HOMICIDE

Trial Court Committed Error by Consolidating for Judgment the Convictions of First Degree Murder and Robbery with a Dangerous Weapon When Jury did not Specify Whether Defendant was Guilty of First Degree Murder Based on Premeditation and Deliberation or Felony Murder.

State v. Blymer __ N.C. App. __, __ S.E.2d. __, (July 6, 2010).
Defendant robbed victim of money and prescription pain pills then beat victim with baseball bat, killing him. Judgment for convictions of first degree murder and robbery with a dangerous weapon were consolidated. Defendant argues that the trial court committed error by consolidating for judgment the convictions where the jury did not specify whether it found defendant guilty of first-degree murder based on premeditation and deliberation or on felony murder. The jury found defendant guilty of first-degree murder and robbery with a dangerous weapon but did not specify upon which theory the murder conviction was premised. Court held that the crime of robbery with a dangerous weapon merged with that of the murder.

Sufficient Evidence Of Malice For Second Degree Murder Conviction When Defendant Is Angry, Not Exhibiting Self Control, Defendant's Vehicle Was Operating Properly and Left Acceleration Marks, Defendant Had An Evil Look, And Yard Was Dark With Several Small Children And Defendant Did Not Know Where Children Were When Car Started.

State v. Neville, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010).
There was sufficient evidence of malice to support a second-degree murder conviction in a case where the defendant ran over a four-year-old child. When she hit the victim, the defendant was angry and not exhibiting self-control; the defendant's vehicle created "acceleration marks" and was operating properly; the defendant had an "evil look"; and the yard was dark, several small children were present, and the defendant did not know where the children were when she started her car.

Trial Court Did Not Err By Denying Request For Voluntary Manslaughter Instruction When Defendant Knew Of Wife's Affair But Did Not Find Her In The Act Or Under Circumstances Indicating The Act Had Just Been Completed.

State v. Simonovich, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010).
The trial court did not err by denying the defendant's request for a voluntary manslaughter instruction. Although the defendant knew that his wife was having sex with other men and she threatened to continue this behavior, the defendant did not find her in the act of intercourse with another or under circumstances clearly indicating that the act had just been completed. Additionally, the defendant testified that he strangled his wife to quiet her.

Evidence Of Malice Based On Driving Recklessly, Drinking Before and While Operating A Motor Vehicle, Prior Convictions For Impaired Driving and DWLR, And Fleeing And Engaging In Elusive Behavior After Accident

State v. Tellez, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009).
There was sufficient evidence of malice to sustain a second-degree murder conviction where the defendant drove recklessly, drank alcohol before and while operating a motor vehicle, had prior convictions for impaired driving and driving while license revoked, and fled and engaged in elusive behavior after the accident.

(2) Constitutional Law--Double Jeopardy--Discharging Weapon into Occupied Property -- First-Degree Murder

(3) Homicide -- Attempted Murder -- Evidence Sufficient

State v. Jackson, 189 NC App 747 (07-695) (15 April 2008)

(2)Defendant was not convicted of discharging a weapon into occupied property in violation of the double jeopardy clause where he contended that discharging a weapon was an element necessary to establish first-degree murder in this case. The relevant inquiry is into the elements of the crimes, not whether the same fact scenario fulfills the elements of the two distinct crimes. The merger doctrine has been held not to apply in North Carolina. (3) The trial court did not err by denying defendant's motion to dismiss a charge of attempted murder on the ground of insufficient evidence. The State presented evidence that defendant fired a weapon at the vehicle the victim was driving as well as evidence of premeditation and deliberation, and a rational trier of fact could conclude from this evidence that defendant intended to kill both men in the car as he and others opened fire on it.

Sufficient Evidence of Culpable Negligence to Support Juvenile's Delinquency Adjudication of Involuntary Manslaughter When Juvenile, After Giving Illegal Drug to Victim Who Then Became Seriously Ill, Failed to Aid Her

In re Z.A.K., 189 N.C. App. 354, 657 S.E.2d 894 (18 March 2008).

The juvenile was adjudicated delinquent of involuntary manslaughter. The court ruled that there was sufficient evidence of culpable negligence to support the juvenile's delinquency adjudication when the juvenile, after giving an illegal drug

(Ecstasy) to the victim who then became seriously ill, failed to aid her. (See the court's detailed discussion of the facts in its opinion.)

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.

(1) Homicide -- Attempted Murder -- Indictment – Sufficiency

State v. Watkins, 181 NC App 502 (04-295-2) (6 February 2007).

Attempted murder and assault with a deadly weapon. (1) An indictment for "attempted murder" without allegations of specific intent, premeditation, or deliberation was not defective.

Homicide -- First-Degree Murder -- Conspiracy -- Sufficiency of Evidence

State v. Theer, 181 NC App 349 (05-1640) (16 January 2007).

There was sufficient evidence that defendant was a perpetrator in a prosecution for first- degree murder and conspiracy to murder. Although much of the evidence was circumstantial and did not rule out every hypothesis of innocence presented by the defense, it was ample and sufficient to allow the jury to make reasonable inferences of defendant's guilt.

Insufficient Evidence to Support Convictions of Second-Degree Murder

State v. Myers, 181 N.C. App. 310, 639 S.E.2d 1 (2 January 2007)

The court ruled that the state's evidence was insufficient to support the defendants' convictions of second-degree murder. (See the discussion of the evidence in the court's opinion.)

Trial Judge in Child Abuse Homicide Trial Did Not Err in Allowing State's Expert To Testify on Rebuttal Concerning Normal Caretaking Reaction and Profile of Caretaking Behavior After Injury to Child

State v. Faulkner, 180 N.C. App. 499, 638 S.E.2d 18 (19 December 2006).

The defendant was convicted of second-degree murder involving the child abuse homicide of a child who was twenty-two months old, and whose mother lived with the defendant. The defendant was alone with the child while the mother went shopping for about twenty to thirty minutes. When she arrived home and picked up the child, his eyes rolled into the back of his head, and his arms and legs were stiff. She called 911. An emergency responder testified that the defendant, when asked what had happened, appeared nervous, with color drained from his face, and did not respond. Cause of death was brain swelling caused by blunt force trauma to the head. A defense expert testified and suggested that there was an over diagnosis and perhaps rush to judgment of child abuse because of a belief that child abuse is underreported and everyone is "discombabobulated" by the death of a child. The state on rebuttal called a medical expert, a developmental

and forensic pediatrician, who outlined three parameters to determine whether a child's injuries were accidentally or intentionally inflicted: (1) the consistency of history given by the caretaker; (2) the extent to which the caretaker's explanation is consistent with the extent of injuries; and (3) the caretaker's behavior. When a child has been accidentally injured, a caretaker who witnesses the accident seeks help right away. When a child is injured intentionally, it is very common that the assailant will leave and not seek care. Often the caretaker is not concerned about what has happened with the child, but with how it impacts on the caretaker. The court ruled, assuming without deciding such testimony would not be admissible on the state's direct case, that the defendant's evidence opened the door to its admissibility on rebuttal. Thus, the trial judge did not abuse his discretion in admitting the testimony.

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

State v. Mann, 355 N.C. 294 (2002).

The trial court did not err by submitting to the jury an acting in concert instruction with respect to the charge of first-degree murder, because there was sufficient evidence that defendant and his wife acted in concert to perpetrate the chain of offenses against the victim when the evidence viewed in the light most favorable to the State reveals that: (1) both defendant and his wife were at their apartment at or near the time the victim was beaten and held against her will; (2) a witness testified that two cars, one resembling the victim's car, were on the same side of the bridge where the victim's body was later discovered; and (3) the murder weapon was found in the car defendant's wife had been driving.

Homicide -- Second-Degree Murder -- Acting in Concert -- Sufficiency of Evidence

State v. Lambert 149 NCA 163 (2002).

The trial court did not err by denying defendant's motion to dismiss the charge of

second-degree murder based on the theory of acting in concert, because: (1) defendant assaulted the victim by throwing glass bottles at her from a close proximity; (2) although defendant argues that the two other co-participants' actions in beating the victim with a tree limb were a distinct act separate and apart from the initial bottle-throwing, the beating occurred immediately following the bottle-throwing and in the same location; (3) there was sufficient evidence from which a reasonable jury could conclude that these two acts, rather than being distinct and separate from one another, were part of a general assault on the victim and that the intensified assault by the two co-participants that culminated in the victim's death was a probable and natural consequence of the initial assault in which defendant actively participated; and (4) defendant afterwards accompanied the two co-participants to conceal evidence of the crime

Homicide - Murder - Acting in Concert - Victim Dead When Defendant's Shots Fired

State v. Cook, 334 N.C. 564 (1993) 433 S.E.2d 730 Page 565

The trial court did not err by denying defendant Smith's requested instruction in a prosecution for murder and for firing into occupied property where Defendant Smith contended that, if the evidence supported the to the jury by argued by the prosecutor, he could not have acted in concert in the killing of the victim because it is not criminal homicide to shoot a dead body. Given that the victim was mortally wounded during a volley of gunfire from defendants' firearms, the temporal order of the fatal shot by defendant Cook and other shots fired by defendant Smith, acting in concert with Cook, is immaterial; the underlying felony and the murder occurred in a time frame that can be perceived as a single transaction.

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_aiding and abetting first degree murder--no variance between indictment and trial

State v. Glynn, 178 NCA 689 (2006)

There was no fatal variance between the allegations in the indictment and the evidence at trial in a firstdegree murder prosecution. The State is not required to declare any specific theory for first degree murder prior to trial; the State's evidence here, regardless of the theory, supports the indictment.

Homicide first-degree murder sufficiency of evidence cause of death

State v. Scanlon, 176 NCA 410 (2006)

The State's evidence was sufficient to prove first-degree murder, and the trial court properly denied defendant's motion to dismiss, where the State's expert testified the cause of death was asphyxia (the victim was found with a plastic bag tied over her head) and that the manner of death was homicide, based on information from investigating officers about the scene. Neither the victim's past heart problems nor the traces of cocaine in her blood altered his opinion.

Homicide_attempted first-degree murder_intent to kill_evidence sufficient

State v. Reid, 175 NCA 613 (2006)

The evidence that a defendant charged with attempted first-degree murder specifically intended the victim's death was circumstantial but sufficient where the victim was unarmed when he was grabbed and pulled from his front door by defendant and two accomplices, all of whom were armed; the victim tried to run and did not see who shot him; and the two accomplices were in a bedroom when the victim was shot.

Homicide--second-degree murder--motion to dismiss--sufficiency of evidence-- malice

State v. Westbrook, 175 NCA 128(2005)

The trial court did not err by denying defendant's motion to dismiss the charge of second- degree murder even though defendant contends there was insufficient evidence of malice, because: (1) it is only necessary for the State to prove that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind; and (2) there was substantial evidence from which the jury could infer malice, including that defendant drove with an alcohol concentration of 0.156, sped seventy-five to eighty miles per hour in a forty-five miles per hour zone, traveled in the opposite direction lane, ran a red light without attempting to brake or stop, and had notice as to the serious consequences of driving while impaired as a result of his nine-year-old driving while impaired conviction.

Homicide_attempted voluntary manslaughter_valid offense

State v. Yang, 174 NCA 755 (2005)

Defendant's contention that attempted voluntary manslaughter is not an offense was overruled; the Court of Appeals is without authority to ignore its own precedent.

Constitutional Law_double jeopardy_convictions for assault with a deadly weapon and

attempted voluntary manslaughter

State v. Yang, 174 NCA 755 (2005)

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

Homicide--attempted first-degree murder--motion to dismiss--sufficiency of evidence—specific intent to kill

State v. Pittman, 174 NCA 745 (2005)

The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree murder of a child, because the State presented sufficient evidence that defendant possessed the specific intent to kill the child including that: (1) defendant left a six- week-old baby with a towel knotted around her face in a collapsing shed some distance from the nearest house with temperatures in the 30-degree range; (2) during the next two days defendant did nothing to retrieve the child or assure her discovery by others; and (3) defendant acted in order to avoid paying child support. A jury could reasonably infer that defendant did not intend for anyone to find or hear the child and that he intended her to die from exposure or lack of food and hydration.

Homicide--attempted murder--motion to dismiss--sufficiency of evidence (for Intent to Kill)

State v. Edwards, 174 NCA 490 (2005)

The trial court did not err by denying defendant's motion to dismiss the charge of attempted murder of an 11-month old child because the evidence viewed in the light most favorable to the State revealed that: (1) a jury could reasonably conclude from the facts that defendant knew that no one would discover the mother's body and the child for a long time in a deserted area; and (2) the

evidence was sufficient for a jury to decide that defendant would not expect an 11-month-old child to survive in a remote location, but would starve, die of dehydration, and/or exposure, or suffer from such effects of nature as insects and wild animals before anyone found him.

Constitutional Law_double jeopardy_attempted first-degree murder and assault_no violation

State v. Bethea, 173 NCA 43 (2005)

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

Homicide--first-degree murder--instruction--acting in concert

State v. Windley, 173 NCA 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.

Conspiracy_first-degree murder--sufficiency of evidence

State v. Brewton, 173 NCA 323 (2005)

There was sufficient circumstantial evidence to deny defendant's motion to dismiss conspiracy to commit first-degree murder even though defendant's alleged co-conspirator testified that they did not expressly agree or plan to kill the victim. A reasonable juror could infer from the evidence an implicit agreement to work together.

Conspiracy_first-degree murder_premeditation and deliberation inherent in agreement

State v. Brewton, 173 NCA 323 (2005)

When a jury finds an agreement to commit a murder, it necessarily also finds premeditation and deliberation.

Assault; Homicide--assault with deadly weapon inflicting serious injury--assault with deadly weapon--first-degree murder--motion to dismiss--sufficiency of evidence

State v. Yarnell, 172 NCA 135 (2005)

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

the ground by another, defendant retrieved a rubber mallet from his vehicle and beat the victim with it, defendant stole the shoes from the victim's feet and fled the scene, and defendant told others during his flight that he had killed the victim.

