses had personal knowledge of the complaining witness and that the three had consequently formed an opinion as to her character for truthfulness or untruthfulness."

OPINION TESTIMONY

LAY OPINION

State v. Cummings, 361 N.C. 438, 648 S.E.2d 788 (August 24, 2007)
At a hearing on defendant's Motion for Appropriate Relief, the trial judge allowed a witness to testify as to what the witness understood someone else to mean during an earlier relevant conversation. The Supreme Court upheld the admission of this evidence, finding that under Rule 701, the witness's "opinion on what [the other person] meant was based on his personal perception of the statements made [and] would be helpful in determining" a relevant issue. This is a good case on this point, as folks are often asked what another person "meant" by ambiguous words, slang, or even non-verbal conduct and there is often an objection along the lines of "Objection, Your Honor, he can't testify as to what someone else meant." Usually this objection can be overruled, so long as the witness's interpretation is based on his own perception of the statements and their context and the testimony would be helpful to the jury.

State v. Llamas-Hernandez, ___ NCApp ___, 659 S.E.2d 79 (April 25, 2008)
No error to admit testimony of experienced law enforcement officers that a substance was cocaine, even though no expert testimony that the substance was cocaine was admitted. The detective had many years' experience plus substantial training in identifying drugs, which the trial court determined was a sufficient basis for the opinion. The majority found it was obligated to follow State v. Freeman, ___ NCApp ___, 648 S.E.2d 876, 881-82 (2007), *appeal dismissed*, 362 N.C. 178, 657 S.E.2d 663 (2008), *reconsideration denied*, 362 N.C. 178, 657 S.E.2d 666 (2008), which reached a similar result, but expressed concern about whether Freeman was appropriately decided. The dissent distinguished Freeman and would have found error.

State v. Johnson, ___ NCApp ___, 651 S.E.2d 907 (November 6, 2007)
Appellate counsel for the defendant contended that the officers who observed the defendant after the driving could not offer personal opinions that the defendant was impaired at the time of the stop. The Court rejected this argument in one sentence, noting that the officer had personally observed the defendant and that this personal observation was a rational basis for the officer's opinion.

State v. Gobal, ___ NCApp ___, 651 S.E.2d 279 (October 16, 2007), appeal pending on another issue pursuant to dissent
Law enforcement officer interviewed defendant about allegations of child abuse. During interview defendant first denied crimes and then made certain admissions. The officer can

explain why he continued to question the defendant after he denied wrongdoing and can offer his opinion about the conclusions he drew from defendant's physical condition. However, the officer's testimony that defendant's admissions were truthful was lay opinion not helpful to the jury and should not have been admitted. However, as no objection had been made at trial and there was substantial other evidence impeaching defendant, error was not prejudicial.

State v. Graham, ___ NCApp ___, 650 S.E.2d 639 (October 2, 2007)
Officer's opinion that door had been forced open was admissible and was not inappropriate lay opinion. "The . . . statements, considered in light of the context, were simply instantaneous conclusions drawn by the witnesses upon seeing the door standing ajar but still bolted, and the splintered door frame. The testimony of each witness was a shorthand statements of fact and therefore not barred by Rule 701. The trial court did not err in admitting it."

State v. Brockett, ___ NCApp ___, 647 S.E.2d 628, *disc. review denied*, 361 NC 697 (2007)

Tape recording of conversation between defendant and his brother was properly admitted, as it contained some statements by defendant indicating guilt, even though it contained a lot of profanity and irrelevant discussion as well. Also proper to allow LEO to testify as expert about meaning of certain slang terms used in that conversation, based on LEO's training and experience as helpful to the jury.

EXPERT TESTIMONY

Burrell v. Sparkkles Reconstruction Company, ___ NCApp ___, 657 S.E.2d 712 (March 4, 2008)
In breach of contract and Unfair Trade Practices case, trial judge did not abuse his discretion in excluding testimony by proffered expert in "insurance claims and proper adjustment of water damage and mold claims" as to whether defendant insurance company violated relevant insurance statutes. Not helpful to the jury.

State v. Little, ___ NCApp ___, 654 S.E.2d 760 (January 15, 2008)
The defendant was charged with rape. Agent Parker analyzed the DNA from the defendant's rape kit. Agent Parker was out of state during trial and Agent Fox was called to testify about Agent Parker's findings. While focus of the decision was the Confrontation Clause issue, the Court did note that the testimony of Agent Fox established that one DNA analyst frequently relied upon the work of another, thus there was no hearsay problem and no problem related to Rule 703.

Roush v. Kennon, ___ NCApp ___, 656 S.E.2d 603 (February 5, 2008)
Under circumstances of this case, general dentist who regularly did surgery was qualified to testify as expert against oral surgeon in dental malpractice case.

Hamilton v. Thomasville Med. Assoc., ___ NCApp ___, 654 S.E.2d 708 (December 18, 2007)
In case determining whether defendant doctor was negligent for failing to read an MRI and whether decedent would have suffered a stroke had defendant neurosurgeon read the MRI and

appropriately treated decedent, trial court erred in ruling that neurologist and internist could not testify on causation.

