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The Voluntary Intoxication Defense

John Rubin

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A. Historical Background

First the man takes a drink,
Then the drink takes a drink,
Then the drink takes the man![1]

Substance abuse has existed since at least the beginning of recorded history, and crime has often followed substance abuse. Yet, until relatively recent times, a criminal defendant who acted while under the influence of intoxicating substances could not rely on intoxication as a defense if, in the eyes of the law, the person had voluntarily induced his or her condition. Until the early to middle part of the nineteenth century, both the English and American criminal law rejected "voluntary intoxication" as a defense to crime. Indeed, some ecclesiastic and common-law authorities condemned drunkenness as an evil in itself and treated it as a factor aggravating the crime with which the defendant was charged.[2]

North Carolina's early jurisprudence reflected then-prevailing sentiments about intoxication. Several nineteenth-century decisions in North Carolina recoiled at the notion that drunkenness could reduce a defendant's criminal liability.[3] The courts took the position that intoxication was relevant only if it rendered the defendant insane at the time of the offense. Absent such a showing, an intoxicated person was considered as culpable for his or her actions as someone who acted while stone sober.[4]

Around the turn of the twentieth century, North Carolina began to follow the lead of other jurisdictions and recognize the relevance of intoxication beyond issues of sanity.

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After veiled suggestions that it was rethinking its position,[5] the North Carolina Supreme Court explicitly recognized the voluntary intoxication defense in the 1911 case of *State v. Murphy*.[6] There, the court accepted that evidence of intoxication was relevant to whether a person acted with the state of mind required for conviction. The defendant in *Murphy* was charged with first-degree murder, an offense requiring proof of premeditation and deliberation. The court held that if intoxication rendered the defendant unable to premeditate and deliberate at the time of the offense—that is, if it "negated" the existence of that state of mind—he could not be convicted of first-degree murder.[7]

Yet, even as the court recognized that voluntary intoxication could serve as a "negating" defense, the court sought to curtail the potential reach of the doctrine. In *Murphy* and other early opinions, the court warned that the defense should be viewed with "great caution"[8] and should be allowed only in "very clear cases."[9] The court translated its general wariness into a number of limiting devices. As discussed in the following sections, the court disallowed use of the voluntary intoxication defense against certain offenses; imposed a heavy burden of proof on the defendant in cases in which the defense could be raised; and allowed trial courts to instruct the jury that claims of intoxication were "dangerous." Some of these early, restrictive rulings remain in force today. Others, however, have slowly fallen away.

This article is intended to serve as a reference source on the developing law of voluntary intoxication in North Carolina. It examines the current state of the law and suggests areas that may continue to be sources of dispute. The article discusses the following topics: (1) the elements of the voluntary intoxication defense; (2) the applicability of the defense to different offenses; (3) evidentiary issues; (4) the burdens on the defense and prosecution; and (5) jury instructions. The article does not discuss sentencing, which is governed by different standards than the guilt-innocence phase, but the reader should be aware that intoxication can serve as a mitigating factor under the Fair Sentencing Act[10] and in capital sentencing.[11]

B. Elements of the Defense

As the North Carolina courts have often stated, voluntarily induced intoxication does not excuse criminal behavior.[12] Rather, as discussed in the preceding section, voluntary intoxication is a negating defense. It prevents the prosecution from proving the elements of the crime, and thus the crime itself, by raising a reasonable doubt about whether the defendant acted with the state of mind required for conviction.

Later sections will discuss the applicability of the voluntary intoxication defense to different offenses and their mental elements.[13] It is useful to begin, however, by considering the elements of the defense itself. This section focuses first on judicial efforts to define the sort of intoxication necessary to negate the mental elements of an offense. It then considers the kinds of conduct the courts have found to be voluntary for purposes of the defense.

1. Intoxication

The courts have had little difficulty identifying the potential causes of intoxication for purposes of the voluntary intoxication defense. From its earliest decisions recognizing the defense, the North Carolina Supreme Court has accepted that intoxication can result from the use of any drug, not just the use of alcohol.[14] Further, the impairing substance can be a legal or an illegal one.[15]

It is not so simple, however, to define the degree of intoxication necessary in each case. Because voluntary intoxication is a negating defense, the degree of intoxication required in a given case will depend on the mental elements of the offense the prosecution is trying to prove. For example, first-degree murder requires proof beyond a reasonable doubt that the defendant acted with the mental state of premeditation and deliberation. In that context, *intoxication* means no more than that the defendant, by reason of his or her ingestion of alcohol or other drugs, was unable to premeditate or deliberate—or at least, that the evidence raises a reasonable doubt about whether the defendant could premeditate or deliberate.[16]

This definition of *intoxication* is legally precise, but provides little guidance about the actual degree of intoxication needed to negate criminal intent. The best, and perhaps only, way to assess the degree of intoxication required by the courts is to look at cases involving questions about the sufficiency of the evidence. Such issues generally arise when a court decides (1) whether the evidence warrants submitting the defendant's claim of voluntary intoxication to the jury and (2) whether the evidence warrants dismissing the case altogether because the prosecution cannot prove a required mental element of the offense. The standards for the two inquiries differ, but in both settings the court has had to weigh the quantity and quality of evidence offered by the parties. The cases therefore illustrate, at least in broad strokes, the types of evidence manifesting intoxication within the meaning of the voluntary intoxication defense. The standards the courts have used for sufficiency of evidence questions, and the kinds of evidence the courts have found persuasive, are discussed further below in the section entitled Burdens.

The courts have sometimes strayed from the negating principles underlying the voluntary intoxication defense, apparently in an effort to create a more exacting definition of *intoxication*. For example, in *State v. Cureton*, the supreme court assessed the "influence of intoxication upon the question of existence of premeditation."[17] The court said that the

relevant inquiry was whether the defendant's intoxication undermined his ability "to think out beforehand what he intended to do and to weigh it and understand the nature and consequence of his act." Similarly, the court said that there had to be some evidence tending to show that the defendant "had temporarily, at least, lost the capacity to think and plan."[18] One construction of *Cureton* is that the court merely sought to define the concept of *premeditation*—that is, as an ability to think ahead, plan, and weigh the consequences of different courses of action—and then determine whether the defendant's intoxication was sufficient to negate premeditation, as so defined. Some decisions, however, treated *Cureton* as having set up an all-purpose definition of *intoxication*, to be used whether the defendant sought to negate premeditation or some other mental element.[19]

The supreme court has since found the latter approach to be incompatible with the voluntary intoxication defense, at least when incorporated into instructions to the jury. In two recent decisions, the court disapproved instructions requiring the defendant to show that he was unable to think and plan and to weigh and understand his actions.[20] As discussed further below in the section entitled Burdens, the supreme court held that the trial judge's instructions placed a substantially heavier burden on the defendant than the law required him to bear. The court recognized that the prosecution had the burden of proving beyond a reasonable doubt all of the elements of the charged offense, including the mental elements of the offense. Accordingly, to find for the defendant the jury only had to have a reasonable doubt—in light of the evidence of intoxication as well as other evidence in the case—that the defendant formed the state of mind required for conviction. The defendant had no obligation to convince the jury that his intoxication rendered him unable to perform the mental processes set forth in the trial judge's instructions or resulted in any other incapacity.

The supreme court also has tried to define *intoxication* more precisely by describing what it is not. For example, the court has said that "mere intoxication" does not serve as an excuse;[21] that an inference of the absence of a criminal intent does not arise as a matter of law from intoxication;[22] and that a person with a blood alcohol content high enough to support a charge of driving while impaired is not necessarily intoxicated to a sufficient degree for purposes of the voluntary intoxication defense.[23] These maxims, however, merely reflect that the defense is concerned not so much with the fact of intoxication as with its effect. One person may be grossly intoxicated but still be capable of forming the mental state required for conviction. Another person may be less intoxicated but his or her intoxication, standing alone or in combination with other circumstances, may negate the requisite mental state. There is no immutable threshold of intoxication, above which the defendant always must be acquitted and below which the defense must fail.

The supreme court also has said that defendants cannot rely on their intoxicated condition if they formed their criminal intent while sober and executed that intent after fortifying their courage with intoxicating substances.[24] This proposition, as with those discussed in the preceding paragraph, may only reflect the logic of the voluntary intoxication defense. Thus, the court may have meant only that a defendant who forms a criminal intent while sober, and who continues to entertain that intent after becoming intoxicated, may be found guilty of the charged offense. The principle is open to question, however, if it means that intoxication can never dissipate a preexisting state of mind. Although older cases from other jurisdictions appear to support this latter assumption,[25] one state has held more recently that such an approach would improperly relieve the prosecution of its burden of proving that the defendant possessed the requisite mental state at the time he or she allegedly committed the offense.[26]

2. Voluntariness

The issue of voluntariness is central to an understanding of the potential defenses that may be based on intoxication. For example, if a person's intoxication is considered involuntary, the person may be able to rely on the defense of involuntary intoxication, which is more favorable to defendants in some respects and less favorable in others than the defense of voluntary intoxication.[27] Whether intoxication is deemed voluntary or involuntary may also affect the availability of other defenses involving mental disorders. As a general rule, voluntary intoxication and other defenses predicated on mental disorders stand on separate legal footings and, therefore, may be presented in the same case.[28] If voluntary intoxication is deemed to be the cause of the mental disorder, however, certain defenses may be unavailable to the defendant. For example, a defendant may rely on the defense of unconsciousness, also called automatism, if the condition resulted from involuntary intoxication, but not if it resulted from voluntary intoxication.[29]

The court's treatment of other defenses and their interrelationship with the defense of voluntary intoxication are beyond the scope of this article. Nevertheless, cases involving claims of involuntary intoxication give some flavor of the voluntariness element of voluntary intoxication.

In *State v. Bunn*,[30] the court established the basic test for involuntary intoxication. The court held that intoxication is to be regarded as involuntary only when the introduction of alcohol or other drugs into a person's system is "without his knowledge or by force majeure."[31] The court also considered, albeit briefly, the impact of alcoholism under this definition. Quoting from a California court of appeal

decision, the *Bunn* court said that "'[w]hen . . . a person takes his first drink by choice and afterwards drinks successively and finally gets drunk, that is voluntary intoxication, even though he may be an alcoholic.'"[32] The *Bunn* court did not elaborate further on the subject, but was apparently of the opinion that an alcoholic's "first drink" is a voluntary act, rendering inapplicable the defense of involuntary intoxication. Some commentators and courts take a different view, claiming that the "compulsion of addiction" may be sufficient to warrant treating the defendant's intoxication as involuntary.[33] Indeed, another division of the court of appeal in California later ruled that addiction may render a person's intoxication involuntary.[34]

The North Carolina courts also have considered the effect of pathological intoxication. The Model Penal Code, which recognizes pathological intoxication as a basis for the involuntary intoxication defense, defines the condition as "intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible."[35] In *State v. Baldwin*, the defendant claimed that he was suffering from pathological intoxication and sought a continuance of the trial to develop evidence of his condition.[36] The supreme court upheld the trial court's denial of the requested continuance, but without directly addressing whether pathological intoxication could support a claim of involuntary intoxication. Accepting for purposes of argument that the defendant suffered from pathological intoxication, the supreme court found that the defendant had voluntarily ingested enough intoxicants to induce the condition. He had done so, according to the court, as part of a premeditated and deliberate design to kill the victim. Under these circumstances, the defendant's conduct was voluntary. The court noted further that the defendant could not rely on voluntary intoxication as a defense because of the maxim, discussed previously, that the defense is unavailable to a person who forms his or her criminal intent while sober and then executes that intent after becoming intoxicated.[37] The question remains open whether pathological intoxication could support a claim of involuntary intoxication in a case in which the defendant satisfied the Model Penal Code definition or a similar test.

C. Applicability to Different Offenses

In most cases, voluntary intoxication acts only as a partially exculpatory defense, reducing the charged offense to an offense of a lesser degree. This result flows from judicial decisions limiting the defense of voluntary intoxication to crimes requiring proof of "specific intent." As shown below, the North Carolina courts have repeatedly held that a defendant may use the defense of voluntary intoxication only to negate mental elements that constitute a specific intent; the defense is unavailable against offenses that do not require proof of such an intent. Since most specific-intent offenses have lesser-included offenses that do not require proof of specific intent, a person can be convicted of a lesser offense even if his or her intoxication negates the specific intent required for the greater offense. For example, the North Carolina courts have held that assault with a deadly weapon with intent to kill requires proof of a specific intent—namely, the intent to kill—and that voluntary intoxication can negate that intent and serve as a defense to the crime.[38] Even if the defendant prevails on the issue of voluntary intoxication, however, he or she still can be convicted of assault with a deadly weapon, a lesser offense not requiring specific intent.[39]

The following section offers some general observations about identifying specific-intent offenses, although few definitive conclusions are possible in this area of the law. The sections thereafter review the particular offenses so far considered by the North Carolina courts.

1. The Distinction between Specific and General Intent

North Carolina's approach to the voluntary intoxication defense derives from a distinction developed at common law between specific-intent and general-intent crimes.[40] The North Carolina courts have not articulated a generally applicable principle, however, for distinguishing between specific and general intent. Instead, the courts have decided on a case-by-case basis whether a particular offense falls into one category or another.

