

ASSAULT

To Prove Assault Was Done In Secret, State Must Offer Evidence Showing Victim Was Caught Unaware.

State v. Holcombe, __ N.C. App. __, __ S.E.2d __ (April 20, 2010).

The evidence was insufficient to support a conviction where the state failed to produce evidence that the assault was done in a secret manner. To satisfy this element, the state must offer evidence showing that the victim is caught unaware.

- (1) Scar Resulting from Deep Cut Over Left Eye Was Permanent Disfigurement to Support Conviction of Assault Inflicting Serious Bodily Injury**
- (2) No Fatal Variance Between Allegations in Assault by Strangulation Indictment Concerning Method of Strangulation and Evidence at Trial**
- (3) Sufficient Evidence to Support Conviction of Assault by Strangulation**
- (4) Punishment Was Not Permitted for Convictions of Both Assault Inflicting Serious Bodily Injury and Assault by Strangulation for Same Conduct**
- (5) Punishment Was Permitted for Convictions of Assault Inflicting Serious Bodily Injury and First-Degree Kidnapping**
- (6) Punishment Was Not Permitted for Convictions of Both Assault With A Deadly Weapon Inflicting Serious Injury and Assault Inflicting Serious Bodily Injury Based on Single Assault**
- (7) Insufficient Evidence of Serious Bodily Injury to Support Conviction of Assault Inflicting Serious Bodily Injury**
- (8) Convictions of Two Counts of First-Degree Sexual Offense Were Permitted Based on Defendant's Insertion of Fingers into Victim's Vagina and Rectum at Same Time**
- (9) Convictions of Both First-Degree Kidnapping and First-Degree Sexual Offense Were Permitted Based on Jury Instruction**
- (10) Sufficient Evidence of Serious Bodily Injury to Support Conviction of Assault Inflicting Serious Bodily Injury**

State v. Williams, __ N.C. App. __, 689 S.E.2d 412 (8 December 2009).

The defendant was convicted in a single trial of multiple offenses involving five different victims over a time period from 2004 to 2006. The offenses included sexual assault, robbery, assault, and kidnapping. The court ruled: (1) There was sufficient evidence to support a conviction of assault inflicting serious bodily injury when the injury to the victim, L.T., included a scar resulting from a deep cut over her left eye, which was a permanent disfigurement (she had other injuries as well). (2) An indictment alleging assault by strangulation alleged the defendant strangled the victim, L.T., by placing his hands around her throat. The court ruled that even if there was a variance between the allegation concerning the method of strangulation and evidence introduced at trial, the variance was immaterial and not fatal. The method of strangulation alleged in the indictment was surplusage and should be disregarded. (3) There was sufficient evidence to support the defendant's conviction of assault by strangulation of L.T. She stated that she felt that the defendant was trying to crush her throat, he pushed down with his weight on her neck with his foot, she thought he was trying to "chok(e) her out" or make her go unconscious, and she thought she was going to die. The court rejected the defendant's argument that the state must prove that the victim had difficulty breathing. (4) G.S. 14-32.4(b) (unless conduct is covered under some other provision of law providing greater punishment) shows a legislative

intent to prohibit a court from sentencing a defendant for the same conduct under both G.S. 14-32.4(b) (assault inflicting serious bodily injury, Class F felony) and G.S. 14-32.4(a) (assault by strangulation, Class H felony). Punishment can only be imposed for the assault inflicting serious bodily injury, which provides for greater punishment than assault by strangulation. (5) Punishment was permitted for convictions of both assault inflicting serious bodily injury and first-degree kidnapping, which was elevated from second-degree to first-degree based on a finding that the victim was seriously injured. Assault inflicting serious bodily injury requires the additional proof of “serious bodily injury” beyond the element of “serious injury” to prove first-degree kidnapping. Also, proof in the kidnapping case that the victim was abducted “for the purpose of doing serious bodily injury” and the act of committing serious bodily injury are two different elements, the latter being more serious than the former. (6) Punishment was not permitted for convictions of both assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury based on a single assault. Punishment was only permitted for the more serious offense of assault with a deadly weapon inflicting serious injury. (7) There was insufficient evidence of serious bodily injury of victim M.L.W. to support the defendant’s conviction of assault inflicting serious bodily injury. Although the victim received a vicious beating, the evidence did not show that her injuries placed her at a substantial risk of death. Though her ribs were still sore five months after the assault, to satisfy the statutory definition the victim must experience “extreme pain” in addition to the “protracted condition.” The state did not present evidence of extreme pain. (8) Convictions of two counts of first-degree sexual offense were permitted based on the defendant’s insertion of his fingers into the victim’s vagina and rectum at the same time. The court relied on *State v. Gopal*, 186 N.C. App. 308 (2008). (9) Convictions of both first-degree kidnapping and first-degree sexual offense were permitted based on the jury instruction for first-degree kidnapping that required proof of serious injury or not released in a safe place, with no reference to the sexual assault. (10) There was sufficient evidence of serious bodily injury to victim K.L.A. to support the defendant’s conviction of assault inflicting serious bodily injury. She suffered a puncture wound to the back of her scalp and a parietal scalp hematoma. She also went into premature labor as a result of the assault. This was sufficient evidence of a bodily injury that created a substantial risk of death, which is included in the definition of serious bodily injury.

Defendant Was Lawfully Convicted of Accessory After Fact of Assault With Deadly Weapon With Intent to Kill Inflicting Serious Injury Even Though Perpetrator of Assault Pled Guilty to Assault With Deadly Weapon Inflicting Serious Injury

State v. McGee, ___ N.C. App. ___, 676 S.E.2d 662 (2 June 2009).

The court ruled that the defendant was lawfully convicted of accessory after the fact of assault with a deadly weapon with the intent to kill inflicting serious injury even though the perpetrator of the assault pled guilty to assault with a deadly weapon inflicting serious injury. The court noted that if the perpetrator had been acquitted of all types of assaults, then the accessory after the fact could not be convicted.

Sufficient Evidence to Prove Fists and Tree Limbs Used to Assault Victim Were Deadly Weapons

State v. Wallace, ___ N.C. App. ___, 676 S.E.2d 922 (2 June 2009).

The defendant and an accomplice, both female, assaulted a male with fists and tree limbs. The two females individually, but not collectively, weighed less than the male victim, and both were shorter than him. They both were convicted of assault with a deadly weapon inflicting serious injury. The court ruled that the evidence was sufficient to prove that the fists and the tree limbs were deadly weapons.

Sufficient Evidence to Support Kidnapping Conviction Arising During Assaults of Victim

State v. Gayton-Barbosa, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009).

The defendant was convicted of two counts of felonious assault, first-degree kidnapping, felonious larceny, and other offenses. The court ruled that there was sufficient evidence to support the defendant's conviction of kidnapping that occurred during the commission of the assaults of the victim. The defendant kept the victim from leaving her house by repeatedly striking her with a bat. When she was able to escape, he chased, grabbed, and shot her. Detaining the victim in her home and then again outside was not necessary to effectuate the assaults.

Trial Court Did Not Err in Not Submitting Assault on Female in Trial of First-Degree Rape Based on Short-Form Indictment Under G.S. 15-144.1; Court Sets Standards for Submitting Assault on Female

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (5 May 2009).

The defendant was convicted of first-degree rape under a short-form indictment under G.S. 15-144.1. He was also convicted of second-degree kidnapping. The court ruled that the trial court did not err in not submitting assault on a female as a lesser offense under the statutory language in G.S. 15-144.1. The court reviewed the case law concerning the submission of this alternative offense and set standards for its submission. (See the court's opinion for its extensive analysis.)

Temporary Restraining Order Entered Under Rule 65(b) of Rules of Civil Procedure Was Not Valid Domestic Violence Protective Order to Authorize Enhanced Sentence Under G.S. 50B-4.1(d)—Ruling of Court of Appeals Is Reversed

State v. Byrd, 675 S.E.2d 323 (1 May 2009), reversing, 185 N.C. App. 597 (2007).

