

## AGGRAVATING – MITIGATING

### **Evidence Insufficient to Establish Aggravating Factor In Sexual Assault Case Involving 13-Year-Old Victim**

*State v. Blakeman*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Feb. 2, 2010).

In a sexual assault case involving a 13-year-old victim, the evidence was insufficient to establish aggravating factor G.S. 15A-1340.16(d)(15) (took advantage of a position of trust or confidence, including a domestic relationship). The defendant was the stepfather of the victim's friend. The victim required parental permission to spend the night with her friend, and had done so not more than ten times. There was no evidence that the victim's mother had arranged for the defendant to care for the victim on a regular basis, or that the defendant had any role in the victim's life other than being her friend's stepfather. There was no evidence suggesting that the victim, who lived nearby, would have relied on the defendant for help in an emergency, rather than going home. There was no evidence of a familial relationship between the victim and the defendant, that they had a close personal relationship, or that the victim relied on the defendant for any physical or emotional care. The evidence showed only that the victim "trusted" the defendant in the same way she might "trust" any adult parent of a friend.

### **Trial Court Abused Discretion in Finding Extraordinary Mitigating Factors in Sentencing Defendant**

*State v. Riley*, \_\_ N.C. App. \_\_, 688 S.E.2d 477 (2 February 2010).

The defendant was convicted of first-degree burglary and another offense. The trial court found two factors in extraordinary mitigation, which were statutory mitigating factors: (1) the defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense [G.S. 15A-1340.16(e)(3)]; and (2) the defendant aided in the apprehension of another felon [G.S. 15A-1340.16(e)(7)]. The trial court sentenced the defendant to special probation, as permitted under G.S. 15A-1340.13(g) (dispositional deviation for extraordinary mitigation), instead of an active sentence that was otherwise required for firstdegree burglary. The state appealed the finding of extraordinary mitigation and the sentence imposed. Relying on *State v. Melvin*, 188 N.C. App. 827 (2008), the court ruled that the trial court abused its discretion in finding the two factors in extraordinary mitigation. The statutory mitigating factors are not by themselves sufficient to support a finding of extraordinary mitigation. There must additional facts over and above the facts required to support a statutory mitigating factor.

### **Court Rules That Defense Counsel at Death Penalty Hearing: (1) Provided Ineffective Assistance Under Sixth Amendment in Failing to Properly Investigate Defendant's Background for Mitigation Evidence; and (2) Ineffectiveness Prejudiced Defendant**

*Porter v. McCollum*, 130 S. Ct. 447, \_\_ L. Ed. 2d \_\_ (30 November 2009).

The defendant was convicted of two murders in state court and sentenced to death for one of them. The Court ruled that defense counsel at the death penalty hearing: (1) provided ineffective assistance under the Sixth Amendment in failing to properly investigate the defendant's background for mitigation evidence; and (2) the ineffectiveness prejudiced the defendant (thus, he would be entitled to a new death penalty hearing). The state appellate court's rejection of the prejudice issue was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). (See the Court's opinion for its analysis of the facts and law.)

### **Trial Court Did Not Abuse Its Discretion in Allowing Jury to Consider Existence of Aggravating Factors During Guilt-Innocence Stage of Non-Capital Trial**

*State v. Anderson*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (6 October 2009).

The defendant was convicted of second-degree murder and felonious child abuse inflicting serious bodily injury. The first-degree murder indictment alleged as aggravating factors that the offense was especially heinous, atrocious, and cruel, and the victim was very young. The felonious child abuse indictment alleged that the offense was especially heinous, atrocious, and cruel. After the state rested, the defendant did not offer any evidence. The trial court asked defense counsel whether she had any additional evidence to offer concerning aggravating factors, and counsel said no. Based on these facts, the court ruled that the trial court did not abuse its discretion in allowing the jury to consider the existence of aggravating factors during the guilt-innocence stage of the trial, which is authorized under G.S. 15A-1340.16(a1).

### **Sufficient Evidence in Adult Sentencing Hearing Before Jury to Prove Aggravating Factor (Juvenile Had Been Adjudicated Delinquent for Offense That Would Be Class B2 Felony If It Had Been Committed by Adult) When State Introduced Transcript of Admission by Juvenile**

*State v. Rivens*, \_\_\_ N.C. App. \_\_\_, 679 S.E.2d 145 (7 July 2009).

