LAY OPINION TESTIMONY
AND
EXPERT TESTIMONY

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Supreme Court of North Carolina

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[1]Judge Sanford Steelman of the Court of Appeals graciously allowed the use of his materials on Rule 701 et seq., the entirety of which is found at: http://www.sog.unc.edu/programs/judicialcollege/documents/Steelman_700SeriesRules.pdf.

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I. Rule and Statutes

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time
Although relevant, evidence may 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.

Rule 602. Lack of personal knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

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.

§ 15A-903. Disclosure of evidence by the State – Information subject to disclosure.

(a) Upon motion of the defendant, the court must order the State to:

(1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. The term "prosecutorial agency" includes any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor in connection with the investigation of the crimes committed or the prosecution of the defendant. Oral statements shall be in written or recorded form, except that oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer or investigatorial assistant shall not be required to be in written or recorded form unless there is significantly new or different information in the oral statement from a prior statement made by the witness. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.

(2) Give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

(3) Give the defendant, at the beginning of jury selection, a written list of the names of all other witnesses whom the State reasonably expects to call during the trial. Names of witnesses shall not be subject to disclosure if the State certifies in writing and under seal to the court that to do so may subject the witnesses or others to physical or substantial economic harm or coercion, or that there is other particularized, compelling need not to disclose. If there are witnesses that the State did not reasonably expect to call at the time of the provision of the witness list, and as a result are not listed, the court upon a good faith showing shall allow the witnesses to be called. Additionally, in the interest of justice, the court may in its discretion permit any undisclosed witness to testify.

(b) If the State voluntarily provides disclosure under G.S. 15A-902(a), the disclosure shall be to the same extent as required by subsection (a) of this section.

(c) Upon request by the State, a law enforcement or prosecutorial agency shall make available to the State a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this section and any disclosure under G.S. 15A-902(a).

II. Standard of Review and Limitations

Standard of Review: In general, appellate courts review decisions regarding the admissibility of opinion testimony under an abuse of discretion standard. *See State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (internal citations omitted).

Legal Standard: Neither lay nor expert witnesses may testify as (1) to the appropriate legal standard or whether a legal standard has been met in a particular case or; (2) a witness's credibility (credibility judgments are within the province of the jury). *State v. Weeks*, 322 N.C. 152 (1988); *State v. Davis*, 321 N.C. 52 (1987).

III. RULE 701

a. Brandis & Broun on North Carolina Evidence, 6th Edition, by Kenneth S. Broun

What is "opinion"? The Rules do not precisely define either "facts" or "opinions" or draw a definitive line between them. The Rules imply that "fact" and "opinion" are mutually exclusive, but evidence classified as an opinion will still be admissible unless it is useless or does not follow from the facts presented. An opinion does not have to be necessary or a "shorthand statement of fact."

If we were to define "opinion," it may include not only a witness's self-proclaimed inferences and conclusions, but also those facts not precisely described by the witness yet reasonably understood by an average juror.

The witness enters the gray area of opinion and fact when he testifies to his impressions, understandings, thoughts, or beliefs. If entering these gray areas indicates the witness's lack of personal knowledge, the testimony fails the basic test for lay testimony and could violate the hearsay rule. As long as the witness has personal knowledge, however, it will be up to the jury to weigh the testimony. § 175

Statement of the rule: Under the Rules, the most significant difference between the lay witness and the expert witness is personal knowledge. While the lay witness bases his testimony on personal knowledge, the expert bases hers on her expertise. § 177

Opinion admissible when witness cannot adequately describe the facts: Opinion evidence is always admissible when it is impracticable to describe the facts in detail. Such opinion may arise when the witness cannot adequately describe his thought process or his inference. In these cases, the witness will not be able to sufficiently describe the facts so that the jury can make its own inference. The inference of the lay witness will suffice.

These circumstances are often expressed as an "instantaneous conclusions of the mind," "natural and instinctive inferences," "evidence of common observers testifying to the results of their observation," a "shorthand statement of the fact" or "the statement of a physical fact rather than the expression of a theoretical opinion." Opinion evidence under these categories is admissible. § 178

Identity, appearances, and conduct of objects, animals, and persons: A lay witness's opinion as to the identity of a person or object personally perceived is admissible. The witness's uncertainty may affect the weight given to the testimony but not its admissibility. The witness may also identify voices, footprints, and tire tracks.

The lay witness can also testify to a person's physical appearance and condition including a person's health, race, display of emotions, ability to work, age, and whether he appeared to be under the influence of drugs or alcohol. A lay witness may not, however, testify to another person's intent. § 181

Questions of Law: A lay witness may testify to personal knowledge of legally operative facts but cannot testify to their legal effect. § 182

Miscellaneous subjects of lay opinion including speed and distance: As long as a lay witness has sufficient personal knowledge and opportunity to observe, the witness may testify to a vehicle's speed or the distance within which it could have stopped. The lay witness may also testify to visibility conditions on a particular occasion.