The defendant's wife filed a civil complaint seeking divorce from bed and board. She filed with the complaint a motion for a preliminary injunction under Rule of Civil Procedure 65(a) and also sought a temporary restraining order (TRO) under Rule 65(b). Her complaint and affidavit alleged that the defendant had assaulted her on many occasions. A district court judge on March 11, 2004, issued an ex

parte order granting her request for a TRO (ordering the defendant not to assault his wife) and set a hearing date for March 15, 2004. The TRO was properly served on the defendant on March 12, 2004. The defendant moved for a continuance on March 15, 2004, and the hearing and TRO were both continued until March 24, 2004. On March 23, 2004, the defendant shot his wife in the head with a rifle, resulting in serious injury. The defendant was convicted of a Class C felony assault for this act. During the sentencing phase for this conviction, the jury found that the defendant knowingly violated a valid protective order in the same course of conduct involving the felony assault. Based on the jury's finding, the conviction was elevated under G.S. 50B-4.1(d) from a Class C felony to a Class B2 felony for sentencing purposes. The court ruled: (1) the TRO was not a valid protective order under the definition in G.S. 50B-1(c) and rejected the state's argument that the TRO was the functional legal equivalent of a valid protective order under G.S. 50B-2; and (2) even if the TRO had been entered under Chapter 50B, it failed to meet the definition in G.S. 50B-1(c) because it was not entered "upon hearing by the court or consent of the parties." Merely putting the defendant on notice that a TRO had been entered against him did not satisfy the hearing requirement to permit the sentence enhancement. The court stated that in addition to the statutory hearing requirement, due process required a hearing at which the defendant had an opportunity to be heard about the allegations of domestic violence against him.

Assault Is Not Lesser-Included Offense of Sexual Battery

State v. Corbett, ___ N.C. App. ___, 675 S.E.2d 150 (21 April 2009).

The court ruled that assault is not a lesser-included offense of sexual battery. The crime of assault has elements that are not elements of sexual battery.

(1) Sufficient Evidence of Intent to Kill to Support Felonious Assault Conviction

(2) Trial Judge Did Not Err in Not Instructing on Assault Inflicting Serious Injury as Lesser Offense of Felony Assault

State v. Liggons, ___ N.C. App. ___, 670 S.E.2d 333 (6 January 2009).

The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury (the victim was driver of a vehicle) and other offenses. The defendant or his accomplice threw a large rock at a moving vehicle, and the rock crashed through the windshield. After the vehicle stopped, they assaulted the passenger and robbed him. The driver suffered a severe skull fracture and underwent surgery to remove pieces of bone and rock lodged in her brain. (1) The court ruled that there was sufficient evidence of intent to kill to support the conviction involving the vehicle driver. The evidence showed that the defendant and his accomplice had previously discussed intentionally forcing motorists off the highway to rob them. The defendant or his accomplice had thrown the rock

when the vehicle was traveling about 55 m.p.h. or 60 m.p.h. The court stated that it was foreseeable that this act could result in death either from the impact of the rock on the driver or from the driver's losing control of the vehicle and being involved in a deadly vehicular accident. (2) The court ruled that the trial judge did not err in not instructing on assault inflicting serious injury as a lesser offense of the felony assault of the driver. The rock, considering its size and the manner of its use, was a deadly weapon as a matter of law. Thus an instruction on an offense without the deadly weapon element was not required.

Sufficient Evidence to Prove Defendant's Hands and Fists Were Deadly Weapon and That Serious Injury Was Inflicted to Support Felonious Assault Conviction

State v. Allen, ___ N.C. App. ___, (21 October 2008).

The defendant was convicted of assault with a deadly weapon inflicting serious injury and larceny of a motor vehicle. The court ruled, relying on *State v. Harris, ___ N.C. App. ___, 657 S.E.2d 701 (2008)*, that there was sufficient evidence to prove that the defendant's hands and fists were a deadly weapon and that serious injury was inflicted to support the felonious assault conviction. The defendant was 25 years old, seven inches taller and 40 pounds heavier than the victim, who was 38 years old. The defendant struck repeated blows to the victim's head and face with his hands and fists. The victim suffered traumatic head injuries and extreme facial bruising and swelling, as well as bleeding from her left ear and nose. Her left eye was swollen shut for over a month, and the insides of her ear and mouth were damaged. She lost consciousness and remained disoriented after she awoke.

(1) Sufficient Evidence of Serious Injury in Felonious Assault Trial

(2) Defendant Was Not Prejudiced in Joint Trial of Felonious Assault and Possession of Firearm by Felon by Admission of Prior Conviction of Possession of Cocaine to Prove Element of Possession of Firearm by Felon

State v. Tice, ___ N.C. App. ___, 664 S.E.2d 368 (5 August 2008).

The defendant was convicted of assault with a deadly weapon inflicting serious injury and possession of a firearm by felon. (1) The court ruled that there was sufficient evidence of serious injury to support the assault conviction. The defendant was shot in the knee, took pain medication for two weeks, walked with a limp for one to two weeks, and required one month to heal. (2) The defendant argued on appeal that he was denied effective assistance of counsel when his trial lawyer agreed to stipulate that the defendant had a prior felony conviction (possession of cocaine) for the charge of possession of firearm by felon without insisting, as a condition of that stipulation, that the nature of the conviction not be disclosed to the jury. The court rejected the defendant's argument, ruling that the defendant was not prejudiced in the trial of the felonious assault charge by the revelation of the conviction of possession of cocaine, a nonviolent crime.

Defendant's Hands Were Deadly Weapon to Support Felonious Assault Conviction

State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701 (4 March 2008).

The defendant was convicted of first-degree sexual offense and assault with a deadly weapon inflicting serious injury. The deadly weapon element of the assault conviction was based on the defendant's use of his fists on the victim. The defendant weighed 175 pounds and the victim weighed 110 pounds. The court ruled that this and other evidence was sufficient to support the deadly weapon element. The court stated that ruling in *State v. Hinton, 361 N.C. 207 (2007)* (hands are not "dangerous weapon" for armed robbery), did not overrule prior cases in which hands and feet were found to be deadly weapons in assault prosecutions.

Sufficient Evidence of Element of Strangulation in Assault by Strangulation

State v. Little, 188 N.C. App. 152, 654 S.E.2d 760 (15 January 2008).

The court ruled that there was sufficient evidence to support the element of strangulation in assault by strangulation when the defendant wrapped his hands around the victim's throat and applied pressure until the victim lost consciousness.

Assault on Female Is Not Lesser-Included Offense of Assault by Strangulation

State v. Brunson, 187 N.C. App. 472, 653 S.E.2d 552 (4 December 2007).

The court ruled that assault on a female is not a lesser-included offense of assault by strangulation. Each offense includes an element not present in the other.

Trial Judge Erred Under Rule 404(b) in Allowing State in Assault Trial to Cross-Examine Defendant About Two Prior Assaults of Other People

State v. Goodwin, 186 N.C. App. 638, 652 S.E.2d 36 (6 November 2007).

The defendant was convicted of a felonious assault. The court ruled, relying on *State v. Morgan, 315 N.C. 626 (1986)*, that the trial judge erred under Rule 404(b) in allowing the state to cross-examine the defendant about two prior assaults of other people (the state had voluntarily dismissed these assault charges). After examining the evidence in this case, the court concluded that the state's sole purpose for its cross-examination was to show the defendant's propensity for violence, which is not allowed under Rule 404(b).

Although Trial Judge in Felonious Assault Trial Correctly Submitted Issue Whether 2x4 Board Was Deadly Weapon, Trial Judge Erred in Not Submitting Lesser Offense of Assault Inflicting Serious Injury

State v. Tillery, 186 N.C. App. 447, 651 S.E.2d 291 (16 October 2007).

