

## IMPEACHMENT

### **Constitutional Error to Allow State to Introduce as Substantive Evidence Defendant's Pre-Arrest Silence to Law Enforcement; Such Evidence Is Admissible Only for Impeachment and Defendant Did Not Testify at Trial**

*State v. Boston, \_\_\_ N.C. App. \_\_\_, 663 S.E.2d 886 (5 August 2008).*

The state was allowed to introduce evidence that the defendant, who had not been arrested, refused a law enforcement officer's request to come to the police department to answer questions about an arson. This evidence was admitted as substantive evidence of the defendant's guilt. The defendant did not testify at trial. The court ruled it was constitutional error to admit this pre-arrest silence as substantive evidence. It could only be introduced as impeachment evidence. The court ruled, distinguishing *Jenkins v. Anderson*, 447 U.S. 231 (1980), and relying on several federal appellate cases, that the admission of the defendant's pre-arrest silence as substantive evidence was constitutional error.

### **Trial Judge Did Not Err in Allowing State to Impeach Defendant Under Rule 609 With Conviction Over Ten Years Old**

*State v. Muhammad, 186 N.C. App. 355, 651 S.E.2d 569 (16 October 2007).*

The defendant was convicted of first-degree murder based on shooting the victim with a pistol. The court ruled that the trial judge did not err in allowing the state to impeach the defendant under Rule 609 with a conviction over ten years old, a New Jersey felony aggravated assault conviction. The court stated the fact that the conviction was for a crime not involving dishonesty and was a different crime than the offense on trial was not dispositive of its admissibility. The trial judge had found that: (1) as a result of the prior conviction the defendant's status as a convicted felon made it illegal for him to possess a firearm at the time of the offense being tried; (2) the prior conviction, like the facts in the case on trial, involved eluding the police; and (3) the prior conviction manifested extreme indifference to human life and recklessly causing serious bodily injury.

## **Evidence-Cross-examination--Prior crimes or bad acts--Prior convictions--status as drug dealer**

*State v. Mewborn, 178 NCA 281 (2006)*

The trial court did not err in a trafficking in cocaine by possession, transportation, and sale case by allowing the State to cross-examine defendant about his prior convictions and his status as a drug dealer, because: (1) by defendant's own admission, N.C.G.S. § 8C-1, Rule 608 is inapplicable to the contested questioning about defendant's status as a drug dealer since it was neither a reference to a specific act nor probative of defendant's truthfulness; (2) evidence which would otherwise be inadmissible may be permissible on cross-examination to correct inaccuracies or misleading omissions in defendant's testimony or to dispel favorable inferences arising from them, and defendant's testimony on cross-examination that his 1995 conviction for possession of cocaine should have been for possession of paraphernalia tended to mislead the jury as to defendant's prior record; (3) defendant's unsolicited testimony about the search of his home seemed to imply that he was framed by the officers who recovered evidence leading to his probation revocation and second conviction, and the State did not exceed the scope of cross-examination under N.C.G.S. § 8C-1, Rule 609(a) by suggesting the reason police officers searched defendant's home was based on the fact that they knew defendant had been convicted of selling drugs; (4) assuming arguendo the cross-examination was improper under N.C.G.S. § 8C-1, Rule 404(a), defendant failed to show he was unduly prejudiced by the State's characterization of him as a drug dealer in light of the uncontested evidence of defendant's prior drug convictions; and (5) although defendant contends *State v. Wilkerson, 356 N.C. 418 (2002)*, establishes that the State's cross-examination violated Rule 404(b), the present case is distinguishable since defendant in this case testified on his own behalf.

## **Evidence-Prior offense-Deferred prosecution-False statements**

*State v. Browning, 177 NCA 487 (2006)*

There was no error in a statutory rape prosecution in the admission of defendant's testimony about a prior theft which was the subject of a deferred prosecution. The State limited its inquiry to defendant's false statements to the police, and did not

ask him about a conviction which had been expunged or offer extrinsic evidence of his false statements. Moreover, any error was harmless, because defendant admitted having sex with the victim.

### **Evidence--impeaching witness\_prior inconsistent statement**

*State v. Reid, 175 NCA 613 (2006)*

There was no plain error in a prosecution for robbery and other offenses in the State's introduction of extrinsic evidence to impeach a defense witness who denied making a prior inconsistent statement. Whether the prior statement was made is a collateral matter and the testimony should not have been allowed; however, defendant did not meet his burden of showing that the jury would probably have reached a different result if the testimony had been excluded.