A lay witness may testify to the appearance of objects and his natural inferences regarding those objects. For example, a lay witness may testify to the presence of intoxicating liquor if he judged it by taste or smell. § 183

b. Rule 701 Cases

Opinions - Shorthand Statement of Facts

In ***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)**, the defendant objected to three segments 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."

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

Police Officer Lay Opinions in Criminal Cases

Opinion as to Intoxication

***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)**. 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. Streckfuss*, 171 N.C. App. 81, 614 S.E.2d 323 (2005).** "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. This observation 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."

Officer allowed to give lay testimony concerning times and distances

In ***State v. Johnson*, No. 05-598 (N.C. Ct. App. Dec. 20, 2005) (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.

Officer Testimony Regarding Fingerprinting Technique

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

Officer Opinion on location of shell casings

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

Officer Lay Opinion concerning characteristics of shoes

In the Supreme Court case of ***State v. Shaw*, 322 N.C. 797, 370 S.E.2d 546 (1988)**, 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.

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

Officer's Lay Opinion of Manner of Shooting

In ***State v. Williams*, 363 N.C. 689, 686 S.E.2d 493 (2009)**, an officer's testimony that a substance found on a vehicle looked like residue from a car wash explained the officer's observations about spots on the vehicle and was not a lay opinion. The officer properly testified to a lay opinion that (1) the victims were not shot in the vehicle, when that opinion was rationally based on the officer's observations regarding a lack of pooling blood in or around the vehicle, a lack of shell casings in or around the car, very little blood spatter in the vehicle, and no holes or projectiles found inside or outside the vehicle; (2) one of the victim was "winched in" the vehicle using rope found in the vehicle, when that opinion was based upon his perception of blood patterns, the location of the vehicle, and the positioning of and tension on the rope on the seat and the victim's hands; and (3) the victims were dragged through the grass at the defendant's residence, when that opinion was based on his observations at the defendant's residence and his experience in luminol testing.

Officer's Lay Opinion on Drug Dealer Behavior

In ***State v. Drewyore*, 95 N.C. App. 283, 382 S.E.2d 825 (1989)**, 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. Hargrave*, __ N.C. App. __, 680 S.E.2d 254 (2009)**. The trial judge did not err by allowing officers to give lay opinion testimony that the cocaine at issue was packaged as if for sale and that the total amount of money and the number of twenty-dollar bills found on the defendant were indicative of drug sales. The officers' testimony was based on their personal knowledge of drug practices, through training and experience.

***In re D.L.D.*, __ N.C. App. __, 694 S.E.2d 395 (2010)**. The trial court did not err by admitting lay opinion testimony from an officer regarding whether, based on his experience in narcotics, he knew if it was common for a person selling drugs to have possession of both money and drugs. Officer also gave an opinion about whether a drug dealer would have a low amount of inventory and a high amount of money or vice versa. The testimony was based on the officer's personal experience and was helpful to the determination of whether the juvenile was selling drugs.

In ***State v. Williams*, No. 03-473 (N.C. Ct. App. May 4, 2004) (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.

In ***State v. Archie*, 2006 No. 05-1444 (N.C. Ct. App. Jul. 18, 2006) (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.

Opinions on Drugs

***State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009)**. The Supreme Court, *per curiam* and without an opinion, reversed the ruling of the North Carolina Court of Appeals and held, for the reasons stated in the dissenting opinion, that the trial judge erred in allowing a detective to offer a lay opinion that 55 grams of a white powder was cocaine. The officer's identification of the powder as cocaine was based solely on the detective's visual observations. There was no testimony why the officer believed that the white powder was cocaine other than his extensive experience in handling drug cases. There was no testimony about any distinguishing characteristics of the white powder, such as its taste or texture.

In ***State v. Rogers*, 28 N.C. App. 110, 113-14, 220 S.E.2d 398, 400-01 (1975)**, 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 SBI 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, and the jury could have assessed more accurately the weight which it might give to the opinion. 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.

In dicta, the Court of Appeals in ***State v. Greenlee*, 146 N.C. App. 729, 732, 553 S.E.2d 916, 918 (2001)**, 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."

***State v. Freeman*, 185 N.C. App. 408, 648 S.E.2d 876 (2007)**. In a case where there was an independent laboratory report confirming that the substance was crack cocaine, the Court of Appeals held that the trial court properly allowed the arresting officer to testify that the substance seized was crack 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. Meadows*, __ N.C. App. __, 687 S.E.2d 305 (2010)**. Citing *Ward,* the court held that the trial judge erred by allowing a police officer to testify that he "collected what [he] believe[d] to be crack cocaine." Controlled substances defined in terms of their chemical composition only can be identified by the use of a chemical analysis rather than through the use of lay testimony based on visual inspection.

***State v. Davis*, __ N.C. App. __, 668 S.E.2d 829 (2010)**. Not mentioning *Meadows,* and stating that notwithstanding *Llamas-Hernandez* (discussed above), *State v. Freeman*, 185 N.C. App. 408 (2007), stands for the proposition that an officer may offer a lay opinion that a substance is crack cocaine.