One possible way to understand the two types of offenses, offered by LaFave, is to define *general intent* as "an intent to do the physical act—or, perhaps, recklessly doing 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."[41] This definition appears adequate to describe the mental components of simpler offenses. For example, under North Carolina law, a person who hits someone with an automobile can be convicted of assault with a deadly weapon if the injury resulted from the person's culpable negligence, a mental state greater than ordinary civil negligence but less than an intention to injure another.[42] The North Carolina Court of Appeals has held that specific intent is not a component of this mental state.[43] The court's ruling appears to be in accord with LaFave's approach because the offense only requires culpable negligence in the performance of a physical act, namely, driving an automobile. The driver need not have the intent to injure anyone or even to use the automobile as a weapon. LaFave's approach also appears adequate to explain North Carolina decisions recognizing assault with a deadly weapon with intent to kill as a specific-intent offense.[44] Thus, in the automobile example, a person could be convicted of assault with

a deadly weapon with intent to kill only if he or she had the additional purpose of using the car to kill someone.

LaFave and other commentators have recognized, however, that many offenses do not lend themselves so easily to classification in terms of specific and general intent. Many definitions of offenses do not explicitly mention specific intent but nevertheless appear to require mental ingredients beyond the intentional or negligent performance of a physical act. For example, offenses may require that the defendant act willfully, maliciously, knowingly, or with various forms of intent—states of mind that do not fit neatly within either the specific-intent or general-intent category.[45] As discussed further below, in dealing with the concepts of *willfulness* and *malice*, the North Carolina courts have indicated that they entail a specific intent in connection with certain offenses but not others.[46] Similarly, the cases vary in their treatment of different formulations of *intent*.[47] The North Carolina cases do not appear to discuss the element of *knowledge*—writing a worthless check, for example, with knowledge that there are insufficient funds for payment of the check. Nevertheless, in some circumstances knowledge appears to be a species of specific intent.[48]

Apart from problems of classification, commentators also have expressed concerns about the underlying justification for distinguishing between specific and general intent—namely, that voluntary intoxication can never negate a general intent. Such critics reason that if intoxication, in fact, "blots out" a required mental element (whether denominated a specific or general intent), then by the logic of the defense the crime has not been committed.[49] They also question the empirical basis for the assumption that intoxication is incapable of negating any of the mental elements classified by the courts as general intent.[50]

These conceptual difficulties have led some to charge that the distinction between specific intent and general intent is merely a result-oriented device, created to ensure some criminal liability for persons who act while intoxicated.[51] As mentioned above, most offenses recognized in North Carolina as specific-intent offenses encompass lesser offenses that do not require such proof. Defendants are therefore subject to conviction of a lesser offense even if they prevail on the defense of voluntary intoxication.[52] The courts have wavered in following this rationale completely, however, barring voluntary intoxication as a defense even when the defendant could be convicted of a lesser-included offense. For example, second-degree murder, voluntary manslaughter, and involuntary manslaughter are all considered general-intent crimes and are all lesser-included offenses of first-degree murder. Yet, as discussed further below, voluntary intoxication is allowed as a defense only to certain kinds of first-degree murder; a defendant charged with other forms of first-degree murder cannot rely on voluntary intoxication as a defense.

In short, the distinction between specific and general intent is problematic. The North Carolina courts' rulings on particular offenses, which are reviewed below, can be consulted to determine when voluntary intoxication is available as a defense. But, because of the inherent ambiguities in this area, existing case law may be of limited utility in predicting how the courts will treat previously unreviewed offenses. Even offenses already considered by the courts may continue to be the subject of dispute.

2. First-Degree Murder

Premeditated and deliberate murder. Premeditated and deliberate murder is one form of first-degree murder considered to be a specific-intent crime. The mental elements of premeditation and deliberation are essential to this form of first-degree murder and can be negated by voluntary intoxication.[53] Further, since premeditation and deliberation have distinct meanings, a defendant can avoid conviction of first-degree murder by negating either element.[54]

The North Carolina Supreme Court has also held that a specific intent to kill is an "essential constituent" of both premeditation and deliberation and a "necessary element" of first-degree murder.[55] Accordingly, if by reason of intoxication the defendant was unable to form the specific intent to kill, the prosecution cannot establish premeditation and deliberation and cannot obtain a conviction for first-degree murder.

Felony murder. Felony murder is a second form of first-degree murder that, in some circumstances, requires proof of specific intent. G.S. 14-17 defines felony murder as the killing of another person during the commission of certain felonies. The supreme court has said that felony murder does not require proof of premeditation, deliberation, or the specific intent to kill.[56] Voluntary intoxication is a defense, however, if the underlying felony requires specific intent. In those circumstances, voluntary intoxication can negate the specific intent required for the predicate felony and thereby preclude conviction for felony murder.[57] Conversely, if the predicate felony does not require specific intent, voluntary intoxication is not a defense.[58]

Murder by poison, lying in wait, imprisonment, starving, or torture. The last form of first-degree murder is a killing by one of the methods specified in G.S. 14-17—namely, poison, lying in wait, imprisonment, starving, or torture. The supreme court has stated generally that none of these offenses requires proof of premeditation, deliberation, or the specific intent to kill.[59] The court has addressed voluntary intoxication, however, only in the context of murder by lying in wait.

In *State v. Leroux*, the supreme court held that since a specific intent to kill is not an element of murder by lying in wait, voluntary intoxication is unavailable as a defense.[60] In

State v. Baldwin, the defendant attempted to avoid this result by arguing that even if murder by lying in wait does not require a specific intent to kill, it at least requires an intent to lie in wait that may be negated by voluntary intoxication.[61] The court rejected this argument as well, holding that lying in wait is a physical act and that the defense of voluntary intoxication is inapplicable. The court also suggested that the other methods of killing specified in G.S. 14-17—that is, poison, starving, imprisonment, and torture—are physical acts.[62] This dictum appears to conflict with other decisions of the court, however. For example, the court has indicated that for murder by torture the state must prove an intent to inflict injury.[63]

3. Other Offenses Requiring Specific Intent

Although the courts appear to have considered the voluntary intoxication defense most often in the context of first-degree murder charges, voluntary intoxication also can serve as a defense to other offenses requiring proof of specific intent. The courts have either held or suggested that the following offenses require specific intent, which can be negated by voluntary intoxication. The list is not intended to be exhaustive; other offenses may involve specific intent as well.

Assaults with intent to kill. Specific intent would appear to be a component of all assaults in which intent to kill is a required element. The courts have specifically reached this result for the offenses of assault with a deadly weapon with intent to kill[64] and assault with a deadly weapon with intent to kill inflicting serious injury.[65]

Attempt. Since a required element of all attempt crimes is an intent to commit a particular crime, all attempts would appear to involve a specific intent that can be negated by voluntary intoxication. The courts have so found for at least three attempt crimes: attempted rape,[66] attempt to burn a dwelling house,[67] and attempted robbery.[68] Attempt crimes differ from most other offenses in that they generally do not have any lesser-included offenses. Voluntary intoxication therefore may serve as a fully exculpatory defense. Attempt crimes are also unique in that they generally are lesser-included offenses of completed crimes. Attempted rape, for example, is a lesser-included offense of rape, which the North Carolina courts have held does not require proof of specific intent. Voluntary intoxication therefore can serve as a defense to attempted rape as well as to other attempt crimes, which require proof of specific intent, even though the defense would be unavailable against the completed crime.[69]

Breaking and entering (felonious). Felonious breaking and entering requires a breaking or entry with the intent to commit a felony or larceny.[70] This intent can be negated by voluntary intoxication.[71]

Burglary (first- and second-degree). Both first-degree and second-degree burglary require a breaking and entering of a dwelling with the intent to commit a felony or larceny.[72] The courts have repeatedly found that voluntary intoxication can negate this intent.[73]

Discharging weapon into occupied property. A person violates G.S. 14-34.1 by "willfully or wantonly" discharging a weapon into occupied property. The supreme court has said that the terms *willfully* and *wantonly* have substantially the same meaning for purposes of this statute—that is, a person must have intentionally, and without legal justification, discharged a firearm into an occupied building with knowledge, or reasonable grounds to believe, that the building was occupied.[74] Based on the supreme court's construction of the statute, the court of appeals found no error in a jury instruction equating *willfully* and *wantonly* with specific intent and stating that voluntary intoxication could serve as a defense.[75] The supreme court apparently has not considered this precise question, however.

Forgery and uttering. Forgery requires that the defendant act with an intent to defraud; uttering requires that the defendant have knowledge that a forged instrument was falsely made and that he or she act for the sake of gain or with the intent to defraud.[76] In *State v. McLain*, the court of appeals found the evidence insufficient in a forgery and uttering case to warrant an instruction to the jury on voluntary intoxication.[77] Implicit in this ruling is that voluntary intoxication may serve as a defense to both forgery and uttering, although the opinion does not clarify whether intoxication would be relevant to intent, to knowledge, or to both.

Kidnapping. The court of appeals has said that voluntary intoxication is not a defense to kidnapping because the crime does not require proof of specific intent.[78] Subsequently, however, the supreme court found that kidnapping does require such proof, although the defense of voluntary intoxication was not at issue in the case. The supreme court held that the prosecution must prove, among other things, that the defendant confined, restrained, or removed the victim "for one of the eight purposes set out in the [kidnapping] statute," such as holding the victim as a hostage or using the victim as a shield.[79] Since the supreme court considers these purposes to be forms of specific intent, voluntary intoxication is arguably available as a defense to kidnapping.

Larceny (misdemeanor and felony). For larceny, the defendant must intend to deprive the possessor of his or her property permanently, with knowledge that the defendant is not entitled to the property.[80] The court of appeals has found that larceny is a crime requiring proof of specific intent, to which voluntary intoxication is a defense.[81] Larceny is also an element of robbery and, for that reason, the courts have found that robbery is a specific-intent crime.[82]

Malicious use of explosive. A person is guilty of violating G.S. 14-49 if he or she "willfully and maliciously" damages the property of another by the use of an explosive or incendiary device. For purposes of this statute, the supreme court has defined *malicious* as "a feeling of animosity, hatred or ill will toward the owner, the possessor, or the occupant" of the property.[83] As discussed further below, common-law arson also requires malice; but in holding that specific intent is not an element of common-law arson, the court has said that an intent or animus against either the property or its owner need not be shown.[84] The court's definition of *malicious* for purposes of malicious use of an explosive appears to supply the animus, or specific intent, found lacking in common-law arson.

Possession of and receiving stolen goods (misdemeanor and felony). A "dishonest purpose" is an element both of the crime of possession of stolen goods and the crime of receiving stolen goods.[85] The supreme court has held that this element is equivalent to felonious intent, meaning an intent to assist another in permanently depriving the owner of his or her property.[86] Although no reported opinion has explicitly addressed the question, voluntary intoxication would appear to apply to dishonest purpose, which is similar to the state of mind required for the specific-intent offense of larceny.

Robbery (common-law and armed). The supreme court has said that robbery requires a specific intent to rob, which can be negated by voluntary intoxication.[87] Stated another way, larceny is an element of both common-law and armed robbery; specific intent is an element of larceny; and voluntary intoxication can negate this intent in a robbery case.[88]

4. Other Offenses Not Requiring Specific Intent

The courts have found that a number of offenses do not require proof of specific intent and, thus, that voluntary intoxication is not a defense to those offenses. The following list is illustrative, not exhaustive.

Arson (common-law). Common-law arson is the willful and malicious burning of another person's dwelling. The supreme court has said in the context of common-law arson that a burning is willful and malicious if it is done "voluntarily and without excuse or justification and without any bona fide claim or right."[89] According to the court, specific intent is not an element of this state of mind, and voluntary intoxication is not a defense.[90]

Assault with a deadly weapon inflicting serious injury. Assault generally requires an intent to harm the victim,[91] but culpable negligence, a heightened form of ordinary negligence, is sufficient to satisfy this requirement.[92] The court of appeals has found that voluntary intoxication is not available as a defense to assault with a deadly weapon based on culpable negligence.[93]

Rape and sexual offense (first-degree). The supreme court has said that the intent to commit the crime of first-degree rape or the crime of first-degree sexual offense is inferred from the commission of the act.[94] The implication of this statement is that an "intent to commit the crime" is an element of both offenses. Yet, addressing first-degree sexual offense, the court has said that intent is not an essential element.[95] Whether intent is or is not an element of first-degree rape and first-degree sexual offense, the supreme court's position is that voluntary intoxication is not a defense.[96]

Second-degree murder. The distinguishing mental element of second-degree murder is malice. The courts have identified three separate forms of malice for purposes of second-degree murder. A killing is malicious if (1) the killing is done with hatred, ill will, or spite; or (2) the act that causes death is inherently dangerous to human life and is done so recklessly and wantonly that it manifests a mind utterly without regard to human life and social duty and deliberately bent on mischief; or (3) the killing is done intentionally and without justification or excuse. The jury may infer, although it is not required to do so, this third form of malice from a killing or infliction of a wound with a deadly weapon if the killing or infliction of the wound was "intentional."[97] This requirement of intent in connection with the use of a deadly weapon is in contrast to the culpable negligence required for assault with a deadly weapon, discussed previously.[98]

Without distinguishing among the various forms of malice for second-degree murder, the North Carolina courts have held that a specific intent to kill is not an element of the offense[99] and that the defense of voluntary intoxication is therefore inapplicable.[100] At times, however, the supreme court has appeared more receptive to the proposition that voluntary intoxication can negate the state of mind required for second-degree murder. In two cases, the supreme court suggested that evidence of voluntary intoxication could be relevant to whether a person intentionally used a deadly weapon to inflict injury and therefore relevant to the ultimate issue of whether the person acted with malice.[101] Subsequently, however, the supreme court appeared to reject this argument. In *State v. Bunn*, the defendant argued that voluntary intoxication made him incapable of intending to use a gun as a weapon, countering any inference of malice.[102] The court held without extended discussion that the weight of authority did not allow voluntary intoxication to reduce murder to manslaughter.

