

Evidence Update (1 hour)

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2016 EVIDENCE UPDATE

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I. Preserving Evidentiary Error

State v. Snead, 738 S.E.2d 344 (N.C. 2016)

Defendant was convicted of felony larceny and conspiracy to commit felony larceny. On appeal, he challenged the admission of opinion testimony regarding the value of the stolen merchandise. The Court of Appeals had initially considered an issue of whether this testimony was proper law opinion. Under **Rule 701**, the opinion of a lay witness is admissible if based on the perception of the witness and helpful to the jury in understanding the witness' testimony or determining a fact in issue. The witness reviewed a surveillance video and then gave his opinion as to the value of the stolen shirts. His opinion was based solely on what he saw on the video, which the jury also saw. He was in no better position than the jury to determine value based solely on what was on the videotape. Thus, his description of what was on the tape and his opinion as to its value based solely on his observation of the videotape was not helpful to the jury. His testimony was the only evidence as to the value of the shirts. The Court of Appeals found the admission of this opinion testimony to be erroneous.

However, the Supreme Court held defendant failed to preserve this issue. He objected to this lay opinion only outside the presence of the jury. He did not renew this objection or otherwise complain when the state offered this testimony about the value of the shirts in front of the jury. The absence of a timely objection makes the claim unreviewable under **N.C. R. App. P. 10(a)**. See **N.C. R. Evid. 103(a)(1)**.

State v. Watts, 783 S.E.2d 266 (N.C. App.),
supersedeas granted, 783 S.E.2d 747 (N.C. 2016)

Defendant was convicted of attempted first degree rape and first degree sexual offenses with a child. These charges arose from allegations that he forced an eleven-year-old girl. He was "like a grandfather" to her. She claimed he took her to his bedroom, pushed her onto the bed, and forcibly removed her clothes. She passed out and awoke on the living room floor. Defendant was on top of her. He made her watch a pornographic movie and "do what was on it," including fellatio and cunnilingus. Defendant testified and denied the allegations. The state offered a witness who testified that when she was seventeen years old, defendant

came to her apartment, forced his way into it, and pushed her onto a bed. Using a knife, he took her pants off and raped her. She reported the incident and completed a rape kit at the hospital. But the charges were dismissed two years later. But the trial court admitted the evidence under Rule 404(b) to show opportunity or plan. Defendant challenged this ruling. The Court of Appeals awarded a new trial because the trial court erred in admitting the evidence under Rule 404(b). The trial court also denied defendant's request for a **limiting instruction** as to this evidence. Defendant raised this issue in the appeal, and the Court of Appeals stated the absence of a limiting instruction "[add[ed] to the prejudicial nature of" the evidence of the prior acts. The Court of Appeals found it unnecessary to address the issue since a new trial was ordered. However, the Court of Appeals noted the **general, non-specific** nature of the **request for a limiting instruction** and cautioned "defense counsel not to take the 'almost routine nature of Rule 404(b) evidence and its accompanying limiting instruction' for granted." It urged "defense counsel [to] clearly state all requests in order to avoid conjecture and the potential **waiver** of the issue on appeal."

State v. Cook, 782 S.E.2d 569 (N.C. App. 2016)

Defendant was convicted of first degree murder. On appeal, he challenged the admission of evidence concerning the deceased statement that she "was scared of him." Defendant and the deceased had been in a relationship for five years. On the day in question, she went with her mother, her sister, and her four-year-old son to take groceries and clothes to defendant at his motel room. When they got there, the deceased took defendant's clothes to the door. Defendant opened the door and began stabbing her with a screwdriver without warning. He chased her into the motel lobby and continued stabbing her. At trial, the deceased sister testified and indicated the deceased was telling her about the relationship with defendant "and that she was scared of [him]." Defendant objected. The prosecutor immediately responded, "Present sense impression." The trial court overruled the objection. On appeal, the state argued the objection as to improper hearsay was not preserved because it was a **general objection**. **N.C. R. Evid. 103(1)**. The Court of Appeals disagreed because the basis for the objection was "apparent from the context." The state also argued the objection was not preserved because defendant did not move to strike the answer. **N.C. R. Evid. 103(1)**. The Court of Appeals again disagreed because defendant objected to the answer. The state also argued the issue was waived because the witness immediately repeated the answer and

defendant did not object again. The Court of Appeals again disagreed because the objection had just been made. The repetition of the answer did not amount to the same evidence being later introduced without objection, which will waive an issue. *See State v. Whitley*, 311 N.C. 656, 662, 319 S.E.2d 584, 588 (1984). But the evidence was admissible to show the deceased state of mind under Rule 803(3).

II. Relevancy and Unfair Prejudice

State v. Ford, 782 S.E.2d 98 (N.C. App. 2016)

Defendant appealed his convictions for involuntary manslaughter and obstruction of justice. The victim appeared to have been killed in a dog attack. Police sized a dog, DMX, from defendant, who went by the nickname Flex, and DMX's DNA was found on the victim's punctured pants. Defendant challenged the admission of the recording of a rap song allegedly done by defendant. A detective discovered the song the night before the trial began, which defendant has posted on his "myspace" page. The song was about the incident and the lyrics denied the victim's death was caused by a dog. The detective recognized and identified defendant's voice performing the song. Defendant's argument on appeal hinged on the song being unfairly prejudicial under **Rule 403**. The court agreed the song had some connection to the case, as it showed defendant knew his dog was vicious and he was proud of it. Even if it was not relevant and had some potentially prejudicial impact, a different result would not have been reached if the evidence had been excluded given the overwhelming evidence that the victim died as a result of an attack by defendant's dog, including the dog's unprovoked attacks on other people and dogs.

