

## RAPE & SEX OFFENSES (ADULT)

### **(1) Sufficient Evidence of Anal Penetration to Support Conviction of First-Degree Statutory Sexual Offense**

### **(2) Controlled Substances Indictments Alleging Substance as Schedule IV Benzodiazepene Were Fatally Defective**

*State v. Lepage*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (18 May 2010).

The defendant was convicted of first-degree statutory sexual offense, various controlled substance offenses, and indecent liberties. (1) The court ruled that there was sufficient evidence of anal penetration to support the conviction of first-degree statutory sexual offense. The victim felt nothing out of the ordinary in her private area before arriving at the defendant's house. The defendant drugged a pie that he served to the victim. The defendant later came into the victim's room during the night. She testified that she felt the defendant's hand go down into her pants and up into her body. She drifted in and out of consciousness and was under the influence of a chemical that caused anterograde amnesia. The next morning, she had a fresh anal laceration that was so sensitive that it caused her to cry out in pain when a doctor examined the area. (2) The indictments charging controlled substance offenses alleged the substance as "benzodiazepines" and as a Schedule IV controlled substance. The evidence at trial showed that the drug was Clonazepam, which is specifically listed in Schedule IV and is a benzodiazepine (the indictment, however, did not allege "Clonazepam"). Benzodiazepine itself is not listed in Schedule IV. Not all benzodiazepines are Clonazepam and not all benzodiazepines are listed in Schedule IV. The court ruled, relying on *State v. Ledwell*, 171 N.C. App. 328 (2005), and *State v. Ahmadi-Turshizi*, 175 N.C. App. 783 (2006), the indictments were fatally flawed because (i) they incorrectly stated that benzodiazepine is listed in Schedule IV; and (ii) they charged the defendant with a category of substances, some of which are not regulated under Schedule IV.

### **(1) Scar Resulting from Deep Cut Over Left Eye Was Permanent Disfigurement to Support Conviction of Assault Inflicting Serious Bodily Injury**

### **(2) No Fatal Variance Between Allegations in Assault by Strangulation Indictment Concerning Method of Strangulation and Evidence at Trial**

### **(3) Sufficient Evidence to Support Conviction of Assault by Strangulation**

### **(4) Punishment Was Not Permitted for Convictions of Both Assault Inflicting Serious Bodily Injury and Assault by Strangulation for Same Conduct**

### **(5) Punishment Was Permitted for Convictions of Assault Inflicting Serious Bodily Injury and First-Degree Kidnapping**

### **(6) Punishment Was Not Permitted for Convictions of Both Assault With A Deadly Weapon Inflicting Serious Injury and Assault Inflicting Serious Bodily Injury Based on Single Assault**

### **(7) Insufficient Evidence of Serious Bodily Injury to Support Conviction of Assault Inflicting Serious Bodily Injury**

### **(8) Convictions of Two Counts of First-Degree Sexual Offense Were Permitted Based on Defendant's Insertion of Fingers into Victim's Vagina and Rectum at Same Time**

### **(9) Convictions of Both First-Degree Kidnapping and First-Degree Sexual Offense Were Permitted Based on Jury Instruction**

### **(10) Sufficient Evidence of Serious Bodily Injury to Support Conviction of Assault Inflicting Serious Bodily Injury**

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

The defendant was convicted in a single trial of multiple offenses involving five different victims over a time period from 2004 to 2006. The offenses included sexual assault, robbery, assault, and kidnapping. The court ruled: (1) There was sufficient evidence to support a conviction of assault inflicting serious bodily injury when the injury to the victim, L.T., included a scar resulting from a deep cut over her left eye, which was a permanent disfigurement (she had other injuries as well). (2) An indictment alleging assault by strangulation alleged the defendant strangled the victim, L.T., by placing his hands around her throat. The court ruled that even if there was a variance between the allegation concerning the method of strangulation and evidence introduced at trial, the variance was immaterial and not fatal. The method of strangulation alleged in the indictment was surplusage and should be disregarded. (3) There was sufficient evidence to support the defendant's conviction of assault by strangulation of L.T. She stated that she felt that the defendant was trying to crush her throat, he pushed down with his weight on her neck with his foot, she thought he was trying to "chok(e) her out" or make her go unconscious, and she thought she was going to die. The court rejected the defendant's argument that the state must prove that the victim had difficulty breathing. (4) G.S. 14-32.4(b) (unless conduct is covered under some other provision of law providing greater punishment) shows a legislative intent to prohibit a court from sentencing a defendant for the same conduct under both G.S. 14-32.4(b) (assault inflicting serious bodily injury, Class F felony) and G.S. 14-32.4(a) (assault by strangulation, Class H felony). Punishment can only be imposed for the assault inflicting serious bodily injury, which provides for greater punishment than assault by strangulation. (5) Punishment was permitted for convictions of both assault inflicting serious bodily injury and first-degree kidnapping, which was elevated from second-degree to first-degree based on a finding that the victim was seriously injured. Assault inflicting serious bodily injury requires the additional proof of "serious bodily injury" beyond the element of "serious injury" to prove first-degree kidnapping. Also, proof in the kidnapping case that the victim was abducted "for the purpose of doing serious bodily injury" and the act of committing serious bodily injury are two different elements, the latter being more serious than the former. (6) Punishment was not permitted for convictions of both assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury based on a single assault. Punishment was only permitted for the more serious offense of assault with a deadly weapon inflicting serious injury. (7) There was insufficient evidence of serious bodily injury of victim M.L.W. to support the defendant's conviction of assault inflicting serious bodily injury. Although the victim received a vicious beating, the evidence did not show that her injuries placed her at a substantial risk of death. Though her ribs were still sore five months after the assault, to satisfy the statutory definition the victim must experience "extreme pain" in addition to the "protracted condition." The state did not present evidence of extreme pain. (8) Convictions of two counts of first-degree sexual offense were permitted based on the defendant's insertion of his fingers into the victim's vagina and rectum at the same time. The court relied on *State v. Gobal*, 186 N.C. App. 308 (2008). (9) Convictions of both first-degree kidnapping and first-degree sexual offense were permitted based on the jury instruction for first-degree kidnapping that required proof of serious injury or not released in a safe place, with no reference to the sexual assault. (10) There was sufficient evidence of serious bodily injury to victim K.L.A. to support the defendant's conviction of assault inflicting serious bodily injury. She suffered a puncture wound to the back of her scalp and a parietal scalp hematoma. She also went into premature labor as a result of the assault. This was sufficient evidence of a bodily injury that created a substantial risk of death, which is included in the definition of serious bodily injury.

**In Trial of Sexual Act by Custodian [G.S. 14-27.7(a)], State Is Not Required to Prove That Defendant Knew or Should Have Known That Victim Was in Defendant's Custody or Custody of Defendant's Employer**

*State v. Coleman*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (3 November 2009).  
The court ruled that the state in a trial of sexual act by custodian [G.S. 14-27.7(a)] is not required to prove that the defendant knew or should have known that the victim was in the defendant's custody or the custody of the defendant's employer.

