

**HANDLING DOMESTIC VIOLENCE CASES IN DISTRICT COURT (2002)**

**DEAN P. LOVEN  
ASSISTANT PUBLIC DEFENDER, MECKLENBURG COUNTY**

**CONTENTS**

I. WHY DOMESTIC VIOLENCE CASES ARE DIFFERENT ..... 3

II. CLIENT INTERVIEWING AND COUNSELING ..... 5

    A. INTERVIEWING AND COUNSELING THE CLIENT ..... 5

    B. INTERVIEWING THE VICTIM..... 6

III. PRETRIAL ISSUES ..... 8

    A. PROBABLE CAUSE..... 8

    B. SETTING BOND AND THE 48 HOUR RULE..... 8

    C. FIRST APPEARANCE..... 10

IV. DISCOVERY ..... 11

V. MOTIONS PRACTICE IN DISTRICT COURT ..... 14

    A. MOTIONS PRACTICE IN GENERAL ..... 14

    B. PROBABLE CAUSE FOR WARRANTLESS ARREST ..... 14

    C. SEQUESTRATION ..... 16

    D. RECORDATION ..... 16

VI. TRIAL..... 18

    A. IMPEACHMENT AND REHABILITATION ..... 18

        1. BIAS OR PREJUDICE..... 18

        2. PRIOR INCONSISTENT STATEMENTS ..... 19

        3. CHARACTER FOR TRUTHFULNESS AND PERCEPTION ..... 21

        4. REHABILITATION ..... 21

    B. THE RECANTING WITNESS..... 22

    C. THE ABSENT VICTIM ..... 23

        1. THE EXCITED UTTERANCE EXCEPTION..... 23

        2. THE MEDICAL TREATMENT EXCEPTION ..... 28

        3. ADMISSION OF HEARSAY UNDER OTHER EXCEPTIONS ..... 28

    D. PREJUDICIAL AND IRRELEVANT EVIDENCE..... 29

VII. AFFIRMATIVE DEFENSES ..... 31

    A. ALIBI..... 31

    B. SELF DEFENSE ..... 31

    C. BATTERED PERSON SYNDROME ..... 32

D. DEFENSE OF PROPERTY.....	32
E. CLAIM OF RIGHT (DEFENSE TO TRESPASS).....	33
F. NECESSITY.....	33
G. DISCIPLINE.....	33
H. ACCIDENT.....	33
I. CONSENT.....	34
J. DETENTION OF FELON.....	34
VIII. SENTENCING.....	35
A. DEFERRED PROSECUTION.....	35
B. MITIGATING FACTORS.....	35
C. RESTITUTION.....	36
IX. EFFECTS OF A FINDING OF GUILT IN DOMESTIC VIOLENCE CASES.....	37
X. PROBATION VIOLATION ISSUES.....	39
XI. SOME CRIME SPECIFIC ISSUES.....	40
A. ASSAULT ON A FEMALE.....	40
B. VIOLATING DOMESTIC VIOLENCE PROTECTIVE ORDER.....	40
C. ASSAULT.....	41
D. STALKING.....	41
E. HARASSING PHONE CALLS.....	41
F. TRESPASS.....	42

## I. WHY DOMESTIC VIOLENCE CASES ARE DIFFERENT<sup>1</sup>

Domestic violence cases are different for several reasons. First, charges often are brought by the police instead of the victim. Unlike other cases where such warrantless arrests are allowed (drunk driving, hit and run and unlawful concealment), the police often have no objective evidence of criminal activity when they arrive, and the bare allegation of an assault may be enough to initiate the criminal process. This often leads to cases where the alleged victim is unwilling to prosecute and ignores a subpoena, but the case goes forward on hearsay statements made to the officer.

Second, a higher percentage of the clients charged with domestic violence remain in jail until trial. There are at least two reasons for this. First, State law restricts the power of magistrates to set bond in such cases, meaning that most persons accused of domestic violence remain in jail at least overnight. In addition, when bond is set, the court considers the defendant being in an intimate relationship with the defendant as a risk factor justifying a higher bond as compared to when the same crime involved persons not in a domestic relationship. Some consequences of continued incarceration also are different in domestic violence cases. The incarcerated person may have child support obligations he cannot meet while in jail, and thus could face collateral legal consequences. In addition, he may be the source of income for his family, including the victim. Incarceration therefore may cause economic hardship and place further stress on the relationship. In Mecklenburg County, the average time between arrest and trial is six weeks. If the client loses his case in district court and demands a jury trial, the wait is typically another six months. We often receive calls from the alleged victims of domestic violence asking if charges can be dismissed so that the client can get out of jail and earn money. This also puts pressure on the client to plead guilty so that he can get out of jail, even if he is not in fact guilty. Prolonged detention also affects the sentence that can be imposed. If the client has less than forty-five days left on an active sentence at the time judgment is imposed, he does not qualify for work release from Mecklenburg County jails. If he has served the maximum time allowed, he cannot be placed on probation, and therefore cannot be required to attend domestic counseling programs or be subject to prolonged court supervision.

Third, Mecklenburg County, like many counties, generally will not drop domestic violence charges prior to the scheduled trial date. As a result, the complaining witness can gain an advantage by bringing charges. For example, a person seeking to take her children may bring assault charges against her estranged husband. When he comes to trial six weeks later, he is still in jail and she has left the State. While the charges are dismissed, she has successfully avoided a protracted custody fight by taking advantage of the system.

Fourth, unique problems exist with counseling clients charged with acts of domestic violence. On one hand, the client may not accept counseling to plead guilty. For example, many are unwilling to accept that a domestic violence order means they cannot go back to their house, or that

---

<sup>1</sup>Because most domestic violence clients are male and most victims are female, these gender connotations are used to distinguish between the defendant and the victim throughout this paper.

an assault is any unwanted touching, no matter how minor. On the other hand, problems exist with guilty pleas when the client wishes to plead guilty to get out of jail. The consequence of a finding of guilt are greater for domestic violence cases than almost any other kind of case. Child custody, and other domestic issues as well employability and the ability to possess a firearm are all affected by a finding of guilt.

Fifth, my experience is that a higher proportion of domestic violence cases go to trial in district court than with non-domestic violence cases. There are several reasons for this. For example, when the victim does not show up in a case not involving domestic violence, the charges are generally dismissed. In domestic violence cases, the State policy is to prosecute based upon available evidence, such as an excited utterance made to a police officer. In addition, the client's insistence on trial to show his side of the story. Clients will often convict themselves by taking the stand against advise of counsel and admitting to the behavior. Further, because there are usually no witnesses, the trial often becomes a matter of impeaching the prosecuting witness, either directly or through the police officer presenting the hearsay statement. Such trials tend to be longer and are more contentious than those involving only a police officer or even civilian witnesses in non-domestic violence cases. When a defendant is found guilty of an act of domestic violence, he is more likely to appeal the case for jury trial than if the case did not involve domestic violence. At jury trial, our office has had nearly 100 % acquittal rate. One reason I believe this occurs is because juries are not sympathetic to a case being prosecuted without the victim. In other cases, I think the jury believe that charges are being trumped up by the alleged victim. This is especially true given the consequences of a finding of guilt in domestic violence proceedings.

Sixth, when the client is found guilty of or pleads guilty to an act of domestic violence, his punishment is usually more severe than if he had committed the same crime against someone other than a domestic partner. In Mecklenburg County, the first time domestic violence offender is usually given two years supervised probation and ordered to attend a domestic violence counseling class that lasts for one year. This class costs almost \$600, and the fee cannot be waived. This may put additional strains on the family as the working person must now pay out additional money, and may not be able to keep a second job. This occurs even though the individual qualified for the public defender based upon his financial situation, and may well have lost his job because he was in jail.

Seventh, the collateral consequences of a finding of guilt are greater in cases of domestic violence than in other misdemeanor cases. The client may have his rights in divorce, child custody and other proceedings affected by a determination of guilt. In addition, some employers may consider acts of domestic violence as grounds for suspension or dismissal of an employee.

Finally, the way domestic violence cases are handled has implications that can actually increase the incidence of domestic violence. Pro arrest policies may discourage contact with the police in future incidents, possibly increasing the risk of violence. Second, financial cost of incarceration and counseling programs may place additional strains on the finances, increasing the risk of conflict. Finally, the no drop policy and failure to bring charges for filing false police reports or appearing in court may encourage abuse of the system, making it even more difficult to identify and address cases where intervention is necessary.

## II. CLIENT INTERVIEWING AND COUNSELING

### A. INTERVIEWING AND COUNSELING THE CLIENT

Because of the belief that persons accused of domestic violence pose an increased risk to others, the first interview often occurs in jail because the client cannot make bond. In such cases, the client often wants an immediate bond hearing. My experience has been that bond is seldom reduced. When the client is informed of this, he often wants to plead guilty to get out of jail instead of waiting six weeks for the trial. In such cases, it is important that the client knows the full consequences of a plea of guilty not only in terms of the sentence imposed, but also the collateral consequences of a plea.

One type of client indicates a desire to plead guilty even while professing innocence. While an *Alford* plea is allowed with the consent of the State, G.S. § 15A-1011 (g), the client must understand that this will be treated as a finding of guilt in any subsequent proceeding and in collateral actions. Further, the client must understand that if he is ordered to attend a domestic violence counseling program, he will probably be required to admit to an act of domestic violence to be accepted into the program. If he is unwilling to make such an admission, he may well be rejected by the program, thus violating a term of his probation.

A second group will admit to the conduct but fail to see the illegality of the action. The client may say “she asked me to come over” as a defense to violating a domestic violence protective order, or “I hit her after she hit me” for assault on a female. Such clients are dissatisfied with what the law defines as an act of domestic violence, and often will want a trial just to explain their side. Advising such clients that they would be allowed to explain their conduct to the judge at the time sentence is imposed, and that these facts will be considered by the judge when imposing a sentence will sometimes avoid a trial in favor of a guilty plea.

A third group are those who show up with the prosecuting witness. Your client may even insist the victim be present during the interview, confidentiality issues notwithstanding. These cases must be handled with care. I usually want to get the stories from each separately, and then counsel my client as to what the victim will say in court. The client must be cautioned not to discuss the case with the victim, and certainly not to try to have the victim change her story or not come to court.

A fourth group is the client who says the victim will not come to court. In some cases, he says this because the alleged victim has truly fabricated charges. In others, the victim does not want charges pressed. For example, she may have called to police because she was concerned an argument might turn violent. The cases that are of the most concern are those where the client may be in the position to procure the victim’s absence at trial, such as by intercepting the mail or controlling access to telephone calls or transportation. A client must be counseled not to interfere with the State having contact with the prosecuting witness, or to take any action to procure her absence from the court. In appropriate cases, the client should be informed that the absence of the victim may actually be detrimental, because she may be able to explain the situation was not as bad as the police are going to say in their testimony.

Sometimes the client will ask what happens if the victim does not show up for court. The client must be counseled not to interfere with her coming to court. However, the client should be informed what the policy is with respect to witnesses not appearing in court. In Mecklenburg

County, the witness is generally not served with a formal subpoena, so it is doubtful they could be held in contempt of court merely because they did not respond to either a telephone request to be in court or an unofficial letter. Even if a formal subpoena is issued, I have never seen a show cause order issued for a person not appearing in court in a domestic violence case. I tell my client this, but again admonish them not to interfere with the victim or any witness coming to court.

A fifth group includes clients who have previously been victims of domestic violence. This client usually is usually unwilling to talk about the past acts. I usually ask about prior acts of domestic violence straight up. Such acts can be used to raise self defense as an affirmative defense, or provocation as a mitigating factor for sentencing.

## ***B. INTERVIEWING THE VICTIM***

Contact with the victim is common before trial. She may call and say she wants your client released from jail, and may even want to drop the charges. The victim must be advised that your scope of representation is to represent your client, and that you cannot discuss details of the case with her unless your client consents. Further, she must be informed that you cannot give her legal advice.

If the victim asks how she can drop the charges, she should be informed contact the District Attorney. If she asks whether she should show up in court, this again should be referred to the District Attorney.

I always try to interview the victim out of the presence of the client. This prevents any tension during the interview and to get the best picture of what she will say if she takes the stand. Most victims consent to an interview, and I have never had one request that someone from a victim's assistance be present during the interview. In such a case, however, I would still interview the victim, and report any problems to the court if they arise. I generally find an uncooperative witness is an ideal case for trial. Such persons usually are difficult for the State to control, and will inevitably say things during trial that are at variance with what they told the police or magistrate.

