Mental Health Defenses—Diminished Capacity and Voluntary Intoxication: What Can the Expert Say?

In mounting a diminished capacity or voluntary intoxication defense in a first-degree murder case, the defense attempts to "negate" the element of specific intent, premeditation, or deliberation. To negate in this context means to raise a reasonable doubt about a mental element required for conviction. The diminished capacity defense involves negation through evidence of a mental disorder or emotional disturbance, whereas the voluntary intoxication defense involves negation through evidence of intoxication arising from the ingestion of alcohol or drugs. Though various types of evidence may be relevant to these defenses, expert testimony pertaining to the defendant's mental state at the time of the alleged offense is often central. *See State v. Shank*, 322 N.C. 243, 248–49 (1988).

Questions arise as to what an expert witness may say in court. Prior to 1983, it was generally not permissible under North Carolina law for an expert to testify on an ultimate issue to be determined by the jury. Official Commentary to Chapter 8C, Section 1, Rule 704 of the North Carolina General Statutes (hereinafter G.S.). However, Rule 704 now provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Experts are thus allowed to go further in offering testimony pertaining to a crucial fact that has a significant bearing on guilt or innocence. However, where the expert applies a particular legal standard to the facts at issue, such testimony likely goes too far and strays into impermissible "legal conclusion" territory. *See State v. Parker*, 354 N.C. 268, 289 (2001).[1]

As a rule of thumb, where a phrase is complex and can be broken down into simpler terms, this may indicate that the phrase is an impermissible legal conclusion. Legal conclusions (based on the application of legal standards) are for the jury, not the expert, to make. Legal standards also may include terms of art. The expert, who likely has a background in medicine or psychology, may be in no better position than the jurors to apply these terms as they should be understood in the context of a given statute or as interpreted in the caselaw. *See* G.S. 8C-1, Rule 702(a) (expert testimony must "assist" the trier of fact); *State v. Boyd*, 343 N.C. 699, 708–10 (1996) (medical expert acknowledged lack of "precision" in his comprehension of the applicable legal standard). In contrast, where a phrase is relatively simple, this may indicate that the phrase is permissible testimony addressing an ultimate issue of fact. This rule of thumb may be somewhat counterintuitive given that the generally more sophisticated expert is prevented from using the more sophisticated language and the jury is left to wrestle with such language without the expert's assistance. The jury will, however, have the benefit of the judge's instructions in applying the legal standard at hand.

The distinction between permissible testimony on an *ultimate issue* and impermissible testimony involving a *legal conclusion* can be subtle and challenging to draw. The rule of thumb above is just that: it does not explain all the distinctions the courts have made in this context. Courts also consider other criteria such as whether the expert is qualified to use the terms properly, and whether the testimony uses the precise legal terms of art the jury must apply or whether it speaks to a dispositive question without explicitly establishing that an element has or has not been met.[2]

With thanks to John Rubin for his work on these bulletins: *The Diminished Capacity Defense*, Admin.of Just. Bull. No. 1992/01 (UNC School of Government, Sept. 1992); *The Voluntary Intoxication Defense*, Admin.of Just. Bull. No. 1993/01 (UNC School of Government, Apr. 1993). Though the cases discussed in the bulletins are now decades-old, the law has stayed relatively consistent. Additional cases of note are included below.

1 For further discussion on the distinction between ultimate issue and legal conclusion, see Nc Prosecutors' Resource Online (NC PRO) § 706.4, *Ultimate Issue [Rule 704]* (last updated 12/01/23).

2 Also compare the distinctions on proper vs. improper expert testimony noted in this chart with the admissibility rules applied in the context of capacity to proceed. There, the statute (G.S. 15A-1002(b)(1a), (2)) allows for admission of the expert's capacity report, which ostensibly includes a legal conclusion that the defendant is or is not capable of proceeding, not merely opinions on "ultimate issues" such as the defendant's ability to understand the proceedings and assist with the defense. However, capacity is determined by the judge, not the jury, and though the rules of evidence likely apply to capacity hearings, they may be relaxed somewhat. *See* John Rubin, *Capacity to Proceed in Criminal Cases in North Carolina*, Admin.of Just. Bull. No. 2025/06, at 31 (UNC School of Government, Oct. 2025).