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

*State v. McKoy*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (5 May 2009).  
The court ruled that rape and sexual offense indictments were not fatally defective when they identified the victim solely by her initials, "RTB." The indictments tracked the statutory language of rape and sexual offense statutes and G.S. 15-144.1 and 15-144.2. The court noted that the record on appeal demonstrates that the defendant had notice of the identity of the victim. The arrest warrants served on the defendant listed the victim by her initials, "R.T.B.," with periods after each letter. The defendant admitted to law enforcement that he knew R.T.B. The defendant did not argue on appeal that he had difficulty preparing his case because of the use of "RTB" instead of the victim's full name. Thus, it appears that the defendant was not confused concerning the identity of the victim, and therefore the use of "RTB" in the indictments provided the defendant with sufficient notice to prepare his defense. The defendant did not argue on appeal that the use of "RTB" placed him at risk of being subjected to double jeopardy. In any event, the victim testified at trial and identified herself in court. Thus, the defendant was protected from double jeopardy.

### **(2) Sufficient Evidence to Support Second-Degree Kidnapping Conviction Occurring During Commission of Rape**

*State v. Thomas*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (5 May 2009).  
The defendant was convicted of first-degree rape under a short-form indictment under G.S. 15-144.1. He was also convicted of second-degree kidnapping. (2) The court ruled that there was sufficient evidence to support the defendant's conviction of second-degree kidnapping. The defendant threatened the victim with a gun while she was in his car. When she tried to escape, he pulled her back into the car and sprayed her with mace. He drove her away from her car and children. When she jumped out, he forced her back into the car at gunpoint. He then drove her to a secluded wooded area, where he raped her.

### **Court, Per Curiam and Without Opinion, Summarily Affirms Ruling of Court of Appeals That There Was Sufficient Evidence of Dangerous or Deadly Weapon to**

## **Support First- Degree Rape Conviction**

*State v. Lawrence*, 363 N.C. 118, \_\_\_ S.E.2d \_\_\_ (20 March 2009), affirming, \_\_\_ N.C. App. \_\_\_, 663 S.E.2d 898 (5 August 2008).

The court, per curiam and without an opinion, summarily affirmed the ruling of the North Carolina Court of Appeals that there was sufficient evidence that the defendant possessed a dangerous or deadly weapon to support his conviction of first-degree rape. The defendant grabbed the victim and told her that he was going to kill her. The victim testified that he then reached into his pocket. She did not see if it was a knife or a gun. She just saw something shiny and silver that she thought was a knife.

## **Sufficient Evidence That Victim Was “Physically Helpless” to Support Conviction of Second-Degree Rape**

*State v. Atkins*, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 809 (7 October 2008).

The court ruled that there was sufficient evidence that the victim was “physically helpless” [defined in G.S. 14-27.1(3)] to support the defendant’s conviction of second-degree rape under G.S. 14-27.3(a)(2). The victim was 83 years old, suffered from severe arthritis, walked with the assistance of a walker, and needed assistance with household chores and daily errands. The court stated the jury could reasonably conclude that she was unable to actively oppose or resist her attacker. (The court stated in footnote 1 that not all elderly victims will necessarily be considered physically helpless.)

### **(1) Two Convictions of Rape Were Supported By Evidence of Separate Acts of Forcible Sexual Intercourse**

### **(2) Sufficient Evidence to Convict Defendant of Rape Based on Acting in Concert Theory When Forcible Sexual Intercourse Was Committed by Accomplice**

*State v. Sapp*, \_\_\_ N.C. App. \_\_\_, 661 S.E.2d 304 (3 June 2008).

(1) The court ruled, relying on *State v. Key*, 180 N.C. App. 286 (2006), that two convictions of rape were supported by evidence of separate acts of forcible sexual intercourse. There was substantial evidence that after the defendant had forcible sexual intercourse with the victim on a couch, he withdrew before reentering her a second time on the floor beside the couch. (2) The court ruled, distinguishing *State v. Bellamy*, 172 N.C. App. 649 (2005), that there was sufficient evidence to convict the defendant of rape based on the acting in concert theory when forcible sexual intercourse was committed by the defendant’s accomplice. The defendant’s rapes of the victim were committed during the course of the burglary and robbery, and the later rape of the victim by the accomplice was a natural or

probable consequence of the robbery.

### **Trial Judge Erred in Ruling That Defendant Was Sexually Violent Predator Without Compliance with Provisions in G.S. 14-208.20**

*State v. Zinkland*, \_\_\_ N.C. App. \_\_\_, 661 S.E.2d 290 (3 June 2008).

The court ruled that the trial judge erred in ruling that the defendant was a sexually violent predator without compliance with the provisions in G.S. 14-208.20. The defendant was convicted of sex offenses and, on the state's oral motion at sentencing, the trial ruled that the defendant was a sexually violent predator. There was no evidence in the appellate record of compliance with the notice, investigation, and written findings required by G.S. 14-208.20.

### **Constitutional Law -- Double Jeopardy -- Punishment for both First-Degree Kidnapping and Underlying Sexual Assault**

*State v. Daniels*, 189 NC App 705 (07-1202) (15 April 2008)

The trial court erred by sentencing defendant for both first-degree kidnapping and first-degree rape where the same sexual assault served as the basis for both convictions, and at the resentencing hearing the trial court may arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping, or arrest judgment on the first-degree rape conviction and resentence defendant on the first-degree kidnapping conviction, because: (1) a defendant may not be punished for both the first-degree kidnapping and the underlying sexual assault; (2) where the jury is presented with more than one theory upon which to convict a defendant and does not specify which one it relied upon to reach its verdict, such a verdict is ambiguous and should be construed in favor of defendant; (3) the jury returned a verdict of guilty of first-degree kidnapping but did not specify on which theory it relied in reaching its verdict, and the Court of Appeals was required to assume that the jury relied on defendant's commission of the sexual assault in finding him guilty of first-degree kidnapping; and (4) the State acknowledged the defect.

### **Sufficient Evidence of Constructive Force to Support Convictions of Sexual Battery**

*State v. Viera*, 189 N.C. App. 514, 658 S.E.2d 529 (1 April 2008).

The defendant was convicted of two counts of sexual battery involving two victims in separate incidents in which the defendant provided massage services in a spa. The court reviewed the facts of both incidents and ruled that there was sufficient evidence of constructive force to support both

convictions. The court concluded that the defendant utilized his apparent status as a licensed, professional massage therapist to induce his victims to lie naked on the massage table, putting them in a position of complete vulnerability. Through his coercion, he forced them to submit to unwanted sexual contact. The defendant's implicit threat was delivered through his abuse of his position of trust and relative authority as a professional massage therapist. Also, both victims testified about their fear of saying anything to the defendant after he began touching them inappropriately. The court stated that the fear created by the victims' feelings of vulnerability also substantiated the element of constructive force.