The defendant was convicted of possession of cocaine with the intent to sell or deliver. During the sentencing hearing before the jury, the state offered proof of an aggravating factor (juvenile had been adjudicated delinquent for offense that would be Class B2 felony if it had been committed by adult) by introducing the transcript of admission by juvenile. The court ruled, adopting the reasoning in *State v. Hatcher*, 136 N.C. App. 524 (2000), concerning proof of a conviction for sentencing purposes, that the state's evidence was sufficient to prove the aggravating factor.

### **Although Trial Judge Has Authority in Pretrial Hearing to Determine Existence of Aggravating Circumstances and to Declare Case To Be Noncapital Based on Lack of Evidence of Aggravating Circumstances, Trial Judge Lacks Authority to Declare Case To Be Noncapital Based on Insufficient Evidence of First-Degree Murder**

*State v. Seward*, 362 N.C. 210, 657 S.E.2d 356 (7 March 2008).

The court ruled that although a trial judge has the authority in a pretrial hearing to determine the existence of aggravating circumstances and to declare a case to be noncapital based on a lack of evidence of aggravating circumstances, the trial

judge lacks authority to declare a case to be noncapital based on insufficient evidence of first-degree murder.

**During Sentencing Hearing Before Jury on Existence of Aggravating Factor in Non-Capital Case, Prosecutor's Jury Argument Reviewing Sentencing Grid Was Improper Because It Was Irrelevant to Finding of Aggravating Factor**

*State v. Lopez, 188 N.C. App. 553, 655 S.E.2d 895 (5 February 2008).*

(Note: The North Carolina Supreme Court has granted the state's petition to review this ruling.) The defendant was convicted of several offenses arising from a vehicle crash that resulted in the death of one person and injuries to another. During the sentencing hearing before the jury on the existence of an aggravating factor, the prosecutor in jury argument reviewed the sentencing grid and explained the effect of a finding of an aggravating factor on the defendant's sentence and also explained the doctrine of merger of the convictions of involuntary manslaughter and felony death by vehicle. The court ruled that the jury argument was improper because it was irrelevant to the finding of the aggravating factor.

**(2) Trial Judge Did Not Err in Using Fact That Defendant Was on Probation and Pretrial Release When He Committed Offenses To Increase Both His Prior Record Level and To Aggravate His Sentence**

*State v. Moore, 188 N.C. App. 593, 656 S.E.2d 287 (5 February 2008).*

The court ruled: (2) the trial judge did not err in using the fact that the defendant was on probation and pretrial release when he committed the offenses to increase both his prior record level and to aggravate his sentence.

**Aggravating Factor (Taking Property of Great Monetary Value) Was Property Found for Class C Felony Embezzlement**

*State v. Cobb, 187 N.C. App. 295, 652 S.E.2d 699 (20 November 2007).*

The court ruled, relying on *State v. Simmons*, 65 N.C. App. 804 (1984), and other cases, that the aggravating factor of taking property of great monetary value [G.S. 15A-1340.16(d)(14)], was properly found for two counts of Class C felony embezzlement, which requires proof of loss of \$100,000 or more. One count involved a loss of \$404,436.00 and the other count a loss of \$296,901.00.

**(4) Trial Judge Did Not Err in Submitting Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant History of Prior Criminal Activity)**

*State v. Cummings, 361 N.C. 438, 648 S.E.2d 788 (24 August 2007).*

The defendant was convicted of first-degree murder and sentenced to death. (4) The court ruled that the trial judge did not err in submitting mitigating circumstance G.S. 15A-2000(f)(1) (no significant history of prior criminal activity). A rational juror could conclude that the defendant's underage alcohol and illegal drug use were minor offenses and thus insignificant. Likewise, the robbery of another person about a month before the murder could be considered to be insignificant because it was so close in time to the murder and an aberration in an otherwise insignificant criminal background.

**(2) Court Rules Trial Judge's Finding of Aggravating Factor in Violation of Blakely v. Washington Was Harmless Error Beyond Reasonable Doubt**

**(3) Trial Judge's Finding of Aggravating Factor Did Not Violate Constitution of North Carolina**

*State v. Blackwell, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006).*

The defendant was convicted of second-degree murder and other offenses when he drove his vehicle while impaired and crashed into another vehicle, killing one of the occupants. In a sentencing hearing held before the ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), the trial judge found the statutory aggravating factor that the defendant was on pretrial release for another charge and imposed a sentence in the aggravated range for the second-degree murder conviction and two other felony convictions. (2) The court reviewed the state's evidence at trial, the defendant's failure to object to the prosecutor's statement at sentencing about the defendant being on pretrial release, and the defendant's failure at sentencing to present any arguments or evidence contesting the aggravating factor. It then ruled that the trial judge's finding of aggravating factor in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), was harmless error beyond reasonable doubt. (3) The court ruled that the trial judge's finding of the aggravating factor did not violate Article I, Section 24 of the Constitution of North Carolina. See also *State v. Speight*, 361 N.C. 106, 637 S.E.2d 539 (15 December 2006) (court set aside North Carolina Court of Appeals ruling that sentence was erroneously imposed under *Blakely* and remanded case to that court for harmless error analysis not inconsistent with ruling in *State v. Blackwell*, discussed above).