State v. Mitchell, 770 S.E.2d 740 (N.C. App. 2015)

Defendant appealed his conviction for first degree murder. He challenged the admission of a recorded telephone conversation he had with his father during the booking process. In this conversation, his father asked him who he had shot now and if he had used the same gun. Defendant admitted shooting the victim and using "That same gun." Defendant admitted the conversation was relevant, but argued it was more prejudicial than probative and should have been excluded under **Rule 403**. The recording was relevant to show (1) defendant shot the victim, which the prosecution was required to prove, and (2) defendant knew he

shot the victim. It was pertinent because defendant claimed the shooting was not premeditated. The trial court did not abuse its discretion in admitting the recorded conversation.

III. Prior Bad Acts

State v. Watts, 783 S.E.2d 266 (N.C. App.),
supersedeas granted, 783 S.E.2d 747 (N.C. 2016)

Defendant was convicted of attempted first degree rape and first degree sexual offenses with a child. These charges arose from allegations that he forced an eleven-year-old girl. He was the grandfather of this child's cousins and "like a grandfather" to her. She claimed he touched her inappropriately. They eventually went to his trailer. As she was sitting on the couch watching television, he again put his hands on her thighs. He then took her to his bedroom, pushed her onto the bed, and forcibly removed her clothes. She passed out and awoke on the living room floor. Defendant was on top of her. She screamed, but he threatened to hurt her. He made her watch a pornographic movie and "do what was on it," including fellatio and cunnilingus. Defendant testified and denied the allegations. The state offered a witness who said that, when she was seventeen years old, defendant came to her apartment, forced his way into it, and pushed her onto a bed. Using a knife, he took her pants off and raped her. She reported the incident and completed a rape kit at the hospital. But the charges were dismissed two years later. But the trial court admitted the evidence under **Rule 404(b)** to show opportunity or plan. Defendant challenged this ruling. The Court of Appeals awarded a new trial. First, the testimony about the 2003 incident was not relevant to show defendant's opportunity to commit the acts in 2011. There was no connection between the two girls. The alleged acts happened at different places. Second, the distinctions between the two incidents showed evidence of the 2003 event did not show a plan that included the 2011 event. The acts were quite dissimilar. The girl in the earlier act was seventeen; the girl in the later act was eleven. The girl in the earlier act barely knew defendant and was alone in her apartment, to which he gained entry by trickery and force. The girl in the later act knew defendant well and had asked to stay at his house. Third, the relationships between defendant and the two girls was quite different. Fourth, the perpetrator in the 2003 incident used a knife. The 2011 was forcible but not with the use of a weapon. Thus, the trial court erred in admitting the evidence under **Rule 404(b)**.

As an aside, the trial court also denied defendant's request for a limiting instruction as to this evidence. Defendant raised this issue in the appeal, and the Court of Appeals stated the absence of a limiting instruction "[add[ed] to the prejudicial nature of" the evidence of the prior acts. The Court of Appeals found it unnecessary to address the issue since a new trial was ordered. However, the Court of Appeals noted the general, non-specific nature of the request for a limiting instruction and cautioned "defense counsel not to take the 'almost routine nature of Rule 404(b) evidence and its accompanying limiting instruction' for granted." It urged "defense counsel [to] clearly state all requests in order to avoid conjecture and the potential waiver of the issue on appeal."

[NOTE WELL: Judge Tyson dissented on the **Rule 404(b)** issue. The state has appealed, and the Supreme Court granted the state's request for a writ of supersedeas.]

State v. Waddell, 767 S.E.2d 921 (N.C. App. 2015)

Defendant appealed his conviction for felony indecent exposure based on his exposing himself to a woman and her mother where a fourteen-month-old male was also present. He challenged the admission of testimony from two adult women that he had previously exposed himself in public in their view, claiming this evidence was inadmissible under **Rule 404(b)**. The Court of Appeals rejected the argument. The evidence about the crime showed defendant exposed his penis and shook it at a woman as she was walking to her car with her mother. He called to the woman to get her attention and moved his hand "up and down." The woman and her mother got into her car with her fourteen-month-old son. As she put the car in reverse, defendant jumped behind the car and began doing jumping jacks. The challenged evidence, which the Court of Appeals reviewed de novo, involved testimony from two adult women who recounted two other instances in which defendant exposed himself in public. Defendant argued, in part, that the **Rule 404(b)** evidence only went to the generic features of indecent exposure. But the Court of Appeals noted the evidence showed he exposed himself to adult women, alone or in pairs, in an area near the downtown courthouse in which he put his hand on or under his penis. The evidence was sufficiently similar. Defendant also argued dissimilarity because the exposure here was in front of a fourteen-month-old child. But the Court of Appeals explained that felony indecent exposure requires the willful display of one's private parts in public *in*

the presence of a person under 16 years of age for the purpose of sexual arousal or gratification. A plain reading of this statute does not require the state to prove the child was the victim, only that a child was present. Since defendant publicly exposed himself to the woman and her mother, in much the same way that he had publicly exposed himself to the other women, the presence of the child was not a sufficiently distinguishing fact to render the prior conduct irrelevant.