### **Trial Judge Did Not Err Under Rule 412(b)(1) or 412(b)(3) in Excluding Evidence of Victim's Prior Sexual History in Prosecution for First-Degree Sexual Offense**

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

The defendant was convicted of first-degree sexual offense. The defendant denied having a sexual encounter with the victim and did not raise consent as a defense. The court ruled that the trial judge did not err under Rule 412(b)(3) in excluding evidence of the victim's prior sexual history with others and did not err under Rule 412(b)(1) in excluding evidence of the victim's prior sexual history with the defendant. Such evidence under these subdivisions is only relevant to the issue of consent between a victim and a defendant.

### **(2) Sufficient Evidence to Prove Commission of Sexual Act to Support Conviction of First-Degree Sexual Offense**

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

The defendant was convicted of first-degree sexual offense and assault with a deadly weapon inflicting serious injury. (2) The court ruled that there was sufficient evidence to prove the commission of a sexual act to support the defendant's conviction of first-degree sexual offense. The victim was apparently rendered unconscious before the sexual act and could not testify about it. However, the physician who examined the victim testified that the intrusion of an object into the victim's rectum could have resulted in the injury to her colon. Also, there was evidence that the victim suffered extensive damage to her outer genital and rectal areas.

### **Defendant's Knowledge of Victims' Ages Is Element in State's Prosecution of Statutory Rape When State Relies on Aiding and Abetting Theory to Prove Defendant's Guilt and Evidence Is Offered Concerning Defendant's Lack of Knowledge That Victims Were Under Statutory Age of Consent**

*State v. Bowman*, 188 N.C. App. 635, 656 S.E.2d 638 (19 February 2008). The defendant was convicted of three counts of aiding and abetting statutory rape under G.S. 14-27.7A (statutory rape of 13, 14, or 15 year old). The court ruled, relying on *State v. Evans*, 279 N.C. 447 (1991), *State v. Capps*, 77 N.C. App. 400 (1985), *State v. Walker*, 35 N.C. App. 182 (1978), and other cases, that the defendant's knowledge of the victims' ages is an element in the state's prosecution of statutory rape when the state relies on the aiding and abetting theory to prove the defendant's guilt and evidence is offered concerning the defendant's lack of knowledge that the victims were under the statutory age of consent. The court stated that although statutory rape is a strict liability crime, aiding and abetting statutory rape is not. Evidence was resented that the defendant (prosecuted as an aider and abettor) did not know the victims' ages, and he thought they were over 18 years old. The court ruled that the defendant was entitled to a jury instruction requiring the state to prove the defendant knew that the victims were under 16 years old.

### **Hands Are Not Dangerous or Deadly Weapon For Offenses of First-Degree Rape and First- Degree Sexual Offense**

*State v. Adams*, 187 N.C. App. 676, 654 S.E.2d 711 (18 December 2007). The court ruled, relying on the ruling in *State v. Hinton*, 361 N.C. 207 (2007) (hands are not dangerous weapon for offense of armed robbery), ruled that hands are not a dangerous or deadly weapon for the offenses of first-degree rape and first-degree sexual offense. The court reasoned that the legislature did not intend the term "dangerous or deadly weapon" to include parts of a human body, such as hands or feet. [Author's note: Neither this ruling nor the Hinton ruling affects prior rulings that hands or feet can be deadly weapons for assault offenses.]

### **(3) Sufficient Evidence to Support Conviction of Attempted Second-Degree Rape**

*State v. Simpson*, 187 N.C. App. 424, 653 S.E.2d 249 (4 December 2007). The defendant was convicted of first-degree kidnapping and attempted second-degree rape. The defendant was in the victim's home when he suddenly got on top of the victim and straddled her. The victim struggled with the defendant, who hit the victim in her face, tried to put a piece of duct tape over her mouth, and pinned her down, trying to lift up her shirt. He dragged her from a couch and toward the kitchen. The victim noticed that the defendant's pants were unzipped. The defendant then tried to drag her outside the house, but she successfully prevented him from doing so and he left. (3) The court ruled that there was sufficient evidence to support the defendant's conviction of attempted second-degree rape. The

defendant straddled the victim and tried to pull up her shirt, and his pants were unzipped.

**Sexual Battery Is Not Lesser-Included Offense of Second-Degree Rape Under G.S. 14-27.3(a)(2) (Vaginal Intercourse With Mentally Helpless, Mentally Incapacitated, or Physically Helpless)**

*State v. Pettis*, \_\_\_ N.C. App. \_\_\_, 651 S.E.2d 231 (18 September 2007).

The court ruled that sexual battery is not a lesser-included offense of second-degree rape under G.S. 14-27.3(a)(2) (vaginal intercourse with mentally helpless, mentally incapacitated, or physically helpless). Sexual battery has a purpose element (battery committed for purpose of sexual arousal, sexual gratification, or sexual abuse) that is not an element of second-degree rape under G.S. 14-27.3(a)(2).

**Convictions of Both First-Degree Statutory Rape and First-Degree Forcible Rape Based on Same Act Is Not Authorized, and Same Rule Applies to First-Degree Statutory Sexual Offense and First-Degree Forcible Sexual Offense**

*State v. Ridgeway*, \_\_\_ N.C. App. \_\_\_, 648 S.E.2d 886 (21 August 2007).

The defendant was convicted of multiple offenses involving the murder and sexual assaults of a fourteen year old victim. The court ruled that convictions of both first-degree statutory rape and first-degree forcible rape based on the same act is not authorized, and the same rule applies to first-degree statutory sexual offense and first-degree forcible sexual offense.

**Defendant Was Properly Convicted of Three Counts of Indecent Liberties for Three Sexual Distinct Acts During Same Transaction**

*State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (17 April 2007).

The defendant was convicted of three counts of indecent liberties for three sexual acts that occurred during the same transaction: (1) fondling the victim's breasts; (2) oral sex; and (3) sexual intercourse. Distinguishing *State v. Laney*, 178 N.C. App. 337, 631 S.E.2d 522 (5 July 2006) (defendant's conduct in touching victim's breast over her shirt, putting his hand under the waistband of her pants, and touching the victim over her pants supported only one conviction of indecent liberties), the court ruled that the three convictions were proper. The court noted that in *Laney* the sole act was touching, while in this case there was a touching and two distinct sexual acts. The court stated that these were three distinctive acts even though they occurred within a short time span.

