

JURY INSTRUCTION

Trial Court's Jury Instruction on Conspiracy Comported With Allegations in Conspiracy Indictment

State v. Pringle, ___ N.C. App. ___, ___ S.E. 2d ___ (15 June 2010).

The defendant was indicted for conspiracy to commit armed robbery in which the indictment alleged that the defendant conspired with "Jimon Dollard and another unidentified male." The trial court's jury instruction stated that the state had to prove that the defendant had conspired "with at least one other person." The evidence showed that the defendant and two other men entered into a conspiracy to commit armed robbery. One of the two men was identified as Jimon Dollard. The other man was never identified. The court ruled, relying on *State v. Johnson*, 337 N.C. 212 (1994), that the jury instruction was in accord with the indictment's allegations and the evidence presented at trial.

(1) Jury Instruction on Counterfeit Controlled Substance Was Not Erroneous (2) Evidence Was Sufficient to Support Convictions Involving Counterfeit Controlled Substance

State v. Bivens, ___ N.C. App. ___, ___ S.E.2d ___ (1 June 2010).

The defendant sold for twenty dollars to undercover officers a white rock-like substance that the officers believed to be crack cocaine. It was calcium carbonate. The defendant was convicted of three counterfeit controlled substances offenses. (1) The court ruled that the trial court did not err in its jury instruction concerning what constitutes a counterfeit controlled substance. The court rejected the defendant's argument that the instruction was erroneous because it did not include paragraph two of the definition in G.S. 90-87(6)b. The court noted that the statute states that it is *evidence* that the substance has been intentionally misrepresented as a controlled substance if the specified factors are established. That does not require those factors to exist to find that a controlled substance has been intentionally misrepresented. (2) The court ruled that the evidence was sufficient to support the convictions. The defendant approached a vehicle, asked its occupants (the undercover officers) what they were looking for, departed to fill their request for a "twenty," and handed the occupants a little baggie containing a white rock-like substance. These acts were sufficient to prove that the defendant represented the substance as an illegal drug. The court also noted that the state is not required to prove that the defendant knew the substance sold was counterfeit.

Plain Error When Judge Instructs Jury That It Can Convict On Theories Not Charged In Indictment.

State v. Hinson, ___ N.C. App. ___, ___ S.E.2d ___ (April 6, 2010).

The defendant was indicted for manufacturing methamphetamine by "chemically combining and synthesizing precursor chemicals to create methamphetamine." However, the trial judge instructed the jury that it could find the defendant guilty if it found that he produced, prepared, propagated, compounded, converted or processed methamphetamine, either by extraction from substances of natural origin or by chemical synthesis. The court held, over a dissent, that this was plain error as it allowed the jury to convict on theories

not charged in the indictment.

Jury Instruction in Eluding Arrest Trial Was Not Erroneous

State v. Graves, ___ N.C. App. ___, 690 S.E.2d 545 (16 March 2010).

The defendant was convicted of felony eluding arrest and other offenses. The court ruled that the pattern jury instruction was not erroneous when it required proof that the defendant knew or had reasonable grounds to know that the officer was a law enforcement officer. The court rejected the defendant's argument that the jury should not be allowed to base its verdict on the defendant's having reasonable grounds to know that the officer was a law enforcement officer.

Trial Court Erred in Denying Defendant's Requested Jury Instructions on Self-Defense and Defense of Family Member—Ruling of Court of Appeals Is Reversed

State v. Moore, 363 N.C. 793, 688 S.E.2d 447 (29 January 2010), reversing, ___ N.C. App. ___, 671 S.E.2d 545 (6 January 2009).

The defendant was convicted of voluntary manslaughter. The court ruled that the trial court erred in denying the defendant's requested jury instructions on self-defense and defense of a family member. The defendant, his wife, and grandson were working at their produce stand. The couple's cash box was bolted to a folding table located behind the truck containing much of the produce. Harris (the person killed by the defendant) approached the produce stand, walked over to the meat container, and began comparing different pieces of meat, stating he was attempting to find a piece suitable for his mother. Shortly thereafter, a struggle erupted between the defendant's wife and Harris when he attempted to steal the cash box and its contents. The defendant's wife testified she was frightened during the altercation and praying that she would not get hurt. Harris became more aggressive as the attempted robbery progressed, including picking the table off the ground. She testified that when Harris had reached for the cash box and began the struggle, she shouted for her husband, who rushed to her aid and shouted for Harris to back off. Harris backed off, but then came back toward her with his left hand in his pocket and began to pull his hand from his pocket. The defendant then shot and killed him. The defendant testified that he "wasn't going to wait to see no gun," and he feared for his, his grandson's, and his wife's safety. The court concluded that the defendant's evidence was sufficient to show that he believed it was necessary to use force to prevent death or great bodily injury to himself or a family member.

If There Is No Evidence Of Coercive Measures Directed Toward Defendant Prior to Crime Being Committed, Court May Deny Defendant's Request For Jury Instruction on Duress.

State v. Sanders, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010).

The trial court did not err in denying the defendant's request for a jury instruction on duress. The defendant voluntarily joined with his accomplices to commit an armed robbery, he did not object or attempt to exit the vehicle as an accomplice forced the victims into the car, and the defendant took jewelry from one victim while an accomplice pointed a gun at her. There was no evidence that any coercive measures were directed toward the defendant prior to the crimes being committed. Any threats made to the defendant occurred after the crimes were committed.

Judge May Re-Instruct Entire Jury But May Not Instruct An Individual Juror As A Violation Of The Defendant's Right to A Unanimous Verdict

State v. Price, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 17, 2009).

