RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
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Robert L. Farb
Institute of Government

North Carolina Supreme Court

Capital Case Issues

United States Supreme Court Ruling in *Ring v. Arizona* Does Not Render Short-Form Murder Indictment Unconstitutional in Failing to Allege Aggravating Circumstances

State v. Hunt, 357 N.C. 257, 582 S.E.2d 593 (16 July 2003). The court ruled that the United States Supreme Court's ruling in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (allowing judge to find aggravating circumstances necessary to impose death sentence violates Sixth Amendment right to jury trial), does not render the short-form murder indictment under G.S. 15-144 unconstitutional in failing to allege the aggravating circumstances on which the state will rely to seek the death penalty.

G.S. 15-187 and 15-188, Which Require Use of Lethal Injection on Defendant Sentenced to Death, Do Not Limit Drugs or Chemicals That Can Be Used During Execution by Lethal Injection

State v. Hunt, 357 N.C. 454, 591 S.E.2d 502 (11 September 2003). The court ruled, after discussing the legislative history of G.S. 15-187 and 15-188, which require the use of lethal injection on a defendant sentenced to death, that these statutes do not limit the drugs or chemicals that can be used during an execution by lethal injection.

Trial Judge Committed Plain Error in Jury Instruction on Aggravating Circumstance (e)(6) (Murder Committed for Pecuniary Gain)

State v. Jones, 357 N.C. 409, 584 S.E.2d 751 (22 August 2003). The defendant was convicted of two counts of first-degree felony murder, based on the underlying felony of armed robbery. The court ruled that the trial judge committed plain error in the jury instruction on aggravating circumstance (e)(6) (murder committed for pecuniary gain), which stated in part that "If you find from the evidence beyond a reasonable doubt . . . that when the defendant killed the victim, the defendant was in the commission of robbery with a deadly weapon, you would find this aggravating circumstance . . . ." The court noted the instruction failed to explain what constitutes pecuniary gain, and the jury's finding of robbery with a dangerous weapon would automatically (and thus erroneously) mandate the finding of this aggravating circumstance.

State's Introduction in Capital Sentencing Hearing of Transcript of Rape Victim's Testimony at Prior Trial to Prove Aggravating Circumstance (e)(3) (Prior Violent Felony Conviction) Violated Defendant's Confrontation Rights When State Did Not Make Good Faith Effort to Produce Victim to Testify

State v. Nobles, 357 N.C. 433, 584 S.E.2d 765 (22 August 2003). The state at the defendant's capital sentencing hearing was allowed, in proving the defendant's prior rape conviction as an aggravating circumstance (e)(3) (prior violent felony conviction), to introduce the transcript of the rape victim's

testimony at the rape trial. The court noted that although the rules of evidence do not apply at a capital sentencing hearing, the constitutional right to confront witnesses does—see State v. Holmes, 355 N.C. 719, 565 S.E.2d 154 (2002), and State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (1995). The court ruled that the trial judge erred in admitting the transcript of the rape victim's testimony because the state did not make a good faith effort to produce the victim to testify. The court stated that the Confrontation Clause requires a showing by the state that it attempted in good faith to contact the potential witness and inquire about her willingness and availability to testify, and the state must present the results of this inquiry to the trial judge. The record in this case did not adequately show that the state satisfied this constitutional obligation.

Trial Judge Erred in Limiting Defendant's Cross-Examination of State's Witness Who Testified in Support of Aggravating Circumstance (e)(3) (Prior Violent Felony Conviction)

State v. Valentine, 357 N.C. 512, 591 S.E.2d 846 (7 November 2003). The court ruled that the trial judge erred in limiting the defendant's cross-examination of a state's witness (concerning whether the witness signed an affidavit denying that the defendant was involved in the crime resulting in the defendant's prior conviction) who testified in support of aggravating circumstance (e)(3) (prior violent felony conviction).

(1) Neither Double Jeopardy Nor Collateral Estoppel Prohibited State from Prosecuting Two Murders and Seeking Death Penalty
(2) Trial Judge Did Not Err in Prohibiting Defense Evidence That Defendant Had Received Life Without Parole for Prior Murder Conviction

State v. Carter, 357 N.C. 345, 584 S.E.2d 792 (22 August 2003). The defendant was convicted of two first-degree murders committed in February 1997 and sentenced to death for both. (1) Before the trial of these two murders, the defendant had been convicted of first-degree murder committed in December 1996 and was sentenced to life imprisonment without parole. At this prior trial, the state had offered at the capital sentencing hearing evidence of the two murders committed in February 1997 in support of aggravating circumstance (e)(11) (murder committed during course of conduct of committing other violent crimes). The jury found the existence of (e)(11) and recommended life imprisonment without parole. The court ruled that the finding and punishment at this prior trial did not bar the state under double jeopardy or collateral estoppel grounds from prosecuting the two murders or seeking the death penalty. The court distinguished Ashe v. Swenson, 397 U.S. 436 (1970), and relied on several of its own cases. (2) The defendant challenged on appeal the trial judge's ruling, on the state's motion in limine, that evidence of the defendant's punishment (life imprisonment without parole) for the December 1996 murder be excluded from the jury. The court stated that the record showed that the jury heard this evidence when the court clerk testified in the sentencing hearing. But even if the evidence had been entirely excluded, the court ruled that there would be no error because the sentence imposed for that murder was irrelevant to the recommendations in the two murders being tried.

Defendant's Prison Sentence for Other Crimes Was Not a Nonstatutory Mitigating Circumstance

State v. Squires, 357 N.C. 529, 591 S.E.2d 837 (7 November 2003). The court ruled, citing State v. Price, 331 N.C. 620, 418 S.E.2d 169 (1992), that trial judge did not err in not submitting as a nonstatutory mitigating circumstance that the defendant had been sentenced to 105 years' imprisonment in Georgia for convictions there. A defendant's prison sentence for other crimes is not a nonstatutory mitigating circumstance.

Criminal Law and Procedure

Court Sets Out When Trial Court May Compel in Context of Criminal Investigation Disclosure of Client's Confidential Communications with Attorney After Client Has Died

In re Investigation of Death of Eric Miller, 357 N.C. 316, 584 S.E.2d 772 (22 August 2003), *later ruling*, 358 N.C. 364, 595 S.E.2d 120 (7 May 2004). On December 2, 2000, A died as a result of arsenic poisoning. A law enforcement investigation determined that A went bowling with his wife and friends on November 15, 2000. While there, A partially consumed a cup of beer given to him by his wife's co-worker, B. A commented that the beer had a bad or "funny" taste. The investigation also determined that A's wife was involved in a relationship with B. Shortly after A's death, B sought legal counsel from a criminal defense attorney. According to an affidavit of B's wife, the attorney advised B that he could be charged with the attempted murder of A. B committed suicide a few days later. The district attorney filed a petition in the nature of a special proceeding in the superior court requesting that the trial court conduct a hearing and, if necessary, an in camera examination to determine whether the attorney-client privilege should be waived or whether compelled disclosure of communications between the attorney and B was warranted for the "proper administration of justice."

The court issued the following rulings involving this matter (see the court's extensive discussion and analysis in its opinion): (1) the superior court had jurisdiction to hear the petition as a special proceeding; (2) the attorney-client privilege continues after the client's death; (3) B's wife, as executor of his estate, did not have the authority to waive B's attorney-client privilege; (4) the court rejected the state's proposed balancing test in determining whether the state should have access to information otherwise protected by the attorney-client privilege; (5) the trial court did not err in ordering the defense attorney to provide to the court a sealed affidavit containing the communications between B and his attorney; (6) communications between an attorney and client concerning a third party's criminal activity, which do not tend to harm the client's interests, are not privileged; (7) in this case, when B made statements to his attorney, anything he said concerning his collaborative involvement with a third party in the death of A was protected by the attorney-client privilege; (8) if the trial court finds that some or all of the communications between B and his attorney are outside the scope of the attorney-client privilege, the trial court may compel the attorney to provide the substance of the communications to the state for use in its criminal investigation; and (9) to the extent the communications concern a third party but also affect B's own rights or interests and thus remain privileged, the communications may be revealed only by clear and convincing evidence that their disclosure does not expose B's estate to civil liability and would not likely result in additional harm to loved ones and reputation.

No Error in Jury Instruction on First-Degree Felony Murder When Felony of Attempted Sale of Cocaine With Deadly Weapon Was Underlying Felony

State v. Squires, 357 N.C. 529, 591 S.E.2d 837 (7 November 2003). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that there was no error in the conviction of first-degree felony murder when the jury instruction authorized the felony murder conviction for the commission or attempted commission of the sale of cocaine with a deadly weapon and the words "sale of cocaine" appeared on the jury verdict sheet. Even if some jurors found a completed sale of cocaine rather than an attempted sale (for which there was sufficient evidence), there was no error because an attempted sale of cocaine is a lesser-included offense of sale, and a finding of sale necessarily included the attempt to sell.

Trial Judge Did Not Err in Denying Defendant's Pretrial Motion for Appointment of Additional Mental Health Expert

State v. Brown, 357 N.C. 382, 584 S.E.2d 278 (22 August 2003). The defendant was convicted of first-degree murder and sentenced to death. The trial judge approved the defendant's initial ex parte application for the assistance of a mental health expert, a psychologist, to review the defendant's mental health status. This expert concluded that the defendant was suffering from a substance induced mood disorder that precipitates a psychosis. The expert stated that he was only generally familiar with this diagnosis and suggested that the defendant retain a specialist. The trial judge denied the defendant's ex parte motion for a specialist. The court ruled that the trial judge did not err because the defendant failed to show what the specialist could have contributed to the confirmation of the psychologist's diagnosis. The court noted that the defendant also had as a witness at his sentencing hearing a Virginia psychologist who had reached a similar diagnosis at the defendant's 1986 Virginia prosecution for malicious wounding.