**(1) Sufficient Evidence to Support Two Rape Convictions When Defendant Vaginally Penetrated Victim on Couch While Facing Defendant, Withdrew His Penis, Turned Her on Her Side, and Then Vaginally Penetrated Her from Behind**

*State v. Key, 180 N.C. App. 286, 636 S.E.2d 816 (21 November 2006).*

The defendant was convicted of two counts of first-degree rape, one count of second-degree kidnapping, one count of attempted second-degree burglary, and one count of first-degree burglary. The defendant broke into the victim's home and threatened her with a knife in the bedroom. He forced her at knife point to go into the kitchen where he taped her eyes shut, took the phone off the hook, and told her to go into the family room and remove her clothing. The defendant vaginally penetrated the victim on a couch while she faced the defendant, withdrew his penis, turned her on her side, and then vaginally penetrated her from behind. (1) The court ruled, relying on *State v. Lancaster, 137 N.C. App. 37, 527 S.E.2d 61 (2000)*, that there was sufficient evidence to convict the defendant of two counts of rape.

**Rape-One incident-Two penetrations-Two charges**

*State v Key 180 N.C. APP. 286 (2006)*

Two acts of penetration during one incident supported two rape charges. *State v. Roberts, 176 N.C. APP.159 (2006)*

**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 Key, 180 N.C. APP. 286 (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.

**Rape--Second-degree--Instruction--Proof beyond a reasonable doubt that victim was sleeping**

*State v Smith, 360 NC 341 (2006)*

The Court of Appeals did not err in a second-degree rape case by granting defendant a new trial although the decision should have been based on the trial court's failure to instruct that the State must prove beyond a reasonable doubt that the victim was sleeping, rather than focusing on the trial court's additional instruction that force and lack of consent are implied in law if at the time of the vaginal intercourse the victim was sleeping or similarly incapacitated, because: 1) the trial court's jury instruction did not clearly emphasize the State's burden to prove beyond a reasonable doubt that the victim was asleep, thus satisfying the force and lack of consent elements of second-degree rape under N.C.G.S. § 14-27.3(a)(1); and 2) there is a reasonable likelihood that the jury applied the instruction in a manner that impermissibly and unconstitutionally lessened the State's burden of proof.

**Sexual Offenses--Crime against nature--Constitutionality of statute--Cunnilingus--Consent--Collateral estoppel**

*State v Whiteley, 172 N.C. APP. 772 (2005)*

The crime against nature statute, N.C.G.S. § 14-177, is not unconstitutional on its face because it may properly be used to criminalize sexual conduct involving minors, nonconsensual or coercive conduct, public conduct, and prostitution. Although the statute could constitutionally be applied in this case on the basis that an act of cunnilingus was nonconsensual because the victim was physically helpless, it was unconstitutional as applied in that the trial court erroneously refused to instruct the jury that defendant would be guilty of a crime against nature only if the act of cunnilingus was performed without the victim's consent. However, the issue of the victim's consent cannot be relitigated in a new trial, and defendant's conviction of crime against nature is vacated, where defendant was acquitted of second-degree sexual offense based upon the same act of cunnilingus; the trial court had instructed the jury that, in order to find defendant guilty of second-degree sexual offense, it must find beyond a reasonable doubt that the victim was physically helpless; and the jury by its verdict found that the evidence did not show beyond a reasonable doubt that the act of cunnilingus was performed while the victim was physically helpless and, therefore, without her consent.

### **Sexual Offenses--First-degree-Motion to dismiss--Sufficiency of evidence--Penetration**

*State v Bellamy, 172 N.C. APP. 649 (2005)*

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree sexual offense even though defendant contends there was insufficient evidence of penetration, because: 1) N.C.G.S. § 14-27.1(4) provides that a sexual act can be defined as penetration, however slight, by any object into the genital or anal opening of another person's body; 2) in the context of rape, our Supreme Court has held that evidence that defendant entered the labia is sufficient to prove the element of penetration, and the Court of Appeals finds no reason to establish a different standard for sexual offense; and 3) the evidence in the instant case shows that defendant used the barrel of his gun to spread the labia of the victim.

### **Sexual Offenses--First-degree-codefendant's act during robbery-Acting in concert--Sufficiency of evidence**

*State v Bellamy, 172 N.C. APP. 649 (2005)*

The trial court erred by denying defendant's motion to dismiss the charge of first-degree sexual offense committed during the course of a robbery of a fast food restaurant under the theory of acting in concert, because: 1) based on the facts of this case, a sex offense committed in the course of a robbery of a public business by a codefendant was not a natural or probable consequence of the robbery; and 2) a reasonable person in defendant's position would not have foreseen that the codefendant would take the time to deviate from the planned robbery to commit this type of bizarre sexual assault on the victim.

### **Evidence--Victim's previous sexual activity-Credibility--Rape Shield Statute**

*State v Dorton, 172 N.C. APP. 759 (2005)*

The trial court did not abuse its discretion in a second-degree sexual offense case by denying defendant's request to inquire into the victim's previous sexual activity for the purpose of attacking her credibility as a witness, because the Rape Shield Statute limits the scope of cross-examination by declaring such examination to be irrelevant to any issue in the prosecution except in four narrow situations inapplicable to the instant case.

### **Sexual Offenses--Crimes against nature--Prostitution and public conduct**

*State v. Pope 168 N.C. APP. 592 (2005)*

The United States Supreme Court opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), did not render North Carolina's crime against nature statute under N.C.G.S. § 14-177 unconstitutional, and this case is remanded to affirm the superior court's order reversing the district court's dismissal of the four charges of solicitation of a crime against nature based upon defendant's encounter with undercover police officers in which she indicated that she would perform oral sex in exchange for money, because the United States Supreme Court expressly excluded prostitution and public conduct from its holding.

**Rape--Rape shield statute--Prior sexual encounter on same day\*\*\***

*State v. Harris 360 NC 145 (2005) Rev'd Ct of Appeals*

The trial court did not err in a second-degree rape case by excluding evidence of the victim's prior sexual encounter with her boyfriend earlier on the same day as the alleged rape even though defendant presented a defense of consent, and defendant's conviction for second-degree rape is reinstated because: 1) no evidence proffered at the in camera hearing supported an inference that the victim's prior sexual activity was forced or caused any injuries; 2) where consent is the defense, evidence of the prior sexual activity is precisely the type of evidence the rape shield statute under N.C.G.S. § 8C-1, Rule 412 is intended to proscribe when in the instant case the victim described an earlier sexual encounter that was consensual and was unlikely to have produced the type and number of injuries the expert testimony verified that she suffered; 3) given the purpose of the rape shield statute, evidence of the victim's consensual attempt at sexual intercourse with her boyfriend is not probative on the issue of whether she consented to sexual activity with defendant; and 4) even assuming that the excluded evidence was probative, it was substantially outweighed by the danger of unfair prejudice to the State and the prosecuting witness.

**Evidence--Rape shield law--Exception--Prior sexual contact relevant to injuries**

*State v. Harris 166 N.C. APP. 386 (2004) Rev'd Ct of Appeals State v. Harris 360 NC 145 (2005)*

Evidence of a second-degree rape victim's prior sexual encounter on the day of the rape should have been admitted because it may have accounted for some of her injuries and was relevant to whether she consented to sex

with defendant. A new trial was also granted on a common-law robbery charge because the victim's credibility was essential to all of the charges. N.C.G.S. § 8C-1, Rule 412(b)(2).