### **Evidence--prior inconsistent statements--impeachment--refreshing memory with prior custodial statements**

*State v. Jacobs, 174 NCA 1 (2005)*

The trial court did not err in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by admitting evidence of two coparticipants' prior inconsistent statements when the State impeached the coparticipants with their prior custodial statements after allowing them to refresh their memory by looking through their statements, because: (1) the record demonstrates the coparticipants were testifying contrary to the expectations of the State and there is no indication that the State called the witnesses or used their impeachment as a mere subterfuge to get evidence before the jury which was otherwise inadmissible; and (2) the trial court instructed the jury that when evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent or may conflict with his testimony, the jury must not consider such earlier statement as evidence of the truth of what was said at the earlier time.

## **Evidence--witnesses' denial of prior statements--impeachment--extrinsic evidence**

*State v. Mitchell, 169 NCA 417 (2005)*

The trial court erred in a first-degree statutory sex offense, indecent liberties, sexual activity by a substitute parent, felony child abuse, and first-degree statutory rape case by permitting the State to impeach three witnesses who denied making prior allegations about defendant's prior sexual abuse of his own children when they were younger with extrinsic evidence, because: (1) once a witness denies having made a prior inconsistent statement, the State may not introduce the prior statement in an attempt to discredit the witness since the prior statement concerns only the collateral matter of whether the statement was ever made; (2) their denials were conclusive for impeachment purposes, and the testimony elicited from a detective and a DSS case manager during the State's rebuttal case was collateral and therefore could not be used to impeach those witnesses; (3) the pertinent statements regarding defendant's prior sexual misconduct were inadmissible to show defendant's intent, motive or plan to commit the crimes since they were hearsay statements; and (4) the evidence that defendant sexually assaulted his own daughters when they were young was highly prejudicial and there was a reasonable probability that without this evidence, the outcome of the trial may have been different. See Farb p13

## **Evidence--impeachment--reversed conviction**

*State v. Jordan, 162 NCA 308 (2004)*

The trial court did err in an accessory after the fact to voluntary manslaughter case by excluding evidence of the principal husband's significantly higher sentence after his jury trial in comparison to the sentence later imposed pursuant to a plea agreement even though defendant contends it prevented her from impeaching the principal's testimony, because: (1) the effect of a reversal is to overturn a conviction, and N.C.G.S. § 8C-1, Rule 609 does not envision the usage of convictions that either have not come to fruition or have become nullities; and (2) although defendant attempted to raise a constitutional claim in her brief, she failed to include it in her assignments of error.

## **Evidence--rebuttal--impeachment testimony**

*State v. Stokes, 357 NC 220 (2003)*

The trial court did not err in a first-degree felony murder and felonious child abuse case by admitting in rebuttal as impeachment testimony defendant's statement to an officer about defendant's treatment of a minor child on the night of the minor child's death, made approximately nineteen hours after defendant was given his Miranda rights, because: (1) the cross-examination questions of defendant about his statement to the officer were proper; (2) the officer was properly called as a rebuttal witness when the impeaching evidence pertained to the substance of defendant's statement; (3) even assuming arguendo that defendant properly preserved plain error review concerning whether the statements was in fact admitted as substantive evidence rather than as impeaching evidence, the alleged error did not arise to the level of plain error; (4) defendant failed to object to the prosecutor's characterization of the statement during closing argument, and it was not so grossly improper that the trial court abused its discretion by failing to intervene ex mero motu; and (5) the trial court instructed the jury that defendant's statement to the officer was being made for the limited purpose of impeaching defendant's truthfulness. Rev'd Ct Appeals 150 NCA 211 Statement in violation of Miranda can still be used for impeachment.

## **Evidence - prior crimes or bad acts - malicious wounding - impeachment**

*State v. Brown, 357 N.C. 382 (2003)*

The trial court did not err in a double first-degree murder case by denying defendant's motion in limine seeking to prevent the State from using his 1986 Virginia conviction for malicious wounding to impeach him during cross-examination even though defendant contends under N.C.G.S. § 8C-1, Rule 403 that the probative value of the conviction was substantially outweighed by the danger of unfair prejudice to him, because: (1) N.C.G.S. § 8C-1, Rule 609 governs whether a prior conviction may be used to impeach a witness; (2) the language of Rule 609(a) that the evidence "shall be admitted" is mandatory, leaving no room for the trial court's discretion; and (3) although Rule 609(b) requires a balancing test for a conviction more than ten years old, the conviction in this case is less than ten years old.

## **Evidence--prior crimes or bad acts--possession of drug paraphernalia--pendency of appeal**

*State v. Weaver, 160 NCA 61 (2003)*

The trial court did not err in a bribery of a public officer case by allowing the State to cross-examine defendant with respect to his district court conviction of possession of drug paraphernalia even though the conviction had been appealed to superior court, because N.C.G.S. § 8C-1, Rule 609 specifically states that pendency of an appeal from a conviction does not render evidence of the conviction inadmissible.