Weaver v. Sheppa, ___ NCApp ___, 651 S.E.2d 395 (October 16 2007), *petition for disc. review allowed*, 362 N.C. 180, 657 S.E.2d 669 (2008)
Court ruled expert neurologist could testify as to causation but not as to standard of care in case against neurosurgeon. The requirements of Rule 702(b) do apply before standard of care testimony can be offered, but "when the challenged expert testimony relates to causation such admitted testimony is competent 'as long as the testimony is helpful to the jury and based sufficiently on information reasonably relied upon under Rule 703[.]'"

HEARSAY EXCEPTIONS

State v. Cummings, 361 N.C. 438, 648 S.E.2d 788 (2007)
Even though the witness said he didn't recall the events at issue as well as when he signed an affidavit about them, he offered testimony in substantial detail about the events. The trial court refused to admit the affidavit as substantive evidence and instead admitted it only as corroborative evidence. On appeal, the defendant argued that the affidavit should have been admitted as past recollection recorded pursuant to Rule 803. The Court ruled that "[c]onsidering the detail and extensiveness of Fuhr's testimony concerning the incidents . . . , defendant failed to show that Fuhr had 'insufficient recollection to enable him to testify fully and accurately.'"

State v. Bodden, ___ NCApp ___, (May 21, 2008)
Victim's statements to law enforcement identifying defendant as shooter were properly admitted as dying declarations. Victim had been shot five times, was bleeding profusely, and was in the hospital, and before talking to law enforcement had told his mother he was going to die. Rule 804(b)(2) requires that "(1) at the time declarant made the statements, the declarant was in actual danger of death; (2) declarant had full apprehension of the danger; (3) death occurred; and (4) declarant, if living, would be a competent witness to testify to the matter." The trial court did not abuse his discretion in finding that the requirements of this Rule 804 had been met. The Court further relied upon State v. Calhoun, *infra*, in ruling that there was no violation of the defendant's Confrontation Clause rights.

State v. Applewhite, ___ NCApp ___, (May 6, 2008)
No error in admitting victim's statements to witness approximately 15 minutes after a confrontation with defendant in which defendant threatened victim with a gun. Trial court appropriately determined that the statements were excited utterances under Rule 803(2).

State v. Calhoun, ___ NCApp ___, 657 S.E.2d 424 (March 4, 2008)
Admission of dying declaration did not violate defendant's confrontation rights, where statement was made to non-law enforcement officer.

State v. Hazelwood, ___ NCApp ___, 652 S.E.2d 63 (December 6, 2007)
In second degree murder case arising out of DWI, defendant's statement to Law enforcement officer was properly admitted even though it contained recitations of defendant's passenger's

request to "stop the car" before the accident. The passenger's statement was not offered for the truth but to show malice, and thus it was not hearsay.

State v. Petrick, ___ NCApp ___, 652 S.E.2d 688 (November 6, 2007), a*ppeal dismissed and, review denied,* 2008 N.C. LEXIS 239 (N.C., Mar. 6, 2008)
In murder trial, statement by victim to witness was admissible as it was to show victim's state of mind.

State v. Wiggins, ___ NCApp ___, 648 S.E.2d 865, *disc. rev. denied,* 361 N.C. 703, 653 S.E.2d 160 (2007)
Law enforcement officer testified concerning statements made to him by confidential informant about the defendant's involvement in the drug deal. In this case, no error, as this evidence was offered to explain why the officer was observing the defendant and was present when the drug deal occurred. Because this evidence was not offered for the truth of the informant's statements and where the trial court gave a limiting instruction, no error.

State v. Harris, ___ NCApp ___, 657 S.E.2d 701 (March 4, 2008)
Out of court statements were admissible to corroborate in-court testimony of victim and thus were not hearsay. Not required that out of court statement be identical to in-court testimony. As victim testified, no Crawford violation.

MARITAL PRIVILEGE

State v. Rollins, ___ NCApp ___, 658 S.E.2d 43 (March 18, 2008), *Stay granted,* 2008 N.C. LEXIS 324 (April 2, 2008)
In murder case, trial court erroneously denied motion to suppress wife's testimony concerning statements made by defendant to her in the visiting room in a prison. The Court recognized that inmates generally have a lessened expectation of privacy for security reasons, but rejected the State's contention that an inmate cannot have a private conversation with his or her spouse simply because the inmate is in prison. While there was testimony that the conversation "possibly" could have been overheard, the wife's evidence was that she and her husband were speaking in confidence and that no one overheard them, and there was no evidence that anyone else in fact overheard any of the conversation. The Court found that the trial court erred in concluding that the statements by the husband were not confidential, and found that the statutory marital privilege in NCGS 8-57 applied.

State v. Kirby, ___ NCApp ___, 653 S.E.2d 174 (December 4, 2007)
Statement made by husband to wife in the presence of a third person was not privileged and wife could testify about it.