

## IDENTIFICATION

### **When Different Names Relate to the Same Person, The Question Of Identity Is For The Jury To Decide.**

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

No fatal variance where an indictment charging sale and delivery of a controlled substance alleged that the sale was made to “Detective Dunabro.” The evidence at trial showed that the detective had gotten married and was known by the name Amy Gaulden. Because Detective Dunabro and Amy Gaulden were the same person, known by both a married and maiden name, the indictment sufficiently identified the purchaser. The court noted that “[w]here different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury to decide.”

### **NCIC Report Contained Sufficient Identifying Information to Be Admitted to Prove Defendant’s Out-of-State Convictions**

*State v. Fortney*, \_\_\_ N.C. App. \_\_\_, 687 S.E.2d 518 (5 January 2010).

The court ruled that a NCIC report contained sufficient identifying information (defendant’s name, date of birth, sex, race, height, weight, eye color, hair color, etc.) to be admitted to prove the defendant’s out-of-state convictions. With other admitted evidence, the court ruled that the state had sufficiently proved that the defendant had been convicted of the out-of-state felonies.

### **Rape and Sexual Offense Indictments Were Not Fatally Defective When They Identified Victim Solely By Her Initials, “RTB”**

*State v. McKoy*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (5 May 2009).

The court ruled that rape and sexual offense indictments were not fatally defective when they identified the victim solely by her initials, “RTB.” The indictments tracked the statutory language of rape and sexual offense statutes and G.S. 15-144.1 and 15-144.2. The court noted that the record on appeal demonstrates that the defendant had notice of the identity of the victim. The arrest warrants served on the defendant listed the victim by her initials, “R.T.B.,” with periods after each letter. The defendant admitted to law enforcement that he knew R.T.B. The defendant did not argue on appeal that he had difficulty preparing his case because of the use of “RTB” instead of the victim’s full name. Thus, it appears that the defendant was not confused concerning the identity of the victim, and therefore the use of “RTB” in the indictments provided the defendant with sufficient notice to prepare his defense. The defendant did not argue on appeal that the use of “RTB” placed him at risk of being subjected to double jeopardy. In

any event, the victim testified at trial and identified herself in court. Thus, the defendant was protected from double jeopardy.

### **Armed Robbery Victim's Identification of Defendant in Courtroom During Trial Did Not Violate Due Process**

*State v. Hussey, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 864 (16 December 2008).*

The court ruled, relying on *State v. Bass*, 280 N.C. 435 (1972), that an armed robbery victim's identification of the defendant in the courtroom during the trial did not violate due process. Before trial the victim chose not to attempt to identify the defendant through a photo lineup. It was not until the victim was seated in the courtroom before the beginning of the trial that he viewed the defendant for the first time since the robbery. Law enforcement did not suggest this method of identification to the victim.

### **One-Photo Identification Procedure Was Not Impermissibly Suggestive Under Due Process Clause**

*State v. Marsh, 187 N.C. App. 235, 652 S.E.2d 744 (20 November 2007).*

An officer stopped a truck matching the description of a truck that had been reported stolen. The defendant got out of the truck, but the officer ordered him back into the truck. Instead, the defendant ran away. The next day, the officer recalled that he had assisted another officer in making a traffic stop of the defendant. The officer viewed a Division of Motor Vehicles photo matching the name on the traffic citation resulting from that stop, and the officer confirmed that the man in the photo was the defendant. The court ruled that the use of a single photo in this context was not impermissibly suggestive under the Due Process Clause. [Author's note: G.S. 15A-284.52, enacted by Session Law 2007-421 (House Bill 1625) and effective for offenses committed on or after March 1, 2008,

sets out statutory requirements for photo lineups.]