***State v. Armstrong*, __ N.C. App. __, 691 S.E.2d 433 (2010)**. In a DWI/homicide case, the trial court erred by allowing a state's witness to testify about ingredients and effect of Narcan. Although

the state proffered the testimony as lay opinion, it actually was expert testimony. When the state called the witness, it elicited extensive testimony regarding his training and experience and the witness testified that Narcan contains no alcohol and has no effect on blood-alcohol content. Because the witness offered expert testimony and because the state did not notify the defendant during discovery that it intended to offer this expert witness, the trial court erred by allowing him to testify as such. However, the error was not prejudicial.

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

In ***State v. Woodard*, 102 N.C. App. 687, 404 S.E.2d 6 (1991)**, the officer testified that the defendant "pretended" to be asleep. It was held that this was a permissible lay opinion under Rule 701.

Officer can give lay opinion as to age of defendant

In the Supreme Court case of ***State v. Banks*, 322 N.C. 753, 370 S.E.2d 398 (1988)**, 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.

Officer Opinion on Surveillance Video

***State v. Belk*, __ N.C. App. __, 689 S.E.2d 439 (2009)**. The trial court committed reversible error by allowing a police officer to give a lay opinion identifying the defendant as the person depicted in a surveillance video. The officer only saw the defendant a few times, all of which involved minimal contact. Although the officer may have been familiar with the defendant’s “distinctive” profile, there was no basis for the trial court to conclude that the officer was more likely than the jury correctly to identify the defendant as the person in the video. There was is no evidence that the defendant altered his appearance between the time of the incident and the trial or that the individual depicted in the footage was wearing a disguise and the video was of high quality.

***State v. Rahaman*, __ N.C. App. __, 688 S.E.2d 58 (2010)**. The trial judge erred in allowing a detective to offer lay opinion testimony regarding whether what was depicted in crime scene

surveillance videos was consistent with the victim's testimony. For example, the detective was impermissibly allowed to testify that the videotapes showed a car door being opened, a car door being closed, and a vehicle driving away. The court found that the officer's testimony was neither a shorthand statement of facts nor based on firsthand knowledge.

Testimony of Abused Child

In ***State v. Wallace*, 179 N.C. App. 710, 635 S.E.2d 455 (2006)**, 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.

Non-Officer Opinion Testimony on Drugs

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

Officer opinion on identification of television

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

Requirement of a Foundation of Opinion

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

In ***State v. Najewicz,*** **112 N.C. App. 280, 436 S.E.2d 132, (1993)**, 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. Washington**, 141 N.C. App. 354, 540 S.E.2d 388 (2000),** ***cert. denied*****, 353 N.C. 396, 547 S.E.2d 427 (2001)**, 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.

Opinions of Sanity

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

Implicit Finding of Lay Witness as an Expert

In ***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)**, 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.

In ***State v. Greime*, 97 N.C. App. 409, 388 S.E.2d 594 (1990)**, 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. It further held while 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); *State v. Cates*, 293 N.C. 462, 471-72, 238 S.E.2d 467, 472 (1977).

Lay opinion of nurse as to effects of drugs

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

Opinion of Value of Personal Property

***State v. Buie*, 194 N.C. App. 725, 671 S.E.2d 351 (2009)**. The trial court did not abuse its discretion by allowing an officer to give a lay opinion as to the value of a stolen Toyota truck in a felony possession trial. The officer had worked as a car salesman, was very familiar with Toyotas, and routinely valued vehicles as a police officer. He also spent approximately three hours taking inventory of the truck.

***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)**. "[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.

In ***State v. Freeman*, 164 N.C. App. 673, 596 S.E.2d 319 (2004)**, two methods were offered to determine the value at trial and during the sentencing hearing. The tract of five acres had 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 pine trees that were "substantially similar" to the timber removed from the subject tract. 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 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.

IV. Evidence Rule 702

a. Brandis & Broun on North Carolina Evidence, 6th Edition, by Kenneth S. Broun

Who are Experts? Rule 702 allows properly qualified experts to state an opinion if doing so would be helpful to the jury. Although pre-Rule cases in North Carolina required that an expert be "better qualified than the jury to draw appropriate inferences from the facts," Rule 702 no longer requires such a comparison between a witness and the jury. Indeed, in only a limited number of cases will the jury's qualifications match those of an expert qualified to state an opinion. Pre-Rule cases also suggested that there was an intermediary category between expert and lay witnesses, such as an "expert on the facts." That implied category no longer exists. Under Rule 702, a witness qualified by "knowledge, skill, experience, training, or education" may testify as an expert in his field of expertise regardless of the nature of the field. Accordingly, in the proper case, a factory worker is just as much of an expert in his field as would be a medical doctor. § 184

Standard of Review: Determinations of whether an expert is qualified are solely within the trial judge's province. Absent an abuse of discretion or a lack of competent evidence to support the finding, the trial judge's determination that a witness is qualified as an expert will not be reversed. When a trial judge determines that a witness is not qualified as an expert, the finding will not be reversed unless an appellate court determines the trial judge abused his discretion or ruled under an erroneous view of the law. § 185

Qualifications of Experts: Under Rule 702, an expert qualified by "knowledge, skill, experience, training, or education" may state an opinion if "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."