Court Clarifies Elements of Common Law Offense of Affray and Rules That State Failed to Prove "Public Place" Element

In re May, 357 N.C. 423, 584 S.E.2d 271 (22 August 2003), *affirming*, 153 N.C. App. 299, 569 S.E.2d 704 (1 October 2002). The juvenile was adjudicated delinquent of affray. The juvenile was a resident of a group home. The evidence showed that the juvenile and another resident were involved in a physical altercation on the home's front grounds. The court noted that there are three elements of affray: (1) a fight between two or more people; (2) the fight occurred in a "public place"; and (3) the fight caused terror to the people who qualify as members of the public. The court stated that two types of locales qualify as a "public place" under element two. One type is parcels and places owned or maintained by a government entity or private business and that are open to traffic—examples are roads, sidewalks, shopping malls, apartment complexes, parks, and commons. The other type is private property situated near enough to public thoroughfares that people using them could see or hear an altercation. The court examined the evidence in this case and ruled that the state had offered insufficient evidence that the altercation occurred in a public place. The court stated, however, that proof of the third element (terror to the people who qualify as members of the public) may in certain cases satisfy the element of public place. For example, a fight that occurs on private property beyond the view or hearing of the general public may nevertheless be witnessed by people who are on the property and are subject to the terror of the altercation. If so, the establishment of the third element also satisfies the second element. In discussing the third element, the court ruled that the correct analysis in evaluating whether a fight caused terror to the people examines the associations between the combatants and witnesses rather than arbitrarily relying on the number of spectators. In this case, the four witnesses who were present at the altercation were either employees or others assigned to live there. None of them were there by happenstance, and therefore they did not qualify as people who might transform the facility from a private place to a public place. The court indicated that a guest at the facility who witnessed the altercation may satisfy both elements two and three. [Author's note: Some aspects of the court's analysis of the term "public place" may apply to the use of that term in other criminal statutes, such as indecent exposure under G.S. 14-190.9 and disorderly conduct under G.S. 14-288.4.]

Trial Judge Gave Proper Malice Instruction in Trial of Malicious Burning of Occupied Dwelling with Incendiary Device (G.S. 14-49.1)—Court of Appeals Ruling Affirmed

State v. Sexton, 357 N.C. 235, 581 S.E.2d 57 (13 June 2003), *affirming*, 153 N.C. App. 641, 571 S.E.2d 41 (5 November 2002). In the trial of malicious burning of occupied dwelling with incendiary device (G.S. 14-49.1), the trial judge instructed the jury on the definition of malice in N.C.P.I.—Crim. 213.20. The court ruled that the jury instruction was proper. As in murder cases, malice for this offense includes

both express and implied malice. The court rejected the defendant's argument that malice for this offense only includes express malice.

Defendants Were Properly Convicted of Second-Degree Trespass When They Refused to Leave Lobby of Private Building When Ordered to Leave Because They Did Not Have Legitimate Purpose to Be in Lobby—Court of Appeals Ruling Affirmed

State v. Marcoplos, 357 N.C. 245, 580 S.E.2d 691 (13 June 2003), *affirming*, 154 N.C. App. 581, 572 S.E.2d 820 (17 December 2002). The court affirmed, per curiam and without an opinion, the ruling of the court of appeals that the defendants were properly convicted of second-degree trespass. The defendants entered during business hours the lobby of a building that was open to allow public access to various stores and restaurants located in the lobby as well as to offices on other floors of the building. They were seeking to speak to the chief executive officer (CEO) of a public utility company whose office was in the building. The manager of the company that provides security for the building asked the defendants to leave because they could not meet with the CEO. The defendants refused to leave. The defendants were convicted of second-degree trespass. The court of appeals ruled that a person may commit second-degree trespass by refusing to leave privately owned property, open to the public for legitimate business only, when the person no longer has a legitimate purpose on the premises and is asked to leave by proper authority. [Author's note: Because the prohibited activity took place in a building, all the elements of first-degree trespass were also satisfied. See G.S. 14-159.12(a)(2) and page 337 of *North Carolina Crimes: A Guidebook on the Elements of Crime* (5th ed. 2001).]

Arrest, Search, and Confession Issues

Assuming Without Deciding That Defendant's Statements Were Taken in Violation of *Miranda*, State Was Properly Permitted to Use Those Statements in Cross-Examination to Impeach Defendant When He Testified at Trial—Court of Appeals Ruling Reversed

State v. Stokes, 357 N.C. 220, 581 S.E.2d 51 (13 June 2003), *reversing*, 150 N.C. App. 211, 565 S.E.2d 196 (21 May 2002). The court ruled, relying on State v. McQueen, 324 N.C. 118, 377 S.E.2d 38 (1989), that assuming without deciding that the defendant's statements were taken in violation of *Miranda*, the state was properly permitted to use those statements in cross-examination to impeach the defendant when he testified at trial. The court also ruled that the state was properly permitted to call the law enforcement officer who took the statements as a rebuttal witness after the defendant had testified, because the testimony was material to the central issue at the murder trial—how the child died.

Trial Judge Had No Authority to Rule on State's Motion to Reconsider Another Trial Judge's Order Granting Defendant's Motion to Suppress When State Did Not Make Sufficient Showing of Substantial Change of Circumstances—Ruling of Court of Appeals Reversed

State v. Woolridge, 357 N.C. 544, 592 S.E.2d 191 (7 November 2003), *reversing*, 147 N.C. App. 685, 557 S.E.2d 158 (2001). The court ruled, citing State v. Hilliard, 120 N.C. 479, 27 S.E. 130 (1997) and other cases, that a trial judge had no authority to rule on the state's motion to reconsider another trial judge's order granting the defendant's motion to suppress when the state did not make a sufficient showing of a substantial change of circumstances since the first judge's order. The court stated that superior court judges must remain mindful that the power of one judge of the superior court is equal and coordinate with that of another.

Evidence

Balancing Test of Rule 403 Is Not Applicable to Conviction Subject to Impeachment Under Rule 609(a) When Conviction Occurred Within Ten Years; Use of Conviction Is Automatically Permitted

State v. Brown, 357 N.C. 382, 584 S.E.2d 278 (22 August 2003). The state at the defendant's 1998 trial impeached the defendant with a 1986 conviction. Because the defendant remained in prison for the 1986 conviction until 1991 or 1992, the conviction was admissible for impeachment under Rule 609(b) (admissible if within ten years of conviction or release from confinement, whichever is later). The court ruled that the balancing test of Rule 403 is not applicable to impeachment under Rule 609(a) when the conviction occurred within ten years under Rule 609(b)— the language of Rule 609(a) ("shall be admitted") is mandatory, leaving no room for the trial judge's discretion.

(1) Murder Victim's Statements Were Properly Admitted Under Rule 803(3) and Residual Hearsay Exception, Rule 804(b)(5)
(2) Statements of Defendant's Brother Were Properly Admitted Under Co-Conspirator Exception, Rule 801(d)(E); Even If Not Admissible Under That Exception, Statements Were Not Hearsay Because Not Offered for Their Truth

State v. Valentine, 357 N.C. 512, 591 S.E.2d 846 (7 November 2003). (1) The court ruled that the murder victim's statements were properly admitted under Rule 803(3) and the residual hearsay exception, Rule 804(b)(5). The statements related directly to the victim's fear of the defendant. (2) The court ruled that the statements of defendant's brother were properly admitted under co-conspirator exception, Rule 801(d)(E). The evidence sufficiently showed that there was a conspiracy between the defendant and the defendant's brother, and the statements were made in furtherance of the conspiracy. The court also ruled that even the statements were not admissible under that exception, the statements were not hearsay because they not offered for their truth.

North Carolina Court of Appeals

Criminal Law and Procedure

Insufficient Evidence of Possession of Cocaine to Support Cocaine Convictions

State v. Acolatse, 158 N.C. App. 485, 581 S.E.2d 807 (17 June 2003). The defendant was convicted of possession of cocaine with intent to sell and deliver and trafficking by possessing cocaine. The court ruled, relying on State v. Chavis, 270 N.C. 306, 154 S.E.2d 340 (1967), that there was insufficient evidence of possession of cocaine to support these convictions. The defendant, while being chased by detectives, was seen making a straight throwing motion towards some bushes behind a detached garage in the backyard of a residence. Cocaine was found on the roof of the detached garage, but not in the bushes. The defendant did not own the residence, and the detectives testified that they did not know who owned it. (See the discussion of other facts in the court's opinion.)

(1) Sufficient Evidence of Possession of Cocaine to Support Conviction
(2) Officers Did Not Destroy Evidence in Bad Faith So Defendant Was Not Entitled to Dismissal of Drug Charge

State v. Burnette, 158 N.C. App. 716, 582 S.E.2d 339 (1 July 2003). (1) The court ruled that there was sufficient evidence of possession of cocaine to support the defendant's cocaine conviction. The defendant

reached into his pants and opened them at the request of law enforcement officers. An officer noticed part of a plastic bag sticking out of the defendant's underwear. The defendant reached in, made a fist, grabbed part of the plastic bag, tore it, threw it on the ground, and ran. The officer pursued the defendant and never lost sight of him. When the defendant was arrested after falling and crawling in a thicket, he did not possess the plastic bag. A drug dog located crack cocaine where the defendant had fallen. The cocaine was found in a plastic bag that the dog had shredded. (2) The officers destroyed evidence when they deliberately threw in the trash pieces of plastic containing the cocaine found in the thicket. The court affirmed the trial judge's finding that the officers did not destroy this evidence in bad faith and thus the defendant was not entitled to a dismissal of the indictment. See, for example, State v. Hunt, 345 N.C. 720, 483 S.E.2d 417 (1997).