**(1) Doctrine of Invited Error Applies When Trial Judge in Capital Sentencing Hearing Erroneously Submits Mitigating Factor G.S. 15A-2000(f)(1) (No Significant Prior Criminal History) at Defendant's Request**

**(2) Trial Judge's Failure to Submit Aggravating Factor in Capital Sentencing Hearing Is Not Structural Error**

*State v. Polke, 361 N.C. 65, 638 S.E.2d 189 (15 December 2006).*

The defendant was convicted of first-degree murder and sentenced to death. (1) The defendant at the capital sentencing hearing requested that the trial judge submit mitigating factor G.S. 15A-2000(f)(1) (no significant prior criminal history), and the judge did so. The defendant on appeal argued that the trial judge erroneously submitted this mitigating factor. The court ruled that the doctrine of invited error applies when a trial judge in a capital sentencing hearing erroneously submits this mitigating factor at the defendant's request, and thus the defendant cannot be prejudiced by an error resulting from his own conduct. [Author's note: The court noted, on the other hand, its recent ruling in *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309 (2006), that the doctrine of invited error does not apply when mitigating factor G.S. 15A-2000(f)(1) is withheld at the defendant's request.] (2) The court ruled that a trial judge's failure to submit an aggravating factor in a capital sentencing hearing is not structural error and thus not subject to structured error analysis.

### **Homicide -- First-Degree Murder - Mitigating Circumstance**

*State v. Coffey*, 336 N.C. 412 (1994)

No significant history of prior criminal activity, activity subsequent to murder but before sentencing not relevant.

### **Indecent Liberties -- Minor Victim's Age as Aggravating Factor**

*State v. Farlow*, 336 N.C. 534 (1994)

The Court of Appeals erred in holding that, because evidence of the victim's age was necessary to establish the offense of taking indecent liberties, such evidence should not have been used as proof of an aggravating factor. Where age is an element of the offense, if the evidence, by its greater weight, shows that the age of the victim caused the victim to be more vulnerable to the crime than he otherwise would have been, the trial court can properly find the statutory aggravating factor based on age. The victim in the present case was eleven years old, so that age alone could not be used to aggravate the sentence for taking indecent liberties with children. However, the trial court did not find the statutory aggravating factor, but the non-statutory factor that "his actions at the age of the victim in this offense made that victim particularly vulnerable to the offense committed" and added language which made it clear that the basis for the factor was increased vulnerability of the victim arising from defendant's bestowing gifts on him. This factor was supported by the evidence and related to the purposes of sentencing.

### **Aggravating Factors -- First Degree Burglary -- Possession of Weapon -- Not Used For Entry**

*State v. Oliver*, 334 N.C. 513 (1993) 434 S.E.2d 202 Page 516

The trial court did not err when sentencing defendant for first-degree burglary by using the fact that defendant was armed with a deadly weapon at the time of the breaking and entering to aggravate the sentence.

### **Burglary -- Aggravating Factor -- Armed with Deadly Weapon**

#### **Attempted Arson -- Aggravating Factor -- Commission to Cover up Murder -- Sufficiency of Evidence**

*State v. Barnes, 333 N.C. 666 (1993) 430 S.E.2d 223 Page 671*

The evidence was sufficient to support the trial court's finding as a non-statutory aggravating factor for attempted arson that such crime was committed to cover up a murder where the evidence tended to show that a house was burglarized, an occupant

#### **Kidnapping and Burglary -- Sentencing -- Aggravating Factors -- Use of Deadly Weapon to Support Two Factors**

*State v. Kyle, 333 N.C. 687 (1993) 430 S.E.2d 412 Page 690*

The trial court erred when sentencing defendant for kidnapping and burglary by finding as aggravating factors that defendant was armed with a deadly weapon and that he used a deadly weapon to commit the offenses.