Homicide_inference of malice_blows to child's head

State v. Murphy, 172 NCA 734 (2005)

The trial court did not err by instructing the jury in a homicide case that "malice may be inferred from evidence that the victim's death was done by an attack by hand alone without the use of other weapons, where the attack was made by a mature man upon a defenseless infant" where the evidence at trial tended to

show that defendant was a twenty-eight-year-old male and the victim was a three-year-old child who was suffering from a broken collarbone, and that the child received multiple traumatic blows to the head which were intentionally inflicted while the child was in defendant's care.

Homicide--short-form indictment--constitutional

State v. Walker, 170 NCA 632 (2005)

The short-form first-degree murder indictment was constitutional where defendant received the presumptive term of life without parole.

Criminal Law--inconsistent verdicts--manslaughter and assault--intent to kill

State v. Hames, 170 NCA 312 (2005)

A new trial was awarded where the offenses of which defendant was found guilty were mutually exclusive and the jury's verdicts were logically inconsistent. Defendant was charged with assault with a deadly weapon with intent to kill

inflicting serious injury and attempted murder of the same victim, and found guilty of assault with a deadly weapon inflicting serious injury and voluntary manslaughter. The jury necessarily found intent to kill for the manslaughter but not for the assault.

Conspiracy -- Felony Murder—specific intent

State v. Curry, 171 NC App 568 (2005)

First-degree murder by reason of felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony is committed or attempted with the use of a deadly weapon. In felony murder, the killing may, but need not, be intentional. The key component, however, is the jurors must be instructed that to find a conspiracy to commit murder, they must first find an agreement to commit first-degree murder.

Homicide--attempted common law murder--short-form indictment

State v. Jones, 359 NC 832 (2005) Rev'd Ct. Appeals

The Court of Appeals erred by concluding that the short-form indictment in this case charged defendant with the offense of attempted common law murder which is an offense not recognized by our General Statutes because a reasonable implication of the indictment is that when it alleged that defendant "did attempt to murder," it could only have meant attempted first-degree murder since North Carolina does not recognize a criminal offense denominated as attempted second-degree murder.

Homicide--first-degree murder--failure to instruct on second-degree murder--failure to instruct on voluntary intoxication

State v. Rios, 169 NCA 270 (2005)

The trial court did not err in a first-degree murder case by failing to instruct the jury on second-degree murder based on voluntary intoxication, because: (1) the evidence was overwhelming that defendant was not intoxicated; (2) defendant's confession contained a detailed account of the murder, but no mention about ingesting alcohol or drugs; (3) viewing the evidence in the light most favor to defendant, even the testimony of his witnesses did not meet the test for submission of an instruction on voluntary intoxication; (4) defendant never testified that he was so intoxicated that he could not premeditate or form a fixed purpose to kill; and (5) the State's evidence of premeditation and deliberation for first-degree murder was very strong.

Homicide–short form indictment–attempted murder

State v. Watkins, 169 NCA 518 (2005)

Defendant's short form indictment for attempted murder was fatally defective in that it failed to allege that defendant acted with the specific intent to kill. The application of N.C.G.S. § 15-144 (authorizing short form indictments for murder or manslaughter) to attempted murder goes beyond the plain language of the statute.

Homicide–premeditation and deliberation–felled victim theory–absence of multiple lethal wounds

State v. Snider, 168 NCA 701 (2005)

The trial court did not err by denying defendant's request to have the jury consider the lack of lethal blows after the killing as a factor in assessing premeditation and deliberation. Although defendant argues that the absence of multiple lethal wounds negates premeditation and deliberation if the presence of such wounds shows premeditation and deliberation (the felled victim theory), the State established premeditation and deliberation by other evidence.

Homicide–second-degree murder–officer's death during high speed chase–malice

State v. Bethea, 167 NCA 215 (2004)

The trial court correctly denied defendant's motion to dismiss a second-degree murder charge for insufficient evidence of malice in the death of an officer in an automobile accident while he was chasing defendant at high speed. While prior second degree murders from automobile accidents have involved impaired driving, defendant's conduct here was equally reckless and wanton.

Homicide–second-degree murder–officer's death in high speed chase–proximate cause

State v. Bethea, 167 NCA 215 (2004)

There was sufficient evidence of proximate cause in a second-degree murder case arising from the death of an officer in an automobile accident while he was chasing defendant at high speed. A reasonable mind might conclude that defendant's reckless flight and wanton violation of the traffic laws caused or directly contributed to the victim's death.

Homicide-second-degree murder–death of officer in car chase--requested instructions–insulating negligence

State v. Bethea, 167 NCA 215 (2004)

The court gave in substance all but one of the instructions on proximate cause requested by a second-degree murder defendant prosecuted for the death of an officer who was chasing defendant at high speed. There was no error in not giving an instruction on insulating negligence because contributory negligence has no place in criminal law and no reasonable person could conclude that the officers' actions intervened to be the cause of death.

Aiding and Abetting--voluntary manslaughter–-intent

State v. Shaw, 164 NCA 723 (2004)

Defendant could properly be convicted for aiding and abetting voluntary manslaughter even though defendant argues that aiding and abetting requires specific intent to commit the underlying crime whereas voluntary manslaughter is a general intent crime, because: (1) defendant concedes that North Carolina has long held that an aider and abettor can be liable for voluntary manslaughter; (2) aiding and abetting is not a crime separate and apart from the underlying offense, but rather it is a theory upon which a person's culpability for the underlying offense may be based; and (3) depending upon the type of criminal intent required to consider an offender culpable for the underlying offense, an aider and abetter, like any other principal to an offense, may develop either specific or general intent.

Homicide–attempted common law murder–not recognized

State v. Jones, 165 NCA 540 (2004) Rev'd State v. Jones, 359 NC 832 (2005)

Attempted common law murder is not recognized by the General Statutes. Defendant's conviction, based on an indictment for that offense, was vacated. See Farb p. 13

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.

Homicide--first-degree murder–-short-form indictment--bill of particulars--notice

State v. Garcia, 358 NC 382 (2004)

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder under the felony murder rule with attempted rape as the underlying felony, or in the alternative, by denying his motion for a bill of particulars even though defendant contends the short-form indictment used to charge him lacked adequate notice of the underlying felony, because: (1) murder indictments that comply with N.C.G.S. § 15-144 are sufficient to charge first-degree murder on the basis of any theory set forth in N.C.G.S. § 14-17, and therefore, a short-form indictment is sufficient to charge first-degree murder on the basis of felony murder committed during an attempted rape; (2) defendant was not entitled to learn the State's theory of the case by a bill of particulars when the State is not required to choose its theory of prosecution prior to trial; and (3) there was no palpable or gross abuse in this case based on the denial of a bill of particulars when the State's legal theory was not factual information within the meaning of N.C.G.S. § 15A-925(b) and defendant was not denied any information necessary to adequately prepare or conduct his defense.

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--felony murder--diminished capacity--instructions

State v. Roache, 358 NC 243 (2004)

The trial court did not err in a multiple murder prosecution by failing to give an instruction on diminished capacity when instructing the jury on felony murder for

the murder of one of the victims and by failing to refer to diminished capacity based on mental illness for the mandate given with reference to the felony murder of that victim, because by addressing specific intent and diminished capacity within the instruction on another victim's death, the trial court informed the jury that diminished capacity applied to armed robbery, which was the underlying felony in this victim's murder.

Criminal Law--instructions--diminished capacity–-acting in concert

State v. Roache, 358 NC 243 (2004)

The trial court did not err in a multiple murder prosecution by failing to instruct on diminished capacity with regard to acting in concert, because our Supreme Court has never applied the doctrine of diminished capacity to the general intent necessary for acting in concert, and defendant has cited no authority to support extension of its application.

Homicide-–alternative theories--aiding and abetting--acting in concert

State v. Roache, 358 NC 243 (2004)

The trial court did not err in a multiple murder prosecution by overruling defendant's objection to the State's use of two alternative theories of guilt including aiding and abetting in connection with premeditation and deliberation, and acting in concert with regard to felony murder, because: (1) defendant's argument that the two theories utilized by the State are mutually exclusive has no merit, and in any given case, both theories may be proven by the same evidence; and (2) defendant failed to show prejudice.

Homicide; Assault– traffic offense–culpable negligence–alcohol not involved

State v. Wade, 161 NCA 686 (2003)

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

Homicide--first-degree murder--pretrial conference required

State v. Matthews, 358 NC 102 (2004)

The prosecutor violated Rule 24 of the North Carolina General Rules of Practice for Superior and District Courts by failing to hold a special pretrial conference in a capital first-degree murder case, and the prosecutor must petition a superior court judge for a Rule 24 conference before the State retries defendant in the instant case.

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 forseeability was not before the appellate court where defendant failed to request such an instruction or to assign its omission as plain error.

Homicide–second-degree murder–sufficiency of evidence–malice–driving while impaired

State v. Locklear, 159 NCA 588 (2003)

The evidence of malice was sufficient in a second-degree murder prosecution where defendant was driving with an alcohol concentration of .08 when he collided with another vehicle; a seven-year-old boy in the other vehicle suffocated when the shoulder belt tore his windpipe; and a prior conviction put defendant on notice of the consequences of driving while impaired.

Homicide–voluntary manslaughter–defendant as perpetrator–sufficiency of evidence

State v. Lassiter, 160 NCA 443 (2003)

There was sufficient evidence in first-degree murder prosecution (with a manslaughter verdict) that defendant was the last person in the presence of the victim and thus the perpetrator of her intentional killing.

Homicide--second-degree murder--failure to instruct on lesser-included charge of involuntary manslaughter

State v. Reynolds, 160 NCA 579 (2003)

The trial court erred in a second-degree murder case by failing to instruct the jury on involuntary manslaughter and the case is remanded for a new trial, because: (1) where the circumstances as described by defendant suggest that the victim was unintentionally killed with a deadly weapon during a physical struggle with defendant, the trial court should charge the jury on the offense of involuntary manslaughter; and (2) defendant in this case testified that he attempted to knock a loaded and cocked gun from the victim's hand, providing evidence from which a jury could find culpable negligence.

Homicide--first-degree murder--short-form indictment--failure to list aggravating circumstances--constitutionality

State v. Hunt, 357 NC 257 (2003)

The trial court did not err by denying a petitioner's writ of habeas corpus petition even though petitioner contends the short-form murder indictments used to charge him with two counts of capital first degree murder and two counts of conspiracy to commit murder were rendered unconstitutional by the United States Supreme Court's decision in *Ring v. Arizona, 536 U.S. 584, 153 L. Ed. 2d 556 (2002)*, based on the fact that the aggravating circumstances relied upon by the State at trial were not alleged in petitioner's indictments, because: (1) N.C.G.S. § 15A-2000(c)(1) provides that aggravating circumstances must be submitted to and found by the jury beyond a reasonable doubt; (2) the Ring case does not require that aggravating circumstances be alleged in state-court indictments; (3) constructive statutory notice under N.C.G.S. § 15A-2000(e) in which the eleven aggravating circumstances are listed for first-degree murder is adequate to satisfy the constraints of due process as dictated by the United States Constitution's Sixth Amendment and the North Carolina Constitution; and (4) if aggravating circumstances are the functional equivalent of elements for the purposes of complying with the Sixth Amendment notice requirement, this Court has already indicated that aggravators, being akin to other elements of murder such as premeditation and deliberation, do not necessarily have to be listed in the short-form murder indictment for a defendant to receive sufficient notice.

Homicide - second-degree murder - failure to submit lesser-included offense of involuntary manslaughter

State v. McCollum, 157 N.C. App. 408 (2003)

The trial court did not commit plain error in a first-degree murder case by failing to submit the lesser-included offense of involuntary manslaughter ex mero motu, because: (1) the failure to instruct did not have a probable impact on the jury's finding that defendant was guilty of second-degree murder; and (2) any error is harmless in light of the jury's rejection of voluntary manslaughter and conviction

of defendant for second-degree murder since a finding of malice precludes a finding of either voluntary manslaughter or involuntary manslaughter.

Evidence - prior DWI convictions - admissible for malice

State v. Smith, 157 N.C. App. 493 (2003)

Defendant's prior convictions for driving while impaired were admissible in his second-degree murder and impaired driving prosecution where the prior convictions were remote in time but were offered to establish malice. (1984; 1990) See Farb P. 29

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.

Constitutional Law--double jeopardy--first-degree murder by acting in concert--solicitation to commit murder--conspiracy to commit murder--not a lesser included offense

State v. Kemmerlin, 356 NC 446 (2002)

The trial court did not err in a first-degree capital murder case by failing to vacate the convictions of solicitation to commit murder and conspiracy to commit

murder even though defendant asserts that both convictions merge with the conviction for first-degree murder by acting in concert and that punishment for both crimes allegedly violates double jeopardy, because: (1) the crime of solicitation requires counseling, enticing, or inducing another to commit a crime whereas this element is not required for acting in concert; (2) acting in concert requires actual or constructive presence at the crime which is not an element present in the definition of solicitation; (3) regarding defendant's contention that her conspiracy conviction also merged based on her allegation that her presence at the scene of the murder was incidental and unnecessary, defendant was not only present at the scene of the murder but she also let the coparticipant into her home knowing he was going to kill her husband and she also brought her husband into the room where he would be killed; (4) conspiracy is a separate offense from the substantive offense and therefore does not merge into the substantive offense; and (5) the requirement of an agreement which is an element of conspiracy is not a necessary element for murder by acting in concert.

Homicide--first-degree murder–felony murder–premeditation and deliberation–failure to submit second-degree murder–premeditation and deliberation convictions vacated–resentencing for one felony murder

State v. Millsaps, 356 NC 556 (2002)

In a capital trial wherein defendant was found guilty of two counts of first-degree murder based on premeditation and deliberation and felony murder of each victim, with the murder of the other victim as the underlying felony, and defendant was sentenced to death for each murder, the trial court erred by failing to instruct on second-degree murder as a lesser offense included within premeditated and deliberate murder, and defendant's convictions based on premeditated and deliberate murders must be vacated. Accordingly, defendant's convictions for first-degree murder are validly based only on felony murder, the murder providing the underlying felony in each case constitutes an element of that murder and merges into that murder conviction, judgment must be arrested on one of the murders, and defendant is awarded a new sentencing hearing at which only one felony murder will be submitted and the (e)(5) aggravating circumstance, that the murder was committed while defendant was engaged in the commission of any homicide, may not be considered. N.C.G.S. § 15A-2000(e)(5).