### **Witnesses–Expert–Sexual assault nurse examiner**

*State v. Fuller 166 N.C. APP. 548 (2004)*

The trial court did not abuse its discretion in a prosecution for statutory rape and other offenses by allowing a nurse to testify as an expert sexual assault nurse examiner where she had been employed by the hospital for nineteen years; had served as a nurse manager in the emergency department for two years; had a bachelor of science in nursing and had received special sexual assault nurse examiner training in 1999; that training involved forty hours in the classroom and fifty-six hours of clinical practice; the witness was specifically trained to examine the victim's demeanor and body language as well as to look for physical evidence and signs of trauma; and the witness had been a certified sexual assault nurse examiner for three years at the time of trial.

### **Rape–First-degree--Assault on a female as lesser offense –Instruction denied--Short form indictment not applicable**

*State v. Hedgepeth 165 N.C. APP. 321 (2004)*

The trial court correctly denied an instruction on assault on a female to a first-degree rape defendant indicted under N.C.G.S. § 14-27.2. Where the indictment specifically alleges all of the elements of first-degree rape under N.C.G.S. § 14-27.2(a)(2)(a) & (b) and does not contain the specific averments or allegations of N.C.G.S. § 15-144.1 (the short form indictment, which can include assault on a female as a lesser offense), the court has jurisdiction only to issue instructions on first-degree rape and any lesser included offenses that meet the definitional test. Assault on a female does not meet that test because it contains elements not present in the greater offense of rape.

### **Sexual Offenses--First-degree--Failure to require unanimous verdict for specific sexual act**

*State v. Carrigan 161 N.C. APP. 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.

*Lawrence v. Texas 2003 US Supreme Ct*

State Statute Prohibiting Two People of Same Sex to Engage in Consensual Sex Act Violated Privacy Interest in Due Process Clause of Fourteenth Amendment When Consensual Sex Act Occurred Between Two Adults in Private Residence However, based on statements in the Court's opinion, the ruling does not bar the prosecution of crime against nature when 1) one of the consenting parties is a minor; 2) one of the parties is an adult who is mentally disabled or incapacitated or physically helpless so as to be incapable of properly consenting; 3) one of the parties offers to commit or commits the sex act for money or other valuable consideration; 4) the sex act is not committed in a private residence or other private place; or 5) one of the parties to the sex act is coerced into committing the act. It is unclear whether the statute (G.S. 14-184) prohibiting fornication and adultery is constitutional after the Lawrence ruling.]

### **Rape--Attempted first-degree--Motion to dismiss--Sufficiency of evidence--Short-form indictment**

*State v. Owen 159 N.C. APP. 204 (2003)*

The trial court did not err by denying defendant's motion to dismiss the charge of attempted first degree rape even though defendant never removed any of his clothing or said anything to the victim about sexually assaulting her, and defendant contends the short-form indictment was fatally defective, because: 1) defendant's actions and words constitute sufficient evidence of defendant's intent to gratify his passion upon the victim, including defendant's repeated insistence that the victim remove her clothes and come toward him and his attempt to stab her with his knife; 2) the only evidence supporting an alternative motivation was defendant's statement to the police that he went in the house to commit a breaking and entering, and the surrounding circumstances do not corroborate defendant's assertion; and 3) North Carolina has consistently upheld the constitutionality of the use of the short-form indictment in rape cases.

### **Rape--Penetration--Sufficiency of evidence**

*State v. Bell 159 N.C. APP. 151 (2003)*

There was sufficient evidence of penetration in a rape case. Complete penetration need not occur.

## **Rape--Second-degree--Constructive force--Sufficiency of evidence**

*State v. Scercy 159 N.C. APP. 344 (2003)*

There was sufficient evidence of constructive force to support defendant's conviction of second-degree rape where the victim testified that defendant took her to an empty ballpark, threatened her by referring to a "9mm" that could be used to "persuade" her, and stated that he would get it the "easy way or the hard way."

### **1) Criminal Law--Indictment for completed offense--Conviction for attempt**

*State v. Sines 158 N.C. APP. 70 (2003)*

An indictment for a completed statutory sexual offense will support a conviction for the lesser crime of attempted statutory sexual offense.

### **2) Sexual Offenses--Attempted statutory sexual offense--Nature of intent**

*State v. Sines 158 N.C. APP. 70 (2003)*

The crime of attempted statutory sexual offense is valid under North Carolina law. The intent required for attempted statutory sexual offense requires only that defendant intended to commit a sexual act with the victim, not that defendant intended to commit a sexual act with an underage person.

### **1) Rape--Attempted first-degree--Motion to dismiss--Sufficiency of evidence**

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

The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree rape even though the State relied on the serious injuries suffered by the victim mother's daughter to elevate the offense when the daughter was not present during the attempted rape and the indictment did not allege which element the State relied on to elevate the crime to a first-degree offense, because: 1) when the State is proceeding under the theory that the serious personal injury was inflicted on a person other than the victim of the rape or attempted rape, there is no requirement under N.C.G.S. § 14-27.2(a)(2)(b) that the other person actually be present during the rape or attempted rape; 2) viewing the evidence in the light most favorable to the State reveals that a jury could have reasonably inferred that defendant attacked the daughter for the purpose of concealing the attempted rape of the mother or aiding in his escape from apprehension and that the attempted rape of the mother and the attack on the daughter were part of one continuous transaction; 3)

the evidence supports the serious personal injury element of attempted first-degree rape based on the injuries suffered by either of the two victims; and 4) N.C.G.S. § 15-144.1 does not require that an indictment for rape contain an allegation of which element the State was relying on to elevate the crime to a first-degree offense.

## **2) Rape--Attempted first-degree--Jury instructions--Serious personal injury on victim or another**

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

The trial court did not err in its instructions on attempted first-degree rape by instructing the jury that it could find defendant guilty if it found that he inflicted serious personal injury on the victim or any other person, because the State presented sufficient evidence to show that the attempted rape of the victim and the assault of another victim were part of a continuous transaction.

## **Evidence--Sexual assault--Emergency room physician's testimony--Credibility of victim**

*State v. O'Hanlan 153 N.C. APP. 546 (2002)*

An emergency room physician's opinion testimony that the victim's emotional state was consistent with someone who had been sexually assaulted and that a sexual assault had occurred did not improperly bolster the credibility of the victim so as to constitute plain error in a rape and sexual offense prosecution. The treating physician is permitted to give the background reasons for his diagnosis and he was never asked whether he believed the victim was sincere.