(1) Defendant Was Not Prejudiced By State's Failure to Produce Actual Money Seized During Defendant's Drug Arrest When Money Had Been Transferred Before Trial to Federal Agency for Federal Forfeiture
(2) Evidence Was Sufficient to Support Defendant's Conviction of Possession of Cocaine With Intent to Sell or Deliver

State v. Davis, 160 N.C. App. 693, 586 S.E.2d 804 (21 October 2003). An officer arrested the defendant and found on his person 9.2 grams of marijuana, 18.6 grams of cocaine, and cash in the amount of $2,641.68. Before trial, the money was transferred to the U.S. Drug Enforcement Agency for federal forfeiture, and thus the actual money was not available at the defendant's trial. The defendant was convicted of possession of cocaine with the intent to sell or deliver and misdemeanor possession of marijuana. (1) The court discussed the trial testimony offered by the state and defense concerning the money and ruled, citing the provision in G.S. 15-11.1(a) that substitute evidence may be introduced at trial as long as it does not prejudice the defendant, that the defendant was not prejudiced by the state's failure to produce the actual money. (2) The court ruled that the evidence was sufficient to support the defendant's conviction of possession of cocaine with the intent to sell or deliver. First, the court stated that the amount of cocaine, almost 20 grams, far exceeded the amount that a typical user would possess for personal use. Second, the cocaine was packaged separately, and an officer testified that drug dealers often keep cocaine in individual packages so it is readily available for sale. Third, the drugs were found in close proximity to the money. The cash was in the defendant's pocket, while the drugs were hidden in his boots.

Cocaine Trafficking Conspiracy Indictment Was Invalid Because It Failed to Allege Weight of Cocaine That Was Object of Conspiracy to Possess Cocaine

State v. Outlaw, 159 N.C. App. 423, 583 S.E.2d 625 (5 August 2003). The court ruled, relying on State v. Epps, 95 N.C. App. 173, 381 S.E.2d 879 (1989), that a cocaine trafficking conspiracy indictment was invalid because it failed to allege the weight of cocaine that was the object of conspiracy to possess cocaine. The weight of the cocaine was an element of the trafficking conspiracy offense and must be alleged.

State in Drug Trafficking Trial Must Prove That Defendant Knowingly Possessed Controlled Substance, But Need Not Prove That Defendant Knowingly Possessed Specific Amount or Weight of That Controlled Substance

State v. Shelman, 159 N.C. App. 300, 584 S.E.2d 88 (5 August 2003). The defendant was convicted of trafficking in methamphetamine by possession and by transportation. The offenses arose out of officers' controlled delivery of the substance that had been sent through the U.S. mail. The court ruled, relying on cases from other jurisdictions, that the state in a drug trafficking trial must prove that the defendant

knowingly possessed a controlled substance, but need not prove that the defendant knowingly possessed a specific amount or weight of that controlled substance.

Legislature Did Not Intend to Authorize, Based on Single Assault, Convictions of Both (1) Assault with Deadly Weapon with Intent to Kill Inflicting Serious Injury, and (2) Assault Inflicting Serious Bodily Injury, and Thus Convictions of Both Offenses Violate Double Jeopardy

State v. Ezell, 159 N.C. App. 103, 582 S.E.2d 679 (15 July 2003). The court ruled, relying on the double jeopardy analysis in State v. Bailey, 157 N.C. App. 80, 577 S.E.2d 683 (1 April 2003), and distinguishing the analysis in State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997), that the legislature did not intend to authorize, based on a single assault, convictions of both (1) assault with deadly weapon with intent to kill inflicting serious injury (Class C felony), and (2) assault inflicting serious bodily injury (Class F felony), and thus convictions of both offenses violated double jeopardy. The court specifically noted the language in G.S. 14-32.4 (assault inflicting serious bodily injury), "[u]nless the conduct is covered under some other provision of law providing greater punishment," a person who assaults another person and inflicts serious bodily injury is guilty of a Class F felony.

Separate Evidence Supported Defendant's Two Assault Convictions Involving Same Victim

State v. Littlejohn, 158 N.C. App. 628, 582 S.E.2d 301 (1 July 2003). The defendant was convicted of assault with a deadly weapon inflicting serious injury and assault with a deadly weapon with intent to kill inflicting serious injury. Both assaults involved the same victim and were committed by three people, one of whom was the defendant. During the victim's altercation with the defendant and the two accomplices, the victim was stabbed seven times in the back, buttocks, and leg by either the defendant or accomplice A. The victim stopped struggling and fell to the ground. He then was shot twice in the leg with a handgun by accomplice B. The court, relying on State v. Rambert, 341 N.C. 173, 459 S.E.2d 510 (1995), upheld both assault convictions because each assault was temporally distinct and inflicted wounds in different locations of the victim's body. Moreover, the assault by accomplice B occurred only after the first assault (the stabbing) had ceased and the victim had fallen to the floor.

Five Shots Fired by Defendant at Victim in Rapid Succession With Semi-Automatic Handgun Supported Only One Assault Conviction

State v. Maddox, 159 N.C. App. 127, 583 S.E.2d 601 (15 July 2003). The court ruled, relying on State v. Brooks, 138 N.C. App. 185, 530 S.E.2d 849 (2000) and State v. Dilldine, 22 N.C. App. 229, 206 S.E.2d 364 (1974) and distinguishing State v. Rambert, 341 N.C. 173, 459 S.E.2d 510 (1995) and State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999), that five shots fired by the defendant at the victim in rapid succession with a semi-automatic handgun supported only one assault conviction, not five assault convictions.

Maiming of Victim's Ear Requires Proof That Victim's Ear Was Totally Severed from Victim's Head or Part of Victim's Ear Was Totally Severed from Rest of Ear

State v. Scott, 161 N.C. App. 104, 587 S.E.2d 485 (4 November 2003). The court ruled, relying on State v. Foy, 130 N.C. App. 466, 503 S.E.2d 399 (1998), that maiming of a victim's ear under G.S. 14-29 requires proof that the victim's ear was totally severed from the victim's head or part of the ear was totally severed from the rest of the ear. There was insufficient evidence to support a conviction of maiming when the evidence showed that the victim's ear was mostly, but not totally, severed from her head. [Author's note: The evidence may have supported a conviction of attempting maiming.]

Sufficient Evidence to Support Conviction of Armed Robbery with Use of Pocketknife

State v. Bellamy, 159 N.C. App. 143, 582 S.E.2d 663 (15 July 2003). The court ruled that the following evidence was sufficient to support the defendant's armed robbery conviction. The defendant took videos from a video store and fled from the store with an employee in continuous pursuit of the defendant. The chase ended about twenty feet from the store, where the defendant turned around, waving a pocketknife, and asked, "You want a piece of this?" The employee was within five or six feet of the defendant and decided not to confront the defendant, who then left. The court ruled that the taking of the videos and the use of the pocketknife was part of a single transaction, citing State v. Hope, 317 N.C. 302, 345 S.E.2d 361 (1986), and the defendant's use of the pocketknife constituted a dangerous weapon that threatened or endangered the employee's life, citing State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981).

Sufficient Evidence to Support Conviction of Armed Robbery When Defendant Threatened Use of His Gun When Confronted by Security Officers After Defendant Had Been Seen on Security Camera Concealing Store's Merchandise

State v. Gaither, 161 N.C. App. 96, 587 S.E.2d 505 (4 November 2003). The court ruled, relying on State v. Cunningham, 97 N.C. App. 631, 389 S.E.2d 286 (1990), that there was sufficient evidence to support a conviction of armed robbery when the defendant threatened the use of a gun in his pocket when confronted by security officers near the store exit after the defendant had been seen on a security camera concealing some of the store's merchandise. While the defendant's use of intimidation with the gun occurred after the taking of the store's merchandise, the defendant's effort to avoid apprehension by the security officers was an action continuous with the taking and thus constituted a part of the robbery.

Sufficient Evidence to Support Conviction of Armed Robbery Based on Victim's Testimony Concerning Object That Appeared to Be Box Cutter, Even Though Victim Stated That He Did Not Feel His Life Was Threatened

State v. Pratt, 161 N.C. App. 161, 587 S.E.2d 437 (4 November 2003). The defendant was convicted of armed robbery. The victim testified that when accosted around his neck by the defendant, he saw an object that appeared to be a box cutter, and his injuries were consistent with those caused by a box cutter. The court ruled, citing State v. Wiggins, 78 N.C. App. 405, 337 S.E.2d 198 (1985), that because the jury could find that a box cutter was used in the robbery and the box cutter was a dangerous weapon, it could have properly been presumed that the victim's life was endangered. Although the victim stated that he did not feel his life was threatened and thus the presumption was rebutted, the dangerous character of the weapon was a fact to be determined by the jury, which found contrary to the victim's testimony.