## **Evidence--prior offense--habitual felon conviction \*\*\*\***

*State v. Owens, 160 NCA 494 (2003)*

The trial court did not err in a larceny prosecution by allowing defendant to be questioned about a previous habitual felon conviction. N.C.G.S. § 14-7.5 only prohibits informing the jury of habitual felon indictments which are pending.

## **Criminal Law--instructions--impeachment of witness with unrelated crimes--testimony on direct examination**

*State v. Jackson, 161 NCA 118 (2003)*

An armed robbery defendant was not entitled to a limiting instruction on impeachment with proof of unrelated crimes after he testified on direct examination about his prior crimes and convictions. He was not impeached.

## **Evidence--bad acts as juvenile--not statutory plain error**

*State v. Perkins, 154 NCA 148 (2002)*

The General Assembly did not label the admission of juvenile convictions as plain error in N.C.G.S. § 8C-1, Rule 609(d), under which a defendant cannot be impeached by a juvenile adjudication, and there was no evidence that defendant was unfairly prejudiced by questions about his juvenile convictions.

### **Evidence--cross-examination--alibi witness--bias or prejudice**

*State v. Bullock, 154 NCA 234 (2002)*

The trial court did not abuse its discretion in an attempted first-degree murder and possession of a firearm by a felon while being an habitual felon case by denying defendant's objection on relevancy grounds to cross-examination questions by the State of a defense witness, defendant's girlfriend, that implied the witness had a previous altercation with the victim, defendant's former wife, because the State was allowed to question defendant's alibi witness about events which may have revealed bias or prejudice against the victim of the crime.

### **Evidence--impeachment--prior DWI offenses**

*State v. Gregory, 154 NCA 718 (2002)*

The trial court properly denied a motion in limine to suppress prior DWI convictions. A careful reading of the applicable statutes indicates that a DWI conviction is a Class 1 misdemeanor and is admissible for impeachment purposes under N.C.G.S. § 8C-1, Rule 609(a).

### **Evidence - examination of witnesses - inconsistencies**

*State v. Robinson, 355 N.C. 320 (2002)*

The trial court did not err in a capital prosecution for first-degree murder where defendant was not allowed to ask questions in a form which called for a witness to vouch for the veracity of another witness. Defendant was free to ask about inconsistencies, and did so.

### **Evidence--prior crimes or bad acts--impeachment--opening door to details**

*State v. Strickland, 153 NCA 581 (2002)*

The trial court did not abuse its discretion in a second-degree rape and misdemeanor breaking and entering case by denying defendant's motion for a mistrial even though the State cross-examined defendant about the details of his prior convictions that were being used for impeachment purposes, because defendant opened the door to the details of his previous convictions by: (1) his detailed explanations of the actions which gave rise to these charges; and (2) on cross-examination, requesting from the prosecutor more specific information about his prior misconduct on several occasions.

### **Evidence--hearsay--prior crimes or bad acts--forcible robbery--credibility \*\*\*\*\***

*State v. McConico, 153 NCA 723 (2002)*

The trial court did not err in a robbery with a dangerous weapon case by allowing the State to question under N.C.G.S. § 8C-1, Rule 806 a defense witness on cross-examination as to defendant's prior conviction for forcible robbery after the witness stated that defendant said he was "going to the studio" to assist in establishing an alibi for defendant on the evening of the pertinent crime, because: (1) once defendant's statement was admitted into evidence through the testimony of the witness, the State was allowed to attack defendant's credibility the same as if defendant had testified in court; and (2) N.C.G.S. § 8C-1, Rule 609(a) states that evidence of this type shall be admitted to attack the credibility of a witness, and no balancing is required prior to admission of this evidence for impeachment purposes when the conviction is less than ten years old.\*\*\*\*\*

## **Evidence--hearsay--prior statements--impeachment**

*State v. Featherston, 145 NCA 134 (2001)*

The trial court did not err in a prosecution for the robbery of a Bojangles by admitting alleged hearsay statements from codefendants where the codefendants' pre-trial statements implicated defendant, their testimony at trial exonerated defendant, and the court instructed the jury that the statements were to be considered as impeaching rather than as substantive evidence. Furthermore, other evidence to the same effect was elicited on cross-examination by defendant or was admitted without an objection, a motion to strike, or a request for limiting instructions and there was no prejudice.

## **Witnesses--credibility--cross-examination**

*State v. Galloway, 145 NCA (2001)*

The trial court did not err in a prosecution for kidnapping, rape, and other offenses by not allowing defendants to fully attack the credibility of the victim. During cross-examination, the victim admitted that she was addicted to crack cocaine and had smoked crack on the day of these crimes; she denied an alleged suicide attempt; she admitted visiting psychiatrists, being involuntarily admitted to a "detox" center and leaving it against medical recommendation; evidence was admitted that she used several aliases and had been convicted of writing bad checks, driving with a revoked license, and prostitution; and she admitted that this was a difficult time in her life, with financial problems, depression, and her husband's recent imprisonment.

