Recent Cases Affecting Criminal Law and Procedure
(November 16, 2004 – June 7, 2005)

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North Carolina Supreme Court

Evidence

(1) Statement of Unavailable State's Witness Made During Interview with Law Enforcement Officer Was Inadmissible Under *Crawford v. Washington* When Defendant Did Not Have Prior Opportunity to Cross-Examine Witness
(2) Evidence in Murder Trial of Prior Similar Assaults on Another Person to Show Identity and Intent to Kill Was Properly Admitted Under Rule 404(b)

State v. Morgan, 359 N.C. 131, 604 S.E.2d 886 (3 December 2004). The defendant was convicted of first-degree murder and sentenced to death. (1) A witness to the murder died before trial for reasons unrelated to the events surrounding the murder. The state offered a statement of this witness given during an interview with a law enforcement officer. The court ruled that the statement, knowingly given in response to structured law enforcement questioning, was inadmissible under Crawford v. Washington, 124 S. Ct. 1354 (2004), because the defendant did not have a prior opportunity to cross-examine the witness. The court ruled, however, that the admission of the statement was harmless error beyond a reasonable doubt. (2) The defendant killed the victim by apparently striking her multiple times with a jagged broken bottle. The state was permitted to introduce testimony of a person who had been assaulted twice by the defendant six years earlier with the use of a bottle in one assault and with the apparent use of a broken bottle in the second assault. The court ruled that this evidence was properly admitted under Rule 404(b) to prove the defendant's identity and the specific intent to kill.

Trial Judge Did Not Err in Ruling Under Rule 403 That Defense Mental Health Expert Could Not Testify She Based Her Opinion Partly on Defendant's Statements to Her and to His Family Members

State v. Smith, 359 N.C. 199, 607 S.E.2d 607 (4 February 2005). The defendant was convicted of first-degree murder and sentenced to death. The court ruled, relying on State v. Workman, 344 N.C. 482, 476 S.E.2d 301 (1996), and State v. Baldwin, 330 N.C. 446, 412 S.E.2d 31 (1992), that the trial judge did not err in ruling under Rule 403 that a defense mental health expert could not testify that she based her opinion partly on the defendant's statements to her and to his family members. The court concluded that the trial judge properly applied Rule 403 to find that although relevant, the danger of these statements prejudicing, confusing, or misleading the jury outweighed their probative value.

Criminal Law and Procedure

Weight of Marijuana Is Determined at Time of Seizure of Marijuana, Including Moisture Naturally Contained Within Marijuana—Weight Is Not Determined When Marijuana Is Later Usable or Suitable for Consumption; Ruling of Court of Appeals Is Affirmed

State v. Gonzales, 164 N.C. App. 512, 596 S.E.2d 297 (1 June 2004)**,** *affirmed per curiam*, 359 N.C. 420, 611 S.E.2d 832 (5 May 2005). The court affirmed, per curiam and without an opinion, the ruling of the

court of appeals. This case involved an appeal by the state of a judge's order dismissing trafficking charges. Officers seized 731 potted marijuana plants. Officers cut the plants where they joined the soil and bagged them. The freshly cut plants weighed a total of 25.5 pounds. When submitted to the SBI about two weeks later, they weighed 6.9 pounds. (Author's note: A drug trafficking offense requires a weight of more than 10 pounds of marijuana.) The court ruled, relying on state and federal case law, that the weight of marijuana is determined at the time of seizure of the marijuana, including moisture naturally contained within marijuana. The weight is not determined when the marijuana is usable or suitable for consumption. The court also noted that the defendant has the burden of showing that some of the weight of marijuana is attributable to parts of the plant (such as the mature stalk or sterile seeds) that is not included in the definition of marijuana under G.S. 90-87(16). The court indicated that the defendant also could show that excess water or extraneous debris contributed to the weight of the marijuana.

Sufficient Evidence of Conspiracy to Traffic by Possessing Cocaine—Ruling of Court of Appeals Is Affirmed

State v. Jenkins, 167 N.C. App. 696, 606 S.E.2d 430 (4 January 2005), *affirmed per curiam*, 359 N.C. 423, 611 S.E.2d 833 (5 May 2005). The court affirmed, per curiam and without an opinion, the ruling of the court of appeals. The defendant was convicted of conspiracy to traffic by possessing cocaine. When officers stopped a pick-up truck, A was driving, B was sitting in the middle, and the defendant was sitting next to the passenger door. The driver, A, had a pile of cash (about $2,800.00) in his lap. When A exited the vehicle, there was a semiautomatic pistol plainly visible inside the driver's door panel. A bag of cocaine was found on the seat between B and the defendant that contained 27.8 grams of powdered cocaine and 51.5 grams of crack cocaine. The court ruled that there was sufficient evidence to support the defendant's trafficking conspiracy conviction.