## **Sexual Offenses--Sexual activity by custodian-Job Corps employee**

*State v. Jones, 143 N.C. App. 514, 2001*

The trial court did not err in a prosecution against a Job Corps employee for voluntary sexual activity with a sixteen-year-old Job Corps participant by refusing to grant motions to dismiss the charge of sexual activity by a custodian. *State v. Raines, 319 N.C. 258*, does not require that a victim be involuntarily or physically confined or that an institution obtain legal custody for the victim to be considered in "custody" under N.C.G.S. § 14-27.7(a). In accordance with *Raines*, the victim here was in the Job Corps' care, preservation, and protection and was therefore within its "custody."

## **1) Sexual Offenses--First-degree--Force element missing in original indictment--Amendment not substantial alternation**

*State v. Haywood, 144 N.C. App. 223, 2001*

The trial court properly concluded the indictment charging defendant with first-degree sexual offense under N.C.G.S. § 15-144.2(a) should not have been dismissed even though it omitted the element of force, because the State's amendment of the indictment to include the addition of the term "by force" did not substantially alter the charge against defendant when the terms "feloniously" and "against the victim's will" were already included in the indictment.

## **2) 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--First-degree--Infliction of serious personal injury**

*State v. Ackerman, 144 N.C. App. 452, 2001*

The trial court did not commit plain error by instructing the jury on first-degree sexual offense based on the employment of a dangerous weapon or the infliction of serious personal injury, because: 1) the photographic evidence revealed three bite marks, a thumb print, scab, and swelling on the victim's neck as the result of being choked, and many bruises and swelling about the victim's face, head, neck, chest, and knees resulting from blows from a full beer bottle and defendant's hands; 2) the victim showed the jury scars on her arm left by defendant's bites; and 3) the victim testified about a blow by defendant's hand on her ear and how she still thinks about the incident every day of her life.

## **Rape--First-degree--Alternative theories**

*State v. Barkley, 144 N.C. 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.

### **Rape--Continuous act--Multiple penetrations**

*State v. Lancappster, 137 N.C. App. 37 (2000)*

The trial court did not err by denying a motion to dismiss one of two rape charges on the theory that there was only one continuous act. Each act of intercourse constitutes a distinct and separate offense and the victim testified that she was penetrated from behind by defendant, that he forced her onto a closet shelf so that she was facing him, and that he again forcibly penetrated her.

### **Sexual Offenses--Sexual activity by a custodian--Motion to dismiss--Sufficiency of evidence**

*State V. Crockett, 138 N.C. App. 109 2000*

The trial court did not err in denying defendant's motion to dismiss the charge of sexual activity by a custodian in 97 CRS 20050 because: 1) the victim's testimony revealed that she believed she was in a custodial relationship with defendant on the date of their sexual encounter; 2) employees from the Youth Opportunity Home testified that the victim was still a participant in their program on the date of the victim's sexual encounter with defendant; and 3) the State demonstrated sufficient evidence that defendant was an employee of the Youth Opportunity Home at that time.

### **Rape--Attempted first-degree--Insufficiency of evidence**

*State v. Walker, 139 N.C. App. 512, 2000*

The trial court erred in denying defendant's motion to dismiss the charge of attempted first-degree rape because: 1) the evidence of defendant's attempt is, at most, ambiguous; 2) the only suggestions of a sexual component was defendant's persistent attempts to have the victim roll onto her stomach, which was not substantial evidence allowing a reasonable conclusion that defendant had an intent to gratify his passion on the victim notwithstanding her resistance; and 3) there was insufficient evidence that defendant manifested, by an overt act, a sexual motivation for his attack on the victim.

### **1) Rape and Allied Offenses 5 (NCI3d) - Second degree sexual offense - Sufficient evidence of force**

*State v. Brown, 332 N.C. 262 (1992) 420 S.E.2d 147*

There was sufficient evidence to support a reasonable finding that defendant used the force required to sustain his conviction under N.C.G.S. 14-27.5(a)(1) for second degree sexual offense where the State's evidence tended to show that defendant and his victim were absolute strangers to each other; defendant entered unbidden into the victim's darkened hospital room in the middle of the night; there he found the female victim suffering from cystic fibrosis and attached to tubing through which she was being administered antibiotics intravenously; the victim's eyes were closed, and defendant had no reason to believe she was conscious; defendant pulled back the bedclothes on the victim's bed, pulled up her gown, pulled down her panties, and put his fingers into her pubic hair; the victim opened her eyes, and defendant immediately pushed his finger into her vagina; and when the victim moved slightly, defendant went immediately to the door, which he had closed after entering the room, and made his escape. The jury could reasonably find that defendant's actions in pulling back the bedclothing, pulling up the victim's gown, and pulling her panties aside amounted to actual physical "force" as that term is to be applied in sexual offense cases.

**2) Rape and Allied Offenses 5 (NCI3d) - First degree sexual offense - Fatal injury - Other serious personal injury**

*State v. Thomas, 332 N.C. 544 (1992) 423 S.E.2d 75*

The State presented sufficient evidence of serious personal injury other than the fatal one to support defendant's conviction of first degree sexual offense where the evidence tended to show that the victim suffered serious external injuries from a savage beating by defendant, that none of the victim's serious external injuries, as testified to by the pathologist and another witness, were the cause of her death, and that all of the external injuries were inflicted upon the victim immediately prior to and during a sexual assault upon her by defendant.

**3) Rape and Allied Offenses 15 (NCI4th) - First-degree rape - Infliction of serious personal injury - Mental or emotional harm**

*State v. Baker, 336 N.C. 58 (1994) 441 S.E.2d 551*

In order to prove a serious personal injury in a rape case based upon mental or emotional harm, the State must prove that the defendant caused the harm, that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the *res gestae* results present in every forcible rape.

**4) Rape and Allied Offenses 96 (NCI4th) - First-degree rape - Infliction of serious personal injury - Sufficient evidence of serious mental harm**

*State v. Baker, 336 N.C. 58 (1994) 441 S.E.2d 551*

**Evidence and Witness 373 (NCI4th) - Second degree rape of stepdaughter - Rape of other stepdaughter ten years earlier - Relevancy - Remoteness - Admissibility to show common plan or scheme**

*State v. Matheson, 110 N.C. App. 577 (1993) 430 S.E.2d 429*

**Rape and Allied Offenses 5 (NCI4th) - Rape - Serious personal injury - Mental injury - Evidence insufficient**

*State v. Baker, 109 N.C. App. 557 (1993) 428 S.E.2d 216*

**Rape and Allied Offenses 4.3 (NCI3d) - Rape Shield Statute - Letter not excluded**

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

Cross-examination of an alleged sexual offense and indecent liberties victim about a letter she wrote asking a school friend to have sex with her was not prohibited by the Rape Shield Statute, N.C.G.S. 8C-1, Rule 412, because evidence of language does not constitute evidence of sexual behavior excluded by this statute.