Recently, the supreme court may have revived the potential for voluntary intoxication to negate the state of mind for second-degree murder. In *State v. Holder*,[103] the court addressed the diminished capacity defense, which is similar in certain respects to the voluntary intoxication defense. Like voluntary intoxication, diminished capacity may negate the defendant's ability to form the state of mind required for

conviction.[104] In *Holder*, the defendant argued that in cases involving evidence of diminished capacity, the prosecution cannot rely on the inference of malice arising from the defendant's intentional use of a deadly weapon. To so infer, the defendant claimed, would impermissibly lessen the state's burden to prove malice beyond a reasonable doubt. The court held that the inference did not relieve the prosecution of its burden of proving malice because the inference did not amount to an irrebuttable presumption. Rather, the jury could accept or reject the inference of malice after weighing the evidence that the defendant had intentionally used a deadly weapon, "countered by evidence presented by defendant tending to show that he lacked the capacity to form the specific intent to kill or inflict serious bodily harm."[105] This resolution of the defendant's argument implies that specific intent is a component of malice; or, at least, that the defendant's capacity to form the specific intent required for first-degree murder is relevant to the question of malice. It is unclear, however, whether the court actually would allow diminished capacity or voluntary intoxication to serve as a defense to second-degree murder.

Voluntary manslaughter. Voluntary manslaughter is an intentional killing without malice.[106] A killing is "intentional" for purposes of voluntary manslaughter if (1) the defendant intentionally committed the act resulting in death and (2) the act was an assault amounting to a felony or likely to cause death or serious bodily injury. The North Carolina courts have held that a specific intent to kill is not an element of this mental state[107] and that voluntary intoxication is not a defense.[108]

D. Evidentiary Issues

A recurring evidentiary question in voluntary intoxication cases is whether witnesses may offer opinion testimony about the defendant's mental state at the time of the offense. For many years, the court has allowed *lay* witnesses to give opinions about whether the defendant was intoxicated and about the defendant's mental capacity.[109] One qualification is that the witnesses must have observed, conversed, or had dealings with the defendant, and must have had a reasonable opportunity to form opinions to their satisfaction about the defendant's condition.[110] Absent this foundation, it is error to admit the opinion.[111]

In recent years, the supreme court has modified its approach to *expert* opinion in voluntary intoxication cases. Before adoption of the current North Carolina Rules of Evidence in 1984, the court would exclude expert testimony about the defendant's capacity to form the state of mind required by the offense.[112] Now, an expert may give an opinion about the defendant's state of mind even though the opinion deals with an issue ultimately to be decided by the jury. An expert still cannot testify, however, to a legal conclusion that he or she is unqualified to make.[113] These general principles are consistent with the approach developed by the court for the diminished capacity defense.[114]

In applying these principles to specific testimony by experts in voluntary intoxication cases, the court has likewise followed the lead of its decisions about the diminished capacity defense. Thus, in first-degree murder cases, an expert ordinarily cannot testify about whether the defendant could "premeditate" or "deliberate" because those terms are considered legal conclusions. An expert can, however, use lay terms to describe those mental processes, testifying to such matters as the defendant's ability to form a plan or scheme.[115] Further, an expert can testify about whether the defendant was able to form the specific intent to kill, which apparently is not considered a legal conclusion.[116] These evidence rules are discussed in greater detail in an earlier *Administration of Justice Memorandum* on the diminished capacity defense.[117]

The courts have not discussed how the above principles would apply to expert testimony about other mental elements, assuming that such elements entail a specific intent that can be negated by voluntary intoxication. The courts could find that concepts such as *willfulness* and *malice* constitute legal conclusions on the ground that they have involved definitions beyond the qualifications of most experts. Experts then would have to use terms more accessible to lay persons in testifying about the mental processes signified by *willfulness* and *malice*. In contrast, it would seem difficult to simplify further concepts like "the intent to take another's property" or "knowledge that an instrument was falsely made." The courts therefore may be inclined to find that such concepts are not legal conclusions and may be explicitly incorporated into an expert's testimony.[118]

E. Burdens

1. The "Utterly Incapable" Standard

From the first North Carolina decisions recognizing voluntary intoxication as a defense, the phrase "utterly incapable," or a close variant, has appeared in cases dealing with the defense. In its 1911 decision in *State v. Murphy*, the court noted that premeditation and deliberation were essential elements of first-degree murder and then said: "[I]f it is shown that an offender . . . is so drunk that he is utterly unable to form or entertain this essential purpose he should not be convicted of [first-degree murder]."[119] It is unclear from the opinion in *Murphy* whether the court attached any particular significance to the words "utterly unable." The court merely may have been stating the legal effect of intoxication—that is, that a person unable to form the required criminal intent by reason of intoxication cannot be

convicted of the crime. Subsequent cases, however, repeatedly drew on the phrase as a way to accentuate the showing required of defendants in intoxication cases. In some decisions, the courts simply said that the defendant had to be utterly incapable of forming the state of mind required for conviction; at other times, the court used more ornate language, stating that the defendant's mind and reason had to be so completely intoxicated and overthrown as to render him or her utterly incapable of forming the requisite state of mind.[120] The "utterly incapable" standard, for lack of a better term, eventually became a part of three separate burdens of proof in cases involving the voluntary intoxication defense: the burden of persuasion, the prosecution's burden of production, and the defendant's burden of production.

As discussed below, *State v. Mash* (hereinafter "*Mash I*") fundamentally altered these burdens.[121] Although *Mash I* did not eliminate the "utterly incapable" standard altogether, its use now appears limited to the defendant's burden of production. Constitutional questions remain, however, about the court's continued reliance on the "utterly incapable" standard even for that burden.

In the sections below, each of the burdens of proof applicable in voluntary intoxication cases will be reviewed. For reference purposes, however, the three burdens can be defined generally as follows:

- The burden of persuasion, under which the party allocated the burden must persuade the jury of the existence or nonexistence of certain facts
- The prosecution's burden of production, under which the prosecution must produce sufficient evidence of the elements of the charged offense to convince the court to submit the offense to the jury
- The defendant's burden of production, under which the defendant must produce sufficient evidence in support of a claimed defense to convince the court to submit instructions about the defense to the jury

a. Burden of Persuasion

Soon after it recognized the voluntary intoxication defense in *Murphy*, the court was asked to decide which party had the burden of persuasion before the jury—that is, the burden of convincing the jury that the defendant did or did not act with the required criminal intent. In its 1913 decision in *State v. Shelton*, the court placed the burden of persuasion, at least in part, on the defendant and, further, incorporated the "utterly unable" language of *Murphy* into the defendant's burden.[122] The court held that the defendant had to show to the jury's satisfaction that, by reason of intoxication, he or she was utterly incapable of entertaining the state of mind required for conviction.[123] As the dissent in a later case pointed out, this approach resulted in "two irreconcilable rules respecting the same matter."[124] The state had the burden of persuading the jury beyond a reasonable doubt that the defendant premeditated and deliberated, while the defendant had the burden to show that he or she was incapable of premeditating and deliberating.

In *Mash I*, decided seventy-five years after *Shelton*, the North Carolina Supreme Court revisited the issue and placed the burden of persuasion squarely on the prosecution. The result in *Mash I* was foreshadowed by the United States Supreme Court's decision in *Mullaney v. Wilbur*.[125] There, the high court held that the due process clause of the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged. The state cannot shift to the defendant the burden to disprove a necessary fact or element.[126] Even before *Mullaney*, the North Carolina Supreme Court seemed to have resolved that the burden of persuasion in intoxication cases should rest with the prosecution.[127] Yet, in decisions issued around the time of *Mullaney* and even afterward, the North Carolina Supreme Court seemed to revert to its original position that the defendant bore the burden of persuasion.[128] *Mash I* put the issue to rest.

In *Mash I*, the trial court instructed the jury that the defendant's intoxication must have been so great that it had rendered him "utterly incapable" of forming a deliberate and premeditated intent to kill. The supreme court found two vices in the instruction. First, the court found that the "utterly incapable" standard was inapplicable to the jury's consideration of intoxication evidence. To find for the defendant, the jury only had to have a reasonable doubt about whether the defendant formed the intent required for conviction. Second, the court found that by requiring the jury to find the defendant utterly incapable of premeditating and deliberating, the instructions improperly suggested that the defendant bore the burden of persuading the jury that he did not premeditate or deliberate. The court recognized that the prosecution must persuade the jury beyond a reasonable doubt of all essential elements of the crime—including the defendant's mental state—and that shifting the burden to the defendant would be unconstitutional.[129]

Mash I remains the definitive statement on the burden of persuasion in voluntary intoxication cases: for the defendant to prevail in such cases, the evidence of intoxication need only lead the jury to have a reasonable doubt about whether the defendant acted with the state of mind required by the offense.

b. Prosecution's Burden of Production

At the close of the evidence and before submission of the case to the jury, the defense may make a motion for

nonsuit calling for the court to dismiss the case on the ground that the prosecution has not produced enough evidence to support a conviction. Previously, the North Carolina Supreme Court applied the "utterly incapable" standard to such motions in cases involving the voluntary intoxication defense. In *State v. Hamby*,[130] the court held that on nonsuit motions the question was whether the evidence, taken in the light most favorable to the prosecution, tended to show that the defendant was utterly incapable of forming the state of mind required for conviction. If "any evidence" reasonably tended to show that the defendant formed the requisite state of mind, the case should be submitted to the jury. Making nonsuit even more difficult to obtain was the "general rule" in murder cases that the jury ordinarily should decide whether intoxication rendered the defendant unable to form the intent to kill.[131] Under these principles, the appellate courts did not issue a single reported decision reversing a trial court's denial of nonsuit.[132]

Mash I did not address the standard applicable to nonsuits; yet, its reasoning reverberates in that area. If the prosecution bears the burden of persuading the jury of each element of the offense, then it would seem necessary for the prosecution to bear a congruent burden of producing sufficient evidence of each element of the offense to warrant submitting the case to the jury. Usage of the "utterly incapable" standard for nonsuit motions therefore seems as problematic as its usage in jury instructions because it suggests that the defendant bears the burden of disproving the mental elements of the offense.

The second *Mash* decision (hereinafter "*Mash II*") seems to bear out this reasoning.[133] In *Mash II*, the court adhered to its previous rule that, on a motion for nonsuit, all evidence must be considered in the light most favorable to the prosecution. But, in *Mash II* the court did not refer to the "utterly incapable" standard, instead phrasing the issue as whether the evidence supported each element of the charged offense. Further, the evidence in support of each element had to be "substantial." The court made no mention of the "any evidence" standard of previous cases. Nor did the court mention the general rule of previous cases favoring submission of murder charges to the jury when the defendant claims intoxication. *Mash II*'s apparently careful choice of words may signal that the court has adopted a test for nonsuit in keeping with *Mash I*'s approach to the burden of persuasion.[134]

c. *Defendant's Burden of Production*

Until recently, North Carolina decisions did not refer to the "utterly incapable" standard in judging whether the defendant had produced sufficient evidence to warrant jury instructions about the voluntary intoxication defense.[135] The supreme court apparently did not incorporate the standard into the defendant's burden of production until the middle to late 1970s, when it held that defendants were not entitled to intoxication instructions unless they showed that they were utterly incapable of forming the state of mind necessary for conviction.[136]

Although *Mash I* reversed longer-established precedent applying the "utterly incapable" standard to the burden of persuasion—and *Mash II* apparently did the same for nonsuit motions—the court has continued to adhere to the "utterly incapable" standard for the defendant's burden of production.[137] According to the court, this "high threshold for adjudging whether the evidence merits an instruction" reflects the "public policy" of the state in cases involving claims of voluntary intoxication.[138] The court's differentiation of the defendant's burden of production from other burdens apparently means, however, that the defendant must make a greater showing to obtain jury instructions on the issue of voluntary intoxication than he or she must make before the jury itself. To prevail before the jury, the defendant need only raise a reasonable doubt about whether he or she formed the state of mind required for conviction; to get jury instructions about voluntary intoxication, the defendant must show that he or she was "utterly incapable" of forming the required mental state.[139]

The court's decisions also suggest that the standard for submission of a voluntary intoxication instruction, which could result in the defendant's conviction of a lesser-included offense, is higher than the standard for submission of instructions on lesser-included offenses in general.[140] The general rule is that an instruction on a lesser-included offense is mandated when there is "'any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.'"[141] In some cases, this differential in burdens will have no practical effect. If the defendant in a first-degree murder case, for example, produces sufficient evidence to warrant an instruction on intoxication, he or she automatically would be entitled to an instruction on the lesser-included offense of second-degree murder. This result necessarily flows from the operation of the voluntary intoxication defense: if the evidence of intoxication leads the jury to have a reasonable doubt that the defendant formed the state of mind for first-degree murder, the defendant can be convicted of no more than second-degree murder.[142] Further, the defendant in the above example would be entitled to an instruction on second-degree murder by producing sufficient evidence apart from voluntary intoxication to satisfy the general standard for the submission of instructions on lesser-included offenses; the defendant would be entitled to such an instruction regardless whether he or she met the burden of production for an instruction on voluntary intoxication.[143] In some cases, however, the defendant's claim to an instruction on a lesser-included

offense may depend entirely on evidence of voluntary intoxication, and the defendant may be unable to satisfy the elevated burden of production for an instruction on voluntary intoxication. In those circumstances, the defendant would not appear to be entitled to a lesser-included offense instruction even though the evidence may be sufficient to convince a rational trier of fact to convict the defendant of a less grievous offense.