IV. Lay Opinion

State v. Hill, 785 S.E.2d 178 (N.C. App. 2016)

After his convictions for multiple counts of breaking and entering, felony larceny, and larceny after a breaking an entering, defendant appealed. He challenged the admission of testimony from two police officers that he was the person depicted in a surveillance video tape. He argued this evidence was impermissible law opinion under **Rule 701** because the jury was as capable as the officers of determining if defendant was the person in the video tape. Under **Rule 701**, the opinion of a lay witness is admissible if it is based on the perception of the witness and it is helpful to the jury in understanding the witness' testimony or determining a fact in issue. Here, the officers had substantial interactions with defendant. They had previously arrested him. They described distinctive features he had, which were shown in the tape. Perhaps most important, defendant's appearance had changed between the time of the crimes, which were shown on the tape, and the trial, where the jury saw him. He looked "very different," including growing a beard and losing weight. Given the distinctive features and the changed appearance, the officers' testimony was rationally based on their special knowledge and would have assisted the jury. There was no abuse of discretion in overruling the objection under **Rule 701**.

State v. Snead, 738 S.E.2d 344 (N.C. 2016)

Defendant was convicted of felony larceny and conspiracy to commit felony larceny. On appeal, he challenged the admission of opinion testimony regarding the value of the stolen merchandise. The Court of Appeals had initially considered an issue of whether this testimony was proper law opinion. Under **Rule 701**, the opinion of a lay witness is admissible if based on the perception of the witness and helpful to the jury in understanding the witness' testimony or determining a fact in

issue. The witness reviewed a surveillance video and then gave his opinion as to the value of the stolen shirts. His opinion was based solely on what he saw on the video, which the jury also saw. He was in no better position than the jury to determine value based solely on what was on the videotape. Thus, his description of what was on the tape and his opinion as to its value based solely on his observation of the videotape was not helpful to the jury. His testimony was the only evidence as to the value of the shirts. The Court of Appeals found the admission of this opinion testimony to be erroneous.

However, the Supreme Court held defendant failed to preserve this issue. He objected to this lay opinion only outside the presence of the jury, He did not renew this objection or otherwise complain when the state offered this testimony about the value of the shirts in front of the jury. The absence of a timely objection makes the claim unreviewable under **N.C. R. App. P. 10(a)**. *See N.C. R. Evid. 103(a)(1)*.

V. Expert Opinion

State v. McGrady, ___ S.E.2d ___, 2016 WL 3221096 (N.C. 2016)

After his conviction for first degree murder, defendant appealed. At trial, he relief primarily on a theory of self-defense and a defense of others (his son). On appeal, he in part challenged the exclusion of expert testimony about a person's responses to a perceived threat, how pre-attack cues and use of force variables would render a deadly response to an imminent and deadly assault reasonable, how defendant's actions were consistent with someone experiencing instinctive survival responses--a "fight or flight" reaction, and how a person's reaction times could explain how the deceased was shot in the back despite the assault by the deceased having been in front of defendant when the shots were fired. Applying the amended version of **Rule 702(a)**, and using an abuse of discretion standard of review, the Supreme Court affirmed the exclusion of the expert testimony.

The General Assembly changed Rule 702(a), which deals with the admissibility of expert testimony. This change tracked, in pertinent part, an amendment to the same federal rule that was designed to codify the principles in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Previously, Rule 702(a) rule allowed a qualified person to testify in the form of an opinion

“[i]f scientific, technical or other specialized knowledge” would “assist the trier of fact to understand the evidence or determine a fact in issue. The amendment added the following language regarding when a qualified person may testify. Now, a witness can testify in the form of

. . .an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Federal Rule 702 was amended to codify *Daubert*. North Carolina 702(a) was amended in a similar fashion. Thus, the amendment codified *Daubert* and its progeny, including *General Electric Company v. Joiner*, 522 U.S. 136 (1977), and *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999). These cases “established ‘exacting standards of reliability’ for the admission of expert testimony,” quoting *Weisgram v. Marley Company*, 528 U.S. 440, 455 (2000).

As the Supreme Court acknowledged, “the General Assembly has made it clear that North Carolina is now a *Daubert* state.” But the Court went on to say this amendment did not abrogate prior cases interpreting **Rule 702(a)**. Prior decisions remain “good law” so long as they do not conflict with the *Daubert* standard (which presumably includes *General Electric* and *Kumho Tire*). The Court made the important observation that the primary difference between the *Daubert* analysis and that of *Howerton v. v. Arai Helmet, Ltd.*, 358 N.C. 440, 455, 597 S.E.2d 674, 684 (2004), was *Howerton* required a less mechanistic and rigorous approach to the admission of expert testimony. It favored the liberal admission of expert testimony, leaving the role in determining its weight to the jury. This “less mechanistic and rigorous” approach seems a thing of the past.

The amended rule contains three requirements. First, the proposed expert testimony must be based on scientific technical or other principles that will assist the trier of fact in determining issues in the case. This inquiry is one of relevancy. But this point means more than minimal relevancy under Rule 401. It must assist the trier of fact by adding something beyond her common understanding or knowledge, but do more than invite the juror to substitute the expert’s judgment as

to the facts for her own. Second, the witness must be qualified. The expertise can come from practical experience as well as academic training. But the trial court has discretion to screen the expert's qualifications. Third, the testimony must meet the three-pronged reliability test under the amended rule: it must be based on sufficient facts or data, it must be the product of reliable principles and methods, and it must flow from the witness having applied the principles and methods reliably to the facts of the case, which the Court called "the reliability inquiry" emanating from *Daubert*, *General Electric* and *Kumho Tire*. The Court said this analysis was not new, as these were the same steps recognized in *Howerton*. But the amended rule "change[d] the level of rigor that our courts must use to scrutinize expert testimony before admitting it." This scrutiny is a preliminary question for the trial court under Rule 104(a). If appropriate, the trial court should make findings of fact, by a preponderance of the evidence, which will be binding on appeal if supported by any evidence. A trial court's ruling will be reviewed for abuse of discretion, where its ruling will only be reversed if it is manifestly unsupported by reason and could not have been the result of a reasoned decision. This standard applies even when the admission or exclusion of expert testimony is outcome determinative, such as resulting in the grant of summary judgment.

