RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
(November 3, 1995 - June 4, 1996)

Robert L. Farb
Institute of Government

NORTH CAROLINA SUPREME COURT

Arrest, Search, and Confession Issues

Defendant Did Not Have a Reasonable Expectation of Privacy in Garbage Placed for Pickup within the Curtilage and Picked Up by Garbage Collector; Court Disavows Contrary Conclusion in Court of Appeals Opinion

State v. Hauser, 342 N.C. 382, 464 S.E.2d 443 (8 December 1995). A detective made arrangements with the city sanitation department to collect trash at the defendant's residence and give it to detectives. A sanitation worker collected the garbage left at the back of the residence for collection. The collection was routine except that the sanitation worker prevented the garbage from commingling with other garbage by depositing the defendant's garbage into his own container in the back of the garbage truck instead of into the truck's collection bin. The sanitation worker gave the defendant's garbage to the detectives, who found cocaine residue in it. One of the detectives then obtained a search warrant based on the cocaine found in the garbage and information received from four informants. One of the informants stated that the defendant had sold him cocaine at the defendant's residence. In addition, the officers provided facts showing the reliability of the informants' information. The officers executed the search warrant, and more than a pound of cocaine was found in the defendant's residence.

The court, disavowing a contrary conclusion in the court of appeals opinion in this case, 115 N.C. App. 431, 445 S.E.2d 73 (1994), ruled that the search of the defendant's garbage did not violate the Fourth Amendment, based on the ruling in California v. Greenwood, 486 U.S. 35 (1988) (no reasonable expectation of privacy under the Fourth Amendment in garbage left for collection). The defendant sought to distinguish the *Greenwood* ruling by noting that the garbage was left at the curb in *Greenwood* while the garbage in this case was left for collection within the curtilage of the home, the defendant's backyard. The court rejected the defendant's argument, relying on United States v. Hedrick, 922 F.2d 396 (7th Cir. 1991) (no Fourth Amendment violation when officers seized garbage placed for collection eighteen to twenty feet within home's curtilage; garbage was placed in view of public passing by on the sidewalk, distance between garbage and sidewalk was short, and there was no fence or other barrier preventing public access to garbage). The supreme court stated that the location of the defendant's garbage within the home's curtilage did not automatically establish that he possessed a reasonable expectation of privacy in the garbage. Relying on the ruling in United States v. Biondich, 652 F.2d 743 (8th Cir. 1981) (no Fourth Amendment violation when officer arranged with regular trash collection service to deliver defendant's garbage to officer, even though there may be an expectation of privacy in garbage while it remained within the curtilage) and distinguishing United States v.

Certain Real Property Located at 987 Fisher Road, 719 F. Supp. 1396 (E.D. Mich. 1989) (Fourth Amendment was violated when police went onto defendant's property and seized garbage bags placed against back wall of house), the court ruled that the defendant did not retain a reasonable expectation of privacy in his garbage once it left his yard in the usual manner, based on the facts in this case. The court also ruled that, even assuming that the search of the defendant's garbage violated the Fourth Amendment, the information supplied by the informants provided a substantial basis for probable cause to support the search warrant for the defendant's house.

Defendant Did Not Have Fourth Amendment Standing to Contest Search of School Bus in Which He Had Previously Lived

State v. Howell, 343 N.C. 229, 470 S.E.2d 38 (10 May 1996). The defendant lived in a converted school bus located in a used car junkyard. The defendant owed money to an employee and the owner of the junkyard. Before leaving North Carolina, the defendant told the employee that he could have the bus and contents. The employee sold the bus to the junkyard owner. The court ruled, based on these facts, that the defendant did not have standing under the Fourth Amendment to contest a search of the bus.

Court, Per Curiam, Adopts Dissenting Opinion in Court of Appeals and Thereby Upholds Strip Search of Defendant for Drugs

State v. Smith, 342 N.C. 407, 464 S.E.2d 45 (8 December 1995). The court, per curiam and without an opinion, reversed the decision of the court of appeals, 118 N.C. App. 106, 454 S.E.2d 680 (7 March 1995), that awarded the defendant a new trial. The court stated that the decision was reversed for the reasons stated in the dissenting opinion in the court of appeals. The dissenting opinion concurred (without additional comment) with the majority opinion on issue (1), discussed below, and disagreed with the majority opinion on issue (2), which is set out below as discussed in the dissenting opinion (except some facts are excerpted from the majority opinion). (1) An officer knew the defendant for two to three years and had information that he was operating a drug house and selling drugs in a certain area of Fayetteville. The officer received a phone call at 12:15 A.M. on 12 May 1992 from a reliable informant, who told the officer that the defendant would be driving a red Ford Escort with a specific license plate and was going to an unknown location to purchase cocaine. The defendant then would go to a particular apartment on Johnson Street, where he was to package the cocaine, and then would go to a house on Buffalo Street where he would sell the cocaine. The informant said that the defendant would have the cocaine concealed in or under his crotch when he left the Johnson Street apartment. The officer and other officers took the informant to Johnson Street, where the informant pointed out the apartment and Ford Escort. At approximately 1:15 A.M. on 12 May 1992, the defendant left the apartment in the Ford Escort. The officers stopped the defendant's car in the middle of Johnson Street where it intersected with Bragg Boulevard. All three judges on the court of appeals hearing this case ruled, based on these facts, that the officers had probable cause to make a warrantless search of the defendant, including his crotch area. (2) After stopping the defendant's vehicle, the officer informed the defendant that he was going to search him completely by using his flashlight and hands. He asked the defendant to step behind the car door of the defendant's vehicle, which was open, and the officer stood between him and the car door on the outside. After the defendant

opened his trousers, the officer could not see underneath the defendant's scrotum and testicles and therefore asked the defendant to pull down his underwear. Because the defendant resisted, the officer slid the defendant's underwear down and pointed his flashlight there. He saw the corner of a small paper towel underneath the defendant's scrotum. He pulled the underwear further. The defendant resisted. The officer pushed the defendant into the door, reached underneath the defendant's scrotum, and removed the paper towel that contained cocaine. The dissenting opinion in the court of appeals, adopted by the supreme court, noted that this search was conducted in the intersection of two streets in Fayetteville at 1:30 A.M. The state's evidence showed that before the search the officer asked the defendant to step behind the open car door of his vehicle and that the officer positioned himself between the defendant and the car door on the outside. The officer testified that he took these steps because he did not want to embarrass the defendant in public. The defendant did not dispute the officer's testimony. The opinion stated that the officer took reasonable precautions to prevent the public exposure of the defendant's private areas and "[w]hile there may have been other less intrusive means of conducting the search . . . the availability of those less intrusive means does not automatically transform an otherwise reasonable search into a Fourth Amendment violation." The opinion concluded that the search did not violate the Fourth Amendment.

Court, Per Curiam, Adopts Dissenting Opinion in Court of Appeals and Thereby Rules that Seizure of Defendant's Small Gym Bag for Purpose of Subjecting It to Drug Dog Sniff Was Not Supported By Reasonable Suspicion

State v. Odum, 343 N.C. 116, 468 S.E.2d 245 (4 April 1996). The court, per curiam and without an opinion, reversed the decision of the court of appeals, 119 N.C. App. 676, 459 S.E.2d 826 (1 August 1995), that affirmed the defendant's conviction. The court stated that the decision was reversed for the reasons stated in the dissenting opinion in the court of appeals. Officers were working drug interdiction at the Raleigh train station. They had received information from a ticket agent that the defendant had purchased a train ticket with cash using small bills, departed Raleigh for New York City on 27 April, and was to return on the afternoon of 29 April. The officers also learned that the defendant had previously been arrested for attempted robbery in New Jersey, although the charge had been dismissed. When the train arrived in Raleigh on 29 April, the defendant left the train carrying a red nylon gym bag and appeared headed toward a car in the parking lot in which a female was sitting. The officers approached the defendant, showed him their badges, and asked him to answer a few questions. The defendant agreed to talk to them, and they moved over to the sidewalk. When asked to produce his train ticket, the defendant showed them his ticket stub bearing the name, "D. Odum" (his name was David Odum). When asked for identification, the defendant became visibly nervous when he could not find his identification. When he looked into his gym bag for identification, one of the officers saw that the defendant was apparently trying to conceal the contents of the bag. The defendant finally told the officers that he could not find any identification. Although the defendant objected, the officers then seized his gym bag (to await a drug detection dog to sniff it). They told him he was free to leave and if he left an address they would have the bag delivered to him. During this conversation, the defendant informed the officers that the woman sitting in the car was his ride. One officer testified at the suppression hearing that the woman neither spoke nor made eye contact with the defendant during the entire questioning.

The dissenting opinion concluded that reasonable suspicion did not exist to support the seizure of the gym bag. The evidence as a whole could easily be associated with many travelers. Many travelers daily embark on trips similar to the defendant's, and the fact that the defendant paid for his ticket in cash was not remarkable, considering the price was $107.00. The opinion noted that one officer testified that there was no evidence that the defendant had any prior involvement with drugs, and the prior robbery charge that was later dismissed was not a sufficient reflection of a person's propensity to be involved in drug trafficking. The court also noted that one of the officers testified that defendant did not give him any false information during the interaction at the train station. The officers never inquired about the nature of the defendant's trip, nor was there evidence of any questions that might have bolstered their suspicions. Although the defendant became visibly nervous when he could not find his identification, the opinion noted that it is not uncommon for a person to appear nervous when approached by a law enforcement officer. Also, the actions of the woman in the car and the defendant's reluctance to let the officers see what was in his bag did not provide reasonable suspicion.

Law Enforcement Officers Were Not Required during Custodial Interrogation to Inform Fifteen-Year-Old Juvenile that His Parents and Attorney Were Present at Police Station at Time of Interrogation

State v. Gibson, 342 N.C. 142, 463 S.E.2d 193 (3 November 1995). Officers who were investigating a homicide properly gave a fifteen-year-old his juvenile custodial interrogation rights under G.S. 7A-595(a) and obtained a waiver of those rights. The juvenile argued on appeal that his waiver of rights was involuntary as a matter of law because the officers did not inform the juvenile that his parents and attorney were at the police station during the time of the interrogation. The court, relying on Moran v. Burbine, 475 U.S. 412 (1986) and State v. Reese, 319 N.C. 110, 353 S.E.2d 352 (1987), rejected the defendant's argument. The court stated that law enforcement officers are not required to inform a juvenile that his parents or attorney are present before taking a voluntary confession, and the failure to do so does not make the juvenile's confession involuntary as a matter of law or otherwise inadmissible. [Note: This ruling would not apply to a juvenile under fourteen, since a juvenile's parent, guardian, custodian, or attorney must be present during custodial interrogation.]

Defendant Volunteered a Statement After Asserting His Right to Remain Silent

State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (3 November 1995). The defendant was convicted of the first-degree murder of a three-year-old boy and felonious assault of the boy's mother. The defendant was arrested, orally informed of his *Miranda* rights, and orally waived them. At the sheriff's department, a detective took the defendant to the fingerprinting room and asked him if he remembered his rights; the defendant said he did. Nevertheless, the detective read him his *Miranda* rights again, provided him with a written copy, and obtained a written waiver. After being told of the crimes for which he was charged, he denied any knowledge of them and signed a writing that he no longer wished to make a statement. The detective did not ask any questions and began to fingerprint him. When he took the defendant's right hand, the defendant exclaimed, "Ouch, take it easy." The detective noticed that the defendant's hand was badly swollen and cut, so he asked him, "What happened to your hand?" The defendant answered, "I hit an oak tree."

The detective asked, "[W]hat did you hit a tree for? A tree had never hurt anybody." The defendant replied, "I should have hit her a little harder so I could really hurt my hand." The court ruled that the defendant's remarks were volunteered statements, and the detective's questions did not convert the conversation into an interrogation under *Miranda*.