**1) Evidence and Witnesses 120 (NCI4th) - Rape Shield Statute - Prior sexual conduct - Exclusion of cross-examination**

*State v. Black, 111 N.C. App. 284 (1993) 432 S.E.2d 710*

In a prosecution of defendant for an alleged series of sexual assaults involving his two stepdaughters, the trial court properly applied the Rape Shield Statute in refusing to permit defendant to cross-examine one stepdaughter concerning whether she had previously engaged in sexual intercourse with two specific persons where the stepdaughter testified at the in camera hearing that she had not had sex with either person, no evidence was offered to contradict her testimony, and there was thus no evidence of sexual activity the relevance of which the trial court was obligated to determine.

**2) Rape and Allied Offenses 6 (NCI3d) - Second-degree rape - Instructions on force proper**

*State v. Black, 111 N.C. App. 284 (1993) 432 S.E.2d 710*

In a prosecution of defendant for sexual assaults on his stepdaughters, the trial court's instruction to the jury on the element of force needed to support the charges of second-degree rape was proper where the instruction indicated that the jury "may find" the existence of constructive force in intrafamilial situations,

**1) Evidence and Witnesses 374 (NCI4th) - Sexual offense charged - Evidence of prior sexual act admissible - Time frame established by evidence**

*State v. Harris, 111 N.C. App. 445 (1993) 432 S.E.2d 415*

Testimony concerning an uncharged prior sexual act between defendant and the victim was properly allowed into evidence to show intent and plan or scheme where evidence established that the prior act happened within one year of the charged offenses.

**2) Evidence and Witnesses 3076 (NCI4th) - Rape Shield Statute - In camera hearing testimony - Use for impeachment**

*State v. Najewicz, 112 N.C. App. 280 (1993) 436 S.E.2d 132*

Where the defendant in a rape trial testified on direct examination that the prosecutrix told him of a previous sexual assault several weeks before he engaged in sex with her, the State was properly permitted to impeach defendant by use of his prior inconsistent testimony at an in camera hearing under the Rape Shield Statute that the prosecutrix led him to believe she was a virgin until moments before they had intercourse when she revealed she had been raped by a former boyfriend since (1) the Rape Shield Statute may not be utilized as a barrier to prevent cross-examination concerning critical inconsistencies in sworn testimony, and (2) the use of the in camera transcript did not constitute impeachment on a collateral matter.

**3) Evidence and Witnesses 120 (NCI4th) - Victim's prior sexual conduct – Inadmissibility**

*State v. Mustafa, 113 N.C. App. 240 (1994)*

A rape victim's prior consensual relationship with her boyfriend which was ongoing since the 1970's did not amount to a pattern of sexual behavior closely resembling the events that took place in this case, and the trial court therefore did not err in excluding evidence of the victim's prior sexual conduct.

**Rape and Allied Offenses 200 (NCI4th) - First-degree rape - Defendant's**

**denial of penetration instruction on attempted rape required**

*State v. Nelson, 114 N.C. App. 341 (1994) \_\_\_ S.E.2d \_\_\_*

**Criminal Law 362 (NCI4th) - Rape case - Judge's clearing of courtroom - Failure to make required findings**

*State v. Jenkins, 115 N.C. App. 520 (1994) \_\_\_ S.E.2d \_\_\_*

**Rape and Allied Offenses 112 (NCI4th) - Sexual assault - Bruises and tears constituting serious personal injury**

*State v. Lilly, 117 N.C. App. 192 (1994) \_\_\_ S.E.2d \_\_\_*

Though a rape and sexual assault victim testified that she moved out of her home to live with her niece because she was scared to go back home, this evidence, standing alone, was insufficient to support a conclusion that the victim sustained a "serious" personal injury; however, bruises to the victim's rectal area and vaginal tears requiring surgery and three days of hospitalization were serious personal injuries which could be used to elevate the sexual offense to first degree.

**Evidence and Witnesses 2522 (NCI4th) rape - Mentally handicapped victim - Requirement of psychological evaluation - No authority**

*State v. Horn, 337 N.C. 449 (1994) \_\_\_ S.E.2d \_\_\_*

**Rape and Allied Offenses 28, 164 (NCI4th) first-degree sexual offense - Diminished capacity no defense**

*State v. Daughtry, 340 N.C. 488 (1995) \_\_\_ S.E.2d \_\_\_*

The trial court did not err by failing to instruct on diminished capacity as that defense related to a charge of first-degree sexual offense since first-degree sexual offense is not a specific intent crime, and diminished capacity is thus not a defense to such crime.

**Rape and Allied Offenses 122 (NCI4th) attempted second-degree rape insufficiency of evidence**

*State v. Rick, 342 N.C. 91 (1995) \_\_\_ S.E.2d \_\_\_*

The evidence was insufficient to support defendant's conviction of attempted second-degree rape where the sole evidence regarding a sexual act was that defendant could not be ruled out as a partial

contributor to a semen stain found on a murder victim's jeans, but there was no evidence that defendant had the intent to have vaginal intercourse with the victim by force and against her will.

**Rape and Allied Offenses 90 (NCI4th) first-degree rape sufficiency of evidence**

*State v. Best, 342 N.C. 502 (1996) \_\_\_ S.E.2d \_\_\_*

The State's evidence was sufficient for the jury in a prosecution of defendant for the first-degree rape of a murder victim where the jury could find that someone other than her husband penetrated the victim from testimony by a DNA expert that semen taken from the victim's vagina was not from her husband; the jury could find the penetration was not consensual from evidence of the defensive wounds on the victim's hands, the cuts on her neck and chest, and the multiple injuries to her face and head; and defendant's identity as the perpetrator of the crime was established by his fingerprint on a knife found next to the body of the rape victim's husband.

**Rape and Allied Offenses 122 (NCI4th) - Attempted second-degree rape - Sufficiency of evidence**

*State v. Canup, 117 N.C. App. 424 (12-20-1994) \_\_\_ S.E.2d \_\_\_*

The evidence was sufficient to support defendant's conviction of attempted second-degree rape where defendant's actions of undressing himself, holding the prosecutrix down, forcing her to fondle his penis, spreading her legs apart, pulling her pants and underpants down, and then lying on top of her were all overt acts showing intent to rape, going beyond mere preparation but falling short of the completed offense of second-degree rape.

**1) Evidence and Witnesses § 124 (NCI4th) complainant's sexual encounter with other men no evidence of consent to sex with defendant evidence properly excluded**

*State v. Ginyard, 122 N.C. App. 25 (1996) 468 S.E.2d 525*

The trial court in a first degree rape case did not err in refusing to allow two men charged with the same crime as defendant based on the same set of facts to testify regarding their sexual encounter with the complainant, since testimony that complainant consented to sexual relations with the two men is not evidence of sexual behavior between "complainant and the defendant" within the meaning of N.C.G.S. §

8C-1, Rule 412(b)(1).