#### **Assault -- Non-Statutory Aggravating Factor -- Elimination of Witness**

*State v. Jefferies, 333 N.C. 501 (1993) 428 S.E.2d 150 Page 504*

#### **Resentencing -- Fewer Charges -- Same Sentence Erroneous**

*State v. Hemby, 333 N.C. 331 (1993) 426 S.E.2d 77 Page 331*

#### **Homicide -- First Degree Murder -- Aggravating Circumstance -- Murders of Sisters -- Common Motive and Modus Operandi**

*State v. Cummings, 332 N.C. 487 (1992) 422 S.E.2d 692 Page 490*

The trial court did not err in submitting the course of conduct aggravating circumstance to the jury in a first degree murder prosecution based on defendant's murder of the victim's sister some twenty-six months after the victim's murder where the evidence showed that the motive and modus operandi were similar in both murders.

**Aggravated Assault -- Broken Neck as Serious Injury -- Paralysis as Basis for Severe and Permanent Injuries Aggravating Factor**

*State v. Brinson, 337 N.C. 764 (1994) \_\_\_ S.E.2d \_\_\_ Page 764*

**Homicide -- Murder -- Automobile Accident -- Prior Convictions as Evidence of Malice -- Improperly Used as Aggravating Factor**

*State v. McBride, 109 N.C. App. 64 (1993) 425 S.E.2d 731*

**Homicide -- Involuntary Manslaughter -- Aggravating Factors**

*State v. Garcia-Lorenzo, 110 N.C. App. 319 (1993) 430 S.E.2d 290*

Great risk of death to more than one person by means of weapon or device normally hazardous to more than one person is not an element of offense

**Prior Sentence / Guilty Pleas Used as Aggravating Factors**

*State v. Hester, 111 N.C. App. 110 (1993) 432 S.E.2d 171*

The State does not bear the burden of proving the validity of a plea of guilty in a prior criminal matter before it may be used to aggravate a defendant's sentence.

**Accessory After the Fact to Murder -- Aggravating Factor -- Offense Committed to Hinder Enforcement of Laws**

*State v. Whitley, 111 N.C. App. 916 (1993) 433 S.E.2d 826*

**Defendant's Inducement of Others to Commit Crime Found as an Aggravating Factor**

*State v. Smallwood, 112 N.C. App. 76 (1993) 434 S.E.2d 615*

**Commission of Offense While on Pretrial Release Properly Considered as Aggravating Factor**

*State v. Allen, 112 N.C. App. 419 (1993) 435 S.E.2d 802*

**Position of Trust or Confidence Improper as an Aggravating Factor for Incest, But Proper for Indecent Liberties**

*State v. Hughes, 114 N.C. App. 742 (1994)*

**Attempted Statutory Rape and Attempted Sexual Offense -- Sentencing -- Aggravating Factor -- Pretrial Release**

*State v. Robertson, 115 N.C. App. 249 (1994)*

The underlying rationale for the factor involves disdain for the law; the fact that defendant was subsequently acquitted of the prior charge does not undermine that rationale.

**Error to Consider Involvement of Seventeen Year Old in Narcotics Offenses as a Non-Statutory Aggravating Factor**

*State v. Bozeman, 115 N.C. App. 658 (1994)*

**Drugs Found at Crime Scene was Aggravating Sentencing Factor**

*State v. Williams, 116 N.C. App. 225 (1994)*

**Insufficient Evidence for Violation of Position of Trust by Acquaintance Through Work as Aggravating Factor, But Evidence was Sufficient for**

**Kidnapping -- Aggravating Factor of Premeditation and Deliberation -- Sufficiency of Evidence**

*State v. Hammond, 118 N.C. App. 257 (1995)*

The trial court in a kidnapping case did not err in finding as an aggravating factor that the kidnapping was premeditated and deliberated where the evidence tended to show that defendant waited by the victim's office during the early morning hours and that he had scissors and an electrical cord.

**Knowingly Creating Risk to More Than One Person with Device Normally Hazardous to More Than One Person -- Drunk Driver -- Fatal Accident -- Finding of Aggravating Factor Proper**

*State v. McBride, 118 N.C. App. 316 (1995)*

The trial court did not err in finding as an aggravating factor for second-degree murder and impaired driving that defendant knowingly created a great risk of

death to more than one person by means of a device which would normally be hazardous to the lives of more than one person, since an automobile driven by an intoxicated driver is a device which in its normal use is hazardous to the lives of more than one person, and defendant's prior convictions for driving while impaired and his reckless operation of his automobile on the night in question, together with his factual misrepresentations, supported the conclusion that defendant knowingly created this risk.