Published by the Institute of Government, The University of North Carolina at Chapel Hill

No. 92/01
September 1992

Administration of Justice Memorandum

Judges, Public Defenders, Appellate Defenders, and District Attorneys

The Diminished Capacity Defense

John Rubin

Contents

A. Introduction

The term "diminished capacity" often carries the stigma of the so-called "Twinkie" defense, a phrase coined by the press in connection with the 1978 killings of the mayor of San Francisco and another city official. The defendant in that case, Dan White, claimed that he killed in a fit of depression—a depression both evidenced and aggravated by his excessive consumption of Twinkies and other junk food. Tried for first-degree murder, White was convicted only of voluntary manslaughter.[1]

White's trial brought national attention to California's interpretation of the diminished capacity defense. Like many other states, California divided murder into two degrees, first and second, and recognized the lesser offense of voluntary manslaughter. Also as in other states, a defendant ordinarily could be convicted of first-degree murder in California only if he or she acted with a particular state of mind—namely, premeditation, deliberation, and malice.

Unlike other jurisdictions, however, California allowed the defendant to defend on the ground of diminished mental capacity even if he or she possessed the state of mind ordinarily required for conviction of first-degree murder. Thus, even if the prosecution proved premeditation, deliberation, and malice, as those elements are normally understood for purposes of first-degree murder, the defendant could still claim that his or her faculties were "diminished" at the time of the offense. If the defendant could not maturely and meaningfully reflect upon the gravity of his or her actions or comprehend his or her duty to act in accordance with law,

which was how California defined diminished capacity, he or she could at most be held liable for second-degree murder or voluntary manslaughter.[2]

This brand of diminished capacity has not been accepted elsewhere. Indeed, California has abolished the diminished capacity defense, at least in its above formulation. However, most jurisdictions have recognized (and California continues to recognize) a distinct type of the diminished capacity defense—one more limited and more in keeping with traditional criminal law concepts.[3]

In this latter form, the diminished capacity defense is a way of suggesting that the defendant did not act with the state of mind required for conviction. This form of diminished capacity acts as a "negating" defense, meaning that it prevents the state from proving its case. For example, if the defendant lacks the capacity to premeditate, or at least raises a reasonable doubt about his or her capacity to premeditate, the prosecution cannot establish an element of first-degree murder. On the other hand, if the prosecution proves that the defendant acted with the state of mind required for conviction of first-degree murder, the defendant cannot use the diminished capacity defense as a basis for avoiding liability.[4]

For many years, North Carolina rejected even this construction of the diminished capacity defense.[5] In a string of recent cases, however, the North Carolina Supreme Court reversed course and allowed evidence of diminished capacity to "negate" state of mind elements, at least in cases of first-degree murder. This paper is intended to serve as a reference source on the major issues that have arisen in diminished capacity cases in North Carolina. The paper discusses the following subjects: (1) the nature of the defense recognized in North Carolina; (2) the applicability of the defense to different offenses; (3) evidentiary problems in raising the defense; (4) the defendant's burden of presenting evidence; (5) the prosecution's burden of persuasion; and (6) jury instructions.

B. Nature of Defense

1. Definition

There is a small but growing body of case law on diminished capacity in North Carolina. To date, all of the cases have involved first-degree murder charges.[6]

The North Carolina Supreme Court first recognized the diminished capacity defense in *State v. Shank*,[7] overruling some of its earlier decisions and distinguishing others. There, the defendant was charged with deliberate and premeditated murder, a form of first-degree murder requiring proof of premeditation, deliberation, and malice. (North Carolina recognizes different forms of first-degree murder;[8] unless otherwise stated, all references to first-degree murder are to premeditated and deliberate murder.) The defendant sought to elicit testimony that he was suffering from a mental disorder and was incapable of premeditating and deliberating at the time of the offense. The trial court refused to allow the evidence, and the defendant was convicted of first-degree murder. The North Carolina Supreme Court awarded the defendant a new trial, finding that the trial court had erroneously excluded the defendant's evidence of his "diminished capacity."

The supreme court grounded its decision on basic principles of relevance. Relying on Rule 402 of the North Carolina Rules of Evidence, the court stated that generally all relevant evidence is admissible. The court further recognized that, under Evidence Rule 401, evidence is relevant if it tends to prove or disprove any fact of consequence in the case.[9]

In the supreme court's view, the evidence offered by the defendant easily met the test of relevance. The defendant sought only to show that he lacked the mental capacity to form the state of mind for first-degree murder, a claim in keeping with the traditional form of diminished capacity discussed above in the introduction. The court found that such evidence was directly relevant in determining "the presence or absence of an element of the offense with which [the defendant] was charged."[10] Further, the particular kind of diminished capacity evidence offered by the defendant, the testimony of a medical expert, was admissible under the rules relating to expert opinions. The court's analysis of expert testimony in diminished capacity cases is discussed in detail below under Evidentiary Issues: Opinion.

Although the defendant in *Shank* based his diminished capacity defense on a mental disorder, subsequent cases show that physical and emotional problems may also be relevant in determining whether the defendant lacked the capacity to form the state of mind required for conviction. In *State v. Rose*,[11] the defendant presented evidence that an earlier head injury was a contributing cause of a psychotic episode, during which he was incapable of forming the state of mind for first-degree murder; in *State v. Weeks*,[12] the defendant claimed that his incapacity flowed from a chronic emotional disturbance and inability to deal with stress.