The seeming rigorousness of the defendant's burden of production in voluntary intoxication cases is ameliorated somewhat by the principle that the court must consider the evidence in the light most favorable to the defendant when deciding whether to submit instructions on the defense to the jury.[144] This principle reverses the approach used for nonsuit motions, where the evidence is considered in the light most favorable to the prosecution. Further, the defendant need not meet the "utterly incapable" standard by proof beyond a reasonable doubt or even by a preponderance of the evidence. Rather, the evidence need only be "substantial," meaning that the evidence must be such that a reasonable mind might accept it as adequate to support a conclusion.[145] Lastly, defendants may rely on evidence produced by the prosecution as well as on their own evidence to meet the burden of production.[146]

Despite these principles, the defendant's burden of production in cases involving the voluntary intoxication defense remains problematic. In his treatise on defenses, Robinson considers in general the constitutionality of placing a rigorous burden of production on the defendant, particularly for negating defenses (like voluntary intoxication). He suggests that if a defendant cannot meet his or her burden of production even with evidence capable of raising a reasonable doubt about the charged offense, the burden may effectively lower the prosecution's burden of persuading the jury beyond a reasonable doubt of all elements of the offense. He also suggests that such a result may deny defendants their right to a trial by jury—that is, their right to present their defense to the jury and have the jury decide the defense's merits.[147]

A further question is whether, in closing argument to the jury, defense counsel can argue the evidence of intoxication notwithstanding the trial court's decision not to give specific instructions about the defense. None of the cases involving the voluntary intoxication defense directly address the issue. On the one hand, an argument can be made that a ruling that the defendant has failed to meet the burden of production for an intoxication instruction is tantamount to a ruling that the jury cannot hear argument on the evidence of intoxication. On the other hand, the jury still must determine whether the prosecution has shown beyond a reasonable doubt that the defendant acted with the state of mind required for conviction, and the defendant arguably is entitled to have the jury consider all of the evidence bearing on that element of the offense.[148] Even assuming, however, that counsel for the defendant can make such a closing argument to the jury after the trial court has refused to instruct on the defense, the refusal to give instructions still may implicate the defendant's constitutional rights. Without instructions from the court authorizing the jury to consider the evidence of intoxication in connection with the mental elements of the offense, the jury may well disregard the evidence. As discussed in the preceding paragraph, this result may entail constitutional problems if the evidence is capable of raising a reasonable doubt about the charged offense.

In a recent case before the North Carolina Supreme Court, the defendant raised constitutional challenges to North Carolina's burden of production.[149] The defendant claimed, first, that the trial court's failure to instruct on voluntary intoxication unconstitutionally lowered the prosecution's burden to prove premeditation and deliberation. The supreme court rejected the argument, finding that the defendant did not meet the burden of production established in previous cases. The court did not address whether the burden itself was unconstitutional. The defendant claimed, second, that the burden of production prevented him from presenting evidence in his defense. The court rejected this argument as well, finding that the burden of production did not preclude the defendant from introducing evidence. The court did not consider whether the defendant was precluded from presenting his defense to the jury in the absence of instructions on voluntary intoxication.[150]

2. Sufficiency of Evidence to Obtain Nonsuit

Although each case ultimately depends on the mental elements of the particular offense at issue and the totality of the evidence presented, the appellate courts have primarily relied on two related factors in refusing nonsuits in voluntary intoxication cases. It is too early to tell whether the more rigorous standard for reviewing the sufficiency of the prosecution's evidence, apparently adopted in *Mash II*, will affect the appellate courts' analysis of nonsuit motions; but, if past cases are a guide, defendants may continue to have difficulty obtaining nonsuits based on the voluntary intoxication defense.

First, the courts have relied on evidence of the defendant's ability to perform certain tasks at or near the time of the offense, such as walking normally, talking clearly, and driving a car competently. Second, the courts have looked at evidence from which criminal intent may be inferred, such as statements and conduct by the defendant before and after the offense. When the courts have found sufficient evidence of these factors—and the courts have so found in every case to date—they have been unwilling to

say that the defendant could not, as a matter of law, have formed the state of mind required for conviction.[151]

3. Sufficiency of Evidence to Obtain Instructions

As discussed above, the supreme court has set a relatively high standard for judging whether defendants have produced sufficient evidence to warrant jury instructions about the voluntary intoxication defense. Nevertheless, the courts appear to have been more receptive to requests for instructions in voluntary intoxication cases than to motions for nonsuit.[152] In a number of reported decisions (cited in endnote), the appellate courts have found that the evidence was sufficient to warrant an instruction on voluntary intoxication and that the trial court erred in refusing to give one.[153] In other instances (cited in endnote), the appellate courts have said that the trial court properly granted intoxication instructions.[154]

The decisions on jury instructions also differ from nonsuit decisions in that they do not turn on a single factor or set of factors. Rather, the courts appear to have decided the defendant's entitlement to jury instructions based on a multitude of factors. This section reviews cases in which the appellate courts did and did not find that instructions were warranted, with an eye toward identifying the factors most often found significant by the courts. As mentioned above, however, a court's refusal to instruct on the voluntary intoxication defense does not necessarily bar defense counsel from arguing the evidence of intoxication to the jury on closing argument.[155]

Nature and amount of intoxicant. The nature and amount of the intoxicant consumed by the defendant has often played a part in the resolution of instruction requests. When the substance consumed has been strong, or the amount large, the courts appear to have been more inclined to require intoxication instructions.[156] Conversely, defendants have had difficulty obtaining instructions when, in the court's view, they have consumed weaker intoxicants in smaller amounts.[157] The courts also have been less receptive to instruction requests when no specifics were provided about what the defendant consumed.[158]

Degree of impairment. The courts have also taken into account the degree of the defendant's impairment. The courts have said that mere intoxication is not enough to meet the defendant's burden of production.[159] Even intoxication sufficient to support a charge of driving while impaired does not guarantee that an instruction will be given about voluntary intoxication.[160] Although the court has not made it a prerequisite, eyewitness testimony corroborating that the defendant was impaired has bolstered instruction requests.[161] In addition, the defendant's own statement that he or she was drunk or high has, on occasion, supported the granting of an instruction.[162] In other instances, however, the courts have discounted statements by the defendant in the absence of other evidence indicating intoxication.[163] In denying instruction requests, the courts also have relied on statements by the defendant or witnesses that the defendant was not drunk or high, even though he or she had consumed intoxicants.[164]

Contemporaneous behavior. Related to the defendant's degree of impairment is his or her behavior at or near the time of the offense. Erratic, uncontrolled, or uncharacteristic actions have tended to support instruction requests.[165] On the other hand, competent and controlled conduct by the defendant has tended to contradict his or her claim of intoxication.[166] The court has not premised the denial of instructions on the defendant's conduct alone, however; in the cited cases, the court also considered the amount consumed by the defendant, the opinions of witnesses about whether the defendant was drunk, and other factors discussed in this section.

Evidence of intent. Although not determinative of a defendant's request for instructions, evidence of criminal intent has been a part of the overall reasons given for the denial of instructions.[167] Conversely, instruction requests have been bolstered by evidence that some other, noncriminal intent motivated the defendant's actions.[168]

Capacity to form intent. A different question is presented by expert testimony about the defendant's ability to form the mental state required for conviction. In a few cases in which the trial court denied nonsuit but apparently granted intoxication instructions, experts for the defense supported the defendant's position by testifying that the defendant was likely suffering an alcoholic blackout at the time of the offense.[169] Only one reported case to date, however, has directly considered whether expert testimony about the defendant's mental capacity was sufficient, along with other evidence, to warrant intoxication instructions; and, as discussed below in the subsection entitled "*Mash* error," that decision may not be an accurate reflection of how the courts will treat future cases involving such testimony.[170] Two recent cases involving the diminished capacity defense provide some general guidance in this area, reaffirming the importance of reasonable certainty in the opinions offered by expert witnesses. In one case, the defendant's expert specifically testified that the disorder suffered by the defendant prevented him from being capable of forming the state of mind required for conviction; the supreme court required jury instructions on the diminished capacity defense. In the other case, the defendant's experts gave equivocal testimony about the defendant's capacities, and the supreme court refused to require such instructions.[171]

Memory. The defendant's lack of memory about the offense, when combined with other evidence of intoxication, has also supported instructions.[172] The mere assertion

by a defendant that he or she does not recall the offense, however, has not been sufficient standing alone to support instructions.[173] Further, when a defendant has been able to recall the details of an offense, the court has relied on such evidence, in conjunction with other factors, to contradict the defendant's claim of intoxication.[174]

Other disorders. In granting instructions on voluntary intoxication, the courts have also taken into account evidence that the defendant suffered from other mental or emotional disorders.[175] Defense experts have also testified to the defendant's history of drug and alcohol abuse in connection with the likely effect of the defendant's consumption of intoxicants at or near the time of the offense.[176] In some cases, however, the court has suggested that the defendant's previous alcohol abuse could have resulted in a greater tolerance of alcohol and a correspondingly lesser degree of intoxication.[177]

***Mash* error.** Another factor to consider is whether the defendant is merely seeking an instruction on intoxication or is arguing instead for a new trial because of *Mash* error in the instructions given by the trial court. In the latter situation, the supreme court has inquired, first, whether the instructions contained *Mash* error—that is, whether the instructions erroneously placed the burden of persuasion on the defendant—and, second, whether the evidence of intoxication was sufficient to support the submission of *any* instruction. In each case to date in which a defendant has sought a new trial based on *Mash* error, the supreme court has found that the trial court's instructions were erroneous, but that the error was not prejudicial because the defendant was not entitled to an intoxication instruction in the first place.[178] At least in some of these *Mash*-error decisions, the court appears to have applied a more stringent standard for judging the evidence than in cases where the defendant merely claimed that the trial court erred in failing to give intoxication instructions.

This difference in approach is apparent in the majority and dissenting opinions in *State v. McQueen*,[179] the first *Mash*-error case to reach the North Carolina Supreme Court. There, the majority found that the evidence was not sufficiently specific to justify jury instructions about intoxication because the testimony showed only that the defendant and another person together consumed alcohol and did not show the amount the defendant individually consumed. The majority also suggested that the opinion offered by the defendant's expert was not sufficiently certain because the expert testified only that the defendant "very possibly" was experiencing an alcoholic blackout at the time of the offense.[180] Although this exacting review of the evidence may signal tougher scrutiny of future requests for intoxication instructions, the opinion may reflect more the majority's reluctance to grant a new trial based on *Mash* error—a case, in the majority's words, "decided three years after the defendant's conviction."[181]

The dissenting opinion by Chief Justice Exum may be a truer guide to how the court will treat cases involving questions about the sufficiency of evidence to support intoxication instructions but not involving allegations of *Mash* error. The chief justice, who also authored *Mash I*, found ample evidence of the defendant's intoxication in *McQueen*. He recited testimony that the defendant and another person consumed a prodigious amount of alcohol the day before and day of the shooting, that the defendant was falling-down drunk on the day of the shooting, and that the defendant had no recollection of his actions. The chief justice also disagreed with the weight to be given the expert's testimony, stating: "One who is suffering from an 'alcoholic blackout' at the time a crime is committed epitomizes a defendant who is so intoxicated that he cannot form a deliberate and premeditated specific intent to kill."[182] The chief justice apparently was untroubled by the alleged uncertainty in the expert's opinion. He also emphasized that the expert's overall opinion was that the defendant likely could not have formed the particular intent to kill the victim, testimony omitted from the majority's analysis of whether jury instructions about intoxication were warranted. The expert's conclusion was supported by evidence of the defendant's psychological problems relating to his alcoholism as well as by evidence of the amount of alcohol the defendant consumed before the offense and the blackout he apparently suffered.[183]

Other *Mash*-error decisions also have viewed the defendant's evidence unfavorably in holding that the trial court's instructions to the jury about intoxication were unwarranted.[184] Although those decisions, unlike the majority opinion in *McQueen*, did not prompt any dissent, they too may be an inaccurate barometer of how the court will treat requests for intoxication instructions outside the context of *Mash* error.