**2) Evidence and Witnesses § 123 (NCI4th) no pattern of sexual behavior excluded**

*State v. Ginyard, 122 N.C. App. 25 (1996) 468 S.E.2d 525*

Testimony by two witnesses in a rape trial that they exchanged crack cocaine for sex with the prosecutrix during the same incident but prior to the time that defendant allegedly exchanged crack cocaine for sex with the prosecutrix did not reveal a pattern of sexual behavior by the prosecutrix so as to be admissible on the issue of consent under N.C.G.S. § 8C-1, Rule 412(b)(3), since evidence of only one incident of the prosecutrix exchanging sex for crack cocaine prior to her alleged exchange with defendant was insufficient to show that the prosecutrix engaged in a pattern of exchanging sex for cocaine.

**3) Evidence and Witnesses § 132 (NCI4th) earlier allegation of rape withdrawn exclusion of evidence error**

*State v. Ginyard, 122 N.C. App. 25 (1996) 468 S.E.2d 525*

The trial court in a first-degree rape case erred by not allowing defendant to question the complainant in the presence of the jury regarding the allegation of rape made by complainant five months earlier and subsequently withdrawn, since the trial court erroneously ruled that the evidence was irrelevant under N.C.G.S. § 8C-1, Rule 412,

**Evidence and Witnesses §§ 1432, 1958 (NCI4th) rape kit emergency room record admissibility**

*State v. McKenzie, 122 N.C. App. 37 (1996) 468 S.E.2d 817*

The trial court did not err by allowing a rape kit and emergency room record to be published to the jury since they were relevant to corroborate the victim's testimony, and since such evidence showed trauma to the victim's vaginal area tending to establish penetration, an essential element of the offense of rape.

**Rape and Allied Offenses § 120 (NCI4th) attempted first-degree rape sufficiency of evidence**

*State v. Dalton, 122 N.C. App. 666 (1996) 471 S.E.2d 657*

The evidence was sufficient to be submitted to the jury in a prosecution for attempted first-degree rape where it tended to show that defendant and

a companion had looked through the victim's house and were preparing to leave when defendant stated he was "horny" and wanted to rape the victim; defendant said he would hold a knife to the victim's throat and instructed his companion to put a pillow over her face so defendant could rape her; when the victim woke up defendant was on top of her trying to pull down her shorts; she felt a knife at her neck and defendant told her that if she opened her eyes he would "hurt [her] real bad"; defendant called her obscene names and told her she was going to get what she deserved; and the victim wrestled defendant and kned him in the groin before he and his companion fled out the back door.

**Kidnapping and Felonious Restraint § 31 (NCI4th); Rape and Allied Sexual Offenses § 90 (NCI4th) first-degree kidnapping to commit prostitute withdrawal of consent**

*State v. Penland, 343 N.C. 634 (1996) 472 S.E.2d 734*

There was sufficient evidence to permit the jury to find beyond a reasonable doubt that defendant committed first-degree kidnapping where defendant argued that the evidence was insufficient to prove that he formed an intent to rape the victim prior to or during the removal because all of the evidence tended to show that the victim got into the truck for the purpose of engaging in prostitution. The evidence indicates that defendant never intended to pay her for sexual services and, given the circumstances, the jury could reasonably infer (1) that defendant would have known the victim's prior consent to sexual activity had been withdrawn, and (2) that his threats and actions compelled her submission and overcame her will, thereby negating her earlier consent.

**Evidence and Witnesses § 125 (NCI4th) - Capital resentencing - Sexual behavior of victim - Not admissible**

*State v. Holden, 346 N.C. 404 (1997)*

In a capital resentencing for a first-degree murder where defendant had also been convicted of rape, the trial court did not err by excluding evidence that the victim had engaged in sexual intercourse with a third party on the night of the killing. The evidence did not relate to any aspect of defendant's character, his record, or any other circumstance which a jury could deem to have mitigating value. There was no evidence that defendant was aware that the victim had engaged in sexual intercourse on the night in question and, even considering defendant's limited intellectual capacity, the evidence did not shed any light on whether defendant believed that the victim had consented to having sexual intercourse with him or on his capacity to appreciate the

criminality of his conduct.

**Rape and Allied Sexual Offenses § 96 (NCI4th) - First-degree rape - Seriousness of injury - Deceased victim**

*State v. Richmonds, 347 N.C. 412 (1998)*

The evidence was sufficient to support a conviction for first-degree rape where defendant contended that there was insufficient evidence that he had inflicted serious personal injury in that serious personal injury does not include injury that results in death. The rule that serious personal injury cannot include injury causing death appears to have its genesis in *State v. Jones, 258 N.C. 89 (1962)*, which held that the statute under which a charge of assault with a deadly weapon with intent to kill inflicting serious injury was brought included as an element that the assault inflicts serious injury not resulting in death. It was logical for the General Assembly to limit the injuries capable of supporting assault charges because injury causing death would have elevated the assault to murder, but it would be absurd to allow a defendant to escape a first-degree rape conviction because his victim did not survive the injuries inflicted in the course of the sexual assault. Any language in *State v. Boone, 307 N.C. 198* and *State v. Thomas, 332 N.C. 544* suggesting that the serious personal injury element of first-degree rape or sexual offense cannot be injury causing death is disavowed. There was sufficient evidence in this case to support the element of serious personal injury.

**Rape; Sexual Offenses - Retarded victim - Acts by force - Evidence sufficient**

*State v. Washington, 131 N.C. App. 156 (1998)*

In a prosecution for second-degree rape and sexual offense against a mentally retarded victim, the trial court correctly denied defendant's motion to dismiss where counts of rape by vaginal intercourse by force and against the victim's will and having vaginal intercourse with a victim who was mentally retarded were based on one act, and counts of second-degree sexual offense by force and with a mentally defective victim were also based on one act. There was substantial evidence that defendant engaged in both vaginal intercourse and a sexual act with the victim, that the victim was mentally retarded, that defendant knew of her retardation, and that her mental retardation rendered her substantially incapable of resisting.

**1) Rape - Accessory - Multiple attempts - Double jeopardy**

*State v. Owen, 133 N.C. App. 543 (1999)*

The trial court did not err by denying defendant's motion to dismiss on double jeopardy grounds two of three counts of statutory rape. Although defendant argued that the two instances in which defendant's husband attempted to penetrate the eleven-year-old victim and the one incident where he was successful constituted one single continuous incident merging into one criminal act, the victim testified that defendant's husband penetrated her to some degree on three distinct occasions. The slightest penetration constitutes intercourse and the evidence as to each separate act was thus complete and sufficient to sustain three indictments for first-degree rape.

## **2) Rape - Sufficiency of evidence - Woman as aider and abettor**

*State v. Owen, 133 N.C. App. 543 (1999)*

The trial court did not err by denying defendant's motion to dismiss charges of first-degree statutory rape against a woman who acted as an aider and abettor to her husband. Even though a woman is physically incapable of committing rape upon another woman, she may still be convicted of rape if she aids and abets a male assailant and, viewing the evidence in the light most favorable to be State, defendant was an active participant in the rape by her husband of this victim.