The question of whether a witness is qualified to state an opinion is one of fact. Witnesses offered as experts need not have a particular degree or vocation. In fact, the Rule does not require an expert to be a specialist or even have direct experience with the exact subject matter at issue. Instead, the trial court must find that expert's "knowledge, skill, experience, training, or education" will be helpful to the trier of fact.

General objections are insufficient to challenge an expert's qualifications, and all objections are waived if not made within an appropriate length of time. The record need not reflect the trial judge's finding that a witness was qualified as an expert. As long as the record suggests that a finding could have been made, it will be assumed the trial judge found the witness to be qualified or the witness's qualifications were not challenged. When an objection is made, the party offering the witness must request a finding on the witness's qualifications. Absent such a request or a finding in the record that the witness was qualified, the exclusion of the witness's testimony will not be reviewed.

The trial judge is free to rule on an expert's qualifications in the jury's presence or in voir dire. There are, however, at least two restrictions on a trial judge determining an expert's qualifications in the presence of the jury. First, although a trial judge may rule that a non-party witness is qualified as an expert, the trial judge may not otherwise opine as to the witness's credibility. Second—at least on the specific facts at issue—a trial judge may not state within the presence of a jury that a defendant doctor in a malpractice action was qualified as a medical expert

when plaintiff did not object to her qualifications. Doing so is an unwarranted expression of opinion. § 185

Subject Matter of Expert Testimony: North Carolina's evidentiary rules no longer require that expert testimony relate to a vocation or activity involving special skill or knowledge. Expert testimony is generally allowed for any matter that could be helpful to the finder of fact. Accordingly, expert opinion is admissible in fields as disparate as medicine and drainage; aircraft and animals; tires and hair; and business and typewriting. Therefore, as noted by the North Carolina Court of Appeals, "[i]t seems abundantly clear that . . . there can be expert testimony upon practically any facet of human knowledge and experience." *State v. Carlton*, 28 N.C. App. 573, 576-77 (1976) (second alteration in original). § 186

Medical Experts: Rule 702 was amended in 1996 to regulate the qualifications of expert witnesses in medical malpractice cases. Under the amended Rule, only an expert may testify to the appropriate standard of care. In addition, expert testimony is usually required to prove the causal connection between the treatment given and a patient's subsequent condition.

The amended Rule 702 restricts the type of witnesses who may testify against a party in a medical malpractice case. A witness who seeks to opine about a specialist, for example, cannot do so unless he is a specialist in the same or a similar field and during the year immediately preceding the incident giving rise to the cause of action spent the majority of his professional time in clinical practice, clinical teaching, or research. A witness who seeks to opine about a general practitioner, in contrast, must have spent the majority of his professional time in the year preceding the incident giving rise to the cause of action in the clinical practice, teaching, or research in the general practice of medicine. These limitations (and others enumerated by the Rule) may be waived in extraordinary circumstances.

Outside of the medical malpractice context, the question of whether a medical witness is qualified to testify is determined in the same way as for any other expert witness. The question is whether the expert's testimony will be helpful to the jury. As in other fields of expert testimony, there is no requirement that medical experts be specialists in a particular field or have experience with certain subject matter. In fact, assuming a witness is otherwise qualified, there is no requirement that she have a license to practice medicine.

Expert medical opinion has been admitted on a wide range of subject matter, including questions of a person's mental condition, the extent of a person's injury, and the type of object causing injury. For additional examples of cases where expert medical testimony has been admitted, see 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 187, at 65-71 (6th ed. 2004). Special considerations, usually tied to the specific subject to be discussed, also arise when experts seek to opine on whether a child was the victim of sexual abuse in the absence of physical evidence or whether a victim suffering from post-traumatic stress syndrome could have been raped. § 187

b. [Continuing] Case Law Evolution

In ***Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)** the United States Supreme Court established a new federal standard for a trial court's review of expert scientific testimony. The legal issue in *Daubert* originated from a conflict between existing case law, *see Frye v. United States*, 54 App.D.C. 46 (1923) (holding that expert scientific testimony must be based on methods "sufficiently established to have gained general acceptance in the particular field"), and the recently adopted Rule 702. Specifically, the Court was faced with the question of whether Rule 702 displaced the antiquated "general acceptance" standard for scientific expert testimony. After studying the text of Rule 702, the Court concluded that the new rule did not incorporate the "general acceptance" standard and, accordingly, that *Frye* was no longer the guidepost for expert scientific testimony.