Officers Violated *Michigan v. Mosley* By Failing to Scrupulously Honor Defendant's Assertion of Right to Remain Silent

State v. Murphy, 342 N.C. 813, 467 S.E.2d 428 (8 March 1996). The defendant, a murder suspect, was in custody on other charges. Officers gave *Miranda* warnings, and the defendant waived his rights. After he talked about some other matters, the officers informed him he was going to be charged with murder. The defendant twice denied any knowledge of the killing. When one officer indicated a willingness to stay and continue talking, the defendant stood up and said, "I got nothing to say." The officers stopped their interrogation, charged him with murder, and began the booking process. During the booking process, an officer (without readvising the defendant of his *Miranda* rights) encouraged the defendant to "tell the truth" about the murder so the "bad feeling in his stomach" would go away. The defendant responded, "Man, you know the position I'm in, I can't tell you about it." This statement was made about fifteen minutes after the initial interrogation, which ended when the defendant advised the officers that he had nothing to say. The court ruled: (1) the defendant's conduct, in abruptly standing up, combined with his unambiguous statement, "I got nothing to say," was an invocation of the right to remain silent, based on the facts in this case; (2) relying on Michigan v. Mosley, 423 U.S. 96 (1975), a defendant's assertion of the right to remain silent permits reinterrogation (unlike the assertion of the right to counsel) if officers "scrupulously honor" the assertion—that is, the officers immediately stop questioning and do not attempt reinterrogation until a significant period of time has elapsed; (3) distinguishing Michigan v. Mosley, 423 U.S. 96 (1975), the officer did not scrupulously honor the defendant's assertion of the right to remain silent because he initiated the conversation about the same subject matter with the defendant fifteen minutes after the assertion; and (4) a readvisement of *Miranda* rights is not a prerequisite to reinterrogation under the ruling in *Mosley*; it is but one factor in determining if the defendant's rights had been "scrupulously honored." The defendant's statement was ordered suppressed because of the ruling in (3) above.

Defendant Did Not Initiate Conversation with Officers After He Had Asserted Right to Counsel, and Therefore Officers' Questioning Violated *Edwards v. Arizona*

State v. Munsey, 342 N.C. 882, 467 S.E.2d 425 (8 March 1996). After the defendant had been arrested and given *Miranda* rights, he told officers that he would like to have a lawyer. At the defendant's request, an officer called a particular lawyer but was unable to reach him. The defendant then asked the officer to call his brother and said "that would do instead of" the lawyer. In response to an officer's telephone call, the defendant's brother came to the law enforcement office where the defendant was located and conferred in private with him for about fifteen to twenty minutes. After the defendant's brother left, the officers went into the office and asked the defendant if he was ready to talk to them now. The defendant answered affirmatively. The officers then questioned the defendant and obtained a statement. The court ruled that this evidence showed that the defendant did not initiate the conversation with officers after his brother left, and

therefore the officers' questioning violated the ruling in Edwards v. Arizona, 451 U.S. 477 (1981).

Officer's Question to Another Officer in Defendant's Presence, Which Was Asked After Defendant's Assertion of Right to Counsel, Was Not Interrogation under *Rhode Island v. Innis*

State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (8 March 1996). The defendant was arrested for two murders and a robbery committed during the murders in which money was taken. He requested a lawyer during custodial interrogation. He was taken to the jail area to collect his clothing as evidence. When instructed to empty his pockets, the defendant placed $13.00 on a bench. Officer A asked officer B "if it was okay for [the defendant] to keep the money." Officer B turned toward the defendant and saw some money in the defendant's top pocket. Before officer B could say anything, the defendant said, "I had some of my own money, too, now." The court ruled, relying on Rhode Island v. Innis, 446 U.S. 291 (1980), that the defendant's answer was not the result of interrogation. The question by officer A was directed toward officer B. Furthermore, the defendant made his statement during a general conversation while turning over his clothing and property in exchange for an inmate jumpsuit. The officer's question was not an initiation of questioning in violation of the defendant's assertion of the right to counsel, because the question was not reasonably likely to elicit an incriminating response from the defendant.

Criminal Offenses

(1) Ten-Day Administrative License Revocation Resulting from DWI Offense Is Not Punishment under Double Jeopardy Provisions of Federal and North Carolina Constitutions that Would Bar Later DWI Prosecution
(2) Arresting Officer Who Is Qualified Chemical Test Operator May Give Notice of Rights and Administer Intoxilyzer Test
(3) Jury's DWI Guilty Verdict Based on Either .08 or Impairment Prongs Did Not Violate State Constitutional Unanimity Requirement

State v. Oliver, 343 N.C. 202, 470 S.E.2d 16 (10 May 1996). The defendant was arrested for DWI by a law enforcement officer who was a qualified chemical test operator. The officer notified the defendant of his chemical test rights and administered the Intoxilyzer; the test result was 0.08. A magistrate then revoked the defendant's driver's license for ten days. The court ruled: (1) the ten-day administrative license revocation under G.S. 20-16.5 is not punishment under the federal and North Carolina constitutions to bar, on double jeopardy grounds, the later DWI prosecution; (2) an arresting officer who is a qualified chemical test operator may give the notification of chemical test rights and administer the Intoxilyzer test [note: this ruling applied to a test administered before a 1995 legislative clarifying amendment on this subject; of course, the ruling also would apply to tests administered thereafter]; and (3) relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), there is no violation of a unanimous jury verdict under the North Carolina Constitution when a defendant is unanimously convicted of impaired driving based on some jurors finding the defendant guilty under the 0.08 prong and other jurors finding the defendant guilty under the impairment prong.

Separate Habitual Felon Indictment Is Not Required for Each Felony Being Tried

State v. Patton, 342 N.C. 633, 466 S.E.2d 708 (9 February 1996), *reversing*, 119 N.C. App. 229, 458 S.E.2d 230 (1995). The court ruled that a separate habitual felon indictment is not required for each felony being tried. One habitual felon indictment is sufficient.

There Was Sufficient Evidence to Support First-Degree Felony Murder Based on First-Degree Arson, Although Victim Was Dead When Arson Occurred, When Arson Was Part of Continuous Transaction that Included Murder

State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (8 December 1995). The accomplice and the defendant parked their car near the murder victim's mobile home at approximately 11:00 P.M. on the night of the murder. After murdering and robbing the victim in his mobile home, they drove the victim's vehicles to another county and returned between 2:00 and 2:30 A.M. to retrieve the car in which they had originally arrived. The defendant then burned the mobile home (with the murder victim's dead body inside) to destroy the evidence. The court ruled that the defendant was properly convicted of first-degree murder based on the felony murder theory, the felony being first-degree arson. The time interval of about three and one-half hours between the murder and arson was short enough so that both crimes were part of one continuous transaction and therefore supported the finding that the dwelling was occupied, which is an element of the crime of first-degree arson. See also State v. Campbell, 332 N.C. 116, 418 S.E.2d 476 (1992) (defendant who had beaten the victim to death in the victim's house and then had set the house on fire was properly convicted of first-degree arson).

(1) Appellate Court's Finding of Insufficient Evidence to Support One Theory of First-Degree Murder Did Not Bar Retrial on Another Theory of First-Degree Murder That Trial Judge Erroneously Failed to Submit to Jury
(2) Sufficient Evidence of First-Degree Burglary Based on Theory of Accessory Before the Fact

State v. Marr, 342 N.C. 607, 467 S.E.2d 236 (9 February 1996). (1) The defendant was convicted of first-degree murder based on the theory that he was an accessory before the fact to first-degree murder committed with premeditation and deliberation. The trial judge did not submit to the jury the theory of felony murder as a basis for the defendant's conviction as an accessory before the fact of first-degree murder. On appeal, the state conceded that there was insufficient evidence to support the first-degree murder conviction based on premeditation and deliberation, but there was sufficient evidence to support felony murder. The court agreed with the state's position and ruled that the trial judge had erred (i) in submitting the theory of premeditation and deliberation, and (ii) not submitting the theory of felony murder. The court, relying on State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989), ruled that the defendant could be retried for first-degree murder based on felony murder as the theory underlying the defendant's being an accessory before the fact. (2) The defendant was convicted of first-degree burglary based on the theory of accessory before the fact. The defendant argued that all the state's evidence showed that the defendant counseled the principals to enter a shop on the victim's premises to steal tools;

there was no need to enter the dwelling to get the tools, and the defendant did not advise the principals to do so. The court disagreed. It ruled that the jury could conclude from the evidence that breaking into the dwelling was within the scope of the defendant's advice that he gave to the principals. Before the burglary, the defendant had gone with the principals to show them the location of the victim's home. He advised them that the victim left the doors of the shop and the dwelling unlocked. He also told them that he wanted the tools in the shop, but he also said that he could sell anything he did not need (which was some indication that the defendant contemplated that the principals would steal more than what was located in the shop). The court stated that "[i]t also can be assumed that the principals would steal something for themselves and would likely enter the [dwelling] to do so."

(1) Defendant Was Not Entitled to Jury Instruction on Involuntary Manslaughter as Lesser Offense of First-Degree Murder, Based on the Facts in this Case
(2) Sufficient Evidence of Discharging Firearm into Occupied Property

State v. James, 342 N.C. 589, 466 S.E.2d 710 (9 February 1996). The defendant was in car with a semiautomatic rifle with a thirty-round clip. He told a person outside a night club that he was going to "shoot the place up." The person then warned the people inside the club. They immediately began to run outside. The defendant instructed the driver to go away and return, and the defendant said he would be shooting from the car as it passed by. As the car passed the club, the defendant began shooting in the direction of the club. There were people and parked cars in front of the club. One bullet penetrated a car and killed a person inside. Other bullets struck another car.

The defendant was convicted of first-degree murder based on the felony murder theory, the felony being discharging a firearm into occupied property. (1) The court rejected the defendant's argument that the trial judge erred in failing to instruct on involuntary manslaughter. He argued that the evidence showed that he shot into the parking lot and did not intend to shoot into the cars but into the club, and the jury could infer that the victim's death was caused by the defendant's culpably negligent actions. The court ruled that the evidence clearly showed that the defendant acted with malice and therefore could not have been found guilty of involuntary manslaughter. No rational fact finder could find that the defendant was unaware that the bullets would likely enter cars parked in the parking lot and that people might be in some of the cars. Also, the uncontradicted evidence showed that the defendant fired the rifle into the club, an area he knew was occupied. (2) The court rejected the defendant's argument that there was insufficient evidence of the defendant's intent to shoot into the cars and therefore insufficient evidence of discharging a firearm into occupied property. The court noted that the intent to shoot into the cars could be inferred from the defendant's firing a semiautomatic weapon into an area where he knew cars were parked. The court also rejected the defendant's argument that there was no evidence that he knew that the cars were occupied. The court stated that although the defendant may not have been sure that the cars in the parking lot were occupied, he clearly had reasonable grounds to believe that the cars might be occupied by one or more people.

Trial Judge Did Not Err in Giving Pattern Jury Instruction on Premeditation and Deliberation and Rejecting Defendant's Proposed Instruction Based on Case Law

State v. Jones, 342 N.C. 628, 467 S.E.2d 233 (9 February 1996). The court ruled that the trial judge in a first-degree murder trial did not err in giving the pattern jury instruction on premeditation and deliberation and rejecting defendant's proposed instruction based on case law, State v. Buchanan, 287 N.C. 408, 418, 215 S.E.2d 80, 85-86 (1975). The court noted that it recently cast doubt on the validity of certain language from *Buchanan* that defined premeditation and deliberation; see State v. Leach, 340 N.C. 236, 456 S.E.2d 785 (1995). [Note: the current pattern jury instruction on premeditation and deliberation is not affected by this ruling.]

Joinder of Murder Charges for Trial Was Not Error

State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (8 December 1995). The trial judge did not err in allowing two murders committed about two months apart to be joined for trial when the facts underlying the murders showed a shared common modus operandi and the temporal proximity was sufficient to establish a transactional connection. Both murder victims were young women with drug habits; the defendant knew both and had smoked crack with each. One victim was nude when found, and the other was nude from the waist down. Both victims suffered blunt-force trauma injuries to their heads; one victim died of strangulation, and the pathologist could not exclude the possibility that the other victim had also been strangled. Both bodies were found in the lowest part of vacant houses within two blocks of each other. The defendant exhibited a misogynistic attitude toward women. The court rejected the defendant's argument that a commonality of witnesses must exist to join two murder cases for trial (the defendant noted that no state's witness had testified about both murders).