Homicide--voluntary manslaughter--failure to include possible verdict of not guilty by reason of self defense

State v. Williams, 154 NCA 496 (2002)

The trial court erred in a voluntary manslaughter case by failing to include not guilty by reason of self-defense as a possible verdict in its final mandate to the jury and defendant is entitled to a new trial.

Homicide--first-degree murder--assault with a deadly weapon inflicting serious injury not a lesser-included offense

State v. Rainey, 154 NCA 282 (2002)

The trial court did not err in an attempted first-degree murder case by failing to instruct on assault with a deadly weapon inflicting serious injury as a lesser-included offense of first-degree murder, because it is not a lesser-included offense of attempted first-degree murder when assault with a deadly weapon inflicting serious injury requires the State to prove the existence of a deadly weapon and attempted murder does not require a deadly weapon.

Homicide--attempted voluntary manslaughter–-recognized in North Carolina

State v. Rainey, 154 NCA 282 (2002)

Attempted voluntary manslaughter is a recognized crime in North Carolina, because: (1) heat of passion voluntary manslaughter is essentially a first-degree murder where a defendant's reason is temporarily suspended by legally adequate provocation; and (2) the specific intent to kill does exist in the mind of such a defendant although the defendant is only legally culpable for the general intent since the specific intent is not based on cool reflection but rather on an adequate provocation that would cause an individual with an ordinary firmness of mind to become provoked.

Homicide-–first-degree murder–-instruction on attempted voluntary manslaughter not required

State v. Rainey, 154 NCA 282 (2002)

The trial court did not err in a first-degree murder case by failing to instruct on the lesser included offense of attempted voluntary manslaughter even though defendant shot at the victim for sleeping with defendant's thirteen-year-old sister, because: (1) the evidence revealed that defendant sought out the victim after learning of the alleged relationship through a conversation and did not discover his thirteen-year-old sister and the victim in an illicit act; and (2) defendant did not act immediately under a heat of passion but rather under an indulgence of revenge or malice.

Homicide--second-degree murder–impaired driving--sufficiency of evidence

State v. Vassey, 154 NCA 384 (2002)

The trial court did not err by failing to dismiss the charge of second-degree murder because there was substantial evidence that defendant's impaired driving caused the accident in which his girlfriend was killed including that: (1) defendant consumed at least ten to twelve beers over a course of six hours; (2) defendant stated he had been drinking beer heavily and possibly champagne as well; (3) defendant's employer who was in defendant's presence for at least twenty minutes the morning of the accident testified that defendant was still heavily drunk some six hours after defendant last reported consuming alcohol; (4) defendant's employer testified that defendant not only reeked of alcohol but that his eyes were glassy and his speech was slightly slurred; (5) the physical evidence from the crash site showed that, although road conditions were clear, defendant lost all control of the vehicle he was driving; and (6) defendant made a deliberate decision to drive despite the fact that he had no license and was impaired at the time, and defendant had been convicted of driving while impaired and with a revoked license on numerous occasions.

Homicide--attempted first-degree murder--sufficiency of short-form indictment

State v. Bullock, 154 NCA 234 (2002)

A defendant's attempted first-degree murder conviction is vacated and the case is remanded for sentencing and entry of judgment on attempted voluntary manslaughter based on insufficiency of the short-form indictment, because: (1) the indictment failed to allege the essential element of malice aforethought as required by N.C.G.S. § 15-144; and (2) the jury's verdict of attempted first-degree murder necessarily means that it found all of the elements of the lesser-included offense of attempted voluntary manslaughter.

Criminal Law–transferred intent–attempted murder–running over estranged wife and companion

State v. Andrews, 154 NCA 553 (2002)

The trial court did not err by instructing on transferred intent in a prosecution for attempted murder and assault where defendant ran down his wife with his car in a grocery store parking lot with the specific intent of killing her, injuring her friend in the process.

Homicide--first-degree murder--failure to instruct on lesser-included offense ***

State v. Wilson, 354 NC 493 (2001)

The trial court did not err in a first-degree murder prosecution by failing to instruct the jury on the lesser included offense of second-degree murder, because: (1) even if the evidence was sufficient to permit a jury to rationally determine that defendant acted without premeditation and deliberation, submission of second degree murder would not necessarily be mandated in this case where defendant was also found guilty on the basis of felony murder; (2) even if it were assumed that defendant did not commit robbery or attempted robbery, the evidence was undisputed that defendant acted in concert with his coparticipant and that the

coparticipant committed robbery; (3) the evidence would not permit a rational jury to find that defendant was not engaged in the commission of a felony at the time of the murders since under a theory of acting in concert defendant would also be guilty of robbery with a dangerous weapon regardless of whether he actually committed or attempted to commit the robbery himself; and (4) no evidence supports a conclusion that defendant had withdrawn from a common plan with his coparticipant to commit robbery with a dangerous weapon. (See Farb note)

Homicide - death of child - shaking and blunt force injuries - malice

State v. Smith, 355 N.C. 268 (2002)

A decision of the Court of Appeals holding that evidence on the issue of malice was not substantial enough to withstand defendant's motion to dismiss a charge of second-degree murder of his two-year old stepdaughter was reversed for the reasons stated in the dissenting opinion in the Court of Appeals that evidence that injuries to the child's head and brain were caused by violent shaking and a blunt force injury to the head was sufficient to support the jury's conclusion that defendant acted with malice and to sustain defendant's conviction of second-degree murder.

Homicide - first-degree murder - acting in concert instruction

State v. Mann, 355 N.C. 294 (2002)

The trial court did not err by submitting to the jury an acting in concert instruction with respect to the charge of first degree murder, because there was sufficient evidence that defendant and his wife acted in concert to perpetrate the chain of offenses against the victim when the evidence viewed in the light most favorable to the State reveals that: (1) both defendant and his wife were at their apartment at or near the time the victim was beaten and held against her will; (2) a witness testified that two cars, one resembling the victim's car, were on the same side of the bridge where the victim's body was later discovered; and (3) the murder weapon was found in the car defendant's wife had been driving.

Homicide - first-degree murder - second-degree not submitted - evidence of premeditation and deliberation

State v. Gainey, 355 N.C. 73 (2002)

The trial court did not err in a first-degree murder prosecution by denying defendant's request for submission of second-degree murder as a possible verdict where defendant presented no evidence; and the State's evidence showed that the victim was shot six times, that defendant deliberately walked to a car after the victim was wounded to retrieve a gun, that defendant shot the victim twice when he was helpless and crying for help, and that defendant dragged the body into the woods, covered it with leaves and branches, and immediately disposed of the murder weapon and the comforter in which the body had been wrapped. Defendant and an accomplice had talked about stealing the victim's car before the date of the murder and defendant had expressed both before and after the murder his plan to move to California and change his identity.

Homicide - instruction on second-degree murder denied - possibility that jury might not believe all of the State's evidence

State v. Gainey, 355 N.C. 73 (2002)

A first-degree murder defendant was not entitled to an instruction on second-degree murder upon the argument that the jury had to pick and choose between pieces of evidence in order to convict of second-degree murder. A defendant is not entitled to an instruction on a lesser-included offense merely because the jury could possibly believe some of the State's evidence but not all of it.

Homicide--second-degree murder--driving while intoxicated--malice--sufficiency of evidence

State v. Goodman, 149 NCA 57 (2002)

The trial court did not err by failing to dismiss the charge of second-degree murder arising out of defendant's driving while intoxicated based on the sufficiency of the evidence concerning malice, because: (1) the State introduced evidence of defendant's extensive driving-related convictions, including prior convictions for driving while impaired; and (2) the evidence also showed that defendant ran a red light while traveling approximately forty to forty-five miles per hour with his head and arm hanging out of the window. Rev'd by Sup Ct 357 NC 43 for reasons in the dissenting opinion (violations up to 37 years before the charged offense)

Homicide-–second-degree murder–-driving while intoxicated–-failure to submit misdemeanor death by vehicle

State v. Goodman, 149 NCA 57 (2002)

The trial court did not err in a second-degree murder case arising out of defendant's driving while intoxicated by failing to submit to the jury the possible verdict of misdemeanor death by vehicle under N.C.G.S. § 20-141.4(a2), because misdemeanor death by vehicle is a lesser included offense of involuntary manslaughter, and since the jury rejected involuntary manslaughter in favor of second-degree murder, it would also have rejected the lesser offense of misdemeanor death by vehicle.

Homicide-–first-degree murder-–voluntary intoxication

State v. Kornegay, 149 NCA 390 (2002)

The trial court did not err in a first-degree murder case by failing to instruct on voluntary intoxication, because: (1) while defendant may have consumed controlled substances prior to the murder, there is no evidence to suggest that he was intoxicated at the time he committed the murder; (2) defendant remembered specific details surrounding the murder including the clothes he was wearing and the conversation he had with the victim prior to the murder; and (3) defendant disposed of the murder weapon and the bags of stolen property after leaving the store, indicating a capacity to form premeditation and deliberation.

Homicide–defense of habitation--porch part of dwelling--unlawful expression of opinion by trial court

State v. Blue, 356 NC 79 (2002)

The trial court erred in a voluntary manslaughter case arising out of a deadly affray which took place on the porch of a dwelling by answering the jury's inquiry by instructing that a porch is not inside the home, because: (1) the trial court's answer expressed an opinion on the evidence, thereby invading the fact finding province of the jury; (2) whether defendant was within the home or whether the victim was attempting or had made an unlawful entry into defendant's home were questions to be answered by the jury; and (3) the trial court's instruction was tantamount to instructing the jury that the porch could not as a matter of law be inside the home for purposes of the statutory defense of habitation under N.C.G.S. § 14-51.1 Rev'd Ct of Appeals 143 NCA 478

Homicide–first-degree murder–no instructions on second-degree or involuntary manslaughter

State v. Stafford, 150 NCA 566 (2002)

The trial court did not err in a first-degree murder prosecution by not instructing the jury on second-degree murder or involuntary manslaughter where the State's evidence tended to show that defendant intentionally shot the victim and defendant offered evidence that he had not fired a gun on the night in question and that the gun used in the murder had never been in his possession. There was no evidence offered to support a finding of second-degree murder or involuntary manslaughter.

Homicide--second-degree murder--malice--motion to dismiss--sufficiency of evidence

State v. McDonald, 151 NCA 236 (2002)

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder at the close of all evidence based on alleged insufficient evidence of malice, because there was substantial evidence of malice by driving in such a reckless manner including: (1) defendant had previously been convicted of consuming alcohol while under the age of twenty-one; (2) defendant knew his conduct at the time of the accident was illegal; (3) defendant was driving without looking at the road in order to pick up a lit cigarette he had dropped; (4) defendant's truck literally flew across the intersection; (5) defendant's blood-alcohol level was almost twice the legal limit; and (6) although defendant was not cited for speeding, defendant drove at 55 mph without looking at the road.

Homicide--attempted first-degree murder--struggle with officer

State v. Haynesworth, 146 NCA 523 (2001)

The trial court did not err by refusing to dismiss a charge of attempted first-degree murder for insufficient evidence where an officer responded to a call regarding an individual causing a disturbance at a church; a struggle ensued when the officer attempted to handcuff defendant; the officer's attempt to handcuff defendant was not a provocation and the officer struck defendant only after defendant struck him; several witnesses, including the officer, testified that defendant made repeated attempts to grab the officer's gun as they struggled and one stated that the officer was in a struggle for his life; defendant freed the gun from the officer's holster and pointed it at the officer upside down, then turned the gun around and pointed it directly in the officer's face; the struggle continued and the gun fired, grazing the top of the officer's hand; and the officer's finger was not inside the trigger guard when the gun fired.

Homicide--second-degree murder--shaken baby syndrome--motion to dismiss--defendant as perpetrator--sufficiency of evidence

State v. Smith, 146 N.C. App. 1 (2001)

The trial court did not err in a shaken baby syndrome case by failing to grant defendant stepfather's motion to dismiss the charge of second-degree murder for

the death of his wife's two-year-old daughter on the basis that there was allegedly insufficient evidence of defendant being the perpetrator of the offense, because the evidence taken in the light most favorable to the State reveals that: (1) defendant had the child in his exclusive care during the time period the injuries were sustained that resulted in the child's death; (2) the wife did not check on the child when she returned home from work or during the night, but the child was alive and conscious when the wife left the child to go to work that afternoon; (3) defendant admitted to an investigator that defendant consumed alcohol that evening and that he might have popped the child in the mouth and that he could have slapped her across the face; (4) defendant told the investigator that he had shaken the child on prior occasions; and (5) while defendant presented some evidence to show his wife abused the child and that there existed a possibility that his wife caused the child's death, this evidence was merely an alternative theory as to the identity of the perpetrator of the offense.

Homicide--second-degree murder--shaken baby syndrome--motion to dismiss--malice--sufficiency of evidence

State v. Smith, 146 N.C. App. 1 (2001)

The trial court erred in a shaken baby syndrome case by failing to grant defendant stepfather's motion to dismiss the charge of second-degree murder for the death of his wife's two-year-old daughter based on the State's failure to present substantial evidence that defendant had the necessary malice and the case is remanded for sentencing and entry of judgment finding defendant guilty of involuntary manslaughter, because: (1) the State failed to present any direct evidence that defendant inflicted the lethal blow to the child's head with the degree of recklessness required to find malice; (2) the evidence failed to establish the cause of the child's head injury and whether the injury was the result of an intentional and willful act or the result of an accident; (3) the fact that defendant admitted to having physically disciplined the child that evening does not support a finding of malice; (4) the State failed to present evidence of previous acts of child abuse which might permit an inference of malice; and (5) defendant cooperated with police, appeared upset at the child's death, made the 911 call, and attempted to revive the child by administering CPR.

