

# *Good Dog/Bad Dog*



# *Openings Left by Caballes*

- Dog sniff that extends duration of stop based on individualized suspicion
- Dog sniff at license checkpoint
- Dog sniff of occupant
- Racially-motivated investigation

# *Impact of Scalia's Thornton Concurrence*

- May officer search passenger compartment of car incident to arrest?
  - Officer stops car for speeding, arrests driver upon learning that driver's license to drive is revoked, and handcuffs and puts driver in back of patrol car.
  - Officer stops car for speeding, sees marijuana in plain view in the car, arrests driver, and handcuffs and puts him in back of patrol car.

# Daubert *and* Howerton

- “Subject of an expert’s testimony must be ‘scientific . . . knowledge.’” *Daubert*
- *Howerton* rejected *Daubert* as test in North Carolina
  - But continued to require that expert’s method of proof be sufficiently reliable as area for expert testimony

# *Present Requirements of Admissibility*

- Expert is qualified
- Method of proof is reliable
- Testimony is relevant
  - Testimony must assist trier of fact
- Other possible requirements
  - Factual basis adequate
  - Opinion not excessively uncertain
  - Probative value outweighs prejudice under R. 403
  - Opinion not on impermissible topic or for impermissible purpose

# *Child Sexual Abuse: Physical Injuries*

- If physical injury, medical expert may testify that injuries were caused by or consistent with
  - Intentional act, not accident
  - Penetration, insertion of blunt object
  - “Sexual abuse”
- *Fuller* consistent with these rulings

# *No Physical Injuries*

- If no physical evidence, expert may not testify that sexual abuse occurred (or intentional act, penetration, etc.)
- Rulings based on concerns about scientific reliability and prohibition on vouching for child's credibility
  - Expert can't simply testify that child is telling truth
  - After *Crawford*, expert may not be able to repeat what child said if child doesn't testify.
- Rulings apply to medical and psychological experts

# *Physical Injury Requirement Refined*

- If no or “insufficient” physical evidence, expert may not testify that
  - Child was victim of sexual abuse or
  - Child was “probably” sexually abused or that diagnosis is “probable” sexual abuse.
- *Ewell, Couser*

# *Child Sexual Abuse: Symptoms & Characteristics*

- With “proper foundation,” expert may testify as to profiles of abused children (ex., PTSD) and whether particular child has symptoms or characteristics consistent therewith
  - Purpose of testimony is supposed to be to explain or corroborate

# *Symptoms & Characteristics Refined*

- *Couser*
  - No evidence was proffered to show the “victim’s behavior or symptoms following the assault were consistent with being sexually abused.”
- *Ewell*
  - “[W] conclude the admission of Dr. Preville’s testimony that it was ‘probable that [T.G.] was a victim of sexual abuse’ was not based on any physical evidence or behaviors consistent with sexual abuse and was error.”

# *Probation Conditions*

- GS 15A-1343(b2) states
  - As special conditions of probation, a defendant who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, must . . . .

# *Probation Conditions*

- (4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.
- (5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the minor child's best interest to allow the probationer to reside in the same household with a minor child.

# *Texas and North Carolina*

- A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.
- If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon.

# *The (Other) Crawford Holding*

- Caption of 14-34.7 says “serious injury”
- Overrides body of statute, which says “serious bodily injury,” because of legislature’s “manifest purpose”
- So, does state only need to show for felony assault on officer that defendant inflicted serious injury, not serious bodily injury?
- Or, was Judge Wynn responding to *Jones*?

# *Argument #1: It's All Dicta*

- Question was adequacy of indictment
- It alleged violation of GS 14-34.7, but quoted words of caption, not statute.
- Defendant was on notice of actual charge.
- Trial judge properly instructed on meaning of “serious bodily injury.”
- Evidence was sufficient to support jury’s finding of “serious bodily injury.”
- See state’s brief in opposition to PDR.

# *Argument #2: True Legislative Intent*

- **1996, 2<sup>nd</sup> Extra Session, Ch. 18, Sec. 10.14B(a):**
  - **Title of Legislation: CLASS F FELONY OFFENSE TO ASSAULT A LAW ENFORCEMENT OFFICER AND INFLICT SERIOUS BODILY INJURY/CREATE A NEW CRIMINAL OFFENSE OF ASSAULTING FIREFIGHTER**
  - Sec. 20.14B. (a) Article 8 of Chapter 14 of the General Statutes is amended by adding a new section to read:
  - **“§ 14-34.7. Assault on a law enforcement officer.**
  - **Unless covered under some other provision of law providing greater punishment, a person is guilty of a Class F felony if the person assaults a law enforcement officer while the law enforcement officer is discharging or attempting to discharge his or her official duties and inflicts serious bodily injury on the law enforcement officer.”**

# Legislative Intent

- **1997, Ch. 443, Sec. 19.25(hh):**
  - G.S. 14-34.7 reads as rewritten:
  - **“§ 14-34.7. Assault on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility.**
  - **(a)** Unless covered under some other provision of law providing greater punishment, a person is guilty of a Class F felony if the person assaults a law enforcement officer, probation officer, or parole officer while the law enforcement officer is discharging or attempting to discharge his or her official duties and inflicts serious bodily injury on the law enforcement officer.
  - **(b)** Anyone who assaults a person who is employed at a detention facility operated under the jurisdiction of the State or a local government while the employee is in the performance of the employee's duties and inflicts serious bodily injury on the employee is guilty of a Class F felony, unless the person's conduct is covered under some other provision of law providing greater punishment.”

# *Legislative Intent*

- AN ACT TO MAKE TECHNICAL CORRECTIONS AND CONFORMING CHANGES TO THE GENERAL STATUTES (S.L. 200-487)
  - **SECTION 41.** The catch line for G.S. 14-34.7 reads as rewritten:
  - “§ 14-34.7. Assault inflicting serious injury on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility.”

# *No Intent to Sell*

- Small amount (4 to 5 rocks weighing 1.2 grams; 1.9 grams of powder cocaine; 10 rocks)
- Small amount of \$\$
- No scales
- No cutting implements
- No containers, packaging
- No other paraphernalia for sale
- Defendant's acts (e.g., home sick in bed when car was searched)
- Testimony by officer that amount was more than he usually sees for personal use (10 rocks worth \$150 or \$250 vs. 1 or 2 rocks worth \$20 or \$30)

# *No Swapping Habitual Felon Horses*

- Rule bars amendment or superseding indictment changing prior felonies
- But when does the prohibition apply?
  - *Little* said after arraignment, but *Cogdell* said we didn't really mean it.
  - *Cogdell* suggests after entry of plea at trial
  - Double jeopardy suggests after jury empanelled on principal felony.
  - *Allen*, 292 NC 431, suggests at least once principal felony concludes and habitual phase begins.

# Nixon *and* Harbison

“When a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course. The reasonableness of counsel’s performance, after consultation with the defendant yields no response, must be judged in accord with the inquiry generally applicable to ineffective-assistance-of-counsel claims.”

# *To Stipulate or Not to Stipulate*

- Prior Level Record Worksheet
  - “The prosecutor and defense counsel, or the defendant, if not represented by counsel, stipulate to the accuracy of the information set out in Sections I. and IV. of this form, including the classification and points assigned to any out-of-state convictions, and agree with the defendant’s prior record level or prior conviction level as set out in Section II.”