The trial court did err by failing to ex mero motu investigate the competency of a juror after the juror sent two notes to the trial court during deliberations. After the juror sent a note saying that the juror could not convict on circumstantial evidence alone, the trial judge re-instructed the whole jury on circumstantial evidence and reasonable doubt. After resuming deliberations, the juror sent another note saying that the juror could not apply the law as instructed and asked to be removed. The trial judge responded by informing the jury that the law prohibits replacing a juror once deliberations have begun, sending the jury to lunch, and after lunch, giving the jury an *Allen* charge. The court found no abuse of discretion and noted that if the judge had questioned the juror, the trial judge would have been in the position of instructing an individual juror in violation of the defendant's right to a unanimous verdict.

Trial Court Committed Plain Error By Instructing Jury That It Could Return Guilty Verdicts for Both First-Degree Murder and Accessory After Fact to First-Degree Murder; Trial Court Should Have Submitted Them as Alternative Verdicts

State v. Melvin, ___ N.C. App. ___, 682 S.E.2d 238 (1 September 2009).

The defendant was on trial for first-degree murder and accessory after the fact to first-degree murder. The defendant was convicted of both offenses. The trial court arrested judgment on the conviction of accessory after the fact and entered judgment for the first-degree murder conviction. (Author's note: Although first-degree murder and accessory after the fact arising from the same transaction may be joined for trial, a defendant may not be convicted of both because they are mutually exclusive.) The court ruled, relying on *State v. Speckman*, 326 N.C. 576 (1990), and *State v. Jewell*, 104 N.C. App. 350, *aff'd per curiam*, 331 N.C. 379 (1992), that the trial court committed plain error because the jury should have been instructed on these offenses as alternative verdicts. The court also found that the error was prejudicial and ordered a new trial for both offenses.

Because Trial Court's Instructions to Individual Juror Violated Defendant's Right to Unanimous Verdict Under Art. I, Sec. 24 of North Carolina Constitution, Error Was Preserved for Appellate Review Despite Defendant's Failure to Object—Ruling of Court of Appeals Is Affirmed

State v. Wilson, 363 N.C. 478, 681 S.E.2d 325 (28 August 2009), *affirming*, 192 N.C. App. 359, 665 S.E.2d 751 (2008).

The defendant was on trial for armed robbery. The jury during its deliberations notified the court that there was a problem with the foreperson that needed to be addressed. Instead of summoning all the jurors to the courtroom to hear the jury's request, the trial court proposed to the attorneys for the state and defendant that only the foreperson be summoned. They agreed. After the foreperson told the court on the record that the jury seemed to believe that he had already had his "mind made up," the court conducted an unrecorded bench conference with the foreperson and both attorneys, then a conversation on the record, and then another unrecorded bench conference. The court summoned all the jurors to the courtroom and instructed them on their duty to consult with one another. The court then directed the jurors, except the foreperson, back to the jury room but not to resume deliberations. The court then held a third unrecorded bench conference with the

foreperson and two attorneys. The court instructed the foreperson not to discuss what occurred during the bench conference with the other jurors, kept the foreperson as a juror because the court determined he could be fair and impartial, and brought the other jurors back into the courtroom and instructed all jurors to continue their deliberations. The court ruled that because trial court's instructions to the individual juror, the foreperson, violated the defendant's right to a unanimous verdict under Art. I, Sec. 24 of the North Carolina Constitution, the error was preserved for appellate review despite the defendant's failure to object. The court also ruled that the error was not harmless beyond a reasonable doubt and ordered a new trial. The court in footnote one stated that the dissent characterized the conversations between the court and foreperson as mere bench conferences and surmised that the court's opinion will lead to inconsistency and confusion in future cases and a chilling effect on juror communication. The court stated that those dire consequences will be avoided because its ruling is limited to instructions and not all communications between a judge and juror.

Trial Court Erred in Capital Case Mental Retardation Hearing in Denying Defendant's Request for Jury Instruction That Verdict Finding Defendant Mentally Retarded Would Result in Sentence of Life Imprisonment Without Parole

State v. Locklear, 363 N.C. 438, 681 S.E.2d 293 (28 August 2009).

The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial court erred in a mental retardation hearing in denying the defendant's request for a jury instruction that a 2 verdict finding the defendant mentally retarded would result in a sentence of life imprisonment without parole.

(1) Defendant Cannot Be Convicted of Kidnapping for Purpose of Facilitating Commission of Felony Murder

(2) Although State Need Not Allege Felony That Was Purpose of Kidnapping, It Must Prove That Felony If It Does

(3) Defendant Was Not Entitled to Jury Instruction on Defense of Accident When Shotgun Discharged After Defendant Broke Into Home With Intent to Commit Robbery and Struggled With Victim Over Shotgun

State v. Yarborough, ___ N.C. App. ___, 679 S.E.2d 397 (7 July 2009).

The defendant was convicted of first-degree murder, first-degree burglary, first-degree kidnapping, and three counts of second-degree kidnapping. (1) The defendant was charged with kidnapping to facilitate the commission of murder. The court ruled, relying on *State v. Lea*, 126 N.C. App. 440 (1997), and *State v. Coble*, 351 N.C. 448 (2000), that a defendant cannot be convicted of kidnapping for the purpose of facilitating felony murder. Thus, because the indictment alleged murder as the kidnapping's purpose, the state had to prove the defendant's purpose was to facilitate the commission of murder committed with premeditation and deliberation. The court examined the evidence in this case and found insufficient evidence to support that theory. (2) The court ruled, relying on *State v. White*, 307 N.C. 42 (1982), and distinguishing *State v. Freeman*, 314 N.C. 432 (1985), that although the state is not required to allege the felony that was the purpose of a kidnapping, the state must prove the particular felony if it does. Under these circumstances, there may be a fatal variance between the indictment's allegations and proof at trial. (3) The court ruled that the defendant was not entitled to a jury instruction on the defense of accident when a shotgun discharged after the defendant had broken into a home with the intent to commit a robbery and within a few minutes of the entry struggled with the victim over the shotgun. The court stated that 6 the defense of accident is unavailable if the defendant has engaged in misconduct when a killing occurs. The court also stated that even

assuming that the killing occurred after the defendant had decided to abandon the intended robbery and attempted to leave, this would not constitute a “break” in the events resulting in the shooting because it was undisputed that the victim was shot without a few minutes of the break-in.