The defendant was convicted of assault with a deadly weapon inflicting serious injury. The court ruled, relying on *State v. Lowe*, 150 N.C. App. 682 (2002), and *State v. Palmer*, 293 N.C. 633 (1977), that although the trial judge correctly submitted the issue to the jury whether a 2x4 board was a deadly weapon, the trial judge erred in not submitting the lesser offense of assault inflicting serious injury. The 2x4 board used in this case was not a deadly weapon as a matter of law.

Trial Judge Erred in Giving Peremptory Jury Instruction on Element of Serious Injury in Felonious Assault Trial

State v. Bagley, 183 N.C. App. 514, 644 S.E.2d 615 (5 June 2007).

The defendant was convicted of assault with a deadly weapon inflicting serious injury and other offenses. The assault victim suffered a bullet wound in the leg that went completely through it. He was treated at a hospital for the wound and suffered pain for two or three weeks afterward. Although the court ruled that this evidence was sufficient to support the element of serious injury, the court also ruled that the trial judge erred in giving a peremptory jury instruction on this element.

Sufficient Evidence of Strangulation to Support Conviction of Assault by strangulation

State v. Braxton, 183 N.C. App. 36, 643 S.E.2d 637 (1 May 2007).

The defendant was convicted of one count of second-degree kidnapping, two counts of assault by strangulation, two counts of assault on a female, and eleven counts of intimidating a witness. The court upheld the defendant's convictions of assault by strangulation based on the victim's testimony that there were separate incidents in which the defendant grabbed her by the throat, causing her to have difficulty breathing. The court rejected the defendant's argument that the definition of strangulation should be the complete closure of one's airways causing an inability to breathe. The court noted with approval the definition of strangulation in footnote one to the offense in N.C.P.I.—Crim. 208.61 (2005): "strangulation is defined as a form of asphyxia characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck brought about by hanging, ligature, or the manual assertion of pressure."

Trial Judge Erred in Assault Trial in Failing to Instruct Jury on Defendant's Lack of Duty to Retreat on His Own Premises

State v. Beal, 181 N.C. App. 100, 638 S.E.2d 541 (2 January 2007).

The defendant was convicted of a felonious assault. The defendant and the alleged victim lived in the same mobile home, which was owned by the alleged victim. The defendant paid rent to live there. The assault occurred in the mobile home and its curtilage. The court ruled, relying on *State v. Browning, 28 N.C. App. 376, 221 S.E.2d 375 (1976)* and other cases, that the trial judge erred in failing to instruct the jury on the defendant's lack of duty to retreat on his own premises.

Sufficient Evidence of "Serious Bodily Injury" to Support Conviction of Assault Inflicting Serious Bodily Injury When Victim Lost Natural Tooth

State v. Downs, 179 N.C. App. 860, 635 S.E.2d 518 (17 October 2006).

The court ruled there was sufficient evidence of "serious bodily injury," as defined in G.S. 14-32.4(a), to support the defendant's conviction of assault inflicting serious bodily injury when the victim lost his natural tooth as a result of the defendant's assault. The natural tooth was located in the top front row of teeth. The court stated that the defendant suffered "serious permanent disfigurement" (a term included in the statutory definition), despite the planned substitution of a dental implant in place of the natural tooth.

Habitual Misdemeanor Assault Offense Is Not Unconstitutional Under Apprendi v. New Jersey, Blakely v. Washington, or Double Jeopardy Clause

State v. Massey, 179 N.C. App. 803, 635 S.E.2d 528 (17 October 2006).

The court ruled that the habitual misdemeanor assault offense is not unconstitutional under the rulings in *Apprendi v. New Jersey, 530 U.S. 466 (2000)*, or *Blakely v. Washington, 542 U.S. 296 (2004)*, or under the Double Jeopardy Clause.

(1) Assault Hands As Deadly Weapons-Sufficiency Of Evidence

(2) Assault Seriousness Of Injury-Sufficiency Of Evidence

State v. Brunson, 180 N.C. App. 188 (2006)

(1) There was sufficient evidence to support a charge of assault with a deadly weapon inflicting serious injury where defendant argued that his hands and feet, with which he committed the assault, were not deadly weapons. Although defendant argued that there was no evidence of the weight of defendant or of the victim, the jury was given the proper standard for determining the issue, as outlined in *State v. Lawson, 173 N.C. App. 270*. (2) There was sufficient evidence of the seriousness of the victim's injury in a prosecution for assault with a deadly weapon inflicting serious injury where the jury heard evidence from the victim

about her pain “all over” as a result of the beating, and from a nurse examiner and the police about black eyes, bruises, and redness on the vagina.

Constitutional Law -- Double Jeopardy -- Habitual Misdemeanor Assault -- Recidivist Statutes -- Sentence Enhancers

State v Massey, 179 N.C. App. 803 (2006)

Despite numerous appellate rules violations, the Court of Appeals exercised its discretionary authority under N.C. R. App. P. 2 and determined that the trial court did not violate the Fifth Amendment prohibition against double jeopardy by convicting defendant of habitual misdemeanor assault even though defendant contends the Apprendi, Blakely, and Allen cases allegedly prohibit the use of sentence enhancers, because: 1) despite challenges to the constitutionality of N.C.G.S. § 14-33.2, the Court of Appeals has conclusively upheld the habitual misdemeanor assault statute in *State v. Carpenter*, 155 N.C. App. 35 (2002), which was two years after the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); 2) recidivist statutes, or repeat-offender statutes, survive constitutional challenges in regard to double jeopardy challenges since they increase the severity of the punishment for the crime being prosecuted and do not punish a previous crime a second time; 3) contrary to defendant's assertion, *Blakely v. Washington*, 542 U.S. 466 (2004), explicitly permits sentence enhancements provided that sentence enhancements, with the exception of prior convictions, are found beyond a reasonable doubt by the jury; 4) our Supreme Court noted in *State v. Allen*, 359 N.C. 425 (2005), that the crux of *Blakely* was to eliminate fact-finding by the court that increased a defendant's sentence beyond the statutory maximum; and 5) *Apprendi* and *Blakely* applied the Sixth Amendment right to a jury trial to sentence enhancements whereas defendant's argument is directed at the Fifth Amendment prohibition against double jeopardy.

Assault -- Serious Bodily Injury -- Loss Of Tooth

State v Downs, 179 N.C. App. 860 (2006)

The **loss of a live, natural tooth was evidence of a serious permanent disfigurement**, despite the prospect of a dental implant, sufficient for the serious bodily injury element of assault inflicting serious bodily injury. N.C.G.S. § 14-32.4(a).

Assault--Inflicting Serious Bodily Injury--Motion To Dismiss--Sufficiency Of Evidence

State v Brown, 177 N.C. App. 177 (2006)

The trial court did not err by denying defendants' motions to dismiss the charge of assault inflicting serious bodily injury, because: 1) there was **sufficient evidence to submit the question** to the jury concerning whether defendant Brown perpetrated an assault on the victim when at trial two witnesses testified that defendant participated in the assault; 2) although defendant contends there were inconsistencies in the victim's testimony and that initially another witness did not identify defendant in a photographic lineup, alleged contradictions or issues of credibility are for a jury to resolve and do not warrant dismissal; and 3) viewing the evidence in the light most favorable to the State, the **evidence was sufficient to show the victim's injuries created a protracted condition that caused extreme pain to satisfy the element of serious bodily injury.**

Constitutional Law -- Double Jeopardy -- Assault And Attempted Murder

State v Reid, 175 N.C. App. 613 (2006)

Convictions for attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury based on the same act are not a violation of double jeopardy. Each offense requires proof of at least one element that the other does not.

Constitutional Law -- Double Jeopardy -- Convictions For Assault With A Deadly Weapon And Attempted Voluntary Manslaughter

State v Yang, 174 N.C. App. 755 (2005)

Double jeopardy was violated by convictions for assault with a deadly weapon inflicting serious injury with intent to kill and attempted voluntary manslaughter. Where a felonious assault offense includes intent to kill as an element, attempted voluntary manslaughter is a lesser included offense of the assault.