**Evidence Victim's Statements to Law Enforcement Officer Responding to Crime Scene and Victim's Later Identification of Defendant at Photo Lineup Were Testimonial Statements Under Davis v. Washington, 126 S. Ct. 2266 (2006)**

*State v. Lewis, 361 N.C. 541, 648 S.E.2d 824 (24 August 2007).*

(Author's note: The North Carolina Supreme Court's initial decision in this case was reported at 360 N.C. 1 (2005). The defendant sought review with the United States Supreme Court, which remanded the case to the North Carolina Supreme Court for further consideration in light of Davis v. Washington, 126 S. Ct. 2266 (2006).] The defendant was convicted of felonious assault, armed robbery, and feloniously breaking and entering. The victim died before trial and thus did not testify and be subject to cross-examination (the cause of death was not related to these crimes). The state was allowed at trial to offer her statements made to a law enforcement officer who had responded to the crime scene shortly after it was reported by neighbors, although apparently several hours after the crimes had been committed. The victim told the officer what had occurred. Several hours later, a detective showed a photographic lineup to the victim in which she identified the defendant's photo as the person who committed the crimes against her. The court ruled that the victim's statements and the photo identification were testimonial statements under Davis v. Washington, 126 S. Ct. 2266 (2006), and their admission violated the defendant's confrontation rights because the defendant had not been afforded an opportunity to cross-examine the victim. The court's analysis of the victim's statements to the law enforcement officer at the crime scene included: (1) the victim did not face an immediate threat to her safety (there was no ongoing emergency); (2) the officer sought to determine "what happened" rather than "what is happening"; (3) the investigation was formal and conducted outside the defendant's presence; (4) the victim's statements in response to questioning recounted how the crimes had begun and progressed; and (5) the questioning occurred some time after the crimes had been committed. The court ruled that it was also clear that the victim's later photo identification of the defendant was testimonial. The court ordered a new trial because it determined that the constitutional error in admitting the victim's statements was not harmless beyond a reasonable doubt. The court noted that the issue of the defendant's forfeiture of confrontation rights remained an issue that may be developed by the parties during the defendant's new trial.

**Identification of Defendants-Encounter on highway-Photograph shown by neighbor-**

## **Findings\_**

*State v. Pulley, 180 NCA 54 (2006)*

The trial court did not err by admitting in-court and out-of-court identifications of defendant where findings to which no error was assigned detailed circumstances in which defendant was seen along a highway near where his wife's body was eventually found, and findings to which error was assigned but which were supported by competent evidence detailed the identification of defendant by one of the men who had seen him on the highway, including an identification from a photograph shown to the witness by a neighbor.

### **Identification of Defendants-Pretrial identification-Photograph shown by neighbor-Not unduly suggestive**

*State v. Pulley, 180 NCA 54 (2006)*

The trial court did not err by concluding that a pretrial identification of defendant from a photograph shown by a neighbor did not result in the likelihood of misidentification and that the in-court identification was of independent origin. The display of the photograph was not done in an impermissibly suggestive manner, but was an attempt to eliminate defendant as a suspect. Even assuming an impermissibly suggestive identification, the court's findings about the encounter between the witness and the defendant support an independent in-court identification.

### **Identification of Defendants-In-court identification--Reasonable possibility of observation--Credibility**

*State v. Watson, 179 NCA 228 (2006)*

The trial court did not err in a first-degree rape and felonious larceny case by denying defendant's motion to suppress the victim's in-court identification of him even though defendant contends the victim identified defendant based on

independent observations on later occasions and not from the source of the crime, because: (1) the victim viewed defendant's face from a couple of feet as he raped her, the victim observed defendant from a distance of one foot when he tapped her on the shoulder, she gave a detailed description of her assailant, and she unequivocally recognized and identified defendant as her assailant when she saw defendant's mug shot the day the rape occurred; (2) the State met its burden of showing a reasonable possibility of observation sufficient to permit subsequent identification; and (3) the credibility of the victim's identification of defendant and the weight to be given her testimony were properly submitted to the jury.

### **Evidence--prior crimes or bad acts\_preparation of photographic lineup**

*State v. Bellamy, 172 NCA 649 (2005)*

The trial court did not err by permitting a detective to testify concerning the method he used to put together a photographic line-up containing a photograph of defendant even if this testimony may have allowed the jury to infer that defendant had a prior arrest.