(1) Although There Was Sufficient Evidence that Murder Was Committed in North Carolina, Trial Judge Erred in Failing to Submit Special Verdict on Jurisdiction
(2) Insufficient Evidence of Burglary
(3) Insufficient Evidence of Attempted Second-Degree Rape

State v. Rick, 342 N.C. 91, 463 S.E.2d 182 (3 November 1995), *affirming in part and reversing in part*, 114 N.C. App. 820, 444 S.E.2d 495 (1994) (unpublished opinion). The defendant was convicted of second-degree murder, second-degree burglary, and attempted second-degree rape. (1) The murder victim's body was found in South Carolina about two miles from the North Carolina border; there was other evidence, however, that the murder was committed in North Carolina. The defendant filed a pretrial motion to dismiss the murder charge because there was insufficient evidence that the murder was committed in North Carolina—that is, the state of North Carolina did not have jurisdiction to try the murder. A judge heard evidence at a pretrial hearing and ruled that there was sufficient evidence to support North Carolina's having jurisdiction. However, the trial judge did not submit a special verdict to the jury on the issue of jurisdiction. The court ruled (i) there was sufficient evidence that the murder was committed in North Carolina, based on all the facts in this case; and (ii) the trial judge erred in not submitting a special verdict on jurisdiction. See State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977). (2) The court ruled that there was insufficient evidence of second-degree burglary, because the nighttime

element was not proven: evidence showed that the victim left work at about 11:00 P.M., 20 April 1992 but the break-in of her home was not discovered until 26 April 1992. (3) The court ruled that there was insufficient evidence of attempted second-degree rape. There was nothing from the physical evidence in this case that suggested that the defendant attempted to rape the victim. The sole evidence of a sexual act was that the defendant could not be excluded as a partial contributor to a semen stain on the victim's jeans. That evidence by itself was insufficient.

Court, Per Curiam, Adopts Concurring Opinion in Court of Appeals and Thereby Finds Sufficient Evidence of Serious Personal Injury Based on Mental Injury to Support First-Degree Sexual Offense Conviction

State v. Lilly, 342 N.C. 409, 464 S.E.2d 42 (8 December 1995). The court, per curiam and without an opinion, affirmed the decision of the court of appeals, 117 N.C. App. 192, 450 S.E.2d 546 (1994), upholding the defendant's convictions. However, the supreme court's affirmance was based on the reasons stated in the concurring opinion in the court of appeals. The defendant was convicted of first-degree sexual offense as well as other offenses. The defendant asserted on appeal that there was insufficient evidence of serious personal injury and therefore the defendant was guilty only of second-degree sexual offense. The opinion for the court of appeals found sufficient evidence of serious personal injury based on physical injury: there was bruising to the rectal area and lacerations to the vagina requiring stitches (from a rape committed by the defendant concomitantly with forcible anal intercourse), and the victim was hospitalized for three days to recover from these injuries. The concurring opinion, adopted by the supreme court, found that there also was sufficient evidence of serious personal injury based on mental injury. The opinion stated that the victim was a seventy-one year old widow who was sexually assaulted in her own home. She testified that after the assault, she was too frightened to return to her home and that, as a result, she went to live with a niece. At the time of trial, nine months after the assault, she was still living there. Thus, the mental injury extended for an appreciable time beyond the sexual assault itself.

Sufficient Evidence to Support Separate Convictions for Both Armed Robbery and Felony Larceny

State v. Robinson, 342 N.C. 74, 463 S.E.2d 218 (3 November 1995). The defendant and his accomplice shot and killed the victim and then took the victim's wallet. They left the murder scene and later returned to take the victim's car. The court ruled that the taking of the wallet (armed robbery) and the taking of the car (felony larceny) were separate takings that supported convictions of both offenses. See also State v. Barton, 335 N.C. 741, 441 S.E.2d 306 (1994) (similar ruling).

Insufficient Evidence to Support Separate Convictions for Both Armed Robbery and Felony Larceny

State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (8 December 1995). After killing the victim in his house, the defendant and his accomplice loaded the victim's personal property into the victim's two vehicles and drove them away. He was convicted of armed robbery and two counts of

felonious larceny (the two vehicles). The court ruled that the judgments for the two larceny convictions must be set aside because the takings of the two vehicles and the personal property occurred simultaneously and were linked together in a continuous act or transaction. Therefore, there was only one taking, and the larcenies were lesser-included offenses of the armed robbery; see State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988).

Opening a Partly-Opened Door Is a "Breaking" under Burglary

State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (8 December 1995). The court ruled that opening a partly-opened door is a "breaking" under the law of burglary.

Using a Firearm as Club May Constitute Sufficient Evidence to Support Armed Robbery

State v. McNatt, 342 N.C. 173, 463 S.E.2d 76 (3 November 1995). The defendant was convicted of first-degree murder based on the felony murder theory, the underlying felony being armed robbery. The defendant swung the butt of a rifle at the victim, hitting him on the right side of the head and knocking him down. The defendant and his accomplice then beat and kicked the victim, killing him. They then stole the victim's wallet, watch, and keys. The court ruled that the use of the rifle in this manner supported the use of armed robbery as the underlying felony for first-degree murder based on the felony murder theory.

Sufficient Evidence of Conspiracy to Commit Armed Robbery

State v. Lamb, 342 N.C. 151, 463 S.E.2d 189 (3 November 1995). The defendant was convicted of first-degree murder and conspiracy to commit armed robbery. On appeal he asserted that the evidence was insufficient to support the conspiracy conviction. A state's witness testified at trial that she, A, and B went to an ABC store and a bar before picking up the defendant. The group returned to the bar, where the three males (defendant, A, and B) got out of the car. They walked behind the building and stayed there for about ten to twenty minutes. They returned to the car and drove directly to the victim's home. No one in the car spoke during this drive. At the victim's home, the three men left the car and approached the house. A, armed with a pistol, entered first, followed by B and then the defendant. The witness heard two gunshots in the house. (The victim had been shot and killed.) The three men returned to the car with A carrying a case of beer. A then drove to a bridge, where he threw a pistol into the river. The group consumed the beers. Relying on State v. Whiteside, 204 N.C. 710, 169 S.E. 711 (1933), the court ruled that the evidence was sufficient to support the conviction of conspiracy to commit armed robbery.

(1) State Was Properly Permitted to Amend Impaired Driving Charge to Add "Public Vehicular Area" to Charging Language
(2) Evidence Was Sufficient to Give Peremptory Jury Instruction that Place Where Defendant Drove Was a Public Vehicular Area

State v. Snyder, 343 N.C. 61, 468 S.E.2d 221 (4 April 1996), *reversing*, 118 N.C. App. 540, 455 S.E.2d 914 (1995). (1) The defendant was charged with habitual impaired driving in which the impaired driving offense was alleged to have been committed on a "street or highway." The

trial judge permitted the state during trial to amend the indictment to read "on a highway or public vehicular area." The court ruled that the amendment was proper, because it merely refined the description of the place where the defendant was driving while impaired rather than making a change in an essential element of the offense. (2) The court ruled that the trial judge did not err in giving the jury a peremptory instruction that, as a matter of law, the nightclub's parking lot in this case was a public vehicular area. The nightclub was licensed by the state to serve alcohol to club members and guests. Its parking lot was generally used as thoroughfare by members of the general public who were trying to access the nightclub or an adjacent motel. There were no signs posted in the parking lot prohibiting the public from parking there or stating that the parking lot was private property, nor were there any security or membership cards allowing members exclusive access to the parking lot. Also, members of the general public were free to use the parking lot while they visited the club and entered or exited the adjacent motel.

No Material Variance Between Indictment Charging Uttering Check with Forged Endorsement and Proof at Trial

State v. Kirkpatrick, 343 N.C. 285, 470 S.E.2d 54 (10 May 1996), *reversing*, 120 N.C. App. 405, 462 S.E.2d 557 (1995). Disagreeing with the court of appeals (which had ruled that the indictment only charged attempted uttering), the court examined the indictment and determined that it sufficiently charged uttering a check with a forged endorsement. Thus there was no material variance between the indictment and proof at trial. The court noted that uttering a check is accomplished either when a person passes or delivers a forged check or attempts to pass or deliver a forged check.

Evidence

Insufficient Evidence of Self-Defense, Despite Evidence of Battered Woman Syndrome, to Require Jury Instruction on Self-Defense, Based on Facts in this Case

State v. Grant, 343 N.C. 289, 470 S.E.2d 1 (10 May 1996). The defendant was tried for the murder of her husband. In her confession, she said that she stabbed her husband while he was asleep on a couch. He awoke and said, "I ought to kill you." She then removed a .357 Magnum revolver from a cabinet and shot her husband three times. A forensic pathologist testified that in addition to the stab wound, there were three bullet wounds, one of which was to the husband's brain. The stab wound would not have immobilized the deceased for two or three minutes, but the wound to the brain would have rendered him unconscious immediately. Either of the two wounds would have been fatal. The defendant offered evidence of continuous violent conduct committed by the husband against her, as well as expert testimony that the defendant suffered from the battered woman syndrome. The court, relying on State v. Norman, 324 N.C. 253, 378 S.E.2d 8 (1989), ruled that this evidence was insufficient to entitle the defendant to a jury instruction on self-defense.

(1) Written Confession May Be Admitted into Evidence Even Though Not Acknowledged by Defendant, If It Is a Word-For-Word Rendition
(2) Trial Judge Erred in Allowing, Over Defendant's Objection, Exhibit to be Taken into Jury Room During Its Deliberations

State v. Wagner, 343 N.C. 250, 470 S.E.2d 33 (10 May 1996). (1) The state sought to introduce the detective's handwritten notes of the defendant's confession. The notes were not read to the defendant, signed by him, or otherwise admitted to be correct. The court ruled that State v. Walker, 269 N.C. 135, 152 S.E.2d 133 (1967) (setting out the rules for the admission of a written confession) does not bar the admissibility of an unsigned statement taken in longhand of a defendant's actual responses to recorded questions. The court noted that the evidence showed that the notes were an exact word-for-word rendition of the interview of the defendant. (2) The court ruled that the trial judge erred under G.S. 15A-1233(b) when the judge, over the defendant's objection, allowed an exhibit to be taken into the jury room during its deliberations.

Defense Evidence that Third Party Was Suspect in Murder Being Tried Was Properly Excluded, Based on Facts in this Case

State v. Burke, 342 N.C. 113, 463 S.E.2d 212 (3 November 1995). The defendant was being tried for a drug-related murder committed by two people. The evidence showed that a person known as "Jamaican Rick" and a second person shot and killed the victim. The issue at trial was the identity of the second person. The state presented evidence that the second person was the defendant. Although the defendant admitted that he was present and armed at the murder scene, he presented evidence that someone else was the second person. However, the trial judge refused to allow the defendant to present evidence that a person known as "Big Deal" was once considered a suspect by law enforcement officers. The court noted that the trial judge admitted evidence that Big Deal was present at the murder scene and that he possessed a .44 caliber handgun (the caliber of handgun that could have been the murder weapon) on the night of the murder. The court stated, however, that being a suspect in a law enforcement investigation is not evidence that the suspect is guilty of the crime. The court ruled that the trial judge properly excluded the defense evidence because it did not directly point to the guilt of Big Deal, nor did it exonerate the defendant.

(1) Rule 803(3) Evidence Was Relevant, Based on Facts in This Case
(2) Defendant's Statement to His Wife Was Not Barred As Confidential Spousal Communication

State v. McLemore, 343 N.C. 240, 470 S.E.2d 2 (10 May 1996). The defendant was being tried for the murder of his mother. (1) The state was permitted to introduce under Rule 803(3) (declarant's state of mind) the mother's statements to another person that showed that she (i) intended to decrease the financial benefits flowing to her son, and (ii) was angry and intended to give her son an ultimatum about whether he could still live with her. The court ruled that this evidence was relevant to show the status of the relationship between the mother and son just before the mother's death. The evidence also related to a potential confrontation between them. The court stated that the defendant's lack of knowledge of his mother's statements was irrelevant.