Sufficient Evidence to Support Conviction of Attempted First-Degree Forcible Rape

State v. Owen, 159 N.C. App. 204, 582 S.E.2d 689 (15 July 2003). The defendant was convicted of attempted first-degree forcible rape and breaking or entering. The court ruled, distinguishing State v. Brayboy, 105 N.C. App. 370, 413 S.E.2d 590 (1992), that the following evidence was sufficient to support the attempted rape conviction. The defendant broke into a house and pointed a knife at the victim, who had known the defendant for several years, and told her to take her clothes off. The victim complied with the order but retreated to the back corner of her bed. She twice refused the defendant's orders to come toward him. When he leaned over the bed and stuck his knife at her, she grabbed the knife and pressed it down on the bed. The victim screamed, thereby awakening others in the house, and the defendant then jumped out of the bedroom window. The court noted the only evidence supporting a motivation other than rape was the defendant's statement to law enforcement that "I went there to commit a B & E." However, the court stated that the surrounding circumstances did not corroborate the defendant's statement because he did not remove anything from the home. The court concluded that the

evidence was sufficient to support the intent to commit rape even though the defendant never removed any of his clothing or said anything to the victim about sexually assaulting her.

(1) Sufficient Evidence of Penetration to Support Rape Convictions
(2) Jury Had Not Reached Verdict Because It Had Not Been Returned in Open Court as Required By G.S. 15A-1237(b), and Thus Trial Judge Did Not Err in Giving New Instructions and Requiring Jury to Deliberate Further

State v. Bell, 159 N.C. App. 151, 584 S.E.2d 298 (15 July 2003). The defendant was convicted of first-degree statutory rape and second-degree forcible rape. The victim was twelve years, eleven months old. (1) The court ruled that there was sufficient evidence of penetration to support the rape convictions. The victim testified that after the defendant's penis was placed between her legs, he continued pushing and "it hurt." She also testified that his penis "didn't never go in, it was on the outside, but he thought it was in and he just kept on pushing." She experienced pain, burning, and found blood in her underwear (she was not having her period). The emergency room physician testified that although there was no indication of complete penetration, there was bruising of the inner lip of the labia minora near the hymen. (2) When instructing the jury on first-degree statutory rape, the judge erroneously required the state to prove that the victim was under 12 years old. The judge realized the error while the jury was deliberating, but the jury informed the court that it had reached a verdict before the judge could call the jury for new instructions. The judge did not receive or read the verdict and sealed it for appellate review (the jury had found the defendant not guilty of first-degree statutory rape). Instead, the judge gave new instructions concerning the age of the victim: the state must prove that she was under 13 years old. The court ruled that a verdict had not been reached because it has not been returned in open court as required by G.S. 15A-1237(b). Thus the judge did not err in giving new instructions and requiring the jury to deliberate further.

Sufficient Evidence of Constructive Possession of Firearm in Vehicle to Support Conviction of Possession of Firearm by Convicted Felon

State v. Clark, 159 N.C. App. 520, 583 S.E.2d 680 (5 August 2003). Officers stopped a vehicle because they had information that the occupants had just committed an armed robbery of a gas station and food store. The defendant was the driver. One passenger occupied the front passenger seat and another was lying down on the back seat. When an officer opened the door, he could see the handle of a .38 derringer protruding under the driver's seat. Behind the driver's seat was a nylon lunch box that contained a black revolver. The defendant jointly owned the vehicle with his girlfriend and had been the sole driver of the vehicle on the day of the robbery. Distinguishing State v. Alston, 131 N.C. App. 514, 508 S.E.2d 315 (1998), the court ruled that this and other evidence showed the defendant's constructive possession of the .38 derringer to support his conviction of possession of a firearm by a convicted felon.

(1) Sufficient Evidence of Possession of Firearm to Support Conviction of Possession of Firearm by Convicted Felon
(2) No Double Jeopardy Violation When State Used Felony Conviction to Support Conviction of Possession of Firearm by Convicted Felon and Used That Same Felony Conviction to Support Finding of Habitual Felon Status

State v. Glasco, 160 N.C. App. 150, 585 S.E.2d 257 (2 September 2003). The defendant was convicted of possession of a firearm by a convicted felon and was found to be a habitual felon. (1) The court ruled that there was sufficient evidence of possession of a firearm to support the conviction of possession of a firearm by a convicted felon. Witness A testified that she heard a shooting into her house. She went outside a few minutes later and recognized the defendant, who was sitting in a police car. Witness B, a next door neighbor, testified that she heard a lot of gunshots. She opened her back door and saw a man holding a paper sack or trash bag and jumping over the fence behind a shed belonging to her neighbor,

witness C. Witness B later saw the defendant in the police car and he appeared to be wearing the same clothes as the person wore that she had seen near the fence. She then positively identified the defendant as the person she had seen jumping the fence. Witness C shortly after the shooting found an AK-47 rifle hidden beside his backyard shed and directed police to the rifle. When arrested at the scene, the defendant had a bundled trash bag under his jacket. A SBI analyst testified that this trash bag had firearm discharge residue on it. At least two holes in the bag were physically altered by melting and lead particulate and vapor, signs consistent with discharging a firearm from inside the bag. (2) The court ruled, citing, State v. Misenheimer, 123 N.C. App. 156, 472 S.E.2d 191 (1996), that there was no double jeopardy violation when the state used a felony conviction to support a conviction of possession of firearm by a convicted felon and used that same felony conviction to support a finding of habitual felon status.

Inoperability of Firearm Is Not Defense to Possession of Firearm by Convicted Felon

State v. McCree, 160 N.C. App. 200, 584 S.E.2d 861 (2 September 2003). The court ruled, relying on State v. Jackson, 353 N.C. 495, 546 S.E.2d 570 (2001), that the inoperability of a firearm is not a defense to the crime of possession of a firearm by a convicted felon.

(1) Sufficient Evidence to Support Conviction of Willful Failure to Appear Under G.S. 15A-543
(2) Defendant Failed to Prove Selective Prosecution for Willful Failure to Appear
(3) Indictment Charging Financial Identity Fraud (G.S. 14-113.20) Was Valid; Unnecessary Language in Indictment Was Surplusage and There Was No Fatal Variance Between Indictment and Evidence
(4) Resist, Delay, or Obstruct Public Officer Under G.S. 14-223 Is Not Lesser-Included Offense of Financial Identity Fraud
(5) Judge's Technical Amendment of Judgment Did Not Need to Occur in Defendant's Presence

State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606 (5 August 2003). The defendant was convicted of financial identity fraud, willful failure to appear, and was found to be a habitual felon. (1) On June 22, 2000, a bail bondsman posted a secured bond for the defendant. The pretrial release order, signed by the defendant in the presence of a magistrate, informed the defendant that he was "ordered to appear before the court on all subsequent continued dates" and noted the punishment if he failed to appear. The defendant appeared in court on July 5, 2000, on other charges and was released on an unsecured bond, signed by the defendant and magistrate, that contained similar language as the secured bond issued on June 22, 2000. The charges against the defendant were set for trial on January 22, 2001, but the defendant failed to appear in court for his trial. Before the court date, the defendant informed his girlfriend that he might not go to court. The court ruled that there was sufficient evidence to convict the defendant of willful failure to appear under G.S. 15A-534. The court rejected the defendant's argument that there was no evidence that a judge or magistrate ordered him to appear in court on January 22, 2001. The court noted the language in the release orders about the duty to appear in court for the charges against him. The court also rejected the defendant's argument that he was not "ordered" to appear because the magistrate's signature on the release order was computer generated. (2) The court ruled that, even assuming without deciding that the defendant was the only person in the county to have been prosecuted for willful failure to appear, the defendant failed to prove that he was selectively prosecuted for the offense based on such impermissible reasons such as race, religion, or other arbitrary classification. The court noted that the state offered several compelling grounds for the defendant's prosecution, which included fleeing from the jurisdiction for a substantial period, making a concerted effort to conceal himself from authorities, and being a habitual felon. (3) The indictment for financial identity fraud (G.S. 14-113.20) alleged that the defendant had fraudulently represented himself as William Artis Smith "for the purpose of making financial or credit transactions and for the purpose of avoiding legal consequences in the name of Michael Anthony Dammons." The court noted that the state offered substantial evidence that the defendant assumed Smith's identity (using his social security card when encountered by a law enforcement officer)

for the purpose of avoiding legal consequences (arrest for a criminal charge). The indictment's statement about financial or credit transactions was unnecessary and therefore surplusage and did not affect the indictment's validity—the court cited State v. Birdsong, 325 N.C. 418, 384 S.E.2d 5 (1989)—and there was no fatal variance between the indictment and evidence at trial. (4) The court ruled that the offense of resisting, delaying, or obstructing a public officer under G.S. 14-223 is not a lesser-included offense of financial identity fraud. (5) The court ruled that the trial judge did not err in making a technical correction to the judgment sentencing the defendant as a habitual felon (by checking block five on the judgment form) without the defendant being present.

Sufficient Evidence to Support Conviction of Second-Degree Kidnapping Committed During Armed Robbery

State v. McCree, 160 N.C. App. 19, 584 S.E.2d 348 (19 August 2003). The defendant entered an apartment and robbed several people. The court ruled that there was sufficient evidence to support a conviction of second-degree kidnapping committed during the armed robbery of victim A. The defendant first robbed victim A of $50, then forcibly restrained and moved him about the apartment at gunpoint to use him as a Spanish interpreter to facilitate the robbery of the other Spanish-speaking occupants. The restraint and removal of victim A to assist in the robberies of the other occupants exposed victim A to greater danger than inherent in the armed robbery itself.