F. Jury Instructions

1. Wording of Instructions

Once the trial court decides that the evidence warrants an instruction on the voluntary intoxication defense, it must decide, in consultation with the parties, the form that the instruction should take. The North Carolina Supreme Court has issued few decisions about the instructions given in intoxication cases, but those decisions have been significant ones.

For many years, the court allowed instructions containing cautionary language to jurors—namely, that the defense of drunkenness is "dangerous in its application" and should be allowed only in "very clear cases."[185] In the 1958 decision

of *State v. Oakes*, the supreme court disapproved the cautionary language.[186] The court said that although the quoted language appeared in North Carolina decisions stretching back to 1913, the language was never intended for use in jury instructions. In the view of the *Oakes* court, such statements were clearly impermissible because they constituted expressions of opinion by the trial judge to the jury. The court, therefore, expressly overruled all previous decisions in conflict with its ruling in *Oakes*.

A second major revision in jury instructions occurred in *Mash I*. As discussed above, the supreme court expressly disapproved jury instructions that referred to the "utterly incapable" standard and that placed the burden of persuasion on the defendant.[187] *Mash I* also disapproved other language in instructions that required the defendant to persuade the jury of some incapacity.[188] Presumably, previous cases allowing the prosecution to argue the "utterly incapable" standard to the jury are no longer good law.[189]

After *Mash I*, the court also has had to assess the effect of the trial court's submission of intoxication instructions when none were warranted. As discussed above,[190] in cases in which the trial court submitted instructions containing *Mash*-error—that is, instructions placing the burden of persuasion on the defendant—the supreme court has found that the evidence was insufficient to warrant the giving of an instruction about intoxication in the first place. In that context, the court has held that even though the instruction was not warranted by the evidence and contained an incorrect statement of law, its submission was not prejudicial to the defendant.[191]

2. Pattern Instructions

In *Mash I*, the court reaffirmed its acceptance of the pattern jury instruction on voluntary intoxication for first-degree murder cases.[192] The pattern instruction provides:

> You may find there is evidence which tends to show that the defendant was [intoxicated] [drugged] at the time of the acts alleged in this case.
>
> (Generally, [voluntary intoxication] [a voluntary drugged condition] is not a legal excuse for crime. However,) if you find that the defendant was [intoxicated] [drugged], 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], 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], 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 guilty of first degree murder.[193]

Although the above instruction has received the court's general approval, instructions geared specifically to the case at hand may still be appropriate when warranted by the evidence and requested by a party.[194] For example, the above instruction strings together the mental elements for first-degree murder, directing the jury to consider whether the defendant had the specific intent to kill, formed after premeditation and deliberation. In *State v. Holder*,[195] a case involving the diminished capacity defense, the defendant sought to break down these elements by requesting two separate instructions, one on specific intent to kill and the other on premeditation and deliberation. The court held that separate instructions were not required because, even though a specific intent to kill is necessary for conviction, it is not an independent element of first-degree murder. Rather, it is a component of the elements of premeditation and deliberation. The court's ruling leaves open whether separate instructions on premeditation and deliberation, which are independent elements, would be appropriate if requested in a case where the evidence concerned the defendant's ability both to premeditate and to deliberate.

The pattern instruction for other offenses is similar to the pattern instruction for first-degree murder, although no reported decisions appear to have reviewed it.[196] The major difference is that the instruction for other offenses leaves room for the trial court to replace the mental elements of first-degree murder with the specific-intent elements of the offense at issue. Thus, the instruction states that to convict the defendant of the particular offense, the jury must find beyond a reasonable doubt that the defendant had "the required specific intent" to commit the crime. Presumably, the drafters of the instruction intended that trial courts replace the general reference to "specific intent" with the particular mental element or elements sought to be negated. Otherwise, for offenses that involve specific intent but do not explicitly refer to that term, jurors might have difficulty understanding the import of the instruction.

Notes

A. Historical Background

1. Edward Rowland Sill, *An Adage from the Orient, in* BARTLETT'S FAMILIAR QUOTATIONS 646 (Emily Morison Beck ed., 15th ed. 1980).

2. *See* David McCord, *The English and American History of Voluntary Intoxication to Negate Mens Rea*, 11 JOURNAL OF LEGAL HISTORY 372, 372–75 (1990).

3. *See* State v. Wilson, 104 N.C. 598, 602, 10 S.E. 315, 317 (1889); State v. Potts, 100 N.C. 359, 364–65, 6 S.E. 657, 660 (1887); State v. Keath, 83 N.C. 540, 542 (1880); State v. Sewell,

48 N.C. 248, 251–52 (1855); State v. John, a Slave, 30 N.C. 241, 246 (1848).

4. *See* State v. Haywood, 61 N.C. 296, 297 (1867) (in case involving intoxication, trial court instructed jury that prisoner would not be guilty only if he "was under the visitation of God, and could not distinguish between good and evil"). *See also* State v. Potts, 100 N.C. 359, 364–65, 6 S.E. 657, 659–60 (1887); State v. Sewell, 48 N.C. 248, 251–52 (1855).

5. *See* State v. Kale, 124 N.C. 521, 523, 32 S.E. 892, 897 (1899) (jury instruction approved by court directed jurors to consider evidence of intoxication in deciding whether defendant premeditated and deliberated); State v. McDaniel, 115 N.C. 562, 564, 20 S.E. 622, 622–23 (1894) (same).

6. 157 N.C. 485, 72 S.E. 1075 (1911).

7. *Id.* at 487, 72 S.E. at 1076.

8. State v. English, 164 N.C. 398, 410, 80 S.E. 72, 78 (1913); *Murphy*, 157 N.C. at 488, 72 S.E. at 1076–77.

9. State v. Shelton, 164 N.C. 411, 415, 79 S.E. 883, 885 (1913).

10. *See, e.g.*, G.S. § 15A-1340.4(a)(2)d. ("defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense"). *See generally* STEVENS H. CLARKE, LAW OF SENTENCING, PROBATION, AND PAROLE IN NORTH CAROLINA 57–58 (1991).

11. *See, e.g.*, G.S. § 15A-2000(f)(2) ("capital felony was committed while the defendant was under the influence of mental or emotional disturbance"); G.S. § 15A-2000(f)(6) ("capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired").

B. Elements of the Defense

12. *See* State v. Bunn, 283 N.C. 444, 457, 196 S.E.2d 777, 786 (1973); State v. Propst, 274 N.C. 62, 71, 161 S.E.2d 560, 567 (1968).

13. *See infra* section C (Applicability of the Defense to Different Offenses).

14. State v. English, 164 N.C. 398, 409, 80 S.E. 72, 77 (1913) (holding that use of alcohol or other drugs can negate mental element). *See also* State v. Peacock, 313 N.C. 554, 559, 330 S.E.2d 190, 193 (1985) (use of LSD supported voluntary intoxication defense).

15. *See, e.g.*, State v. Locklear, 322 N.C. 349, 354, 368 S.E.2d 377, 380 (1988) (use of Tylenol, prescribed pills, and alcohol); State v. Peacock, 313 N.C. 554, 559, 330 S.E.2d 190, 193 (1985) (use of LSD).

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

17. 218 N.C. 491, 494–95, 11 S.E.2d 469, 471 (1940).

18. *Id.*

19. *See, e.g.*, State v. Robbins, 319 N.C. 465, 508–09, 356 S.E.2d 279, 304–05 (1987) (employing *Cureton* language without distinguishing elements of premeditation, deliberation and the specific intent to kill); State v. Respass, 27 N.C. App. 137, 141, 218 S.E.2d 227, 230 (1975) (employing *Cureton* language in breaking and entering case).

20. State v. Vaughn, 324 N.C. 301, 306–08, 377 S.E.2d 738, 741 (1989); State v. Mash, 323 N.C. 339, 343–47, 372 S.E.2d 532, 535–37 (1988).

21. State v. Bunn, 283 N.C. 444, 461, 196 S.E.2d 777, 788 (1973); State v. Wilson, 280 N.C. 674, 681, 187 S.E.2d 22, 26 (1972).

22. State v. Hamby, 276 N.C. 674, 678, 174 S.E.2d 385, 387 (1970), *death sentence vacated*, 408 U.S. 937 (1972); State v. Murphy, 157 N.C. 485, 489, 72 S.E. 1075, 1077 (1911).

23. *Bunn*, 283 N.C. at 459–61, 196 S.E.2d at 787–88.

24. State v. Miller, 197 N.C. 445, 447, 149 S.E. 590, 592 (1929); *Murphy*, 157 N.C. at 488, 72 S.E. at 1077; State v. Kale, 124 N.C. 521, 522, 32 S.E. 892, 896 (1899).

25. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 344–45 & n.25 (1972) (hereinafter "LAFAVE") (citing cases decided in the 1800s and early 1900s).

26. *See* State v. Lentz, 306 So. 2d 683, 685–86 (La. 1975) (court finds that defendant would not be guilty of burglary unless specific intent and unauthorized entry coincided; court gives as example that "A" would not be guilty of burglary if he had intended to break into "B's" house and then, after becoming intoxicated, stumbled into "B's" house thinking it was his own). *Accord* State v. Sinegal, 393 So. 2d 684, 686 (La. 1981) (rejecting older treatise suggesting contrary view).

27. For example, while defendants claiming voluntary intoxication still risk conviction of lesser-included offenses in most cases, involuntary intoxication is a fully exculpatory defense. *See* State v. Bunn, 283 N.C. 444, 457, 196 S.E.2d 777, 786 (1973); 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 337–40 (1984) (hereinafter "ROBINSON"). On the other hand, a defendant seeking to use involuntary intoxication as a fully exculpatory defense apparently must meet the test for insanity, a state of mind that may be considerably more difficult to show than the absence of criminal intent required by the voluntary intoxication defense. *Id.*

28. *See* State v. Silvers, 323 N.C. 646, 657–58, 374 S.E.2d 858, 865–66 (1989) (insanity and voluntary intoxication are discrete doctrines that "may coexist in the same case and be considered, jointly and severally, by the jury").

29. *See* State v. Mercer, 275 N.C. 108, 118, 165 S.E.2d 328, 336 (1969). This restriction may violate due process, however. *See* Susan F. Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses*, 53 FORDHAM L. REV. 221, 225 n.26, 228–31 (1984) (suggesting that a voluntary act is implicitly an element of many crimes, that the defense of unconsciousness can negate this voluntariness element, and that defendants have a fundamental right, protected by due process, to rely on any evidence negating an element of the offense).

30. 283 N.C. 444, 196 S.E.2d 777 (1973).

31. *Id.* at 457, 196 S.E.2d at 786.

32. *Id.*, *quoting* People v. Morrow, 268 Cal. App.2d 939, 948–49, 74 Cal. Rptr. 551, 558 (1969).

33. 2 ROBINSON, *supra* note 27, at 456 & n.33 and cases cited therein. *See also* Benjamin Sendor, Mental Health Defenses to First-Degree Murder at 20, *in* NORTH CAROLINA ACADEMY OF TRIAL LAWYERS, DEATH PENALTY: DEFENSE FOR THE 90'S (September 1990) (suggesting that a defendant may be able to argue in an appropriate case that his or her alcoholism or drug addiction was due to an organic disorder, such as fetal alcohol syndrome, and that both the underlying addiction and resulting intoxication should be regarded as involuntary).

34. *See* People v. Wyatt, 22 Cal. App. 3d 671, 677, 99 Cal. Rptr. 674, 678 (1972).

35. MODEL PENAL CODE § 2.08(5)(c) (Proposed Official Draft 1962).

36. 276 N.C. 690, 174 S.E.2d 526 (1970).

37. 276 N.C. at 698–700, 174 S.E.2d at 531–33.

C. Applicability to Different Offenses

38. *See infra* notes 41–44, 64–65 and accompanying text.

39. *See infra* notes 41–44, 91–93 and accompanying text.

40. The reported cases do not explicitly refer to general intent, but from the inception of the defense in North Carolina the courts have hewed to the common-law construct of specific intent. *See* State v. Murphy, 157 N.C. 485, 487–488, 72 S.E. 1075, 1076 (1911).

41. LAFAVE, *supra* note 25, at 343–44. Similarly, LaFave states that "the most common usage of 'specific intent' is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." *Id.* at 202.

42. *See* State v. Eason, 242 N.C. 59, 65, 86 S.E.2d 774, 778 (1955).

43. State v. Coffey, 43 N.C. App. 541, 543–44, 259 S.E.2d 356, 357–58 (1979).

44. *See* State v. Gerald, 304 N.C. 511, 521, 284 S.E.2d 312, 318–19 (1981); State v. Hinson, 85 N.C. App. 558, 566, 355 S.E.2d 232, 237, *rev. den.*, 320 N.C. 635, 360 S.E.2d 98 (1987).