This evidence also showed the defendant's motive for committing the murder. (2) The defendant's father testified at trial that the defendant's wife told the father that the defendant had called her and said he had shot his mother and asked her to call his father. The court ruled that the defendant's statement was not barred as a confidential spousal communication because he did not intend the communication to be confidential (since he specifically told his wife to let other people know what he had told her). In addition, the father's hearsay testimony of what the defendant's wife told him was admissible under Rule 803(2) as an excited utterance by the defendant's wife. She had called the defendant's father three minutes after she had talked to her husband; her conversation in which he told her he had shot his mother was undoubtedly a startling event. A detective also testified at trial about the defendant's wife telling him about this telephone conversation with her husband. The court ruled that the detective's hearsay testimony was admissible under Rule 801(d)(C) (statement authorized by party) because the statement was introduced against the defendant and he had authorized his wife to make a statement about the telephone conversation. Assuming without deciding that a hearsay statement of an agent cannot be used to establish agency (in this case, the wife as the purported agent for the husband), the court said that the rule is satisfied in this case by the father's testimony that showed that the defendant's wife had the authority to make the statement.

Murder Victim's Uncommunicated Threats Toward Defendant Were Admissible under Rule 803(3) and Were Relevant, Based on the Facts in this Case

State v. Ransome, 342 N.C. 847, 467 S.E.2d 404 (8 March 1996). The defendant was on trial for two murders. The defendant asserted the defense of self-defense. The court ruled that the trial judge erred in not allowing the defendant to introduce evidence of threats by the murder victims toward the defendant that were made to third parties, even though the threats were not communicated to the defendant. One threat was made to witness A four weeks before the killings. Another threat was made to witness B two hours before the killings. The court ruled that the common law rule on the admissibility of uncommunicated threats [see State v. Goode, 249 N.C. 632, 107 S.E.2d 70 (1959) and State v. Minton, 228 N.C. 15, 44 S.E.2d 346 (1947)] is carried forward under the Rules of Evidence, Chapter 8C of the General Statutes. The threats communicated to witnesses A and B were admissible under Rule 803(3) as statements of the murder victims' then-existing states of mind that expressed their intentions to be aggressors when they confronted the defendant. The court also ruled that the statements were relevant, based on the facts in this case.

High Speed Car Chase Four Months After Murder Had Been Committed Was Admissible as Evidence of Flight

State v. King, 343 N.C. 29, 468 S.E.2d 232 (4 April 1996) A murder was committed on February 20, 1992. On July 2, 1992, an officer responded to a radio call for assistance to stop a 1985 Audi. The officer followed the Audi at speeds over one hundred miles per hour. The Audi crashed and the defendant ran from the Audi into a wooded area. He was not arrested until July 10, 1992 in Virginia. The trial judge admitted this evidence on the issue of flight and gave a jury instruction on flight. Relying on its ruling in State v. McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994) (defendant's escape from jail four months after arrest was properly admitted as evidence of

flight), the court ruled that an officer's pursuit of the defendant for speeding was properly admitted as evidence of flight. The court rejected the defendant's argument that a defendant must be aware of the initiation of formal charges against him or her before evidence of flight is admissible—the court noted that a guilty conscience, completely apart from the initiation of formal charges, influences conduct. The court also rejected the defendant's argument that because the defendant had committed other serious charges unrelated to murder after February 20, 1992, the car chase could not have indicated his consciousness of guilt for the murder.

Capital Case Issues

Prosecutor May Offer Plea of Second-Degree Murder to Defendant Who Is Charged with First-Degree Murder Even Though There Is Evidence of Aggravating Circumstance(s)

State v. Lineberger, 342 N.C. 599, 467 S.E.2d 24 (9 February 1996). The defendant was charged with first-degree murder, and there was evidence to support the finding of aggravating circumstances. The defendant accepted the prosecutor's offer of a guilty plea to second-degree murder and a specified sentence recommendation. The trial judge refused to accept the plea arrangement. The judge ruled that he did not have the authority to accept a plea to second-degree murder because the defendant was charged with first-degree murder and there was evidence of aggravating circumstances. The supreme court rejected the trial judge's ruling. The court ruled that when a defendant is charged with first-degree murder and there is evidence of an aggravating circumstance or circumstances, a prosecutor has broad discretion to decide, absent a constitutionally unjustifiable reason (for example, race, religion, or other impermissible classification), whether to try a defendant for first-degree murder, second-degree murder, or other lesser offense, or to offer the defendant a guilty plea to second-degree murder or a lesser offense. The court noted and discussed its rulings on prosecutorial discretion in State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984) and State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984). The court also distinguished its ruling in State v. Case, 330 N.C. 161, 410 S.E.2d 57 (1991) (prosecutor impermissibly limited the number of aggravating circumstances to be presented to the jury in return for the defendant's guilty plea to first-degree felony murder) because that case involved a guilty plea to *first-degree murder*. The court ruled that the prosecutor in this case had a sufficient reason (the state's case was weakened by evidence that a law enforcement agency had made cash payments to two of the state's witnesses) to offer the guilty plea to second-degree murder; thus the prosecutor's decision was not arbitrary or capricious.

The court also stated that if a prosecutor tries a defendant for first-degree murder, the prosecutor may accept a guilty plea to second-degree murder or other lesser offense at any time before the jury's returning a verdict finding the defendant guilty of first-degree murder. However, once a defendant has been determined to be guilty of first-degree murder either by plea or jury verdict, the trial judge must conduct a capital sentencing hearing if there is evidence to support the finding of an aggravating circumstance or circumstances.

(1) Defendant Did Not Have Unwaivable State Constitutional Right to be Present at Rule 24 Pretrial Conference
(2) Prosecutor's Failure to Mention Particular Aggravating Circumstance at Rule 24 Pretrial Conference Did Not Bar Judge from Submitting that Circumstance at Capital Sentencing Hearing

State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (8 December 1995). (1) The court ruled that the defendant's absence from the Rule 24 pretrial conference did not violate his state constitutional right to be present at every stage of a capital trial. The court stated that such a right does not arise before the commencement of trial. (2) At the Rule 24 pretrial conference, the prosecutor indicated that an aggravating circumstance existed under G.S. 15A-2000(e)(3) (prior violent felony conviction). At the capital sentencing hearing, the trial judge also submitted the aggravating circumstance under G.S. 15A-2000(e)(11) (violent course of conduct). The court ruled that the trial judge did not err in submitting an aggravating circumstance not mentioned by the prosecutor at the Rule 24 pretrial conference. The court stated that the rule does not require that the prosecutor must enumerate with finality all aggravating circumstances that will be pursued at trial.

Defendant Did Not Have Unwaivable State Constitutional Right to be Present at Conference Held Four Days before Trial Began

State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (8 December 1995). A pretrial conference was held four days before the trial begun. The judge, prosecutor, and the defendant's attorney were present, but the defendant was not present. The conference discussed plans for the trial's daily schedule and other matters. Relying on State v. Rannels, 333 N.C. 644, 430 S.E.2d 254 (1993), State v. Cole, 331 N.C. 272, 415 S.E.2d 716 (1992), and State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (8 December 1995), the court ruled that there was no violation of the defendant's unwaivable state constitutional right to be present at every stage of a capital trial, because the conference occurred before the trial had begun. The court also ruled that the defendant's federal constitutional right to be present was not violated, based on the facts in this case.

In-Chambers Conference During Capital Trial Without Defendant's Presence Violated Defendant's Unwaivable Right to be Present

State v. Exum, 343 N.C. 291, 470 S.E.2d 333 (10 May 1996). At the conclusion of testimony by a defense witness during a capital trial, the trial judge conducted an unrecorded in-chambers conference with attorneys for the state and defendant but without the defendant. The court ruled that the in-chambers conference violated the defendant's unwaivable constitutional right to be present. Since there was no record of what occurred at this conference, the court was unable to determine whether the error was harmless beyond a reasonable doubt. The court ordered a new trial.

Although the Commission of Prior Violent Felony under Aggravating Circumstance (e)(3) Must Occur Before the Commission of First-Degree Murder for Which Defendant Is Being Sentenced, the Conviction of that Prior Violent Felony May Occur Any Time before Trial of First-Degree Murder

State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (4 April 1996). A prior violent felony under (e)(3) must have occurred before the commission of the first-degree murder for which the defendant is being sentenced. However, the court ruled that the *conviction* of that violent felony may occur at any time before the trial of the first-degree murder for which the defendant is being sentenced. See also State v. Burke, 343 N.C. 129, 469 S.E.2d 901 (10 May 1996)(similar ruling).

Sufficient Evidence of Aggravating Circumstance (e)(6) (Pecuniary Gain) to Submit (e)(6) When Defendant Was Convicted of First-Degree Murder on Felony Murder Theory Only, With First-Degree Burglary as Underlying Felony

State v. Chandler, 342 N.C. 742, 467 S.E.2d 636 (8 March 1996). The defendant was convicted of first-degree murder based solely on the felony murder theory, and the underlying felony was first-degree burglary. The court ruled that the trial judge properly submitted (e)(6) because the evidence showed that the defendant broke and entered the victim's home with the intent to steal. The court stated that it was irrelevant whether the defendant wanted to steal (i) the victim's purse or (ii) marijuana to satisfy his drug dependency, because the burglary was motivated by pecuniary gain in either event. The court also ruled that (e)(6) was properly submitted even though the underlying felony was first-degree burglary and one of its elements was larceny. Pecuniary gain under (e)(6) reflects the motive for committing the murder, and pecuniary gain is not an element of first-degree burglary.

(1) Sufficient Evidence of Aggravating Circumstance (e)(9) (Especially Heinous, Atrocious, or Cruel)
(2) No *Enmund* Issue Is to be Submitted to Jury When Defendant Is Convicted of First-Degree Murder by Premeditation and Deliberation Theory

State v. Robinson, 342 N.C. 74, 463 S.E.2d 218 (3 November 1995). (1) The defendant and his accomplice asked the victim for a ride. The accomplice placed a sawed-off shotgun at the victim's neck. The victim kept begging and pleading not to hurt him because he didn't have any money. The accomplice and the defendant forced him to drive to a side street. The victim was forced to lie down. The victim looked up at the accomplice as he was standing over him. The accomplice then shot him in the face, killing him. The accomplice was getting ready to jump into the car to leave when the defendant told him to hold up and got the victim's wallet from his back pocket. Relying on its rulings in State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983) and State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), the court ruled that there was sufficient evidence of aggravating circumstance (e)(9) (murder was especially heinous, atrocious, or cruel). The evidence tended to show that the murder was physically agonizing or otherwise dehumanizing to the victim. (2) The court ruled that when a defendant is convicted of first-degree murder based on the premeditation and deliberation theory (or that theory and other theories as well), there is no *Enmund* issue (death penalty may not be imposed when defendant did not kill, attempt to kill, or

intend that killing take place or lethal force be used) to be submitted to the jury at the capital sentencing hearing. This issue only must be submitted to the jury when the defendant is convicted solely on the felony murder theory. In this case, the defendant was convicted of first-degree murder based on the theories of premeditation and deliberation and felony murder, and the court ruled that the trial judge did not err in failing to submit the issue.

Sufficient Evidence of Aggravating Circumstance (e)(11) (Murder Committed during Course of Conduct that Included Commission of Violence against Other Person or Persons)

State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (8 December 1995). There was sufficient evidence to submit (e)(11) for two murders committed about two months apart. The murders shared a common modus operandi. Both murder victims were young women with drug habits; the defendant knew both and had smoked crack with each. One victim was nude when found, and the other was nude from the waist down. Both victims suffered blunt-force trauma injuries to their heads; one victim died of strangulation, and the pathologist could not exclude the possibility that the other victim had also been strangled. Both bodies were found in the lowest part of vacant houses within two blocks of each other.