(1) Trial Judge Did Not Err When Giving Jury Instruction on Mitigating Circumstance, G.S. 15A-2000(f)(7) (Defendant’s Age When Murder Committed); Ruling in Roper v. Simmons, 543 U.S. 551 (2005) Does Not Affect Jury Instruction

State v. Garcell, 363 N.C. 10, ___ S.E.2d ___ (20 March 2009).

The defendant was convicted of first-degree murder and sentenced to death. The defendant was eighteen years, five months old when he committed the murder. (1) The court ruled that the trial judge did not err when giving a jury instruction on the mitigating circumstance, G.S. 15A-2000(f)(7) (defendant’s age when murder committed). The ruling in Roper v. Simmons, 543 U.S. 551 (2005) (Eighth Amendment prohibits execution of person who commits murder before eighteenth birthday) did not affect the jury instruction.

(2) Trial Judge Did Not Commit Plain Error in Jury Instruction on Indecent Liberties, and Sufficient Evidence Supported Conviction When State’s Evidence Satisfied Corpus Delicti Rule—Ruling of Court of Appeals Is Reversed

State v. Smith, 362 N.C. 583, 669 S.E.2d 299 (12 December 2008), affirming in part and

reversing in part, ___ N.C. App. ___, 660 S.E.2d 82 (6 May 2008).

The defendant was convicted of first-degree sexual offense and indecent liberties. (2) The court ruled that the trial judge did not commit plain error in the jury instruction on indecent liberties. When instructing on indecent liberties, the trial judge is not required to specifically identify the acts that constitute the charge; the court cited State v. Hartness, 326 N.C. 561 (1990). The court also ruled that there was sufficient evidence to support the indecent liberties conviction because there was substantial evidence independent of the defendant’s confession. (See the

court's discussion of the evidence in its opinion.)

(2) Jury's Guilty Verdict of Felony Possessing Stolen Goods Must Be Set Aside When Jury Found Defendant Not Guilty of Felony Breaking or Entering and Judge Had Instructed Jury on Charge of Felony Possessing Stolen Goods Only on Theory That Property Was Stolen Pursuant to Breaking or Entering

State v. Tanner, ___ N.C. App. ___, 666 S.E.2d 845 (7 October 2008).

The defendant was convicted of felony possession of stolen goods. (1) The defendant purchased a box full of hair products for three dollars and later purchased from the same person a refrigerator, CD player, and small television set for eighteen dollars. The court ruled, relying on *State v. Parker*, 316 N.C. 295 (1986), that this was sufficient evidence to prove that the defendant knew or had reasonable grounds to believe the property was stolen because such knowledge or belief may be inferred from defendant's buying property at a fraction of its actual cost. (2) The court ruled, relying on *State v. Marsh*, ___ N.C. App. ___, 652 S.E.2d 744 (2007), and other cases, that a jury's guilty verdict of felony possessing stolen goods must be set aside when the jury found the defendant not guilty of felony breaking or entering and the judge had instructed the jury on the charge of felony possessing stolen goods only on the theory that the property was stolen pursuant to a breaking or entering. Although the indictment in this case had alleged that the value of the stolen goods exceeded \$1,000.00 and evidence was presented at trial to support this valuation, the trial judge failed to submit this theory to the jury.

When Jury During Its Deliberations in Capital Case Sent Written Note to Trial Judge With Questions About Jury Instructions, Trial Judge's Failure to Reveal Contents of Note to Defendant Violated Defendant's Unwaivable State Constitutional Right to Be Present at All Stages of Trial

State v. Smith, 188 N.C. App. 207, 654 S.E.2d 730 (15 January 2008).

The jury during its deliberations in a capital case sent a written note to the trial judge with questions about the jury instructions. The judge did not share the contents of the note with the state, defense counsel, or the defendant. The court ruled the trial judge's failure to reveal the contents of the note to the defendant violated the defendant's unwaivable state constitutional right to be present at all stages of a capital trial.

No Violation of Right to Unanimous Jury Verdict When Jury Instruction for Felony Eluding Officer (G.S. 20-141.5) Did Not Require Jury Unanimity on Which of Several Motor Vehicle Violations Constituted Two Aggravating Factors to Support Felony Conviction

State v. Hazelwood, 187 N.C. App. 94, 652 S.E.2d 63 (6 November 2007).

The defendant was convicted of felony eluding officer under G.S. 20-141.5. The court ruled, relying on *State v. Funchess*, 141 N.C. App. 302 (2000), that there was no violation of the defendant's state constitutional right to a unanimous jury verdict when the jury instruction did not require jury unanimity on which of several motor vehicle violations constituted the two aggravating factors to support the felony conviction.

Insufficient Evidence of Intent to Commit Felony Inside House to Support Conviction of First-Degree Burglary; Court Suggests Modification of Pattern Jury Instruction

State v. Goldsmith, 187 N.C. App. 162, 652 S.E.2d 336 (6 November 2007).

The court ruled that there was insufficient evidence of the defendant's intent to commit the felony of armed robbery inside the house to support the defendant's conviction of first-degree burglary. The court stated that the defendant's act of

pulling the victim outside the house was evidence to support an inference that the defendant intended to commit the robbery outside the home. The court also suggested that the pattern jury instruction should require the jury to find that the defendant at the time of the breaking and entering intended to commit the felony in the building that was broken into and entered.