The defendant does not have the right to compel a witness to submit to an interview. *State v. Phillips*, 328 N.C. 1, 399 S.E.2d 293 (1991). The state, however, may not instruct the witness not to talk to the defense. *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982). What if a third party interferes with efforts to talk to the victim? N.C. Gen. Stat. § 8-53.12 creates a domestic violence and rape counsellor privilege. This privilege can be waived by the victim or by order of the court, except for obtaining evidence to impeach the character of the victim. Cases may arise where the State has not obtained a court order or waiver before talking to the counselor or locating the victim through a domestic violence center. Further, it has not been addressed whether waiver can be limited to one side in a criminal proceeding, or whether a court order requiring disclosure can be granted *ex parte*. Finally, because much impeachment evidence is always relevant if it is favorable to the defendant, it is unclear if the bar on obtaining impeachment evidence is constitutional. Examples of favorable evidence would include false statements of the witness, *United States v. Minsky*, 963 F.2d 870 (6th Cir. 1992), prior inconsistent statements, *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980), bias of witness, *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976), and drug or mental health problems that may affect capacity to observe or recollect, *State v. Williams*, 330 N.C. 711, 412 S.E.2d 359 (1992). If a counselor has knowledge of such evidence, failure to disclose may violate defendant's Due Process rights. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (failure of prosecution to

disclose evidence that is requested, material and favorable is reversible error) The fact the information is in the hands of a third party is irrelevant because the defendant has a constitutional right to obtain favorable evidence in the possession of third parties, even if they are confidential. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

### III. PRETRIAL ISSUES

#### A. PROBABLE CAUSE

Probable cause for issuance of a warrant pursuant to G.S. § 15A-304(d) requires that the factfinder determine it is more likely than not that a crime has been committed and that the defendant committed the crime. This can be determined based upon an affidavit, oral testimony obtained under oath, or both. The requirements for a criminal summons and for an arrest warrant are similar, but in the latter, a determination is made that the person should be taken into custody because of risk of flight, risk of injury to property or persons, and the seriousness of the offense. G.S. § 15A-303(c). While Charlotte Mecklenburg police have a pro-arrest policy in cases of domestic violence, there still must be an individualized determination by the officer that issuance of an arrest warrant as opposed to a summons is proper.

A person arrested with or without a warrant must be taken before a magistrate without unnecessary delay. G.S. § 15A-511(a). If the arrest was made without a warrant, the magistrate must determine whether there is probable cause to believe a crime has been committed and the person arrested has committed the crime. G.S. § 15A-511 (c). The rules of evidence do not apply at such proceedings.

At this time, the initial appearance presents few issues. The initial appearance may become more of an issue in the future as increasing pressure is placed upon magistrates to find probable cause in domestic violence cases. The main issues arising with respect to first appearance are the conduct of timely hearings and assuring the defendant that he has the right to speak with counsel and friends. G.S. § 15A-512. Because an attorney is not appointed until the first appearance, the indigent client has no actual right to speak to counsel at this time. Timely contact with persons outside jail may be especially important if the alleged victim intends to take property from the defendant's house or to take the children and flee the jurisdiction. I have had situations where both of these have occurred. Unfortunately, there appears to be no meaningful remedy for failure to inform the defendant of this right or to allow him to exercise the right in a timely manner, unless the violation in some way causes the defendant to make inculpatory statements that are subject to suppression by pretrial motion or motion during trial in district court, as discussed below.

#### B. SETTING BOND AND THE 48 HOUR RULE

G.S. § 15A-533(b) requires all persons charged with a noncapital crime have conditions of pretrial release set. G.S. § 15A-534.1(a) requires a judge to set bond for a defendant within the first forty-eight hours in cases involving domestic relations and for the crimes of assault, communicating threat, domestic criminal trespass, and violating a domestic violence protective order. Note that this statute does not apply to other types of alleged criminal conduct, even if the alleged victim falls in a category that would result in the case being placed in a domestic violence court. In cases not covered by G.S. § 15A-534.1, the magistrate must set conditions of pretrial release pursuant to G.S. § 15A-511.

In most cases, our magistrates declare an alleged crime involving persons fitting the definition of domestic partners to be an act of domestic violence, and will not set bond even for

crimes not covered by the statute. As a result, these persons do not receive a bond hearing until they appear before a judge. While this is a violation of the statute, it appears the possible remedies are limited, because under *Gerstein v. Pugh*, 420 U.S. 103 (1975), the defendant must show prejudice if the delay in setting bond is less than 48 hours. However, it may be possible to argue the double jeopardy issues in such cases in light of *State v. Thompson*, 349 N.C. 483 (1998) and *State v. Mallette*, 350 N.C. 52 (1999). See attached *Thompson* motion.

In *Thompson*, our Supreme Court held that a person charged with an act of domestic violence must be brought before the first available district court judge to have bond set. *State v. Thompson*, 349 N.C. 483 (1998), *State v. Mallette*, 350 N.C. 52 (1999). We have used *Thompson* to argue that holding any one beyond this time constitutes double jeopardy and requires dismissal of the charges. See attached motion. Under *Gerstein v. Pugh*, 420 U.S. 103 (1975), defendant has the burden of proof to show prejudice when bond not set within first 48 hours, while State has the burden to show no prejudice if person held more than 48 hours before bond is set.

Based upon our own *Thompson* motions, the defendant must show either (1) defendant was not brought over at the time required on magistrate's order, (2) defendant was listed as failing to appear in court when he was actually in custody, and his bond was raised or revoked or (3) bond was not properly entered into documents available at the jail so that a bondsman could post bond. To prove this, you must get copies of defendant's jail records as soon as possible, and get information as to his appearance before a magistrate and judge to confirm the timing of events.

The procedure is generally to get the client over as quickly as possible for a bond hearing, and to have counsel appointed if necessary. The *Thompson* motion is addressed at trial as a double jeopardy issue. While pretrial motions are not required in district court, we generally serve one so that the State will not seek continuance to get witnesses, such as sheriff deputies, clerks, etc. to testify that the defendant was given a proper hearing and procedure was followed.

*Thompson* suggests that any time someone is held in excess of 48 hours, the remedy is dismissal. I argue the rationale behind this is that a judge could impose a probationary sentence without any jail time upon a finding of guilt, so spending additional time in jail amounts to punishment. However, our courts have not gone this far. Instead, the defendant must also show prejudice. Courts have interpreted *Thompson* to say there is *per se* prejudice if the defendant is held beyond the time a judge was available to set bond ( a holding more liberal than *Gerstein*). The defendant must show that more likely than not he would have been able to make bond had it been set in a timely matter. This can be shown if defendant makes the bond that is set, is not being held on other charges, or had a job at the time of arrest (even if he lost it due to continued incarceration - this is also the prejudice discussed in *Gerstein*).

The State has raised various issues at *Thompson* hearings. These include attempts to shift burden and claim defense lawyer had obligation to get defendant before judge if a mistake was made. This can be countered with the argument that appointment of counsel does not occur until defendant appears before the judge. The State may also contend that the error was clerical or ministerial in nature, and therefore does not warrant a result as drastic as dismissal. However, the Court in *Thompson* stated otherwise. (see attached motion). Finally, the State may claim the error is harmless. This will usually work if defendant is unable to make bond and still in jail at the time of trial.

*Thompson* motions may be useful in other cases where an individual is held in custody without a timely hearing. For example, some probationers are not afforded a probation violation or

probable cause hearing within the seven working days required under G.S. § 15A-1345(c). To date, most judges have dismissed such cases without prejudice, so the motion is useful only if the period of probation has passed and additional violations cannot be brought against the probationer.

### *C. FIRST APPEARANCE*

When a defendant is arrested without a warrant and held upon a finding of probable cause by a magistrate or is arrested with a warrant, he is entitled to an initial appearance before a district court judge if he has not been released on bail. G.S. § 15A-601. This appearance must be within 96 hours of arrest or the next available court date, whichever is first. G.S. § 15A-601(e). At the first appearance the judge must review the sufficiency of the charges in a non-adversarial proceeding. G.S. § 15A-604(a); *State v. Detter*, 298 N.C. 604 (1979). The judge also must determine whether the person should be appointed counsel, and determine or review the defendant's eligibility for pretrial release. G.S. §§ 15A-603, 15A-605. The court also must set the trial date of matters within the original jurisdiction of the district court. G.S. § 15A-604(b)(4).

A defendant who has made bond or who received a summons also has the right to a first appearance before a district court judge. G.S. § 15A-601. At this hearing the judge must assure the defendant's right to counsel, and appoint him counsel if he desires an attorney and cannot afford one. G.S. § 15A-603. In Mecklenburg County, persons who are not in jail generally do not appear before a judge, but before a magistrate for their first appearance. The magistrate may not inform the defendant of his right to counsel, because a videotape is used to inform a large group of persons of the first appearance process, and the procedure is basically a cattle call for setting the next court date and taking pleas for traffic offenses. In several cases, domestic violence defendants have waived counsel when they appeared before the magistrate because they did not understand the severity of the charge. In some cases the district attorney has brought this to the attention of the public defender. Even so, we should be on the lookout for such cases, and work to change the handling of such cases.

## IV. DISCOVERY

There is no common law right to pretrial discovery in district court. *State v. Tatum*, 291 N.C. 73 (1976). Nor does statutory discovery apply to district court cases. G.S. § 15A-901 *et seq.* However, the court has inherent authority to order pretrial discovery in the interests of justice, *State v. Hardy*, 293 N.C. 105 (1977); *State v. Warren*, 347 N.C. 309 (1997), unless a statute prohibits discovery of the material sought. *See, e.g.*, G.S. § 15A-904 (protecting the work product of the district attorney).

There is a constitutional right to discovery of some material. *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecutor must disclose evidence that is both favorable to the defendant and material to the issue of guilt or punishment. The information must be admissible or lead to admissible evidence. *State v. Potts*, 334 N.C. 575 (1993). Material evidence is that which has apparent exculpatory value and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means. *California v. Trombetta*, 467 U.S. 479 (1984).

The State must turn over any evidence in the possession, custody or control of the prosecutor, including law enforcement. *State v. Pigott*, 320 N.C. 96 (1987). The good faith conduct of the prosecutor is irrelevant. *Kyles v. Whitley*, 514 U.S. 419 (1995). The prosecutor has imputed knowledge of all law enforcement material. *State v. Smith*, 337 N.C. 658 (1994).

Examples of *Brady* material include evidence that may be used to impeach the State's witnesses, *Giglio v. United States*, 405 U.S. 150 (1972); *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980), including prior inconsistent statements of witnesses that are exculpatory. *Kyles v. Whitley*, 514 U.S. 419 (1995); *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir., 1980), information showing witness bias, *United States v. Sutton*, 542 F.2d 1239 (4th Cir., 1976) (disclosure of threat to prosecute if witness did not testify), and the capacity of the witness, *State v. Williams*, 330 N.C. 711 (1992) (right to cross examine defendant about drug habit and mental problems). Prior convictions or misconduct of the witness are discoverable if they are significant to the case. *State v. Kilpatrick*, 343 N.C. 466 (1996). This may require *in camera* review. The argument is stronger if the victim's prior record indicates the defendant was in fear of the victim at the time of the alleged crime. Finally, evidence discrediting an investigation must be disclosed. *Kyles v. Whitley*, 514 U.S. 419 (1995).

The State must disclose *Brady* material in time for effective use of the information by the defendant at trial. *State v. Taylor*, 344 N.C. 31 (1996). In practice, this generally means prior to cross examination of the witness. However, Mecklenburg County has an open file policy in district court which allows the defendant to see the information before trial.

The Defendant need not make a request for discovery which he has a constitutional right to obtain. *Kyles v. Whitley*, 514 U.S. 419 (1995). However, the State need not disclose if defendant has knowledge of evidence **and has access to it**. *State v. Wise*, 326 N.C. 421 (1990). For example, an offence report may be obtainable by request, but the victim's or defendant's statements usually are not, making them "unobtainable" Material that could have been subpoenaed is obtainable. But if the subpoena is not complied with, it may be unobtainable. Statements made directly to prosecutor are probably work product, and not normally obtainable by subpoena. This creates special problems when we do not see our client until the day of trial.

The investigating or arresting officer's reports are work product and not discoverable in general, G.S. § 15A-904(a), but are discoverable if they contain *Brady* material. This will be true if

the police took a statement for the victim that has been signed by the victim. Even if the report is not subject to discovery, the defense can see it pursuant to G.S. § 8C-1 Rule 612 if the officer used it to refresh recollection before or at trial. If there some question as to whether material falls under *Brady*, the defendant may request *in camera* review by judge. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *State v. Kelly*, 118 N.C. App. 589 (1995).

The most useful *Brady* material is generally the statements the victim or defendant made to the police, and any affidavit the victim made to the magistrate when swearing out a warrant. The latter may also have notes written on it by the magistrate indicating responses made to questions. The person seeking the warrant is under oath, and this can be pointed out if there are any inconsistencies between what was said to the magistrate and what was testified to at trial.

In addition to formal discovery, informal discovery can be obtained either before or during trial in district court. One form of discovery is to talk to the prosecuting witness. While the victim does not have to talk to the defense attorney, and cannot be compelled to do so, *State v. Phillips*, 328 N.C. 1, 399 S.E.2d 293 (1991), the prosecutor cannot interfere with the defense attorney talking to witnesses. *State v. Pinch*, 306 N.C. 1 (1983).

Because we often see our clients for the first time at trial, the district court trial itself is often a form of discovery in preparation for a trial *de novo* in superior court. Our Supreme Court has essentially characterized district court trials as a guarantee of speedy trial while allowing the defendant free discovery. *State v. Brooks*, 287 N.C. 392 (1975).

If the State intends to use hearsay statements admissible pursuant to G.S. §§ 8C-1 Rules 805 (25) or 804(b)(5), notice must be given to the opposing party. *State v. Smith*, 315 N.C. 76 (1985); *State v. Triplett*, 316 N.C. 1 (1986). No exception to this notice requirement exists for criminal trials in district court. If the State provides such notice, it also constitutes a form of discovery as to the existence of such evidence.