Homicide--attempted murder and assault--intent to kill--sufficiency of evidence

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

There was sufficient evidence to deny defendant's motion to dismiss charges of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury where defendant contended that there was insufficient evidence of intent to kill but the evidence was that defendant and the victim had been involved in an altercation only an hour or two earlier in which the victim had hit defendant in the face; defendant pulled up next to the victim, got out of the car, and pointed a gun at the victim; defendant used a gun to assault the victim; he fired and missed, paused, and then fired again; his second shot hit the victim; he was only a few feet from the victim when he fired; and, even after the second shot, defendant continued to approach the victim with an angry look and only retreated at the urging of his aunt.

Homicide--first-degree murder--sufficiency of evidence

State v. Barnett, 141 N.C. App. 378 (2000)

The trial court did not err by denying a first-degree murder defendant's motions to dismiss and to set aside the verdict where defendant's statements place him at the store where the murder occurred on the morning of the murder, place defendant as having access to the victim during the moments after the victim was bludgeoned, and may be considered as tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate himself. Although defendant attacks the forensic evidence and the evidence of motive, his statements concerning his presence and the things he touched make a conclusive match on footprints or fingerprints unnecessary and the State presented evidence permitting the inference that defendant was in need of money.

Homicide--second-degree murder--provocation--insufficient as matter of law

State v. Salmon, 140 N.C. App. 567 (2000)

The trial court correctly denied defendant's motion to dismiss the charge of second-degree murder, properly leaving the issue of provocation for the jury to decide, where the victim told defendant he was going to have sex with the defendant's sister; defendant said that the victim would not and that he would shoot the victim; defendant pointed a gun at the victim; the victim shoved defendant, who shoved back; and defendant shot the victim. The victim never assault or threatened to assault defendant; his statement was inflammatory, but the statement and the shoving were not sufficient to negate malice as a matter of law.

Evidence--prior convictions--driving while impaired--reckless driving--malice

State v. Miller, 142 N.C. App. 435 (2001)

The trial court did not err in a prosecution for second-degree murder arising from defendant's impaired driving by admitting defendant's prior convictions for driving while impaired and careless and reckless driving to establish that defendant acted with malice.

Homicide--second-degree murder--driving while impaired--sufficiency of evidence

State v. Miller, 142 N.C. App. 435 (2001)

The trial court properly denied defendant's motion to dismiss a charge of second-degree murder arising from driving while impaired for lack of sufficient evidence where defendant had prior convictions, was swerving prior to the accident, and had a blood alcohol level far beyond the legal limit four hours after the accident.

Homicide--second-degree murder--driving while impaired--instruction--malice

State v. Miller, 142 N.C. App. 435 (2001)

The trial court did not err when instructing the jury on malice in a second-degree

murder prosecution arising from driving while impaired.. Although defendant contended that the court erred by not stating that the act must be performed intentionally, the court gave an instruction expressly approved in *State v. Rich, 351 N.C. 386*.

Homicide--attempted second-degree murder--crime does not exist in North Carolina

State v. Parker, 143 N.C. App. 680 (2001)

The trial court committed plain error by instructing the jury on the issue of attempted second degree murder because our Supreme Court has stated since defendant's conviction that attempted second degree murder does not exist under North Carolina law.

Homicide--first-degree murder--sufficiency of evidence

State v. Clark, 138 NC App 392 (2000)

The trial court did not err in a first-degree murder case by denying defendant's motions to dismiss because the State's circumstantial evidence was sufficient to reveal that the minor victim was a battered child who died as a result of injuries inflicted by defendant.

Homicide--second-degree murder--malice--sufficiency of evidence

State v. Blue, 138 NC App 404 (2000)

The trial court erred in denying defendant's motion to dismiss the charge of second-degree murder in a shaken baby syndrome case based on a failure to show malice, because: (1) a defendant's shaking a baby and the baby's death by shaken baby syndrome are not the sole determinants of whether the State has produced sufficient evidence of malice; (2) the evidence did not show the infant victim was

shaken violently or vigorously, nor that she vomited, had bruises to the brain, suffered hemorrhaging in her lungs, or had multiple external injuries; (3) the facts do not show a particular animosity and wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind utterly regardless of social duty and deliberately bent on mischief; and (4) the evidence is sufficient only to raise a suspicion or conjecture of malice.

Homicide--second-degree murder--driving while impaired-- malice--sufficiency of evidence

State v. Fuller, 138 NC App 481 (2000)

The trial court did not err by denying defendant's motion to dismiss the two charges of second degree murder based on substantial evidence revealing that defendant had malice of the type manifesting a mind utterly without regard for human life and social duty, because: (1) defendant operated his automobile with a high degree of alcohol in his blood and after numerous prior driving convictions including reckless driving, speeding and driving while license was revoked due to his habitual offender status; (2) during a 16.7 mile chase by a police officer, defendant ran both a stop sign and a red stop light, passing stopped traffic at speeds of 90-95 miles per hour; and (3) both passengers in the truck defendant struck during the high speed chase died as a result of the collision.

Homicide--deadly weapon—hands

State v. Krider, 138 N.C. App. 37 (2000)

The trial court did not err in denying defendant-mothers's motion to dismiss a first-degree murder charge, while committing felonious child abuse with the use of defendant's hands as a deadly weapon, because: (1) the size of both the actor and the victim are important factors in the determination of whether hands are deadly weapons; and (2) when a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons.

Homicide--second-degree murder--motion to dismiss--sufficiency of evidence--malice

State v. Mcallister, 138 N.C. App. 252 (2000)

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder because: (1) the State need not show that defendant intended to kill in order to establish malice, but instead may meet its burden by showing that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result; and (2) the evidence reveals malice since defendant drove while impaired by alcohol and at a time when his license was in a state of permanent revocation, he was previously convicted in 1991 for driving while impaired, and he had a 1997 conviction for driving while impaired that was on appeal.

Evidence--murder prosecution--pending DWI charge--malice

State v. Mcallister, 138 N.C. App. 252 (2000)

The trial court did not err in a prosecution for murder and assault arising from driving while impaired by admitting defendant's pending DWI charge. The circumstances attendant to the pending charge, such as speeding on the wrong side of the road and running another motorist off the road, demonstrate that defendant was aware that his conduct was reckless and inherently dangerous. The evidence therefore tended to show malice, an element of second-degree murder, and was properly admitted under N.C.G.S. § 8C-1, Rule 404(b).

Homicide--DWI--proximate cause and insulating negligence--denied--instructions denied

State v. Mcallister, 138 N.C. App. 252 (2000)

The trial court did not err in a prosecution for murder and assault resulting from driving while impaired by not instructing the jury on proximate cause and insulating acts of negligence. The requested instruction that defendant's actions must be the sole and only proximate cause of the collision in order to hold him

criminally liable was a misstatement of the law and the record shows no evidence of any negligence by the driver of the other car. Defendant was in her lane and she was forced to swerve into the left lane to try to avoid a collision; defendant's argument that she should have swerved to the right and hit a telephone pole and/or mailboxes is entirely unpersuasive.

Homicide--first-degree murder--evidence of premeditation and deliberation--instruction on second degree murder not given

State v. Leazer, 353 N.C. 234 (2000)

The Court of Appeals erred in a first-degree murder case by holding that the trial court should have instructed on the lesser-included offense of second-degree murder where there was evidence of malice in that defendant, an inmate, punched another inmate in the chest with an eight-and-a-half inch shank; the evidence did not demonstrate provocation by the decedent and there was no evidence of an argument between the two; there was evidence that defendant anticipated a confrontation in that he entered the recreation area carrying a shank and waited until the guard turned away before striking; and defendant inflicted three stab wounds on the victim, with over ten seconds between the first and the fatal blows. No matter what defendant's intent may have been before he inflicted the first wound, there was adequate time between each blow for defendant to have premeditated his actions. The case was remanded to the Court of Appeals with instructions to address the remaining assignments of error.

Evidence - Relevancy - homicide - impaired driving - prior conviction

State v. Gray, 137 N.C. App. 345 (2000)

The trial court did not err in a prosecution for impaired driving second-degree murder by admitting a prior conviction for violation of N.C.G.S. § 20-138.3, which makes it unlawful for a person under 21 to drive while consuming alcohol.

Homicide - Second-degree murder - impaired driving - malice - sufficiency of evidence

State v. Gray, 137 N.C. App. 345 (2000)

There was sufficient evidence of malice in an impaired driving second-degree murder prosecution where defendant's blood alcohol level was .113 three hours after the accident, the collision occurred in the victim's lane of travel, and charges of driving while impaired and driving while license revoked were pending against defendant at the time of the accident.

Homicide - First-degree murder - sufficiency of evidence

State v. Clark, 138 N.C. App. 392 (2000)

The State's evidence showed that Budde was a battered child and died as a result of injuries inflicted by the defendant. Although the State's case centered around circumstantial evidence, taken in the light most favorable to the State, it was sufficient to withstand the defendant's motions to dismiss.

Homicide - Second-degree murder - malice - sufficiency of evidence

State v. Blue, 138 N.C. App. 404 (2000)

The trial court erred in denying defendant's motion to dismiss the charge of second-degree murder in a shaken baby syndrome case based on a failure to show malice.

Homicide - attempted second-degree murder - not crime in this state

State v. Coble, 351 N.C. 448 (2000)

The crime of "attempted second-degree murder" does not exist under North Carolina law because the offense of attempted murder requires the element of

specific intent to kill, and while specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder, it is not an element of second-degree murder or manslaughter. Where the element of malice in second-degree murder is proved by intentional conduct, a defendant need only intend to commit the underlying act that results in death.

Homicide - murder and attempted murder by poison - malice instruction not required

State v. Smith, 351 N.C. 251 (2000)

The trial court did not err in denying defendant's request to instruct the jury on the element of malice for charges of first-degree murder by means of poison and attempted first-degree murder by means of poison since malice is implied by law for a murder by poison, and a separate showing of malice is not necessary.

Homicide; Child Abuse and Neglect - child abuse - involuntary manslaughter - sufficiency of evidence

State v. Fritsch, 351 N.C. 373 (2000)

The trial court properly denied defendant's motion to dismiss charges of involuntary manslaughter and felonious child abuse and the evidence supported defendant's convictions of involuntary manslaughter and misdemeanor child abuse, where there was evidence tending to show that the seven-year-old victim had cerebral palsy and was profoundly mentally retarded; the victim was absent from a developmental center for extended periods of time while in defendant's care and custody; the victim's weight dropped after these absences from the center and rose again after regular attendance; each time the victim returned to the center after extended absences, she had sores on her back and was dirty and unkempt; the DSS had twice substantiated neglect of the victim by defendant based upon observations of the victim's physical condition and defendant's continued failure to take the victim to a doctor for a physical examination; the victim's death was caused by "starvation malnutrition"; and there was no evidence that the victim could not digest and ingest food. Substantial evidence existed from which the jury could infer that defendant willfully, or through her culpable negligence, deprived

the victim of food and nourishment and that the victim's death was caused by defendant's actions or inactions.

Homicide - malice - instructions - second-degree murder - automobile accident – attitudinal circumstances

State v. Rich, 351 N.C. 386 (2000)

The trial court did not err in a prosecution for second-degree murder by instructing the jury that malice may be present if only one of the attitudinal circumstances constituting malice - wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, a mind regardless of social duty and deliberately bent on mischief - is found to exist. The attitudinal circumstances listed by the trial court in the instruction serve only as descriptive words or phrases and do not constitute elements of malice so that the State need not prove each and every one of those attitudinal examples of malice in order for the jury to infer malice.

Homicide - instructions - malice - recklessness of consequences

State v. Rich, 351 N.C. 386 (2000)

The trial court's instruction allowing the jury in a second-degree murder case to find malice based on "recklessness of consequences" did not lower the culpability level required to convict a defendant of second-degree murder to a level of culpable negligence since the trial court's instructions as a whole reflected terms which described the degree of recklessness sufficient for the jury to find the state of mind which constitutes malice, and the jury could not have confused such a high degree of recklessness with mere culpable negligence.

Homicide - instructions - malice - deliberately bent on mischief

State v. Rich, 351 N.C. 386 (2000)

The trial court did not err in its definition of "deliberately bent on mischief" as used in its instruction on malice in a prosecution for second-degree murders arising from an automobile accident by failing to convey the appropriate concepts of deliberateness and intention since it was necessary for the State to prove only that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind; the State was not required to show that defendant had a conscious, direct purpose to do specific harm or damage, or had a specific intent to kill; and the State presented testimony that defendant drove his vehicle at a high rate of speed while impaired, on the wrong side of the road, in a no-passing zone and in violation of right-of-way rules. Therefore, the jury was properly focused on defendant's intention to perform an act which reflected the level of intent that is associated with a person being "deliberately bent on mischief."

Homicide - instructions - malice - deliberately bent on mischief

State v. Rich, 351 N.C. 386 (2000)

The trial court's instruction on the meaning of "deliberately bent on mischief" in a prosecution for second-degree murders arising from an automobile accident could not have caused the jury to confuse malice with culpable negligence where the trial court never mentioned culpable negligence to the jury in connection with its charge on second-degree murder but focused on the term "malice"; and the instructions clearly required a finding of malice sufficient to support second-degree murder if the jury concluded that defendant's actions were such as to be inherently dangerous to human life and were done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

Homicide - Short-form indictments - constitutionality

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

Although the short-form indictment used to charge defendant with first-degree murder did not allege the elements of premeditation, deliberation, and specific intent to kill, the trial court did not err in concluding the indictment was constitutional.