Criminal Law; Sentencing -- Habitual Misdemeanor Assault -- Absence Of Arraignment -- Stipulation Of Prior Convictions

State v Artis, 174 N.C. App. 668 (2005)

The trial court did not commit prejudicial error by its **failure to arraign defendant on a habitual misdemeanor charge or to ask defendant whether he wanted the issue regarding his prior convictions submitted to the jury** where defendant requested at trial that his prior convictions not be shared with the jury, and defense counsel, after consultation with defendant, stipulated to the prior convictions. N.C.G.S. § 15A-928.

Homicide -- Attempted Murder -- Motion To Dismiss--Sufficiency Of Evidence (For Intent To Kill)

State v Edwards, 174 N.C. App. 490 (2005)

The trial court did not err by denying defendant's motion to dismiss the charge of attempted murder of an 11-month old child because the evidence viewed in the light most favorable to the State revealed that: 1) a jury could reasonably conclude from the facts that defendant knew that no one would discover the mother's body and the child for a long time in a deserted area; and 2) the evidence was sufficient for a jury to decide that defendant would not expect an 11-month-old child to survive in a remote location, but would starve, die of dehydration, and/or exposure, or suffer from such effects of nature as insects and wild animals before anyone found him.

(1) Assault -- Instruction -- Deadly Weapon As A Matter Of Law -- Knife

(2) Assault -- Deadly Weapon Inflicting Serious Injury -- Failure To Instruct On Lesser Included Offenses

(3) Constitutional Law -- Double Jeopardy -- Assault

State v McKoy, 174 N.C. App. 105 (2005)

(1) The trial court did not err or commit plain error by instructing the jury that a knife is a deadly weapon as a matter of law for the charge of assault with a deadly weapon inflicting serious injury given the evidence of the knife's use and the injuries produced. (2) The trial court erred by failing to instruct the jury on the lesser-included offenses of assault with a deadly weapon and assault inflicting serious injury for the charge of assault with a deadly weapon inflicting serious injury, because: 1) the jurors were not instructed that defendant's hands were deadly weapons per se, but rather they were asked to determine whether defendant's hands became deadly weapons as used in the alleged assault; 2) there was no way to ascertain what verdict the jury might have reached had it been given an alternative which did not include the use of a deadly weapon; and 3) assault with a deadly weapon does not require the victim to suffer serious injury, and the victim in the instant case did not seek medical treatment nor does the record contain any evidence of pain, blood loss, or time lost from work as a result of the injuries. (3) The trial court violated defendant's right to be free of double jeopardy when it sentenced him in 03 CRS 79519 for both assault with a deadly weapon inflicting serious injury and assault inflicting serious injury, and in 03 CRS 71958 for both assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury, because: 1) N.C.G.S. § 14-33(c)(1) provides, just as N.C.G.S. § 14-32.4 does, that the section does not apply if the conduct is covered under some other provision of law providing greater punishment; and 2) although the evidence establishes assaults on two different days, it does not establish that two separate and distinct assaults occurred on each of the dates in question as opposed to multiple injuries arising from a single continuous transaction.

Assault -- Deadly Weapon Inflicting Serious Injury -- Motion To Dismiss -- Sufficiency Of Evidence

State v Lawson, 173 N.C. App. 270 (2005)

The trial **court erred by denying defendant's motion to dismiss the charge of assault with a deadly weapon** inflicting serious injury based on **insufficient evidence to support the deadly weapon element**, and the case is remanded for entry of judgment on the lesser-included offense of assault inflicting serious injury, because: 1) there was insufficient evidence to determine defendant's size and strength compared to that of the victim; 2) when instruments fall within the purview of those "other weapons that may become deadly" such as defendant's hands, there must be sufficient evidence at trial regarding the size and condition of defendant versus the victim as well as sufficient evidence pertaining to the manner of the weapon's use; and 3) although the jury had an opportunity to observe both defendant and the victim at trial, mere observation by the jury of the victim and defendant's strength and size alone is insufficient to support the deadly weapon element.

(1) Assault -- Knife--Deadly Weapon Per Se

(2) Assault -- Description of Wounds As Serious Injury -- Not Plain Error

(3) Assault -- With a Deadly Weapon Inflicting Serious Injury -- Refusal to Charge On Lesser Offense -- Evidence Of Deadly Weapon

State v Caudle, 172 N.C. App. 261 (2005)

(1) There was no plain error in an assault prosecution where the court instructed the jury that the kitchen knife used by defendant was a deadly weapon per se. The definition of a deadly weapon clearly encompasses a wide variety of knives, and the actual effects produced by the weapon may be considered in determining whether it is deadly. **(2)** The trial court's descriptions of an assault victim's stab wounds as a serious injury did not amount to plain error where the victim suffered injuries to her cheek, lip, head, neck, and hands, required thirty to forty stitches, and was hospitalized for two days. **(3)** There was no plain error in the trial court's refusal to instruct on the lesser included offense of assault inflicting serious injury in a prosecution for assault with a deadly weapon inflicting serious injury.

Assault; Homicide -- Assault With Deadly Weapon Inflicting Serious Injury -- Assault With Deadly Weapon -- First-Degree Murder -- Motion To Dismiss -- Sufficiency Of Evidence

State v Yarnell, 172 N.C. App. 135 (2005)

The trial court did not err by denying defendant's motion to dismiss the charges of double assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, and first-degree murder, because: 1) the State demonstrated how defendant's hands and feet were used as deadly weapons in the attack of one of the victims who was undressed and facing downward in an unlit bedroom when he was hit from behind, dragged to the ground, and then kicked while facing downward; 2) the State provided substantial elements for the assault with a deadly weapon inflicting serious injury of another victim who was also undressed and lying in bed in an unlit bedroom where she was struck, was bleeding, and blacked out; 3) the State showed that defendant used his hands and a rubber mallet to hit one victim and that during this attack another victim was hit in the head while she was trying to stop the attack which caused her to get a deep laceration over her left eye that required stitches, antibiotics, and a tetanus shot; and 4) with regard to the first-degree murder, the State showed substantial evidence that defendant attacked the victim after the victim had been knocked to the ground by another, defendant retrieved a rubber mallet from his vehicle and beat the victim with it, defendant stole the shoes from the victim's feet and fled the scene, and defendant told others during his flight that he had killed the victim.

Constitutional Law -- Double Jeopardy -- Attempted First-Degree Murder And Assault -- No Violation

State v. Bethea, 173 N.C. App. 43 (2005)

Double jeopardy was not violated by the submission to the jury of both attempted first-degree murder and assault with a deadly weapon inflicting serious injury. The charge of attempted murder does not contain an assault with a deadly weapon or serious injury requirement, and assault with a deadly weapon with intent to kill inflicting serious injury does not require premeditation and deliberation.

Constitutional Law -- Double Jeopardy -- Discharging A Weapon Into Occupied Property -- Assault With A Deadly Weapon

State v. Allah, 168 N.C. App. 190 (2005)

Discharging a weapon into occupied property and assault with a deadly weapon inflicting serious injury are **separate offenses with unique elements which do not place defendant in double jeopardy.**

Assault -- Habitual Misdemeanor Assault -- Motion To Dismiss -- Sufficiency Of Evidence

State v. Forrest, 168 N.C. App. 614 (2005)

The trial court did not err by denying defendant's motion to dismiss the two habitual misdemeanor assault charges even though defendant contends that

four of the five prior misdemeanor convictions arose from a single incident, because: 1) N.C.G.S. § 14-33.2 contains no language which could be reasonably construed as requiring that any of the prior misdemeanor convictions either occur on separate dates or arise from separate incidents; 2) contrary to defendant's assertion, from the very fact that the legislature chose to specify that the three felony convictions underlying a habitual felon charge must arise from separate occurrences, it can be inferred that the legislature would have included a similar specification in N.C.G.S. § 14-33.2 **if it had intended to impose a separate occurrences limitation on the offense of habitual misdemeanor assault**; and 3) the Court of Appeals has already concluded that N.C.G.S. § 14-33.2 violates neither the ex post facto nor double jeopardy provisions of our federal and state constitutions.