Insufficient Evidence of Embezzlement When Employee Took Corporate Signature Stamp Without Permission and Wrote Unauthorized Checks—Ruling of Court of Appeals Is Affirmed

State v. Weaver, 359 N.C. 246, 607 S.E.2d 599 (4 February 2005), *affirming*, 160 N.C. App. 613, 586 S.E.2d 841 (21 October 2003). The court ruled, affirming the ruling of the court of appeals, 160 N.C. App. 613, 586 S.E.2d 841 (21 October 2003), that there was insufficient evidence of embezzlement when an employee took a corporate signature stamp without permission and wrote unauthorized checks, thereby misappropriating corporate funds from her employer. The court concluded that the employee did not lawfully possess or control the misappropriated funds, and therefore the crime of embezzlement did not occur. The court reversed the defendant's convictions for aiding and abetting the employee to commit embezzlement and conspiracy to commit embezzlement. The court stated that the appropriate charges against the defendant should have been aiding and abetting larceny and conspiracy to commit larceny.

Court, Per Curiam and Without an Opinion, Affirms Ruling of Court of Appeals That Dog Used By Defendant To Attack Law Enforcement Officers Was Sufficient Evidence Of Deadly Weapon To Support Defendant's Convictions of Assault With a Deadly Weapon on a Governmental Official

State v. Cook, 359 N.C. 185, 606 S.E.2d 118 (17 December 2004), *affirming*, 164 N.C. App. 139, 594 S.E.2d 819 (4 May 2004). The court, per curiam and without an opinion, affirmed a ruling of the North Carolina Court of Appeals, 164 N.C. App. 139, 594 S.E.2d 819 (4 May 2004), that a dog used by the defendant to attack two law enforcement officers was sufficient evidence of a deadly weapon to support the defendant's convictions of assault with a deadly weapon on a governmental official. The court stated that a dog may be considered a deadly weapon when ordered to attack another person, as occurred in this case.

Arrest, Search and Seizure, and Confession Issues

Affidavit Established Probable Cause for Search Warrant to Search Residence for Drugs—Ruling of Court of Appeals Is Reversed

State v. Sinapi, 359 N.C. 394, 610 S.E.2d 362 (7 April 2005), *reversing*, 164 N.C. App. 56, 596 S.E.2d 822 (4 May 2004). Law enforcement officers were investigating a heroin overdose in which the defendant was implicated as the seller of the heroin. A criminal records check revealed that the defendant had been previously arrested twice for drug offenses. Division of Motor Vehicle records showed that the defendant resided at 3300 Pinecrest Drive. Officers went to that address and performed a trash pick-up during the normal trash day and time. They recovered a single, white plastic garbage bag from the front yard/curb line beside the driveway. Inside the garbage bag were eight marijuana plants, although there were no items in the bag that specifically connected the contents to the residence at that address (such as documents or mail). The court ruled that this information was sufficient to establish probable cause to issue a search warrant to search the residence. The court stated that the issuing magistrate was entitled to infer that the garbage bag came from the defendant's residence and the items inside were probably also associated with that residence. This inference was bolstered by the location of the garbage bag and the officers' retrieval of it from the defendant's yard on the regularly scheduled garbage collection day. The marijuana plants in the garbage bag, taken in conjunction with the defendant's drug-related criminal history and the information linking the defendant to a heroin sale and overdose, established a fair probability that contraband and evidence of a crime would be found in the residence. The affidavit constituted a "substantial basis" for the magistrate's finding probable cause to issue the search warrant.