2. Relation to Insanity

The *Shank* court recognized that, by definition, diminished capacity differs from insanity. Defendants may be found insane in North Carolina if, at the time of the offense, they were incapable of knowing the nature and quality of their actions or that their actions were wrong.[13] In contrast, diminished capacity means only that the defendant lacked the capacity to form the state of mind necessary for conviction.[14]

The specific evidence allowed in *Shank* reflects the court's differentiation of diminished capacity from insanity.

The defendant offered evidence that at the time of the offense he was suffering from psychogenic amnesia, a disorder that rendered him incapable of premeditating or deliberating. The court allowed the evidence even though it fell short of insanity.[15]

Despite their differences, the insanity and diminished capacity defenses may be presented in the same case along with other defenses related to the defendant's state of mind. The supreme court has recognized that state of mind defenses, such as insanity and voluntary intoxication, "are not mutually exclusive. They may coexist in the same case and be considered, jointly and severally, by the jury."[16] The court has, therefore, allowed a combination of voluntary intoxication, insanity, and diminished capacity evidence all in the same case.[17]

C. Applicability to Different Offenses

1. First-Degree Murder

For both first-degree and second-degree murder, the prosecution must prove beyond a reasonable doubt that the defendant acted with malice. First-degree murder differs from second-degree murder in that the prosecution has the added burden of proving beyond a reasonable doubt that the defendant acted with premeditation and deliberation. The North Carolina courts have long held that premeditation and deliberation are distinct mental elements.[18] Therefore, if the defendant lacked the capacity either to premeditate or to deliberate at the time of the offense, an essential element of first-degree murder cannot be proven and the defendant cannot be convicted of the offense.

The North Carolina courts have also recognized that specific intent to kill is an essential component of premeditation and deliberation and, therefore, a necessary element of first-degree murder. In *State v. Holder*,[19] in which the defendant claimed diminished capacity as a defense, the supreme court reaffirmed that specific intent to kill is an "essential constituent of the elements of premeditation and deliberation." Thus, to prove premeditation and deliberation, the prosecution must prove that the defendant acted with the specific intent to kill. Conversely, if the defendant lacked the capacity to form the specific intent to kill, the prosecution cannot establish premeditation and deliberation and cannot obtain a conviction for first-degree murder.

If the evidence negates only premeditation and deliberation, or the constituent element of specific intent to kill, the defendant does not avoid all criminal liability. The defendant's conduct may still constitute second-degree murder, which the supreme court has held requires proof only of malice.[20]

2. Other Offenses

The question remains whether evidence of diminished capacity is admissible to negate states of mind other than those required for conviction of first-degree murder. If so, the diminished capacity defense could preclude conviction of other offenses. For example, as discussed above, second-degree murder requires proof of malice; burglary, meanwhile, requires proof that the defendant broke into a dwelling with the specific intent to commit a felony or larceny. The North Carolina courts have not yet addressed whether diminished capacity is available as a defense in these instances.

The issue has arisen, however, in cases involving the defense of voluntary intoxication, which is similar in certain respects to the diminished capacity defense. Like a defendant suffering from diminished capacity, a defendant who is voluntarily intoxicated at the time of the offense may lack the capacity to form the state of mind required for conviction.[21] The North Carolina courts have held that the availability of voluntary intoxication as a defense depends on whether the offense in question requires proof of specific intent. The two categories of offenses—those that do not require proof of specific intent and those that do—are discussed separately below.

a. Offenses Not Requiring Specific Intent

The North Carolina courts have repeatedly held that voluntary intoxication is not available as a defense to offenses that do not require proof of specific intent. The courts have not articulated a generally applicable principle, however, for identifying specific intent crimes. Proceeding instead on a case-by-case basis, the courts have held that a number of offenses, including second-degree murder, rape, and arson, do *not* require proof of specific intent. In such cases, voluntary intoxication is not a defense as a matter of law.[22]

This approach derives from a distinction developed at common law between specific intent and general intent crimes. LaFave distinguishes the two types of intent by defining general intent as "an intent to do the physical act . . . which the crime requires" and specific intent as "some intent in addition to the intent to do the physical act which the crime requires."[23] By this definition, assault with a deadly weapon would likely be considered a general intent crime because it depends on the intent to do the physical act of using a deadly weapon against another; and assault with a deadly weapon with intent to kill would be a specific intent crime because it requires the additional purpose of trying to kill another.