45. LAFAVE, *supra* note 25, at 344; 1 ROBINSON, *supra* note 27, at 281–82.

46. *Compare infra* notes 83–84 and accompanying text (malicious use of explosive appears to require proof of specific intent) *with* notes 89–90 and accompanying text (common-law arson does not require specific intent).

47. *Compare infra* notes 80–82 and accompanying text (larceny requires specific intent) *with* notes 94–96 and accompanying text (rape does not require specific intent).

48. *See* LAFAVE, *supra* note 25, at 344–46 (for offenses requiring actual knowledge by defendant, intoxication is relevant in determining whether defendant had such knowledge; for offenses requiring that defendant reasonably should have known certain facts, defendant is held to standard of reasonably sober person and cannot defend on ground of intoxication).

49. LAFAVE, *supra* note 25, at 344 (giving as example the intent to engage in intercourse required for rape and arguing that such an intent, whether considered general or specific, can be negated by intoxication). *See also* 1 ROBINSON, *supra* note 27, at 297–301.

50. LAFAVE, *supra* note 25, at 344; 1 ROBINSON, *supra* note 27, at 297–301.

51. 1 ROBINSON, *supra* note 27, at 300–01.

52. Attempt crimes, discussed *infra* notes 66–69, are the most notable exception to this pattern.

53. *See, e.g.*, State v. Mash, 323 N.C. 339, 345–47, 372 S.E.2d 532, 536–37 (1988); State v. Murphy, 157 N.C. 485, 487–88, 72 S.E. 1075, 1076–77 (1911).

54. *See, e.g.*, State v. Ruof, 296 N.C. 623, 636, 252 S.E.2d 720, 728 (1979) (defining *premeditation* as "thought beforehand for some length of time, however short" and *deliberation* as "an intention to kill executed by one in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose and not under the influence of a violent passion suddenly aroused by some lawful or just cause or legal provocation").

55. State v. Holder, 331 N.C. 462, 474–75, 418 S.E.2d 197, 203–04 (1992).

56. State v. Johnson, 317 N.C. 193, 202–03, 344 S.E.2d 775, 781 (1986).

57. State v. Peacock, 313 N.C. 554, 560–62, 330 S.E.2d 190, 194–95 (1985) (felony murder based on burglary); State v. Simmons, 286 N.C. 681, 696, 213 S.E.2d 280, 290 (1975), *death sentence vacated*, 428 U.S. 903 (1976) (felony murder based on burglary and attempted robbery); State v. Brower, 289 N.C. 644, 658, 224 S.E.2d 551, 561 (1976) (felony murder based on robbery).

58. State v. White, 291 N.C. 118, 126, 229 S.E.2d 152, 157 (1976) (felony murder based on common-law arson).

59. State v. Johnson, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986).

60. 326 N.C. 368, 379–80, 390 S.E.2d 314, 322–23, *cert. den.*, __ U.S. __ (1990). *Accord* State v. Brown, 320 N.C. 179, 193, 358 S.E.2d 1, 13 (1987).

61. 330 N.C. 446, 412 S.E.2d 31 (1992).

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

63. *See* State v. Crawford, 329 N.C. 466, 479–482, 406 S.E.2d 579, 586–588 (1991) (although supreme court held that prosecution need not make separate showing of malice for murder by torture, supreme court accepted trial court's definition of *torture* as course of conduct by which defendant "intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion or sadistic pleasure"); State v. Phillips, 328 N.C. 1, 20–21, 399 S.E.2d 293, 303 (court gave general approval to instruction by trial judge, which required that torture be intentionally inflicted), *cert. den.*, __ U.S. __ (1991). *See also* NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES (hereinafter N.C.P.I.—CRIM.) § 206.12 at p. 2 (Jan. 1987) (for murder by poison, state must prove beyond reasonable doubt that "defendant intentionally caused a substance known to him to be poison to be placed into or to enter the body of the victim").

64. State v. Hinson, 85 N.C. App. 558, 566, 355 S.E.2d 232, 237, *rev. den.*, 320 N.C. 635, 360 S.E.2d 98 (1987).

65. State v. Gerald, 304 N.C. 511, 521, 284 S.E.2d 312, 318-19 (1981).

66. State v. Boone, 307 N.C. 198, 210, 297 S.E.2d 585, 592 (1982).

67. State v. Arnold, 264 N.C. 348, 349, 141 S.E.2d 473, 474–75 (1965).

68. State v. Simmons, 286 N.C. 681, 696, 213 S.E.2d 280, 290 (1975), *death sentence vacated*, 428 U.S. 903 (1976); State v. Bailey, 4 N.C. App. 407, 412, 167 S.E.2d 24, 27 (1969).

69. State v. Boone, 307 N.C. 198, 209–10, 297 S.E.2d 585, 592 (1982) (finding that defense could be raised against attempted rape even though it could not be used against crime of rape itself).

70. G.S. § 14-54(a); BENJAMIN B. SENDOR, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIMES (hereinafter "ELEMENTS OF CRIMES") 111–13 (3d ed. 1985).

71. State v. Respass, 27 N.C. App. 137, 141, 218 S.E.2d 227, 230 (1975).

72. ELEMENTS OF CRIMES, *supra* note 70, at 106–10.

73. State v. Peacock, 313 N.C. 554, 560, 330 S.E.2d 190, 194 (1985); State v. Simmons, 286 N.C. 681, 696, 213 S.E.2d 280, 290 (1975), *death sentence vacated*, 428 U.S. 903 (1976); State v. Feyd, 213 N.C. 617, 618–20, 197 S.E. 171, 173 (1938); State v. Allen, 186 N.C. 302, 309, 119 S.E. 504, 507 (1923).

74. State v. Williams, 284 N.C. 67, 72–73, 199 S.E.2d 409, 412 (1973).

75. State v. Gunn, 24 N.C. App. 561, 563, 211 S.E.2d 508, 510, *cert. den.*, 286 N.C. 724, 215 S.E.2d 724 (1975).

76. G.S. §§ 14-119, 14-120.

77. 10 N.C. App. 146, 147–48, 177 S.E.2d 742, 743 (1970).

78. State v. Wilson, 73 N.C. App. 398, 405, 326 S.E.2d 360, 365, *rev. den.*, 313 N.C. 514, 329 S.E.2d 400 (1985).

79. State v. Moore, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). *Accord* State v. Surrett, __ N.C. App. __, __ S.E.2d __ (March 16, 1993) (stating that kidnapping is a specific-intent crime).

80. ELEMENTS OF CRIMES, *supra* note 70, at 154–59.

81. State v. Evans, 10 N.C. App. 265, 267–68, 178 S.E.2d 83, 84–85 (1970).

82. *See infra* notes 87–88 and accompanying text.

83. State v. Conrad, 275 N.C. 342, 352, 168 S.E.2d 39, 46 (1969). *Accord* State v. Cannady, 18 N.C. App. 213, 215–16, 196 S.E.2d 617, 619 (1973) (using same definition of *malicious* for offense of malicious use of explosive).

84. State v. White, 291 N.C. 118, 126, 229 S.E.2d 152, 157 (1976).

85. ELEMENTS OF CRIMES, *supra* note 70, 161–66.

86. State v. Parker, 316 N.C. 295, 305–06, 341 S.E.2d 555, 561 (1986).

87. State v. Brower, 289 N.C. 644, 658, 224 S.E.2d 551, 561 (1976) (voluntary intoxication may be used as defense to underlying offense of robbery in felony murder case). *See also* State v. Attmore, 92 N.C. App. 385, 396, 374 S.E.2d 649, 656 (1988) (voluntary intoxication is relevant to charge of robbery with firearm), *rev. den.*, 324 N.C. 248, 377 S.E.2d 757 (1989).

88. State v. Hurst, 82 N.C. App. 1, 8, 346 S.E.2d 8, 12 (1986), *rev'd on other grounds*, 320 N.C. 589, 359 S.E.2d 776 (1987).

89. State v. White, 291 N.C. 118, 126, 229 S.E.2d 152, 157 (1976).

90. State v. Jones, 300 N.C. 363, 365, 266 S.E.2d 586, 587 (1980); *White*, 291 N.C. at 126, 229 S.E.2d at 157; State v. McLaughlin, 286 N.C. 597, 606, 213 S.E.2d 238, 244 (1975), *death sentence vacated*, 428 U.S. 903 (1976).

91. ELEMENTS OF CRIMES, *supra* note 70, at 41–42.

92. State v. Eason, 242 N.C. 59, 65, 86 S.E.2d 774, 778 (1955); State v. Coffey, 43 N.C. App. 541, 543–44, 259 S.E.2d 356, 357–58 (1979).

93. *Coffey*, 43 N.C. App. at 543–44, 259 S.E.2d at 357–58.

94. State v. Boone, 307 N.C. 198, 209–10, 297 S.E.2d 585, 592 (1982).

95. *Id.*

96. *Id.*; *see also* State v. Hairston, 222 N.C. 455, 462, 23 S.E.2d 885, 889 (1943) (reaching same result for rape before enactment of current G.S. § 14-27.2 on first-degree rape).

97. State v. Hedgepeth, 330 N.C. 38, 47–51, 409 S.E.2d 309, 314–17 (1991) (finding error in jury instruction that omitted word "intentionally" in discussing inference of malice from killing with a deadly weapon); State v. Reynolds, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (discussing the three forms of malice and the inference arising from the intentional use of a deadly weapon).

98. *See supra* notes 41–44, 91–93 and accompanying text.

99. *See, e.g.*, State v. Rose, 323 N.C. 455, 458, 373 S.E.2d 426, 429 (1988); State v. Ray, 299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980).

100. State v. Bunn, 283 N.C. 444, 459, 196 S.E.2d 777, 787 (1973); State v. Caudle, 58 N.C. App. 89, 94–95, 293 S.E.2d 205, 208 (1982), *cert. den.*, 308 N.C. 545, 304 S.E.2d 239 (1983); State v. Couch, 35 N.C. App. 202, 207, 241 S.E.2d 105, 108 (1978).

101. State v. Propst, 274 N.C. 62, 72–73, 161 S.E.2d 560, 568 (1968) (voluntary intoxication may be relevant to whether the defendant intentionally shot the victim); State v. Adams, 241 N.C. 559, 561–62, 85 S.E.2d 918, 920 (1955) (same).

102. 283 N.C. 444, 459, 196 S.E.2d 777, 787 (1973).

103. 331 N.C. 462, 418 S.E.2d 197 (1992).

104. *See generally* John Rubin, *The Diminished Capacity Defense*, ADMINISTRATION OF JUSTICE MEMORANDUM 92/01 (Institute of Government, 1992).

105. *Holder*, 331 N.C. at 487–88, 418 S.E.2d at 211.

106. State v. Wilkerson, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978).

107. State v. Ray, 299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980).

108. State v. Alston, 210 N.C. 258, 262, 186 S.E. 354, 356 (1936); State v. Murphy, 157 N.C. 485, 488, 72 S.E. 1075, 1077 (1911); State v. Caudle, 58 N.C. App. 89, 94–95, 293 S.E.2d 205, 208 (1982), *cert. den.*, 308 N.C. 545, 304 S.E.2d 239 (1983).

D. Evidentiary Issues

109. State v. Strickland, 321 N.C. 31, 37, 361 S.E.2d 882, 885 (1987); State v. Brower, 289 N.C. 644, 663, 224 S.E.2d 551, 564 (1976).

110. State v. Smith, 310 N.C. 108, 114, 310 S.E.2d 320, 324 (1984); *Brower*, 289 N.C. at 663, 224 S.E.2d at 564.

111. *See* State v. Cummings, 22 N.C. App. 452, 454, 206 S.E.2d 781, 782 (error to allow lay witness to give opinion about defendant's sobriety because witness did not have sufficient opportunity to observe defendant), *cert. den.*, 285 N.C. 760, 209 S.E.2d 284 (1974).

112. *See, e.g.*, State v. Shank, 322 N.C. 243, 247–48, 367 S.E.2d 639, 642 (1988) (finding that Rule 704 of current evidence rules changed former doctrine that excluded opinion testimony if it purported to resolve ultimate issue in case); State v. Johnson, 317 N.C. 343, 355–58, 346 S.E.2d 596, 603–05 (1986) (excluding expert opinion about defendant's ability to form specific intent to kill in voluntary intoxication case, but noting that under new evidence rules, which were not in effect at time of trial, testimony would have been admissible).

113. State v. Hedgepeth, 330 N.C. 38, 46–47, 409 S.E.2d 309, 314 (1991); State v. Mash, 328 N.C. 61, 65–66, 399 S.E.2d 307, 310–11 (1991).

114. *See, e.g.*, State v. Shank, 322 N.C. 243, 247–49, 367 S.E.2d 639, 642–43 (1988); State v. Weeks, 322 N.C. 152, 164–67, 367 S.E.2d 895, 902–04 (1988).

115. State v. Mash, 328 N.C. 61, 65–66, 399 S.E.2d 307, 310–11 (1991).

116. State v. Hedgepeth, 330 N.C. 38, 46–47, 409 S.E.2d 309, 314 (1991).

117. *See supra* note 104.