With regard to the testimony excluded here, the trial court did not abuse its discretion. First, the proposed testimony about pre-attack cues and use of force variables would not have assisted the jury as they were within the common knowledge of lay people. Even the expert's report admitted as much. Second, the expert was not qualified to discuss and opine about stress responses by a person's nervous system. He was not a medical doctor. The trial court found it was not sufficient for him to have read articles and been trained by medical doctors in the area. It did not abuse its discretion in finding the expert unqualified in this area. Third, the proposed testimony about reaction times was excluded because the expert did not provide the trial court with known or potential error rates for the studies on which he relied and that other variables, like defendant's physical disability, might affect his reaction times. The expert did not consider these disabilities. In short, "the trial court properly fulfilled its gatekeeping role."

State v. Godwin, ___ S.E.2d ___, 2016 WL 1569437 (N.C. App.),
stay allowed, 785 S.E.2d 93 (N.C. 2016)

Defendant appealed his conviction for driving while impaired. He challenged the admission of testimony from a police officer about the results of

the Horizontal Gaze Nystagmus (HGN) test and argued the police officer had not been qualified as an expert by the trial court. The Court of Appeals reviewed the issue de novo as it involved an issue of statutory construction, i.e. the meaning of **Rule 702(a1)**. **Rule 702(a1)** allows “[a] witness, qualified under subsection (a) of this section and with proper foundation” to give expert opinion testimony about “[t]he results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.” The trial court had stated, “I’m not—he doesn’t have to be qualified as an expert. I’m not going to make that requirement.” The Court of Appeals disagreed. A trial court errs when it permits a witness who has not been qualified as an expert under Rule 702(a) to testify about impairment based on HGN test results. It awarded a new trial. [The Court of Appeals applied and followed *Godwin* in *State v. Torrence*, 2016 WL 1569454 (N.C. App. 2016)]

State v. Turbyfill, 776 S.E.2d 249 (N.C. App.),
disc. rev. denied, 780 S.E.2d 560 (N.C. 2015)

Defendant appealed his convictions for driving while impaired and consuming alcohol while being under twenty-one. On appeal, he appeared to not dispute the scientific validity of retrograde extrapolation, but only the reliability of the particular expert’s testimony because the expert was not qualified to testify as an expert about retrograde extrapolation. The expert in question had held a chemical analyst certification since 1995 and had been employed as a field technician of NCDHHS in the “Forensic Test for Alcohol Branch” since 2005. He had been an instructor in this area since 2006. He was the co-author of the pharmacology section of the current chemical analyst training manual for law enforcement officers in North Carolina and had attended ten workshops with Paul Glover. He had previously testified as an expert in retrograde extrapolation twenty-eight times. Defendant argued the amendment to **Rule 702(a)** required a more searching and rigorous standard of *Daubert*. But the Court of Appeals found the trial court had not committed a manifest abuse of discretion in finding that the witness was qualified in the area of retrograde extrapolation and that he applied the appropriate principles and methods reliably to the facts of this case.

State v. Walston, 780 S.E.2d 846 (N.C. App. 2015),
disc. rev. allowed, 2016 WL 3265513 (N.C. 2016)

Defendant was convicted of first degree rape, first degree sex offense, and

indecent liberties. He was initially granted a new trial. *State v. Walston*, 229 N.C. App. 141, 747 S.E.2d 720 (2013). The Supreme Court reversed and remanded. *State v. Walston*, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014) (evidence of defendant being respectful to children was inadmissible), directing the Court of Appeals to consider the ramifications of the trial court using a superceded version of **Rule 702**. The Court of Appeals ruled there had been no prejudicial error. *State v. Walston*, 2015 WL 680240 (N.C. App. 2015). The Supreme Court then allowed defendant's petition for discretionary review for the limited purpose of remanding the case to the Court of Appeals to determine if the trial court's exclusion of defendant's proffered expert testimony was an abuse of discretion and prejudiced him. The Court of Appeals found it was an abuse of discretion and prejudiced defendant.

The specific issue dealt with the exclusion of proffered expert testimony about repressed memory, "the suggestibility of memory," and whether telling a child repeatedly that he has been abused can lead to his having false memories. The trial court excluded this expert testimony, in part, because the expert had never interviewed or spoke to the child or anyone else involved in the case. But the trial court did not make any findings of fact or conclusions of law. The Court of Appeals found the trial court's failure to make findings of facts and conclusions of law rendered its exclusion of the proffered expert testimony erroneous.

The Court of Appeals reviewed this issue de novo as involving an issue of statutory interpretation. It ruled that expert testimony about the credibility and reliability of child witnesses would be helpful to the jury as the subject was beyond the kin of the lay person. The Court of Appeals carefully distinguished expert testimony about the credibility or truthfulness of a specific witness, which is inadmissible, from the general reliability and credibility of child-witnesses generally.