There are several things to look for in discovery. First, look for the time the complaint was made versus time of alleged incident. Also look at the time the victim made statements to police or went to magistrate as opposed to when the incident supposedly occurred, as this is useful for attacking admissibility of hearsay evidence under the excited utterance exception. Second, did the victim ever call the police or district attorney and recant. Third, did the victim make subsequent statement to police. Fourth, did more than one police officer make a report concerning the incident. Fifth, did other persons or agencies participate in investigation. Access to such information depends on extent of agencies involvement in the investigation. See *State v. Crews*, 296 N.C. 607 (1979) (materials in possession of mental health and social services not discoverable because prosecutor denied access and had no power to obtain information); but see G.S. § 7S-548 (social services departments must provide child abuse reports to prosecutor); *State v. Morrell*, 108 N.C. App. 465 (1993) (social worker representing abused child acts as law enforcement agent). If a domestic violence service provides information to the prosecutor or performs an investigation at request of prosecutor, they are arguably working at the request of the prosecutor, and such information should also be subject to discovery.

The remedies for failure to disclose discovery material are contained in G.S. § 15A-910. The sanction will depend upon whether the discovery is covered by *Brady* or by statute. If constitutional discovery is at issue, sanctions may be imposed if the evidence was favorable to the defendant and material to the outcome of the case, meaning that there is a reasonable probability that the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 97 (1976).

If the district attorney knowingly uses testimony the State knew or should have know is false, *Giglio v. United States*, 405 U.S. 150, (1972); *Agurs v. United States*, 427 U.S. 97 (1976), the result must be reversed if there is a reasonable likelihood that such statements would have resulted in a different verdict. *United States v. Bagley*, 473 U.S. 667 (1985). These sanctions normally apply on post conviction review of such evidence. However, if it appears during trial that such evidence may exist and has not been turned over, the court should be reminded that continuation with the trial without imposing a sanction could subject the trial court to reversal.

The actual sanctions that can be imposed include dismissal under G.S. § 15A-910(3a) for flagrant violation of defendant's constitutional rights. This can be made at any time, and I have successfully raised it during the trial when cross examination revealed the officer failed to give notes of an interview with the defendant to the district attorney and did not bring the notes to court. Second, the court may bar the State from introducing evidence not disclosed. G.S. § 15A-910(3). Third, the court may grant a motion to continue when the defense needs additional time to review discovery provided in court or to rebut surprise evidence. G.S. § 15A-903 (2). Finally, the court may declare a mistrial. G.S. § 15A-903(a). Mistrial is governed by G.S. § 15A-1061 *et seq.* This can be done *ex meru moto* or on motion by defendant when a defect in the proceedings results in substantial and irreparable prejudice to defendant's case. Failure to exclude certain evidence may amount to substantial prejudice when the trial is in front of a judge, requiring a mistrial. The judge must be written findings of fact to support a mistrial.

The district attorney quite often takes personal offense when defendant claims material has not been disclosed. However, disclosure is required by N.C. REVISED RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (prosecutor has duty to make timely disclosure of all evidence that tends to negate guilt or mitigate offense or sentence). It is important to point out that the complaint is not against the district attorney, but against the persons who had an obligation to turn items over to the district attorney. Further, the sanction is not for misconduct by the district attorney in most cases, but to assure that the criminal defendant's due process rights are protected.

## V. MOTIONS PRACTICE IN DISTRICT COURT

### A. MOTIONS PRACTICE IN GENERAL

Written motions are not required in district court, although written motions practice does apply if a case is appealed to superior court. G.S. § 15A-953. Written motions may be filed with the consent of the State and the trial judge. We generally file written *Thompson* motions because of the complexity of the issues involved. Our Chief District Court Judge recently ordered written motions be submitted before trial for all such cases, but we believe this violates G.S. § 15A-953 (no written motions required in district court), G.S. § 15A-954(c) (motions to dismiss for grounds such as double jeopardy may be raised at any time) and G.S. § 15A-973 (motions to suppress evidence in district court should ordinarily be made during the course of the trial).

While pretrial motions are not required, you may use motions *in limine* for hearings to exclude evidence on constitutional or non-constitutional grounds. G.S. § 15A-973; *State v. Summers*, 92 N.C. App. 453 (1988). This can be a means to determine the admissibility of hearsay evidence before trial. The advantage to using an *in limine* motion as opposed to a *voir dire* proceeding will depend on the individual case.

The rules of evidence do not apply at *voir dire* or *in limine* proceedings. G.S. § 8C-1 Rules 104(a) and 1101(b)(1). In addition, the defendant's testifying at these hearings does not subject him to cross examination on other issues related to the case. G.S. § 8C-1 Rule 104(d). Finally, presentation of evidence at such hearings does not cost defendant his substantive right of last argument if he presents no evidence. N.C. Superior and District Court Rule 10; *State v. Hall*, 57 N.C. App. 561 (1982) (defendant loses the right to last argument when substantive evidence is offered and is viewed by the factfinder that illustrates, corroborates or impeaches the testimony of the witness; showing an item to the witness to refresh his recollection is not tantamount to offering the item into evidence).

### B. PROBABLE CAUSE FOR WARRANTLESS ARREST

For misdemeanors, the power of law enforcement to make a warrantless arrest for crimes not committed in their presence is limited. G.S. § 15A-401(b). Failure to comply with this statute constitutes illegal arrest. *State v. Moore*, 275 N.C. 141 (1969). A person has the right to resist unlawful arrest, *State v. Williams*, 32 N.C.App. 204 (1977), but a mistaken belief that probable cause exists will excuse arrest. *State v. McNinch*, 90 N.C. 695 (1884). An unlawful arrest does not discharge defendant from criminal liability except that arising from the illegal arrest, *State v. Jones*, 17 N.C.App. 54 (1972), and will not lead to exclusion of evidence obtained as a result of the arrest at trial if the arrest was constitutional but illegal. *State v. Finch*, 293 N.C. 132 (1977).

A warrantless arrest is valid only if the information would have been sufficient to have resulted in issuance of warrant if submitted to magistrate. *State v. Phillips*, 300 N.C. 678 (1980). Probable cause must be based upon the facts known to officer at time arrest was effected. *State v. Thompson*, 313 N.C. 157 (1985). The information must be reasonably trustworthy information, *State v. Matthews*, 40 N.C. App. 41 (1979), and flight is strong indicia of mens rea, *State v. Williams*, 32 N.C. App. 204 (1977). However, domestic violence courses usually teach the

perpetrator to leave to avoid a violent confrontation.

To effect a legal warrantless arrest for a misdemeanor, the officer must have probable cause to believe the suspect has done one of the following with respect to possible acts of domestic violence. First, that the defendant has committed a misdemeanor and will not be apprehended unless arrested immediately, or poses a danger to self or others. Second, that the defendant has committed domestic criminal trespass, G.S. § 14-134.3, regardless of his relationship to the victim. G.S. § 15A-401(b)(2)c. Third, the defendant has committed assault, G.S. § 14-33(a), assault with a deadly weapon, G.S. § 14-33(c)(1), assault on a female G.S. § 14-33(c)(2) or assault by pointing a gun, G.S. § 14-34, against a person with which the defendant has a personal relationship as defined by G.S. § 50B-1(b), which includes current or former spouse, persons living together or who have lived together, who are related as parent and child, who have a child in common, or are persons of the opposite sex in or having been in a dating relationship. G.S. § 15A-401(b)(2)d. Fourth, the defendant has committed the crime of violating a domestic violent protective order, G.S. § 50B-4.1(a). G.S. § 15A-401(b)(2)e. Under G.S. § 50B-4.1(b), when an officer establishes probable cause that a valid protective order has been violated, arrest is mandatory in cases where the person returns to the residence in violation of the order or threatens abuses, follows, harasses at home or work, or otherwise interferes with the other party.

A warrantless arrest is not allowed even in cases of domestic violence for communicating threats, trespass, injury to personal or real property, etc., unless such conduct is in violation of a 50B order. Nor is the arrest allowed when a family relationship is not established, such as casual dating, employee-employer, or tenant-landlord relationships.

If a warrantless arrest generally has no effect on the trial, then why worry about it? Because if you can establish that the officer did not act reasonably in relying on the information provided by the alleged victim, then probable cause to make the arrest can be attacked, possibly avoiding the need for trial. This is especially important when the victim is not present to corroborate what the officer says, or when the witness is present and denies what the officer alleges he was told at the by the victim at the time of the arrest.

During *voir dire* examination of the arresting officer, you can argue the officer had access to criminal records, and thus knew or should have known whether the alleged victim previously brought charges that were voluntarily dismissed, suggesting she failed to appear in court, or whether the alleged victim is currently or has previously been a defendant in a domestic violence case involving the defendant, suggesting motive to fabricate the assault. The officer's report may contain other information establishing the absence of probable cause, such as recantation by the alleged victim or evidence of motive for fabrication.

In making such an attack on probable cause to arrest, a distinction must be made between what the officer must determine and what the magistrate must determine. The officer must act on information known or reasonably available to him, and must disclose relevant information to the magistrate. The magistrate on the other hand must make his determination from the information presented to him. He is not required to look behind the affidavits or sworn statements made to him.

### C. SEQUESTRATION

Sequestration is allowed under G.S. § 8C-1 Rule 615 and G.S. § 15A-1225 at the court's discretion. Judge Edmunds recently argued that because the testimony of witnesses who hear each other testify often converges, and because the commentary to G.S. § 8C-1 Rule 615 indicated the practice should be to sequester witnesses unless there exists some reason not to do so, the practice should be to sequester. *State v. Bishop*, 133 N.C.App. 210 (1999) (Edmunds, J., concurring). Some judges believe the Crime Victim's Rights Act, G.S. § 15A-830 *et seq.*, gives victims the right to be present during the proceeding. First, only those persons defined as victims within the meaning of G.S. § 15A-830 (a)(7) are covered by the Act. This applies in misdemeanors only for persons who have a personal relationship as defined in G.S. § 50B-1, and then only for the crimes of assault, (G.S. § 14-33 and G.S. § 14-34), domestic criminal trespass (G.S. § 14-134.3) and stalking (G.S. § 14-277.3). Harassing phone calls, injury to personal or real property, trespass, breaking and entering, communicating threats and violating a domestic violence protective order are not covered by this act. Second, while G.S. § 15A-832(e) does require the court to make every effort to permit the attendance of the victim to the fullest extent possible, the section states that the participation must not interfere with the defendant's right to a fair trial.

Usually when the defendant seeks sequestration of the State's witnesses, the State will seek reciprocal sequestration. The defendant always has the right to be present, and courts find the presence of the lead the investigating officer is usually needed for the interest of justice. G.S. § 8C-1 Rule 615; *State v. Jones*, 337 N.C. 198 (1994).

Sequestration can be a powerful tool. In a case involving stalking and violating a 50B order, I used sequestration to obtain different stories from the ex-wife and her daughter who was present when a taxi cab belonging to the company for which my client worked came into the apartment complex where the victim and her daughter lived.

### D. RECORDATION

Unlike civil proceedings in district court or any proceeding in superior court, criminal proceedings in district court are not on the record. This is because the defendant is entitled to trial *de novo* on the record in superior court and a record need not be preserved for appellate review. *See State v. Brooks*, 287 N.C. 392 (1975).

There are cases where a record is useful, especially if collateral proceedings such as child custody are pending or anticipated. If the defendant is found not guilty in district court, then no record would ever be made of the proceeding. The defendant can request the proceedings be recorded, but this probably would not be granted the day of trial, because a reporter probably would not be available.

In these cases, defendant could request to record the proceedings to preserve the record. The tape presents evidentiary problems for authentication and chain of custody. However, if the tape can be sealed the same as any other evidence. This does prevent you from listening to the tape. At any subsequent proceeding, the tape can be used as a prior inconsistent statement, for impeachment, or to show that the client's testimony is not a recent fabrication. Further, because electronic recording is allowed for civil proceedings in district court, a transcript arguable possibly could be made from the recording for future use. *Pollock v. Parnell*, 126 N.C.App. 358 (1997).

## VI. TRIAL

Many domestic violence cases go to trial, although not always because there is a question of guilt or innocence. Many clients see trial as a chance to present their side of the story, and insist on trial regardless of their chance of winning. This can create special problems when the client insists on testifying against advise of counsel. As with any case, a client will often make the State's case when he testifies. I have had several cases where the State has presented sufficient evidence to survive a motion to dismiss at the close of the State's evidence, but not enough to support a finding of guilt beyond a reasonable doubt, only to have my client hand the State such evidence during his own testimony. In one case, the victim gave contradictory testimony at trial, claiming that the assault resulted in blood being found in the living room. There was no evidence of bleeding in her affidavit to the magistrate. I put my client on the stand and asked him if he saw any blood in the living room. He said no. Before I could ask the next question, he said all the blood was in the bathroom.

Trials involving domestic violence often lack physical evidence or disinterested witnesses, and so turn to a large extent on the credibility of witnesses. As a result, such trials tend to be more contentious than trials not involving domestic violence.