## **Evidence--medical records--discharge notation--psychiatric history--not admissible**

*State v. Galloway, 145 NCA (2001)*

The trial court did not err in a prosecution for kidnapping, rape, and other offenses by excluding the victim's medical discharge summary and other medical records.

The notation of psychiatric history on the discharge summary was not admissible under N.C.G.S. § 8C-1, Rule 703 as the basis for an expert opinion because the doctor making the notation was an expert in surgery rather than psychiatry and admitted during voir dire that he had no personal knowledge or expertise on the challenged matters. The discharge summary statements were not admissible as business records under N.C.G.S. § 8C-1, Rule 803(6) because the court found the source of the doctor's statements to be unreliable. Moreover, any error that might have resulted from the omission of these statements was cured by the testimony of another emergency room doctor, who clearly identified the source of her information. Other medical records were properly excluded because they contained inconsistencies and the doctor was not present to clarify them, or were in fact used by defendant.

### **Constitutional Law--defendant's silence--cross-examination--admissible**

*State v. Fair, 354 NC 131 (2001)*

The trial court did not err in a capital prosecution for first-degree murder by allowing the State to cross-examine defendant about his failure to tell the police about a witness who could have backed up his story, about his failure to tell a journalist about the person who allegedly committed the crime, and about statements made to an officer while in a holding cell. Defendant's objection to the first set of questions was sustained, the State asked defendant no questions concerning silence during cross-examination about his holding cell statements, and it would have been natural for defendant to reveal the identity of the real killer when he voluntarily spoke to the press. (See Farb's text)

### **Evidence--allegations of prior insurance fraud--probative of truthfulness**

*State v. Kimble, 140 NC App 153 (2000)*

The trial court did not abuse its discretion in a first-degree murder case by allowing the State to question defendant regarding allegations that his brother and his parents had committed insurance fraud, because: (1) the possibility that defendant was aware of, and therefore conspired in, an insurance fraud scam

undertaken by his brother and parents is arguably probative of defendant's truthfulness under N.C.G.S. § 8C-1, Rule 608(b); and (2) defendant failed to show an abuse of discretion.

### **Evidence - Prior convictions - defendant - cross-examination**

*State v. Braxton, 352 N.C. 158 (2000)*

The trial court did not err in a capital trial by allowing the prosecutor to cross-examine defendant about the details of his prior convictions because defendant's testimony on direct examination tended to minimize the seriousness of his criminal involvement, and the prosecutor did not improperly ask defendant about tangential circumstances of the crimes.

### **Evidence - Prior convictions - defense witness - cross-examination**

*State v. Braxton, 352 N.C. 158 (2000)*

The trial court did not err in a capital trial by allowing the prosecutor to cross-examine a defense witness about the details of his prior convictions because even if the questions exceeded the proper scope of inquiry under N.C.G.S. § 8C-1, Rule 609(a), any error was not prejudicial since the questions were asked of a defense witness and not the defendant.

### **Evidence - Prison infractions - character - untruthfulness**

*State v. Braxton, 352 N.C. 158 (2000)*

The trial court did not abuse its discretion under N.C.G.S. § 8C-1, Rule 608(b) in a capital trial by allowing the prosecutor to cross-examine defendant with respect to his prison infractions for weapon possessions, provoking an assault, disobeying an order and fighting, and making a verbal threat, because the record reveals the

purpose of the prosecutor's inquiry was to show defendant's character for untruthfulness.

**Evidence and Witnesses 2923 (NCI4th) - direct examination of own witness - impeachment by prior charges not permitted**

*State v. Mills, 332 N.C. 392 (1992) 420 S.E.2d 114*

A defendant charged with murder could not call the victim's husband as a defense witness and then attempt to impeach him by inquiring into prior charges or indictments against the husband for killing his first wife and shooting his second wife since a party is not free on direct examination to impeach his witness by evidence of specific acts or prior convictions. N.C.G.S. 8C-1, Rules 608, 609.

**Evidence and Witnesses 221 (NCI4th) - first-degree murder of spouse - failure to provide support for children following wife's death – admissible**

*State v. Collins, 335 N.C. 729 (1994) 440 S.E.2d 559*

**Evidence and Witnesses 765, 3023 (NCI4th) - impeachment - specific instances of misconduct - opening door to cross-examination**

*State v. Syriani, 333 N.C. 350 (1993) 428 S.E.2d 118*

While Rule of Evidence 608(b) prohibits use of specific instances of misconduct to impeach a defendant upon cross-examination, a defendant on trial for the first degree murder of his wife opened the door to cross-examination regarding specific instances of misconduct toward both his wife and children when he testified on direct examination that he was a loving and supportive husband and father, and that he did not intend to hurt his wife but unintentionally, or in self-defense, struck back at her with a screwdriver, trying only to get her to stop moving her car.