Assuming It Was Error to Submit Statutory Mitigating Circumstance (f)(1) (No Significant Prior Criminal History), Error Was Not Prejudicial; Court Offers Instructions to Judges When Defendant Objects to Submission of Mitigating Circumstances

State v. Walker, 343 N.C. 216, 469 S.E.2d 919 (10 May 1996). Evidence of the defendant's prior criminal activity was (1) the defendant's attempted second-degree murder conviction that occurred nine years before the murder for which the defendant was being sentenced, and (2) that the defendant sold drugs. The court ruled that, assuming that it was error to submit statutory mitigating circumstance (f)(1) (no significant prior criminal history) and the defendant objected to its submission, it was not prejudicial to the defendant. The court noted that a jury's rejection of an erroneously-submitted statutory mitigating circumstance is not tantamount to the jury having found an aggravating circumstance. The court then commented as follows:

> Absent extraordinary facts not present in this case, the erroneous submission of a mitigating circumstance is harmless. We caution trial courts and prosecutors, however, that prosecutors must not argue to the jury that a defendant has requested that a particular mitigating circumstance be submitted or has sought to have the jury find that circumstance, when the defendant has in fact objected to the submission of that particular mitigating circumstance. Additionally, the better practice when a defendant has objected to the submission of a particular mitigating circumstance is for the trial court to instruct the jury that the defendant did not request that the mitigating circumstance be submitted. In such instances, the trial court also should inform the jury that the submission of the mitigating circumstance is required as a matter of law because there is some evidence from which the jury could, but is not required to, find the mitigating circumstance to exist.

The court noted that in this case the prosecutor never argued that the defendant requested (f)(1). The court concluded that the defendant was not prejudiced by the assumed, erroneous submission of (f)(1).

Trial Judge Erroneously Instructed Jurors that It Could Determine Whether Statutory Mitigating Circumstances Have Mitigating Value

State v. Howell, 343 N.C. 229, 470 S.E.2d 38 (10 May 1996). The trial judge at a capital sentencing hearing, in response to a juror's question about the meaning of mitigation and the procedure for determining whether a proffered mitigating circumstance exists, instructed the jury to decide whether any of the submitted sixty-one mitigating circumstances (three were statutory mitigating circumstances) had mitigating value. Thus the instruction erroneously told the jury they could decide to give *no* weight to a statutory mitigating circumstance; see State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995). The court ordered a new capital sentencing hearing.

Miscellaneous

Court Modifies Case Law Concerning the Jurisdiction of Superior and District Courts Over Juveniles Based on Their Ages When They Committed Criminal Offenses

State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (4 April 1996), *reversing*, 118 N.C. App. 529, 455 S.E.2d 877 (1995). Sometime when the defendant was twelve or thirteen years old, he allegedly committed the felony of crime against nature. (This offense occurred when a juvenile could be tried as an adult only if the juvenile was fourteen or fifteen years old when the alleged offense occurred.) He was indicted for that offense when he was sixteen (apparently, the offense was not discovered until then). While the case was pending in the appellate division, the defendant became eighteen years old. The supreme court ruled that the district court (juvenile division) had exclusive, original jurisdiction of this offense, since the age of the juvenile at the time of the offense governs the jurisdiction issue. The court stated that the superior court may obtain subject matter jurisdiction only if it is transferred from the district court under the procedures set out in G.S. 7A-608. The superior court may not obtain jurisdiction by the mere passage of time; nor can the mere passage of time transform a juvenile offense into an adult felony. In addition, the court ruled that the district court no longer had jurisdiction in this case because it was divested of jurisdiction when the juvenile became eighteen years old. Based on these rulings, the court ruled that the case must be dismissed for lack of subject matter jurisdiction by both superior and district courts. The court also stated that to the extent that State v. Lundberg, 104 N.C. App. 543, 410 S.E.2d 216 (1991) (superior court had proper jurisdiction of defendant indicted at age twenty-three for offenses committed when he was thirteen and fifteen) and In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982) (eighteen-year-old defendant could be indicted and tried in superior court for felony offenses committed when he was fifteen) conflicted with its ruling, they are overruled.

[Note: The effect of this ruling and the overruling of *Lundberg* and *Stedman* apparently is as follows: (1) If a juvenile commits a felony when the juvenile is thirteen, fourteen, or fifteen, a juvenile petition must be brought before his or her eighteenth birthday, and the case is either tried in juvenile district court or is transferred for trial as an adult in superior court (as long as the order of transfer is entered before the juvenile's eighteenth birthday). A juvenile petition may not be

brought after the juvenile's eighteenth birthday under any circumstances, and the state may not indict a person for a felony committed when the person was thirteen, fourteen, or fifteen unless there has been a proper transfer order from juvenile district court. (2) A juvenile who commits a felony when the juvenile has not reached his or her thirteenth birthday may never be tried in superior court for that felony. (3) If a juvenile commits a misdemeanor when the juvenile has not reached his or her sixteenth birthday, a juvenile petition must be brought before his or her eighteenth birthday and the case may be tried only in juvenile district court. Once the juvenile reaches his or her eighteenth birthday (including a situation in which the petition was brought before the juvenile's eighteenth birthday but the juvenile becomes eighteen before the case is tried), the juvenile may never be tried for a misdemeanor committed when the juvenile was under sixteen years old.

Note, however, that in response to this case, G.S. 7A-523(c) was later enacted to allow the state to seek transfer for trial as an adult of a person, even though the person is then over eighteen years old, who allegedly committed a felony when he or she was 13, 14, or 15 years old.]

Prosecutor's Jury Argument that Commented on Defendant's Demeanor during Trial Did Not Improperly Comment on Defendant's Failure to Testify

State v. Barrett, 343 N.C. 164, 469 S.E.2d 888 (10 May 1996). During the prosecutor's jury argument at the guilt-innocence phase (the defendant did not testify during this phase) of a capital trial, the prosecutor commented that the defendant's demeanor in the courtroom showed that he was bored with the trial proceedings because he didn't care what he had done in committing the murders. The prosecutor noted that the defendant's rights have been protected throughout the trial, but the two murder victims had no rights on the day they were murdered. The court ruled that the prosecutor's jury argument was not a comment on the defendant's failure to testify, based on the facts in this case. The court stated that a comment on the defendant's demeanor is not necessarily a comment on the defendant's failure to testify.

Defendant May Not, Before Trial, Appeal an Order Denying a Motion to Dismiss a Charge Based on Double Jeopardy Grounds

State v. Shoff, 342 N.C. 638, 466 S.E.2d 277 (9 February 1996). The defendant made a pretrial motion to dismiss a criminal charge on double jeopardy grounds. The trial judge issued an order denying the motion. The defendant gave notice of appeal to the Court of Appeals. In State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995), the Court of Appeals reviewed its conflicting prior opinions on this issue and concluded that the better view is that the defendant has no right to appeal an order denying a motion to dismiss on double jeopardy grounds because the order is interlocutory and nonappealable. That is, a defendant may only challenge the denial of the motion in an appeal after a conviction. The court, in affirming the Court of Appeals ruling in this case, stated that the Court of Appeals correctly ruled that the order at issue was interlocutory and nonappealable.

Defendant Failed to Prove that Actual Conflict of Interest Affected His Lawyers' Representation

State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (3 November 1995). The defendant was represented by two lawyers at his first-degree capital murder trial. One of the lawyers had previously represented a state's witness in a district court criminal case that was pending in superior court at the time of this trial. However, the evidence showed that the lawyer had made an appearance limited to the district court case and had not spoken to the witness since then. The defendant's other lawyer conducted the cross-examination of this witness, which the court noted was a vigorous one. The court ruled that, based on these and other facts, the defendant failed to show that an actual conflict of interest had adversely affected his lawyers' representation. See generally Cuyler v. Sullivan, 446 U.S. 335 (1980).

Trial Judge Did Not Err in Refusing to Change Status of Defendant's Privately-Retained Attorneys to Appointed Indigent Counsel, Based on Facts in this Case

State v. Richardson, 342 N.C. 772, 467 S.E.2d 685 (8 March 1996). The defendant, charged with first-degree murder, was found to be indigent and was appointed two attorneys. The next month, two attorneys hired by the defendant's parents entered a general notice of appearance to represent the defendant. A judge then granted the appointed attorneys' motion to withdraw as defense counsel. Several months later, the retained attorneys informed the judge that the defendant's parents were facing financial difficulties and had paid less than one-sixth of the attorneys' fee. The attorneys filed a motion for determination of the defendant's indigency, asking the judge to order the state to pay for defense counsel and other necessary expenses of representation. The judge granted the motion for expenses to hire experts, but refused to change the attorneys' status from retained to court-appointed. (The record indicated that $26,500 of the $40,000 fee remains unpaid.) The court ruled, based on the facts of this case, that the judge did not err in his ruling. The court stated that a defendant who has retained counsel—and the counsel have made a general appearance on the defendant's behalf and have not been permitted to withdraw—is no longer indigent for purposes of the appointment of an attorney; the court distinguished State v. Boyd, 332 N.C. 101, 418 S.E.2d 471 (1992) (defendant with retained counsel may qualify for state assistance for experts if defendant cannot afford to hire them) and State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

Trial Judge Erred in Instructing Jury that Any Question Addressed to Judge Could Not Be that of Individual Juror But Must Be that of Entire Jury

State v. King, 342 N.C. 357, 464 S.E.2d 288 (8 December 1995). The court ruled that the trial judge erred by instructing the jury that any question addressed to the judge could not be that of an individual juror but had to be that of the entire panel. G.S. 15A-1234(a)(1) does not require that all twelve jurors must agree that a question be asked before it may be brought before the judge. Rather, the statute merely requires that all communications between the judge and the jury must be conducted in open court with all members of the jury being present.

Trial Judge's Questioning of Prospective Juror in Presence of Other Prospective Jurors Violated the Defendant's Right to a Fair and Impartial Jury, Based on Facts in this Case

State v. Gregory, 342 N.C. 580, 467 S.E.2d 28 (9 February 1996). The trial judge questioned a prospective juror in the presence of eight other prospective jurors who ultimately served as jurors in this case. The juror stated that she had assisted the defendant's former attorney in preparing a defense of this case. The judge asked her if she learned some things that would be favorable to the state. The juror responded affirmatively. The judge then asked her if what she learned would influence her decision in this case. The juror responded affirmatively. The judge excused her and instructed the other prospective jurors that they should disregard anything that they heard from her. The defendant was convicted of first-degree murder and sentenced to death. Because the defendant did not object at trial to the colloquy between the judge and the prospective juror, the court undertook plain error analysis. It then ruled that the colloquy violated the defendant's right to a fair and impartial jury and ordered a new trial. The court stated that the colloquy left the eight jurors free to speculate about the nature of the damning information that the defendant and his attorneys were presumably hiding from them. If the jury noticed any gaps in the evidence, the colloquy invited them to fill in the gaps with the assumption that the missing information was favorable to the state. Because the colloquy potentially could lead the jury to rely on assumptions about evidence that was not presented at trial, the court was not satisfied that the verdict was based solely on the evidence introduced at the trial. The court also ruled that the judge's curative instruction was insufficient to cure the potential prejudice to the defendant, based on the controverted issues in this case (see the court's opinion for a discussion of these issues).

Prosecutor's Open-File Discovery Policy Does Not Give Defendant Standing Motion for Discovery

State v. Reeves, 343 N.C. 111, 468 S.E.2d 53 (4 April 1996). The defendant argued that the trial judge erred in failing to exclude a statement made by the defendant because the state had failed to provide the statement to the defendant as part of its open-file discovery policy. The court, relying on a similar ruling in State v. Abbott, 320 N.C. 475, 358 S.E.2d 365 (1987), ruled that a defendant is not entitled to discovery from the state unless the defendant makes a motion to compel discovery. A prosecutor's open-file discovery policy does not give a defendant a standing motion for discovery.