### A. IMPEACHMENT AND REHABILITATION

Impeachment is one of the most powerful tools in domestic violence cases. However, it often relies on good discovery and not objecting when the prosecuting witness testifies to evidence that is not probative when the witness is making statements inconsistent with those previously made.

Any one can impeach a witness, including the person calling the witness. G.S. § 8C-1, Rule 607. A hearsay declarant may be attacked in the same manner as any other witness. G.S. § 8C-1, Rule 806. The person impeaching must have a good faith basis for impeachment, N.C. Rules Prof. Conduct 7.6(C)(1). Extrinsic evidence cannot be used to impeach witness on a collateral matter when the purpose is to contradict unfavorable answers. *State v. Jerrels*, 98 N.C.App. 318 (1992). Nor can the examiner use the inconsistent statements of one witness to impeach another. *Lemly v. Ellis*, 143 N.C. 200 (1906).

Impeachment can be with any evidence tending to discount the credibility of a witness by showing defect in memory, perception or veracity. *State v. Looney*, 294 N.C. 1 (1978). This can be shown with prior inconsistent statements or lack of statements or by proof of conduct.

### 1. BIAS OR PREJUDICE

The bias, prejudice, interest, or corrupt motive of a witness is never collateral, and may always be proven with extrinsic evidence. *State v. Cutshall*, 278 N.C. 334 (1971); *State v. Hart*, 239 N.C. 709 (1954). However, once impeached, the witness is entitled to explain bias or interest on redirect. *State v. Austin*, 27 N.C.App. 395 (1976). The criminal defendant has a constitutional right under the Confrontation Clause to impeach a witness on cross examination with evidence revealing a motive to fabricate testimony. *Olden v. Kentucky*, 488 U.S. 227 (1988).

Domestic violence cases contain numerous motives for fabrication. The alleged victim may use the threat of prosecuting charges as a means of revenge for a spurned lover, someone who wants to end the relationship, etc. The prosecuting witness also may use the period of detention of the defendant that accompanies the arrest of a person on domestic violence charges for personal gain, such as to remove items from the home or to take the children and flee. An allegation or finding of domestic violence may be used as a pretext to obtain a domestic violence protective order to obtain temporary possession of the house, custody of the children, etc. The alleged victim also may use a charge as a basis to gain an advantage in domestic civil proceedings, such as divorce and child custody. These are discussed below in the section on the consequences of a finding of guilt. A foreign national may use an allegation of domestic violence to continue to stay in this country. 8 C.F.R. § 240.58 *et seq.* Finally, a motive to bring false charges could be the alleged victim's attempt to have a warrant against her for domestic violence involving the current defendant dismissed, or as grounds to have his probation in another proceeding revoked. G.S. § 15A-1368.4(b).

## 2. PRIOR INCONSISTENT STATEMENTS

A witness can be impeached with a prior inconsistent statement if she makes a contradictory statement at trial. At the time of cross examination, you need not show the witness the prior inconsistent statement, but you must disclose entire statement to opposing counsel on request, G.S. § 8C-1 Rule 613 (abolishes common law rule to the contrary). A prior inconsistent statement is not substantive evidence, and so cannot be used to establish a fact. *State v. Bartlett*, 77 N.C.App. 747 (1985). Because a witness for the State is not a party opponent, even statements under oath by a prosecuting witness are not admissible for the truth of the matter asserted as exceptions to the hearsay rule under G.S. § 8C-1 Rule 801(d).

Impeachment can be done using extrinsic evidence if the issue is central to the case. If it is a collateral matter, the use of extrinsic evidence is within the discretion of the court, and you are usually stuck with the answer. *State v. Williams*, 322 N.C. 452 (1988) (may not impeach on a collateral matter using extrinsic evidence); *State v. Jerrels*, 98 N.C. App. 318 (1990).

One source of inconsistent statements is the statement made to the magistrate or police. Generally, the allegations for and content of a warrant are inadmissible as hearsay, because they are based upon information provided to the police. *State v. Nobles*, 350 N.C. 483 (1999). However, when the warrant is obtained based upon the direct affidavit of the alleged victim, there is no hearsay issue if the victim is in court.

In one case I tried, the witness got up and gave graphic testimony in as to how my client was at her house earlier that evening and ran when some friends came by. She then heard some noises later that night, and got a call from her sister saying that she saw my client throw a brick through the window of the victim's apartment. Both went down to the magistrate and made statements under oath. The problem was, the story they told the magistrate was completely different. They were not sisters. They were not alone, as each had a man with them that night. The second witness told the magistrate she did not see who threw the brick. And there was no police report of any damage to the property. Much of the testimony the witnesses gave was irrelevant, and probably would not have been admitted had I objected. However, I wanted these two witnesses, who had been sequestered, to talk as much as possible so I could show that their stories not only contradicted each other, but what each had previously told the police and the magistrate under oath.

Impeachment with hearsay evidence of then existing state of mind is admissible for the truth of the matter asserted to explain future conduct, regardless of the availability of the witness. G.S. § 8C-1 Rule 803(3); *State v. McElrath*, 322 N.C. 1 (1988) (rule allows admission of hearsay statement of then existing intent to engage in a future act). Thus, a witness could testify that the victim said to her shortly before the alleged assault “if he tries to break up with me I will charge him with assault.”

Impeachment by silence or failure to speak when one would reasonably have spoken may be used. I have used this to impeach police officers and prosecuting witnesses who give far more graphic description of event at trial that was given in a report given to or prepared by the police, or in affidavit prepared for the magistrate. The foundation is laid by establishing the standard procedure to prepare a police report, that the officer is trained to write such reports, that the officer must make accurate records of each arrest, and that the report is kept by the police. The officer can then be shown the report and asked to point to the statement in report that supports what he said on the stand. This also amounts to using the report to refresh the officer’s recollection on impeachment. Remember, you may use anyone’s prior statements. See *State v. Hall*, 57 N.C.App. 561 (1982) (physical object used to refresh recollection). Impeachment by refreshing recollection may be used only when witness forgets. However, you can impeach with the prior inconsistent statement if he remembers incorrectly. Because most judges will allow the witness to refresh his memory to see if he remembers incorrectly, the distinction is generally not important. However, it is very dramatic to approach the witness, have them read a statement they admit they prepared, and then state to the jury it contradicts the testimony they just gave under oath in court.

Impeachment by conduct is allowed even if the issue is not raised by the State, providing it is relevant. See G.S. § 8C-1 Rule 611(b). Extrinsic evidence is allowed even if it is not admissible as to the character of the witness under Rule 608(b), because the evidence goes to the credibility, not the character of the witness. *State v. Williams*, 330 N.C. 711 (1992). Examples of impeachment by conduct would be evidence the victim continues to live with the defendant, which is inconsistent with her being in fear of the defendant. Her failure to immediately report an incident without a good explanation is inconsistent with the occurrence of incidence. The victim bringing charges on prior occasions and not appearing to prosecute is suggestive of the litigious nature of the victim as opposed to severity of the conduct alleged. See *Thompson v. James*, 80 N.C.App. 535 (1986) (litigious nature is suggestive that alleged wrong is not as severe as claimed). Some courts will disallow such testimony because the charges could be dismissed for a variety of reasons. However, if you can get the court documents to show that the prosecuting witness did not appear in the previous case, this could be extrinsic evidence to impeach. Further, if your client takes the stand, he can testify as to whether the prosecuting witness appeared in court in prior proceedings.

If the prosecuting witness denies ever being the aggressor, showing she was the aggressor in past cases would go to both motive to bring false charges in the present case and to attack her credibility. See *State v. Syriani*, 333 N.C. 350(1993) (proper to cross examine defendant concerning previous acts of violence towards murder victim when defendant denied any violent conduct; questions establish credibility). Prior assaultive acts by the prosecuting witness against the defendant can be used to establish the victim’s violent character, which is relevant for the claim of self-defense, *State v. Shoemaker*, 80 N.C. App. 95 (1986). Even if the defendant did not know of the violent conduct, it is relevant to show it was more likely victim was the aggressor. *State v. Watson*, 338 N.C. 168 (1994).

### 3. CHARACTER FOR TRUTHFULNESS AND PERCEPTION

The witness' character for truthfulness can be attacked by reputation or opinion. G.S. § 8C-1 Rule 608(a). However, evidence of truthful character can be introduced only after truthfulness has been attacked by opinion or reputation or otherwise. Prior convictions generally go only to credibility, not substantive evidence of guilt. G.S. § 8C-1 Rule 609, *State v. Dalton*, 96 N.C.App. 65 (1989).

A favorite tactic of the State is to use your client's record to show prior acts of domestic violence. Admission of the witness' prior record does not open the door to examination about details of prior convictions. *State v. Ross*, 329 N.C. 108 (1991); *State v. Lynch*, 334 N.C. 402 (1993). The rule says that impeachment cannot be made with convictions more than ten years ago, unless notice given. There is no exception for district court practice. However, in a domestic violence case any conviction for domestic violence during the marriage is admissible. *State v. Lynch*, 327 N.C. 210 (1990) (applied to prior acts by defendant against victim in capitol murder case). The same rule would arguably apply to non-marital relationship, providing they involved the victim.

Drug or alcohol use may affect capacity, and thus goes to ability of witness to testify accurately at trial. *State v. Williams*, 330 N.C. 711 (1992). But be careful when you open this door. If your client was also intoxicated, the factfinder may not believe what he says happened either.

### 4. REHABILITATION

When your client has taken a beating on the stand, make sure to rehabilitate him when possible. Ways to do this include the rule of completeness, which requires that when part of a writing or recording is introduced, the adverse party may require production of the recorded statement when fairness so requires. G.S. § 8C-1 Rule 106. You do not have to wait until redirect to do this, but can require it be done at the time the statement is introduced. G.S. § 8C-1 Rule 106, *State v. Thompson*, 332 N.C. 204 (1992).

You can also use prior consistent statements to rehabilitate your witness. While North Carolina has no equivalent to F.R.E. 801(d)(1)(B) for admissibility of prior consistent statements to rebut allegations of recent fabrication, the best way to do this is simply introduce the prior statement for corroborative purposes. The beauty of this approach is you do not have to wait for the witness to be impeached before introducing the statement. *State v. Ramey*, 318 N.C. 457 (1986) Any prior statement tending to give credibility to testimony at trial, can be used. *State v. Ballew*, 113 N.C.App. 674 (1994) (evidence of other sexual assaults beyond those with which defendant charged admissible as corroborative evidence tending to strengthen trial testimony of victims).

Remember that statements are inadmissible as being in violation of defendant's Federal Constitutional rights to counsel or Miranda rights may be introduced for impeachment purposes, *Michigan v. Harvey*, 494 U.S. 344 (1990); *Harris v. New York*, 401 U.S. 222 (1977). However, the issue apparently has not been addressed under the North Carolina Constitution.

A final point on rehabilitation is that while cross is wide open under G.S. § 8C-1 Rule 611, redirect is generally limited to issues raised in direct and cross examination, but may go beyond this in the discretion of the court, *State v. Barton*, 335 N.C. 696 (1994).

## B. THE RECANTING WITNESS

A common problem the State faces is the recanting witness. When this happens, the State may still try to use the witness, hoping to introduce prior inconsistent statements by way of impeachment. Impeachment may not be used for the sole purpose to introduce evidence that is otherwise inadmissible, at least in a criminal trial. *State v. Hunt*, 323 N.C. 343 (1989) (cannot call witness knowing she will repudiate prior statement in order to have officer introduce inculpatory statements witness previously made to officer). The State may not call a witness for the sole purpose of impeachment to introduce otherwise inadmissible hearsay. *State v. Price*, 118 N.C.App. 212 (1995). Nor can the State call a witness who made a written statement admissible as recorded recollection under G.S. § 8C-1 Rule 803(5) to introduce the writing if witness later recanted evidence and testified she does not remember what happened. *State v. Hollingsworth*, 78 N.C. App. 578 (1985).

If you suspect the State is calling the witness for the sole purpose of introducing an inadmissible statement, such as calling a recanting witness to introduce a prior statement incriminating the defendant, you should address the issue with a motion *in limine* or *voir dire* examination during trial. See *State v. Bell*, 87 N.C.App. 626 (1987) (noting better practice is for trial court to make findings of facts and conclusions of law with respect to whether State has reason to suspect a need for impeachment exists).

The State may claim genuine surprise as the reason for impeaching the witness. If this happens, ask for an *in camera* review of the prosecutor's files to determine if the State was aware the witness would recant. Any recantation is *Brady* material and subject to discovery. Establish recanting testimony with motion *in limine* or *voir dire*.

When the recanting witness not present at trial, there are problems, because hearsay probably will have to be used to establish the recantation. Remember, the rules of evidence do apply to motions *in limine* or on *voir dire*, so use the fact that the witness was subpoenaed but did not appear as evidence the initial statement is not reliable. If the witness was not subpoenaed, argue that the State's failure to do so should infer that the testimony would have been unfavorable to the State, especially if the witness is also the alleged victim. Your client also may be able to testify at the *voir dire* or *in limine* hearing as to where the witness is, whether she knew of the hearing, whether she ever called the district attorney and asked that the charges be dropped, and whether the witness and defendant continue to cohabitate. All of these are factors that weigh against the admissibility of the prior statement. If inculpatory statement are allowed in, the hearsay declarant can be impeached with the recantation (are you aware that she recanted?). G.S. § 8C-1 Rule 806.