### **Evidence and Witnesses 3025 (NCI4th) - impeachment - limited to prior convictions**

*State v. Jordan, 333 N.C. 431 (1993) 426 S.E.2d 692*

The trial court did not err in a murder prosecution where a State's witness testified concerning conversations with defendant in jail by limiting defendant's cross-examination of that witness about prior bad acts to questions under N.C.G.S. 8C-1, Rule 609 concerning prior convictions.

### **Evidence and Witnesses 282 (NCI4th) - character witness - cross-examination - specific acts of misconduct**

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

The trial court in a first degree murder prosecution did not err in allowing the State to ask three witnesses whether they were aware of an assault committed by defendant twenty-five years earlier after defendant's attorneys had elicited testimony from the witnesses that they had never known defendant to be a violent person. Any conduct that rebuts earlier reputation or opinion testimony offered by the defendant is a "relevant" specific instance of conduct admissible under N.C.G.S. 8C-1, Rule 405(a), and this Rule contains no time limit.

### **Evidence and Witnesses 3088 (NCI4th) - letter soliciting sex - admissibility for impeachment**

*State v. Guthrie, 110 N.C. App. 91 (1993) 428 S.E.2d 853*

Where an alleged sexual offense and indecent liberties victim testified that defendant dictated letters she wrote to defendant implying that she would do things of a sexual nature for defendant if he would take her to school and lend her money, cross-examination of the victim about a letter she voluntarily wrote to a school friend asking the friend to have sex with her was relevant to impeach the

credibility of the victim because this evidence supports an inference that the victim voluntarily wrote the letters to defendant and thus contradicts her earlier testimony.

**Evidence and Witnesses 3072 (NCI4th) - hostile witness - prior grand jury testimony - use for impeachment**

*State v. Minter, 111 N.C. App. 40 (1993) 432 S.E.2d 146*

Once a hostile State's witness refused to testify or claimed that parts of his earlier, sworn statements before the grand jury were false, the State could properly use his grand jury testimony for the limited purpose of impeachment.

**Evidence and Witnesses 3052 (NCI4th)- sexual abuse case - defendant's drug use - cross-examination error**

*State v. Wilson, \_\_\_ N.C. App. \_\_\_ (5-2-1995)*

In a prosecution of defendant for sexual abuse of children in the day care center in which she worked, the trial court erred in allowing the prosecutor to cross-examine her regarding her drug knowledge and use, since this evidence was irrelevant and inadmissible under Rule 608(b) of the Rules of Evidence.

**Evidence and Witnesses 3022 (NCI4th) - pending charge - evidence not admissible to show bias of defense witness**

*State v. Graham, 118 N.C. App. 231 (1995)*

In *State v. Williams*, our Supreme Court held that "for purposes of impeachment, a witness . . . may not be crossexamined as to whether he has been indicted or is under indictment for a criminal offense." *State v. Williams*, 279 N.C. 663 We now hold that evidence of a pending charge or indictment may not be offered to

show bias of a defense witness. As the court in Williams stated, "an indictment cannot rightly be considered as more than an unproved accusation."

**Evidence and Witnesses 3003 (NCI4th) first-degree murder - prior conviction ten years and one month old - admissible**

*State v. Lynch, 337 N.C. 415 (1994) \_\_\_ S.E.2d \_\_\_*

**Evidence and Witnesses 3018 (NCI4th) first-degree murder and assault - State's witnesses - impeachment - dismissed charges and warrants - not allowed**

*State v. Abraham, 338 N.C. 315 (1994) \_\_\_ S.E.2d \_\_\_*

The trial court did not err in a prosecution for murder and multiple assaults by not allowing defendant to impeach a victim by having him admit that a charge of larceny of an automobile was dismissed pursuant to a plea to a drug offense, by not allowing defendant to question the victim about a pending warrant for his arrest for possession of a firearm without a license, or by sustaining the State's objection when trial counsel asked another State's witness whether there were any charges pending against him when counsel interviewed him.

**Evidence and Witnesses 2899 (NCI4th) first-degree murder - cross-examination of defendant - length of prior sentences**

*State v. Conaway, 339 N.C. 487 (1995) \_\_\_ S.E.2d \_\_\_*

There was no plain error in a first-degree murder prosecution in denying defendant's motion in limine to exclude evidence of the length of his prior sentences.