Homicide 566 (NCI4th) - murder - instruction on voluntary manslaughter as lesser included offense - imperfect self defense - denied

State v. Ligon, 332 N.C. 224 (1992) 420 S.E.2d 136

The trial court did not err in a murder prosecution by not instructing the jury on the lesser included offense of voluntary manslaughter based on imperfect self defense where, even assuming defendant's version of the evidence is accurate, there was absolutely no evidence that defendant believed it necessary to kill the victim in order to save himself from death or great bodily harm and, even if he had such a belief, it certainly would not have been reasonable, given that the victim's car was speeding away when the shots were fired.

Homicide 562 (NCI4th) - murder - instruction on voluntary manslaughter as lesser included offense - provocation - denied

State v. Ligon, 332 N.C. 224 (1992) 420 S.E.2d 136

The trial court did not err in a murder prosecution by not instructing the jury on the lesser included offense of voluntary manslaughter based on provocation where, assuming defendant's version of the evidence was accurate, there was absolutely no evidence that defendant shot the victim in the heat of passion upon adequate provocation. While defendant may have been "provoked" that the victim stole his cocaine, that is hardly what the law regards as adequate provocation.

Homicide 609 (NCI4th) - murder - instruction on self defense refused - no evidence of reasonable apprehension of death or great bodily harm

State v. Ligon, 332 N.C. 224 (1992) 420 S.E.2d 136

Homicide 678 (NCI4th) - murder - instructions - diminished capacity - no error

State v. Pittman, 332 N.C. 244 (1992) 420 S.E.2d 437

The trial court did not err in a murder prosecution by refusing defendant's request to include an instruction on diminished capacity in its final mandate where the court included in its charge an instruction that the jury could consider defendant's mental condition in connection with his ability to formulate a specific intent to kill.

Homicide 552 (NCI4th) - first degree murder - second degree instruction not required

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

The trial judge in a first degree murder prosecution did not err in refusing to instruct the jury on the lesser included offense of second degree murder where there was no evidence to negate the elements of premeditation and deliberation other than defendant's denial.

Homicide 200 (NCI4th) - first degree murder - possible suicide - sufficiency of evidence

State v. Walker, 332 N.C. 520 (1992) 422 S.E.2d 716

The trial court properly denied defendant's motions to dismiss a charge of first degree murder for insufficient evidence where the evidence suggested two possibilities: that the victim was either shot by her lover in cold blood or that she took her own life in his presence. Setting aside defendant's evidence and taking the facts established at trial by the State in the light most favorable to the prosecution, the facts constitute substantial evidence of.

Homicide 245 (NCI4th) - murder - possible suicide - premeditation or deliberation – circumstantial evidence sufficient

State v. Walker, 332 N.C. 520 (1992) 422 S.E.2d 716

Homicide 253 (NCI4th) - first degree murder - sufficient evidence of premeditation and deliberation

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

The State's evidence was sufficient to support the jury's verdict finding that defendant killed the victim with premeditation and deliberation where it tended to show that, while in defendant's truck, defendant grabbed the victim's breast, at which time the victim "backhanded" defendant; defendant knocked the victim back into the sleeper portion of the truck and began beating the victim about the head and face; when he saw the victim's blood, he became more enraged and continued to beat her; fearing that she was going to be raped, the victim removed her clothing; defendant bit the victim's breasts until they were bleeding and then inserted his fingers into her vagina; the entire time the assault was occurring, the victim was fighting, kicking, and screaming; defendant reached for a hand cleaner on the floorboard and, after lubricating his hands with it, penetrated the victim with his entire hand to a point past his wrist at least twice; defendant tore out the wall between the victim's vaginal and anal openings and proceeded to tear out part of the victim's colon and right kidney; when the victim attempted to crawl from the truck and fell to the ground, defendant dragged her into the woods some 120 feet on her back and left her helpless and bleeding to death; defendant made no attempt to obtain assistance for the victim; the victim was conscious for some amount of time after being left to die; and defendant thereafter cleaned up his truck, resumed his delivery route, and slept before his next delivery. The victim's act of slapping defendant did not constitute provocation because the mere repelling of a sexual assault does not constitute provocation.

Homicide 552 (NCI4th) - first degree murder - instruction on second degree not required

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

Homicide 489 (NCI4th) - premeditation and deliberation - lack of provocation - propriety of instruction

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

The trial court did not err in instructing the jury in a first degree murder case that it could infer premeditation and deliberation from lack of provocation by the victim because all of the evidence at trial revealed no provocation on the part of the victim where it tended to show that defendant began his assault on the victim by an unsolicited and nonconsensual fondling of her breasts; the victim responded by slapping the defendant; and defendant then proceeded to beat the victim into submission and sexually abused her to the point that she died. The victim's act of slapping defendant did not constitute provocation since the act of repelling a sexual assault does not constitute provocation under North Carolina law.

Homicide 253 (NCI4th) - murder of child - hard blows to the head - evidence of premeditation and deliberation

State v. Greene, 332 N.C. 565 (1992) 422 S.E.2d 730

The trial court did not err by submitting to the jury the charge of first degree murder on the theory of premeditation and deliberation were there was evidence that the victim, a five-year-old child, was brutally beaten during which time the defendant delivered several hard blows to the victims's head. A reasonable man would know that this would very likely cause the death of the child.

Homicide 557 (NCI4th) - first-degree murder - poisoning - instruction on second-degree murder refused - no error

State v. Moore, 335 N.C. 567 (1994) 440 S.E.2d 797

Homicide 489 (NCI4th) - premeditation and deliberation - lack of provocation – instruction supported by evidence

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

Evidence and Witnesses 217 (NCI4th) - first-degree murder - disposal of body - relevant to premeditation and deliberation - admissible

State v. Rose, 335 N.C. 301 (1994) 439 S.E.2d 518

The trial court did not err in a first degree-murder prosecution by admitting evidence that defendant had burned the victim's body a day after killing her.

Homicide 226 (NCI4th) - first-degree murder - evidence of defendant's identity - sufficient

State v. Mlo, 335 N.C. 353 (1994) 440 S.E.2d 98

Evidence and Witnesses 216 (NCI4th) - murder - prior possession of rifle - murder weapon not identified - relevant

State v. Mlo, 335 N.C. 353 (1994) 440 S.E.2d 98

There was no error in a murder prosecution in the admission of testimony that defendant had been seen in possession of a black rifle with a clip on the bottom and "a long handle that pulled back" where no murder weapon was produced at trial, but a federal firearms form was introduced which showed that an individual who identified himself as defendant purchased a .22 caliber semiautomatic rifle

which a fifteen round clip and retracting stock, and the pathologist indicated that the victim's wounds had been caused by a .22-caliber weapon. When no weapon is found in a defendant's possession at the time of his arrest or thereafter, testimony that defendant had once owned or possessed a weapon becomes especially relevant.

Homicide 378 (NCI4th) - murder - evidence of self-defense introduced by State - other evidence raising inference of premeditation

State v. Carter, 335 N.C. 422 (1994) 440 S.E.2d 268

The trial court did not err by submitting to the jury first-degree murder based on premeditation and deliberation where defendant contended that the State was bound by defendant's claim of self-defense because the State introduced the claim during its direct examination of two officers and did not present any contradictory evidence, but there was evidence which, while not directly contradictory, raised the legitimate inference that defendant killed with premeditation and deliberation and not in self-defense.

Homicide 489 (NCI4th) - premeditation and deliberation - lack of provocation - propriety of instruction

State v. Howell, 335 N.C. 457 (1994) 439 S.E.2d 116

Constitutional Law 183 (NCI4th) conspiracy to commit first-degree murder and first-degree murder - conviction and punishment for both

State v. Morston, 336 N.C. 381 (1994) ___ S.E.2d ___ge

Evidence and Witnesses 2284 (NCI4th) - murder -pathologist's testimony - pain and

suffering of victim

State v. Morston, 336 N.C. 381 (1994) ___ S.E.2d ___ge

Homicide 552 (NCI4th) noncapital first-degree murder - refusal to charge on second-degree murder - provocation - no error

State v. Arrington, 336 N.C. 586 (1994) ___ S.E.2d ___

Homicide 244 (NCI4th) - murder - premeditation and deliberation - sufficiency of evidence

State v. Williams, 334 N.C. 440 (1993) 434 S.E.2d 588

The evidence was clearly sufficient to support a conclusion that a murder was premeditated and deliberate where defendant carried a knife with him during an attempted safe-cracking, indicating that he had anticipated a violent confrontation and the need for deadly force; defendant struck the victim numerous times with a heavy object, causing at least three lethal injuries; some of the lethal blows may have been inflicted while the victim was lying helpless on the ground; and there was no evidence to show that defendant was provoked.

Homicide 83 (NCI4th) - first-degree murder - self-defense - deadly force reasonable to repel attack but then continued unnecessarily - instructions

State v. Potts, 334 N.C. 575 (1993) 433 S.E.2d 736

The trial court did not err in its instructions on self-defense in a first-degree murder prosecution where defendant contended that State v. Robinson, 188 N.C. 784, provides for a finding of guilty of manslaughter when the defendant reasonably uses deadly force to repel an attack but continues to use it when it is

no longer necessary. Robinson should not be read to hold that once a defendant can no longer reasonably believe he is in danger that he may continue to use deadly force and be found guilty of no more than manslaughter; in such a case, the defendant would be guilty of murder.

Homicide 86 (NCI4th) - first-degree murder - instructions on result of defendant's aggression – no error

State v. Potts, 334 N.C. 575 (1993) 433 S.E.2d 736

The trial court did not err in a first-degree murder prosecution by instructing the jury that the defendant would not be entitled to a verdict of not guilty if he was the aggressor in the fight where there was evidence from which the jury could believe the defendant was the aggressor.

Evidence and Witnesses 1695 (NCI4th) - photographs of victim's body - admission for illustrative purposes

State v. Mccollum, 334 N.C. 208 (1993) 433 S.E.2d 144

Evidence and Witnesses 2265 (NCI4th) - expert testimony - unlikely wounds self-inflicted

State v. Shoemaker, 334 N.C. 252 (1993) 432 S.E.2d 314

The trial court in a first-degree murder case did not err by admitting a forensic pathologist's opinion that it was highly unlikely that the victim's wound was self-inflicted where the opinion was based on findings from his autopsy of the victim concerning the location of the wound, the distance from which the shot was fired, and the awkward angle that the victim would have had to hold the gun to inflict such a wound.

Homicide 250 (NCI4th) - first-degree murder - premeditation and deliberation - sufficiency of evidence

State v. Shoemaker, 334 N.C. 252 (1993) 432 S.E.2d 314

The evidence was sufficient to take the issue of premeditation and deliberation to the jury in a first degree murder prosecution where it tended to show that there was a lack of provocation on the part of the victim; a note written by the victim on the date of her death indicated that defendant had pulled a gun on her and threatened her life; after the killing, defendant appeared "carefree," "extremely calm," "nonchalant," "very unconcerned," and "uncaring" to officers and medical personnel and defendant never inquired as to the health or status of the victim; and the killing was done in a brutal manner in that the victim was shot in the face from a distance of two to six inches.

Homicide 226 (NCI4th) - first-degree murder - defendant as perpetrator - sufficiency of evidence

State v. Shoemaker, 334 N.C. 252 (1993) 432 S.E.2d 314

There was sufficient circumstantial evidence for the jury to find that defendant was the perpetrator of a first-degree murder where the evidence tended to show that defendant was the only person in the house with the victim when the police arrived; the .22-caliber bullet removed from the victim had the same rifling characteristics and similar barrel markings as a bullet taken from a box of ammunition found in defendant's truck and fired from defendant's gun; the nine-shot .22-caliber pistol found on the floor of the master bedroom had eight live rounds and one fired cartridge in the cylinder; defendant's ex-wife identified the pistol found in the bedroom as belonging to defendant; a pathologist testified that it was highly unlikely that the victim's gunshot wound was self-inflicted; the victim left a handwritten note explaining that defendant had pulled a gun on her earlier in the evening and had threatened to kill them both; defendant first told officers on the scene that he did not know what happened but later told a detective that he heard a gunshot while watching television, found the victim's body, and caught a glimpse of a figure running up the hill; defendant later told the detective that he pled "no contest"; and defendant claimed that he had no knowledge about the gun that was found, but when asked how the gun could have gotten into the

master bedroom without his noticing it, admitted that he moved it.

Homicide 558, 706 (NCI4th) - first-degree murder - refusal to instruct on voluntary manslaughter

State v. Shoemaker, 334 N.C. 252 (1993) 432 S.E.2d 314

The trial court in a first-degree murder prosecution did not err in denying defendant's request for an instruction on the lesser included offense of voluntary manslaughter where there was no evidence of defendant being under the influence of passion or in the heat of blood produced by adequate provocation.

Homicide 21 (NCI4th) - attempted murder - recognized - lesser-included offense of murder

State v. Collins, 334 N.C. 54 (1993) 431 S.E.2d 188

Homicide 254, 257 (NCI4th) - murder - evidence of premeditation and deliberation - wounds - possession of weapon

State v. Ginyard, 334 N.C. 155 (1993) 431 S.E.2d 11

There was sufficient substantial evidence of premeditation and deliberation to support the trial court's denial of the defendant's motion to dismiss at the conclusion of all of the evidence where evidence of the nature and number of the victim's wounds provides substantial evidence from which the jury could properly infer that defendant premeditated and deliberated before killing the victim, and the fact that defendant was carrying a knife was evidence tending to support an inference that he had anticipated a possible confrontation with the victim and that he had given some forethought to how he would resolve that confrontation

Homicide 480 (NCI4th) - murder - instructions - use of deadly weapon - cowboy boots

State v. Jennings, 333 N.C. 579 (1993) 430 S.E.2d 188

Homicide 256 (NCI4th) - first degree murder - premeditation and deliberation - sufficiency of evidence contradicting defendant's confession

State v. Rannels, 333 N.C. 644 (1993) 430 S.E.2d 254

Homicide 552 (NCI4th) - first degree murder - second degree murder instruction not required

State v. Barnes, 333 N.C. 666 (1993) 430 S.E.2d 223

Homicide 489 (NCI4th) - premeditation and deliberation - lack of provocation – instruction supported by evidence

State v. Barnes, 333 N.C. 666 (1993) 430 S.E.2d 223

There was sufficient evidence of lack of provocation in a first degree murder case to support the trial court's instruction that evidence of lack of provocation by the decedent could be considered in determining whether there was premeditation and deliberation by defendants

Homicide 250 (NCI4th) - first degree murder - sufficient evidence of premeditation and deliberation

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

Homicide 211 (NCI4th) - first degree murder - sufficiency of evidence - cause of death

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

The trial court did not err by denying defendant's motion to dismiss a first degree murder prosecution for insufficient evidence that the shooting of the victim was the proximate cause of death. Although defendant contended that the victim's family and doctor determined that they would not pursue medical options available to them to keep the victim alive, the evidence presented was clearly sufficient to establish that the gunshot wounds inflicted by defendant were the proximate cause of the victim's death. Contradictions in the evidence are for the jury to resolve.