The Court went on to explain that, in lieu of the "general acceptance" standard, Rule 702 provided a new standard for reviewing an expert's scientific testimony. In other words, under Rule 702, the trial court was still a "gatekeeper," but the standard of assessing the proposed evidence had been revised. The new standard provided by Rule 702 required the trial court to determine that the expert's scientific testimony was (1) scientifically reliable and (2) relevant to the case. The Court discerned this new standard from the text of Rule 702: the Court said that "scientific . . . knowledge" implied that the expert's testimony must be based on a reliable methodology; next, the Court said that "assist the trier of fact" implied that the expert's methodology must be relevant to the question at hand. To use the Court's own words, pursuant to Rule 702, a trial court's gatekeeper function requires "a preliminary assessment of whether the reasoning or methodology underlying the testimony is *scientifically valid* and of whether that reasoning or methodology properly can be applied to the facts in issue." (emphasis added)

The Court then went on to provide "general observations" as to key considerations a trial court should ask when assessing the reliability of the expert's methodology. These considerations include (1) whether the theory or technique "can be (and has been) tested;" (2) "whether the theory or technique has been subjected to peer review and publication;" (3) "the known or potential rate of error," (4) the "existence and maintenance of standards controlling the technique's operation," and (5) the general acceptance of the theory. In closing, the Court stated that, despite these enumerated key factors, the inquiry under Rule 702 was "a flexible one," and no single factor (or lack of a factor) would be determinative.

In ***State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995),** the North Carolina Supreme Court discussed North Carolina's standard for a trial court's review of expert scientific testimony. The Court began by holding that Rule 702 required an initial determination by the trial court as to whether (i) the witness's methodology is reliable and (ii) the methodology is applicable to the case at hand. The Court went on to elaborate that this initial determination actually included three separate questions. Specifically, before allowing the testimony of a scientific expert, the trial court must determine that: (1) the witness's methodology is sufficiently reliable; (2) the witness is qualified to apply and explain this methodology (i.e., the witness is an "expert"); and (3) the witness's testimony is relevant to the facts at hand.

The Court provided some additional guidance for these three decisions. First, to determine the reliability of the method, the trial court should consider the general acceptance of the methodology, the professional background of the expert, and the use of visual aids for the jury. The Court added that even new scientific methods are admissible if deemed sufficiently reliable, and, when making the reliability determination, the trial court can (1) look to the testimony of an expert specifically relating to the reliability, (2) take judicial notice, or (3) use a combination of the two. Second, to decide whether an expert is qualified, the trial court need only decide that the witness is in a better position than the trier of fact to have an opinion on the subject. The trial court will be granted wide latitude in making this decision. Third, as for the issue of relevancy, the scientific testimony need only assist the jury in drawing certain inferences from the facts that the jury otherwise would not be able to draw.

In *Goode*, Defendant argued (1) that "blood spatter interpretation" was not an appropriate area for expert testimony, as it has not been established as scientifically reliable, and (2) that the trial court erred in qualifying a witness as a purported bloodstain pattern interpretation expert. The court disagreed on both counts. As for the methodology, the Court noted that the witness testified extensively on *voir dire* concerning the reliability of bloodstain pattern interpretation. Moreover, the Court noted that the Court had previously implicitly accepted bloodstain pattern interpretation as an approved methodology, and appellate courts in other jurisdictions had reached the same conclusion. As for the witness's qualifications, the Court highlighted the witness's extensive experience in the field of bloodstain pattern interpretation.

In ***Howerton v. Arai Helmet, Ltd.*** **358 N.C. 440, 597 S.E.2d 674 (2004),** the North Carolina Supreme Court clearly stated that North Carolina did not follow the *Daubert* standard when reviewing the reliability of expert testimony.

The Court began by acknowledging and reaffirming *Goode*'s adoption of *Daubert*'s three-part inquiry into expert testimony (i.e., reliability, qualifications, and relevancy). However, the Court pointed out that *Goode* never adopted *Daubert*'s heightened standard of review for reliability: *Daubert* required that in order for a methodology to be deemed reliable, it must be "scientifically valid"; while *Goode* only required that a methodology be "sufficiently reliable." In other words, when assessing the reliability of a methodology, *Goode* required the trial court to apply a less stringent review than *Daubert*.

The Court elaborated that in determining whether a methodology was "sufficiently reliable," a North Carolina trial court should first look to precedent to see if the methodology was deemed reliable (or unreliable) in the past. If the methodology was novel and precedent was unavailable, the trial court should then apply *Goode*'s reliability inquiry. When applying *Goode*'s inquiry into reliability, the Court instructed that a trial court should not "go

so far as to require the expert's testimony to be conclusively reliable or indisputably valid."

The Court then went on to explain why it refused to adopt the *Daubert* standard of review. The Court noted that *Daubert* esteemed the "gatekeeping" function of the federal trial court—its function of screening questionable expert testimony before it reached the delicate ears of the jury. The Court pointed out that this gatekeeping function put an impractical burden on the trial judge and resulted in a mechanical application of the *Daubert* reliability inquiry. The Court quipped, "When the United States Supreme Court jettisoned the rigid general acceptance requirement of *Frye*, it did so to further the liberal thrust of the Federal Rules . . . however, the application of the 'flexible' *Daubert* standard has been anything but liberal and relaxed . . ."