**Evidence and Witnesses 2927 (NCI4th) State's impeachment of own witness State surprised by testimony**

*State v. Williams, 341 N.C. 1 (1995) \*\*\*\*\**

The trial court did not err in allowing the State to impeach its own witness with her prior inconsistent statement where defendant's girlfriend testified at trial that defendant told her that another person shot the victim, and there was nothing to indicate that the State knew or believed prior to calling defendant's girlfriend to testify that she would testify differently from her prior statement that defendant told her he had shot the victim. The fact that the prosecutor knew the girlfriend had visited defendant in jail and had ridden home with defendant's mother from trial did not show that the prosecutor knew the witness would change her testimony. N.C.G.S. 8C-1, Rule 607.

**Evidence and Witnesses 3164 (NCI4th) prior inconsistent statement extrinsic evidence properly allowed instructions proper**

*State v. Williams, 341 N.C. 1 (1995) \*\*\*\*\**

The trial court did not err in allowing the State to introduce extrinsic evidence of a witness's prior inconsistent statement where the witness testified on direct examination that she had made the prior inconsistent statement, since the extrinsic evidence of this statement was thus admissible to corroborate this portion of the witness's testimony.

**Evidence and Witnesses 3027 (NCI4th) cross-examination of defendant prior false statements**

*State v. Goode, 341 N.C. 513 (1995) \_\_\_ S.E.2d \_\_\_*

The trial court properly permitted the State to cross-examine defendant pursuant to Rule 608(b) about false statements defendant made to hospital personnel and his commanding officer less than a year before the murders for which he was on

trial since those statements are highly probative of defendant's character for truthfulness. N.C.G.S. 8C-1, Rule 608(b).

**Evidence and Witnesses 298 (NCI4th) first-degree murder cross-examination impeachment of another witness**

*State v. Walls*, 342 N.C. 1 (1995) \_\_\_ S.E.2d \_\_\_

The trial court did not err in a first-degree murder prosecution by sustaining the prosecutor's objections to defendant's attempt to elicit information from a prosecution witness for the purpose of impeaching another prosecution witness. The impeachment questions propounded by defendant, as clearly extrinsic evidence, would be proper only if the first witness had testified in some fashion as to the second's character for truthfulness or untruthfulness and there is no instance in the record in which the first witness testified in any way concerning the second's character. N.C.G.S. 1 8C-1, Rule 608(b).

**Constitutional Law 359 (NCI4th); Evidence and Witnesses 1087 (NCI4th) defendant's failure to offer explanation of events no violation of right against self-incrimination**

*State v. Alkano*, 119 N.C. App. 256 (1995) \_\_\_ S.E.2d \_\_\_

In a prosecution of defendant for second-degree sexual offense, the prosecutor's questions to the arresting officers concerning defendant's pre-Miranda post-arrest lack of explanation of the events in question did not violate defendant's right against self-incrimination, since defendant did not choose to remain silent but instead, without any interrogation whatever by the officers, spontaneously made several inculpatory statements after being arrested, and the prosecutor's line of questioning served only to show the extent of defendant's spontaneous utterances.

**Criminal Law 426 (NCI4th) first-degree murder prosecutor's argument defendant's refusal to talk to police impeachment no error**

*State v. Buckner, 342 N.C. 198 (1995) \_\_\_ S.E.2d \_\_\_*

There was no plain error in a first-degree murder prosecution where the prosecutor's closing argument referred to defendant's refusal to talk to the police. There was no evidence that defendant had been read his Miranda rights at the time of the silence and inaction referred to by the prosecutor, and the arguments made by the prosecutor were permissible as impeachment of defendant's testimony. Defendant's entire defense was based on his being a police informant who was at the scene of the crime attempting to gather incriminating evidence against the victim. It would have been natural for defendant to have told the police that an accomplice shot the victim and to have helped the police gather evidence even before defendant was brought to the police station; evidence that he did not do so contradicted his testimony. Additionally, it would have been natural for defendant to tell police that he had not shot anyone and that an accomplice had shot the victim when confronted with the accomplice's statement identifying defendant as the triggerman. Although defendant also argues that the prosecutor used defendant's reliance on his constitutional rights as substantive evidence of defendant's guilt, in the limited circumstances of this particular case, the argument was made to impeach defendant's testimony at trial and the court did not err in allowing the argument. Am Jur 2d, Trial 557. Impeachment of defendant in criminal case by showing defendant's prearrest silence- state cases. 35 ALR4th 731.

### **Evidence and Witnesses 3156 (NCI4th) credibility of witness - opinion testimony**

*State v. Jones, 342 N.C. 457 (1996) \_\_\_ S.E.2d \_\_\_*

A deputy sheriff who investigated a murder was properly permitted to testify that he had formed an opinion that a State's witness was a truthful and honest person and that he had not caught her in a lie that he could prove, since the credibility of a witness whose credibility has been attacked may be supported by opinion testimony pursuant to N.C.G.S. 8C-1, Rule 608(a).