Trial Judge Erred in Failing to Specifically Instruct Jury on “Not Guilty” Verdict After Instructing on “Not Guilty” Verdict on Issue of Self-Defense; Court Also Comments on Apparent Ambiguity in N.C.P.I.—Crim. 308.45 (Self Defense)

State v. McArthur, 186 N.C. App. 373, 651 S.E.2d 256 (16 October 2007).

The court ruled, relying on *State v. Dallas*, 253 N.C. 568 (1960), *State v. Ramey*, 273 N.C. 325 (1968), and *State v. Woods*, 278 N.C. 210 (1971), that the trial judge, after instructing on a “not guilty” verdict on the issue of self-defense, erred in failing to specifically instruct the jury on a “not guilty” verdict if the state failed to prove the elements of the offense beyond a reasonable doubt. The court also commented on an apparent ambiguity in N.C.P.I.—Crim. 308.45 (see the court’s discussion).

Trial Judge Did Not Err in Instructing Jury on Aiding and Abetting False Pretenses Even Though Indictment Alleged Acting in Concert, Because Indictment’s Allegation Was Surplusage

State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598 (16 October 2007).

The court ruled, relying on *State v. Westbrooks*, 345 N.C. 43 (1996), that the trial judge did not err in instructing the jury on aiding and abetting false pretenses even though the indictment alleged acting in concert, because the indictment’s allegation was surplusage.

Trial Judge Did Not Err in Not Instructing Jury on Voluntary Intoxication

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

The defendant was convicted of first-degree murder. The court ruled that the trial judge did not err in denying the defendant's request for a jury instruction on diminished capacity by voluntary intoxication. There was testimony that the defendant was drinking tequila straight from a one-gallon bottle and also drank three or four beers in approximately a one-and-one-half hour period. The court noted that the defendant had the ability to drive and communicate with other people. There was no evidence suggesting that the defendant was incapable of forming a deliberate and premeditated purpose to kill.

Trial Judge Did Not Err in Giving Acting-in-Concert Instruction to Jury (Which Had Not Been Included in Initial Instructions) After It Had Reported That It Was Divided 11-1 on Verdict

State v. Williams, ___ N.C. App. ___, 648 S.E.2d 896 (21 August 2007).

The defendant was convicted of first-degree murder based on the felony murder theory, with the underlying felony being armed robbery. Evidence showed that another person was involved in committing the offense. In the original jury instructions, the trial judge did not give an instruction on acting in concert. After the jury reported that it was divided 11-1 on a verdict (without indicating whether the vote was for conviction or acquittal), the judge gave the instruction. The court ruled that the judge properly gave the instruction under G.S. 15A-1234(a)(4), and by doing so did not impermissibly coerce a verdict.

Trial Judge Did Not Err in Not Giving Jury Instruction on Contributory Negligence in Prosecution of Felony Death by Vehicle

State v. Bailey, ___ N.C. App. ___, 646 S.E.2d 837 (17 July 2007).

The defendant was convicted of felony death by vehicle. The defendant drove his vehicle in the rear of the victim's vehicle, which had stopped on a highway. The court ruled that the trial judge did not err in not giving a jury instruction on the victim's contributory negligence because that theory is not a defense to a criminal prosecution. The court noted that if the defendant had requested a jury instruction on intervening negligence, the judge would have been required to give that instruction [see *State v. Hollingsworth*, 77 N.C. App. 36 (1985)]. The court stated that even assuming that the victim was negligent, her negligence was at most a concurring proximate cause of her death, which still would have made the defendant criminally liable. The state's evidence tended to show that the defendant's blood alcohol level was over twice the legal limit, which inhibited him from exercising due care and keeping a proper lookout.

New Trial Ordered When Trial Judge Instructed on Several Theories of Kidnapping, Jury Returned General Verdict of Guilty of Kidnapping, and Evidence Did Not Support One of the Theories of Kidnapping

State v. Johnson, 183 N.C. App. 576, 646 S.E.2d 123 (5 June 2007).

The court ruled, relying on *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), and other cases, the trial judge committed error requiring a new trial when he instructed on several theories of kidnapping, the jury returned a general verdict of guilty of kidnapping, and the evidence did not support one of the theories of kidnapping.

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.

Defendant's Right to Unanimous Verdict Was Not Violated When Jury Instruction for Contributing to Delinquency of Minor Did Not Require Jury to Be Unanimous in Finding Which of Three Criminal Acts Juvenile Could Have Been Adjudicated Delinquent

State v. Cousart, 182 N.C. App. 150, 641 S.E.2d 372 (6 March 2007).

The defendant was convicted of contributing to the delinquency of a minor. The jury instruction did not require that the jury be unanimous in finding one of the three criminal acts (driving without a license; breaking into a motor vehicle; larceny) the juvenile could have been adjudicated delinquent. The court ruled, relying on *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), that the defendant's right to a unanimous verdict was not violated. The court stated that the gravamen of the crime is the defendant's conduct, and the jury need only be unanimous that the juvenile committed an act for which he could be adjudicated delinquent, but need not be unanimous on the specific act.

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.

(3) Trial Judge Erred in Instructing on Attempted Assault, Which Is Not Recognized Crime

State v. Barksdale, 181 N.C. App. 302, 638 S.E.2d 579 (2 January 2007).

The defendant was convicted of attempted assault with a deadly weapon on a law enforcement officer and possession of firearm by a felon. After chasing the defendant, three officers tackled him and then struggled in trying to subdue him on the ground. After an officer had handcuffed the defendant's right wrist, he noticed a chrome-plated handgun in the grass about six inches from the defendant's left hand. Although none of the officers saw the defendant touch the gun, the defendant was reaching for the gun with his outstretched hand. They applied even greater force and finally subdued him. They then retrieved the gun, which was dry and warm even though the ground was wet from rain earlier in the evening and the weather was cool. (3) The court ruled, relying on *State v. Currence*, 14 N.C. App. 263, 188 S.E.2d 10 (1972), that the trial judge erred in instructing on the offense of attempted assault, because attempted assault is not a recognized crime.