(1) Disparate Treatment Between Prospective White and Black Jurors Is Not Necessarily Dispositive on Issue of Discrimination under *Batson*
(2) *Batson* Test Must Be Used to Determine Discriminatory Jury Selection under State Constitution

State v. Floyd, 343 N.C. 101, 468 S.E.2d 46 (4 April 1996). (1) The court reaffirmed its ruling in State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990) that an attorney's disparate treatment between prospective white and black jurors is not necessarily dispositive on the issue of discriminatory use of peremptory challenges against black jurors. A quality that might cause the rejection of one person as a juror does not necessarily mean that another person should be rejected as a juror, because the second person may have other qualities that would cause him or

her to be a good juror. (2) The court ruled that the *Batson* test [prima facie case; racially-neutral reason; did challenging party establish purposeful discrimination; see Batson v. Kentucky, 476 U.S. 79 (1986)] is the same test to be applied when a party makes a jury discrimination claim under Article I, Sections 19 and 26 of the North Carolina Constitution.

NORTH CAROLINA COURT OF APPEALS

Criminal Offenses

Acquittal of Named Principal at Separate Trial Requires Acquittal of One Charged as Aider and Abettor to that Named Principal

State v. Byrd, 122 N.C. App. 497, 470 S.E.2d 548 (21 May 1996). The defendant was charged and convicted of aiding and abetting McKinney in committing a felonious assault on the victim. At a later separate trial, McKinney was found not guilty of the same felonious assault charge. The court reviewed the case law on this issue and ruled that the defendant's conviction must be set aside. The acquittal at a separate trial of a named principal (that is, named in the criminal pleading) requires the acquittal of one charged as an aider and abettor of that named principal. The court noted, however, that this legal principle does not apply when both the principal and aider and abettor are tried together; the court cited State v. Reid, 335 N.C. 647, 440 S.E.2d 776 (1994).

Defendant's Entry into Common Areas of University Sorority House, Appurtenant to Occupied Private Apartment within House, Was Entry into Dwelling for Burglary Offense

State v. Merritt, 120 N.C. App. 732, 463 S.E.2d 590 (21 November 1995). The defendant was convicted of first-degree burglary. The victim of the burglary was the house director of a university sorority house, and as part of her compensation she and her husband occupied a private apartment within the sorority house. The apartment occupied two floors and entry was prohibited to other residents; however, she had free access to all parts of the building constituting the sorority house. While she and her husband were in their apartment, the defendant entered the sorority house (but not the apartment); no one else was in the house at the time of the defendant's entry. After reviewing the use of the rest of the sorority house by the victim and her husband (the victim's job responsibilities required access to the entire house, they stored personal items there, etc.), the court ruled that the common areas of the house, appurtenant to the private apartment, are a portion of the victim's "dwelling house" under the burglary statute.

Residence is "Dwelling House" for Burglary Offense When Elderly Occupant Is Residing Elsewhere Due to Ill Health But Has Intention to Return There

State v. Smith, 121 N.C. App. 41, 464 S.E.2d 471 (5 December 1995). The court ruled that a residence is a "dwelling house" for a burglary offense even though its elderly occupant is residing elsewhere due to ill health when the occupant has an intention to return there. The court noted that in the three second-degree burglary cases before it, each occupant had left personal items in

the residences, each had the intent to return to their residences, and there was no evidence of abandonment of the residences.

Burning of Unoccupied Mobile Home Constitutes Second-Degree Arson

State v. Hodge, 121 N.C. App. 209, 465 S.E.2d 14 (19 December 1995). The court ruled that the intentional burning of an unoccupied mobile home constitutes second-degree arson. [Note: the intentional burning of an *occupied* mobile home is first-degree arson. See G.S. 14-58.2.]

Asportation of Rape Victim in Apartment Was Sufficient to Support Separate Conviction of Kidnapping

State v. McKenzie, 122 N.C. App. 37, 468 S.E.2d 817 (19 March 1996). The defendant was convicted of second-degree rape, second-degree kidnapping, felonious larceny, common law robbery, and felonious breaking or entering. The court ruled that the following evidence was independent of the rape to support the kidnapping conviction: The victim was in a hallway in an apartment when the defendant grabbed her, carried to the bedroom, bound her hands, and covered her head with a pillowcase. The defendant told the victim that he was not going to rape her. He then left the bedroom, turned off the television, shut the blinds, and rummaged throughout the apartment before returning to the bedroom. The court noted that the defendant transported the victim from the hallway to the bedroom and confined her there before the rape apparently to conceal his identity and to facilitate the commission of the independent acts of larceny and robbery. The court cited State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

Indictment for Attempted Second-Degree Kidnapping Did Not Properly Allege Felony When It Failed to Allege that Offense Was Committed "Infamously"

State v. Bell, 101 N.C. App. 700, 468 S.E.2d 484 (5 March 1996). In a case tried under the Fair Sentencing Act, the court ruled that an indictment for attempted second-degree kidnapping did not properly allege a felony when it failed to allege that the offense was committed "infamously." See G.S. 14-3(b) (an attempt to commit a felony is a misdemeanor unless otherwise provided by statute). The court noted that attempted second-degree kidnapping is an infamous offense and thus a felony. [Note: under the Structured Sentencing Act (SSA), attempted second-degree kidnapping is a Class F felony; see G.S. 14-39(b) and 14-2.5. There is no need to allege "infamously" for this offense under SSA.]

Trial Judge Did Not Err in Excluding Expert's Testimony about Defendant's Blood-Breath Ratio in Regard to Defendant's Intoxilyzer Reading in DWI Trial

State v. Cothran, 120 N.C. App. 633, 463 S.E.2d 423 (7 November 1995). The defendant was being tried for impaired driving in a commercial vehicle. Evidence showed that the Intoxilyzer 5000 revealed that the alcohol content of the defendant's breath was 0.04 grams per 210 liters of breath. The trial judge refused to allow defendant's expert chemist to testify that the defendant's blood-breath ratio was 1,722 to 1 and thus would result in a higher reading because the Intoxilzyer is calibrated at an assumed blood-breath ratio of 2,100 to 1—see G.S. 20-4.01(0.2).

The court ruled that because the legislature has adopted a breath-alcohol per se offense as an alternative method of committing an impaired driving offense, it is immaterial whether the defendant was in fact impaired. Accordingly, the expert's proposed testimony that the defendant's Intoxilyzer reading did not accurately reflect his blood alcohol level was inadmissible.

A Thirteen-Year-Old Becomes Thirteen on the First Second of the Day of Thirteenth Birthday; Time of Birth on that Birthday Is Irrelevant

In re Robinson, 120 N.C. App. 874, 464 S.E.2d 86 (21 November 1995). The juvenile was born at 10:45 A.M. on 22 August 1981. He allegedly committed criminal offenses at 3:00 A.M. on 22 August 1994. The juvenile asserted that he was not thirteen years old at the time of the offenses (because his time of birth was later in the day than the time of the offenses) and therefore his cases could not be transferred to superior court for trial as an adult. The court, after reviewing prior appellate case law, ruled that the juvenile became thirteen on the first second of 22 August 1994. The court rejected the use of a fraction of a day in computing birthdays. Therefore, the juvenile was thirteen at the time of the alleged commission of the criminal offenses.

Defendant Was Properly Convicted of Attempting to Possess Cocaine When She Sought to Purchase Cocaine from Undercover Police Officer Who Sold Her Pieces of Brazil Nuts Cut Up to Resemble Crack Cocaine

State v. Gunnings, 122 N.C. App. 294, 468 S.E.2d 613 (16 April 1996). Officers posed as drug dealers selling cocaine. The defendant and an accomplice drove up to an officer and asked if they could purchase two "rocks" for thirty dollars. The officer handed her two white rock-like substances (pieces of Brazil nuts cut up to resemble crack cocaine) in exchange for thirty dollars. The court noted that the evidence showed that (1) the defendant intended to possess cocaine; (2) she took several steps to accomplish that intent, including driving to an area known for drug sales, approaching people she believed to be cocaine dealers, and exchanging money for what she thought was cocaine; and (3) her efforts fell short of completing the offense of possession of cocaine. Relying on State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982) (when defendant has the specific intent to commit a crime and does the acts necessary to consummate the substantive offense, but because of facts unknown to the defendant essential elements of the substantive offense are lacking, the defendant may be convicted of an attempt to commit the crime), the court upheld the conviction of attempting to possess cocaine.

Evidence Was Sufficient to Support Conviction of Intentionally Maintaining Dwelling for Purpose of Keeping and Selling Controlled Substance

State v. Kelly, 120 N.C. App. 821, 463 S.E.2d 812 (21 November 1995). The court ruled that the evidence was sufficient to support the defendant's conviction of intentionally keeping and maintaining a dwelling for the purpose of using, keeping, and selling controlled substances, G.S. 90-108(a)(7). The court noted the following evidence: a Federal Express package with cocaine inside and addressed to Randy Brown, 1225 Jacksontown (in fact, Jamestown) Court was intercepted. A "dummy package" was sent instead to 1225 Jamestown Court. The defendant said he was Randy Brown and signed for it in that name. The package never went inside the house, but

was placed in the trunk of a car used by an accomplice. The defendant possessed a key to the house there and used it to go in and out of the house. Inside the house, in the upstairs master bedroom, a letter from an insurance company to the defendant (addressed to 1225 Jamestown Court) was found. Scales and baking soda, items commonly used to cut and package cocaine, were located in the kitchen. Potpourri similar to that found in the package containing the cocaine was also found in a ziplock bag in the house. The defendant also listed 1225 Jamestown Court as his address after he was arrested.

(1) Spouse May Properly Be Convicted of Armed Robbery of His or Her Spouse
(2) Sentences May Be Imposed for Convictions for Which Judgments Had Previously Been Arrested, When Reason for Arresting Judgments Was Defendant's Having Received Death Sentence, and Death Sentence Had Later Been Changed to Life Imprisonment

State v. Mahaley, 122 N.C. App. 490, 470 S.E.2d 549 (21 May 1996). The defendant was convicted of first-degree murder, armed robbery, and conspiracy to commit murder; the victim was her spouse. The defendant received a death sentence for first-degree murder, and the trial judge arrested judgment on the two other charges solely because the defendant had received a death sentence. At a later resentencing hearing, the defendant was sentenced to life imprisonment. The state then moved to impose sentences for the two other convictions for which the judgments had been arrested; the trial judge set aside the arrested judgments and imposed sentences. (1) The court rejected the defendant's argument that she could not be convicted of armed robbery of her spouse because spouses could not be prosecuted at common law for crimes committed against the property of another spouse (the law viewed them as one person). The court noted that this common law rule did not apply to assault or acts of "dangerous violence," and thus the defendant could properly be convicted of armed robbery. (2) Relying on State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987), the court ruled that the trial judge did not err in setting aside the arrested judgments and in imposing sentences for the convictions of armed robbery and conspiracy to murder. The court noted that the sole reason for the arrested judgments at the original trial was the defendant's having received a death sentence.

Trial Judge Erred in Not Submitting Lesser-Included Offense of Attempted Common Law Robbery

State v. Brandon, 120 N.C. App. 815, 463 S.E.2d 798 (21 November 1995). The defendant was convicted of attempted armed robbery in which the defendant struck the victim with a stick, approximately two by two inches in size. The defendant's defense was alibi. Relying on State v. Jackson, 85 N.C. App. 531, 355 S.E.2d 224 (1987), the court ruled that the trial judge erred in refusing to instruct on the lesser-included offense of attempted common law robbery because the stick was not a dangerous weapon as a matter of law.

Defendant's Possession of Handgun in Yard of Trailer Home Owned by Defendant But Rented to Another Person Did Not Satisfy Possession of Handgun "Within His Own Home" Exception for Offense of Possession of Firearm by Convicted Felon

State v. Locklear, 121 N.C. App. 355, 465 S.E.2d 61 (2 January 1996). The court, relying on State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), ruled that the defendant's possession of a handgun in the yard of a trailer home owned by the defendant but rented to another person did not satisfy the possession of a handgun "within his own home" exception for the offense of possession of firearm by convicted felon; see G.S. 14-415.1(a). The defendant's conviction was affirmed.