Lurking in this matter are the changes to **Rule 702(a)** and the continuing validity of cases under the version of the rule before the 2011 amendments. Indeed, the decision in *State v. McGrady* may have some application to this case. On June 10, the same day it decided *McGrady*, the Supreme Court again granted discretionary review in *Walston*.

VI. Hearsay

State v. Cook, 782 S.E.2d 569 (N.C. App. 2016)

Defendant was convicted of first degree murder. On appeal, he challenged the admission of evidence concerning the deceased statement that she “was scared of him.” Defendant and the deceased had been in a relationship for five years. On the day in question, she went with her mother, her sister, and her four-year-old son to take groceries and clothes to defendant at his motel room. When they got there, the deceased took defendant’s clothes to the door. Defendant opened the door and began stabbing her with a screwdriver without warning. He chased her into the motel lobby and continued stabbing her. At trial, the deceased sister testified and indicated the deceased was telling her about the relationship with defendant “and that she was scared of [him].” Defendant objected. The prosecutor immediately responded, “Present sense impression.” The trial court overruled the objection. On appeal, defendant argued the statement constituted inadmissible hearsay. The Court of Appeals disagreed with the statement at trial that the evidence was a present sense impression under **Rule 803(1)**. But the evidence was admissible to show the deceased’s state of mind under **Rule 803(3)**.

VII. Confrontation

Ohio v. Clark, ___ U.S. ___, 135 S. Ct. 2173, 192 L.Ed.2d 306 (2015)

This case is the most recent application and explication of the confrontation clause from the Supreme Court in the line of case beginning with *Crawford v. Washington*. *Crawford* overruled *Ohio v. Roberts* and explained a “testimonial” statement was not admissible at trial in the absence of a defendant’s ability to confront the speaker, even if circumstances surrounding the statement indicated it was reliable.

Clark involved a situation where a teacher testified and repeated statements made to her by a three-year-old child that defendant was who abused him and inflicted the injuries the teacher saw and asked him about. The child was deemed incompetent to testify at trial. The teacher acknowledged the child had been somewhat reluctant, hesitant, and unclear in making the statement. The teacher was lawfully required to report child abuse. A five-justice majority of the Supreme Court held the “primary purpose” doctrine controlled. In examining the

circumstances surrounding the making of the statement, the Court concluded the primary purpose of the statement was not to create potential evidence to be used in a later proceeding. The primary purpose of both the child and the teacher was to protect against further abuse of the child by identifying and removing the abuser from an ability to have more contact with the child. Even though the teacher had a statutory duty to report child abuse, this obligation did not make her sufficiently like a law enforcement officer who was investigating a possible crime and gathering evidence for a possible prosecution. The Court reached this conclusion despite the realization that the natural result of the reporting would likely be as criminal prosecution.

State v. McLaughlin, __ S.E.2d __, 2016 WL 1000985 (N.C. App.),
petition for discretionary review filed (N.C., 18 April 2016)

Defendant was convicted of multiple counts of statutory sex offenses and taking indecent liberties. He allegedly molested the accuser beginning when he was nine years old until he was sixteen years old. He committed suicide when he was almost eighteen years old, making him unavailable to testify. Defendant objected on **confrontation** grounds to the admission of statements by the accuser to his mother and to the Children’s Advocacy Center. The trial court rejected the arguments, and the Court of Appeals affirmed. First, the Court of Appeals rejected the state’s claim that defendant could not maintain his confrontation objection due to forfeiture by wrongdoing. This doctrine of forfeiture by wrongdoing applies only when a defendant acts to procure the absence of the witness, having in mind the particular purpose of making the witness unavailable. The accuser later committing suicide, even if proximately resulting from the sexual abuse, did not constitute defendant forfeiting his right to confrontation due to his own wrongdoing. Second, the Court of Appeals rejected defendant’s confrontation argument. After engaging in a review of the confrontation doctrine and the prevailing Supreme Court precedents, it noted the underlying purpose of confrontation is to ensure the reliability of evidence. Relying largely on *Ohio v. Clark*, the court explained confrontation may be satisfied by considering the totality of the circumstances, including the non-testimonial nature of the statements, whether the statements are as reliable as those admissible under various hearsay exceptions (such as a statement for medical diagnosis or treatment), the person to whom the statements were made, the “primary purpose” behind the statements, the primary purpose for which the statements are offered at trial, and various public policy concerns.

Engaging in a de novo review of the trial court's ruling, the Court of Appeals found the statements were admissible in the absence of confrontation. There was no reason to believe the accuser, even though fifteen years old, would know the statements might be used in a prosecution. The questions by the nurse were aimed at the primary purpose of the accuser's physical and mental health and his safety. He was at the center for a checkup. She told him she needed accurate information to make sure he did not have any diseases or other issues. Even statements related to information to protect against ongoing abuse were not inadmissible due to lack of confrontation. The statements were not made to a law enforcement officer, and the nurse's duty to report abuse did not transform her into the same status as a law enforcement officer. Finally, the statements had the same reliability and characteristics as a statement in the course of medical diagnosis or treatment, the admissibility and reliability of which had long been recognized.

VIII. Authentication

State v. Snead, 738 S.E.2d 344 (N.C. 2016)

Defendant was convicted of felony larceny and conspiracy to commit felony larceny. On appeal, he challenged the admission of a surveillance videotape due to lack of **authentication**. A proper foundation must be laid for a videotape to be admitted for substantive or illustrative purposes. This foundation includes whether the equipment was properly maintained, whether the videotape accurately presents the events depicted, and whether there is an unbroken chain of custody.