Criminal Law -- **Inconsistent Verdicts -- Manslaughter And Assault -- Intent To Kill**

State v. Hames, 170 N.C. App. 312 (2005)

A new trial was awarded where the offenses of which defendant was found guilty were mutually exclusive and the jury's verdicts were logically inconsistent. Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury and attempted murder of the same victim, and found guilty of assault with a deadly weapon inflicting serious injury and voluntary manslaughter. **The jury necessarily found intent to kill for the manslaughter but not for the assault.**

Sentencing -- Punishment Enhancement -- Habitual Misdemeanor Assault

State v. McDonald, 165 N.C. App. 237 (2004)

The trial court did not err by using the charge of habitual misdemeanor assault (HMA) to enhance defendant's punishment even though defendant contends he never entered a guilty plea to nor was convicted of this charge, because: 1) habitual misdemeanor assault can be considered as either a substantive offense or a sentence enhancement offense; 2) defendant admitted the prior convictions element of the HMA offense, the jury found defendant guilty of assault on a female which was the last element of the HMA charge, and thus the trial court correctly used this conviction as one of the underlying felonies to enhance defendant's sentence under the Habitual Felon Act; and 3) defendant was not prejudiced by the trial court's failure to formally arraign him under N.C.G.S. § 15A-928(c), since defense counsel and defendant's statements to the trial court show that defendant understood the charges against him and knowingly waived his right for the jury to determine those issues.

(1) Assault -- On A Handicapped Person -- Hearing Impairment

(2) Indictment And Information -- Indictment And Instruction -- Fatal Variance

(3) Assault -- On A Handicapped Person -- Sentencing

State v. Hines, 166 N.C. App. 202 (2004)

(1) The denial of a motion to dismiss a charge of aggravated assault on a handicapped person was correct where defendant argued that the State did not show that the victim's hearing problem substantially impaired her ability to defend herself, but the victim testified that she had difficulty hearing a person approaching from behind. N.C.G.S. § 14-32.1(a). (2) There was a fatal variance between an indictment for aggravated assault on a handicapped person and the instruction where the instruction permitted the jury to convict on a criminal negligence theory which was not alleged in the indictment. This substantially affected defendant's ability to prepare a defense. (3) The trial court did not err by entering judgment on a charge of aggravated assault on a handicapped person where a judgment was also entered on a charge of armed robbery of that person. N.C.G.S. § 14-32.1(e) (which bars punishment for assaulting a handicapped person when conduct is covered by another statute providing greater punishment) does not apply here.

Homicide; Assault -- Traffic Offense -- Culpable Negligence -- Alcohol Not Involved

State v. Wade, 161 N.C. App. 686 (2003)

There was **sufficient evidence of culpable negligence** to support defendant's convictions on charges of **assault and involuntary manslaughter arising from a traffic accident in which alcohol was not involved**. There is precedent for recognizing that the **operation of a vehicle can lead to involuntary manslaughter even without alcohol**, and, although this may be the first such holding in the absence of alcohol, defendant's actions were also sufficient for assault with a deadly weapon inflicting serious injury.

Assault -- Type Of Weapon -- Fatal Variance

State v. Skinner, 162 N.C. App. 434 (2004)

There was a fatal variance between an assault indictment and the evidence where the indictment alleged that defendant attacked the victim with his fists while the evidence was that he used a hammer or an iron pipe.

Assault -- Instructions -- Boxcutter As Dangerous Weapon

State v. Doisey, 162 NCA 447 (2004)

An instruction in an assault prosecution that a boxcutter was a deadly weapon as a matter of law was supported by the testimony of the officers attacked by defendant.

Assault -- on a handicapped person -- sufficiency of evidence

State v. Singletary, 163 N.C. App. 449 (2004)

There was sufficient evidence that a defendant in a prosecution for assault on a handicapped person knew or should have known of the handicap. Although N.C.G.S. § 14-32.1(e) does not specifically require that a defendant know that his victim is handicapped, the **knowledge requirement is in keeping with the purpose and intent of the legislature and is consistent with the interpretation of the statute for assault on a law enforcement officer.**

Assault -- Box Cutter --Deadly Weapon Per Se

State v. Adams, 156 N.C. App. 318 (2003)

The trial court's instruction that a box cutter is a deadly weapon was not plain error in an assault and robbery prosecution. The question of whether the weapon is deadly is one of law when the character of the weapon and its manner of use admit but one conclusion; here, the victim testified that defendant attempted to cut her face with the box cutter and that she covered her face with her hands, suffering cuts which required eight stitches. Moreover, the box cutter was found, admitted into evidence, and observed by the judge and jury.

Assault -- Bystander Wounded -- Intent To Kill

State v. Ramirez, 156 N.C. App. 249 (2003)

There was no plain error in the trial court's failure to dismiss a charge of assault with a deadly weapon with intent to kill inflicting serious injury upon a bystander, and defendant was not deprived of the effective assistance of counsel in his attorney's failure to move for the dismissal. Intent follows the bullet.

(1) Assault -- Deadly Weapon Inflicting Serious Injury -- Broken Wine Bottle -- Sufficiency Of Evidence

(2) Assault -- Deadly Weapon Inflicting Serious Injury -- Jury Instruction--Broken Wine Bottle A Deadly Weapon As A Matter Of Law

State v. Morgan, 156 N.C. App. 523 (2003)

(1) The trial court did not err by denying defendant's motion to dismiss two charges of assault with a deadly weapon inflicting serious injury, because there

was substantial evidence that defendant assaulted two victims with a broken wine bottle as a deadly weapon. (2) The trial court did not err in an assault with a deadly weapon inflicting serious injury case by instructing the jury that a broken wine bottle was a deadly weapon as a matter of law because in the circumstances of its use by defendant here, it was likely to produce death or great bodily harm.

Assault -- One Sequence Of Events -- Two Counts

State v. Littlejohn, 158 N.C. App. 628 (2003)

The evidence was sufficient to establish two assaults, and the trial court properly denied defendant's motion to dismiss, where the assaults involved defendant and two different individuals, each with his own thought process and each using a different weapon, each assault was distinct in time and inflicted wounds in different locations, and the second assault occurred after the first had ceased and the victim had fallen to the floor.

(1) Assault -- With A Deadly Weapon With Intent To Kill -- Sufficiency Of Evidence

(2) Assault -- Multiple Shots -- Single Assault

State v. Maddox, 159 N.C. App. 127 (2003)

(1) There was sufficient evidence of assault with a deadly weapon with intent to kill where defendant shot at the victim five times with a nine-millimeter handgun as the victim attempted to flee, and the victim was spared serious injury or death only by jumping behind a tree. (2) The trial court erred by not dismissing four of five assault charges as part of a single assault where the shots were fired in a single place in rapid succession and were not separate events requiring defendant to employ his thought processes each time he fired the gun.

(1) Assault -- Pointing A Gun--Sufficiency Of Evidence

(2) Firearms And Other Weapons -- Possession By Felon -- Operability Of Weapon

(3) Assault -- Handgun -- Deadly Weapon Per Se

State v. McCree, 160 N.C. App. 200 (2003)

(1) There was sufficient evidence of assault by pointing a gun, even though defendant contended that the intended victim was another, where the victim testified that defendant pointed a gun directly at her and told her not to move, identified defendant both at a photo lineup and in court, and defendant did not contend that he had a legal justification for pointing the gun at the victim. (2) The operability of a firearm is not an essential element of possession of a firearm by a felon, nor is it an affirmative defense. (3) A handgun is a deadly weapon per se

and the State need only show possession of a handgun to establish the deadly weapon element of assault with a deadly weapon inflicting serious injury. The State is not required to show that defendant used the gun with deadly force.