Punishment for Assault with Deadly Weapon Inflicting Serious Injury and Assault with Deadly Weapon on Law Enforcement Officer Is Not Permitted

State v. Locklear, 121 N.C. App. 355, 465 S.E.2d 61 (2 January 1996). The court, relying on State v. Byrd, 50 N.C. App. 736, 275 S.E.2d 522 (1981), ruled that the defendant may not be punished for convictions of both assault with a deadly weapon inflicting serious injury and assault with a deadly weapon on a law enforcement officer. The court arrested judgment for the conviction of the law enforcement officer assault.

(1) Chemical Analyst's Testimony Sufficient Evidence of Instrument Calibration
(2) Intoxilyzer Test Results Properly Given to Defendant

State v. Watson, 122 N.C. App. 596, 472 S.E.2d 28 (4 June 1996). The defendant was arrested for impaired driving and registered 0.13 on the Intoxilyzer. (1) The chemical analyst testified that in preparing the Intoxilyzer instrument he "insured that the instrument calibration checked out accurately." The court ruled that this testimony was sufficient evidence of instrument calibration under NCAC 19B.0320. (2) G.S. 20-139.1(e) requires a chemical analyst to record the results of the test and the time of the collection of breath samples and provide a copy of this information to the suspect. The court ruled that this statutory obligation was satisfied by the analyst's giving the suspect a test card with this information that was printed by the Intoxilyzer.

Evidence

Medical Experts Were Properly Permitted to Testify that Victim's Injuries Were Intentionally, As Opposed to Accidentally, Inflicted

State v. McAbee, 120 N.C. App. 674, 463 S.E.2d 281 (7 November 1995). The defendant was being tried for the murder of his girlfriend's four-month-old daughter. The court ruled that the trial judge under Rule 702 properly permitted a forensic pathologist and a pediatric neurologist to testify that the victim's injuries were intentionally, as opposed to accidentally, inflicted. The court noted that both experts had experience with the medical conditions known as battered-child and shaken-baby syndromes and gave detailed explanations of the general nature of these conditions and how they are medically evaluated. Their testimony was within their area of expertise, was helpful to the jury, and did not embrace a legal term of art or conclusion of law.

Trial Judge Did Not Err in Prohibiting Defendant, Charged with Sexual Abuse, from Introducing Evidence of Similar Prior Sexual Abuse of Victim by Her Uncle, Based on Facts in This Case

State v. Bass, 121 N.C. App. 306, 465 S.E.2d 334 (2 January 1996). The defendant was being tried for sexual abuse of a six-year-old victim. The trial judge prohibited the defendant from introducing evidence that the victim had been similarly abused by her uncle when she was three years old. The defendant argued on appeal that this evidence was admissible to show that the victim had prior knowledge of sexual matters and therefore had the ability to lie. The court upheld the trial judge's ruling. The court noted that the defendant conceded on appeal that his proposed evidence was not admissible under the four exceptions to Rule 412 (rape and sexual offense evidence shield rule). The court also noted that the defendant did not introduce any evidence that (1) the victim's prior accusations of sexual abuse were false, (2) the victim had made prior inconsistent statements, or (3) someone other than the defendant committed the sexual assault being tried. The court rejected the defendant's contention, as contrary to Rule 412, that the proffered evidence was relevant to the witness's credibility merely because it would show that the witness had some of the requisite information to lie if she desired to do so.

Trial Judge Did Not Err in Declining to Rule, Before Defendant's Decision to Testify, on Defendant's Motion in Limine to Suppress Rule 404(b) Evidence of Defendant's Prior Criminal Acts

State v. Barber, 120 N.C. App. 505, 463 S.E.2d 405 (7 November 1995). The defendant was being tried for various sexual assaults on the victim. His defense was consent. The defendant asserted on appeal that the trial judge impermissibly chilled his right to testify on his own behalf when the judge declined to rule—before the defendant testified—on his motion in limine to suppress Rule 404(b) evidence of prior criminal acts. Distinguishing State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988) [state's case so completely rested on the testimony of defendant's relatives (the subject of the motion in limine) that the trial judge prejudiced the defendant when the judge denied the motion to hear the matter before the defendant testified, thereby discouraging the defendant from exercising her right to testify to refute her relatives' testimony], the court ruled that the trial judge did not abuse his discretion in deferring a ruling on the motion. The court noted several factual differences from the *Lamb* case: (1) the trial judge did not absolutely deny the motion but deferred his decision until such time as facts would allow him to make a well-reasoned decision; (2) it is unclear that the defendant's decision to testify rested solely on the trial judge's decision on the motion in limine; and (3) the trial judge indicated that he would protect the defendant from impermissible evidence being used to impeach him.

Error in Drug Prosecution to Admit Defendant's Passport Showing that He Had Visited the Country of Colombia Two Months Before the Offense Being Tried

State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (20 February 1996). The court ruled that the trial judge in a drug prosecution erred in allowing the admission of the defendant's passport showing travel (within two months of the drug offenses being tried) to the country of Colombia.

Such evidence was not relevant to a fact in issue and unfairly prejudiced the defendant, since Colombia is widely known for its connection to the drug trade. [Note: the state did not present any evidence in this prosecution to link the defendant's obtaining the drugs from Colombia.]

G.S. 15A-1025 Did Not Prohibit Testimony by State's Witness that Defendant Admitted Killing Victim and Would Take Plea Bargain and Walk

State v. Bostic, 121 N.C. App. 185, 465 S.E.2d 20 (19 December 1995). The defendant was being tried for murder. The court stated that the trial judge erred in not allowing the state to introduce into evidence the third statement in the following proposed testimony of a state's witness—that he overheard the defendant tell another inmate: "Yeah, I killed the bitch. I've done my time. I'll take a plea bargain and walk." G.S. 15A-1025 (fact that defendant or counsel and prosecutor engaged in plea discussions is inadmissible) did not bar this testimony, because it did not refer to the fact that the defendant or his counsel and the prosecutor had engaged in plea bargain discussions.

Trial Judge Erred in Failing to Make Sufficient Finding Before Admitting Evidence under Residual Hearsay Exception, Rule 804(b)(5)

State v. Dammons, 121 N.C. App. 61, 464 S.E.2d 486 (5 December 1995). The court ruled that the trial judge erred in failing to make specific findings of fact and conclusions of law as to the trustworthiness of the victim's statement offered by the state under the residual hearsay exception, Rule 804(b)(5); see State v. Smith 315 N.C. 76, 337 S.E.2d 833 (1985) and State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986). The court stated that the judge's cursory statement that the victim's statement was "highly credible" was insufficient, based on the facts in this case. The court ordered a new trial for the defendant.

(1) Defendant's Failure to Appear for Trial May Be Admissible as Evidence of Flight
(2) Trial Judge Did Not Err in Excluding Testimony of Defense Witness Who Violated Sequestration Order, Based on Facts in this Case

State v. Williamson, 122 N.C. App. 229, 468 S.E.2d 840 (16 April 1996). (1) The state introduced evidence that the defendant failed to appear at a session of superior court when the defendant's case was first scheduled for trial. Relying on State v. Robertson, 57 N.C. App. 294, 291 S.E.2d 302 (1982), the court ruled that this evidence was properly admitted as evidence of flight. (2) The trial judge granted a defendant's motion to sequester the witnesses, and witnesses for the state and the defendant were sequestered. After the state completed its evidence, the defendant moved to present testimony by his girlfriend, even though she had not been listed as a potential witness for the defendant and had been present in the courtroom during at least a portion of the state's evidence. She had been present during the testimony of two witnesses and had discussed other testimony with the defendant's sister who had been present in the courtroom throughout the trial. Based on this evidence, the trial judge ruled that she had violated the sequestration order and did not allow her to testify. Based on the ruling in State v. Williamson, 110 N.C. App. 626, 430 S.E.2d 467 (1993), the court ruled that the trial judge did not abuse his discretion by excluding the testimony of this witness.

Arrest, Search, and Confession Issues

Weaving Within Lane and Other Facts Supported Reasonable Suspicion to Make Investigative Stop of Vehicle for Impaired Driving

State v. Watson, 122 N.C. App. 596, 472 S.E.2d 28 (4 June 1996). At about 2:30 A.M., an officer saw a vehicle driving on the dividing line on a two-lane highway near a nightclub. After turning to follow the vehicle, the officer watched the vehicle weave back and forth in its lane for about fifteen seconds. The officer then stopped the vehicle. The court ruled that this was sufficient evidence, based on the totality of the circumstances, to support an investigative stop of the vehicle for impaired driving.

(1) Defendant May File Supplemental Suppression Motion Based on Newly-Discovered Evidence
(2) Reasonable Suspicion Did Not Support Stop of Vehicle When Information Supporting Reasonable Suspicion Was Fabricated by Another Law Enforcement Officer and Supplied to Officer Who Made Stop, Even Though Stopping Officer Did Not Know Information Was Fabricated

State v. Watkins, 120 N.C. App. 804, 463 S.E.2d 802 (21 November 1995). An officer stopped a vehicle for impaired driving. A prior appeal of this case determined that anonymous information and the officer's observations provided reasonable suspicion for the stop; see State v. Watkins, 337 N.C. 437, 446 S.E.2d 67 (1994). The defendant then filed a supplemental suppression motion based on newly-discovered evidence that the anonymous information had been supplied to the stopping officer by another officer, and this other officer had fabricated the information (there was no evidence that the stopping officer knew that the information was fabricated). The court ruled: (1) the defendant had the authority to file a supplemental suppression motion based on newly-discovered evidence—see G.S. 15A-975(c); and (2) reasonable suspicion that is based on information fabricated by a law enforcement officer and supplied to another law enforcement officer may not serve as a basis for the stop by the officer who received the fabricated information, even though that officer did not know the information was fabricated.

Officer's Frisk Was Based on Reasonable Suspicion and Incriminating Character of Evidence Seized During Frisk Was Immediately Apparent under *Minnesota v. Dickerson*

In re Whitley, 122 N.C. App. 290, 468 S.E.2d 610 (16 April 1996). Two officers responded to a call that drug sales were occurring between two black males on a certain street. Officers saw the respondent and another person under a tree. They approached them and told them they were going to search them for weapons. During the search of the respondent, an officer noticed that his lower body and legs were really tight so he asked him to spread his legs. The officer's hands were outside of the respondent's trousers in the bottom crotch area when an item fell from the respondent's buttocks into his pants. (The officer testified at a hearing that based on his personal experience as a law enforcement officer, he had probable cause to believe that the object was some kind of illegal substance.) When the officer felt the item fall on his hand, he held it in one

hand and put his other hand into the pants and retrieved it. It was a plastic bag with a white powdered substance, and the officer placed the respondent under arrest. The court ruled: (1) there was reasonable suspicion that the respondent might be armed, dangerous, and involved in criminal activity to frisk him; and (2) the incriminating character of the object seized was immediately apparent to the officer, noting State v. Wilson, 112 N.C. App. 777, 437 S.E.2d 387 (1993) and Minnesota v. Dickerson, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). The court noted that there was no evidence that the officer improperly manipulated the object to determine if it was an illegal substance.

Probable Cause Supported Search Warrant of Apartment Despite Officer's Alleged Unlawful Entry, Based on Independent Source Exception to Exclusionary Rule

State v. McLean, 120 N.C. App. 838, 463 S.E.2d 826 (21 November 1995). Exterminators and apartment managers discovered marijuana in an apartment as a result of the exterminating work performed there. The apartment managers then contacted a local law enforcement agency. An officer entered the apartment with the managers and saw the marijuana. The officer, without seizing any evidence, left the apartment to await a detective. The detective gathered information from the exterminators, apartment managers, and the law enforcement officer. He provided this information in an affidavit for a search warrant, obtained a search warrant, searched the apartment, and seized the marijuana. The court ruled, assuming without deciding that the officer's entry with the managers was unconstitutional [note: the entry, apparently without the tenant's consent or exigent circumstances, would have been unconstitutional], that the seizure of the marijuana should not be suppressed, based on the independent source exception to the exclusionary rule; see Murray v. United States, 487 U.S. 533 (1988). There was sufficient probable cause, independent of the illegal entry by the officer and his corroborative observations of the marijuana, to support the search warrant. The finding of probable cause was unconnected with the illegal entry. The court also noted that the detective who applied for the search warrant did not participate in the illegal entry.