### **Constitutional Law--right to confrontation\_-prior sexual assault--testimonial evidence\_-photo lineup--harmless error**

*State v. Bellamy, 172 NCA 649 (2005)*

Although the trial court violated defendant's right to confrontation in a double second-degree rape, first-degree kidnapping, possession of cocaine, possession of drug paraphernalia, and habitual misdemeanor assault case by allowing the admission of evidence regarding an alleged prior sexual assault obtained from a detective's testimony that a prior victim identified defendant as her assailant when the prior victim was unavailable at trial, it was harmless error beyond a reasonable doubt because: (1) the victim in this case provided sufficient detail of her rape and identified defendant as her attacker; and (2) the sexual assaults upon two prior victims were properly admitted to show defendant's modus operandi, common plan or scheme, intent, and knowledge. Witness ID of Def. in Photo Lineup was testimonial under Crawford v. Washington.

## **Identification of Defendants – photographic lineup—not unduly suggestive**

*State v. Tutt, 171 NC App 518 (2005)*

A photographic lineup was not impermissibly suggestive where the photographs were not unduly suggestive and the evidence, although conflicting, supported the court's findings concerning the manner of the lineup.

When a motion to suppress identification testimony is made, the trial judge must conduct a voir dire hearing and make findings of fact to support his conclusion of law and rule as to the admissibility of the evidence. When the facts found are supported by competent evidence, they are binding on the appellate courts.

To determine the suggestiveness of pretrial identification, the test is whether the totality of circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice. If an identification procedure is not impermissibly suggestive, the inquiry is ended. If the procedure is impermissibly suggestive, then it is necessary to determine whether all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification.

Due process does not require that all subjects in a photographic lineup be identical in appearance. Nor is such a lineup impermissibly suggestive merely because the defendant has a distinctive appearance. All that is required is that the lineup be fair and the investigating officers do nothing to induce the witness to select one subject rather than another.

## **Identification of Defendants—photographic lineup—illustrative of pre-trial identification**

*State v. McMillian, 169 NCA 160 (2005)*

Evidence about a photographic lineup and the victim's identification of defendant was admissible where the evidence was admitted to illustrate the pre-trial identification of defendant. The officer explained the methods used in the creation of the lineup, and both the officer and the victim testified that the victim's response was not prompted.

## **Identification of Defendants--in-court identification--voir dire**

*State v. Beck, 163 NCA 469 (2004)*

Although the trial court erred by overruling defendant's objection to a witness's in-court identification of defendant without allowing voir dire, defendant failed to show prejudicial error to warrant a new trial because: (1) the witness testified that she was present outside the victim's home on the night he died and recalled several specific identifying characteristics of both the victim and defendant, including skin tone, clothing, and facial features; and (2) defendant's ex-wife and son testified that defendant confessed that he killed the victim.

## **Search and Seizure--video tapes seized during drug raid--identity of people controlling premises**

*State v. Adams, 159 NCA 676 (2003)*

Defendant's motion to suppress videotapes seized during a narcotics search of his home was properly denied (sic). The tapes portrayed defendant having sex in the bedroom where marijuana and drug paraphernalia were found and the warrant under which the mobile home was searched included articles of personal property tending to establish the identity of those in control of the premises. N.C.G.S. § 15A- 242(4).

## **Identification of Defendants--photographic lineup--in-court identification--motion to suppress**

*State v. McCree, 160 NCA 19 (2003)*

The trial court did not err in a robbery with a dangerous weapon, second-degree kidnapping, and attempted robbery with a dangerous weapon case by denying defendant's motion to suppress his identification by four prosecuting witnesses

from a photographic lineup and also their subsequent in-court identification, because: (1) although defendant's face appeared fuller and more round than four of the five men depicted in the lineup, it did not render the lineup impermissibly suggestive; (2) there was no impermissibly suggestive intent or effect from a detective's decision to use an older photo of defendant rather than his more recent photo from his arrest based on the fact that the more recent photo was too dark to show sufficient facial detail; (3) the photo lineup was assembled fairly and presented to each of the witnesses separately in a fair and unbiased manner with instructions not to talk to each other until each had seen the lineup and that they were under no obligation to pick anyone; and (4) the prosecuting witnesses' incourt identification of defendant was not tainted by the photo lineup.