118. *See generally* State v. Smith, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985) ("expert may not testify that . . . particular legal conclusion or standard has or has not been met . . . at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness").

E. Burdens

119. 157 N.C. 485, 488, 72 S.E. 1075, 1076 (1911).

120. *Compare* State v. Propst, 274 N.C. 62, 72, 161 S.E.2d 560, 568 (1968) *with* State v. Medley, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978).

121. 323 N.C. 339, 372 S.E.2d 532 (1988).

122. 164 N.C. 411, 413–14, 79 S.E. 883, 884 (1913).

123. *Id.*; *accord* State v. Marsh, 234 N.C. 101, 104, 66 S.E.2d 684, 686 (1951) (placing burden of persuasion on defendant); State v. Creech, 229 N.C. 662, 673–74, 51 S.E.2d 348, 356–57

(1948) (same); State v. Absher, 226 N.C. 656, 660–61, 40 S.E.2d 26, 29 (1946) (same).

124. *Creech*, 229 N.C. at 681, 51 S.E.2d at 362 (Barnhill, J., dissenting).

125. 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

126. *Id.*; *see also In Re* Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (finding the requirement of proof beyond a reasonable doubt to be indispensable to due process in a criminal case).

127. *See* State v. Wilson, 280 N.C. 674, 681, 187 S.E.2d 22, 26 (1972) (approving jury instruction that placed burden of persuasion on prosecution; language of instruction was essentially the same as N.C.P.I.—CRIM. § 305.11, the current pattern jury instruction on voluntary intoxication).

128. *See* State v. Pinch, 306 N.C. 1, 10–11, 292 S.E.2d 203, 214 (finding no error in prosecutor's argument to jury that defendant had to be utterly incapable of forming criminal intent), *cert. den.*, 459 U.S. 1056 (1982); State v. Griffin, 288 N.C. 437, 444-46, 219 S.E.2d 48, 54-55 (1975) (upholding jury instruction requiring that defendant be utterly incapable of forming the required state of mind; decision issued shortly after *Mullaney*), *death sentence vacated*, 428 U.S. 904 (1976); State v. Simmons, 286 N.C. 681, 695–97, 213 S.E.2d 280, 290–91 (1975) (finding instruction too lenient because it did not place burden on defendant to prove intoxication to satisfaction of jury; decision issued shortly before *Mullaney*), *death sentence vacated*, 428 U.S. 903 (1976).

129. *Mash I*, 323 N.C. 339, 346–47, 372 S.E.2d 532, 537 (1988).

130. 276 N.C. 674, 678–79, 174 S.E.2d 385, 387–88 (1970), *death sentence vacated*, 408 U.S. 937 (1972).

131. *Id.*; *accord* State v. Lowery, 309 N.C. 763, 767, 309 S.E.2d 232, 236 (1983).

132. *Hamby*, 276 N.C. at 678, 174 S.E.2d at 388 (surveying cases and finding no reported case reversing a refusal to grant nonsuit in a voluntary intoxication case). Since the issuance of *Hamby*, there also have been no reported cases in favor of the defendant on nonsuit.

133. 328 N.C. 61, 399 S.E.2d 307 (1991).

134. In *State v. Cummings*, a decision issued the same day as *Mash I*, the court used both the "substantial evidence" and "utterly incapable" standards on the defendant's nonsuit motion. 323 N.C. 181, 188–90, 372 S.E.2d 541, 546–48, *death sentence vacated*, 494 U.S. 1021 (1990). Thus, the court first said that the defendant would be entitled to nonsuit if substantial evidence did not support each element of the offense, including the requisite criminal intent; the court then said that nonsuit would be inappropriate unless the defendant was utterly incapable of forming that intent. In *Mash II*, the court appears to have resolved this tension by retaining the "substantial evidence" standard and eliminating the "utterly incapable" language.

135. *See, e.g.*, State v. Propst, 274 N.C. 62, 72–73, 161 S.E.2d 560, 568 (1968) (even though court recognized that the evidence of intoxication did not support a finding that defendant was so drunk that he was utterly unable to form the state of mind required for conviction, court held that the evidence was competent for consideration by the jury in deciding whether the prosecution had met its burden of proving the mental elements of the offense; trial court therefore erred in failing to submit appropriate instructions).

136. *See, e.g.*, State v. Medley, 295 N.C. 75, 79–80, 243 S.E.2d 374, 376 (1978) (expressly using "utterly incapable" standard); State v. McLaughlin, 286 N.C. 597, 606–07, 213 S.E.2d 238, 244 (1975) (using similar standard), *death sentence vacated*, 428 U.S. 903 (1976).

137. *See Mash I*, 323 N.C. 339, 343–47, 372 S.E.2d 532, 535–37 (1988).

138. State v. Clark, 324 N.C. 146, 161–62, 377 S.E.2d 54, 63–64 (1989).

139. *See* State v. McQueen, 324 N.C. 118, 141, 377 S.E.2d 38, 51 (1989) (contrasting burden of production and burden of persuasion for voluntary intoxication defense).

140. *See* State v. Clark, 324 N.C. 146, 161–62, 377 S.E.2d 54, 63–64 (1989) (contrasting burden of production for voluntary intoxication instruction with general burden of production for instruction on lesser-included offense).

141. State v. Peacock, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1981), *quoting* State v. Wright, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981).

142. *See, e.g.*, State v. Peacock, 313 N.C. 554, 561–62, 330 S.E.2d 190, 195 (1981) (since rational trier of fact could find that drugged and intoxicated defendant did not form intent to commit larceny necessary for burglary, trial court erred in failing to instruct on lesser offense of misdemeanor breaking or entering).

143. *See, e.g.*, State v. Phipps, 331 N.C. 427, 457–59, 418 S.E.2d 178, 194–95 (1992) (although defendant did not meet burden of production to obtain instruction on voluntary intoxication, trial court erred in refusing to give instruction on second-degree murder based on other evidence).

144. *Mash I*, 323 N.C. 339, 346–48, 372 S.E.2d 532, 536–37 (1988).

145. *Id.*; *see also* State v. Smith, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (giving basic definition of *substantial evidence*).

146. *Mash I*, 323 N.C. at 346, 372 S.E.2d at 536; State v. Jones, 299 N.C. 103, 107, 261 S.E.2d 1, 5 (1980).

147. 1 ROBINSON, *supra* note 27, at 22–26, 130–36. *See also* Staples Hughes, Negation of Intent Elements of Criminal Charges by Evidence of Voluntary Intoxication and Mental Disorder at 4–6, *in* NORTH CAROLINA ACADEMY OF TRIAL LAWYERS, 27TH ANNUAL CONVENTION (June 1991) (questioning constitutionality of North Carolina's burden of production for voluntary intoxication defense).

148. *See* Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (stating in dictum that lower court could not have precluded jury from considering evidence relevant to elements of offense in deciding whether state had proved those elements beyond reasonable doubt); State v. Reeb, 331 N.C. 159, 174, 415 S.E.2d 362, 370 (1992) (suggesting that jury could consider evidence of intoxication in deciding whether defendant formed state of mind required for conviction even though evidence did not warrant instruction on intoxication); 1 ROBINSON, *supra* note 27, at 23–24, 131–32 (asserting that when prosecution must establish certain facts for conviction, judge cannot foreclose jury from considering admissible evidence on the point, no matter how weak; author gives as example that defendant would be entitled to have jury consider any evidence of alibi defense in deciding whether defendant committed the acts required for conviction).

149. State v. Phipps, 331 N.C. 427, 445–57, 418 S.E.2d 178, 193–94 (1992).

150. The supreme court did find that the trial court erred in failing to submit instructions on the lesser-included offense of second-degree murder. But, the supreme court's decision did not concern the evidence necessary to warrant a lesser-included of-

fense instruction based on the voluntary intoxication defense; rather, the court simply found sufficient evidence apart from evidence of intoxication to warrant such an instruction. *Id.* at 457–59, 418 S.E.2d at 194–95.

151. *Mash II*, 328 N.C. 61, 66–67, 399 S.E.2d 307, 311 (1991) (defendant not staggering or slurring speech and able to negotiate steep "S" curves in car; defendant also had motive for attacking victim, beat victim after he was helpless, and lied to arresting officers); State v. Cummings, 323 N.C. 181, 190, 372 S.E.2d 541, 548 (1988) (defendant coolly and coherently planned murder, removed incriminating evidence, and made intimidating statements to coerce witness's silence), *death sentence vacated*, 494 U.S. 1021 (1990); State v. Locklear, 322 N.C. 349, 358–59, 368 S.E.2d 377, 383 (1988) (defendant walked and talked normally and repeatedly vowed to kill victim); State v. Lowery, 309 N.C. 763, 767–69, 309 S.E.2d 232, 237–38 (1983) (defendant able to engage in basketball game and other activities before shooting, smuggled gun into nightclub despite presence of metal detector, and shot victim without any apparent provocation); State v. Mitchell, 288 N.C. 360, 365–66, 218 S.E.2d 332, 336–37 (1975) (conduct of defendants before and after killing supported inference of premeditation and deliberation); State v. Duncan, 282 N.C. 412, 418–20, 193 S.E.2d 65, 69–70 (1972) (defendant shot victim once, chased victim and shot her a second time, and then ran from scene; after shooting, defendant could talk clearly, walk without help, and understand what was said to him); State v. Hamby, 276 N.C. 674, 679–80, 174 S.E.2d 385, 388–89 (1970) (defendants went to victim's house to obtain money, forcibly removed victim from bed and looted house, attempted to burn house to conceal crime, and drove treacherous mountain roads without mishap), *death sentence vacated*, 408 U.S. 937 (1972).

152. *See, e.g.*, *Mash II*, 328 N.C. at 66-67, 399 S.E.2d at 311 (evidence sufficient to support jury instruction in *Mash I* found insufficient to warrant nonsuit); State v. Propst, 274 N.C. 62, 72–73, 161 S.E.2d 560, 568 (1968) (evidence sufficient to support jury instruction, although apparently insufficient to warrant nonsuit).

153. *See Mash I*, 323 N.C. 339, 347–49, 372 S.E.2d 532, 537–38 (1988) (error not to give instruction for premeditated and deliberate murder); State v. Peacock, 313 N.C. 554, 559–60, 330 S.E.2d 190, 193–94 (1985) (error not to give instruction for burglary, which was predicate for felony murder); *Propst*, 274 N.C. at 72, 161 S.E.2d at 568 (error not to give instruction for premeditated and deliberate murder); State v. McManus, 217 N.C. 445, 445–46, 8 S.E.2d 251, 251–52 (1940) (same); State v. Evans 10 N.C. App. 265, 266–68, 178 S.E.2d 83, 83–85 (1970) (error not to give instruction for larceny).

154. *See* State v. Corley, 310 N.C. 40, 54, 311 S.E.2d 540, 548 (1984) (trial court properly refused insanity instruction, but supreme court said that evidence warranted instruction given by trial court on voluntary intoxication); State v. Mitchell, 288 N.C. 360, 367–68, 218 S.E.2d 332, 337–38 (1975) (trial court properly submitted to jury question of effect of defendant's intoxication on mental elements of offense), *death sentence vacated*, 428 U.S. 904 (1976); State v. Duncan, 282 N.C. 412, 418–20, 193 S.E.2d 65, 69–70 (1972) (same).

155. *See supra* note 148 and accompanying text.

156. *Mash I*, 323 N.C. at 348–49, 372 S.E.2d at 538 (periodic consumption of alcohol over seven-hour period, including mixture of 190-proof grain alcohol and punch); State v. Peacock, 313 N.C. 554, 559–60, 330 S.E.2d 190, 193–94 (1985) (LSD and alcohol); State v. Corley, 310 N.C. 40, 44–45, 54, 311 S.E.2d 540, 548 (1984) (LSD); State v. Mitchell, 288 N.C. 360, 363, 367–68, 218 S.E.2d 332, 335, 337–38 (1975) (combination of alcohol, marijuana, THC, and cocaine), *death sentence vacated*, 428 U.S. 904 (1976); *Propst*, 274 N.C. at 72, 161 S.E.2d at 568 (almost a fifth of whiskey); *McManus*, 217 N.C. at 446, 8 S.E.2d at 251–52 (defendant and victim shared half-gallon of whiskey); *Evans*, 10 N.C. App. at 266–68, 178 S.E.2d at 83–85 (1970) (defendant had been drinking heavily, then drank six to eight more beers and bought a six-pack to go).

157. State v. Baldwin, 330 N.C. 446, 463, 412 S.E.2d 31, 41 (1992) (defendant drank five or six beers, but could not specify how much marijuana and cocaine he may have consumed some time earlier in day before killing); State v. Brogden, 329 N.C. 534, 548 & n.1, 407 S.E.2d 158, 167 & n.1 (1991) (defendant typically had three or four mixed drinks a day, did same early in morning on day of shooting, and consumed two and one-half cans of beer in afternoon before killing; defendant presented no evidence until sentencing that drinks had any effect on him); State v. Strickland, 321 N.C. 31, 41–42, 361 S.E.2d 882, 888 (1987) (defendant consumed two drinks).