LaFave and other commentators have been critical, however, of classifying offenses in terms of specific or general intent.[24] The mental elements for many offenses do not fit neatly within either category. For example, second-degree

murder requires proof of malice, of which the supreme court has recognized at least three different kinds,[25] while arson requires proof that the defendant acted willfully and maliciously.[26] Commentators have also criticized the specific intent/general intent approach as an artifice, without logical coherence or empirical support, which courts have used to exclude relevant state of mind evidence in "general intent" cases.[27]

The North Carolina courts have not yet decided whether to apply the limitations developed in voluntary intoxication cases to the diminished capacity defense—that is, they have not decided whether to allow the diminished capacity defense in cases that do not involve specific intent. In its only opportunity to date, the supreme court withheld deciding the issue. In *State v. Baldwin*,[28] the supreme court stated that, unlike first-degree murder involving premeditation and deliberation, first-degree murder perpetrated by lying in wait does not require proof of a specific intent to kill. Indeed, according to the court, the crime does not even require an intent to lie in wait.[29] Although the court concluded that voluntary intoxication could not be used as a defense, it noted that it was unnecessary to decide whether diminished capacity would have been cognizable as a defense.[30]

The supreme court has indicated in other respects, however, that it may be more favorably disposed toward the diminished capacity defense than toward the voluntary intoxication defense. In *State v. Clark*,[31] the court compared the two for purposes of deciding when the trial court should submit a jury instruction on diminished capacity. The court held that a defendant seeking such an instruction should have a less rigorous burden of producing evidence than a defendant relying on voluntary intoxication. In the court's view, the policy reasons for imposing a heavy burden of production in a case of voluntary intoxication, where the defendant's condition is self induced, do not apply in a case of diminished capacity, where the defendant's mental defect is beyond his or her control.[32] The specific standard of producing evidence established by the court for diminished capacity cases is discussed below under Burden of Production: Standard.

b. Offenses Requiring Specific Intent

In contrast to their treatment of offenses that do not require proof of specific intent, the North Carolina courts have allowed voluntary intoxication as a defense whenever specific intent has been a component of the charged offense. Many offenses other than first-degree murder require proof of specific intent, including burglary (intent to commit felony or larceny), attempt crimes (intent to commit crime), and assault with a deadly weapon with intent to kill (intent to kill).[33] In those cases, the courts have acknowledged that voluntary intoxication may negate the specific intent required for conviction.[34] The courts have also held that when the predicate for felony murder is a specific intent crime, such as robbery, voluntary intoxication may negate the specific intent required for robbery and thereby preclude conviction for felony murder.[35]

Diminished capacity seems no less applicable than voluntary intoxication in cases where proof of specific intent is required. Both defenses serve the same function—that is, both negate the state of mind required for conviction of the offense. Also, as discussed above, the current supreme court appears to be less resistant to diminished capacity as a defense than to voluntary intoxication.[36] It therefore seems likely that the North Carolina courts will allow diminished capacity as a defense at least to the same extent as they allow voluntary intoxication.

D. Evidentiary Issues

1. Opinion

Because expert testimony plays such a prominent role in diminished capacity cases, the supreme court has focused on the permissible scope of expert opinion about the defendant's state of mind. In *State v. Shank*,[37] the court recognized that Evidence Rule 704 expressly allows an expert to give an opinion even on an issue ultimately to be decided by the jury. Finding no other rule barring admissibility, the court held that an expert could give testimony tending to show that the defendant did not have the capacity to premeditate or deliberate, an issue ultimately for the jury to decide.

In *State v. Weeks*,[38] issued the same day as *Shank*, the court refined this approach. The court held that even though an expert is permitted to give his opinion on an ultimate issue, he may not testify to a "legal conclusion" that he is "not qualified to make."[39] Under this rule, the trial court could bar an expert from testifying specifically that the defendant did, or did not, have the capacity to premeditate and deliberate.

Although *Weeks* and *Shank* may appear to conflict with each other, they are reconcilable. Under *Weeks*, an expert ordinarily may not use the terms "premeditation" or "deliberation" in testifying about the defendant's mental capacity. Nor may an expert say whether the defendant acted in a "cool state of mind" or under a "suddenly aroused violent passion," terms which the North Carolina courts often use to explain "deliberation" to the jury.[40] Such testimony is ordinarily impermissible on the ground that it embraces precise legal terms, the "definitions of which are not readily apparent to medical experts."[41] Arguably, an expert with suf-

ficient legal expertise might be allowed to give an opinion in legal terms even under *Weeks*.

Whether or not experts would be permitted to use the words "premeditate" and "deliberate" in their testimony, they can still render an opinion in lay terms tending to show that the defendant did not have the capacity to premeditate or deliberate. *Shank* specifically approved questions about the defendant's ability to "make or carry out plans" and "to plan his activities."[42] *Shank* also found it permissible for an expert to testify whether the defendant was "under the influence of mental or emotional disturbance" at the time of the offense, terminology drawn from the sentencing field.[43]

Unlike its treatment of testimony about premeditation and deliberation, the supreme court's position on "specific intent" is that an expert may explicitly state whether the defendant had the capacity to form the specific intent to kill.[44] The term "specific intent" is apparently not considered a legal conclusion beyond the qualifications of a medical expert. In light of the court's preference for lay terminology, it should also be permissible for an expert to use other terms, more understandable to a jury, in describing whether the defendant could form the specific intent to kill.