### **Identification of Defendants--showup procedure--motion to suppress--suggestiveness**

*State v. Lee, 154 NCA 410 (2002)*

The trial court did not err in a robbery with a dangerous weapon case by failing to suppress eyewitness identifications of defendant based on a showup procedure used at the restaurant where the crime occurred, because defendant failed to demonstrate that the showup was impermissibly suggestive and created a substantial likelihood of irreparable misidentification when: (1) the eyewitnesses had sufficient opportunity to observe defendant earlier in the evening before the showup and one of the witnesses was familiar with defendant; (2) the time period was sufficiently proximate to support the reliability of the identification; (3) the potential suggestiveness of the showup was mitigated by the fact that the eyewitnesses were shown a different individual shortly before defendant was brought to the restaurant and none of the eyewitnesses identified the first suspect even though he wore a shirt with the same logo as the shirt worn by one of the robbers; (4) although defendant was handcuffed when he first arrived at the showup, this alone is insufficient to make the showup impermissibly suggestive; and (5) the trial court considered that the eyewitnesses' in-court identifications were based on their recollection of the crime and not the subsequent showup.

### **Evidence--exclusion of expert testimony--eyewitness confidence, eyewitness memory, and showups**

*State v. Lee, 154 NCA 410 (2002)*

The trial court did not err in a robbery with a dangerous weapon case by excluding expert testimony about eyewitness confidence, eyewitness memory, and showups, because: (1) the overwhelming evidence of defendant's guilt was sufficient to permit a jury to draw inferences without the aid of expert testimony; and (2) the probative value of the expert's testimony was outweighed by its likely danger to mislead the jury and confuse the issues.

### **Identification of Defendants - photographic lineup - motion to suppress**

*State v. Rogers, 355 N.C. 420 (2002)*

The trial court did not err in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution by denying defendant's motion to suppress a witness's identification of defendant in a photographic lineup, because: (1) defendant was not impermissibly photographed since he came to the police station voluntarily and was not under arrest or in custody when photographed; (2) the photographic identification process was not suggestive since the witness was shown an array of six photographs, including the photograph taken of defendant that day, and the witness quickly selected defendant's photograph; (3) the witness identified defendant in court as the man she saw at the victim's home; and (4) although defendant is the only one in the photo array not standing before a grid of horizontal lines, a photographic lineup is not impermissibly suggestive merely based on the fact that defendant has a distinctive appearance, and none of the men in the photo array appears particularly distinctive in comparison with any of the others.

### **Identification of Defendants - in-court - motion to suppress**

*State v. Rogers, 355 N.C. 420 (2002)*

The trial court did not err in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution by denying defendant's motion to suppress a witness's in-court identification of defendant as the perpetrator of the crime,

because: (1) the witness had the opportunity to view the perpetrator of the crime from a distance of approximately forty feet for several seconds on two occasions; (2) although it was night, lighting was adequate to allow the witness to see the man's face and the witness's eyesight was good; (3) the witness was paying close attention and shortly thereafter provided a detailed description to the investigators; and (4) at the suppression hearing, the witness was careful to ask to see defendant without his hat before committing herself and then was confident of her identification.

### **Identification of Defendants—eyewitness testimony—percentages of certainty**

*State v. Cole, 147 NCA 637 (2001)*

The trial court did not err in a first-degree murder prosecution by allowing the State to ask a witness to give percentages of certainty to the words “sure” and “pretty sure” in her identification testimony.

### **Identification of Defendant--in-court--suggestiveness of identification procedure**

*State v. Fowler, 353 N.C. 599 (2001)*

A witness's in-court identification of defendant in a capital trial did not deprive him of his due process rights even though defendant contends the identification was the result of an impermissibly suggestive procedure based on the cumulative effect of viewing photographic arrays and meeting with prosecutors, because: (1) the trial court found the witness's identification was based on his independent recollection of defendant from the night of the crimes; (2) the record reveals that prosecutors told the witness when they met with him before the pretrial hearing that he should tell the truth if he did not recognize defendant; (3) nothing suggests that the prosecutors encouraged the witness to make a false identification; (4) although prosecutors should avoid instructing the witness as to defendant's location in the courtroom, there is insufficient evidence to support defendant's contention that prosecutors rigged the identification; and (5) the in-court identification was not the only evidence pointing to defendant's guilt.