If the witness flip flops, you can ask her if she gave you a different story when you interviewed her just before testifying. However, if she denies doing this, you are stuck with the answer unless you have some witness to call to verify what she said out of court. Such testimony would be hearsay, but is not being introduced for the truth of the matter asserted. Generally, if the witness has changed her testimony from favorable to unfavorable testimony, the judge will probably allow the testimony and permit the defendant to impeach the witness with the prior favorable inconsistent statement. If the witness has changed testimony from unfavorable to favorable, the judge may prevent the state from using the witness to introduce the unfavorable statement.

## C. THE ABSENT VICTIM

A worst case scenario in domestic violence cases is the absent witness. The State refuses to dismiss because it is an act of domestic violence, and you are left with cross examining a police officer who not only is used to testifying, but knows the magic words to get in testimony under hearsay exceptions.

The victim's absence can be used to impeach the credibility of the hearsay declarant, especially in closing arguments at a jury trial. The State may try to argue that it shows fear by the victim of the defendant, but remind the jury that court is where the victim has the opportunity to do something about a genuine fear. While this usually cannot be brought out to a jury, the judge will usually learn if a victim has brought the charges instead of the police, and then not shown up in court.

In a criminal case, there must always be a showing of necessity and that the original statement is inherently trustworthy prior to admission of hearsay evidence. *State v. Gregory*, 78 N.C.App. 565 (1985). This should be done at a motion *in limine*, but in district court it can be done during trial. You can attack necessity by showing witness was not subpoenaed. This includes challenging whether a telephone call versus actual serving of subpoena is sufficient under G.S. § 1A-1 Rule 45 (Rule of Civil Procedure) to show that the witness has been subpoenaed and refuses to comply. If the prosecutor has had contact with the witness who is not present in court, this may constitute *Brady* material, and an *in camera* review even of the prosecutor's work product may be in order to determine if the victim subsequently recanted, giving rise to grounds to challenge the trustworthiness of the initial statement. Because of the right of confrontation in a criminal proceeding, the burden is on the State to show that reasonable efforts were used to obtain the witness when the hearsay evidence does not fall under a firmly rooted hearsay exception. *White v. Illinois*, 502 U.S. 346 (1992); *State v. Rogers*, 109 N.C.App. 491 (1993).

## 1. THE EXCITED UTTERANCE EXCEPTION

The State will usually attempt to get statements made to a police officer or third party admitted under the excited utterance exception. An excited utterance is admissible regardless of the declarant's availability pursuant to G.S. § 8-C1 Rule 803(2). This rule codifies the common law concerning such testimony. *State v. Wingard*, 317 N.C. 590 (1986). The Confrontation Clause does not require the proponent to show the declarant is unavailable before introducing the statement. *White v. Illinois*, 502 U.S. 346 (1992); *State v. Jolly*, 332 N.C. 351 (1992).

A threshold question is whether the proffered evidence is hearsay, and if so whether its admission is sought under the excited utterance exception. The statement is not hearsay if it is not admitted for the truth of the matter asserted, but for other purposes, such as corroboration or to prove other acts. *See, e.g., State v. Caddell*, 287 N.C. 266 (1975) (testimony as to injured victim's cries for help, a bystander's exclamation upon finding her, and the victim's father's words of comfort to the victim were not introduced for the truth of the matter asserted); *Southern Watch Supply Co. v. Regal Chrysler-Plymouth* 82 N.C.App. 21 (1986) (police report properly introduced for purpose of showing a report was made).

A statement may be used to refresh the memory of the witness, G.S. § 8-C1 Rule 612, or be introduced into evidence as a recorded recollection if the foundation is laid that (1) the statement is based upon personal knowledge, (2) the document was prepared at the time the event was fresh in

the memory of the declarant and (3) the declarant testifies that after reading the document he has no independent recollection of the events preserved in the writing. G.S. § 8-C1 Rule 803(5). In such cases, the document is read into evidence and not received as an exhibit. However, a past recollection recorded cannot be used to impeach a witness who has subsequently recanted her statement and later testified she does not remember what happened. *State v. Hollingsworth*, 78 N.C.App. 578 (1985).

To qualify as an excited utterance under Rule 803(3), “there must be (1) a sufficiently startling experience suspending reflective thought, and (2) a spontaneous reaction, not one resulting from reflection or fabrication.” *State v. Smith*, 315 N.C. 76, 86 (1985). The declaration also must concern the startling incident. *State v. Deck*, 285 N.C. 209 (1974). The declarant need not be a victim or defendant, but may be a mere observer of the event. *See, e.g., State v. Feaganes*, 272 N.C. 246 (1967); *State v. Markham*, 80 N.C.App. 322 (1986).

The preliminary question of admissibility of an excited utterance, as with any evidence, is a matter for the court. G.S. § 8C-1 Rule 104 (a). The rules of evidence do not apply when making this determination. G.S. § 8-C1 Rule 1101(b)(1). The defendant can testify as to the preliminary question without being subject to cross examination on other matters. G.S. § 8-C1 Rule 104(d). The admissibility of such testimony is based upon the preponderance of evidence, *United States v. Franco*, 874 F.2d 1136 (7th Cir. 1989), considering the totality of the circumstances surrounding the statement, and is reviewed on appeal under the abuse of discretion standard. *State v. Nance*, 219 N.C. 772 (1941); WIGMORE ON EVIDENCE, CHADBURN REVISION Vol 6 § 1750.

A *voir dire* should be conducted when evidence is proffered under this exception. In the event of an adverse ruling, the *voir dire* can be re-opened based upon subsequent testimony developed during a proceeding. *State v. Alston*, 293 N.C. 553 (1977); *State v. Branch*, 288 N.C. 514 (1975) (considering such factors as degree of evidence presented in first *voir dire* and whether new evidence was developed on cross examination as factors the trial court should consider when a request is made to re-open the *voir dire*).

The most important factor in determining the spontaneity of a statement is the time after the startling event the declaration was made. A police officer asking a victim within four minutes of a shooting who shot him is admissible as *res gestae*. *State v. Hamlette*, 302 N.C. 490 (1981). A statement made more than one hour after a crime was discovered could have been manufactured, and therefore is properly excluded. *State v. Fullwood*, 323 N.C. 371 (1988), *vacated on other grounds*, 494 U.S. 1022 (1989). On the other hand, when uncontradicted evidence indicated a person remained in an agitated state fifteen minutes after an incident, the statement was properly admitted as an excited utterance. *State v. Kerley*, 87 N.C.App. 240 (1987), *writ of supersedeas den. and disc. rev. den.*, 321 N.C. 476 (1988).

The relevant time frame is longer when children are the declarants, as they are likely to repress an incident, unlikely to report an incident to anyone except their mother, and inherently tend to produce declarations free from fabrication. *State v. Smith*, 315 N.C. 76 (1990). A statement made up to three days later may be considered an excited utterance in such cases. *State v. Rogers*, 109 N.C.App.491 *cert. denied*, 334 N.C. 625 (1993), 114 S.Ct. 1875 (1994). Even in the case of children, when the statement is made in response to questions posed a period of time after the startling event, the length of the interval is a major factor in determining the admissibility of the statement. *State v. Perkins*, 345 N.C. 254 (1997).

An exculpatory statement suggests lack of spontaneity. *State v. Vick*, 341 N.C. 569 (1995).

When such statements are made to the police more than one hour after the crime is alleged to have occurred, there is adequate time to reflect and therefore fabricate an answer. *State v. Fullwood*, 323 N.C. 371 (1988). In addition, statements of opinion are not admissible as excited utterances. *People v. Miron*, 258 Cal. Rptr 494 (Cal. App. 5th Dis. 1989).

Because the rules of evidence do not apply in the proceedings to determine admissibility of an excited utterance, the content of the statement itself may be introduced as evidence of the surprise. *State v. Braxton*, 344 N.C. 702 (1996) (co-defendant's statement "I didn't believe you would shoot him" shortly after getting into car and telling driver to leave indicative that declarant had observed a startling event).

While North Carolina cases have not directly addressed whether the excited utterance can be used to establish the principal act, *see, e.g., id.* (independent evidence established principal act), other jurisdictions require independent testimony to establish the principal act. *See, e.g., People v. Burton*, 445 N.W.2d 133 (MI 1989) (excited utterance not admissible when declarant later retracted qualifying statements made to police and refused to testify in court, and no other evidence of the principal act was presented, although such statements would have been admissible as corroborative evidence); *State v. Rowe*, 843 P.2d 714 (1992); *see generally*, NECESSITY IN CRIMINAL PROSECUTION OF INDEPENDENT EVIDENCE OF PRINCIPAL ACT TO ALLOW ADMISSION UNDER *RES GESTAE* OR EXCITED UTTERANCE EXCEPTION TO HEARSAY RULE, OF STATEMENTS MADE AT TIME OF, OR SUBSEQUENT TO, PRINCIPAL ACT, 38 A.L.R. 4th 1238. This can be important in domestic violence cases where the officer sees no evidence of physical injury.

Being a victim of or witness to a crime is sufficiently startling to qualify as an excited utterance. *See, e.g., State v. Yancy*, 291 N.C. 656 (1977). An individual's reaction to an arrest also is sufficiently startling to qualify as an excited utterance. *State v. Beaver*, 317 N.C. 643 (1986) (statements made by defendant's mother and defendant's response upon learning of his arrest considered excited utterances). However, a defendant's exculpatory response to his girlfriend's statement that she heard he had killed someone was not triggered by a sufficiently startling event to be admissible under this exception. *State v. Jackson*, 340 N.C. 301 (1995). And the mere questioning by a friend about possible wrongdoing several hours after an alleged crime is not itself a sufficiently startling event to invoke an excited utterance. *State v. Perkins*, 345 N.C. 254, *cert. den.*, 139 L.Ed.2d 64 (1997).

The excited utterance must not be made solely in response to questioning, and the degree of questioning is a factor to be weighed when evaluating admissibility of such statements. *State v. Rogers*, 109 N.C.App. 491 (1993). Likewise, a mere recounting of events to the interrogator is not by itself sufficient to establish that a statement is an excited utterance. *Id.* A general question, such as "what happened" does not *per se* negate the spontaneity of the statement. *State v. Derek*, 285 N.C. 209 (1980); *see also State v. Perkins*, 345 N.C. 254 (citing *State v. Johnson*, 294 N.C. 288 (1978), *State v. Cousin*, 291 N.C. 413 (1978)) (responses to general questions such as "who shot you" or "what happened" do not negate the spontaneity of the statement). Likewise, the posing of questions by a police officer does not automatically negate the spontaneity of the statement. *State v. Hamlette*, 302 N.C. 490 (1981); *see also State v. Cox*, 271 N.C. 579 (1967) (statements made to police immediately upon their arrival properly admitted). This continues the common law holding that such statements to the police did not preclude their admissibility, providing they were part of the *res gestae*. *Id.* However, answers to questions designed by the police to elicit specific answers are not admissible under this exception. *Faulkner v. State*, 65 S.W. 1093 (Tex. Cr. 1901).

Coercive questioning negates the finding of an excited utterance by robbing the declaration of its spontaneity. The coercive nature of the questioning is evaluated by the totality of the circumstances. However, such questions may be appropriate with a child who will not otherwise talk. Compare *State v. Bethune*, 578 A.2d 364 (NJ 1990) (coercive questioning of child does not destroy admissibility of excited utterance) with *State v. Hill*, 578 A.2d 370 (NJ 1990) (coercive questioning of adult destroyed spontaneity of excited utterance). In *Bethune*, the Court looked at the degree of coercion, the age of the declarant, the relationship of the declarant and the interrogator, the circumstances of the interrogation, and the type of questions (leading and specificity). In *Hill*, the Court also considered who initiated the discussion. The *Hill* Court noted that if the interrogator is an authority figure as opposed to a friend or counselor, it is more likely to be inadmissible. In *State v. Wallace*, 524 N.E.2d 466 (OH 1988), the Ohio Supreme Court held a declaration was inadmissible under this exception if (1) it was made in response to coercive or leading questions, (2) the questions were not of the type which would facilitate the declarant's expression of what is already the natural focus of her thoughts, or (3) if the questions would destroy the climate of the nervous excitement.

The fact that the victim is hysterical and crying suggests the statement is spontaneous. *State v. Cox*, 271 N.C. 579 (1967) Other factors considered are where the statement was made (at the scene) and the age of the victim (12 year old in this case). *Id.* The fact the victim is suffering from injuries resulting from the alleged acts is also a factor as to the spontaneity of the statement. *State v. Hamlette*, 302 N.C. 490 (1981).

When the officer calms the declarant down before asking questions, the utterance is no longer excited. *State v. Bargas*, 763 P.2d 470 (WA App. 1988). Likewise, when the statement is a narrative or is a written statement with additional details added later by the declarant, it is not spontaneous. *State v. Dixon*, 684 P.2d 725 (WA App. 1984).