Homicide 427 (NCI4th) - first degree murder - proximate cause - intervening causation - instructions

State v. Gibson, 333 N.C. 29 (1992)

There was no prejudicial error in a first degree murder prosecution where the trial court instructed the jury erroneously on intervening causation and correctly on contributing causation and concerted action. If one person inflicts a mortal wound and, before the victim dies, another person kills the victim by an independent act, the former cannot be properly convicted of murder; however, if the same two people acted in concert to kill another according to an agreement among themselves, they both may be properly held accountable for the murder.

Homicide 39 (NCI4th) - first degree murder - specific intent to kill - showing required

State v. Keel, 333 N.C. 52 (1992)

To show the "specific intent to kill" required to prove first degree murder, the State must show more than an intentional act by the defendant resulting in the death of the victim; the State also must show that the defendant intended for his action to result in the victim's death.

Homicide 251, 243 (NCI4th) - murder - premeditation and deliberation - evidence sufficient

State v. Williamson, 333 N.C. 128 (1992)

Homicide 552 (NCI4th) - first degree murder - second degree instruction not required

State v. Cummings, 332 N.C. 487 (1992)

The trial judge in a first degree murder prosecution did not err in refusing to instruct the jury on the lesser included offense of second degree murder where there was no evidence to negate the elements of premeditation and deliberation other than defendant's denial,

Animals, Livestock, or Poultry 18 (NCI4th) - dog control ordinance - safety ordinance - involuntary manslaughter

State v. Powell, 336 N.C. 762 (1994)

Automobiles and Other Vehicles 790 (NCI4th) - murder - driving while impaired - evidence of malice- sufficient

State v. McBride, 109 N.C. App. 64 (1993)

There was sufficient evidence of malice in a second degree murder prosecution

arising from an automobile accident where defendant drove his car knowing that his license was permanently revoked, indicating that he acted with a mind without regard for social duty and with recklessness of consequences; the fact that defendant used false license tags and lied to inspection personnel to obtain an inspection sticker indicates a mind deliberately bent on mischief; and defendant's driving while substantially impaired after prior convictions for driving while impaired and while his license was revoked manifests a mind utterly without regard for human life and social duty.

Homicide 287 (NCI4th) - second degree murder - unlawful killing and malice - sufficiency of evidence

State v. Stanley, 110 N.C. App. 87 (1993)

Homicide 299 (NCI4th) - second degree murder - sufficiency of evidence

State v. Jones, 110 N.C. App. 169 (1993)

Homicide 73 (NCI4th) - solicitation to commit murder - future phone call required before murder -sufficiency of evidence

State v. Davis, 110 N.C. App. 272 (1993)

Homicide 218 (NCI4th) - second degree murder - victim struck by defendant's car - breathing machine removed - cause of death

State v. Garcia-Lorenzo, 110 N.C. App. 319 (1993)

Homicide 304 (NCI4th) - second-degree murder - sufficient evidence to support submission

State v. Webster, 111 N.C. App. 72 (1993)

The evidence supported the trial court's submission to the jury of a charge of second-degree murder of her husband after the court dismissed the charge of first-degree murder where the State's evidence tended to show that the victim was shot at close range but there were no fingerprints on the gun and no traces of lead, barium or antimony on the victim's hands; the wound was atypical of a self-inflicted wound; no hand wipings were taken from defendant because she had been to the bathroom where she might have washed her hands; defendant was the beneficiary of the victim's life insurance policies; defendant and the victim argued about another woman and financial matters on the night in question; and the victim had told his mother that he was moving out of the trailer he shared with defendant. The jury could have found from the evidence that defendant intentionally and unlawfully killed her husband but that she acted without premeditation and deliberation.

Homicide 365 (NCI4th) - murder - struggle to prevent suicide - gun discharged - instruction on involuntary manslaughter refused - error

State v. Tidwell, 112 N.C. App. 770 (1993)

Homicide 284 (NCI4th) - second-degree murder - sufficiency of evidence

State v. Parker, 113 N.C. App. 216 (1994)

Evidence was sufficient to support defendant's conviction of second-degree murder where it tended to show that defendant constantly maintained surveillance of the victim; defendant possessed two firearms; he engaged in target practice with the guns shortly before the murder; defendant threatened suicide because the victim had ended her relationship with him; defendant had threatened to kill the victim; defendant was seen by several witnesses in the area of the crime on the morning it was committed; and defendant's brand of cigarette package was found

on the opposite side of the road from where the victim's vehicle came to rest.

Homicide 287 (NCI4th) - second-degree murder - self-defense - sufficiency of eveidence

State v. Irby, 113 N.C. App. 427 (1994)

The State presented substantial evidence of each element of second-degree murder and substantial evidence from which the jury could infer that defendant did not act in self-defense or in defense of his family where the evidence tended to show that there was a forty-five minute delay between the firing of shots and a telephone call for emergency help; it could be inferred from this delay that defendant intended to assure the deaths of the victims rather than merely to stop any aggression by the victims toward defendant's father;

Homicide 216 (NCI4th) - assault as cause of death - sufficiency of evidence

State v. Lane, 115 N.C. App. 25 (1994)

There was sufficient evidence in a prosecution for involuntary manslaughter from which a reasonable jury could find that defendant's punch was the actual cause of a blunt force injury to decedent's head, leading directly to his death.

Homicide 216 (NCI4th) - assault as proximate cause of death - sufficiency of evidence

State v. Lane, 115 N.C. App. 25 (1994)

A jury could reasonably infer that defendant's assault started a series of events culminating in decedent's death, and the assault therefore constituted a proximate cause of the death; furthermore, defendant could not be excused from responsibility because of decedent's pre-existing condition, alcoholism, which rendered him less able to withstand the assault.

Homicide 349 (NCI4th) - submission of second-degree murder - no objection - absence of plain error

State v. Blue, 115 N.C. App. 108 (1994)

Homicide 635 (NCI4th) - no duty to retreat - failure to instruct error

State v. Nixon, 117 N.C. App. 141 (1994)

In a first-degree murder case where the evidence tended to show that defendant and the victim were shooting at each other from separate cars after the victim was the aggressor in the events preceding the first shooting, the trial court erred in failing to instruct that defendant had no duty to retreat, since the evidence showed that, because the victim was using deadly force, defendant was permitted to stand his ground and kill the victim if defendant believed it necessary and had a reasonable ground for such belief.

Homicide 550 (NCI4th) first-degree murder - conflict about underlying felony or lying in wait -submission of lesser offenses

State v. Camacho, 337 N.C. 224 (1994)

For all murder cases prosecuted under N.C.G.S. 14-17 (1993), when there is a conflict in the evidence regarding whether defendant committed the underlying felony or was lying in wait, all lesser degrees of homicide charged in the indictment pursuant to N.C.G.S. 15-144 and supported by the evidence must be submitted to the jury.

Homicide 257 (NCI4th) -first-degree murder - premeditation and deliberation - quarrel with victim

State v. Watson, 338 N.C. 168 (1994)

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to dismiss for lack of evidence showing premeditation and deliberation where defendant argued that all of the evidence showed that his intent to kill the victim was formed under the influence of the provocation of the quarrel with the victim. However, there was evidence tending to show preparedness on the part of defendant to kill the victim before the argument between them ensued in that defendant procured a gun and placed it by his side in the truck where he was seated before the argument and evidence that after the argument had ended and the victim had withdrawn there was time for defendant's blood to have cooled before the shooting occurred. Defendant's mere anger at the victim is not alone sufficient to negate deliberation.

Homicide 384 (NCI4th) first-degree murder - self-defense - fear of death or great bodily harm

State v. Watson, 338 N.C. 168 (1994)

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to dismiss on the ground that the State failed to prove that defendant did not act in self-defense where there was evidence from which the jury could find beyond a reasonable doubt that defendant's belief in the need to kill was unreasonable.

Homicide 615 (NCI4th) first-degree murder - self-defense - instructions - honest but unreasonable belief in need to kill

State v. Watson, 338 N.C. 168 (1994)

There was no plain error in a noncapital first-degree murder prosecution in which self-defense was an issue where the trial court charged the jury in terms of defendant's belief in a need to kill, rather than in terms of his belief in a need to use deadly force. Although defendant argued that an honest but unreasonable

belief in the need to kill is tantamount to the use of excessive force and should result in a verdict of voluntary manslaughter on the theory of imperfect self-defense, and although as a general proposition instructing a jury in terms of the need "to use deadly force" rather than "to kill" could be appropriate if the evidence supported such an instruction, the evidence in this case showed an intent to kill rather than an intent to use deadly force.

Homicide 589 (NCI4th) murder trial - self-defense instruction not required

State v. Ross, 338 N.C. 280 (1994)

The trial court did not err in failing to instruct the jury on the State's burden of proof with regard to self-defense in a first-degree murder trial where all of the evidence, including defendant's statement, tended to show that the victim was unarmed and walking away from defendant when defendant shot him in the back, since defendant was not facing an imminent threat of death or great bodily harm from the victim when he fired the fatal shot, and a reasonable person of ordinary firmness could not have believed it was necessary to use deadly force on the victim.

Homicide 374 (NCI4th) first-degree murder -two defendants - acting in concert - evidence sufficient

State v. Abraham, 338 N.C. 315 (1994)

The trial court did not err by denying defendant Abraham's motion to dismiss a change of first-degree felony murder for insufficient evidence where the evidence would permit the jury to find that Foster, Hardin, Steve and Gaddy were walking to Foster's mother's house when they were accosted by defendants Abraham and Cureton on Lander Street; words were exchanged and both Abraham and Cureton began firing handguns; as Hardin and Foster ran away, Hardin's leg was grazed by a bullet; Hardin fell into some nearby bushes and watched Cureton fire in his direction and Abraham fire in Foster's direction; and Gaddy was found dead in the middle of Lander Street after the shooting with fatal gunshot wounds to his head and abdomen and another wound to the sole of his foot. Although defendant

Abraham contended that the evidence was not sufficient to show that either he or someone acting in concert with him fired the fatal shots, the jury could reasonably infer that Abraham and Cureton were acting in concert when they accosted the other four men and began firing their weapons, the other four men were unarmed and ran when the shooting began, Cureton shot at and wounded Hardin, Abraham shot at Foster, and bullets fired during one of these assaults fatally wounded Gaddy while Gaddy was running away. Since the evidence supports the guilt of both defendants as to all of the felonious assaults, it makes no difference which of the felonious assaults is the underlying felony or which defendant actually fired the fatal shots or whether defendants intended that Gaddy be killed.

Homicide 262, 478 (NCI4th) assault with a deadly weapon -different victim killed - felony murder

State v. Abraham, 338 N.C. 315 (1994)

The trial court did not err by submitting to the jury first-degree murder based on felony murder where defendant was seen shooting at one man and a different person was killed. Although defendant argued that the felonious assaults merged with the homicide and the only proper theory by which he could be convicted is transferred intent, the felony murder theory upon which the case was submitted was fully supported by the evidence and the failure to submit the case on a transferred intent theory was not detrimental to defendant.

Homicide 495 (NCI4th) -murder - evidence of anger - instruction on second-degree murder not given - no error

State v. Perry, 338 N.C. 457 (1994)

Homicide 556 (NCI4th) first-degree felony murder - refusal to instruct on second-degree murder and manslaughter - alibi defense

State v. Corbett, 339 N.C. 313 (1994)

The trial court did not err in a prosecution for first-degree murder and discharging a firearm into a vehicle by refusing to instruct on second-degree murder and manslaughter where defendant's defense was an alibi. Defendant cannot tell the jury that he was innocent of the crime because he was elsewhere when it occurred and that the inculpatory statements were not true and also demand to have the jury instructed on second-degree murder and manslaughter based on portions of his inculpatory statements which were favorable to him when taken out of context.

Homicide 299 (NCI4th) second-degree murder - sufficient evidence - decision of the Court of Appeals that the evidence was insufficient to support defendant's conviction of second-degree murder is reversed for the reasons stated in the dissenting opinion in the Court of Appeals.

State v. Cannada, 340 N.C. 101 (1995)

Homicide 226 (NCI4th) defendant as perpetrator of murder sufficiency of evidence

State v. Lambert, 341 N.C. 36 (1995)

There was substantial evidence from which the jury could conclude that defendant was the one who shot and killed her husband where uncontroverted evidence showed that defendant never left her mobile home from the time she went to bed until the time the police arrived pursuant to her emergency phone call; in the interim her husband was shot in the head while in the mobile home; the victim and defendant owned several pistols, all of which the police found in the mobile home; one of the pistols was the murder weapon; and defendant made an inculpatory statement when she went to the funeral home to view her husband's body, i.e., "Why did you make me do it?".

Homicide 382 (NCI4th) argument initiated by murder victim argument quit by victim defendant as aggressor jury question

State v. Cannon, 341 N.C. 79 (1995)

The trial court properly allowed the jury to determine whether defendant was the aggressor where the evidence tended to show that the victim initially went to defendant's home and began to argue with him, but immediately before she was shot she had straightened her car up to go out of the driveway and was about to leave; furthermore, the evidence also reflected that the victim was shot from the side and from behind, further supporting the inference that defendant shot at the victim only after the victim had quit the argument and was trying to leave.