An opinion offered by an expert is subject to the additional qualification that the expert must be reasonably certain of the opinion. Under Rule 702 of the Rules of Evidence, an expert may testify in the form of an opinion if the testimony would help the jury understand the evidence or determine a fact in issue. In the court's view, an equivocal or speculative opinion about the defendant's capacity does not assist the jury and may be excluded under Rule 702.[45]

These restrictions on opinion testimony apply equally to the prosecution and the defense. Either side may ask an expert about the defendant's capacity to form the specific intent to kill and to make and carry out plans.[46] Similarly, neither may elicit expert testimony that uses the words "premeditate" or "deliberate."[47]

Laypersons may also give opinions about the defendant's state of mind. Although the North Carolina courts have not specifically decided the issue in diminished capacity cases, they have allowed lay opinion in cases involving voluntary intoxication and insanity.[48]

2. Basis of Opinion

In insanity cases, the supreme court has developed rules liberally allowing experts to give the bases of their opinions about the defendant's mental state. In *State v. Wade*, the court held that if an expert's opinion is admissible, the expert may testify to the "information he relied on in forming it for the purpose of showing the basis of the opinion."[49] The court said that if the expert were not allowed to explain his opinion, the testimony " 'would impart a meaningless conclusion to the jury.' "[50]

The *Wade* court further ruled that conversations between a medical expert and the defendant, whether held for treatment or diagnostic purposes, are part of the basis of the expert's opinion and are also admissible. The court reasoned that "[c]onversation, and its interpretation and analysis by a trained professional, is undoubtedly superior to any other method the courts have for gaining access to an allegedly insane defendant's mind."[51] The court also recognized that since such testimony is not offered as substantive evidence, but only to explain the basis of the expert's opinion, it does not violate hearsay proscriptions.

Although *Wade* was decided before adoption of the North Carolina Evidence Code, the court reaffirmed its position after the Code's enactment. In *State v. Allison*,[52] another insanity case, the court interpreted Section 8-58.14 of the North Carolina General Statutes, which was later renumbered without material change as Rule 705 of the current Rules of Evidence. In the court's view, "the statute assumes that, at the very least, the expert is *allowed* to disclose the basis [of his opinion] on direct examination" (emphasis in original).[53] The court held that excluding the expert's testimony about his conversations with the defendant constituted prejudicial error and warranted a new trial.

Only one case to date, *State v. Baldwin*,[54] has addressed whether the basis of an expert's opinion is likewise admissible in a diminished capacity case. In *Baldwin*, the trial court allowed the defense's expert to give his opinion that the defendant was incapable of functioning independently in planning or carrying out a plan of murder. The expert was not permitted, however, to recite any "self-serving, exculpatory statements" made by the defendant to the expert unless the defendant first testified about the "matters related to those statements."[55]

The supreme court upheld the exclusion of the evidence, but not on the ground that the defendant first had to testify before the expert could recount his conversations with the defendant. The supreme court began with Evidence Rule 705, finding that the rule does not always require the trial court to admit the basis of an expert's opinion. According to the court, "[o]nly if an adverse party requests disclosure must the trial court require the expert to disclose" the facts underlying his or her opinion.[56] On the other hand, if the proponent of the testimony seeks to have the expert disclose the basis of his or her opinion, the trial court retains discretion to exclude the testimony under Evidence Rule 403. That rule states that the trial court may exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The supreme court concluded that the trial court did not abuse its discretion on the facts presented.

Although the result in *Baldwin* appears to depart from previous decisions in the insanity area, the court's reasoning

suggests that the basis of expert opinion will continue to be generally admissible in diminished capacity and insanity cases alike. First, the court found that the defendant's statements to the expert in *Baldwin* were of limited probative value on the issue of diminished capacity. In the court's view, the statements related to several other defenses, including self-defense and duress.[57] This concern is reminiscent of a limitation the supreme court placed on expert testimony in older insanity cases. In its 1920 decision in *State v. Alexander*, the court held that an expert's testimony about the defendant's statements to the expert were inadmissible to the extent that the statements did not "throw any light upon the present condition or the past condition of the [defendant's] mind."[58] *Baldwin* can be read as reviving this concept and incorporating it into the balancing process under Evidence Rule 403. Thus, an expert's testimony about the defendant's statements to the expert should be admissible if (a) the defendant's statements serve to explain the basis of the expert's opinion, pursuant to *Wade* and *Allison* and (b) the statements shed some light on the defendant's claimed lack of capacity and do not merely relate to other defenses.

Second, the *Baldwin* court was concerned about the possibility of prejudice. At the time the expert sought to testify about his conversations with the defendant, no substantive evidence had been presented about self-defense, duress, or any of the other defenses raised in the conversations. If the jury had heard the expert's testimony and considered it as substantive proof of the defendant's other defenses—when no substantive evidence had actually been presented—the state's case could have been prejudiced.[59] The court's analysis suggests that even if an expert's testimony concerns defenses other than the defendant's lack of capacity, the testimony may still be admissible if it serves only to corroborate other, substantive evidence already in the record.

E. Burden of Production

1. Standard

In *State v. Clark*,[60] the supreme court identified two different burdens of production on the defendant in diminished capacity cases. The defendant must meet one standard to warrant submission of a specific instruction to the jury on diminished capacity; and must satisfy a related, but separate, standard to warrant the submission of an instruction to the jury on a lesser included offense—which, in the case of *Clark*, was second-degree murder.