Double Jeopardy Did Not Bar Convictions for First-Degree Kidnapping Based on Serious Injury and Assault with Deadly Weapon with Intent to Kill Inflicting Serious Injury Involving Same Victim

State v. Smith, 160 N.C. App. 107, 584 S.E.2d 830 (2 September 2003). The court stated, relying on State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997), that double jeopardy did not bar the defendant's convictions for first-degree kidnapping based on serious injury and assault with a deadly weapon with intent to kill inflicting serious injury involving the same victim. Each crime contained elements not required to be proved in the other crime.

(1) Statute Prohibiting Weapon on Educational Property (G.S. 14-269.2) Does Not Require State to Prove Mens Rea, and Statute Is Constitutional
(2) Trial Judge Did Not Err in Instructing Jury That Necessity Was Not a Defense in This Case
(3) Defendant Bail Bondsman Was Not an Officer of the State and Thus Was Not Exempt From Prosecution Under G.S. 14-269.2(g)(1a) and 14-269(b)(2)

State v. Haskins, 160 N.C. App. 349, 585 S.E.2d 766 (16 September 2003). The defendant, a bail bondsman, possessed a handgun and pursued a client who had failed to appear in court onto an elementary school property in order to arrest him. He was convicted of possessing a weapon on educational property under G.S. 14-269.2(b). The court ruled: (1) the statute's not requiring the state to prove mens rea or criminal intent is not unconstitutional; (2) the trial judge did not err in instructing the jury that necessity was not a defense in this case; and (3) the defendant was not an officer of the state and thus was not exempt from prosecution under G.S. 14-269.2(g)(1a) and 14-269(b)(2).

State Failed to Prove Felony of Habitual Misdemeanor Assault

State v. Burch, 160 N.C. App. 394, 585 S.E.2d 461 (16 September 2003). The court ruled that the state failed to prove the felony of habitual misdemeanor assault when the defendant neither stipulated to his five prior misdemeanor convictions nor was arraigned under G.S. 15A-928(c) and admitted to them, and the state did not prove the convictions before the jury.

Sufficient Evidence of Element of Fraudulent Purpose in G.S. 14-65 (Occupant Burning Dwelling for Fraudulent Purpose), When Defendant Burned Dwelling to Deceive Law Enforcement in Investigation of Another Person's Death

State v. Lassiter, 160 N.C. App. 443, 586 S.E.2d 488 (7 October 2003). The court ruled, distinguishing State v. White, 288 N.C. 44, 215 S.E.2d 557 (1975), that there was sufficient evidence of the element of fraudulent purpose in G.S. 14-65 (occupant burning a dwelling for a fraudulent purpose), when the defendant burned his dwelling to deceive law enforcement in their investigation of another person's death.

No Double Jeopardy Violation When State Prosecuted Juvenile In Juvenile Court for Simple Assault After Using That Conduct In Juvenile Probation Violation Hearing

In re O'Neal, 160 N.C. App. 409, 585 S.E.2d 478 (16 September 2003). The court ruled, relying on Breed v. Jones, 421 U.S. 519 (1975), State v. Monk, 132 N.C. App. 248, 511 S.E. 2d 332 (1999), and other cases, that there was no double jeopardy violation when the state prosecuted a juvenile in juvenile court for simple assault after using that conduct in a juvenile probation violation hearing.

Trial Judge Did Not Err in Denying Defendant's Motion to Dismiss Charges for Improper Venue

State v. Perry, 159 N.C. App. 30, 582 S.E.2d 708 (15 July 2003). The defendant was tried in Buncombe County and convicted of involuntary manslaughter and practicing medicine without a license. He pretended to be a medical doctor and instructed a mother to withhold insulin from her diabetic daughter, who died as a result. The defendant lived and worked in Polk County, and all the face-to-face visits between the defendant, mother, and daughter occurred in Polk County. The listed address for the mother and daughter was in Transylvania County, and the cell phone used by the mother was based in that county. During the last days of the daughter's life, the mother and daughter stayed in a campground in Buncombe County and the mother placed cell phone calls from Buncombe County to the defendant in Polk County. The defendant returned those calls to her cell phone while the mother was in Buncombe County. The daughter was admitted to a hospital in Buncombe County where she died. The court ruled that the trial judge did not err in denying the defendant's motion to dismiss the charges for improper venue. The court noted that under G.S. 15A-132(a) when acts constituting an offense occur in multiple counties, each county has concurrent venue. While the mother and daughter were in Buncombe County, the defendant talked with them by telephone and thus committed criminal negligence constituting involuntary manslaughter, and the daughter died in that county. Because the two offenses were joinable under G.S. 15A-926(a), venue was proper in Buncombe County under G.S. 15A-132(b) and 15A-131(e).

(1) Trial Judge Erred in Giving "Acquit First" Instruction in Response to Jury Question During Its Deliberations
(2) Jury's Note Was Not Verdict of Second-Degree Murder to Bar Retrial of First-Degree Murder

State v. Mays, 158 N.C. App. 563, 582 S.E.2d 360 (1 July 2003). (1) The defendant was on trial for first-degree murder. The jury foreman sent a note to the trial judge asking that if the jury cannot unanimously agree on first-degree murder and it can unanimously agree that "minimally" the defendant is guilty of second-degree murder, must the jury conclude that the defendant is guilty of second-degree murder. The judge then instructed the jury that they could not consider the charge of second-degree murder unless it had unanimously acquitted the defendant of first-degree murder. The court ruled, based on G.S. 15A-1237(e) and State v. Sanders, 81 N.C. App. 438, 344 S.E.2d 592 (1986), that the judge erred in giving this instruction, commonly known as the "acquit first" instruction. The court suggested the following jury

instruction under similar circumstances as occurred in this case: (i) the jury should first consider the primary offense, but it is not required to determine unanimously that the defendant is not guilty of that offense before it may consider a lesser included offense; and (ii) if the jury's verdict is not guilty of the primary offense, or if, after all reasonable efforts, the jury is unable to reach a verdict as to that offense, then it may consider whether the defendant is guilty of the lesser included offenses. (2) The jury's note, as described in (1) above, was not a verdict finding second-degree murder to bar the state from re-prosecuting the defendant for first-degree murder when the trial ended in a mistrial. See State v. Booker, 306 N.C. 302, 293 S.E.2d 78 (1982).

(1) Jurors' Questions Should Be Submitted in Writing
(2) Trial Judge Erred in Ordering Forfeiture of Alleged Drug Money When Defendant Was Not Convicted of Act Set Out in G.S. 90-112(a)(2)

State v. Jones, 158 N.C. App. 465, 581 S.E.2d 107 (17 June 2003). (1) The trial judge allowed jurors to orally ask questions of a witness. The court noted that the supreme court in State v. Howard, 320 N.C. 718, 360 S.E.2d 790 (1987), stated that the better practice is to require jurors to submit questions in writing to the trial judge, the judge to hold a bench conference to rule on any objections outside the jury's presence, and the judge to read jurors' questions to the witness. However, the court did not find error in this case. (2) The defendant was convicted of second-degree murder, conspiracy to commit armed robbery, and first-degree burglary. The court ruled that the trial judge erred under G.S. 90-112 in ordering the forfeiture of alleged drug money found in an apartment in which the defendant lived because he was not convicted of an act set out in G.S. 90-112(a)(2); the court relied on the reasoning in State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16 (1996).

(1) Jury Selection Procedure in Which Prospective Jurors Were Divided into Panels and Called in Order in Which They Were Assigned Was Improper
(2) Trial Judge Did Not Err After Opening Statements in Re-Impaneling Jury and Replacing Person Incorrectly Seated as Alternate Juror

State v. Johnson, 161 N.C. App. 68, 587 S.E.2d 445 (4 November 2003). (1) The court ruled that the trial judge erred in dividing prospective jurors into panels and then calling prospective jurors from each panel in the order in which they were assigned (thus allowing both parties to know exactly which prospective juror was next to be called), rather than calling prospective jurors randomly from the jury venire as a whole as required by G.S. 15A-1214(a). This procedure clearly violated the statute. (2) After opening statements had been presented, it was discovered that the jury had been impaneled with the wrong person serving as an alternate juror. Rather than declaring a mistrial, the trial judge re-impaneled the jury with the correct alternate juror seated and allowed the parties to present opening statements to the re-impaneled jury. The court ruled that the judge did not err in doing so, citing State v. Kirkman, 293 N.C. 447, 238 S.E.2d 456 (1977), and State v. McKenna, 289 N.C. 668, 224 S.E.2d 537 (1976).

Defendant in Attempted First-Degree Murder Trial Was Not Entitled to Instruction on Self-Defense Because His Belief in Using Deadly Force Was Not Objectively Reasonable

State v. Meadows, 158 N.C. App. 390, 581 S.E.2d 472 (17 June 2003). The court ruled, relying on State v. Williams, 342 N.C. 869, 467 S.E.2d 392 (1996), that the defendant in an attempted first-degree murder trial was not entitled to an instruction on self-defense because his belief in using deadly force was not objectively reasonable—even though the defendant testified he believed that the victim had a weapon and it was necessary to shoot him in self-defense. The court noted statements in *Williams* that a self-defense instruction is not required when the record is totally devoid of any evidence supporting the defendant's self-serving assertion that he believed that the victim was reaching for a weapon. (See the court's discussion of the facts in its opinion.)

Trial Judge Erred in Not Instructing on Involuntary Manslaughter in Second-Degree Murder Trial

State v. Reynolds, 160 N.C. App. 579, 586 S.E.2d 798 (7 October 2003). The court ruled, relying on State v. Wallace, 309 N.C. 141, 305 S.E.2d 548 (1983) and State v. Tidwell, 112 N.C. App. 770, 436 S.E.2d 922 (1993), that the trial judge erred in not instructing on involuntary manslaughter in a second-degree murder trial. The defendant's evidence showed that the decedent pointed a gun at the defendant and cocked it. When the defendant tried to knock the gun away, a scuffle with the decedent ensued over control of the gun and the gun discharged into the decedent's chest, killing her.