Homicide 552 (NCI4th) first-degree murder request for instruction on second-degree murder denied

State v. Alston, 341 N.C. 198 (1995)

The trial court did not err in a first-degree murder prosecution by denying defendant's request to instruct the jury on second-degree murder as a lesser-included offense. The evidence supports a finding of premeditation and deliberation and evidence of the lesser-included offense was totally lacking. The fact that the defendant did not bring the murder weapon to the scene of the killing, without more, will not support an instruction of second-degree murder.

Homicide 596 (NCI4th) second-degree murder and assault instructions belief that killing necessary

State v. Richardson, 341 N.C. 585 (1995)

The trial court did not err in a prosecution in which defendant was convicted of second-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury by instructing the jury that it could find that defendant acted in self-defense only if defendant reasonably believed that under the circumstances it was necessary "to kill" the victims. The self-defense instruction in this case did not read into self-defense an element that is not part of second-degree murder and did not impermissibly lessen the State's burden of disproving

defendant's claim of self-defense. The instruction as given can be read consistently and sensibly without changing the language of the first element of self-defense to read that "it was reasonably necessary to shoot [or use deadly force] in order to save himself from death or great bodily harm." The language in State v. Watson, 338 N.C. 168, that indicates otherwise is expressly disavowed.

Evidence and Witnesses 264 (NCI4th) first-degree murder victim's reputation for violence defense of accident

State v. Goodson, 341 N.C. 619 (1995)

There was no error in a first-degree murder prosecution in the exclusion of testimony as to the victim's reputation for violence where defendant contended that the killing resulted from an accident. It was held in State v. Winfrey, 298 N.C. 260, and State v. McCray, 312 N.C. 519, that evidence of a victim's violent character is irrelevant in a homicide case when the defense of accident is raised.

Homicide 555 (NCI4th) first-degree murder statement that codefendant shot victim insufficiency to negate premeditation and deliberation instruction on second-degree murder not required

State v. Robinson, 342 N.C. 74 (1995)

Defendant's statement to the police that he handed a sawed-off shotgun to a codefendant just before the killing and did not pull the trigger himself, which the State introduced in his first-degree murder trial, was insufficient to constitute affirmative evidence tending to negate premeditation and deliberation and require the trial court to submit second-degree murder to the jury when considered in light of evidence that defendant carried the shotgun to the scene of the killing; defendant had stated on three occasions before the murder that "he was going to burn him a whitey"; he told a friend the day after the murder that he had robbed a man the night before and shot him in the head; and defendant admitted in his statement that the victim "kept begging and pleading for us not to hurt him, because he didn't have any money.

Homicide 727 (NCI4th) first-degree murder premeditation and deliberation and felony murder no merger of felony

State v. Robinson, 342 N.C. 74 (1995)

Where defendant was convicted of first-degree murder based upon both premeditation and deliberation and felony murder, the underlying felony did not merge with the murder conviction, and the trial court did not err by failing to arrest judgment on the underlying felony.

Homicide 232 (NCI4th) first-degree murder premeditation and deliberation sufficiency of evidence

State v. McCray, 342 N.C. 123 (1995)

Evidence and Witnesses 285 (NCI4th) victim's past violence no showing that defendant knew about violence no apprehension of bodily harm evidence properly excluded

State v. Brown, 120 N.C. App. 276 (1995)

In a prosecution of defendant for the murder of her husband, the trial court did not err in excluding testimony by the husband's ex-girlfriend concerning his violent and abusive behavior which occurred six years before defendant shot her husband, since such testimony failed to establish that defendant knew of her husband's abusive behavior toward his ex-girlfriend and that his past violence put her in reasonable apprehension of bodily harm.

Homicide 226 (NCI4th) second-degree murder sufficiency of evidence

State v. Bostic, 121 N.C. App. 90 (1995)

There was no error in the denial of defendant's motion to dismiss a charge of second-degree murder for insufficient evidence where the State presented evidence that defendant had a history of abusing the victim, that defendant had threatened to kill the victim on numerous occasions, and that he had told a witness that he planned to kill the victim in a graveyard. While that would be insufficient to show that defendant was the person who killed the victim under State v. Lee, 294 N.C. 299, here the State also presented evidence that defendant was seen hitting the victim near the cemetery where she was found at 4:30 a.m. the morning the police received the phone call regarding her body at 9:00 a.m.; that defendant was overheard in jail telling another inmate that he killed the victim; and that he had told another witness that he had killed the victim.

Homicide 663 (NCI4th) murder by lying in wait specific intent not required voluntary intoxication irrelevant

State v. Aikens, 342 N.C. 567 (1996)

Voluntary intoxication is irrelevant to a charge of first-degree murder by lying in wait, a crime that does not require a finding of specific intent, because voluntary intoxication may only be considered as a defense to specific intent crimes.

Homicide 573 (NCI4th) firing into club and parking lot malice no instruction on involuntary manslaughter

State v. James, 342 N.C. 589 (1996)

There was no error in a first-degree murder trial which arose from defendant firing an assault rifle into a club building and parking lot where the court did not instruct the jury on the lesser included offense of involuntary manslaughter.

Homicide 175 (NCI4th) knife dangerous weapon as a matter of law

State v. DeCastro, 342 N.C. 667 (1996)

Homicide § 225 (NCI4th) defendant as perpetrator insufficiency of evidence

State v. Davidson, 123 N.C. App. 326 (1996)

In a prosecution of defendant for second-degree murder, the evidence was insufficient to show that defendant was the perpetrator of the crime charged where it tended to show that defendant and the victim had an argument several days before the murder during which they threatened to kill each other; defendant heard a loud noise after he went to sleep which could have been a gunshot; defendant told an acquaintance during two separate arguments that he had killed the victim and he would do the same thing to the acquaintance; defendant told two other acquaintances that they would end up like the victim; the victim was found dead of a shotgun wound in a house which defendant owned and in which the victim lived; defendant and the victim were together, along with others, on the night of the murder; markings found on a fired shotgun shell found in defendant's house were consistent with the shotgun found in defendant's house; the same company manufactured the wadding found at the scene and the spent shotgun shell found in the gun; and a gunshot residue test found unusual amounts of barium and lead on defendant's hands which would be consistent with his having fired a gun in the hours before the test.

Homicide § 113 (NCI4th) noncapital first-degree murder voluntary intoxication failure to instruct

State v. Scott, 343 N.C. 313 (1996)

The trial court did not err by failing to instruct on voluntary intoxication as a defense to first-degree murder where the evidence shows that defendant may have been highly intoxicated but does not show that defendant was utterly incapable of forming a deliberate and premeditated purpose to kill.

Homicide § 333 (NCI4th) involuntary manslaughter stabbing foreseeability

State v. Cole, 343 N.C. 399 (1996)

The trial court did not err in a retrial for first-degree murder and manslaughter by denying defendant's motion to dismiss the charge of involuntary manslaughter. It was not necessary that defendant foresee that the victim would die from the assault, just that he foresee that some serious injury might result, and the evidence shows that the victim was a fifty-seven year-old woman and that defendant was well aware of her state of health. It is reasonable that defendant would have foreseen that two stab wounds to a woman of her age and health would be injurious to her.

Homicide § 250 (NCI4th) first-degree murder premeditation and deliberation sufficiency of circumstantial evidence

State v. Crawford, 344 N.C. 65 (1996)

The circumstantial evidence in this case was sufficient to permit the jury to infer that defendant killed his wife with premeditation and deliberation so as to support his conviction of first-degree murder where it tended to show that the victim's body was found in bed; she died from a stab wound to her chest which punctured her heart; defendant was in bed beside her but could not be roused because he had attempted suicide by overdosing on a prescription medication; the marriage between defendant and the victim had been pervaded by marital problems for years, and the victim was going to divorce defendant; there was evidence of threats, ill will, and previous difficulties between defendant and the victim; defendant had stated on several occasions that he would kill the victim before he would allow the court to tell him when he could see his children or his wife; defendant had threatened to kill the victim on several prior occasions; defendant paid the premium on life insurance policies on the day before the victim's death; defendant stayed home from work to accomplish his purpose; defendant wrote a note shortly before killing the victim; a note written by defendant in which he shifted the blame for the problems in their marriage to the victim and stated that the victim had abused him was discovered near the victim's body; and the victim had a defensive wound that extended across three of her fingers, but defendant had no knife wounds when he was examined.

Homicide § 446 (NCI4th) capital murder instructions malice use of hands or feet

State v. Elliott, 344 N.C. 242 (1996)

There was no plain error in a prosecution for capital first-degree murder and felony child abuse in the court's instruction on malice where defendant contended that the instruction unconstitutionally reduced the State's burden of proof. Although malice is not implied when death ensues from an attack made with the hands or feet on a strong or mature person, death not ordinarily being caused by such an attack, this reasoning is inapplicable when a strong or mature person makes an attack by hands or feet alone upon a two-year old child. The instruction here informed the jury that it could infer malice from an attack by hand alone when the attack was made by a strong or mature person upon a weaker or defenseless person, but did not require the jury to infer malice from the evidence.

Criminal Law § 641 (NCI4th) felony murder State's announcement court's submission of premeditation and deliberation

State v. Hales, 344 N.C. 419 (1996)

The trial court did not err by submitting to the jury a charge of first-degree murder based on premeditation and deliberation after the district attorney announced at the pretrial and charge conferences that the State would not ask for a conviction based on premeditation and deliberation but would try defendant only for felony murder. The State did not make a binding election to proceed only on the theory of felony murder, and the trial court was not deprived of its right and duty to determine what bases for the offense the evidence would support because the district attorney had a different opinion.

Homicide § 73 (NCI4th) solicitation to commit murder lesser included offense of accessory before the fact

State v. Westbrooks, 345 N.C. 43 (1996)

Solicitation to commit murder is a lesser included offense of murder as an accessory before the fact because solicitation to commit murder contains no element that is not also present in the offense of being an accessory before the fact to murder.

Homicide § 256 (NCI4th) murder and robbery no evidence of who fired fatal shots no charge on acting in concert evidence of premeditation and deliberation insufficient

State v. Wilson, 345 N.C. 119 (1996)

The trial court erred in a prosecution arising from the robbery of a convenience store and the killing of two employees by submitting first-degree murder to the jury based on premeditation and deliberation where the evidence merely raised a suspicion that defendant fired the fatal shots, even though there was evidence that defendant was present, armed, participated in the robbery, and may have been involved in the shooting, and the jury was not instructed on acting in concert with respect to first-degree murder based on premeditation and deliberation. Felony murder is left as the sole basis for the convictions and judgment was arrested on the underlying felony of robbery with a firearm. Defendant's convictions and life sentences for first-degree murder based on the felony murder rule were not affected.

Evidence and Witnesses § 221 (NCI4th) murder subsequent possession of victim's property relevance

State v. Barnes, 345 N.C. 184 (1997)

The trial court did not err as to defendant Barnes in a capital prosecution for first-degree murder, robbery, and burglary by not limiting its instruction on the doctrine of possession of recently stolen property to burglary and robbery charges. Although Barnes argues that the instructions allowed the jury to infer premeditation and deliberation from the fact that he had stolen goods in his possession shortly after the time of the murders, the instruction informed the

jurors that they were permitted, but not required, under the doctrine of recent possession to make the inference that Barnes stole the property in their determination of whether Barnes committed the other crimes at issue, but were allowed to use any such inference only to the extent appropriate under the other instructions of the trial court.

Homicide § 727 (NCI4th) first-degree murders premeditation and deliberation and felony murder sentence for underlying felony

State v. Burgess, 345 N.C. 372 (1997)

Where defendant was convicted of two first-degree murders based upon theories of premeditation and deliberation and felony murder, the underlying felony of arson did not merge with the murders, and the trial court did not err by sentencing defendant separately for each of the murders and for the underlying felony of arson.

Homicide § 727 (NCI4th) two first-degree murders premeditation and deliberation and felony murder each murder as underlying felony sentences for both murders

State v. Burgess, 345 N.C. 372 (1997)

Where defendant was convicted of two first-degree murders based upon theories of premeditation and deliberation and felony murder, there was no merger of either murder conviction by its use as an underlying felony for the other murder, and the trial court did not err by sentencing defendant separately for each murder.

Homicide § 361 (NCI4th) - second-degree murder - no instruction on manslaughter - no error

State v. Rick, 126 N.C. App. 612 (1997)

The trial court did not err by not instructing the jury on manslaughter in a prosecution which resulted in a second-degree murder conviction where the State made a showing of implicit malice and there was no evidence of heat of passion on sudden provocation or self-defense. The evidence could reasonably show that defendant committed the crime charged and no evidence of the lesser included offense was presented.

Homicide 17.2, 19.1 - reputation of victim - threats against defendant - not admissible

State v. Jones, 83 N.C. App. 593 (1986)

The trial court did not err in a murder prosecution by refusing to admit evidence of the victim's history and reputation for violence and evidence of a threat the victim had made to defendant where defendant's own evidence showed that, at least at the time of the fatal shot to the head, the deceased did not present any threat of imminent harm to the defendant or appear to be doing so.

Homicide § 257 (NCI4th) - capital murder - premeditation and deliberation - sufficiency of evidence

State v. Larry, 345 N.C. 497 (1997)

There was sufficient evidence of premeditation and deliberation in a capital first-degree murder prosecution where defendant's conduct before and after the killing supports a finding that the scuffle with the victim did not overcome defendant's faculties and reason. Defendant carried a loaded gun into a Food Lion and used it to accomplish a robbery; a witness testified that she saw defendant point the gun at the victim and say, "If you move, you're dead"; a Food Lion cashier who witnessed the incident heard the robber say, "Don't move or I'll kill you"; and several witnesses testified that defendant fired two or more shots with a pause in between.