Accomplices and Accessories - Testimony of one against another - limiting instruction

State v. Robinson, 136 N.C.App. 520 (2000)

The trial judge erred in a robbery prosecution by not giving a limiting instruction when a codefendant's testimony was introduced over defendant's objection. The court is required to give a limiting instruction when evidence is introduced at a

joint trial against one defendant which is not admissible against a codefendant and the codefendant makes a general objection to the evidence.

Sexual Offenses -- First-degree -- Failure to Instruct on Acting in Concert or Aiding and Abetting -- Failure to Show Defendant Personally Employed or Displayed Dangerous or Deadly Weapon

State v. Roberts, 176 N.C. App. 159 (2006).

The trial court erred by concluding that the evidence was sufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant committed first-degree sexual offense, and the case is remanded for entry of judgment against defendant for second-degree sexual offense, because: (1) the jury was instructed it could find defendant guilty of first-degree sexual offense only if he employed or displayed a dangerous or deadly weapon; (2) without an instruction on acting in concert or the theory of aiding and abetting, the evidence must support a finding that defendant personally employed or displayed a dangerous or deadly weapon in the commission of the sexual offense; (3) there was no evidence at trial that defendant ever, personally, employed or displayed a dangerous weapon during the time he was in the victim's apartment; (4) all the testimony at trial established that another man held the shotgun throughout the incident; and (5) the jury's verdict is recognized as a verdict of guilty of second-degree sexual offense.

Homicide -- First-Degree Murder – Instruction -- Acting in Concert

State v. Windley, 173 N.C. App. 187 (2005)

The trial court erred by instructing the jury on acting in concert with respect to the charge of first-degree murder, and defendant is entitled to a new trial on this charge, because: (1) the State presented evidence tending to show that defendant was the perpetrator of the acts; (2) the State presented no evidence that defendant acted with others in killing the victim or that anyone other than defendant shot and killed the victim; and (3) although defendant was found guilty of first-degree murder on the basis of felony murder as well

as premeditation and deliberation, the trial court erroneously informed the jury that it could convict defendant of first-degree murder on the basis of acting in concert in its instructions under both theories.

Homicide – Noncapital First Degree Murder -- Instructions -- Acting in Concert

State v. Taylor, 337 N.C. 597 (1994) ___ S.E.2d ___

There was sufficient evidence to support the trial court's instructions on acting in concert in a noncapital prosecution for first-degree murder where the evidence in the case would support a reasonable finding that the defendant was present and acting in concert with Johnny Beck as they picked up the victim to "party" with them and that the defendant and Beck formed a common purpose to murder Thomas after she had "partied" for some time at the defendant's expense and would not proceed with bargained-for sex acts.

Homicide -- Acting in Concert -- Instructions -- Specific Intent of Defendant

State v. Straing, 342 N.C. 623 (1996) ___ S.E.2d ___

The trial court's instructions that the State was required to prove as an element of each of the crimes of first degree premeditated and deliberated murder, armed robbery, and first-degree kidnapping that "defendant, or someone with whom he was acting in concert" had the specific intent to commit the crime erroneously allowed the jury to convict defendant of those crimes on the theory of acting in concert without requiring the State to establish that defendant had the specific intent to commit those crimes, and defendant is entitled to a new trial on each of those charges. Defendant is also entitled to a new trial on a felony murder charge because the predicate felony which supported that theory was obtained without the State being required to establish defendant's specific intent.

Homicide -- Capital Murder Instructions -- Acting in Concert -- Blankenship Overruled

State v. Barnes, 345 N.C. 184 (1997) ___ S.E.2d ___

The trial court did not err in a capital prosecution for first-degree murder in its instruction to the jury on the doctrine of acting in concert with regard to premeditated and deliberate first-degree murder. Although the defendants argued that this instruction violated *State v. Blankenship*, 337 N.C. 543, by permitting the jury to find defendants guilty of premeditated and deliberate first-degree murder without specific findings that they individually possessed the requisite mens rea to commit that crime, *Blankenship*, *State v. Reese*, 319 N.C. 110, and their progeny are overruled to the extent that they are inconsistent with this opinion. The correct statement of the doctrine of acting in concert in this jurisdiction is that enumerated in *State v. Westbrook*, 279 N.C. 18, and *State v. Erlewine*, 328 N.C. 626. 19. Constitutional Law § 166 (NCI4th) **capital murder instructions acting in concert Blankenship overruled not ex post facto in this case**. The return to the acting in concert instructions as enumerated in *State v. Erlewine*, 328 N.C. 626, rather than *State v. Blankenship*, 337 N.C. 543, did not act as an ex post facto law in this capital first-degree murder prosecution because the crimes here were committed on 29 October 1992, defendants were sentenced on 10 March 1994, and the certification date for *Blankenship* was 29 September 1994. The law on acting in concert at all relevant times during the disposition of this case was the rule as stated in *Erlewine*, which is reaffirmed.