The court set the burden of production for a diminished capacity instruction somewhere between the standards applied in self-defense and voluntary intoxication cases. The court recognized that the defendant is entitled to a specific instruction on self-defense when there is "any evidence" showing that it was necessary or that it reasonably appeared to be necessary for the defendant to kill to protect himself or herself against death or great bodily harm. In voluntary intoxication cases, the defendant must meet a higher evidentiary threshold; the evidence must show that the defendant's mind and reason were so completely intoxicated and overthrown that he or she was "utterly incapable" of forming the state of mind required for first-degree murder.[61]

The court found that neither the "any evidence" nor the "utterly incapable" standards struck the right balance in diminished capacity cases, and fashioned the following, intermediate burden of production:

> [W]hen a defendant requests the trial court to instruct the jury that it may consider the mental condition of the defendant in deciding whether she formed a premeditated and deliberate specific intent to kill the victim, there must be sufficient evidence "reasonably to warrant inference of the fact at issue." [citation omitted]. The proper test is whether the evidence of defendant's mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the specific intent to kill the victim at the time of the killing.[62]

While setting a new burden of production for instructions on diminished capacity, the *Clark* court adhered to preexisting standards for the submission of lesser included offenses to the jury. The court said that an instruction on a lesser included offense is mandated whenever there is " 'any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.' "[63]

In certain cases, these different burdens of production will have no practical effect. If the defendant in a first-degree murder case produces sufficient evidence to warrant a diminished capacity instruction, he or she would automatically be entitled to an instruction on the lesser included offense of second-degree murder.[64] It also follows that if the defendant fails to meet the burden of production for diminished capacity, and there is no other evidence to support a verdict of second-degree murder, he or she would not be entitled to an instruction on a lesser included offense.[65] There could be instances, however, when the defendant produces evidence apart from diminished capacity tending to show the commission of a crime of lesser degree. Such other evidence would warrant an instruction on a lesser included offense whether or not the defendant met the burden of production for diminished capacity.

2. Sufficiency of Evidence

The *Clark* case also provides examples of evidence that did and evidence that did not warrant a specific jury instruc-

tion on diminished capacity. The court found that the defendant in *Clark* had failed to meet her burden of production. It reached this result by comparing the evidence in the case before it with the evidence presented in *Rose I*. Although the *Rose I* court did not explicitly consider the defendant's burden of production, it did find that the defendant was entitled to an instruction on diminished capacity.

The *Clark* court focused first on the strength of the expert testimony in each case. In *Rose I*, an expert had testified that the defendant was experiencing a psychotic episode at the time of the offense and could not have formed the specific intent to kill. In contrast, the testimony was unfocused and speculative in *Clark*. One expert testified to the defendant's mental condition without giving an opinion on whether the condition affected the defendant's ability to form the specific intent to kill; and although a second expert testified about the defendant's capacity to form the specific intent to kill, his opinion was so equivocal and laced with disclaimer that the trial court excluded it as speculation.[66]

The *Clark* court next compared the nature of the defendants' disorders in the two cases. In *Rose I*, a physical injury contributed to the change in the defendant's personality that rendered him incapable of forming the specific intent to kill. In *Clark*, the defendant had a personality disorder consistent with "battered woman syndrome"; but, the court found that the disorder had affected the defendant since childhood, that she had been able to cope with it in the past, and that her behavior at the time of the offense was inconsistent with her claimed incapacity based on the disorder.[67]

The *Clark* court did not announce strict rules, however, regarding the disorders that may qualify as diminished capacity. Although *Clark* found some significance in the physical origin of the defendant's condition in *Rose I*, it did not make physical injury a prerequisite for submission of a diminished capacity instruction to the jury. Nor did the *Clark* court rule out battered woman syndrome as a basis for obtaining a diminished capacity instruction in an appropriate case.

F. Burden of Persuasion

Although the defendant has the burden of producing enough evidence to warrant placing the issue of diminished capacity before the jury, the prosecution bears the ultimate burden of persuading the jury of all elements of the offense, including the defendant's state of mind. This is necessarily so because the diminished capacity defense merely negates an element of the offense. A defendant is under no obligation to prove that he or she did not possess the state of mind necessary for conviction; rather, the prosecution must establish beyond a reasonable doubt that the defendant acted with that state of mind, notwithstanding any claim of diminished capacity. In the case of first-degree murder, the prosecution must prove beyond a reasonable doubt that the defendant had the specific intent to kill, formed after premeditation and deliberation.[68]

G. Instructions

1. Diminished Capacity Instructions for First-Degree Murder

a. Instructions Reviewed by the Courts

The North Carolina Supreme Court has examined only a few instructions on diminished capacity for first-degree murder. The cases have concerned the extent to which diminished capacity instructions must address each of the mental elements of first-degree murder. With each new situation the court has refined its analysis.

In *Rose I*, the defendant requested two diminished capacity instructions—one on specific intent to kill and the other on premeditation and deliberation—but the court found that only the first was supported by the evidence. The court held that since the defendant had introduced expert testimony that he was unable to form the specific intent to kill, he was entitled to an instruction directing the jury to consider his "mental condition in connection with his ability to form the specific intent to kill."[69] In contrast, the court found that the instruction requested by the defendant on premeditation and deliberation was unsupported by any evidence. The instruction would have directed the jury to consider the "opinions rendered by expert witnesses" regarding the elements of premeditation and deliberation.[70] The trial court had properly excluded such testimony, however, as an impermissible legal conclusion.