The nature of the declaration is important as well. In *U.S. v. Iron Shell*, 633 F.2d 77, 85-6 (8th Cir. 1980), *cert. den.*, 450 U.S. 1001 (1981), the Court considered the time after the statement was made, the age of the declarant, the subject matter of the statement, the characteristics of the statement (short bursts or detailed narration), and the nature of the questioning - "what happened" as opposed to specific questions.

While the excited utterance exception is a firmly rooted exception to the rule excluding hearsay evidence, such testimony may nevertheless be of questionable validity in light of the totality of the circumstances. Our courts have articulated various factors to be considered when considering the reliability of hearsay testimony under the residual hearsay exceptions, G.S. §§ 8-C1 Rules 803 (24) and 804(b)(5). While the residual hearsay rules do not apply to an excited utterance, the factors nevertheless may be useful guides to attack the admissibility or credibility of such statements. When determining the admissibility of hearsay testimony under a residual hearsay exception, the trial court considers such factors as (1) the declarant's personal knowledge of the underlying event, (2) the declarant's motivation to speak the truth or not speak the truth, (3) whether the declarant has ever recanted the testimony, and (4) the practical availability of declarant for meaningful cross examination. *State v. Smith*, 315 N.C. 76 (1985). The race of the declarant cannot be considered in determining the trustworthiness of a statement. *State v. Rhome*, 120 N.C.App.278 (1995). Arguably, the gender of the declarant also cannot be considered when considering the trustworthiness of the statement. In cases referring to admissibility of hearsay when the declarant is not available, such factors as the relationship of the parties and the nature of the statement, and the reason for the declarant's unavailability should be considered in evaluating the admissibility of a

hearsay statement. *State v. Triplett*, 316 N.C. 1 (1986); *State v. Nichols*, 321 N.C. 616 (1988) (both referring to admissibility under G.S. § 8C-1 Rule 804(b)(5)).

When circumstances indicate one statement by a declarant was not an excited utterance, a subsequent statement by the declarant to the same person also will not be an excited utterance with respect to the same event. *State v. Sidberry* 337 N.C. 779 (1994).

Spontaneous statements made in response to an ongoing event are admissible as an exception to the hearsay rule under either the present-sense impression or the excited utterance exception as evidence of *res gestae*, or things done as part of the crime. Such statements must be contemporaneous with the event in question and be spontaneous. *Hargett v. Jefferson Pilot Life Ins. Co.*, 258 N.C. 10 (1962). The statement may be made by a witness or a participant. However the act itself must be admissible independently of the hearsay statement. *Staley v. Royal Pines Park, Inc.*, 202 N.C. 155 (1932). Even when the statement by the declarant is not admissible based upon relevancy as to *res gestae*, it may be admissible to attack the credibility of the declarant when it is in direct conflict with the declarant's statement at trial. *Hughes v. Anchor Enterprises, Inc.*, 245 N.C. 131 (1956).

Statements made during the crime, such as "Please don't kill her. She'll give you all of her money," are properly admitted as part of the *res gestae*. *State v. Covington*, 290 N.C. 313 (1976). Likewise, statements by bystanders telling an assailant to let the victim go are admissible as part of the *res gestae*. *State v. Goines*, 273 N.C. 509 (1968). Statements made by a victim immediately before a fight occurs are admissible if they tend to show the context under which fight occurred. *State v. Reid*, 335 N.C. 647 (1994).

Testimony concerning an excited utterances is subject to hearsay on hearsay, or double hearsay, analysis. Thus, while a statement by a five year old to her playmates concerning sexual abuse that occurred five days previously may qualify as an excited utterance, the repetition of the statement by the playmates to their mothers did not qualify as an excited utterance. *State v. Thomas*, 119 N.C.App. 708, *disc. rev. denied*, 342 N.C. 196 (1995).

When the trustworthiness of the excited utterance is in question, the proponent may introduce evidence such as the injuries inflicted upon the declarant to establish the mental state of the declarant. *State v. Ali*, 329 N.C. 394 (1991). For example, during *voir dire* examination, hearsay statements indicating a basis for the victim's fear of defendant, which is relevant to show the nature of the relationship between the victim and the defendant and the impact of the defendant's behavior on the victim's state of mind prior to the act in question, are admissible. *State v. Glenn*, 333 N.C. 296 (1988).

Even if the hearsay declaration is admitted, the weight given to the declaration may be attacked. Many of the same factors that can be used to attack the admissibility of the declaration may be used to attack the credibility of and weight given to such statements, such as where is the victim, and under what circumstances was the excited utterance memorialized.

## 2. THE MEDICAL TREATMENT EXCEPTION

On some occasions, the State may attempt to get statements made by victim in under G.S. § 8C-1 Rule 803 (4). Our Supreme Court has recently announced a two step test for such statements. *State v. Hinnant*, \_\_ N.C. \_\_ (2000). First, the statement must be made by the person with the understanding it will lead to medical diagnosis or treatment. Second, the statement must be

pertinent to the diagnosis or treatment. The Court reaffirmed that statements made to persons such as rape task force volunteers after the initial diagnosis and treatment are not pertinent to medical diagnosis or treatment. *State v. Smith*, 315 N.C. 76 (1985). Finally, the *Hinnant* decision noted that such statements may be admissible under the residual hearsay exception, but must meet the criteria for admissibility under these exceptions.

When such statements are admitted, the State may seek to have the identity of the assailant brought in as part of statements admissible under this exception. Identity is generally not relevant to treatment in cases involving adults, unlike child sexual abuse cases where the identity is relevant to treatment. *State v. Aguallo*, 318 N.C. 590 (1986) (identity of perpetrator determines counseling child rape victim receives). It is unclear whether such collateral evidence would be admissible in cases where the identity of the assailant is not germane to treatment. *See State v. Stafford*, 317 N.C. 568 (1986) (statements made to doctor in anticipation of trial to show victim suffered from rape trauma syndrome not admissible to show why victim delayed reporting the alleged rape, as no testimony was introduced to show the victim actually suffered from the syndrome); *State v. Gray*, 347 N.C. 143 (1998) (testimony of doctor who referred victim to treatment properly allowed to identify defendant as person identified who caused the injuries where testimony concerned ongoing pattern of violence).

### 3. ADMISSION OF HEARSAY UNDER OTHER EXCEPTIONS

When hearsay statements do not fall under the excited utterance or medical treatment exceptions, the State may try to obtain admission under the catchall exceptions. Common examples of such hearsay are statements made to a social worker, rape crisis counselor or domestic violence counselor.

Admission of hearsay evidence under the catchall exception that applies regardless of availability of the declarant under G.S. § 8C-1 Rule 803(24) requires the judge to make the following findings: (1) proper notice been given, (2) the hearsay is not specifically covered by another rule, (3) the statement is trustworthy, (4) statement the statement is material, (5) the statement is more probative on issue than other evidence that can be reasonably obtained, and (6) the interests of justice served by admission of the evidence. *State v. Smith*, 315 N.C. 76 (1985); *State v. Triplett*, 316 N.C. 1 (1986).

Admission of hearsay evidence under the catchall exception to G.S. § 8C-1 Rule 804(b)(5) require the court to consider include those factors listed in *Smith*, plus the reason for unavailability (being out of state or ill as opposed to invoking privilege). Other factors that must be considered include (1) declarant's personal knowledge of the underlying events, (2) declarant's motivation to speak the truth or otherwise, (3) whether declarant has ever recanted the statement, (4) practical availability of the declarant at trial for meaningful cross examination, (5) the nature and character of the statement, and (6) the relationship of the parties. *State v. Triplett*, 316 N.C. 1 (1986). Evidence that does not fall within a firmly rooted hearsay exception is inherently unreliable and inadmissible for Confrontation Clause purposes absent such showing. *State v. Swindler*, 339 N.C. 469 (1994). Other factors the courts have considered with respect to admissibility include (1) existence of corroborating evidence, (2) declarant's propensity for truthfulness, (3) declarant's personal

knowledge, (4) whether the statement was made under oath with penalty of perjury, and (5) practical unavailability of witness, *State v. McLaughlin*, 316 N.C. 175 (1986).

The use of such evidence requires notice. No exception to this notice requirement has been created for district court. Therefore, such evidence arguably cannot be introduced in district court proceedings if notice is not provided. However, the remedy is probably continuation, not dismissal.

#### D. PREJUDICIAL AND IRRELEVANT EVIDENCE

Certain evidence should be excluded as irrelevant, at least during the guilt-innocence phase of the proceeding. G.S. § 8C-1 Rule 402. Even in district court, the judge is the fact finder, and prejudicial information should not be presented to the fact finder. If too much prejudicial evidence is submitted, you should move for mistrial even if objections to the evidence are sustained.

Common types of irrelevant evidence the State attempts to introduce include the pregnancy of victim when it is not an element of crime and prior assaults by defendant against the victim when they are not relevant during the State's case in chief such as to show fear to establish an element of the crime charged (communicating threats, assault by show of force), or to show motive, intent, or the like. The State may try to get admission of evidence subject to conditional relevancy, however, the State should not present evidence during its case in chief in anticipation of rebutting defense evidence. *See* G.S. § 8C-1 Rule 104 (conditional relevancy) and G.S. § 8C-1 Rule 611 (mode and order of interrogation and presentation). For example, if the defendant does not testify and does not open the door to his conduct, the State cannot impeach the defendant through other witnesses using evidence of prior convictions, statements made in violation of defendant's constitutional rights, etc.

Remember that statements made during plea discussions are inadmissible. G.S. § 8C-1 Rule 410; G.S. § 15A-1025. We contend deferred prosecution agreements where the defendant agrees to go on deferred prosecution or plead guilty are plea discussions if the defendant later withdraws from the agreement. The State contends the signed statement is part of deferred prosecution, and thus a contract containing a statement against interest. No appellate decisions exist on this matter.

When evidence is admitted for a limited purpose, the better procedure is to object to its introduction and force the court to rule that it is admitted only for the limited purpose, *see, e.g., State v. Jones*, 322 N.C. 406 (1988) (admission of evidence competent for limited purpose is not prejudicial absent request by defendant for limiting instruction to jury).

A common problem in domestic violence cases is a witness testifying to the ultimate question in absence of personal knowledge. For example an officer may lack personal knowledge and therefore should not be allowed to testify to the effect that it appeared to him there had been an assault, although he can testify as to the nature of the injuries. Such testimony is not relevant as it does not help the fact-finder reach a conclusion. G.S. § 8C-1 Rule 602; *see State v. Shaw*, 106 N.C. App. 433 (1992) (police officer's testimony that his observations were there appeared to be a break in is not admissible as personal knowledge, but is mere speculation). However, in self defense cases, the witness being told by the victim that he has assaulted others is sufficient to establish first-hand knowledge as to the matter. *State v. Riddick*, 315 N.C. 749 (1986).

The State will often attempt to introduce a statement made by the defendant as an admission by defendant as party opponent. Such statements are treated as non-hearsay statements under the North Carolina Rules. G.S. § 8C-1 Rule 801. To be admitted, the witness must have first hand knowledge the statement was made and that it was made by the party against whom it is offered. A

statement is adopted by declarant under G.S. § 8C-1 801(d)(B) only if failure to deny the statement under the circumstances which the statement was made indicates acquiescence. *See State v. Hunt*, 325 N.C. 187 (1989). A confession is admissible as a statement against the party -opponent. *State v. Brown*, 81 N.C.App. 622 (1986). However, an adverse witness, even the complaining witness, is not a party opponent in a criminal proceeding. *State v. Shoemaker*, 80 N.C.App.95 (1986).

A common statement against interest is a confession to the effect “I hit her.” Probably the best way to handle this is to first attempt to suppress the statement on constitutional grounds. If this fails, attack whether the statement was indeed adopted by the defendant. For example, if the officer wrote the statement, did the defendant have an opportunity to read and correct the statement, and did he sign it. Also, did the officer write the defendant’s statement verbatim, or paraphrase it. For example, if the statement contains the word “assault,” did the defendant use that word or did the officer write it down when the defendant said “I hit her.” If the court finds the defendant made or adopted the statement, attack the circumstances around the statement. For example, ask the officer if he is a lawyer. Ask if, to the best of his knowledge, the defendant is a lawyer. Then ask he is familiar with each and every element of assault. Then ask him if he inquired of the defendant about affirmative defenses. This method can reduce the impact of the confession and show that the officer did not fully investigate what happened by asking questions designed to get to the truth of what happened, but merely wrote down what he was told.

In one case, I had a client who walked out of the woods and said “Arrest me. I hit her.” I asked the officer if either the officer or my client were lawyers. I then asked the officer if he questioned by client about affirmative defenses. He said he did not. I then asked if he saw any broken items in the trailer my client and his wife shared. He said that several items were broken. My client was found not guilty on the affirmative defense of necessity.

## VII. AFFIRMATIVE DEFENSES

Affirmative defenses are an important part of domestic violence cases. While self defense is the most common, it is important to be familiar with other affirmative defenses that may be useful. It is not necessary to put your client on the stand to prove such defenses. *See State v. Jones*, 299 N.C. 103 (1979) (defendant has burden of going forward with evidence of affirmative defense or can rely on such evidence that may be in the State's case to raise his defense).