### **Evidence and Witnesses § 2983 (NCI4th) impeachment of defense witness prior conviction scope of inquiry factual elements of crime**

*State v. King, 343 N.C. 29 (1996) 468 S.E.2d 232*

The prosecutor's question to a defense witness as to whether he had been convicted "for kicking Joseph Kinnion in the mouth and cutting him so that he had to get 13 stitches" did not exceed the scope of proper inquiry under N.C.G.S. § 8C-1, Rule 609(d) since the question related to the factual elements of the crime rather than the tangential circumstances of the crime.

### **Evidence and Witnesses § 1092 (NCI4th) first-degree murder defendant's prearrest silence impeachment**

*State v. Westbrooks, 345 N.C. 43 (1996) 478 S.E.2d 483*

There was no error in a first-degree murder prosecution in which defendant was charged with murdering her husband in the admission of statements made by defendant to a detective before and after her arrest, in the cross-examination of defendant about those statements, and in the argument of the prosecutor about the statements. Under common law rules, it would have been natural for defendant to have told officers about the conversation in light of the fact that she was told the identity of the person who killed her husband during the conversation. Her silence about this conversation was evidence of an inconsistent statement and it was not error to allow the prosecutor's cross-examination of defendant on this issue. Assuming that it would not have been natural for defendant to have told officers about the facts set out in the statement, any error was not prejudicial given the overwhelming evidence against defendant.

### **Evidence and Witnesses § 1092 (NCI4th) first-degree murder defendant's postarrest silence used for impeachment purposes**

*State v. Westbrooks, 345 N.C. 43 (1996) 478 S.E.2d 483*

The trial court did not err in a first-degree murder prosecution by using defendant's post-arrest, post-Miranda silence for impeachment where the record discloses that defendant was not induced to remain silent, executed a waiver and voluntarily gave a statement to investigating officers. Any references to omissions

or inconsistencies in statements defendant made after receiving her Miranda warnings were proper.

**Evidence and Witnesses § 2942 (NCI4th) - prearrest - impeachment of defendant - no denial of federal constitutional rights**

*State v. Bishop, 346 N.C. 365 (1997)*

The use of defendant's prearrest silence to impeach defendant during cross-examination when the prosecutor inquired into defendant's failure to talk with law officers after her interview by an SBI agent a few days after a murder did not violate defendant's federal constitutional rights where defendant was not induced to remain silent prior to her arrest by any government assurances that her silence would not be used against her; defendant did not invoke or rely upon her right to remain silent; and defendant denied any involvement in the crime when she talked with the SBI agent. U.S. Const. amends. V and XIV.

**Evidence and Witnesses § 2942 (NCI4th) - prearrest silence - impeachment of defendant - improper under N.C. law - no plain error**

*State v. Bishop, 346 N.C. 365 (1997)*

Assuming arguendo that the prosecutor's questions on cross-examination of defendant inquiring into defendant's failure to talk with law officers after her interview by an SBI agent a few days after a murder constituted an improper use of her prearrest silence for impeachment pursuant to rules of evidence formulated by our jurisdiction, any error in the trial court's failure to limit the prosecutor's questions did not rise to the level of plain error where there was evidence tending to show that defendant made a false statement to the SBI agent, this statement was inconsistent with defendant's trial testimony and was highly damaging to her credibility, and questions about her subsequent failure to speak to law officers did not further damage her credibility.

**Evidence and Witnesses § 3019 (NCI4th) - prior convictions - misleading testimony -**

## **opening door – details of crimes**

*State v. Bishop, 346 N.C. 365 (1997)*

Where defendant gave misleading testimony on direct examination that her two prior fraud convictions resulted from a mere failure to report two insurance premiums, defendant opened the door to the prosecutor's questions about the details of her prior crimes.

## **Evidence and Witnesses § 3027 (NCI4th) - taking money from boyfriend - character for untruthfulness - inquiry properly allowed**

*State v. Bishop, 346 N.C. 365 (1997)*

The purpose of the prosecutor's cross-examination of a defendant charged with murder as to whether she had taken money from her former boyfriend by forging his name on both a loan application and a check and cashing the check without his permission was to show conduct indicative of defendant's character for untruthfulness, and the trial court did not abuse its discretion under N.C.G.S. § 8C-1, Rule 608(b) by allowing this inquiry.

## **Evidence and Witnesses § 3081 (NCI4th) - prior inconsistent statement - flight of defendant - impeachment**

*State v. Jones, 347 N.C. 193 (1997)*

Where a defense witness denied on cross-examination that she had notified law enforcement authorities of defendant's flight to another state, a deputy sheriff's testimony on rebuttal that the witness had told her that defendant had been taken to Tennessee by a third person was properly admitted for the purpose of impeaching the witness's in-court testimony on the material issue of defendant's flight from authorities.