In the next case, *State v. Hedgepeth*,[71] the evidence apparently supported a diminished capacity instruction on specific intent to kill, premeditation, and deliberation, but the defendant did not request any particular instructions. In the absence of any request, the trial court instructed the jury to consider the mental and emotional condition of the defendant concerning whether he acted with premeditation and deliberation. The trial court failed, however, to direct the jury to consider the defendant's mental and emotional state concerning whether he formed the specific intent to kill. The supreme court held that since the defendant had not requested a particular instruction or objected to the instructions given, the trial court's instructions were subject to the "plain error" standard of review—that is, whether the alleged error was fundamental to the fairness of the trial or had a probable impact on the jury's verdict. The supreme court concluded that, on the facts presented, the omission of

specific intent to kill from the diminished capacity instruction did not amount to plain error.[72]

In *State v. Holder*,[73] the supreme court faced the issue left open in *Rose I* and *Hedgepeth*. In *Holder*, the defendant requested diminished capacity instructions on both specific intent to kill and premeditation and deliberation, and the evidence supported both of the requested instructions. The trial court gave a single instruction only, drawn largely from the pattern jury instruction on diminished capacity. The instruction strung together the mental elements for first-degree murder, directing the jury to consider whether the defendant had "the specific intent to kill the deceased formed after premeditation and deliberation."[74]

The supreme court held that the trial court's instruction was sufficient. The instruction referred to all of the mental elements of first-degree murder, and separate instructions—one on specific intent to kill and the other on premeditation and deliberation—were not required. The court's ruling rested on the premise that specific intent, although necessary for conviction of first-degree murder, is a not an independent element; rather, it is a component of the elements of premeditation and deliberation. The court did not address whether separate instructions on premeditation and deliberation, which are independent elements, would be appropriate if requested.

b. Pattern Instructions

Except to the extent reviewed in *Holder*, discussed in the preceding section, the pattern instruction on diminished capacity has not been reviewed by the North Carolina appellate courts. The pattern instructions were revised in 1989 to add diminished capacity to the voluntary intoxication instruction for first-degree murder. The revised pattern instruction directs the jury to consider whether the defendant was intoxicated, drugged, *or* lacked mental capacity:

> If you find that the defendant was [intoxicated] [drugged], [lacked mental capacity], you should consider whether this condition affected his ability to formulate the specific intent which is required for conviction of first degree murder. In order for you to find the defendant guilty of first degree murder, you must find, beyond a reasonable doubt, that he killed the deceased with malice and in the execution of an actual, specific intent to kill, formed after premeditation and deliberation. If as a result of [intoxication] [a drugged condition], [lack of mental capacity] the defendant did not have the specific intent to kill the deceased, formed after premeditation and deliberation, he is not guilty of first degree murder.
>
> Therefore, I charge that if, upon considering the evidence with respect to the defendant's [intoxication] [drugged condition] [lack of mental capacity], you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first degree murder, you will not return a verdict of first degree murder.[75]

The pattern instruction is, as its name suggests, a generic instruction designed for use in a range of settings. Instructions geared specifically to the case at hand may be appropriate when warranted by the evidence and requested by a party.[76] For example, the pattern instruction refers generally to lack of mental capacity. Defendants may, however, present evidence of emotional and physical conditions, as well as mental disorders, to show they lacked the state of mind required for the offense.[77] When warranted by the evidence and requested by a party, it may be appropriate for the court to instruct the jury to consider the defendant's mental, emotional and physical condition, as well as other pertinent circumstances, in connection with whether he or she acted with the requisite state of mind.[78]

2. Other Instructions

As discussed previously, the North Carolina appellate courts have not addressed diminished capacity except in first-degree murder cases. Nor has the committee responsible for drafting pattern instructions issued a diminished capacity instruction for any offense other than first-degree murder. The appropriateness of diminished capacity instructions for other offenses must, therefore, be resolved on a case-by-case basis.

The supreme court has considered, however, the impact of diminished capacity evidence on instructions for other defenses. In *State v. Hudson*,[79] the court reviewed, but did not rule definitively on, the jury instructions given in a case involving claims of both diminished capacity and insanity. There, the trial court instructed the jury to consider evidence of the defendant's sanity only if it first found that the state had proven beyond a reasonable doubt the elements of the offense. The supreme court rejected the defendant's initial contention that in insanity cases the jury should proceed in the reverse order—that is, the jury should determine the defendant's sanity before considering whether the state had proven the elements of the offense. Adhering to its previous decisions, the court held that the option requested by the defendant was the "better procedure" in insanity cases but was not required.[80]

The defendant argued further that the insanity instruction given by the trial court precluded the jury from considering evidence of his diminished capacity on the issues of premeditation, deliberation, specific intent to kill, and malice. The defendant also claimed that the trial court's instructions relieved the state of its burden of proof because the instructions effectively required the defendant to prove lack of capacity, along with insanity, to the satisfaction of the jury. The supreme court left these issues open by rejecting

the defendant's argument on procedural grounds. The court found that the defendant had not requested a diminished capacity instruction at trial and so had waived any argument that the trial court's instructions prevented the jury from properly considering his claim of diminished capacity.[81]

Notes

1. Greil Marcus, *San Francisco's Days of Rage*, ROLLING STONE, July 12, 1979, at 50; Melinda Beck & Michael Reese, *Night of Gay Rage*, NEWSWEEK, June 4, 1979, at 30–31.