In contrast to the federal approach, the Court strived to actually achieve a workable and flexible system of assessing expert testimony. In refusing to adopt the *Daubert* standard of review, the Court "emphazie[d] the fundamental distinction between the admissibility of evidence and its weight, the latter of which is a matter traditionally reserved for the jury." The Court rejected a broad "gatekeeping" power for the trial court: the trial court should not determine the ultimate credibility of an expert's scientific testimony; rather, the trial court should screen only for truly unreliable methodologies, and largely allow the jury to determine the credibility of scientific testimony.

In ***Crocker v. Roethling*, 363 N.C. 140, 675 S.E.2d 625 (2009)**, the Supreme Court reviewed the trial court's application of the *Goode* standard in a medical malpractice case. In *Crocker*, the trial court granted defendant's motion for summary judgment on the grounds that plaintiff could not establish that the defendant breached a duty of care. The trial court excluded plaintiff's sole expert, a doctor from Arizona, as to the appropriate standard of care for a doctor in Goldsboro, precluding the plaintiff from establishing a breach of duty. The doctor opined that the standard of care was violated when the defendant doctor did not attempt a Zavanelli maneuver. The expert had never performed or seen a Zavanelli maneuver during roughly twenty-five years of practice, nor did he personally know anyone who had. He was only aware of the procedure through medical literature, which included a study which found that roughly ten Zavanelli maneuvers were performed worldwide each year between 1985 and 1997

Justice Hudson, joined by Justice Timmons-Goodson, wrote that the trial court erred in finding the expert's testimony to be inadmissible under *Goode*. Justice Hudson said that, in deciding to exclude plaintiff's expert, the trial court had gone beyond its permissible bounds as gatekeeper by ruling on the

credibility of the expert. According to Justice Hudson, the expert's deposition and affidavit provided support for the expert's ability to testify about the appropriate standard of care: the Arizona doctor used a reliable method to determine the appropriate standard of care in Goldsboro, the doctor was credentialed, and his testimony was relevant to the breach of duty. Accordingly, Justice Hudson believed the trial court's decision to exclude the Arizona doctor was a determination of his ultimate credibility—and such a determination was solely in the province of jury. She believed it was improper to grant a motion for summary judgment and remanded the case to the trial court.

Justice Martin, joined by Justice Edmunds, concurred in the result. The concurrence agreed that the case should be remanded to the trial court, but included that the trial court should hold a *voir dire* hearing before ruling on the motion for summary judgment. The concurrence found the deposition and the affidavit to be inconclusive as to the ability of the expert to testify about the appropriate standard of care. At the same time, the concurrence recognized that the standard of review for the trial court's decision was abuse of discretion. Therefore, given this deferential standard of review, the concurrence held that a *voir dire* hearing would provide the trial court with an adequate opportunity to properly exercise its discretion.

The dissent, Justice Newby joined by Chief Justice Parker and Justice Brady, emphasized that the standard of review was abuse of discretion. The dissent pointed out that neither opinion properly applied the deferential abuse of discretion standard of review. After scrutinizing the deposition and the affidavit, the dissent concluded that the trial court did not abuse its discretion in deciding that the expert was unqualified to testify. While the dissent agreed that the best practice would have been for the trial court to hold a *voir dire* hearing in a close case, the dissent concluded that it was within trial court's discretion to forgo a *voir dire* hearing under the facts presented here. According to the dissent, the trial court was reasonable in excluding the Arizona doctor from testifying: while the doctor himself claimed he was aware of the appropriate standard of care in Goldsboro, his affidavit and deposition left serious doubts as to whether he used a reliable methodology to determine the appropriate standard of care. The dissent explained that, in excluding the Arizona doctor, the trial court was not making a determination of credibility, but a determination of reliability.

In ***State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010)**, the Supreme Court considered whether a visual inspection technique for identifying certain drugs, using the "Micromedex" resource, was a

sufficiently reliable methodology. In the case, the State offered expert testimony that certain pills found in the defendant's possession were controlled substances. The State's expert relied on the visual inspection method to determine the nature of the pills. Micromedex is commonly used by doctors and pharmacists to identify certain drugs, and the method had been used by the crime labs for 35 years. The State argued that the expert testimony should be admissible and that "any shortcomings inherent to [the method] should be measured by the jury only when considering the weight of the evidence."

The Court disagreed with the State, and held that Micromedex was not sufficiently reliable. The Court relied on a previous decision, *State v. Llamas-Hernandez*, to support its conclusion. In *Llamas-Hernandez*, the defendant was convicted of trafficking in cocaine based on two detectives' lay testimony that, based on their law enforcement experience and training, they believed the substance was cocaine. The Court in *Llamas-Hernandez* founds this method of identification to be insufficient. Accordingly, in *Ward*, the Court relied on *Llamas-Hernandez* to conclude that the a methodology used to prove that a substance was a controlled substance "must be based on a *scientifically valid* chemical analysis and not mere visual inspection." (emphasis added). The Court noted that "[t]here is little evidence in the record either implying that identification of controlled substances by mere visual inspection is scientifically reliable or suggesting that [the expert]'s particular methodology was uniquely reliable. His testimony is completely devoid of any scientific data or demonstration of the reliability of his methodology."