### A. ALIBI

Alibi is not an affirmative defense in that the defendant denies engaging in the criminal conduct. The defendant does not have to prove he was not present or did not participate in the criminal activity, as it is the duty of the State to prove each and every element of the crime charged, including defendant's presence and participation in the crime charged. However, at a jury trial, an instruction on alibi can be requested, instructing the jury to consider all the evidence to determine whether defendant was present and participated in the crime. N.C.P.I. 301.10; *State v. Hunt*, 283 N.C. 617 (1973).

### B. SELF DEFENSE

North Carolina recognizes self defense as an affirmative defense providing four items are proved. *State v. Norris*, 303 N.C. 526 (1981) (applying doctrine to use of deadly force); N.C.P.I. 308.40 (self defense not involving deadly force); 308.45 (self defense involving deadly force). First, defendant must not have started the fight. Second, a reasonable person must believe it is necessary to use force. Third, the defendant must actually believe the force used is required. Finally, the minimal force must be used for the minimal time necessary to defend oneself.

The defendant must have reasonable belief that he faced death or serious injury before he is entitled to use deadly force. Among the factors considered in determining whether the belief is reasonable are the relative size, age and strength of defendant and attacker, the fierceness or persistence of the assault on the defendant, whether the attacker appeared to have a weapon, and the reputation of the attacker for danger and violence. *State v. Clay*, 297 N.C. 555 (1979). These factors are evaluated as they appeared to the defendant at the time of the assault. *State v. Jones*, 299 N.C. 103 (1980). The defendant is allowed to introduce hearsay evidence to show a real or apparent belief that self-defense was necessary based upon the circumstances and facts known to him at the time, even if the statement is otherwise inadmissible hearsay. *State v. Crump*, 277 N.C. 573 (1970). In addition, the threat of harm must be imminent. *State v. Norman*, 324 N.C. 253 (1989).

To show self defense, the defendant must show he was not acting as the aggressor without legal justification. Generally you must look at each encounter separately (do not look at prior incidents to see if victim was the aggressor). *State v. Hunter*, 315 N.C. 371 (1986). However, this may not apply when a continuing pattern of abuse exists. *State v. Norman*, 89 N.C.App. 384 (1988), *reversed on other grounds*, 324 N.C. 253 (1989).

A defendant who quits the fight may raise self defense upon renewal of the fight even if he started the original confrontation. *State v. Miller*, 221 N.C. 356 (1942). However, one who uses

language which under the circumstances is calculated and intended to bring on the fight is not entitled to this affirmative defense.

There is no duty to retreat before using force. *reviewed in State v. Musselwaite*, 54 N.C.App. 68 (1981) (Becton, J. dissenting).

### C. BATTERED PERSON SYNDROME

The battered person syndrome is not recognized as a defense *per se*, although it may play a role in other defenses, such as diminished capacity or insanity. *State v. Clark*, 324 N.C. 146 (1989). Past abuse is relevant to show that the defendant had reasonable fear of imminent assault. *State v. Norman*, 324 N.C. 253 (1989). When the defense is to an immediate threat, our Court of Appeals has suggested that past abuse may make the victim the aggressor. *State v. Norman*, 89 N.C.App. 384 (1988), *reversed on other grounds*, 324 N.C. 253 (1989).

### D. DEFENSE OF PROPERTY

A person has the right to use non-deadly force to defend against threatened loss, damage or other encroachment to personal property, applying the *Norris* test. *State v. Lee*, 258 N.C. (1962).

The same test is applied to defense of real property and eviction of trespassers. *State v. McCombs*, 297 N.C. 151 (1979); N.C.P.I. 308.80.. A person has the right to defend with deadly force his habitation against an intruder who intends to commit a felony. A person has the right to evict a trespasser using non-deadly force. This involves *molliter manus*, where the person must first ask the trespasser to leave, then may lay hands upon trespasser to remove them, and only then use more excessive force. *State v. McCombs*, 297 N.C. 151 (1979). The issue as to whether the defendant is a rightful owner and the victim is a trespasser must be settled. If there is a protective order, this may establish the relative rights of the parties (although if the order was issued without representation of the person against whom the order is issued, it may be argued that the person was not afforded due process of law). If both persons are on the lease or mortgage or in privity of estate, it can be argued they have a present possessory interest to be on the land, and statutory procedures must be used to obtain eviction. The exception is when both persons agreed that only one person was entitled to possession of the tenancy. *Miller v. Brooks*, 123 N.C.App. 20 (1996); *see also* G.S. § 14-134.3 (evidence of parties living apart for domestic criminal trespass includes judicial order of separation, court order, verbal or written agreement parties shall live apart and are in fact living apart, or separate residence for parties).

Only one person's name on the lease creates no privity of estate and so no right to avoid eviction. However consent of the tenant to allow a person to stay on the leasehold creates a sublease between the lessee and the sublessee with terms of tenancy at will. If the tenant at will has made some payment of rent in advance, the tenancy at will is converted into a periodic tenancy. *Kent v. Humphries*, 50 N.C.App. 580 (1981). To determine if the consideration paid amounts to rent, look to nature of the payment. Does it involve sharing all expenses or merely sharing household expenses. A tenancy at will can be terminated at any time by either party simply by giving notice. *Stout v. Crutchfield*, 21 N.C.App. 387 (1974). Terminating the tenancy at will would convert a tenant to a guest or trespasser.

An invited guest becomes trespasser if he exceeds his legal authority, *Blackwood v. Cates*,

297 N.C. 163 (1979), when his conduct exceeds the permission given, *Miller v. Brooks*, 123 N.C.App. 20 (1996), or when he is ordered to leave by a person who is a lawful occupant. See G.S. §§ 14-159.12 and 13, *State v. Kelly*, 24 N.C.App. 670 (1975).

#### E. CLAIM OF RIGHT (DEFENSE TO TRESPASS)

To assert this defense to unlawful entry, the defendant must have a *bona fide* claim of right. *State v. Crosset*, 81 N.C. 579 (1879); *State v. Cooke* (entry on to land to cut trees); 246 N.C. 518 (1957) The burden is on the defendant to show facts sufficient to excuse his conduct. *State v. Cooke*, 248 N.C. 485 (1958). A good faith belief that a protective violence protective order has been lifted is arguably a *bona fide* claim of right.

#### F. NECESSITY

To assert the defense of necessity, the defendant must show that he was not responsible for bringing about the emergency, that his actions were justified because the potential that would result from compliance with the law was greater than that which would result from its violation, and that no reasonable legal alternative was available. *State v. Thomas*, 103 N.C.App. 264 (1991); *State v. Gainey*, 84 N.C.App. 107 (1987). This defense does not excuse criminal activity by those who disagree with a statute.

#### G. DISCIPLINE

To show this defense, the defendant must be acting *in loco parentis*, the discipline must involve moderate correction determined by general principals, the punishment must inflict temporary pain and no injury and not be a punishment that seriously endangers the life, limb or health or seriously disfigures a child or causes permanent injury, and the punishment must be without malice, but for the purpose of correction. *State v. Alford*, 68 N.C. 266 (1873).

#### H. ACCIDENT

To prove this affirmative defense, the defendant must show his acts were unintentional, occurred during the course of otherwise lawful conduct, and did not involve culpable negligence. *State v. Douglas*, 16 N.C. App. 597 (1972); *State v. Wright*, 28 N.C.App. 481 (1976), N.C.P.I. 307.11. Culpable negligence is gross negligence or carelessness that imparts a thoughtless disregard of the consequences or heedless indifference to the safety of others. The defense of accident really is an attack on the intent element of a crime, and so is not a true affirmative defense requiring admission to this element.

## *I. CONSENT*

I had one case where my client had been talking to friends on the telephone and the phone was not properly hung up. Their friends heard what sounded like a fight, but was actually rough sex. The cross warrants against my client and her boyfriend were dismissed in part because the bite marks the police observed were the result of consensual acts.

## *J. DETENTION OF FELON*

A private individual can detain a person he has probable cause to believe has committed in his presence a felony, breach of the peace, crime involving injury to another, or crime involving theft or destruction of property. G.S. § 15A-404, N.C.P.I. 308.41.. We normally see this statute used as the basis for a store owner to detain a suspected shoplifter. I used this defense in one case where the victim tried to take the engagement ring out of my client's hand. She grabbed him and he swung at her. She then grabbed his testicles hard enough he blacked out. I successfully argued that his attempt to take the ring was common law robbery under G.S. § 14-87.1, and therefore she was justified in using reasonable force to detain him. When he resisted, she was justified in using increased force to defend herself.

## VIII. SENTENCING

A sentencing hearing must be held unless defendant waives the hearing. G.S. § 15A-1334(a). The defendant has the right to present evidence and to confront adverse witnesses at the hearing. G.S. § 15A-1334(b). The rules of evidence do not apply at a sentencing hearing. G.S. § 15A-1334 (b); G.S. § 8C-1, Rule 1101(b)(3); *State v. Daughtry*, 340 N.C. 488 (1995). The defendant has the right to be notified of and offer rebuttal to adverse evidence. *State v. Pope*, 257 N.C. 326 (1962) (interpreting prior law). In addition, evidence presented at the guilt-innocence phase of a trial is generally admissible at the sentencing phase, *State v. McLaughlin*, 341 N.C. 426 (1995) (death penalty case) (construing G.S. § 15A-2000(a)(3)). Finally, the defendant must be allowed to present evidence going to a mitigating or aggravating factor under the Due Process Clause, *State v. Jones*, 339 N.C. 114 (1994) (citing *Green v. Georgia*, 442 U.S. 95 (1979)) (death penalty case), providing the evidence is relevant and has a sufficient indicia of reliability. *State v. Walls*, 342 N.C. 1 (1995) (death penalty case).

The defendant can be sentenced using any of the provisions of G.S. § 1340.20 *et seq.* for active sentences, or G.S. § 1341 *et seq.* for probationary sentences, which include the authority to order an individual to domestic violence counseling programs pursuant to G.S. § 15A-1343(b)(1) and (10).

### A. DEFERRED PROSECUTION

Deferred prosecution is a form of probation G.S. § 15A-1341(a1). The victim has the right to be heard with respect to deferred prosecution. G.S. § 15A-1341(a1)(2). In Charlotte, the defendant cannot be placed in the deferred prosecution program without the consent of the victim. This goes beyond the purpose of the statute if the issue is ever preserved for appeal. Further, it removes discretionary power from the prosecutor because it allows the victim, not the State to control a criminal prosecution.

### B. MITIGATING FACTORS

At the sentencing phase, one of the best places to look for mitigating factors is to consider the statutory migrating factors listed in G.S. § 15A-1340.16(e). Several of these are applicable to misdemeanor cases in general. However, some factors may be of particular value in domestic violence cases.

One factor is G.S. § 15A-1340.16(e)(1), that the crime was committed under duress which does not constitute a defense but reduced the defendant's culpability. This does not mean defendant was in fear of the victim. *State v. Canty*, 321 N.C. 520 (1988). For example, the victim may have been threatened by the defendant, causing him to react in a manner that constituted assault.

A second factor is G.S. § 15A-1340.16(e)(2), that the defendant is suffering from a physical or mental condition that was insufficient to constitute a defense, but significantly reduced her culpability. This includes abused spouse syndrome, *State v. Holden*, 321 N.C. 689 (1987) and drug or alcohol dependence, *State v. Barts*, 321 N.C. 689 (1988).

A third factor is G.S. § 15A-1340.16(e)(6), that the victim was more than sixteen and a willing participant in defendant's conduct. This one is useful when the victim invites the defendant

over in violation of a 50B order. Most judges, however, do not like to hear this, although it is a recognized factor in felony sentencing.

A fourth factor is G.S. § 15A-1340.16(e)(8), the defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating. This must include a showing of threat or challenge by the victim to the defendant, *State v. Braswell*, 78 N.C. App. 598 (1985), and must be supported by uncontradicted, substantial, and manifestly credible evidence that the conduct was extenuating, *State v. Michael*, 311 N.C. 214 (1984). I used this once to get a prayer for judgment when the victim had used strong racial epithets against her boyfriend in an interracial relationship.

A fifth factor is G.S. § 15A-1340.16(e)(10), that the defendant reasonably believed his conduct is legal. This may work in cases of criminal domestic trespass. It generally does not work for violations of a 50B order, although it may work if defendant did not go to the hearing and was told by the victim that the order was no longer in effect.

Other factors that are listed as mitigating factors include (1) defendant voluntarily acknowledged wrongdoing to a law enforcement officer prior to arrest or at an early stage in the proceedings; (2) defendant is of good character or has a good reputation in the community, (but evidence of defendant's bad character may generally be admitted in response to defendant's evidence of his good character. *State v. Carter*, 338 N.C. 569 (1994) (death penalty case); however such evidence does not go to impeachment of the credibility of a witness, and is admissible even if the defendant does not testify. *State v. Williams*, 339 N.C. 1 (1994) (death penalty case)); (3) defendant has been honorably discharged from the armed forces; (4) defendant has accepted responsibility for his criminal conduct; (5) defendant has entered into a drug or alcohol treatment program subsequent to arrest and prior to going to trial; (6) defendant supports his family; (7) defendant has support system within the community; (8) defendant has a positive employment history or is gainfully employe; and (9) defendant has a good prognosis and a workable treatment plan is available.