2. *See* 1 PAUL ROBINSON, CRIMINAL LAW DEFENSES 475–78 & accompanying footnotes (1984).

3. *Id.* at 474–78 & accompanying footnotes.

4. *Id.* at 474–75 & accompanying footnotes.

5. *See* cases cited in State v. Shank, 322 N.C. 243, 249–51 & n.1, 367 S.E.2d 639, 643–44 & n.1 (1988).

6. State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992); State v. Baldwin, 330 N.C. 446, 412 S.E.2d 31 (1992); State v. Hedgepeth, 330 N.C. 38, 409 S.E.2d 309 (1991); State v. Rose (hereinafter *Rose II*), 327 N.C. 599, 398 S.E.2d 314 (1990); State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989); State v. Rose (hereinafter *Rose I*), 323 N.C. 455, 373 S.E.2d 426 (1988); State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988); State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

7. 322 N.C. 243, 367 S.E.2d 639 (1988).

8. *See* N.C. GEN. STAT. § 14–17.

9. *Shank*, 322 N.C. at 248, 367 S.E.2d at 643.

10. *Id.* at 249, 367 S.E.2d at 643.

11. 323 N.C. 455, 456–57, 373 S.E.2d 426, 427–28 (1988).

12. 322 N.C. 152, 165, 367 S.E.2d 895, 903 (1988).

13. State v. Silvers, 323 N.C. 646, 655, 374 S.E.2d 858, 864 (1989).

14. *Shank*, 322 N.C. at 250, 367 S.E.2d at 644.

15. *Id.* at 245, 367 S.E.2d at 641.

16. *Silvers*, 323 N.C. at 658, 374 S.E.2d at 866.

17. *Baldwin*, 330 N.C. at 452, 457, 461, 412 S.E.2d at 35, 38, 40 (duress, voluntary intoxication, and diminished capacity defenses presented); *Hedgepeth*, 330 N.C. at 43–44, 409 S.E.2d at 313 (voluntary intoxication and diminished capacity); *Silvers*, 323 N.C. at 657–58, 374 S.E.2d at 865–66 (insanity and voluntary intoxication); *Rose I*, 323 N.C. at 456, 373 S.E.2d at 427 (insanity and diminished capacity).

18. *See, e.g.*, State v. Ruof, 296 N.C. 623, 636, 252 S.E.2d 720, 728 (1979).

19. 331 N.C. 462, 418 S.E.2d 197 (1992).

20. *Rose I*, 323 N.C. at 458–59, 373 S.E.2d at 429.

21. *See* State v. Mash, 323 N.C. 339, 372 S.E.2d 532 (1988).

22. State v. Boone, 307 N.C. 198, 209, 297 S.E.2d 585, 592 (1982) (rape and first-degree sexual offense); State v. McLaughlin, 286 N.C. 597, 606, 213 S.E.2d 238, 244 (1975) (arson), *vacated on other grounds*, 428 U.S. 903, 96 S. Ct. 3206, 49 L.Ed.2d 1208 (1976); State v. Bunn, 283 N.C. 444, 458–59, 196 S.E.2d 777, 786 (1973) (second-degree murder).

23. WAYNE LAFAVE, HANDBOOK ON CRIMINAL LAW 343–44 (1972).

24. *Id.* at 344; 1 PAUL ROBINSON, *supra* note 2, at 280–83, 297–301 (1984).

25. State v. Reynolds, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982).

26. State v. White, 288 N.C. 44, 50, 215 S.E.2d 557, 560–61 (1975).

27. LAFAVE, *supra* note 23, at 344; 1 ROBINSON, *supra* note 2, at 280–83, 297–301.

28. 330 N.C. 446, 412 S.E.2d 31 (1992).

29. *Id.* at 461–62, 412 S.E.2d at 40–41.

30. *Id.* at 461 n.2, 412 S.E.2d at 40 n.2.

31. 324 N.C. 146, 377 S.E.2d 54 (1989).

32. *Id.* at 161–63, 377 S.E.2d at 64.

33. *See* BENJAMIN SENDOR, NORTH CAROLINA CRIMES 22–23, 49, 106–07 (3d ed. 1985).

34. State v. Peacock, 313 N.C. 554, 560, 330 S.E.2d 190, 194 (1985) (burglary); State v. Boone, 307 N.C. 198, 210, 297 S.E.2d 585, 592 (1982) (attempted rape); State v. Gerald, 304 N.C. 511, 521, 284 S.E.2d 312, 318–19 (1981) (assault with a deadly weapon with intent to kill inflicting serious bodily injury).

35. State v. Brower, 289 N.C. 644, 658, 224 S.E.2d 551, 561 (1976).

36. *Clark*, 324 N.C. at 161–63, 377 S.E.2d at 63–64 (less evidence required to warrant jury instruction on diminished capacity than on voluntary intoxication).

37. 322 N.C. 243, 367 S.E.2d 639 (1988).