In dissent, Justice Newby argued that the Court had just altered the "foundational inquiry our trial judges must conduct prior to admitting an expert's opinion." The dissent reminded the Court that *Howerton* and *Goode* had rejected *Daubert*'s requirement that an expert's method of proof be "scientifically valid." However, the dissent pointed out that the Court was now requiring that an expert's testimony be "scientifically reliable." The dissent noted that *Ward* invaded the province of the jury by reestablishing the *Daubert*-type of gatekeeping function that *Howerton* had explicitly rejected. The dissent emphasized that the *Goode* standard only required that a method be "sufficiently reliable." Accordingly, the dissent found it "difficult to fathom" how the methodology was not reliable in court, when it was "sufficiently reliable in [the medical treatment of] potentially life-and-death scenarios."

c. Rule 702 Case Notes

General Standard for Admission of Expert Testimony

In ***State v. Locklear*, 349 N.C. 118, 505 S.E.2d 277 (1998)**, 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.

Police/Laboratory Experts

Officer's testimony concerning crime scene

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

Officer allowed to give expert opinion concerning time of death

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

Officer as Expert in Accident Reconstruction

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

Officer permitted to testify as expert in bloodstain pattern interpretation

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

Officer permitted to testify concerning broken glass samples

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

Drug Cases

In ***State v. Chisolm*, 90 N.C. App. 526, 369 S.E.2d 375 (1988)**, the evidence in this case 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.

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

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

In ***State v. Diaz*, 155 N.C. App. 307, 575 S.E.2d 523 (2002)**, 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. Hargrave*, __ N.C. App. __, 680 S.E.2d 254 (2009)**. A laboratory technician who testified that substances found by law enforcement officers contained cocaine was properly qualified as an expert even though she did not possess an advanced degree.

***State v. Ward*, __ N.C. App. __, 681 S.E.2d 354 (2009), *aff'd*, 364 N.C. 133, 694 S.E.2d 738 (2010)**. A new trial was required in a drug case where the trial court erred by admitting expert testimony as to the identity of the controlled substance when that testimony was based on the results

of a NarTest machine. Applying *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004), the court held that the State failed to demonstrate the reliability of the NarTest machine.

***State v. Armstrong*, __ N.C. App. __, 691 S.E.2d 433 (2010)**. In a DWI/homicide case, the trial court erred by allowing a state's witness to testify about ingredients and effect of the drug Narcan. Although the state proffered the testimony as lay opinion, it was actually expert testimony. When the state called the witness, it elicited extensive testimony regarding his training and experience and the witness testified that Narcan contains no alcohol and has no effect on blood-alcohol content. Because the witness offered expert testimony and because the state did not notify the defendant during discovery that it intended to offer this expert witness, the trial court erred by allowing him to testify as such. However, the error was not prejudicial.

***State v. Meadows*, __ N.C. App. __, 687 S.E.2d 305 (2010)**. The trial court erred by allowing the State's expert to identify drugs based solely upon the results of a NarTest machine, without providing evidence of its reliability.

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

In **State v. Holmes, 355 N.C. 719, 565 S.E.2d 154 (2002)**, defendant assigned as error that the trial court erred in overruling his objection to testimony from the State's firearm analysis and identification expert, SBI Agent Trochum, 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." The Court held any alleged error was harmless.

Expert testimony on DNA profiles permitted

In ***State v. Williams*, 355 N.C. 501, 565 S.E.2d 609 (2002)**, 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. SBI Agent Spittle 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.

Expert Testimony on Gunshot Residue

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

Expert testimony on bloodstains should have been excluded; fracture match testimony properly admitted

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

Defendant’s proffered testimony on undercover police procedures properly excluded

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

In ***State v. Harden*, 344 N.C. 542, 476 S.E.2d 658 (1996)**, the Supreme Court affirmed the trial court's exclusion of Ronald Guerrette's testimony. 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.

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

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

Admission of expert testimony on memory factors upheld

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

Testimony concerning blood spatter and forensic psychiatry properly admitted

In the Supreme Court case of ***State v. Campbell,* 359 N.C. 644, 617 S.E.2d 1 (2005),** 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.

Expert testimony contradicting defendant's version of events admissible

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

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

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

Experts in Child Sex Abuse Cases.

In ***State v. Chandler*, ___ N.C. ___, 697 S.E.2d 327 (2010),** defendant argued that the law previously allowed an expert to testify that a child was in fact sexually abused absent physical evidence of abuse, but that, since the time of his trial and appeal, such evidence had become inadmissible. The trial court believed that the cases of *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002), *State v. Ewell*, 168 N.C. App. 98, 606 S.E.2d 914 (2005), and *State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004), significantly changed the law such that "expert testimony that a child has been abused is [now] inadmissible at least where there is no physical evidence of abuse."