Assault -- Habitual Misdemeanor Assault -- Motion To Dismiss -- Sufficiency Of Evidence

State v. Burch, 160 N.C. App. 394 (2003)

The trial court erred by failing to dismiss the charge of habitual misdemeanor assault and the case is remanded for resentencing on defendant's conviction for assault inflicting serious injury, because: 1) the State failed to present any evidence of defendant's prior misdemeanors as required by N.C.G.S. § 15A-928(b), and defendant did not stipulate to the five prior misdemeanors before the State rested its case; and 2) there was no discussion in the record of an agreement to bifurcate the proceedings and submit the issue of defendant's prior record to the jury at a later time.

(1) Assault -- Maiming -- Partially Severed Ear Not Sufficient

(2) Assault -- Intent To Kill -- Evidence Sufficient

State v. Scott, 161 N.C. App. 104 (2003)

(1) A motion to dismiss a maiming charge should have been granted where the victim's ear was not totally severed from her head. N.C.G.S. 14-29. (2) There was sufficient evidence of an intent to kill in an assault prosecution where the victim was attacked with a deadly weapon, suffered serious injuries, placed in the trunk of defendant's car, and deprived of medical care for several hours. Defendant's motion to dismiss was correctly denied.

Assault -- Habitual Misdemeanor Assault -- No Accompanying Indictment

State v. Williams, 153 N.C. App. 192 (2002)

An indictment did not sufficiently charge defendant with the felony of habitual misdemeanor assault where the indictment only charged assault on a female and there was no accompanying indictment as required by N.C.G.S. § 15A-928(b). There was no jurisdiction for the felony charge without a valid indictment and, even though defendant failed to move to dismiss, the appropriate action when the record shows a lack of jurisdiction is to vacate or arrest judgment.

(1) Assault -- Deadly Weapons -- Hands And Feet -- Sufficiency Of Evidence

(2) Assault -- Intent To Kill -- Sufficiency Of Evidence

State v. Hunt, 153 N.C. App. 316 (2002)

(1) The jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury was properly allowed to determine whether defendant's hands and feet constituted deadly weapons, given the severity of the victim's injuries, the size differential, and the fact that the victim was pregnant at the time of the assault. (2) There was sufficient evidence in an assault prosecution that defendant intended to kill the victim where defendant severely beat the victim, refused to allow her to seek help, cut the telephone lines, and told the victim that she wasn't calling for help, wasn't going to the doctor, and could lie there and die. This evidence, combined with the evidence of the attack, the resulting injuries, and defendant's actions throughout, was enough to support an inference that defendant intended to kill.

Assault -- With A Deadly Weapon With Intent To Kill Inflicting Serious Injury -- Sufficiency Of Evidence

State v. Blymyer, 153 N.C. App. 516 (2002)

The trial court did not err by denying defendant's motion to dismiss a charge of assault with a deadly weapon with intent to kill inflicting serious injury where the evidence tended to show that defendant had been involved in two altercations with the victim in the victim's home on the night in question; defendant was instructed both times to leave; defendant "flipped off" the victim and drove his truck directly at the victim; after he pinned the victim against a mobile home, defendant pumped the clutch a couple of times and asked how it felt; defendant said after the incident that next time he would have to stab the victim and kill him; and the victim suffered life-threatening injuries and underwent twenty surgeries.

Assault -- Deadly Weapon -- Singular Hand -- Sufficiency Of Evidence

State v. Rogers, 153 N.C. App. 203 (2002)

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury even though the State relied on defendant's use of his singular hand as a deadly weapon, because: 1) North Carolina courts have held that hands and fists may be considered deadly weapons given the manner in which they were used and the relative size and condition of the parties involved; 2) the State's evidence showed that the manner in which defendant used his hand to assault the victim had devastating physical effect, and defendant is a six feet two inches tall male weighing 165 pounds while the victim is a female approximately five feet three inches tall weighing ninety-nine pounds; 3) the distinction advanced by defendant between a singular hand as opposed to both hands or fists is insignificant in light of the evidence; and 4) the evidence supported a reasonable inference that defendant intended to kill the victim while he was hitting and choking her, and the

fact defendant may have changed his mind and allowed the victim to escape from his attack does not mean the State was precluded from submitting the issue of intent to kill to the jury.

Assault -- Felonious Assault Inflicting Serious Bodily Injury -- Motion To Dismiss -- Sufficiency Of Evidence -- Serious Bodily Injury

State v. Williams, 154 N.C. App. 176 (2002)

The trial court did not err by denying defendant's motion to dismiss at the close of all evidence the charge of felonious assault inflicting serious bodily injury under N.C.G.S. § 14-32.4 based on alleged insufficient evidence of serious bodily injury after defendant struck his eight-year-old daughter on the buttocks with a board multiple times while disciplining her for perceived misbehavior, because even assuming arguendo that there was insufficient evidence of serious bodily injury to satisfy the statutory definition, any error in submission to the jury of the greater offense of felonious assault inflicting serious bodily injury was rendered harmless by the jury's verdict convicting defendant of the lesser offense of misdemeanor assault inflicting serious injury.

Assault; Indictment And Information -- Multiple Count Indictment -- Necessary Element -- No Incorporation By Reference

State v. Moses, 154 N.C. App. 332 (2002)

A motion to arrest judgment on a conviction for assault with a deadly weapon inflicting serious injury was allowed where the applicable count of the indictment, Count III, did not mention the bottle which was the weapon and did not incorporate by reference the mention of the bottle in Count II, which charged armed robbery. However, the indictment sufficiently alleged assault inflicting serious injury, the jury was instructed on this offense, and the case was remanded for entry of judgment on that offense. **Failed to name the deadly weapon.**

Assault; Child Abuse And Neglect -- Felony Child Abuse -- Assault With A Deadly Weapon Inflicting Serious Injury -- Intentionally Kicking Child -- Motion To Dismiss -- Sufficiency Of Evidence

State v. Carter, 153 N.C. App. 756 (2002)

The trial court did not err in a felony child abuse and assault with a deadly weapon inflicting serious injury case by denying defendant's motion to dismiss based on alleged insufficient evidence to prove that defendant intentionally kicked the minor child victim, because: 1) while the statement "my daddy kicked me" standing alone is insufficient to prove intent, the expert testimony presented indicated the minor child had sustained an extremely unusual severe and traumatic injury consistent with having been kicked; and 2) as the child's injury

was the result of a high-energy impact equivalent to the force sustainable in a car wreck, it is reasonable to infer the injury was not accidental in nature but was the result of an intentional kick.

Assault -- Habitual Misdemeanor Assault Convictions -- Ex Post Facto Laws -- Double Jeopardy

State v. Carpenter, 155 N.C. App. 35 (2002)

The trial court did not err by failing to vacate defendant's habitual misdemeanor assault convictions even though defendant contends N.C.G.S. § 14-33.2 is unconstitutional on its face and as applied to defendant, because: 1) defendant's argument that habitual misdemeanor assault convictions violate ex post facto prohibitions has already been rejected by our Court of Appeals; and 2) the statute does not violate the United States Constitution or the North Carolina Constitution provisions against double jeopardy since the statute is a substantive offense and a punishment enhancement offense rather than a statute imposing punishment for previous crimes.

Assault; Criminal Law -- Aggravated Assault -- Disjunctive Instructions -- Erroneous

State v. Lotharp, 148 N.C. App. 435 (2002)

The trial court erroneously gave disjunctive instructions in a prosecution for assault with a deadly weapon inflicting serious injury where the court told the jury to return a verdict of guilty if it found that defendant beat the victim with his hands and feet and/or a chain, and that defendant's hands and feet and/or the chain were deadly weapons. While there is a line of cases which allows disjunctive phrasing if there is a single wrong which can be proven by alternative means, the controlling statute here requires that an assault must have been committed with a deadly weapon with a resulting serious injury from the use of that weapon.