Capital Case Issues

(1) Defendant's Willingness to Plead Guilty and Accept Life Sentence Was Not a Mitigating Circumstance
(2) Trial Judge Did Not Err in Not Submitting Mitigating Circumstance G.S. 15A-2000(f)(7) (Defendant's Age When Murder Committed)

State v. Thompson, 359 N.C. 77, 604 S.E.2d 850 (3 December 2004). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled, relying on State v. Carroll, 356 N.C. 526, 573 S.E.2d 899 (2002), that the defendant's willingness to plead guilty to first-degree murder and accept a life sentence was not a mitigating circumstance. The court noted that the defendant chose to plead not guilty and proceed to trial. (2) The court ruled that the trial judge did not err in not submitting mitigating circumstance G.S. 15A-2000(f)(7) (defendant's age when murder committed). Testimony of the defense expert that the defendant was emotionally immature was contradicted by other evidence tending to show that the defendant functioned emotionally as an adult.

Defendant Did Not Receive Ineffective Assistance of Counsel at Capital Sentencing Hearing in Which Defendant Was Sentenced to Death

State v. Frogge, 359 N.C. 228, 607 S.E.2d 627 (4 February 2005). The court ruled that the defendant did not receive ineffective assistance of counsel at a capital sentencing hearing in which the defendant was sentenced to death. The issues concerned the two defense attorneys' investigation of the defendant's social and medical history and the presentation of evidence by defense experts. (See the court's analysis in its opinion.)

(1) Defendant Did Not Receive Ineffective Assistance of Counsel at Guilt-Innocence Phase of Capital Murder Trial
(2) Trial Court Is Without Jurisdiction to Adjudicate a Defendant Mentally Retarded in Motion For Appropriate Relief Proceeding Other Than Through Interim Provision in G.S. 15A-2006

State v. Poindexter, 359 N.C. 287, 608 S.E.2d 761 (4 March 2005). (1) The court ruled that defense counsel in the guilt-innocence phase of the defendant's capital murder trial did not provide ineffective assistance of counsel when they did not assert a diminished capacity defense. The court noted that the defendant testified at the guilt-innocence phase that unknown assailants committed the murder, a defense inconsistent with the diminished capacity defense. (2) The court ruled that a superior court judge is without jurisdiction to adjudicate a defendant mentally retarded in a motion for appropriate relief proceeding other than through the interim provision in G.S. 15A-2006 (which both parties conceded did not apply to the defendant in this case).

North Carolina Court of Appeals

Criminal Law and Procedure

Short-Form Murder Indictment Is Not Unconstitutional Under *Blakely v. Washington*

State v. Walker, 170 N.C. App. 632, 613 S.E.2d 330 (7 June 2005). The court ruled that the short-form murder indictment is not unconstitutional under the ruling in Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Defendant's Conviction of Possessing Firearm by Felon Did Not Violate Ex Post Facto Clause and Other Constitutional Provisions When He Was Convicted of a Felony in 1983, His Right to Possess a Firearm Was Restored Before a 1995 Amendment to G.S. 14-415.1 Again Barred Him From Possessing a Handgun, and He Possessed a Handgun in 2001

State v. Johnson, 169 N.C. App. 301, 610 S.E.2d 739 (5 April 2005). The defendant was convicted of felonious sale and delivery of cocaine in 1983. He was unconditionally discharged from that conviction in 1985. Under the version of G.S. 14-415.1 (possession of firearm by felon) in effect then, the bar against his possession of a handgun expired in 1990, five years from the unconditional discharge. In 1995, the statute was amended to bar the possession of a handgun if a person was convicted of a felony before, on, or after December 1, 1995. During a traffic stop on December 15, 2001, an officer found a handgun in the defendant's possession, and the defendant was convicted of violating G.S. 14-415.1. The court reviewed case law from various federal and state jurisdictions and ruled that the defendant's conviction did not violate the ex post facto provisions of the United States and North Carolina constitutions, did not constitute a bill of attainder under the United States and North Carolina constitutions, and did not violate the defendant's right to due process.

(1) Faxed Copy of Certified Federal Conviction Was Admissible to Prove Felony Conviction in Habitual Felon Hearing
(2) Defendant's Federal Unarmed Robbery Conviction Was Felony Conviction Under Habitual Felon Law, and Defendant Has Burden of Proving He Received Unconditional Discharge

State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648 (17 May 2005). The defendant was convicted of the felony of assault on a governmental officer with a deadly weapon, reckless driving, and being an habitual felon. The court ruled: (1) the introduction of a facsimile copy of a judgment of conviction from a federal district court, which contained a seal and was stamped as a true copy by a deputy clerk of that

court, was sufficient evidence to prove a felony conviction in the habitual felon hearing; and (2) the defendant's federal unarmed robbery conviction was a felony conviction under the habitual felon law; the defendant had the burden of proving that the defendant may have received an unconditional discharge for that felony under federal law.