The Court of Appeals had reversed and ordered a new trial. *State v. Snead*, 768 SE.2d 344 (N.C. App. 2015). As it viewed the record, the sole authenticating witness explained how the store's surveillance system worked and that he had reviewed the tape in question. But he was not the person in charge or maintaining the equipment and was not at the store on the date in question. There was no evidence the equipment was operating properly on the day in question, that the tape showed the events in the store, or the chain of custody of the tape. Thus, the proper foundation was not laid and the tape should not have been admitted.

The Supreme Court reversed the Court of Appeals. As it explained, **Rule 901(a)** only requires "that the matter in question is what its proponent claims" it to be. Recordings, including a tape from an automatic surveillance camera, need

only be authenticated as an accurate product of the automated process. This authentication can be accomplished by evidence that (1) the recording process is reliable, and (2) the tape recording or video being offered at trial is the same tape recording or video that was produced by the recording process. This showing can be made by testimony that the recording was one involved with the incident depicted and has not undergone any material change since it was produced. Defendant admitted he was one of the two people depicted in the video stealing shirts from the business, he offered no reason to doubt the reliability or accuracy of th recording. Moreover, the Supreme Court noted the state’s witness testified the surveillance system was working properly on the day in question, was industry standard, and contained safeguards to prevent tampering. Thus, the video was properly authenticated under **Rule 901(a)**.

State v. Ford, 782 S.E.2d 98 (N.C. App. 2016)

Defendant appealed his convictions for involuntary manslaughter and obstruction of justice. The victim appeared to have been killed in a dog attack. Police sized a dog, DMX, from defendant, who went by the nickname Flex, and DMX’s DNA was found on the victim’s punctured pants. Defendant challenged the admission of two screen shots from an internet site that included pictures of him, his dog, and his nickname. A detective testified he had found a “myspace page with the name of Flexugod/7.” The detective had previously found a certificate awarded to defendant on which he was referred to as “Flex.” The screen shots included a picture of defendant, a picture of DMX, a video captioned “DMX the Killer Pit,” and other content distinctive and unique to defendant and DMX. This evidence was “sufficient to support a prima facie showing that the myspace webpage at issue was defendant’s webpage.” **Rule 901(a)** only requires evidence sufficient to support a finding that the matter in question is what the proponent claims it to be. This burden is not a heavy one. The court did not say the reliability of these screen shots was established by this testimony. In other words, defendant could offer evidence, if available, that either he did not post these materials or the materials on the site were not what they appeared to be. But these challenges would not go to the authenticity of the exhibits.

IX. Miscellaneous

State v. Crisco, 777 S.E.2d 168 (N.C. App. 2015),
disc. rev. denied, 781 S.E.2d 605 (2016)

Defendant was convicted of first degree murder in the beating death of a woman who approached defendant about posting a bond for her husband, who was in jail on unrelated criminal charges. Sometime after the deceased body was found, defendant had a conversation with a friend who was helping him at defendant's house. In this conversation, defendant admitted killing the woman. While defendant was in the bathroom, the friend telephoned his wife and told her to listen but not talk. She then heard defendant admit the killing to her husband. In an unrelated development, a pastor (who previously knew defendant) contacted him about an unrelated matter and offered to counsel him. Defendant accepted. During the ensuing counseling sessions, defendant told the pastor he had killed the deceased. Defendant later told his friend he had told a preacher about the murder. The trial court denied the motion to suppress based on the communication between the pastor and the defendant not being privileged because the pastor, not defendant, had initiated the communications. **See N.C. Gen. Stat. § 8-53.2.** The Court of Appeals affirmed, but on a different basis. It held that the pastor having initiated the communication did not render them exempt from the privilege. But, although clergy-communicant privilege is virtually absolute, it can be waived when the communicant divulges the substance of the communication to a third party with whom he does not have a confidential relationship. By disclosing the substance of his confidential communication with the pastor to his friend, defendant waived the privilege.

Herndon v. Herndon, ___ S.E.2d ___, 2016 WL 3221115 (N.C. 2016)

This appeal was from a domestic violence protective order based on husband's claim that his wife put sleep-inducing drugs in his food so she could sneak away to pursue an affair, sometimes leaving the children at home unsupervised. When the wife's attorney called her client to testify at the hearing, the trial court announced, "You're calling her. She ain't going to get up there and plead no Fifth Amendment?" The attorney said she did not expect her client to invoke the **privilege against self-incrimination**. The trial court responded, "I want to make sure that wasn't going to happen because you—somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth

Amendment.” The wife testified. After the conclusion of direct examination, the trial court stated there would be no cross-examination due to the expiration of the time allotted for the hearing but proceeded to question the wife itself. The wife answered all of the court’s questions, occasionally saying “I don’t know” or “I don’t recall,” but never refusing to answer based on a claim the answer would be incriminating. The trial court found the testimony “not credible that you don’t remember” and entered the domestic violence protective order against the wife.

The Court of Appeals reversed the trial court. It explained the privilege against self-incrimination is a shield but not a sword. The privilege is not waived merely by testifying in a civil case and is not lost as to matters wholly unrelated to and connected with the subject of the direct examination. The trial court’s statements violated the wife’s Fifth Amendment privilege. *See Brown v. United States*, 356 U.S. 148 (1958). Judge Bryant dissented. The Supreme Court reversed the Court of Appeals and remanded for the court to review other issues.