Assault -- Evidence Of Serious Injury -- Sufficient

State v. Poland, 148 N.C. App. 588 (2002)

The trial court did not err by refusing to dismiss an assault charge for insufficient evidence of serious injury where the victim sustained a knife wound which punctured his colon in two places, another that could have severed an artery, he was in intensive care for four days, had 27 or 28 stitches in his right index finger, and now has a limited grip.

Assault --With A Deadly Weapon Inflicting Serious Injury -- Lesser Included Offense -- Assault Inflicting Serious Bodily Injury

State v. Hannah, 149 N.C. App. 713 (2002)

The trial court erred by submitting to the jury assault inflicting serious bodily injury as a lesser included offense of assault with a deadly weapon with intent to kill inflicting serious injury. "Serious bodily injury" requires proof of more severe injury than "serious injury." ***INDICT FOR BOTH***

Assault -- Inflicting Serious Bodily Injury -- Sufficiency Of Evidence

State v. Williams, 150 N.C. App. 497 (2002)

The trial court did not err by denying defendant's motion to dismiss the charge of assault inflicting serious bodily injury even though defendant contends there was insufficient evidence the victim suffered serious bodily injury as found under part of N.C.G.S. § 14-32.4 and the jury instructions defining serious bodily injury as an injury that creates or causes a permanent or protracted condition that causes extreme pain, because: 1) the evidence tends to show the victim suffered a broken jaw which was wired shut for two months, and during those two months the victim lost thirty pounds; 2) the victim testified that the injury to his jaw resulted in \$6,000 worth of damage to his teeth, that his ribs were broken, that he suffered back spasms on two occasions that made it so difficult for him to breathe that he had to visit the emergency room, and that his back spasms had continued up until the day he testified at trial; and 3) a doctor testified that the type of injury suffered by the victim, the broken jaw, would cause a person quite a bit of pain and discomfort. ***Great case to define Serious Injury***

Assault -- Deadly Weapon With Intent To Kill -- Mistrial

State v. Edwards, 150 N.C. App. 544 (2002)

The trial court did not abuse its discretion by declaring a mistrial and failing to declare defendant not guilty of the felony charge of attempted assault with a deadly weapon with intent to kill, because: 1) a deadlocked or hung jury is a classic example of manifest necessity requiring the declaration of a mistrial; and 2) the jury was not merely silent on the attempted assault charge, but sent a written note to the trial court indicating that it was unable to reach a unanimous verdict. ***see Farb p. 11***

Assault -- Deadly Weapon With Intent To Kill Inflicting Serious Injury -- Failure To Instruct On Lesser Included Offense Of Misdemeanor Assault Inflicting Serious Injury

State v. Lowe, 150 N.C. App. 682 (2002)

The trial court committed plain error by failing to instruct on misdemeanor assault inflicting serious injury under N.C.G.S. § 14-33(c) as a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury, because: 1) there is sufficient evidence from which the jury could find that fists and a commode lid were not used as deadly weapons but did inflict serious injury; and 2) even though the State argues that the jury would have found defendant guilty of felonious assault inflicting serious bodily injury under N.C.G.S. § 14-32.4, felonious assault inflicting serious bodily injury is not a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury.

Assault -- Deadly Weapon Inflicting Serious Injury -- Assault Inflicting Serious Injury -- Instruction Not Given

State v. Uvalle, 151 N.C. App. 446 (2002)

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury by not giving an instruction on assault inflicting serious bodily injury. Assault inflicting serious bodily injury is not a lesser included offense of assault with a deadly weapon inflicting serious injury because “serious injury” does not necessarily rise to the level of “serious bodily injury.”

Assault -- On A Female -- Motion To Dismiss

State v. Ackerman, 144 N.C. App. 452, (2001)

The trial court did not err by denying defendant's motion to dismiss the charge of assault on a female even though defendant contends the State failed to present evidence that defendant was over the age of eighteen as required by N.C.G.S. § 14-33(c)(2), because: 1) the jury had ample opportunity to observe defendant in the courtroom for the duration of the trial; and 2) the jury was presented circumstantial evidence of defendant's regular patronage at a bar from which the jury could conclude that defendant was over eighteen years of age.

Assault -- Deadly Weapon With Intent To Kill Inflicting Serious Injury -- Victim Seriously Injured

State v. Streeter, 146 N.C. App. 594 (2001)

The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury case by concluding that the evidence supports a finding that the victim was seriously injured, because: 1) the record shows a bullet pierced the victim's shoulder, ricocheted off his shoulder blade, and exited his body and created two holes in his upper body; 2) the victim testified that the pain really struck when everything calmed down and he looked at the bullet hole that was in his shoulder; and 3) the victim reported pain at the site of the injury to the emergency medical technicians.

Assault -- Show Of Violence -- Arrest Warrant -- Reasonable Apprehension Of Immediate Bodily Harm

State v. Garcia, 146 N.C. App. 745 (2001)

The trial court erred by failing to dismiss the charge of simple assault by show of violence under N.C.G.S. § 14-33(a) because the arrest warrant did not sufficiently allege the crime when it omitted facts supporting the element of a reasonable apprehension of immediate bodily harm on the part of the victim.

Assault With A Deadly Weapon With Intent To Kill Inflicting Serious Injury -- Victim A Bystander At Murder -- Transferred Intent -- Discharging A Firearm Into Occupied Property -- Murder At The Front Door -- Intent To Fire Into Occupied Dwelling -- Separate Offense

State v. Morston, 336 N.C. 381 (1994)

Assault And Battery -- Aggravated Assault -- Defendant As Perpetrator -- Sufficiency Of Evidence

State v. Reid, 335 N.C. 647 (1994) 440 S.E.2d 776 Page 647

There was sufficient evidence from which the jury could reasonably infer that defendant shot the victim with a deadly weapon with the intent to kill inflicting serious injury where the evidence tended to show that, on the night of the shooting at a club, three bullets were fired from a .357 Magnum revolver, two from a .38-caliber revolver, and one from a security officer's .40-caliber handgun; defendant testified that he was holding and fired the .38; he shot in response to a companion's instruction to "shoot the mother f___er"; the club was searched by crime scene technicians immediately after the incident occurred; three bullets identified as coming from the .357 Magnum and one bullet fired from the officer's .40-caliber handgun were recovered; no bullets were recovered that were identified as being shot from the .38; one bullet and fragments of another bullet remained unidentified in the victim's body; and the victim sustained near fatal injuries but survived.

(1) Aggravated Assault -- Amendment Of Indictment -- Cell Bars And Floor As Deadly Weapons

(2) 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

Robbery -- Pellet Gun Dangerous Weapon

State v. Westall, 116 N.C. App. 534 (1994) ___ S.E.2d ___

A pellet gun may be a dangerous weapon per se, or at a minimum, such determination must be made upon a consideration of the instrument's use.

Assault And Battery -- Assault With A Deadly Weapon With Intent To Kill Inflicting Serious Injury -- Intent To Kill -- Sufficiency Of Evidence

State v. Alexander, 337 N.C. 182 (1994)

The evidence of defendant Cunningham's intent to kill Corey Hill was sufficient to withstand his motion to dismiss considering the nature of the assault, the weapon used, and the circumstances. When a person fires a twelve-gauge shotgun into a moving vehicle four times while at the same time his accomplice is firing a pistol at the vehicle, it may fairly be inferred that the person intended to kill whoever was inside the vehicle.