The Supreme Court reversed and determined that there had been no 'significant change' in the law regarding admissibility of expert testimony in child sexual abuse cases since the time of the defendant's trial and appeal. Under Rule 702 and subsequently interpreted by the Court in *State v. Trent*, expert opinion must be based upon the expert's specialized knowledge in order to assist the trier of fact. *State v. Trent* 320 N.C. 610, 614, 359 S.E.2d 463, 466 (1987). *Trent* specifically addressed the requirement that physical evidence support a definitive diagnosis of sexual abuse. Rule 702 and *Trent* were established law at the time of defendant's direct appeal to the Court. The decisions relied on by Defendant, *Stancil, Bates, Couser*, and *Ewell*, were merely applications of existing case law on expert opinion evidence.

***State v. Ray*, __ N.C. App. __, 678 S.E.2d 378 (2009), *rev'd in part*, __ N.C. __, 697 S.E.2d 319 (2009)**. The trial court did not err in admitting the State's expert witness's testimony that the results of his examination of the victim were consistent with a child who had been sexually abused; the expert did not testify that abuse had in fact occurred and did not comment on the victim's credibility. *State v. Webb*, __ N.C. App. __, 682 S.E.2d 393 (2009).

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

In ***State v. Parks,* 96 N.C. App. 589, 386 S.E.2d 748 (1989),** 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. Streater*, ___ N.C. App. ___, 678 S.E.2d 367 (2009), *rev. denied* 363 N.C. 661, 687 S.E.2d 293 (2009)**. The state's expert pediatrician was improperly allowed to testify that his findings were consistent with a history of anal penetration received from the child victim where no physical evidence supported the diagnosis. The expert was properly allowed to testify that victim's history of vaginal penetration was consistent with his findings, which included physical evidence supporting a diagnosis of sexual intercourse. The expert's testimony that his findings were consistent with the victim's allegations that the defendant perpetrated the abuse was improper where there was no foundation for the testimony that the defendant was the one who committed the acts.

***State v. Horton*, __ N.C. App. __, 682 S.E.2d 754 (2009)**. In child sexual abuse case, it was error to allow the state's expert, a child psychologist, to testify that he believed that the victim had been exposed to sexual abuse. The expert's statement pertained to the victim's credibility; it apparently was unsupported by clinical evidence. Prejudicial error occurred warranting a new trial when the trial court overruled an objection to testimony of a witness who was qualified as an expert in the treatment of sexually abused children. After recounting a detailed description of an alleged sexual assault provided to her by the victim, the State asked the witness: "As far as treatment for victims . . . why would that detail be significant?" The witness responded: "[W]hen children provide those types of specific details it enhances their credibility." The witness's statement was an impermissible opinion regarding credibility. Additionally, it was error to allow the witness to testify that the child "had more likely than not been

sexually abused," where there was no physical evidence of abuse; such a statement exceeded permissible opinion testimony that a child has characteristics consistent with abused children.

Horizontal Gaze Nystagmus Test

***State v. Smart,* ___ N.C. App. ___, 674 S.E.2d 684 (2009), *rev. denied*, 363 N.C. 810, 692 S.E.2d 874 (2010).** Rule 702(a1) obviates the state's need to prove that the horizontal gaze nystagmus testing method is sufficiently reliable

V. Other Considerations

Rule 403: "More Prejudicial than Probative"

The trial court has the discretion to exclude relevant testimony if its probative value is substantially outweighed by risk of

(a) Unfair prejudice (i.e., causes the jury to make a decision based on emotion rather than the relevant evidence);
(b) Confusing or misleading the jury; or
(c) Undue delay, waste of time, needless presentation of cumulative evidence (i.e., the point has already been made).

The Confrontation Clause

In ***Crawford v. Washington*, 541 U.S. 36 (2004)**, the United States Supreme Court defined the standard for determining hearsay violations in light of the Confrontation Clause of Sixth Amendment. In *Crawford*, the Court held that the Confrontation Clause requires that prior testimonial statements by a witness who has since become unavailable must be cross-examined. *See also Davis v. Washington*, 547 U.S. 813 (2006) (holding that statements given in an affidavit regarding past events are testimonial but statements made in a 911 emergency call are not testimonial); *Hammon v. Indiana*, 546 U.S. 1213 (2006) (holding that statements made to the police are testimonial if there is no on-going emergency or immediate threat of harm to the speaker)

Most recently, in ***Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009),** the United States Supreme Court held that a chemical drug lab report was a "testimonial statement." The Court held that, in order to satisfy the Confrontation Clause, a lab report must be accompanied by the testimony of the lab analyst so that the defendant has an opportunity to cross-examine the analyst. *Melendez-Diaz* has spawned two lines of cases in North Carolina's Court of Appeals. The first line of cases holds that an expert witness is not allowed to parrot another's lab report as his own—only the lab analyst who prepared the lab report can testify about the report's results. If, however, the testifying expert forms an independent opinion based upon the test results and testifies that experts in the field rely on such data, the testimony and lab results are admissible. The North Carolina Supreme Court has not addressed this evolving issue.