With respect to the alleged violation of the privilege against self-incrimination, the Supreme Court found that the trial court did not ask any questions that were beyond the scope of the direct examination. While the wife’s paramour had invoked his right against self-incrimination when called by the husband, the wife never attempted to invoke her privilege against self-incrimination, unlike the situation in *Brown v. United States*, 356 U.S. 148 (1958). The Supreme Court noted a distinction between a witness who is compelled to testify (the paramour) and one who voluntarily takes the stand (the defendant-wife), a distinction between this case and *Brown*.

Furthermore, nothing in the trial court’s questioning of the wife veered outside the scope of the questions asked on the direct examination of the wife by her own attorney. The Supreme Court found specific questions in the transcript where the wife’s attorney asked her about the very things she claimed the trial court improperly asked her, specifically if she drugged her husband or sent some of the incriminating text messages. As the Supreme Court explained, “even if the [wife] had attempted to invoke the Fifth Amendment, under the rule in *Brown* the privilege was not available to [her] during the trial court’s inquiry.”

The Supreme Court noted the inappropriateness of the trial court’s conduct. The trial judge should not have threatened the wife with being put in jail. But this action did not amount to a constitutional violation.

Berens v. Berens, ___ S.E.2d ___, 2016 WL 1569215 (N.C. App. 2016)

In this interlocutory appeal from an order in a domestic relations matter, defendant challenged the denial of her request for a protective order and motion to quash a subpoena. Defendant claimed the person subject to the subpoena was protected by the **attorney-client privilege** and work product doctrine. The person had been present during meetings between defendant and defendant's attorney. According to defendant, the person was her agent and the attorney-client privilege extended to her. The person, who was now an inactive attorney, admitted being a friend of defendant before the litigation began but had signed a confidentiality agreement with defendant and emphasized any privileged information she learned would solely be used to settled or litigate the domestic issue. Plaintiff suggested she was engaging in the unauthorized practice of law. The person was not an employee of the law firm representing defendant and had not been hired by the law firm in any capacity. The trial court found she was "a good friend" of defendant who "is helping [her] out in this litigation. The Court of Appeals reversed. It determined the import of the confidentiality agreement and attestation of an agency relationship between defendant and her friend were controlling. The documents referred to the friend as "Client's Agent." Thus, an agency relationship existed between defendant and her friend. Being both a good friend and an agent are not mutually exclusive. In addition, many of the documents involved in the subpoena might well be work-product. The trial court was incorrect in failing to consider the work-product doctrine.

Litigating Experts after *McGrady*

Experts and Amended Rule 702(a)

New N.C. Rule Evid. 702(a)

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Purpose of 2011 amendment to NC's version of Rule 702 was to adopt *Daubert*

The questions become:

1. What did *Daubert* really mean?
2. What is the impact of the *Daubert* trilogy in NC now?



State v. McGrady:

"We hold that the 2011 amendment adopts the federal standard for the admission of expert witnesses articulated in the *Daubert* line of cases. The General Assembly amended North Carolina's rule in 2011 in virtually the same way that the corresponding federal rule was amended in 2000. It follows that the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule."

What is “the *Daubert* line of cases?”

Daubert (1993): Evidence must be reliable;
Frye is dead

General Electric v. Joiner (1997):
--May exclude if linkage to data is only by
ipse dixit of expert
--Appellate review for abuse of discretion

Kumho Tire v. Carmichael (1999): extends *Daubert*
to all expert testimony, not just novel scientific
techniques; reinforces abuse of discretion
standard

– Scalia, J., concurring in *Kumho Tire*:

“trial-court discretion in choosing the
manner of testing expert reliability- is not
discretion to abandon the gatekeeping
function. I think it worth adding that it is not
discretion to perform the function
inadequately. Rather, it is discretion to
choose among *reasonable* means of
excluding expertise that is *fausse* and
science that is junky.”

“I will haunt you forever, Widenhouse!”



McGrady describes the *Daubert* trilogy:

“these three cases established ‘exacting
standards of reliability’ for the admission of
expert testimony” quoting *Weisgram v.
Marley Co.*, 528 U.S. 440, 455 (2000)

McGrady also says framework remains
same as *Howerton*, but with “change[d]
level or rigor” to scrutinize expert
testimony before admitting it

Post-*Daubert* Practice in federal court

Some cases where summary judgment
granted because judge, acting as a
Daubert gatekeeper, made pretrial
determination that party’s expert could not
testify under Rule 702

NC initially resisted this approach in
Howerton

State v. McGrady, 787 S.E.2d 1 (N.C. 2016)

Trial court excluded defense expert on use of
force; extensive questioning by trial court

Review for abuse of discretion; wide latitude to
exclude evidence; no indication trial court
exceeded gate keeping role

Reasonableness of a different ruling does not
show actual ruling was arbitrary

McGrady explains sections of Rule 702(a)

1. "scientific, technical or other specialized knowledge" must "assist the trier of fact to understand the evidence or determine a fact in issue"
2. Witness must be "qualified as an expert by knowledge, skills, experience, training, or education"
3. Testimony must meet "the three-pronged reliability test that is new to the amended rule"
(1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; (3) The witness has applied the principles and methods reliably to the facts of the case.