Drugs-Trafficking-Awareness of illicit substance-Testimony presented-Instruction erroneously denied

State v. Lopez, 176 NCA 538 (2006)

There was plain error and a defendant convicted of trafficking in heroin was entitled to a new trial where he testified that he was not aware of the heroin in a refrigerator a third party had paid him to receive, he properly requested an instruction that he was guilty only if he knew the refrigerator contained an illicit substance, and he did not receive that instruction. (This only applies if Defendant alleges not knowing)

Motor Vehicles--felonious fleeing by motor vehicle to elude arrest--instruction

State v. Wood, 174 NCA 790 (2005)

The trial court did not commit plain error by instructing the jury on the charge of felony fleeing by motor vehicle to elude arrest, because: (1) defendant failed to cite to any case law or statute that requires the trial court to define the terms of “reckless driving,” “negligent driving,” and “driving with license revoked” during its jury instruction; (2) the trial court charged the jury using the language of the pattern jury instruction which stated it had to find at least two of the three aggravating factors set out in the bill of indictment were present in order to convict defendant of felonious speeding to elude arrest; (3) while defendant was not specifically charged with either reckless driving under N.C.G.S. § 20-140 or driving while her license was revoked under N.C.G.S. § 20-28, substantial evidence was presented which tended to show defendant had struck an officer's vehicle and caused more than \$1,000 in damage; and (4) evidence was presented that tended to show defendant's driving was erratic, she accelerated to hit an officer's vehicle, and the jury found her speeding twelve miles per hour over the limit.

Criminal Law--instruction--confession--supporting evidence--invited error

State v. Duke, 360 NC 110 (2005)

The trial court did not err in a double first-degree murder case by its instruction to the jury on confession, because: (1) the instruction conformed to the North Carolina Pattern Jury Instruction on confession; (2) an instruction by the trial court stating the evidence tends to show the existence of a confession to the crime charged is not an impermissible comment invading the province of the jury and its fact-finding function; (3) considering defendant's admissions which tended to show premeditation and deliberation, the statement did support inclusion of the confession instruction; (4) the instruction left it to the jury to conclude whether the confession occurred and what weight to give it; and (5) defendant cannot show prejudice on this issue when it was defendant, not the prosecution, who requested this jury instruction.

Homicide--second-degree murder--final mandate--exclusion of verdict of not guilty by

reason of self-defense

State v. Ledford, 171 NCA144 (2005)

The trial court erred in a second-degree murder case by omitting the verdict of not guilty by reason of self-defense in its final mandate to the jury and defendant is entitled to a new trial.

Criminal Law--instruction--right to resist unlawful arrest

State v. Brewington, 170 NCA 264 (2005)

The trial court did not err in an assault on a governmental officer with a deadly weapon and reckless driving case by denying defendant's request for a jury instruction on the right to resist an unlawful arrest, because: (1) upon discovering illegal narcotics on the driver's person, the police had probable cause to search the stopped vehicle in which defendant was a passenger; and (2) at the moment defendant slid into the driver's seat of the stopped vehicle, tried to start the car, and ignored the officer's command to stop, a violation of N.C.G.S. § 14-223 occurred and defendant was subject to arrest.

Homicide--felony murder--instructions--unanimous jury

State v. Roache, 358 NC 243 (2004)

The trial court did not err in a multiple murder prosecution by failing to instruct the jury on felony murder that the jury had to be unanimous in determining whether defendant was guilty of felony murder based on defendant's commission of an underlying felony or based on acting in concert with his coparticipant in committing an underlying felony, and defendant did not receive ineffective assistance of counsel based on a failure to object to this instruction, because: (1) the trial court properly instructed the jury that it must be unanimous in finding defendant guilty of first-degree murder, whether based on felony murder or on premeditation and deliberation, and that the jury must be unanimous in finding

which felony defendant engaged in that subjected him to the felony murder rule; (2) whether defendant acted in concert with his coparticipant or committed the underlying felony, defendant would still be guilty of felony murder in either case; and (3) the jurors were unanimous in finding defendant to be guilty of felony murder.

Homicide--felony murder--instructions--intent

State v. Roache, 358 NC 243 (2004)

The trial court did not err in a multiple murder prosecution by its instruction to the jury on intent with respect to the murder of one of the victims, because: (1) the trial court's instruction viewed as a whole correctly charged the jury on felony murder; and (2) the pertinent part of the instruction to which defendant objects meant that whether the felonies were committed by defendant or by his coparticipant, if defendant had the specific intent to commit one or any of the felonies, then he would be guilty of felony murder.

Sexual Offenses--crime against nature--instruction--penetration by object

State v. Stiller, 162 NCA 138 (2004)

The trial court did not err in a multiple second-degree rape and crime against nature case by its instruction on crime against nature, because: (1) while no case in our State has specifically included penetration of the genital opening by an object in its definition of crime against nature, such an act is consistent with the language of *State v. Joyner, 295 N.C. 55 (1978)*; and (2) defendant failed to object to the instructions when given, and the instructions did not arise to the level of plain error.

Homicide--first-degree murder--no instruction on second-degree--invited error

State v. Dawkins, 162 NCA 231 (2004)

There was no plain error in the court not submitting second-degree murder to the jury in a first-degree murder prosecution where defendant sought to prevent just that.

Homicide--first-degree-murder--requested instruction--accidental death

State v. Lanier, 165 NCA 337 (2004)

The trial court did not err in a first-degree murder case by failing to give defendant's requested jury instruction on the theory of accidental death, because: (1) the trial court's instruction on accident was a correct statement of the law and contained the substance of the instruction defendant requested; and (2) defendant failed to show that had the jury been instructed as she suggested, there is a reasonable probability that the outcome of her trial would have been different.