Assault And Battery -- Assault With A Deadly Weapon With Intent To Kill Inflicting Serious Injury -- Serious Injury -- Sufficiency Of Evidence

State v. Alexander, 337 N.C. 182 (1994)

evidence tended to show that the force of the shotgun blasts into the truck drove shards of glass into the arm and shoulder of Corey Hill; blood was observed on his arm, and treatment for the injuries was given; Hill identified a photograph that he testified showed "cuts and wounds that I sustained from glass coming through the window from the shotgun blast"

Discharging Firearm Into Occupied Vehicle -- Three Shots, Three Convictions, No Double Jeopardy Violation

State v. Rambert, 341 N.C. 173 (1995)

Assault With Deadly Weapon Inflicting Serious Injury Sufficiency Of Evidence

State v. Dammons, 120 N.C. App. 182 (1995)

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury where evidence that defendant had been drinking, pointed a gun with no cock hammer in the victim's direction at close range, and intentionally pulled the trigger was sufficient to show defendant either intentionally shot the victim or that he acted with a reckless

disregard for her safety and was therefore culpably negligent when he intentionally pulled the trigger of the gun.

Assault And Battery -- Instruction On Lesser Included Offense Of Simple Assault Required

State v. Andrews, 122 N.C. App. 274 (1996) 468 S.E.2d 597

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, defendant was entitled to an instruction on the lesser included offense of simple assault where there is evidence that the victim was attacked by multiple assailants not acting in concert; defendant admitted that he struck the victim with his fists but denied that he cut the victim; defendant presented other evidence that the victim was cut by another perpetrator; and the victim testified that he was unsure who actually cut him.

Assault And Battery -- Transferred Intent -- Discharge Of Firearm Into Occupied Residence

State v. Fletcher, 125 N.C. App. 505 (1997)

The trial court did not err by instructing the jury that the intent to shoot a person is transferrable in order to satisfy the intent element of discharging a firearm into the occupied property of another where the evidence tended to show that defendant intended to shoot a person but instead shot into an occupied residence.

(1) Assault And Battery -- Bill Of Indictment -- Assault -- "Serious Injury" -- No Need Of Exact Language

(2) Assault -- Deadly Weapon -- Serious Injury -- Lesser Included Offense

State v. Crisp, 126 N.C. App. 30 (1997)

(1) In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, it was not necessary for the bill of indictment to track the exact language of N.C.G.S. § 14-32(a) by using the term "serious injury" where the indictment alleged that the victim received a gunshot wound to the left arm which required medical treatment and hospitalization. **(2)** In a prosecution for assault with a deadly weapon with the intent to kill inflicting serious injury, the trial court **did not err by instructing the jury that the victim's injury was serious and by refusing to instruct the jury on the lesser included offense of assault with a deadly weapon** because reasonable minds could not differ as to the seriousness of the victim's injuries where the evidence showed that defendant shot the victim; the bullet entered the victim's leg; the victim's leg went numb and then began burning and throbbing; the victim needed assistance to leave the building; and the victim required treatment at a hospital.

Homicide -- Attempted Second-Degree Murder -- Valid Conviction

State v. Lea, 126 N.C. App. 440 (1997)

Defendant could validly be convicted of attempted second-degree murder where defendant's conduct fell short of the completed offense in that none of the victims were killed; the State was not limited to convictions of completed assaults.

Assault And Battery -- Assault With A Deadly Weapon -- Prison Fight -- Pen Or Shank -- Submission Of Simple Assault Not Required

State v. Allred, 129 N.C. App. 232 (1998)

The evidence in a prosecution for assault with a deadly weapon arising from a prison fight did not support a jury instruction on the lesser-included offense of simple assault where the evidence undisputedly revealed that the victim received stab wounds during the altercation with defendant. Testimony that another inmate saw only a ballpoint pen did not contradict the State's case that defendant stabbed the victim with a shank made from a ballpoint pen.

Evidence -- Attempted Murder And Assault Charges -- HIV Status -- Admissible

State v. Monk, 132 N.C. App. 248 (1999)

The trial court did not err in a prosecution for first-degree statutory rape, taking indecent liberties with a minor, attempted murder, and assault with a deadly weapon by allowing the State to introduce evidence that defendant has AIDS where the evidence of defendant's HIV status was relevant to the State's charges of attempted murder and assault with a deadly weapon and, although the charges were dismissed at the close of the evidence, they had not been dismissed when the trial court considered the admissibility of the evidence. Moreover, defendant failed to show that the admission of the evidence was unfairly prejudicial.

Evidence -- General Intent Crimes -- Prior Assault -- Admissibility To Show Intent

State v. Elliott, 352 N.C. 663 (2000)

The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion in the Court of Appeals that evidence of a prior incident in which defendant hit the female victim's face was admissible in this prosecution for the general intent crimes of assault inflicting serious injury and assault on a female to show defendant's intent with respect to the present assault on the female victim.

Assault -- Intent To Kill -- Sufficiency Of Evidence

State v. Grigsby, 351 N.C. 454 (2000)

The State's evidence of defendant's intent to kill was sufficient to withstand defendant's motion to dismiss a charge of assault with a deadly weapon with intent to kill inflicting serious injury where it tended to show that defendant threw the victim, an assistant restaurant manager, to his knees; defendant was carrying a knife and demanded to know how many people were in the building and how much money was there; defendant tied the victim's hands with duct tape, and the victim told defendant not to hurt him, that he would give him whatever he wanted; defendant jumped onto the victim's back once the victim seized defendant's knife and struggled with the victim, causing the victim to be seriously injured; defendant threatened the victim before and after the scuffle without appearing to hear the victim's acquiescence in his demands; defendant had attempted to obtain and had subsequently regretted not being equipped with a gun at the assault; and defendant had instead obtained and chosen to use an assault-type knife with finger holes, designed to enable an assailant to repeatedly stab a victim without losing his grip.

Assault -- Serious Injury -- Peremptory Instruction

State v. Wilson, 135 N.C. App. 504 (1999)

The trial court did not err in an assault with a deadly weapon inflicting serious injury case by instructing the jury that if it finds beyond a reasonable doubt that the victim's injuries consisted of a gunshot wound and such wound resulted in his hospitalization, the jury could find such serious injury has been proved, because the trial court can properly resolve this issue with a peremptory instruction when the evidence is not conflicting and reasonable minds could not differ as to the serious nature of the injuries inflicted.

(1) Assault - Deadly Weapon Inflicting Serious Injury - Sufficiency Of Evidence

(2) Assault - Deadly Weapon Inflicting Serious Injury - Instruction On Acting In Concert - Sufficiency Of Evidence

State v. Cody, 135 N.C. App. 722 (1999)

(1) Viewing the evidence in the light most favorable to the State, the trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury at the close of defendant's case-in-chief because the State presented evidence that: 1) the victim saw defendant participate in the fight and while the victim did not identify which participants struck him with which instruments, he was **hit with both a gun and a log**; 2) another witness saw defendant kick the victim a few times and hit the victim with a branch or a log; and 3) the victim suffered two hematomas near his brain and received fifteen stitches after being hit in the head with a log while lying on the

ground, revealing a jury could find the log was a deadly weapon based on the severity of the victim's injuries and the manner in which the log was used. (2) The trial court did not err in an assault with a deadly weapon inflicting serious injury trial by submitting the acting in concert theory under North Carolina Pattern Jury Instruction 202.10 because the State presented evidence that defendant was at the scene of the crime, defendant and two other men planned to assault the victim if he had a gun, and the three men did assault the victim after discovering he had a gun.

Assault -- Deadly Weapon -- Inflicting Serious Injury -- Separate Charges -- Three Bullet Wounds

State v. Brooks, 138 N.C. App. 185 (2000)

The trial court erred in denying defendant's motion to dismiss the second charge of assault with a deadly weapon inflicting serious injury because although the victim sustained three bullet wounds, there is no evidence of a distinct interruption in the original assault followed by a second assault.

Constitutional Law -- Double Jeopardy -- Assault With Intent To Kill -- Attempted Murder

State v. Peoples, 141 N.C. App. 115, (2000)

There was no double jeopardy in the imposition of separate sentences for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The assault conviction requires proof of the use of a deadly weapon as well as proof of a serious injury, elements not required for attempted first-degree murder, and attempted first-degree murder requires premeditation and deliberation, which goes beyond an intent to kill.