"scientific, technical or other specialized knowledge" must "assist the trier of fact to understand the evidence or determine a fact in issue"

Described as "the relevance inquiry"

Rule 401; have some probative value to case; relate to case

But expert testimony must have more to be relevant; it "must provide insight beyond the conclusions that jurors can readily draw from their own experience"

It must also do more than invite jurors to substitute expert's judgment as to facts for juror's own

Witness must be "qualified as an expert by knowledge, skills, experience, training, or education"

"Does witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?" Here, *McGrady* quotes *Howerton*

Court explains trial court can screen evidence based on expert's qualifications

Trial court "has the discretion" to decide if witness is sufficiently qualified to testify in given field

Testimony must meet "the three-pronged reliability test that is new to the amended rule:" (1) based upon sufficient facts or data; (2) product of reliable principles and methods; (3) witness applied principles and methods reliably to facts of case

Court describes three prongs as reliability inquiry from *Daubert*, *Joiner*, and *Kumho Tire*

Primary focus is reliability of witness's principles and methodology, not on witness's conclusions

Trial court has "same kind of latitude" in deciding *how* to test expert's reliability as in deciding "*whether* that expert's relevant testimony is reliable"

"a 'flexible' inquiry," quoting *Daubert*

McGrady extols five *Daubert* factors:

1. Can theory or technique be or has it been tested?
2. Has theory or technique been subjected to peer review and publication?
3. What is "known or potential error rate" of theory or technique?
4. Are there standards controlling technique's operation?
5. Has theory or technique achieved "general acceptance?"

McGrady adds five factors from federal rule notes:

1. Is expert testifying about matters found independent of litigation or for purpose of testifying?
2. Has expert "unjustifiably extrapolated" from accepted premise to unfounded conclusion?
3. Has expert "adequately accounted for alternative explanations?"
4. Was expert as careful in his consulting work as in his regular professional work?
5. Is expert's field of expertise known to reach reliable results for type of opinion being given?

McGrady adds:

Trial court may use any factors identified in previous cases and any more it may identify so long as they are “reasonable measures” of the three prongs under Rule 702(a)

Trial court will only be reversed for abuse of discretion, i.e. a decision that is “manifestly unsupported by reason”

Both for admitting or excluding evidence, even if the ruling is “outcome determinative,” quoting *Joiner*

What about specific testimony in McGrady?

1. Testimony about “pre-attack cues” and “use of force variables” would not assist the jury

Trial court said within juror’s knowledge/experience

Anyone would know how threat might be perceived

Even expert’s own report stated people without training recognize and respond to cues and variables when assessing a threat

No abuse of discretion to exclude on this basis

2. Expert “not qualified to” testify about “stress responses of the sympathetic nervous system;” expert wanted to describe how instinctive survival response to fear can cause “fight or flight”

Not medical doctor; not psychologist

He had worked with them; been trained by them; personally experienced it

Even though Rule 702(a) not require academic training or credentials, not abuse of discretion to find expert lacked necessary qualifications on this basis

3. Expert testimony about reaction times was unreliable

Expert explained basis for opinion

But admitted reaction “could be affected by previous injuries, clothing, and body position”

He did not consider deceased medical history; thought adrenalin would overcome physical impairment, but not certain how much

He admitted not aware of error rates in two studies he used in report; trial court can reasonably conclude this lack of knowledge rendered opinions unreliable

Preliminary Takeaways from *McGrady*

1. NC is now a *Daubert* + *Joiner* + *Kumho* state
2. Expertise must assist trier of fact; opinion must reach beyond common experience/knowledge
3. Expertise can come from many places, not just book learning
4. Three prongs of 702(a) go to reliability of evidence
 - testimony is based upon sufficient facts or data
 - testimony is product of reliable principles/methods
 - witness applies principles/methods reliably to facts

5. Trial court has expanded role as gatekeeper; advised to make findings and conclusions by preponderance of evidence; binding on appeal if supported by evidence; amended rule strikes new balance, as admission of expert testimony now more rigorous than *Howerton*
6. Appellate review will be more limited; standard of review abuse of discretion, which means trial court reversed "only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision"

Be careful in the trial court ...very careful

Some Critical Considerations for Trial Courts

- Expert's professional background in the field
- Expert's use of established techniques and independent research by expert
- Expert's ability to discuss studies and other data
- Expert's connection to facts of case

State v. Turbyfill, 776 SE2d 249 (N.C. App.),
disc. rev. denied, 780 N.C. 560 (2015)

Trial court overruled defense objection to state's expert on retrograde extrapolation; appeal focused on qualification of expert rather than reliability of retrograde extrapolation; argued for rigorous scrutiny under *Daubert* as opposed to less scrutiny under *Howerton*

State's expert certified as chemical analyst; co-authored pharmacology section of NC training manual; testified as expert 28 times before

State v. Godwin, 786 N.C. App0 34, stay granted, 785 S.E.2d 93 (2016)

D convicted of DWI; trial court admitted officer opinion re HGN testing; did not qualify officer as expert; "he doesn't have to be qualified as an expert. I'm not going to make that requirement."

Oops. Rule 702(a1)(1) says HGN results admissible by witness "qualified under subsection (a) of this section and with proper foundation"

COA applied plain language of rule and reversed; lots of evidence of non-impairment; defense expert questioned not only HGN testing but what he saw on video of stop

State v. Walston, 780 S.E.2d 249 (N.C. App. 2015)

First appeal: COA reversed (D being respectful to children should have been admitted) but also noted trial court used superseded version of 702; NCSC reversed COA on merits (being respectful to children is improper character evidence) but COA should fully address 702 issue on prejudice

Second appeal: COA said no prejudice under 702; D sought PDR; NCSC granted PDR and told COA to re-examine in light of *State v. King*

Third appeal: COA orders new trial; trial court erred in excluding D expert on repressed memory because expert not interview kids; no FF/CL re 702 or 403

Fourth appeal: NCSC granted discretionary review June 10, same day it decided *McGrady*

THE END