**Identification of Defendant--armed robbery--finding of fact--insufficient opportunity to view perpetrator**

*State v. Pinchback, 140 N.C. App. 512 (2000)*

The trial court's finding of fact in a robbery with a firearm case that the victim had an ample and sufficient opportunity to view the passenger of another vehicle who took the victim's wallet in an ABC parking lot at gunpoint is not supported by competent evidence even though the trial court based its finding on evidence that the street lights were on, the victim was in the passenger's presence for approximately 30 minutes, and the passenger did not wear any masks or other concealing clothing, because: (1) the only evidence regarding the victim's ability to view the passenger is the victim's testimony that the passenger was in sight for approximately five minutes and the victim was unable to view the passenger during this time because it was dark; and (2) the victim also testified the passenger forced him to lie face down on the ground and the victim never made eye-to-eye contact with him.

**Identification of Defendant--pretrial--suggestive nature--substantial likelihood of misidentification--error not harmless beyond a reasonable doubt**

*State v. Pinchback, 140 N.C. App. 512 (2000)*

The trial court erred in a robbery with a firearm case by denying defendant's motion to suppress the victim's pretrial identification, because: (1) there is a substantial likelihood that the victim misidentified defendant when weighing the suggestiveness of the identification procedure against the facts that the victim's description of the height and weight of the passenger of another vehicle who took the victim's wallet in an ABC parking lot at gunpoint differed significantly from defendant's actual height and weight; and (2) the State failed to meet its burden under N.C.G.S. § 15A-1443(b) to demonstrate this error was harmless beyond a reasonable doubt.

**Evidence and Witnesses § 427 (NCI4th) - suggestiveness of showup identifications - no likelihood of misidentification**

*State v. Capps, 114 N.C. App. 156 (1994)*

"Showup" identification procedures in which three witnesses observed defendant while he was sitting in a police car, coupled with statements made by officers to two of the witnesses that they had a suspect, that he had changed clothes, and that he no longer had a mustache, were unnecessarily suggestive. However, under the totality of the circumstances there was no substantial likelihood of misidentification and the identification of defendant by each witness was sufficiently reliable to be admissible where each witness observed defendant as he fled from the scene of an armed robbery; each witness indicated a high degree of attention to the appearance of the man they observed; the witnesses' descriptions of the perpetrator varied from defendant's appearance only because defendant had shaved his mustache and changed clothes between the time the witnesses observed him and his apprehension by the police; the identifications by all three witnesses occurred within an hour after the robbery; and the three witnesses were all unequivocal in their identifications of defendant.

**Evidence and Witnesses § 402 (NCI4th) - in-court identifications - absence of pretrial identifications - observations of witnesses**

*State v. Caporasso, 128 N.C. App. 236 (1998)*

Three witnesses were properly permitted to make in-court identifications of defendant without first being required to submit to other nonsuggestive identification procedures where none of the witnesses participated in pretrial identifications, and their identifications of defendant were based solely upon their observations of defendant at times and locations relating to the crimes charged.

**Evidence and Witnesses § 1775 (NCI4th) - voice demonstration - voice identification - no selfincrimination violation**

*State v. Thompson, 129 N.C. App. 13 (1998)*

The trial court did not violate defendant's constitutional right against self-incrimination by requiring defendant to demonstrate her voice to robbery victims and the jury for the purpose of voice identification where the court advised the jury to only view the voice demonstration as an example by which the victims could test their recollections of defendant's voice during the robbery.