Constitutional Law--right to unanimous verdict--failing to differentiate each individual charge in jury instructions and verdict sheet

State v. Wiggins, 161 NCA 583 (2003)

The trial court did not violate defendant's right to a unanimous verdict in a multiple statutory rape and statutory sexual offense case by failing to specifically differentiate each individual charge in its jury instructions and on the verdict sheet, because: (1) verdict sheets do not need to match the specificity of indictments; (2) the indictments in this case which distinguished the offenses charged by their names and case numbers without pointing to any specific encounter between defendant and the victim were proper since they could be understood by the jury based on the evidence presented at trial; and (3) the trial court differentiated each instruction on two counts of statutory sexual offense and five counts of statutory rape by the applicable case number found on the indictments

Jury--conversions with jury foreman alone--failure to summon full jury into courtroom for instructions

State v. Robinson, 160 NCA 564 (2003)

The trial court erred in a conspiracy to traffic in cocaine, trafficking in cocaine, and possession with intent to sell or deliver cocaine case by engaging in three conversions with the jury foreman alone regarding the charges and jury deliberations outside the presence of the remainder of the jury, and defendant is granted a new trial, because: (1) the full jury must be summoned into the courtroom when giving instructions on the law applicable to the case under N.C.G.S. § 15A-1234; (2) it cannot be known whether the jury foreman truly understood the answers provided to him by the trial court or whether he conveyed them correctly to the other jurors; and (3) it is impossible to know whether the other jurors themselves understood the instructions provided to them by the foreman when deliberating and deciding their verdict.

Constitutional Law; Rape--right to unanimous verdict--instruction--first-degree statutory rape of female under age of thirteen

State v. Holden, 160 NCA 503 (2003)

The trial court erred in a first-degree statutory rape of a female under the age of thirteen case by depriving defendant of his constitutional right to a unanimous jury verdict before being found guilty of a crime when it failed to distinguish between each of the ten counts submitted to the jury, because the effect of the instruction was to permit the jury to return guilty verdicts without agreeing that defendant committed a particular offense, or without agreeing on which two particular incidents of statutory rape occurred. N.C. Const. art. I, § 24.

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.

Sexual Offenses--first-degree--failure to require unanimous verdict for specific sexual act

State v. Carrigan, 161 NCA 256 (2003)

The trial court did not commit plain error by failing to require a unanimous verdict regarding the specific sexual act it found as the predicate act for the verdict of guilty of first-degree sexual offense because N.C.G.S. § 14-27.4(a)(1) does not require all twelve jurors to agree as to which act defendant committed, but rather that he committed a sexual act.

Homicide--instructions--acquit first

State v. Mays, 158 NCA 563 (2003)

An erroneous instruction that the jurors in a first-degree murder prosecution could consider second-degree murder only after they unanimously acquitted defendant of first-degree murder was harmless. The defendant in this case received the only relief to which he was entitled when the jury failed to convict and the court ordered a new trial. It is suggested that a jury expressing confusion be instructed to consider first the primary offense, then the lesser offense if reasonable efforts do not produce a verdict, and that a unanimous not guilty verdict for the primary offense is not required before consideration of the lesser offense.

Burglary--lesser offense of non-felonious breaking or entering--no instructions

State v. Mangum, 158 NCA 187 (2003)

There was no plain error in refusing to instruct on non-felonious breaking or

entering in a first-degree burglary prosecution where there was substantial evidence that defendant entered the residence in order to rape the victim and none of the acts committed by defendant in the residence were in furtherance of his stated intent to use the telephone or the restroom.

Homicide--first-degree murder--proximate cause--expanded instruction

State v. Messick, 159 NCA 232 (2003)

The trial court did not err by giving an expanded instruction on proximate cause in a first-degree murder prosecution that “defendant’s act need not have been the last cause or the nearest cause. It is sufficient if concurred where some other cause acting at the same time which in combination with it proximately caused the death of the victim” where the State’s evidence showed that defendant shot the victim in the head and shoulder from a range of two feet; defendant shot the victim a second time after the victim fell to the ground; defendant threw the gun down and fled; a friend of defendant retrieved the gun and shot the victim again; the friend then drove the victim’s body from the scene and burned it; and the cause of death was two gunshot wounds to the victim’s neck and face area. The issue of the omission of an additional instruction on reasonable foreseeability was not before the appellate court where defendant failed to request such an instruction or to assign its omission as plain error.

Criminal Law--reinstruction--verdict reached but not returned

State v. Bell, 159 NCA 151 (2003)

The court’s re-instruction of the jury on the age element of statutory rape was not erroneous where the court realized the error in the original instruction, correctly instructed the jury, and returned the jurors to the jury room after they had announced that they had a verdict but before the verdict was delivered. Defendant was not subjected to double jeopardy because there had been no final judgment before the reinstruction, and the court did not attempt to coerce a verdict.

Assault–deadly weapon–disjunctive instruction - OK

State v. Lotharp, 356 NC 420 (2002) Rev'd 138 NCA 445 (2002)

The Court of Appeals decision granting defendant a new trial on a charge of assault with a deadly weapon inflicting serious injury is reversed for the reason stated in the dissenting opinion that defendant was not denied a unanimous verdict by the trial court's instruction permitting the jury to return a guilty verdict if it found beyond a reasonable doubt that defendant intentionally beat the victim with his hands and feet and/or with a chain and that defendant's hands and feet and/or the chain were deadly weapons that inflicted serious injury.

Criminal Law - jury instruction - implied admissions

State v. Marecek, 152 N.C. App. 479 (2002)

The trial court did not err in a second-degree murder case by giving an instruction on implied admissions based on a witness's testimony that he stated to defendant that the witness knew defendant killed his wife, because defendant's reported failure to deny that he killed his wife, along with his incriminating statements, manifest circumstantially his assent to the truth of the witness's statement that defendant killed his wife. 801 (d) B

Sexual Offenses; Rape--first-degree--disjunctive jury instruction proper

State v. Haywood, 144 N.C. App. 223 (2001)

The trial court did not err by denying defendant's post-verdict motion to set aside the verdict on the charges of first-degree rape, first-degree sexual offense, and conspiracy to commit first-degree rape, because the Supreme Court has upheld a defendant's convictions for these crimes based upon the same disjunctive jury instruction utilized in this case showing defendant could be found guilty of these crimes if he either displayed a dangerous or deadly weapon or was aided and abetted by one or more persons during their commission.