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The chart below gives concrete examples from North Carolina appellate courts, dividing common phrases into the categories of proper and improper testimony.

Admissibility of Expert Testimony on the Defendant's Mental State

PROPER EXPERT TESTIMONY

"The defendant could not form the specific intent to kill"

The statement is admissible.

See G.S. 8C-1, Rule 704 (expert may testify to ultimate issue); *State v. Rose I*, 323 N.C. 455, 458 (1988) (the term "specific intent" encompasses the ultimate issue, but it is not a legal conclusion beyond the qualifications of a medical expert); *State v. Daniel*, 333 N.C. 756, 760–64 (1993).

"The defendant was incapable of making plans"

"The defendant was incapable of carrying out plans"

Both statements are admissible.

See State v. Shank, 322 N.C. 243, 248 (1988) (specifically approving of this phraseology as helpful to the jury in determining whether the defendant premeditated or deliberated at the time of offense).

"The defendant was under the influence of a mental or emotional disturbance"

The statement is admissible.

See Shank, 322 N.C. at 248.

OTHER PROPER EXPERT TESTIMONY

Testimony pertaining to the expert's basis of opinion about the defendant's mental state (assuming the opinion is admissible), including conversations between the expert and the defendant

Generally admissible.

See Rule 705; *State v. Wade*, 296 N.C. 454, 462 (1979) (concluding that expert's basis of opinion was admissible in an insanity case); *see also State v. Allison*, 307 N.C. 411 (1983).

However, "self-serving, exculpatory statements" made by the defendant to the expert may potentially be inadmissible under Rule 403 as unfairly prejudicial to the State. *See State v. Baldwin*, 330 N.C. 446, 455–56 (1992).

IMPROPER EXPERT TESTIMONY

"The defendant was incapable of premeditation at the time"

"The defendant was incapable of deliberation at the time"

Neither statement is admissible.[a]

See State v. Weeks, 322 N.C. 152, 164 (1988) (though an expert may give an opinion on an ultimate issue, the expert may not testify to a "legal conclusion" that the expert is "not qualified to make"); *Rose I*, 323 N.C. at 458–60.[b]

"The defendant did not act in a cool state of mind"

"The defendant acted in suddenly aroused violent passion"

Neither statement is admissible.

See Weeks, 322 N.C. at 166; *Rose I*, 323 N.C. at 459–60; *State v. Boyd*, 343 N.C. 699, 708–10 (1996) (expert "admitted that the legal import of 'cool state of mind' was not the same as the medical meaning, to which he was referring").

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a Less direct formulations such as "the defendant's mental disorder would have negatively affected his ability to premeditate" may be admissible in that they do not draw a legal conclusion as to whether the defendant did or did not premeditate on the date in question, though they speak to the legal standards the jury must apply. One might compare such testimony to expert testimony in the child sexual abuse context, where experts are generally permitted to give their opinion that certain behavioral symptoms are consistent with being the victim of sexual abuse (subject to certain limitations, such as a limiting instruction), *see State v. Ray*, 197 N.C. App. 662, 672–73 (2009), though experts are not permitted to opine that sexual abuse occurred in the absence of physical symptoms, *see State v. Stancil*, 355 N.C. 266 (2002).

b Note that based on this reasoning, a medical expert who also has legal expertise may perhaps be allowed to give such an opinion, though courts generally exclude expert testimony on the law. *See* Joseph L. Hyde, *Questions of Law: Untangling Admissibility in State v. Gibbs*, N.C. Crim. L.: A UNC Sch. Of Gov't Blog (Nov. 14, 2023), (citing to McCormick On Evidence and other sources in discussing the general principle that expert testimony on the law should not be allowed; such testimony invades "the province of the court" rather than "the province of the jury," as it is for the judge to instruct the jury on a legal standard, *see HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 587, (1991)).