Homicide §§ 552, 558 (NCI4th) - capital murder - instruction on second-degree murder and manslaughter - carrying gun to robbery - refusal to give instruction - no error

State v. Larry, 345 N.C. 497 (1997)

The evidence in a capital prosecution for first-degree murder did not support an instruction on the lesser included offenses of second-degree murder and manslaughter; the uncontradicted evidence that defendant carried a loaded gun to commit a robbery and threatened to kill the victim if the victim moved is sufficient positive evidence of premeditation and deliberation.

Homicide § 368 (NCI4th) - first-degree murder - mere presence rule - evidence sufficient to convict

State v. Gaines, 345 N.C. 647 (1997)

The trial court did not err in a first-degree murder prosecution by denying defendant Harris's motion to dismiss where Harris contended that the evidence was insufficient to support his conviction under the "friend" exception to the mere presence rule. The evidence demonstrates that Harris encouraged and intended to assist Gaines, that Gaines knew of Harris's support and encouragement, and that Harris was not merely present.

Homicide § 261.1 (NCI4th) - first-degree murder by torture - sufficiency of evidence

State v. Anderson, 346 N.C. 159 (1997)

The State's evidence was sufficient to show that defendant's actions of torture of the victim were part of a course of conduct that resulted in the victim's death so as to support defendant's conviction of first degree murder by torture where it tended to show that a group of persons living in a trailer began to beat and torture the victim; after defendant arrived at the trailer several days later, he beat the victim, used a soldering iron on the victim's arm in an attempt to burn off a tattoo, used an aerosol torch on the victim's genital area, carved a derogatory term on the victim's arm with a knife, and otherwise participated in the torture of the victim; defendant and members of the group living in the trailer discussed possible ways to kill the victim; and after defendant left the trailer, the torture continued for a

few more days until the victim ultimately died after being bound, gagged, and locked in a closet while the others went out for pizza.

Homicide § 260 (NCI4th) - first-degree murder - lying in wait - sufficiency of evidence

State v. Richardson, 346 N.C. 520 (1997)

The State's evidence was sufficient to be submitted to the jury on a charge of first-degree murder on the basis of lying in wait where it would permit the jury to find that defendant drove into the parking lot of a food store from the side entrance so that the victim would not see him; he waited fifteen minutes for the victim to come out and close the store; defendant ran up to the victim and the victim did not see him until he was right up to her; defendant abducted the victim, drove her to a secluded area, and ran over her with her own car; and defendant went back to the store to make a robbery attempt.

Homicide § 226 (NCI4th) - first-degree murder - sufficiency of evidence

State v. Robinson, 346 N.C. 586 (1997)

There was sufficient evidence to support a first-degree murder conviction where the evidence showed that defendant brought his girlfriend into his trailer at gunpoint and forced her into the bathroom, threatened to kill her, and beat her in the head with a pistol until she was unconscious; arrived at another woman's house that evening and told her about the beating and said the incident was not over yet; proceeded to a nightclub, where he threatened a man at gunpoint and asked him if he was having an affair with his girlfriend; talked with the victim while at the club; drove later that night to another woman's home, described how he had beaten his girlfriend, and placed a pistol beneath the driver's seat of his white Cadillac as he drove away; the owner of a convenience store testified that he looked out the window after being awakened by two shots and saw a white Cadillac driving away from a red car; the victim was found shot to death in the red car; defendant arrived at another convenience store at approximately 2:00 a.m., pulled into the parking lot, and fell asleep; he was arrested a short time later; the arresting officer found the murder weapon under defendant's seat; and a

ballistics expert testified that his pistol fired the fatal shots into the victim. The evidence presented clearly supports a reasonable inference - more than a mere suspicion or conjecture - that defendant was the perpetrator of the murder.

Homicide - second-degree murder - child abuse - sufficiency of evidence

State v. Qualls, 130 N.C. App. 1 (1998)

The trial court did not err by not dismissing a second-degree murder charge based upon insufficient evidence where defendant contended that evidence that he may have shaken the two-month-old child in an attempt to rouse him was insufficient to show malice, but there was medical testimony that the child's injuries were consistent with shaken baby syndrome, and there was other medical evidence of defendant previously inflicting a severe blow to the victim's head.

Homicide § 552 (NCI4th) - first-degree murder case - self-serving statement - insufficient to require instruction on second-degree murder

State v. Smith, 347 N.C. 453 (1998)

In this prosecution for first-degree murder and attempted first-degree murder arising from an apartment building fire set by defendant, defendant's self-serving statement to officers that he set the fire as a prank was not sufficient evidence of his lack of premeditation and deliberation to entitle him to an instruction on second-degree murder and attempted second-degree murder where the evidence, reasonably construed, indicates that defendant burned the apartment building in an attempt to eliminate witnesses who might be able to testify against him regarding his theft of mail from the apartment building; defendant told an officer that he became concerned about the mail theft being traced o him, so he and a companion decided to burn the building; the two men drove by the building late at night to observe the area, bought kerosene, and drove around before returning between two and three in the morning; defendant admitted that he poured kerosene in front of the apartment door of a woman whose credit card number he had stolen and used; and when the kerosene did not light, he splashed it up the stairs and into the stairwell and succeeded in lighting it. Any reasonable

construction of the evidence indicates that the murder was both premeditated and deliberate.

Homicide § 261.1 (NCI4th) - murder by torture - sufficient evidence

State v. Lee, 348 N.C. 474 (1998)

The State's evidence was sufficient to support defendant's conviction for first-degree murder by torture of a two-year-old child where it tended to show that, during a one-week period, the child consistently emerged from defendant's care with myriad bruises, many of which defendant admitted to causing under the guise of either punishment or protection; on Saturday, 23 October 1993, defendant hit the child to punish him; on the following Monday, the child had visible bruises on both sides of his face after spending six hours alone with defendant on Sunday; on Wednesday, after being alone with defendant for four hours, the child had new bruises on his arm and visible bruises on both sides of his neck, he was vomiting, he had diarrhea, and his eyes were crossed; four doctors testified that the child's death was the result of a brain injury which caused massive bleeding in his brain; each doctor testified that the bruises and head injury did not appear accidental but were more likely the result of severe child abuse, battered child syndrome, or shaken baby syndrome; one doctor testified that the child probably died around 2:00 a.m. on Friday morning based on the amount of blood that was in his brain; and the child's mother testified that she saw defendant standing over the child that night between midnight and 5:00 a.m.

Homicide - first-degree murder - instruction on second-degree not warranted

State v. Thomas, 350 N.C. 315 (1999)

The trial court did not err by refusing to instruct the jury on second-degree murder as a lesser included offense of first-degree murder because the jury could not have reasonably concluded that defendant killed the victim without premeditation and deliberation where the evidence tended to show that defendant entered the victim's home by trick and attacked him without provocation; the victim was

bound and helpless during the murder; the victim suffered thirty-six stab wounds to his body inflicted with a butcher knife, many of which had been inflicted while the victim was still alive; and the only evidence offered by defendant to negate first-degree murder was his own testimony denying his involvement in the crime.

Homicide - felony death by motor vehicle - not a lesser included offense of second-degree murder

State v. Grice, 131 N.C. App. 48 (1998)

The trial court did not err in a second-degree murder prosecution arising from a fatal automobile accident resulting from defendant's impaired driving by instructing the jury on second-degree murder, involuntary manslaughter, and misdemeanor death by vehicle, but refusing to instruct on felony death by motor vehicle. Felony death by motor vehicle is not a lesser included offense of second-degree murder.

Criminal Law - prior convictions - admitted to show malice - limiting instructions

State v. Grice, 131 N.C. App. 48 (1998)

The trial court did not err in a second-degree murder prosecution arising from a fatal automobile accident which resulted from defendant's impaired driving by admitting DUI convictions from 1980. Prior driving while impaired convictions may be offered to show malice and the trial court correctly gave a limiting instruction.

Homicide - attempted first-degree murder - elements - evidence sufficient

State v. Cozart, 131 N.C. App. 199 (1998)

The trial court did not err by denying defendant's motion to dismiss an attempted

first-degree murder charge for insufficient evidence. A person commits the crime of attempted first-degree murder if he specifically intends to kill another person unlawfully; does an overt act calculated to carry out that intent that goes beyond mere preparation; acts with malice, premeditation, and deliberation; and falls short. There was sufficient evidence in each case of each element and that defendant was the perpetrator.

Homicide - attempted first-degree murder - assault with a deadly weapon not a lesser included offense

State v. Cozart, 131 N.C. App. 199 (1998)

The trial court did not err in a prosecution for attempted first-degree murder by not giving an instruction on assault with a deadly weapon with intent to kill. Although defendant contends that assault with a deadly weapon with intent to kill is a lesser included offense of attempted first-degree murder, use of a deadly weapon is an element not required for attempted first-degree murder.

Homicide - instructions - malice

State v. Rich, 132 N.C. App. 440 (1999)

The trial court did not err in a prosecution for second-degree murder by instructing the jury that the malice necessary for second-degree murder could be supplied by one, some, or all of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief.

Evidence - prior crime or act - malice - prior traffic offenses

State v. Rich, 132 N.C. App. 440 (1999)

The trial court did not err in a second-degree murder prosecution arising from speeding and drinking by admitting defendant's prior traffic violations to substantiate malice. Evidence of defendant's prior violations was relevant to establish defendant's "depraved heart" on the night he struck the victims' vehicle while rounding a sharp curve at a speed at least forty miles per hour over the posted limit.

Homicide; Parent and Child - manslaughter and child abuse - malnourishment - evidence insufficient

State v. Fritsch, 132 N.C. App. 262 (1999)

The trial court erred in a prosecution for involuntary manslaughter and felonious child abuse by denying defendant's motions to dismiss where defendant was convicted of misdemeanor child abuse and involuntary manslaughter. The State's evidence failed to demonstrate that defendant willfully or through culpable negligence deprived the victim of food and nourishment or that the victim's death was proximately caused by defendant's actions or inaction.

Criminal Law - abandonment of attempted murder - instruction denied - no error

State v. Gartlan, 132 N.C. App. 272 (1999)

The trial court did not err in a prosecution for attempted murder by denying defendant's request for jury instructions on the defense of abandonment. The evidence showed that defendant intended to kill his children; in furtherance of that purpose, while the children were in their beds at night, he started his car with the garage door closed and all of the children were exposed to carbon-monoxide poisoning, exhibiting physical symptoms from the exposure. Only after defendant observed his younger daughter turning blue did he decide that he could no longer continue; defendant's actions amounted to more than mere preparation to commit murder and he could not legally abandon the crime of attempted murder after committing these overt acts.

Homicide - first-degree murder - sufficiency of evidence of corpus delicti

State v. Cintron, 132 N.C. App. 605 (1999)

The trial court correctly denied defendant's motion to dismiss a charge of first-degree murder where there was enough evidence from which any rational trier of fact could find that the victim's death was not an accident and was caused by defendant.

Homicide – 1st Murder – abusive relationship—premeditation and deliberation—evidence sufficient

State v Gary, 348 NC 510 (1998)

Evidence for the state showed that the victim and defendant had a stormy relationship, defendant abused the victim physically and the victim was afraid of defendant, defendant had on a prior occasion thrown a hammer at the victim and stated that he would kill her if she called the police, the victim had called the police and defendant had plead guilty to assault and communicating threats, defendant had threatened to kill the victim if she had broken up with him, the victim was trying to break up with defendant, and she died as a result of repeated blows to her head with a hammer or hammer-shaped object.

Homicide - first-degree murder - corpus delicti - criminal act - premeditation and deliberation -sufficient evidence

State v. Sokolowski, 351 N.C. 137 (1999)

The evidence was sufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant has guilty of premeditated and deliberate murder of the victim (his live-in girlfriend), although her body has never recovered, where circumstantial evidence presented by the State tended to show: (1) defendant had wooden pallets delivered to his house; (2) defendant built a bonfire with some of the pallets in mid- February 1992 around the time the victim

mysteriously disappeared; (3) defendant made contradictory statements as to the victim's whereabouts; (4) defendant made incriminating comments to two friends, concluding that he had had the victim "tooken (sic) care of"; (5) defendant concealed the victim's corpse by the hideous indignities of dismemberment and burning; (6) defendant built a second bonfire on 9 March 1992 and a male neighbor's remains were found burning in this fire; (7) police found the neighbor's severed ears as well as the severed ears of the victim at defendant's house; (8) defendant possessed the victim's bloody shirt and bloody bra; (9) the victim's shirt had a hole in the back "consistent with an injury resulting from a gunshot wound"; (10) the victim's clothes were cut up the back as if to remove them from her torso; (11) charred bone and skull fragments were found in a hole 300 feet from defendant's house in a location where he indicated to a friend that the victim was located; and (12) the victim's important belongings were found at defendant's house.

Homicide - felony murder - assault - store clerk protected by bullet resistant glass

State v. Chavis, 134 N.C. App. 546 (1999)

The trial court did not err by denying defendant's motions to dismiss a first-degree murder charge based upon felony murder Page 547 arising from an assault where defendant fired at a store clerk who was protected by bullet resistant glass and then shot and killed a customer. Despite the bullet resistant glass, the store clerk was placed in apprehension and fear for his safety and other people in the store were clearly terrified; whether on transferred intent or shooting directly at the victim, the evidence of assault was sufficient.

Constitutional Law - due process-alternative but not mutually inconsistent theories - credibility

State v. Leggett, 135 N.C. App. 168 (1999)

The trial court did not violate defendant's due process rights in a double murder case when it allowed the State to argue alternative but not mutually inconsistent theories at different trials because only the co participants know who actually

fired the fatal shots at each victim and the State is allowed to argue the credibility of the witnesses to the different juries.

Homicide - proximate cause - victim's refusal to accept blood transfusion - not intervening cause of death

State v. Welch, 135 N.C. App. 499 (1999)

The trial court did not err in denying defendant's motion to dismiss the murder charge based on the theory that the victim's refusal to accept a blood transfusion was an independent and intervening cause of death cutting off defendant's responsibility for the victim's stabbing death because: (1) but for defendant's act of stabbing the victim, she would not have been in need of a blood transfusion; and (2) the doctor could not state with certainty whether the victim would have survived had she received a blood transfusion.