Sexual Offenses; Rape--first-degree--disjunctive jury instruction proper

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The trial court did not err by denying defendant's post-verdict motion to set aside the verdict on the charges of first-degree rape, first-degree sexual offense, and conspiracy to commit first-degree rape, because the Supreme Court has upheld a defendant's convictions for these crimes based upon the same disjunctive jury instruction utilized in this case showing defendant could be found guilty of these crimes if he either displayed a dangerous or deadly weapon or was aided and abetted by one or more persons during their commission.

Rape--first-degree--alternative theories

State v. Barkley, 144 NC App 514 (2001)

There was no plain error in a rape prosecution where the trial court instructed the jury that it could find defendant guilty of first-degree rape if it found that defendant used a dangerous weapon or that the victim was seriously injured where there was evidence to support both theories.

Assault; Criminal Law--aggravated assault--disjunctive instructions--erroneous

State v. Lotharp, 148 NCA 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. Overturned by Sup Ct. based on dissenting opinion.

Criminal Law 803 (NCI4th) - lesser included offense - effect of refusing opportunity for instruction

State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993)

A defendant may not decline an opportunity for instructions on a lesser included offense and then claim on appeal that failure to instruct on the lesser included offense was error.

Burglary and Unlawful Breakings 164 (NCI4th) first-degree burglary - intent to commit murder - conflicting evidence - necessity for instruction on misdemeanor breaking or entering

State v. Barlowe, 337 N.C. 371 (1994) ___ S.E.2d ___

In a prosecution for first-degree burglary wherein the State presented evidence that defendant intended to murder the victim, his mother-in-law, at the time he broke and entered her home while looking for his wife and son, defendant presented sufficient evidence that the killing of the victim was accidental and that he did not possess the requisite intent to murder at the time he entered her home so that the trial court erred by refusing to instruct the jury on misdemeanor breaking or entering

Criminal Law 904 (NCI4th) - first-degree murder -disjunctive instruction - aider and abetter or principal - no denial of unanimous verdict

State v. Allen, 339 N.C. 545 (1995) ___ S.E.2d ___

Trial 444 (NCI4th) witness's statement taken into jury room defendant prejudiced

State v. Poe, 119 N.C. App. 266 (1995) ___ S.E.2d ___

The trial court's submission of a witness's statement to the jury to take to the jury room over one defendant's objection rose to a level of error sufficiently prejudicial to entitle that defendant to a new trial, since the State's entire case rested on the testimony of that witness who himself had pending charges of assault and damage to personal property arising out of this same incident.

Criminal Law 478 (NCI4th) written questions from juror during evidence instruction to that juror alone failure to admonish all jurors

State v. Mitchell, 342 N.C. 797 (3-8-1996) ___ S.E.2d ___

The trial court did not abuse its discretion by calling one juror into the courtroom alone during a recess while the State was presenting its evidence and instructing the juror outside the presence of the jury panel that the court could not answer questions she had submitted in a handwritten note to the bailiff about perceived discrepancies in the State's evidence. Nor did the trial court err by failing to admonish all jurors of their duty not to discuss the case with one another before deliberation where the note was from one juror only and not from the entire jury. N.C.G.S. 15A-1236.

Criminal Law - 695 (NCI4th Rev.) - request for instruction - necessity for writing

State v. Mcneill, 346 N.C. 233 (1997)

The trial court did not err by denying defendant's oral request to modify the pattern instruction for premeditation and deliberation. A trial court's ruling denying requested instructions is not error where defendant fails to submit his request for instructions in writing.

Criminal Law § 503 (NCI4th Rev.) - review of testimony - denial of jury request - failure to exercise discretion

State v. Johnson, 346 N.C. 119 (1997)

The trial court in a prosecution for first-degree statutory rape and taking indecent liberties with a child improperly failed to exercise its discretion, as required by N.C.G.S. § 15A-1233(a), in denying the jury's request to review the testimony of the victim and her aunt where the trial court's statement, "I'll need to instruct you that we will not be able to replay or review the testimony for you," and the trial court's statement immediately thereafter that it "can review further instructions" indicate that the trial court believed it did not have discretion to grant the jury's request. Moreover, this error was prejudicial where the testimonies sought to be reviewed were central to the case and involved issues of some confusion and contradiction.

Crime Against Nature § 13 (NCI4th) - indecent liberties - sleeping defendant - instruction on mistake - improperly denied

State v. Connell, 127 N.C. App. 685 (1997)

The trial court erred in an indecent liberties prosecution by not giving the requested mistake of fact instruction where the eight-year-old victim was touched by defendant after she joined defendant and her mother in her mother's bed after defendant and her mother were asleep. The only evidence is that defendant went to bed and went to sleep before the victim entered his room, and the only testimony regarding intent is the victim's statement to a social worker that, when confronted by the mother, defendant said that he thought he was touching the mother. Because the State presented only circumstantial evidence that defendant was awake and intended to touch the child instead of the mother, the court should have given the instruction.

Sexual Offenses - instructions - nonunanimous

State v. Petty, 132 N.C. App. 453 (1999)

There was no error in a prosecution for indecent liberties and sexual offenses against a child where the court instructed the jury that it could find defendant guilty of a first-degree sexual offense if it found that defendant had engaged in either of two acts. The single wrong of engaging in a sexual act with a minor may be established by a finding of various alternatives, which are merely alternative ways of showing the commission of a sexual act. Even if some jurors found that one act occurred and others found that the other act transpired, the jury as a whole would unanimously find that there occurred sexual conduct constituting the single crime of engaging in a sexual act with a child. However, it was noted that charging a defendant with a separate count of first-degree sexual offense for each alternative sexual act performed in a single transaction would result in a multiplicitious indictment.