Defendant Was Not Entitled to Jury Instruction in N.C.P.I. 105.40 on Impeachment by Prior Conviction When Convictions Were Elicited by Defense Counsel on Direct Examination of Defendant

State v. Jackson, 161 N.C. App. 118, 588 S.E.2d 11 (4 November 2003). The court ruled, relying on State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131 (1984), *affirmed*, 315 N.C. 444, 340 S.E.2d 701 (1986), that the court did not err in not giving the jury instruction in N.C.P.I. 105.40 ("Impeachment of the Defendant as a Witness by Proof of Unrelated Crime") when the convictions were elicited by defense counsel on direct examination of the defendant. The court stated that the defendant under these circumstances was not entitled to a special instruction limiting consideration of such testimony to the defendant's "truthfulness."

Trial Jury Erred in Speaking Only to Jury Foreman Without Other Jurors Being Present When Answering Jury's Questions about Jury Instructions and Related Matters

State v. Robinson, 160 N.C. App. 564, 568 S.E.2d 534 (7 October 2003). The court ruled, relying on State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985) and State v. Tucker, 91 N.C. App. 511, 372 S.E.2d 328 (1988), that the trial judge erred when after the jury had begun deliberations, the judge spoke only to the jury foreman without the other jurors being present when answering the jury's questions about the jury instructions and related matters.

Trial Judge's Determination That State Did Not Discriminate Based on Race or Gender in Exercising Peremptory Challenges of Jurors Was Not Clearly Erroneous

State v. Wiggins, 159 N.C. App. 252, 584 S.E.2d 303 (5 August 2003). The court ruled that the trial judge's determination that the state did not discriminate based on race or gender in exercising peremptory challenges of jurors was not clearly erroneous. (See the court's detailed analysis in its opinion.)

Defendant's Access to Counsel Before Administration of Intoxilyzer Tests Was Not Violated

State v. Rasmussen, 158 N.C. App. 544, 582 S.E.2d 44 (1 July 2003). The defendant was involved in an accident. A corporate attorney who was not involved in the accident, but had left a business dinner in a separate car at the same time as the defendant, stopped her car and saw the defendant. A State Highway Patrol officer who had responded to the accident arrested the defendant for DWI and transported him to an Intoxilyzer operator. When given his Intoxilyzer rights and asked if wanted to call a witness or attorney to observe the Intoxilyzer test, the defendant responded that he wanted to call the corporate attorney. After the observation period ended, the attorney was brought into the Intoxilyzer room and witnessed the administration of the Intoxilyzer test to the defendant. The defendant was released shortly thereafter and left with the attorney. The court rejected the defendant's argument that the DWI charge should have been dismissed because he had a statutory right under G.S. 15A-501(5) to consult with the attorney before submitting to the Intoxilyzer test and was prevented from doing so. The court stated,

quoting from Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979), that a defendant has no right to counsel under these circumstances other than that provided in G.S. 20-16.2(a)(6). G.S. 20-16.2 controls over G.S. 15A-501(5) in the context of this case. The court reviewed the facts and determined that the defendant never requested to confer with the attorney before the administration of Intoxilyzer test and thus his right of access to counsel was not denied.

Trial Judge Did Not Have Jurisdiction to Revoke Probation When Hearing Was Conducted After Probationary Period Had Ended and Judge Did Not Make Required Finding Under G.S. 15A-1344(f)

State v. Hall, 160 N.C. App. 593, 568 S.E.2d 561 (7 October 2003). The defendant's probationary period ended on May 17, 2002, and the probation hearing and subsequent revocation occurred on August 19, 2002. Because the judge did not make a finding required under G.S. 15A-1344(f) that the state made a reasonable effort to conduct the hearing earlier, the court ruled, relying on State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980), the judge did not have jurisdiction to revoke the defendant's probation.

Arrest, Search, and Confession Issues

(1) Defendant's Nonverbal Conduct Constituted Valid Consent to Enter Hotel Room
(2) Scales Were Lawfully Observed and Seized Under Plain View Doctrine
(3) Warrantless Search of Mattresses and Night Stand Drawer for Weapons Was Justified for Officers' Self-Protection

State v. Harper, 158 N.C. App. 595, 582 S.E.2d 62 (1 July 2003). Based on an investigation that people in a hotel room were involved with illegal drugs, an officer knocked on the door to the room. The defendant initially opened the door slightly and while continuing to have a conversation with the officer, opened it about halfway. The officer asked the defendant if he could step inside the room to see if George Davis was in. The defendant then stepped back from the officer and the threshold of the door and opened it almost to its full extension. The officer saw a set of electronic scales on the night stand between the room's two beds and knew that drug dealers often used such scales to measure illegal drugs. There was another person in the room beside the defendant. That person started moving around the room, then refused the officer's order to remain seated on a bed, and became increasingly agitated. He was handcuffed. The defendant defied the officer's order to remain seated on a bed and was handcuffed. The officer then searched for weapons the mattresses and night stand where the defendant and other person had been located. The officer and other officers saw illegal drugs and cash in these places. They obtained a search warrant and conducted a search of the hotel room and seized evidence. (1) The court ruled, relying on State v. Graham, 149 N.C. App. 215, 562 S.E.2d 286 (2002), that the defendant's nonverbal conduct constituted valid consent to enter the hotel room. (2) The court ruled (after determining that the officer was lawfully in the room with the consent to enter) that the scales were lawfully observed and seized under the plain view doctrine. [Author's note: The court's ruling is clearly correct. However, the court referred to statements in State v. Bone, 354 N.C. 1, 9, 550 S.E.2d 482, 487 (2001), that the discovery of evidence under the plain view doctrine must be inadvertent. The statements in *Bone* were incorrect. An inadvertent discovery is not required under the Fourth Amendment; see Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). Inadvertence is required by G.S. 15A-253, but only during the execution of a search warrant. The discovery in this case did not occur during the execution of a search warrant.] (3) The court ruled that the warrantless search for weapons of the mattresses and night stand drawer (where the defendant and the other person had repeatedly moved) was justified for the officers' self-protection.

Uncorroborated Anonymous Tip That Vehicle Was Involved in Sale of Illegal Drugs Did Not Support Reasonable Suspicion to Make Investigative Stop

State v. McArn, 159 N.C. App. 209, 582 S.E.2d 371 (15 July 2003). An anonymous caller reported to a police department that a white Nissan vehicle at a specified location was involved in the sale of illegal drugs. Based on this information and with no additional corroboration of the anonymous caller's information, an officer stopped the vehicle. The court ruled, relying on State v. Hughes, 353 N.C. 200, 539 S.E.2d 625 (2000), and other cases, that the officer did not have reasonable suspicion to make an investigative stop of the vehicle.

Warrantless Search of Vehicle Was Supported by Probable Cause

State v. Nixon, 160 N.C. App. 31, 584 S.E.2d 820 (19 August 2003). Officer A received information from a informant he knew to be reliable that the defendant shortly would meet with a named person at a specified restaurant to purchase marijuana and then return to his home driving a specified vehicle. Officer A relayed that information to Officer B, telling him that it came from a CRI (confidential and reliable informant). Officer B relayed the information to Officer C, who conducted a warrantless search of the vehicle for marijuana. Officer A testified at the suppression hearing and established that the informant had given him information several times over the previous two years, and the information given had been correct every time and had led to several arrests. The court ruled that this and the other information provided probable cause to search the defendant's vehicle. The court noted, relying on United States v. Hensley, 469 U.S. 221 (1985), that an officer who takes a law enforcement action (in this case, the warrantless search) need not know the facts establishing probable cause when directed by another officer who has probable cause and, for the evidence seized to be admissible at trial, those facts are provided at a suppression hearing if they are necessary to support the law enforcement action. The court distinguished State v. Hughes, 353 N.C. 200, 539 S.E.2d 625 (2000), because in that case the officer with knowledge of the information about an informant did not testify at the suppression hearing (or supply that information to other officers who testified at the suppression hearing).

Videotapes Were Properly Seized Under G.S. 15A-242(4) During Execution of Search Warrant for Marijuana Because Videotapes Depicted Defendant's Control of Room Where Marijuana Was Found

State v. Adams, 159 N.C. App. 676, 583 S.E.2d 689 (5 August 2003). Officers executed a search warrant for the defendant's mobile home to search for marijuana. The warrant also authorized the seizure of "[A]rticles of personal property tending to establish and document sales of marijuana . . . plus articles of personal property tending to establish the identity of persons in control of the premises . . . ." Four people in addition to the defendant lived in the defendant's mobile home. Officers found in the defendant's bedroom marijuana, drug paraphernalia, a concealed video camera positioned to videotape the bed area, and a box of homemade videotapes located in a closet. There were no markings or labels on the videotapes. An officer briefly viewed two of the videotapes while in the bedroom and saw sexual activity between a male and female in the defendant's bedroom. Another officer arrived later and not knowing what the other officer had seen on the videotapes, questioned the defendant about them. The defendant admitted that they depicted his having sex with women in his bedroom. The officer seized the videotapes to establish who was in control of the bedroom in which the marijuana had been found. Based on the evidence from the videotapes, the defendant was convicted of first-degree sexual exploitation of a minor and participating in the prostitution of a minor. The court ruled that the videotapes were properly seized under G.S. 15A-242(4) because there was probable cause to believe they constituted evidence of the identity of a person participating in an offense.