Defendant's Appeal of Denial of Suppression Motion Is Dismissed Because Defendant Gave Insufficient Notice to Judge and Prosecutor of Intent to Appeal Before Defendant Pled Guilty

State v. McBride, 120 N.C. App. 623, 463 S.E.2d 403 (7 November 1995), *affirmed*, 344 N.C. 623, 476 S.E.2d 106 (1996). The defendant negotiated a guilty plea with the state, and the guilty plea was accepted by the judge. He then filed a notice of appeal of the judge's denial of his suppression motion; see G.S. 15A-979(b). The court dismissed the appeal without reaching the merits of the suppression motion because the defendant failed, under State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979), to preserve the right to appeal by giving notice to the judge and prosecutor of his intent to appeal before entering the guilty plea.

Defendant Was Not Seized When Officer Asked Him to Consent to Search His Luggage

State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (20 February 1996). Officers who were conducting drug surveillance followed the defendant and an acquaintance as they took a cab from

a bus station. The cab eventually stopped at a restaurant. The officers drove up in their car. An officer approached the cab, opened its rear passenger door, identified himself as a police officer, and asked the defendant and the acquaintance for consent to search them and their luggage. Drugs were discovered and the defendant was arrested. The defendant argued that he had been illegally seized without reasonable suspicion before he consented to the search. The court ruled, relying on State v. West, 119 N.C. App. 562, 459 S.E.2d 55 (1995), that the defendant had not been seized before the consent search. The court noted that law enforcement conduct does not constitute a seizure unless "a reasonable person would not feel free to decline the officer's request or otherwise terminate the encounter." See Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). In other words, the court said, a seizure does not occur until there is a physical application of force or submission to a show of authority. See California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). The court stated that the officer did not order the cab to stop, turn on the law enforcement car's siren, or order the defendant to stay in place. Rather, the officer opened the cab's rear door and asked the defendant and his acquaintance for consent to search them and their luggage. Nothing during this encounter suggested that the defendant was not free to leave.

Paper Writing Containing Defendant's Statement Was Inadmissible When It Was Neither Signed by Defendant Nor a Verbatim Record of Questions and Answers

State v. Bartlett, 121 N.C. App. 521, 466 S.E.2d 302 (6 February 1996). While the defendant spoke to law enforcement officers, one of the officers attempted to write down the defendant's answers to the questions asked by another officer. The officer's questions were not written down. When the paper writing was given to the defendant, he refused to sign it. The court ruled that the trial judge erroneously permitted the state to introduce the paper writing into evidence. The court noted the general rule that a defendant's written statement may not be introduced into evidence unless (i) it was read to or by the defendant and signed or otherwise admitted to being correct, or (ii) it was a verbatim record of the questions asked and answers given by the defendant. In this case, the officer did not write down the questions asked and never testified that the answers given by the defendant were correctly reflected on the paper writing. In addition, there was no evidence that the defendant acquiesced in the correctness of the paper writing. [Note: this ruling only applies to the admissibility of the paper writing, not the admissibility of oral testimony of the conversation between the officers and the defendant.]

Officer's Statement to Defendant that He Would Not Seek to Charge Him With Habitual Felon Status If He Confessed to Break-Ins Violated Defendant's Constitutional and Statutory Rights

State v. Sturgill, 121 N.C. App. 629, 469 S.E.2d 557 (5 March 1996). The defendant was convicted of five felony break-ins and larcenies and sentenced as an habitual felon. Evidence showed that officers arrested the defendant for a felony break-in and larceny. During custodial interrogation a detective told the defendant that he would be charged with several other break-ins. The defendant then indicated that the only statement he wanted to make was that he did not commit any of the break-ins. The detective stopped the questioning and began to leave the interrogation room. The defendant then asked "what would be in it" for him if he provided

information about the break-ins. The detective told him that he would not seek to indict him for habitual felon status. The defendant then confessed. The court ruled that the officers' statement about the charge of habitual felon status violated the defendant's substantive due process rights (i.e., the defendant detrimentally relied on the officer's promise) and statutory rights under G.S. 15A-1021 (no improper pressure to induce defendant to plead guilty) and G.S. 15A-974 (statutory exclusionary rule), and thus the confession was inadmissible.

Sentencing

Judge Properly Determined Prior Record Level Under Structured Sentencing in Assigning One Point Each for (1) All Elements of Current Offense Included in Prior Offense, and (2) Current Offense Committed While on Probation for Prior Offense, Even Though Prior Offense Was Included in Establishing Habitual Felon Status

State v. Bethea, 122 N.C. App. 623, 471 S.E.2d 430 (4 June 1996). The defendant pled guilty to two felony charges (felonious breaking and entering and felonious larceny) and to being an habitual felon. The prior convictions that established habitual felon status were (1) felonious breaking and entering and felonious larceny; (2) larceny of a firearm; and (3) possession of cocaine. In determining the defendant's prior record level, the trial judge assigned one point under G.S. 15A-1340.14(b)(6) because all the elements of the current offense were included in a prior offense [see (1) above] and one point under G.S. 15A-1340.14(b)(7) because the defendant committed the offenses for which he had pled guilty while he was on probation for a prior offense [see (3) above]. The defendant, citing G.S. 14-7.6 (which prohibits—in determining prior record level for sentencing as an habitual felon—convictions used to establish habitual felon status), argued that the trial judge erred in assigning one point each as described above. The court ruled that the trial judge did not err. The court reasoned that both G.S. 15A-1340.14(b)(6) and (b)(7) address the gravity and circumstances surrounding the offense for which the defendant is now being sentenced, rather than the mere existence of the prior offense.

When Grave Desecration Offense Required Proof of Damages in Excess of $1,000, Statutory Aggravating Factor of Great Monetary Loss Was Properly Found When Damages Were $10,000

State v. Sammartino, 120 N.C. 597, 463 S.E.2d 307 (7 November 1995). The defendant was convicted of desecrating a grave site under G.S. 14-149, which requires proof of damages of more than $1,000. Evidence showed that the actual damages were $10,000. The court ruled, relying on State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983), that the trial judge properly found the Fair Sentencing Act statutory aggravating factor of "damage causing great monetary loss" [G.S. 15A-1340.4(a)(1)(m); the same factor exists under Structured Sentencing Act in G.S. 15A-1340.16(d)(14)]. The same evidence was not used to prove both an element of the offense and the aggravating factor, which would have been a violation of G.S. 15A-1340.4(a)(1). See also State v. Evans, 120 N.C. App. 752, 463 S.E.2d 830 (21 November 1995) (similar ruling; $135,000 in damages for injuries to a felonious assault victim and $28,325 in damages for injuries to another felonious assault victim).

Various Aggravating Factors Were Properly Found in Sentencing for Three Felonious Assault Convictions

State v. Evans, 120 N.C. App. 752, 463 S.E.2d 830 (21 November 1995). The defendant was convicted of three counts (three separate victims) of assault with a deadly weapon with intent to kill inflicting serious injury. The court ruled that the trial judge properly found the following aggravating factors: (1) The statutory aggravating factor that each offense was especially heinous, atrocious, or cruel [G.S. 15A-1340.4(a)(1)(f); the same factor exists under Structured Sentencing Act in G.S. 15A-1340.16(d)(7)] was supported by evidence of multiple gunshot wounds suffered by each victim. The court rejected the defendant's argument the same evidence supported this factor and the serious injury element of the offenses. (2) The nonstatutory aggravating factor found for two victims that their injuries resulted in permanent disability (one underwent a hysterectomy and the other had one-half of her collarbone removed) was not based on the same evidence that the offense was heinous, atrocious, or cruel; see State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994). (3) The statutory aggravating factor of creating a great risk of death to more than one person by a weapon hazardous to the lives of more than one person [G.S. 15A-1340.4(a)(1)(g); the same factor exists under Structured Sentencing Act in G.S. 15A-1340.16(d)(8)] was supported by evidence that the defendant indiscriminately fired a semi-automatic weapon in a house occupied by three women and two minor children.

Statutory Aggravating Factor of Taking Advantage of Position of Trust Properly Found When University Student Stole Computer Equipment after He Had Been Given Security Code Providing Access to Equipment

State v. Carter, 122 N.C. App. 332, 470 S.E.2d 74 (7 May 1996). The defendant, a university student, was convicted of felonious larceny based on stealing computer equipment from a university computer lab that was accessible only with a security code. The defendant had been given the security code for his classes. The court ruled that the trial judge properly found the statutory aggravating factor [G.S. 15A-1340.4(a)(1)n. under FSA; G.S. 15A-1340.16(d)(15) under SSA] that the defendant took advantage of a position of trust or confidence to commit this offense. The court rejected the defendant's argument that this factor is predicated on a friendship or familial relationship and would not apply when the victim is a legal entity or corporation.

Miscellaneous

Jury's Special Verdict Finding State of North Carolina Had Jurisdiction of Criminal Offense Barred, on Res Judicata Principles, Relitigation of that Issue at Second Trial

State v. Dial, 122 N.C. App. 298, 470 S.E.2d 84 (7 May 1996). The defendant was charged with first-degree murder. It was unclear whether the murder occurred in North Carolina. The jury returned a special verdict finding that the State of North Carolina had jurisdiction to try the murder; however, the jury could not agree on a verdict as to the defendant's guilt and innocence. The trial judge accepted the special verdict and declared a mistrial concerning the murder charge. At the second trial, the trial judge ruled that the special verdict had determined the issue of

jurisdiction and denied the defendant's motion to relitigate the issue. The court affirmed the trial judge's ruling. The principle of res judicata barred a relitigation of the issue.

Prosecutor's Jury Argument Was Improper When Based on Information that Prosecutor Knew Was Untrue

State v. Bass, 121 N.C. App. 306, 465 S.E.2d 334 (2 January 1996). The defendant was being tried for sexual abuse of a six-year-old victim. The trial judge prohibited the defendant from introducing evidence that the victim had been similarly abused by her uncle when she was three years old. [The prosecutor agreed that the victim had in fact been sexually abused, but successfully kept out the evidence on the ground that the victim's allegations against the uncle were not false.] The prosecutor in jury argument, over the defendant's objection, essentially argued that a six-year-old child who knew nothing about sexual activity could not have made up the allegations of sexual abuse against the defendant. The court ruled that this argument was improper because the prosecutor knew that the victim had previously been sexually abused. The court concluded that the prosecutor's argument was calculated to mislead or prejudice the jury and ordered a new trial for the defendant.

Claimant Who Was Shot While Attempting to Flee with Money He Stole Was Not Entitled to Benefits from Crime Victims Compensation Commission

McCrimmon v. Crime Victims Compensation Comm'n, 121 N.C. App. 144, 465 S.E.2d 28 (19 December 1995). A claimant applied to the Crime Victims Compensation Commission for benefits after being shot while attempting to flee with money he stole from a customer in a convenience store. The court ruled that the commission did not err in denying benefits on the ground that the claimant committed "contributory misconduct" under G.S. 15B-11(b). The court ruled that the claimant committed a larceny and it was reasonably foreseeable that his illegal act could result in injury to himself.

Prior Adjudications of Non-Paternity Did Not Bar Plaintiffs, Who Were Not in Privity with Parties to Prior Actions, from Instituting Civil Action for Paternity and Child Support

Devane v. Chancellor, 120 N.C. App. 636, 463 S.E.2d 293 (7 November 1995). In 1979, Chancellor was found not guilty in a criminal prosecution for nonsupport of illegitimate children, and the jury in a special verdict found that the state had not proven beyond a reasonable doubt Chancellor was the father of the children. In 1986, the Sampson County Child Support Enforcement Agency brought a civil action against Chancellor to establish paternity and to gain child support. The agency's attorney took a dismissal with prejudice. In 1994, the mother and her children (plaintiffs) brought a civil action against Chancellor to establish paternity and to gain child support. Relying on County of Rutherford ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990), the court ruled that the plaintiffs were not collaterally estopped from establishing Chancellor as the children's father because they were not in privity with the parties (State of North Carolina and the Sampson County Child Support Enforcement Agency) to the prior actions against Chancellor.