### **Evidence - lineup - photo and physical - defendant only suspect in both**

*State v. Breeze, 130 N.C. App. 344 (1998)*

The trial court did not err in an armed robbery prosecution by denying defendant's motion to suppress identifications where defendant was the only suspect who appeared in both the photo and physical lineups. Each of the three victims who viewed the physical lineup after the photo lineup had a strong motive for and intention to remember the appearance of the perpetrator; each of the victims had ample opportunity to observe the features of the perpetrator; each provided police with a definite, detailed description of the perpetrator based on studying the features of the perpetrator at the scene of the crime; defendant was not distinguished from the other suspects in either lineup; the witnesses were not encouraged to draw more attention to defendant than the other suspects; and each of the witnesses was able to sufficiently identify defendant as the perpetrator.

### **Evidence - identification - in-court**

*State v. Breeze, 130 N.C. App. 344 (1998)*

There was no error as to in-court identifications of defendant in an armed robbery prosecution where some of the victims who identified defendant at trial had not identified him during lineups. The victims identified defendant as looking like the perpetrator during both the lineup and at trial, identified defendant at trial as looking like the perpetrator even though they had identified another person in a lineup, did not pick defendant during a lineup but identified him at trial as looking like the perpetrator, or chose defendant during the lineup as the person who

looked the most like the perpetrator and again pointed him out at trial as looking like the perpetrator. Such discrepancies or inconsistencies go to the credibility of the witness and do not render the identification inadmissible.

### **Evidence - identification - pre-trial - suggestive - no irreparable misidentification**

*State v. Smith, 134 N.C. App. 123 (1999)*

The trial court did not err in a prosecution for possession of cocaine with intent to sell and deliver by admitting an officer's pre-trial identification of defendant where the officer was shown a page from defendant's high school yearbook on which he was the only black male and below which his name was clearly printed, and the officer knew that she was identifying a black male and had been told defendant's name. The pre-trial identification was unnecessarily suggestive, but did not result in the strong probability of misidentification because the officer had ample opportunity to view defendant at the time of each crime, the officer was trained to maintain a high degree of attention when observing suspects and was aware that she would later identify defendant, she gave a detailed description of defendant, and she exhibited a high degree of certainty when shown the high school yearbook.

### **Indictment and Information - spelling of defendant's name - correction**

*State v. Grigsby, 134 N.C. App. 315 (1999)*

The trial court did not err in a prosecution for robbery and assault by allowing the State to amend the indictment on the first day of the trial to correct the spelling of defendant's last name. Although a change in the name of the victim is a substantial change, a change in the spelling of defendant's name to add one letter is not a substantial alteration. Defendant cannot seriously argue that he was unaware of the charges against him.

### **Evidence - identification of defendant - brief opportunity for observation**

*State v. Parker, 350 N.C. 411 (1999)*

The trial court properly permitted identification of defendant by a witness who observed defendant during the day from a short distance for a period of a few seconds to a minute and was able to remark about defendant's unseasonable clothing. The witness's limited opportunity for observation goes to the weight rather than the admissibility of the identification.

**Evidence - identification - in-court - hypnosis - essentially identical description before and after**

*State v. Hall, 134 N.C. App. 417 (1999)*

The trial court did not err in allowing the witness' in-court identification of defendant because even though the witness had been hypnotized by the police, her description of the assailant remained essentially identical before and after hypnosis. The witness identification was based on her observations the night of the murder and attempted robbery, and was related immediately to police well before hypnosis. The only portion of the witness' testimony which might be considered "hypnotically refreshed" was that containing the minimal descriptive details and not her in-court identification of defendant.

**Evidence - out-of-court identification - photographic lineup not unnecessarily suggestive**

*State v. Roberts, 135 N.C. App. 690 (1999)*

The trial court did not err in a felony breaking or entering case when it denied defendant's motion to suppress the out-of-court identification evidence because: (1) defendant has not made the photographic lineup part of the record on appeal; (2) the fact that defendant was the only one pictured with freckles does not render the photographic lineup impermissibly suggestive per se; (3) the trial court specifically found the investigating officer who compiled the photographic lineup did the best she could in including individuals with similar features to those described by the victim; and (4) even if the photographic lineup was

impermissibly suggestive, it was not so suggestive that there was a substantial likelihood of irreparable misidentification.