Probable Cause Supported Search Warrant Even Without Evidence Obtained By Unconstitutional Use of Thermal Imager

State v. Lemonds, 160 N.C. App. 172, 584 S.E.2d 841 (2 September 2003). During the course of an investigation into the defendant's drug activities, law enforcement officers conducted two thermal imaging scans of the defendant's residence, revealing a heat signature consistent with a marijuana-growing operation. This information was included in the affidavit for a search warrant to search the residence. After the execution of the search warrant, the United States Supreme Court in Kyllo v. United States, 533 U.S. 27 (2001), ruled that the warrantless use of a thermal imager to detect heat emanating from a private home violated the Fourth Amendment. The court ruled that even without the thermal imaging results, there was sufficient information in the search warrant's affidavit to support a finding of probable cause to search the residence, which included police surveillance, an anonymous tip, and electric bills showing a dramatic increase in electricity usage. (See the fourteen factors recited by the court in its opinion.)

Anticipatory Search Warrant Was Valid Under Standards Set Out in *State v. Smith*

State v. Phillips, 160 N.C. App. 549, 568 S.E.2d 540 (7 October 2003). Approximately 1,000 grams of cocaine were found in a package at an Federal Express facility in Greensboro. A detective obtained a search warrant for the residence at the address to which the package was to be delivered and arranged a controlled delivery of the re-sealed package. The package was addressed to Sonya Moore, 1412 Hamlet Pl., Greensboro, North Carolina. The pertinent part of the search warrant stated:

> On this date, the applicant and other officers will attempt to make a controlled delivery of the Federal Express Package addressed to Sonya Moore, 1412 Hamlet Pl., Greensboro, N.C. If this Federal Express Package is delivered to said residence within the forty eight hours of the Issuance of this Warrant, this search warrant will be executed shortly thereafter.

The controlled delivery took place the same day as the search warrant was obtained. Because there was no answer at the residence and the mailing label indicated a signature release, allowing the package to be left if no one was home, the officer attempting delivery left the package on the porch. A few minutes later, the defendant opened the front door from inside of the residence and retrieved the package. About twenty minutes later, the detective executed the search warrant and forced entry into the defendant's residence when no one answered the door. The court ruled that this anticipatory warrant was valid under the standards set out in State v. Smith, 124 N.C. App. 565, 478 S.E.2d 237 (1996). First, the warrant set out "explicit, clear, and narrowly drawn triggering events" authorizing the execution of the warrant. The triggering event was the successful controlled delivery of the package to the listed address. The court rejected the defendant's argument that 48 hours was too long for law enforcement to be entitled to execute the anticipatory search warrant and that the phrase "shortly thereafter" concerning the timing of the execution after delivery was ambiguous. The court stated that *Smith* requires only that the execution of the search warrant occur after the triggering event, and the triggering event must be appropriately articulated, as it was in this case. Second, the search warrant satisfied the *Smith* requirement that the contraband must be on a sure, irreversible course to the place of the intended search, and any future search of the place must be made expressly contingent on the contraband's arrival there. In this case, the execution of the search warrant was made contingent on the delivery of the package to the listed address after a controlled delivery. Third, the search under the search warrant awaited the arrival of the contraband to the place listed in the search warrant, which happened in this case.

Officer’s Response to Question Posed by In-Custody Defendant Was Not Interrogation to Require *Miranda* Warnings

State v. Smith, 160 N.C. App. 107, 584 S.E.2d 830 (2 September 2003). While being held in the county jail awaiting trial for several felonies, the defendant was served in the holding area of the magistrate’s office with an order involving another case. The defendant questioned a detective whether his mother would be arrested as an accessory after the fact involving the pending felony cases. When the detective responded affirmatively, the defendant became angry and said, “Look, man, my mom is innocent. Just because I attacked two innocent people in Greensboro doesn’t mean you have to charge innocent people.” The court ruled, relying on State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986), that the detective’s factually correct response to the defendant’s question called for no response from the defendant; it was neither express questioning nor was it likely to elicit an incriminating response from the defendant under the standard set out in Rhode Island v. Innis, 446 U.S. 291 (1980). Thus the defendant’s statement was admissible at trial even though he had not been given *Miranda* warnings.

Evidence

(1) Accomplice’s Statements Offering Bribe to Law Enforcement Officer Were Admissible Against Defendant as Non-Hearsay Verbal or Operative Acts and Also as Adoptive Admissions
(2) District Court Conviction on Appeal for Trial De Novo in Superior Court May Be Used to Impeach Witness Under Rule 609(e)

State v. Weaver, 160 N.C. App. 61, 584 S.E.2d 345 (19 August 2003). (1) The defendant was convicted of offering a bribe to a public officer in which the defendant and an accomplice, Blakeney, were involved. Officers possessed a search warrant to search Blakeney’s apartment. A detective encountered Blakeney outside his apartment and found crack cocaine and cash on his person. The officer escorted him inside the apartment and all the officers began to search it. Blakeney asked the detective if they could speak in private. While the defendant was standing three to five feet away, Blakeney asked the detective if there was anything that Blakeney could do so the detective would forget about the cocaine he had just found. Later Blakeney said he would give the detective some money to drop the charges. Blakeney then turned to the defendant and asked him, “How much money are you willing to give him to make this go away?” The defendant replied, “It doesn’t matter to me, whatever it takes.” Additional statements were made by Blakeney, the detective, and the defendant. Blakeney did not testify at trial. The court ruled that Blakeney’s statements were admissible under two separate grounds. First, citing United States v. Moss, 9 F.3d 543 (6th Cir. 1993), and the official commentary to Rule 801, the court ruled that Blakeney’s statements were not hearsay because they were “operative facts” or “verbal acts,” the words concerning the attempt to bribe the detective. Second, Blakeney’s statements were also admissible as adoptive admissions under Rule 801(d)(B): the defendant participated in the conversation and affirmatively endorsed Blakeney’s statements. (2) The court ruled that the trial judge did not err in permitting the state to cross-examine the defendant under Rule 609(e) (pendency of appeal does not render evidence of conviction inadmissible) about a district court conviction that was pending for trial de novo in superior court. The court stated that there is no authority suggesting that Rule 609(e)’s reference to an “appeal” excludes appeals from district court to superior court.

Statements of Child Sexual Abuse Victim to Social Worker Who Worked With Pediatrician Were Properly Admitted Under Rule 803(4) (Statement for Purpose of Medical Diagnosis and Treatment) and Satisfied *State v. Hinnant* Standard

State v. Thornton, 158 N.C. App. 645, 582 S.E.2d 308 (1 July 2003). The child sexual abuse victim was examined by a pediatrician and a social worker who worked with the pediatrician. The social worker conducted the interview and the pediatrician conducted the medical examination. The court ruled that

statements of the victim to the social worker were properly admitted under Rule 803(4) (statement for purpose of medical diagnosis and treatment) and satisfied the standard for admission under Rule 803(4) as set out in State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000). The medical and psychological evaluations of the child took place at a medical facility. The social worker testified that at the beginning of her interview she made sure that the child understood that she was in a doctor's office and that the social worker worked with a doctor and her job was to help the child. The social worker explained the importance of being truthful during the interview and the child understood that.

(1) Murder Victim's Handwritten Notes in Hospital Were Not Admissible Under Hearsay Rule 803(1) (Present Sense Impression)
(2) Defendant's Constitutional Rights Were Not Violated When Defendant's Statements to Others Were Not Allowed to Be Admitted During Defendant's Presentation of Evidence

State v. Wiggins, 159 N.C. App. 252, 584 S.E.2d 303 (5 August 2003). The defendant was on trial for the murder of his girlfriend and other offenses. He was convicted of conspiracy to commit first-degree murder and other offenses. (1) The murder victim was shot while in her car shortly after midnight. She described the shooting in her call to 911 and later to a law enforcement officer. She was transported to a hospital. About seven hours after the shooting (and after surgery while she had a tube in her throat), she handwrote notes describing the shooting and the events of the morning and previous evening. The court ruled that these notes were not admissible under hearsay Rule 803(1) (present sense impression—statement describing event made while declarant was perceiving event, or immediately thereafter). The court noted that even after subtracting the length of time the victim spent in surgery and recovery, nearly two additional hours elapsed between the event and the written statement and thus the statement was not made "immediately thereafter" the event. (2) The defendant did not testify at trial. The court ruled, distinguishing Chambers v. Mississippi, 410 U.S. 284 (1973), that the defendant's constitutional rights were not violated when the defendant's statements to others were not allowed to be admitted during the defendant's presentation of evidence. The statements were self-serving, were sought to be admitted for the truth of the matter asserted, and were not evidence of the defendant's state of mind under hearsay Rule 803(3) (then existing mental, emotional, or physical condition).

Statements of Witnesses to Law Enforcement Officer Shortly After Armed Robbery Were Admissible Under Both Hearsay Rule 803(1) (Present Sense Impression) and Rule 803(2) (Excited Utterance)

State v. Clark, 159 N.C. App. 520, 583 S.E.2d 680 (5 August 2003). An law enforcement officer testified that two unidentified men spoke to him twice concerning an armed robbery of a gas station and food store. The first time, the men ran down from the Shell gas station practically out in the street in front of the officer's patrol car and stated, "Those guys are robbing the Shell station." A little later, the same men told him, "Hey, you just missed the guy." The officer responded by asking missing in what. They said it was a gray Jeep and it just went that way, referring to a particular street. The court ruled that the statements of these unidentified men were admissible under both hearsay Rule 803(1) (present sense impression—statement describing event made while declarant was perceiving event, or immediately thereafter) and Rule 803(2) (excited utterance).