38. 322 N.C. 152, 367 S.E.2d 895 (1988).

39. *Id.* at 164, 367 S.E.2d at 903.

40. NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES § 206.11 at 5 (Feb. 1989).

41. *Weeks*, 322 N.C. at 166, 367 S.E.2d at 166; *see also Rose I*, 323 N.C. at 459–60, 373 S.E.2d at 429–30 (medical expert may not give opinion on whether legal standards of premeditation and deliberation have been met).

42. 322 N.C. at 248, 367 S.E.2d at 643.

43. N.C. GEN. STAT. § 15A-2000(f)(2).

44. *Rose I*, 323 N.C. at 458, 373 S.E.2d at 428.

45. *Clark*, 324 N.C. at 160, 377 S.E.2d at 62–63.

46. *Hedgepeth*, 330 N.C. at 46–47, 409 S.E.2d at 314 (prosecution allowed to ask own expert whether defendant had capacity to form specific intent to kill).

47. *Compare Rose I*, 323 N.C. at 459–60, 373 S.E.2d at 429–30 (testimony of defendant's expert barred) *with Rose II*, 327 N.C. at 604–05, 398 S.E.2d at 316–17 (testimony of prosecution's expert barred and new trial ordered).

48. State v. Strickland, 321 N.C. 31, 35–39, 361 S.E.2d 882, 884–86 (1987).

49. 296 N.C. 454, 462, 251 S.E.2d 407, 412 (1979).

50. *Id.* at 463, 251 S.E.2d at 412, *quoting* State v. Griffin, 99 Ariz. 43, 49, 406 P.2d 397, 401 (1965).

51. *Wade*, 296 N.C. at 463, 251 S.E.2d at 412.

52. 307 N.C. 411, 298 S.E.2d 365 (1983).

53. *Id.* at 416, 298 S.E.2d at 368.

54. 330 N.C. 446, 412 S.E.2d 31 (1992).

55. *Id.* at 455–56, 412 S.E.2d at 37.

56. *Id.* at 456, 412 S.E.2d at 37.

57. *Id.* at 457, 412 S.E.2d at 38.

58. 179 N.C. 759, 765, 103 S.E. 383, 386 (1920).

59. *Baldwin*, 330 N.C. at 457, 412 S.E.2d at 38.

60. 324 N.C. 146, 377 S.E.2d 54 (1989).

61. *Id.* at 161–62, 377 S.E.2d at 63–64.

62. *Id.* at 163, 377 S.E.2d at 64.

63. *Id.* at 162, 377 S.E.2d at 64, *quoting* State v. Peacock, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985).

64. This result necessarily flows from the operation of the diminished capacity defense. If the jury is instructed on diminished capacity and has a reasonable doubt about the defendant's capacity to form the state of mind for first-degree murder, the defendant can be convicted of no more than second-degree murder.

65. *See Clark*, 324 N.C. at 164–65, 377 S.E.2d at 65–66 (since the defendant was relying primarily on diminished capacity and there was no other evidence sufficient to cause a rational trier of fact to doubt the state's proof of premeditation, deliberation, and specific intent, the defendant was not entitled to an instruction on second-degree murder).

66. *Id.* at 157–60, 163–64, 377 S.E.2d at 61–65.

67. *Id.*

68. *See* State v. Mash, 323 N.C. 339, 345–46, 372 S.E.2d 532, 536–37 (1988) (burden of persuasion on prosecution in voluntary intoxication cases; instruction to jury impermissibly shifted burden of persuasion to defendant by suggesting that defendant bore burden of proving he was so intoxicated as to be unable to form deliberate and premeditated intent to kill).

69. 323 N.C. at 457, 373 S.E.2d at 428.

70. *Id.* at 459, 373 S.E.2d at 429.

71. 330 N.C. 38, 409 S.E.2d 309 (1991).

72. *Id.* at 51–52, 409 S.E.2d at 317.

73. 331 N.C. 462, 418 S.E.2d 197 (1992).

74. *Id.*

75. NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES § 305.11 (Mar. 1989).

76. *See Rose I*, 323 N.C. at 458, 373 S.E.2d at 428 (when instruction is requested by party and is supported by evidence, "it is error for the trial court not to instruct in substantial conformity with the requested instruction").

77. *Id.* at 456–57, 373 S.E.2d at 427–28 (previous head injury was contributing cause of psychotic episode); *Weeks*, 322 N.C. at 165, 367 S.E.2d at 903 (chronic emotional disturbance).

78. *Compare* State v. Johnson, 298 N.C. 47, 68–70, 257 S.E.2d 597, 613–14 (1979) (in capital case, supreme court held that trial court should have explained the mitigating factor of impaired capacity in more detail in sentencing instructions; in supreme court's view, mental disorders are not as well understood by the average juror as intoxication and, in appropriate case, greater explanation is required).

79. 331 N.C. 122, 415 S.E.2d 732 (1992).

80. *Id.* at 146, 415 S.E.2d at 745.

81. *Id.*

The Institute of Government of The University of North Carolina at Chapel Hill has printed a total of 885 copies of this public document at a cost of $369.49, or $0.42 per copy. These figures include only the direct costs of reproduction. They do not include preparation, handling, or distribution costs.

∞ This publication is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.