**Evidence and Witnesses § 2983 (NCI4th) - robbery and assault - prior narcotics arrests - not admissible**

*State v. Johnson, 128 N.C. App. 361 (1998)*

The trial court did not err in a prosecution for robbery and assault by denying defendant's motion to question the victim regarding his prior arrests for possession of marijuana with intent to sell and deliver and possession of cocaine with intent to sell and deliver where the victim denied on cross-examination ever having possessed marijuana. Defendant was able to impeach the victim's credibility by questioning him about two prior convictions of possession of marijuana and other drug related activity, rendering inquiry into the two additional arrests cumulative at best. Moreover, the two additional arrests show nothing beyond the fact that the victim was arrested and that there was insufficient evidence to proceed; they have no tendency to prove that he was guilty. N.C.G.S. § 8C-1, Rule 609.

**Evidence - impeachment - victim's juvenile adjudications**

*State v. Mcallister, 132 N.C. App. 300 (1999)*

The trial court did not abuse its discretion in a prosecution which resulted in an indecent liberties conviction by excluding evidence of the victim's juvenile adjudications where the court stated that N.C.G.S. § 8C-1, Rule 609 had been considered and found that the probative value of the evidence was far outweighed by the prejudice and the creation of ancillary issues. Despite the language used by the court, it is clear from the record that the court understood the standard to be applied under Rule 609 and believed that the evidence was not necessary for a fair determination of the issue of guilt or innocence.

**Evidence and Witnesses 3023 (NCI4th) - impeachment of witness - drug habit, suicide attempts, psychiatric history - Rule 608(b) inapplicable**

*State v. Williams, 330 N.C. 711 (1992) \*\*\*\*\*Bad for State\*\*\*\*\**

Rule of Evidence 608(b), which governs the admissibility of evidence of specific instances of conduct bearing on truthfulness or untruthfulness, does not govern the admissibility of evidence of the drug habit, suicide attempts and psychiatric history of the State's chief witness in a first degree murder case.

**Evidence and Witnesses 2947, 2948 (NCI4th) - State's chief witness - impeachment - drug habit, suicide attempts, psychiatric history**

*State v. Williams, 330 N.C. 711 (1992) \*\*\*\*\*Bad for State\*\*\*\*\**

The trial court erred in precluding defendant from cross-examining the State's chief witness in this first degree murder trial about his chronic drug habit, suicide attempts and psychiatric history because this evidence was admissible under Rule of Evidence 611(b) to impeach the witness's ability to perceive, retain, or narrate even though the suicide attempts and psychiatric counselling occurred more than two years prior to the victim's death. Furthermore, defendant was prejudiced by the exclusion of this evidence where the testimony of this witness was the only evidence directly linking defendant to the murder, and impeachment of the witness was particularly critical in light of the testimony of defendant's witnesses that contradicted this witness's estimation of the time of the victim's death and his claim that defendant was with him when the victim was killed.

**Evidence - impeachment - prior violent conduct - specific instance - probative of truthfulness**

*State v. Holston, 134 N.C. App. 599 (1999)*

The trial court did not err in a first-degree murder case by denying defendant's right to cross-examine a State's witness with regard to that witness' prior violent conduct because a specific instance of violent conduct is not admissible for impeachment purposes unless it is probative of truthfulness.

**Evidence - impeachment - prior conviction - more than ten years ago - credibility - more probative than prejudicial**

*State v. Holston, 134 N.C. App. 599 (1999)*

The trial court did not err in a first-degree murder case by allowing the State to impeach defendant with a prior conviction for attempted robbery that occurred more than ten years ago because defendant's credibility was central to the resolution of this case and his prior conviction was more probative than prejudicial. N.C.G.S. § 8C-1, Rule 609(b).

### **Evidence - impeachment - State's own witnesses - prior inconsistent statements**

*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 allowing the State to impeach its own witnesses with their prior inconsistent statements because the witnesses admitted giving the prior statements, and witnesses can be impeached concerning inconsistencies in their prior statements.

### **Evidence - recorded recollection - statement not written or recalled by witness – impeachment**

*State v. Spinks, 136 N.C. App. 153 (1999)*

The trial court erred in the retrial of a murder defendant five years after the original trial by admitting a written pretrial statement by a State's witness where the witness's recollection of the events was not clear but there was no showing that the statement was made or adopted when the matter was fresh in the witness's memory and that it reflected her knowledge correctly. Her subsequent testimony made clear that she did not write the statement herself, did not read it before signing it, did not recall the matters in the statement, and disagreed with some of it. There was no foundation for suggesting that the statement was independently admissible and it was not used properly to impeach her because she denied making some of the prior statements. N.C.G.S. § 8C-1, Rule 803.