Prosecutor Was Properly Permitted to Cross-Examine Defendant Under Rule 404(b) About Defendant's Prior Assaults on Correctional Officers in Trial of First-Degree Murder of Law Enforcement Officer

State v. Mays, 158 N.C. App. 563, 582 S.E.2d 360 (1 July 2003). The defendant was on trial for first-degree murder of a law enforcement officer. He testified on direct examination that he would have never shot the officer if he had known he was a law enforcement officer. The court ruled that the prosecutor was

properly permitted to cross-examine the defendant under Rule 404(b) whether he had attempted to assault correctional officers—to show that the defendant had knowingly assaulted officers on another occasion.

Cross-Examination of State's Witness and School Principal About Witness's School Disciplinary Record Was Properly Prohibited Because Record Did Not Relate to Witness's Credibility Under Rule 608(b)

In re Oliver, 159 N.C. App. 451, 584 S.E.2d 86 (5 August 2003). The court ruled that cross-examination of a state's witness and her school principal about the witness's school disciplinary record was properly prohibited because the disciplinary record did not relate to the witness's credibility under Rule 608(b).

Trial Judge Did Not Err in Allowing State to Ask Defendant on Cross-Examination About Defendant's Prior Adjudication as Habitual Felon

State v. Owens, 160 N.C. App. 494, 568 S.E.2d 519 (7 October 2003). The defendant was indicted for felonious larceny and other charges, and habitual felon. During the defendant's trial for the substantive offenses, the trial judge allowed the state to ask the defendant on cross-examination about the defendant's prior adjudication as a habitual felon. The court ruled that the trial judge did not err in allowing this cross-examination. The court noted that G.S. 14-7.5 bars the revelation to the jury of a pending habitual felon indictment, but not a prior adjudication of habitual felon; the state's cross-examination simply served to elicit information about the defendant's prior criminal record.

Defense Counsel on Cross-Examination of State's Witnesses Opened the Door to Allow Witnesses on Re-Direct Examination to Testify About Otherwise Inadmissible Hearsay

State v. Mason, 159 N.C. App. 691, 583 S.E.2d 410 (5 August 2003). The defendant was convicted of first-degree murder and other offenses. (1) On cross-examination of a state's witness (a law enforcement officer), the defense counsel asked the witness specific questions concerning a report he had written about a domestic violence call and his failure to record certain data. To rehabilitate the witness, the trial judge allowed the state on re-direct examination to permit questioning about the contents of the report (which apparently included otherwise inadmissible hearsay). The judge limited the use of the evidence to identity and opportunity under Rule 404(b). The court ruled, relying on State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), that the re-direct examination was permitted because the defense counsel "opened the door" about this evidence. (2) On cross-examination of a state's witness (a different law enforcement officer), the defense counsel asked the witness why the police did not follow any other leads. The trial judge allowed the state on re-direct examination to ask the witness why other potential suspects were not pursued and why the investigation focused on the defendant. The witness testified that two people identified the defendant as being at the crime scene when the shooting occurred. The court ruled, relying on *State v. McNeil*, that the re-direct examination was permitted because the defense counsel "opened the door" to permit this testimony, including the otherwise inadmissible hearsay evidence. See also State v. Clark, 159 N.C. App. 520, 583 S.E.2d 680 (5 August 2003) (defendant's cross-examination of state's witness opened door for admissibility of otherwise inadmissible hearsay evidence on re-direct examination).

(1) Trial Judge Did Not Err in Permitting Officer to Demonstrate Before Jury How Apron String Was Wrapped and Tied Around Murder Victim's Neck
(2) Defendant Was Not Entitled to Jury Instruction on Character Trait of Having "Good Reputation in the Community"

State v. Fowler, 159 N.C. App. 504, 583 S.E.2d 637 (5 August 2003). The defendant was convicted of first-degree murder. (1) The court ruled, relying on State v. Hunt, 80 N.C. App. 190, 341 S.E.2d 350

(1986), and other cases, that the trial judge did not err in permitting an officer to demonstrate before the jury how an apron string was wrapped and tied around the murder victim's neck. The officer use an apron string similar to the one found on the victim's body and a Styrofoam mannequin's head. The court stated that the demonstration was relevant to the jury's determination whether the defendant acted with premeditation and deliberation. The defendant's defense in seeking a second-degree murder verdict was that he had impulsively strangled the victim as the two of them had struggled and fought. (2) The court ruled that the defendant was not entitled to a jury instruction on the character trait of having a "good reputation in the community." The court noted, citing State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989), that since the adoption of the rules of evidence in 1984 a defendant may not offer evidence of undifferentiated, overall "good character." Instead the defendant must offer pertinent traits of character.

Trial Judge Erred During State's Presentation of Evidence in Admitting for Corroboration a Prior Statement of State's Witness That Contradicted Witness's Trial Testimony

State v. McCree, 107 N.C. App. 200, 584 S.E.2d 861 (2 September 2003). The defendant was on trial for assault with a deadly weapon inflicting serious injury. The victim testified that he had been struck by a fist, and although the defendant possessed a handgun, he did not remember being struck by it. The state was permitted to introduce a prior statement of the victim that he had been beaten with a gun. The court ruled that the trial judge erred because the prior statement contradicted the witness's trial testimony and thus was not a prior consistent statement.

State Expert's Testimony About Cause of Fire Was Properly Admitted

State v. Lassiter, 160 N.C. App. 443, 586 S.E.2d 488 (7 October 2003). The defendant was convicted of setting fire to a dwelling house under G.S. 14-65. He told firefighters on the day of the fire that it was caused by hot vegetable oil that had ignited while cooking. The court ruled that the trial judge did not err in admitting the testimony of the state's expert witness, who had examined the fire scene. The expert testified that the fire was caused by a hydrocarbon source and it was physically impossible that vegetable oil started the fire because, as tested by the expert, a fire from hot vegetable oil would go out when it hit the floor. The expert also found hydrocarbon soot in the dwelling, and vegetable oil is not a hydrocarbon.

Sentencing

Record Check Handed to Sentencing Judge, Although Not Introduced into Evidence, Was Sufficient to Support Judge's Finding That Defendant Was on Probation When He Committed Offense

State v. Maddox, 159 N.C. App. 127, 583 S.E.2d 601 (15 July 2003). The court ruled that a record check handed to the sentencing judge, although not introduced into evidence, was sufficient to support the judge's finding that defendant was on probation when he committed the offense—thus adding an additional point to the defendant's prior record level determination. The record check showed that the defendant was sentenced to 24 months probation on January 26, 2000, and the offense in this case was committed on October 21, 2000. [Author's note: Federal law prohibits a DCI printout from becoming a public record. This ruling would allow the state to hand the DCI printout to the sentencing judge to prove convictions in determining a defendant's prior record level without having to introduce the DCI printout into evidence. Of course, the defendant's prior convictions may be proved without the offer or introduction of evidence if the state and the defendant enter into a stipulation.]

Prosecutor's Statement to Sentencing Judge and Offer of Worksheet, Absent Defense Stipulation or Record Evidence, Was Insufficient to Establish Prior Record Level for Sentencing

State v. Riley, 159 N.C. App. 546, 583 S.E.2d 379 (5 August 2003). The court ruled, citing State v. Mack, 87 N.C. App. 24, 359 S.E.2d 485 (1987) and State v. Hanton, 140 N.C. App. 679, 540 S.E.2d 376 (2000), the a prosecutor's statement to the sentencing judge and the offer of worksheet, absent a defense stipulation or record evidence, was insufficient to establish the defendant's prior record level for sentencing.

Trial Judge in Sentencing Defendant for First-Degree Kidnapping Did Not Err in Finding Statutory Aggravating Factor That Victim Suffered Serious, Permanent, and Debilitating Injury [G.S. 15A-1340.16(d)(19)]

State v. Jones, 158 N.C. App. 498, 581 S.E.2d 103 (17 June 2003). The court ruled, relying on State v. Crisp, 126 N.C. App. 30, 483 S.E.2d 462 (1997), and State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994), that the trial judge in sentencing the defendant for first-degree kidnapping did not err in finding the statutory aggravating factor that the victim suffered serious, permanent, and debilitating injury [G.S. 15A-1340.16(d)(19)]. Although serious injury elevates second-degree kidnapping to first-degree kidnapping, the finding of this aggravating factor requires more evidence than proving serious injury and thus does not violate G.S. 15A-1340.16(d) (evidence necessary to prove an element may not be used to prove an aggravating factor). In this case, the shooting of the victim supported the finding of serious injury and the resulting paralysis supported the aggravating factor.

Trial Judge Did Not Err in Ordering Defendant to Pay $30.00 in Restitution for Drug Purchase Made by Confidential Informant with Money Supplied by Officer, Even Though Purchase Did Not Result in Charge or Conviction, When Purchase Was Part of Ongoing Investigation Leading to Defendant's Conviction

State v. Reynolds, 161 N.C. App. 144, 587 S.E.2d 456 (4 November 2003). A confidential informant, working under an officer's supervision, was supplied thirty dollars by the officer and made a drug purchase from the defendant on September 16, 2001. The defendant was not charged with this offense, but was tried and convicted for a similar offense on November 19, 2001. The court ruled that the trial judge properly ordered defendant to pay restitution of thirty dollars for the September drug purchase under G.S. 90-95.3 and G.S. 15A-1343(d) because the September purchase was part of the ongoing investigation leading to his conviction.