### C. RESTITUTION

Restitution is permitted as part of any punishment, G.S. § 15A-1340.34, and the court must consider restitution for persons covered by the Victim's Rights Act, G.S. § 15A-830 *et seq.* G.S. § 15A-1340.34. This includes victims of designated misdemeanors when the offense involves persons who have a personal relationship as defined in G.S. § 50B-1(b). The designated misdemeanors are assault with a deadly weapon, G.S. § 14-33(c)(1); assault on a female, G.S. § 14-33(c)(2); assault, G.S. § 14-33(a); assault by pointing a gun, G.S. § 14-34; and stalking, G.S. § 14-277.3. G.S. § 15A-834 (referring to G.S. § 15A-1340.34 *et seq.* for terms of restitution); G.S. § 15A-830(g). Restitution may be for medical and related expenses, lost income, damage, loss or destruction of the victim's property, or any measure specifically provided for by the statute covering a given crime. G.S. § 15A-1340.35(a). However, admissible evidence must be submitted to the court to document the costs claimed. G.S. § 15A-1340.35(b). The defendant's assets, income, earning potential, obligation to support dependants and other factors affecting his ability to make restitution must be considered in determining whether the defendant is required to make full or partial restitution. Because restitution is a condition of probation in such cases as provided in G.S. § 15A-1343(d). G.S. § 15A-1340.34.

## IX. EFFECTS OF A FINDING OF GUILT IN DOMESTIC VIOLENCE CASES

As with any finding of guilt, an individual faces the consequence of the sentence imposed as well as possible collateral effects such as having another point on his misdemeanor record. If the defendant was on probation and the crime in domestic violence court is not a class 3 misdemeanor, the defendant may face revocation for being found guilty of another crime. G.S. § 15A-1344(d).

A finding of guilt may be used as an element in subsequent charges. A finding of guilt of any type of assault can become an element for a subsequent charged of habitual assault (G.S. § 14-333.2) (Class H felony). A finding of guilt as to stalking will enhance the penalty for a second finding of guilt of stalking within a five year period by increasing the penalty from a class A1 misdemeanor to a class I felony. G.S. § 14-277.3(b)).

A finding of domestic violence is grounds for separation (divorce from bed and board), G.S. § 50-7(3), providing the events are recent incidents, *O'Connor v. O'Connor*, 109 N.C. 139 (1891); for the award of post-separation support, G.S. § 50-16.2A(c) (requires the court to consider misconduct of dependant spouse; if misconduct found, court must consider misconduct of supporting spouse; court may consider acts of post-separation misconduct as corroborative evidence of misconduct during marriage, G.S. § 50-16.2A(e)); the award of alimony G.S. § 50-16.3A(b)(1) (see definition of marital misconduct in G.S. § 50-16.1A(3); the award of child custody, G.S. § 50-13.2 (best interest of child considers incidents of domestic violence); and the distribution of marital property (need of custodial parent to have access to marital home and household effects,) G.S. § 50-20(b)(4); *see also* G.S. § 50-20(b)(12) (any other factor which the court finds to be just and proper). A finding of guilt may also be used to prove an element in an action in tort between husband and wife. Such actions allow the husband or wife to recover for damages sustained to their person or property as if they were unmarried. G.S. § 52-5. Note however that conviction is res judicata for prior conviction, but not as to facts of the crime charged, *Reliable Properties, Inc. v. McAllister*, 77 N.C.App. 783 (1985).

The 1996 amendments to the Gun Control Act of 1966 make it a federal crime for any person convicted of an act of domestic violence from possessing a firearm or ammunition. 18 U.S.C. § 922(g)(9). The penalty for a person knowingly violating this law is to 10 years in prison and/or a fine not to exceed \$250,000. 18 U.S.C. § 924. Under this law, an act of domestic violence is any use or attempted use of force, or the threatened use of a deadly weapon, when the crime is committed by a former spouse, parent, or guardian of the victim, a person with whom the victim shares a child in common, a person with whom the victim cohabitates or has cohabitated as a spouse, parent or guardian, or a person similarly situated with the victim as a spouse, parent or guardian. 18 U.S.C. § 921(a)(33). Exceptions are made to the law when the convicted defendant did not knowingly and intelligently waive his right to trial, and in jurisdictions where the defendant has a right to a jury trial, where he did not knowingly and intelligently waive this right. There are no exceptions for persons otherwise required to carry a gun for the purpose of their job. This law is retroactive to any prior act of domestic violence. This law may have an impact on public defenders in State court if motions for appropriate relief are filed on the ground that waiver of counsel was not knowing and voluntary.

In addition, specific crimes may carry additional sanctions. For example, any conviction for misdemeanor that is classified as a class A1 or class 1 misdemeanor counts as a point for the

purpose of felony sentencing. G.S. § 15A-1310.14(e). A recent court of appeals decision held that a plea of no contest with prayer for judgment continued is a prior conviction. *State v. Hatcher*, \_\_\_ N.C.App. \_\_\_ (2000) (citing G.S. §§ 15A-1331(b) and 15A-1340.11(7)). However, G.S. § 15A-1340.11 distinguishes prior convictions between district and superior court. *Hatcher* construed the felony provisions of the statute, which define a prior conviction as a conviction regardless of whether the conviction is on appeal to the appellate division. G.S. § 15A-1340.11(7)b. In contrast, for district court a conviction is that where the person has not given notice of appeal and the time for appeal has not expired. G.S. § 15A-1340.11(7)a. Conviction is defined in G.S. § 15A-1331 as being adjudged guilty or entering a plea of guilty or no contest. G.S. § 15A-1331(b). A judgment is entered when sentence is pronounced, and a prayer for judgment continued does not constitute entry of judgment. G.S. § 15A-101(4a). The statutes suggest at a minimum that a prayer for judgment continued in misdemeanor cases may be distinguished from a felony prayer for judgment continued construed in *Hatcher*. Second, the definition in G.S. § 15A-101(4a) may give rise to a challenge of *Hatcher*.

## **X. PROBATION VIOLATION ISSUES**

Before revocation can be ordered, the court must find good cause. Arguably, the court should consider lesser sanctions as allowed under G.S. § 15A-1344(e), such as special probation, modify the terms of probation under G.S. § 15A-1344(d), or continue him on probation but find him in criminal contempt under G.S. § 15A-1344(e1).

A violation alleging nonpayment of costs or fines is handled pursuant to the statutory procedure set forth in G.S. § 15A-1364. G.S. 15A-1345(e). This procedure requires the court to continue probation if the defendant can show an inability to comply that is not attributable to a failure on his part to make a good faith effort to pay the monies. The court also may allow the defendant additional time to pay, or modify or reduce the monies owed. Often, our clients cannot pay both supervision fees and the cost of domestic violence counseling. In such cases, it can be argued the fees should be waived or the defendant should be given additional time to pay the monies. If the defendant

The case for continued probation is especially true in cases of domestic violence, where it can be argued that continued supervision will assure that no further acts of domestic violence occur, and that probation may be the only way to assure the defendant attends domestic violence or substance abuse counseling classes.

## XI. SOME CRIME SPECIFIC ISSUES

### A. ASSAULT ON A FEMALE

While there is a split of authority, most recent case holds that the law of evidence does not allow a jury to determine the age of a criminal defendant beyond a reasonable doubt by mere observation of the criminal defendant without the introduction of other evidence, whether circumstantial or direct. *Compare In re Jones*, 520 S.E.2d 787 (1999) (statutory rape case); *State v. Bynum*, 111 N.C.App. 845 (1993) (evidence that defendant married victim's mother six years before trial and drank alcoholic beverages for a number of years, combined with the jury's chance to observe the defendant in court sufficient to establish he was at least sixteen years of age to prove element of taking indecent liberties with a minor); *State v. Evans*, 298 N.C. 263 (1979) (opportunity of jury to view defendant allowed for jury to determine if defendant was over the age of eighteen, even if error, is harmless in light of the fact that the judgment for assault on a female was run concurrent to first degree burglary). *State v. McNair*, 93 N.C. 625 (1885), which is cited in *Evans* for the proposition that the jury can view the person to determine their age, actually involved testimony from witnesses as to the age of the defendant in a rape case. However, *McNair* refers to *State v. Arnold*, 35 N.C. 184 (1851) in which the Court held that where the defendant appeared to be over the age of fourteen, the onus is on the defendant to show that he is not in order to disprove an element of the crime of murder.

### B. VIOLATING DOMESTIC VIOLENCE PROTECTIVE ORDER

Double Jeopardy prevents subsequent prosecution for assault on a female when the order prevents defendant from assaulting victim and he is punished for violating the order with criminal contempt for same conduct because all the elements of the charged offense were adjudicated in the contempt proceeding. Criminal contempt did not prevent subsequent prosecution for kidnaping, domestic criminal trespass or breaking and entering, which were not adjudicated. *State v. Gilley*, 135 N.C.App. 519, 522 S.E.2d, 111 1999. Note, however, that a plea of guilty or no contest waives a later assertion of double jeopardy *State v. Hughes*, 136 N.C.App. 92, 524 S.E.2d 63 (1999).

An order that is invalid because it is ambiguous under *Brandon v. Brandon*, 132 N.C.App. 646 (1999) (where the order combines several possible findings disjunctively so that it is uncertain whether the trial court found all or only some of the possibilities where evidence was presented on more than one possibility) may not be valid, and could be subject to collateral attack at the criminal trial, as the existence of a valid order is an essential element of the crime.

We have discussed whether a respondent is entitled to appointed counsel at a 50B hearing. The adjudication of such hearings may deprive him of property interests, and therefore an entitlement to counsel may arise under due process analysis. In addition, the findings of a protective order expose the defendant to contempt under G.S. § 50B-4(a).

### C. ASSAULT

Our courts recognize two forms of assault are proscribed by, N.C. Gen. Stat. § 14-33: assault involving harmful touching, or assault involving a reasonable apprehension of immediate bodily harm. A warrant charging the latter must allege (1) a show of violence by the defendant, (2) accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed, (3) causing the victim to engage in a course of conduct which he or she would not otherwise have followed. *State v. McDaniel*, 111 N.C. App. 888, 891 433 S.E.2d 795, 797-8 (1993).

A warrant used as a criminal pleading must indicate which theory of assault the State is pursuing, because the statute does not define the crime. Therefore, a warrant alleging the theory of show of violence would not support conviction for harmful touching. *State v. Garcia*, 146 N.C. 745, 553 S.E.2d 914 (2001).

Generally, the State must show a present intent to injure. *See State v. Hemphill*, 162 N.C. 32 (1916) (while assault may be inferred from the act or the consequence of the act, the mere touching of another with no intent to harm is not sufficient); *see also* N.C.P.I. 308.40. For assault involving battery, evidence showing defendant's state of mind may be relevant to show the present intent to cause injury. *See State v. Alston*, 341 N.C. 198, 229, 461 S.E.2d 687, 703 (1995) (in trial for murder, defendant's prior assaults relevant to show malice, premeditation, deliberation, intent or ill will against the victim); *State v. Cox*, 344 N.C. 184, 188, 472 S.E.2d 760, 762 (1996) (evidence of previous threats admissible). For assault by show of force or communicating threats, other bad acts could be relevant to show victim's state of mind. Such prior acts are likely admissible during the case in chief under rule 404(b).

### D. STALKING

The lack of notice requirement and subjective fear standard are both subject to challenge. Does the defendant really have notice that his conduct is putting the victim in fear of death or imminent bodily injury?

### E. HARASSING PHONE CALLS

Any recording must be authenticated, and a chain of custody established. This is usually subject to attack even if the evidence is admitted. The State can obtain a voice exemplar to compare against the voice on tape. *State v. Locklear*, 117 N.C.App. 255 (1994). I won one case where the State never made the defendant repeat the words on the tape, and raised to the jury why the State didn't have the defendant speak in court.

Harassing phone calls is not a lesser included offense of communicating threats, even though the use of threatening language may be one means by which the harassment is shown. In contrast, the crime of communicating threats includes the requirement that the threat be communicated in a manner to make a reasonable person believe the threat would be carried out. *State v. Evans*, 40 N.C. App. 730, 253 S.E.2d 590 (1979). Thus, a client calling the victim from jail and threatening to personally beat her up may be guilty of making an harassing phone call, but probably is not guilty of communicating threats, because he is physically incapable of carrying out the threat.

## *F. TRESPASS*

The State must prove the individual has no legal right to be present. There is no real case law in this area. However, factors tending to establish domicile are useful. Does the defendant have a key. Does he have his belongings there. Is his mail delivered there. Other factors could be voter registration, listed on the phone, cable, or utility bill for the unit. Sharing expenses and lack of another place where the individual stays are also evidence of domicile.

If the person is a roommate and pays rent and no protective order has been issued, it can be argued that the only way the person can be banned is to use statutory eviction procedures under G.S. § 42-25.6 *et seq.* Absent eviction, the person is not considered to have quit the premises until the leasehold expires.

The domestic criminal trespass statute G.S. §14-134.3(a) says that a person has quit the presence when an oral or written agreement exists. Because a leasehold is a possessory interest in land, it is doubtful that an oral agreement by itself would rescind a written lease agreement with respect to surrender of the leasehold. However, the individual's conduct may indicate an intent to quit, and therefore bar raising the absence of a writing. No appellate decisions exist on this issue.