158. *Baldwin*, 330 N.C. at 463, 412 S.E.2d at 41 (defendant drank five or six beers, but could not specify how much marijuana and cocaine he may have consumed some time earlier in day before killing); State v. Wynne, 329 N.C. 507, 517, 406 S.E.2d 812, 817 (1991) (no definitive evidence offered regarding amount of alcohol defendant consumed, and defendant conceded that evidence of intoxication was not overwhelming); State v. Laws, 325 N.C. 81, 98, 381 S.E.2d 609, 619 (1989) (unspecified amount of beer over several hours), *death sentence vacated*, 494 U.S. 1022 (1990); State v. Robbins, 319 N.C. 465, 508–09, 356 S.E.2d 279, 304–05 (1987) (insufficient evidence offered of amount of alcohol consumed by defendant); State v. Johnson, 317 N.C. 343, 384, 346 S.E.2d 596, 619 (1986) (although defendant apparently had PCP in his possession, there was no evidence that defendant actually consumed it); State v. Brower, 289 N.C. 644, 658, 224 S.E.2d 551, 561 (1976) (no evidence of nature or quantity of drugs ingested).

159. *Mash I*, 323 N.C. at 346, 372 S.E.2d at 536.

160. *Id.* at 348, 372 S.E.2d at 537; State v. Medley, 295 N.C. 75, 80–81, 243 S.E.2d 374, 377–78 (1978).

161. *Mash I*, 323 N.C. at 348–49, 372 S.E.2d at 538 (witnesses described defendant as drunk and high); State v. Duncan, 282 N.C. 412, 418–20, 193 S.E.2d 65, 69–70 (1972) (witness testified that defendant was drunk).

162. State v. Peacock, 313 N.C. 554, 559–60, 330 S.E.2d 190, 193–94 (1985) (defendant gave statement to police that he was hallucinating from LSD and large quantities of alcohol).

163. State v. Phipps, 331 N.C. 427, 456, 418 S.E.2d 178, 193–94 (1992) (defendant claimed he was "pretty buzzed" on beer and marijuana, but only other evidence of intoxication was store clerk's testimony that defendant had purchased six-pack of beer); State v. Fowler, 285 N.C. 90, 102, 203 S.E.2d 803, 811 (1974) (no evidence that defendant was intoxicated except defendant's exculpatory statement), *death sentence vacated*, 428 U.S. 904 (1976); State v. Cureton, 218 N.C. 491, 495–96, 11 S.E.2d 469, 471 (1940) (defendant testified he was "pretty full" at time of offense, but other evidence and defendant's own assertions contradicted claim).

164. State v. Baldwin, 330 N.C. 446, 463, 412 S.E.2d 31, 41 (1992) (defendant said he wasn't high at time of killing); State v. Wynne, 329 N.C. 507, 517, 406 S.E.2d 812, 817 (1991) (defendant conceded evidence of his intoxication was not overwhelming); State v. Gerald, 304 N.C. 511, 521–22, 284 S.E.2d 312, 318–19

(1981) (although defendant had been drinking, witnesses said he was not drunk); State v. Goodman, 298 N.C. 1, 14, 257 S.E.2d 569, 579 (1979) (witness testified that defendant was "not in a drunken condition"); State v. Medley, 295 N.C. 75, 80–81, 243 S.E.2d 374, 377–78 (although defendant had consumed a few drinks and was above the legal limit for purposes of DWI law, he said he was not drunk); State v. Brower, 289 N.C. 644, 658, 224 S.E.2d 551, 561 (1976) (defendant said he "wasn't high to extent he didn't know what was going on"); State v. McLaughlin, 286 N.C. 597, 607–09, 213 S.E.2d 238, 244–46 (1975) (although defendant had been drinking, witnesses said he was not drunk), *death sentence vacated*, 428 U.S. 903 (1976); State v. Fowler, 285 N.C. 90, 102, 203 S.E.2d 803, 811 (1974) (witnesses testified that defendant was not drunk), *death sentence vacated*, 428 U.S. 904 (1976).

165. *Mash I*, 323 N.C. at 348–49, 372 S.E.2d at 538 (defendant was wild and out of control, swerved while driving, and committed unprovoked and inexplicable assaults on girlfriend and strangers); State v. Evans, 10 N.C. App. 265, 266–68, 178 S.E.2d 83, 83–85 (1970) (defendant collided with another driver and later that day drove car off embankment, wrecking it).

166. State v. Brogden, 329 N.C. 534, 548, 407 S.E.2d 158, 167 (1991) (defendant able to drive car, fire weapon, hit victim with all three shots, and flee); State v. Robbins, 319 N.C. 465, 508–09, 356 S.E.2d 279, 304–05 (defendant appeared to be in control and coherent); State v. Goodman, 298 N.C. 1, 12–14, 257 S.E.2d 569, 578–79 (1979) (defendant was capable of driving, giving directions, leading search throughout neighborhood, and participating in scheme to dispose of victim's body); State v. Cureton, 218 N.C. 491, 495–96, 11 S.E.2d 469, 471 (1940) (record devoid of evidence that defendant's mental processes were deranged; on the contrary, defendant claimed he had capacity to and did reason with victim, who was disorderly, and attempted to take pistol away from victim).

167. *Brogden*, 329 N.C. at 548, 407 S.E.2d at 167 (defendant fled scene after shooting, suggesting that he recognized the gravity of his actions).

168. State v. Peacock, 313 N.C. 554, 559–60, 330 S.E.2d 190, 193–94 (1985) (evidence suggested that defendant went to landlord's apartment to talk about back rent, not to rob her); State v. Propst, 274 N.C. 62, 72, 161 S.E.2d 560, 568 (1968) (defendant killed victim while victim was striking him); State v. Evans, 10 N.C. App. 265, 266–68, 178 S.E.2d 83, 83–85 (1970) (in larceny case, jury could find that defendant took fellow employee's car with intent to get beer and drive home, not with intent to deprive employee of car permanently).

169. State v. Locklear, 322 N.C. 349, 354, 368 S.E.2d 377, 381 (1988); State v. Lowery, 309 N.C. 763, 765, 309 S.E.2d 232, 235 (1983).

170. *See* State v. McQueen, 324 N.C. 118, 377 S.E.2d 38 (1989), discussed *infra* notes 178–83.

171. State v. Clark, 324 N.C. 146, 157–64, 377 S.E.2d 54, 61–65 (1989) [comparing evidence in case before it, which did not warrant instruction, with evidence in State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988), which warranted instruction].

172. State v. Mitchell, 288 N.C. 360, 363, 367–68, 218 S.E.2d 332, 335, 337–38 (1975) (defendant claimed not to remember killing victim), *death sentence vacated*, 428 U.S. 904 (1976); State v. McManus, 217 N.C. 445, 446, 8 S.E.2d 251, 251–52 (1940) (defendant and victim shared a half-gallon of whiskey, and defendant had no memory of killing victim); State v. Evans, 10 N.C. App. 265, 266–68, 178 S.E.2d 83, 83–85 (1970) (defendant had no memory from time he purchased beer until time he woke up in hospital four days later).

173. State v. Laws, 325 N.C. 81, 98, 381 S.E.2d 609, 619 (1989) (only evidence was that defendant drank unknown quantity of beer over period of several hours and claimed not to remember killings), *death sentence vacated*, 494 U.S. 1022 (1990).

174. State v. Wynne, 329 N.C. 507, 517, 406 S.E.2d 812, 817 (1991) (defendant able to give detailed account of crime days afterward); State v. Fowler, 285 N.C. 90, 102, 203 S.E.2d 803, 811 (1974) (defendant able to recite his activities in minute detail), *death sentence vacated*, 428 U.S. 904 (1976); State v. Cureton, 218 N.C. 491, 495–96, 11 S.E.2d 469, 471 (1940) (defendant claimed to "know all about what took place").

175. State v. Corley, 310 N.C. 40, 54, 311 S.E.2d 540, 548 (1984) (expert testimony about mental disorders); State v. Propst, 274 N.C. 62, 72, 161 S.E.2d 560, 568 (1968) (expert testimony about mental status and nervous condition).

176. State v. Locklear, 322 N.C. 349, 354, 368 S.E.2d 377, 381 (1988) (history of alcohol abuse considered by expert in opinion regarding likely effect of intoxicants; nonsuit properly denied, but trial court apparently granted intoxication instructions). *See also* State v McQueen, 324 N.C. 118, 144–45, 377 S.E.2d 38, 53 (1989) (Exum, C.J., dissenting) (dissent notes that expert testimony about defendant's ability to form necessary intent was based, in part, on defendant's alcoholism and psychological problems relating to alcoholism).

177. State v. Brogden, 329 N.C. 534, 548 & n.1, 407 S.E.2d 158, 167 & n.1 (1991) (defendant typically had at least three or four mixed drinks a day and presented no evidence until sentencing that his drinking on day of offense had any effect on him). *See also Mash II*, 328 N.C. 61, 67, 399 S.E.2d 307, 311 (1991) (nonsuit properly denied based, in part, on testimony of defendant's expert that defendant could have built up tolerance to alcohol through long-term abuse).

178. State v. Reeb, 331 N.C. 159, 173–74, 415 S.E.2d 362, 370 (1992); State v. Vaughn, 324 N.C. 301, 306–09, 377 S.E.2d 738, 741–42 (1989); State v. McQueen, 324 N.C. 118, 139–43, 377 S.E.2d 38, 50–52 (1989).

179. 324 N.C. 118, 377 S.E.2d 38 (1989).

180. *Id.* at 142, 377 S.E.2d at 52.

181. *Id.* at 140, 377 S.E.2d at 51.

182. *Id.* at 143–44, 377 S.E.2d at 53 (Exum, C.J., dissenting).

183. *Id.* at 145, 377 S.E.2d at 53 (Exum, C.J., dissenting).

184. *See, e.g.*, State v. Vaughn, 324 N.C. 301, 303–05, 308–09, 377 S.E.2d 738, 739–42 (1989). In *Vaughn*, witnesses testified that the defendant was drunk, was not walking very well, and had trouble getting to the door, factors which the court has found to support instructions in the past. *See supra* notes 159–66 and accompanying text. The court found no evidence, however, that the defendant's behavior was inappropriate, irrational, or reflected a lack of awareness by the defendant of what was going on around him. The court found on that basis alone that the defendant was not entitled to an instruction on voluntary intoxication, an approach that appears to depart from the court's multifaceted analysis of previous cases and appears to be more in keeping with its approach to nonsuit motions. *See supra* note 151 and accompanying text.

F. Jury Instructions

185. *See, e.g.*, State v. Absher, 226 N.C. 656, 660–61, 40 S.E.2d 26, 29 (1946) (finding error in instruction but on other

grounds); State v. Hammonds, 216 N.C. 67, 77–78, 3 S.E.2d 439, 446–47 (1939) (giving general approval of instruction).

186. 249 N.C. 282, 285, 106 S.E.2d 206, 208 (1958).

187. *Mash I*, 323 N.C. 318, 343–47, 372 S.E.2d 532, 535–37 (1988).

188. *Id.* (disapproving instruction requiring defendant to prove that his "mental processes were so overcome by the excessive use of liquor . . . that he had temporarily, at least, lost the capacity to think and plan"). *See also* State v. Vaughn, 324 N.C. 301, 306–08, 377 S.E.2d 738, 741 (1989) (relying on *Mash I*, court disapproved instruction requiring defendant to prove that he was "not able by reason of drunkenness to think out beforehand what he intended to do, and to weigh it and understand the nature and consequences of his act").

189. *See* State v. Pinch, 306 N.C. 1, 10–11, 292 S.E.2d 203, 214 (1982) (in decision issued before *Mash I*, court found no error in prosecutor's argument to jury that defendant had to be utterly incapable of forming criminal intent), *cert. den.*, 459 U.S. 1056 (1982).

190. *See supra* note 178 and accompanying text.

191. State v. Reeb, 331 N.C. 159, 174, 415 S.E.2d 362, 370 (1992); State v. McQueen, 324 N.C. 118, 142–43, 377 S.E.2d 38, 52 (1989). *Compare* State v. Arnold, 329 N.C. 128, 138–42, 404 S.E.2d 822, 828–30 (1991), *aff'g*, 98 N.C. App. 518, 527–33, 392 S.E.2d 140, 147–50 (1990) (in another context, the court found prejudice in the submission of second-degree murder instructions that were not warranted by the evidence; the state had argued that the instructions were warranted by intoxication evidence tending to negate the state of mind for first-degree murder).

192. 323 N.C. at 344, 372 S.E.2d at 535, *citing with approval* State v. Wilson, 280 N.C. 674, 681, 187 S.E.2d 22, 26 (1972).

193. N.C.P.I.—CRIM. § 305.11 (March 1989).

194. *See* State v. Rose, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988) (when instruction is requested by a party and is supported by the evidence, "it is error for the trial court not to instruct in substantial conformity with the requested instruction").

195. 331 N.C. 462, 473–75, 418 S.E.2d 197, 203–04 (1992).

196. N.C.P.I.—CRIM. § 305.10 (April 1986).

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