Prior Convictions That Had Occurred on Same Date Were Properly Admitted to Prove Habitual Misdemeanor Assault

State v. Forrest, 168 N.C. App. 614, 609 S.E.2d 241 (1 March 2005). The defendant was convicted of habitual misdemeanor assault under G.S. 14-33.2. The court ruled that prior convictions that had occurred on the same date were properly admitted to prove the offense. The statute does not require that the prior convictions must have occurred on separate dates.

Proof of Defendant's Being in "Custody" of Officer, Element in Malicious Conduct by Prisoner Under G.S. 14-258.4, Is Satisfied by Showing That Reasonable Person in Defendant's Position Would Have Believed He or She Was Not Free to Leave

State v. Ellis, 168 N.C. App. 651, 608 S.E.2d 803 (1 March 2005). The defendant was convicted of malicious conduct by prisoner under G.S. 14-258.4. After an officer's long chase of the defendant during which the officer told the defendant he was under arrest, the officer trapped the defendant in a canal. The officer again told him he was under arrest and was going to handcuff him. As the officer approached the defendant with handcuffs, he smeared the officer with feces. The court ruled that proof of a defendant's being in "custody" of an officer under G.S. 14-258.4 is satisfied by showing that a reasonable person in the defendant's position would have believed he or she was not free to leave. [Author's note : The court utilized the Fourth Amendment standard for a seizure of a person set out in United States v. Mendenhall, 446 U.S. 544 (1980); which was later modified in California v. Hodari D., discussed on page 273 of Robert L. Farb, Arrest, Search, and Investigation in North Carolina (3d ed. 2003)]. The court ruled that the defendant was in custody of the officer in this case.

Assault on a Government Officer Is Not Lesser-Included Offense of Malicious Conduct by Prisoner Under G.S. 14-258.4

State v. Crouse, 169 N.C. App. 382, 610 S.E.2d 454 (5 April 2005). The defendant was convicted of malicious conduct by prisoner under G.S. 14-258.4 for spitting in the face of an officer while being detained in a holding cell. The court ruled that assault on a government officer under G.S. 14-33(c)(4) is not a lesser-included offense of malicious conduct by prisoner under G.S. 14-258.4.

(1) Sufficient Evidence of Malice and Proximate Cause Supported Defendant's Conviction of Second-Degree Murder for Death of Law Enforcement Officer During High Speed Pursuit of Defendant; Malice Does Not Require Proof of Impaired Driving
(2) Trial Judge Did Not Err in Jury Instruction on Proximate Cause

State v. Bethea, 167 N.C. App. 215, 605 S.E.2d 173 (7 December 2004). The defendant was convicted of second-degree murder for the death of a law enforcement officer during a high speed pursuit of the defendant. At about 1:00 a.m., Officer A saw the defendant, who he knew had a revoked license, get into a vehicle and begin driving. The officer activated his blue light to stop the defendant. The defendant responded by driving through a red light and increasing his speed to 75 m.p.h. in a 35 m.p.h. zone. Another patrol car joined the pursuit, with Officer B as the driver and Officer C as a passenger. During the pursuit, the defendant sped through several stop signs, drove at speeds up to 100 m.p.h., crossed into oncoming traffic several times, and turned his car lights off on dark rural roads, decreasing his own visibility and making his car extremely difficult to see, while traveling between 90 m.p.h. and 95 m.p.h.

As officers B and C approached a curve, the defendant slowed very quickly. Officer B braked heavily, but the heated brakes were not working effectively and his car struck the defendant's car. Officer B reacted by quickly steering right to avoid another collision with the defendant's car. The officers' car slid off the road and struck a concrete maker and a tree, and Officer C was thrown from the car and killed. (1) The court ruled that there was sufficient evidence of malice and proximate cause to support the defendant's conviction of second-degree murder. The court rejected the defendant's argument that there was insufficient evidence of malice because the defendant was not driving impaired. Malice for second-degree vehicular murder does not require proof of impaired driving. The court also rejected the defendant's argument that there was insufficient evidence of proximate cause because he did not actually collide with the officers' vehicle and kill the victim with his impact—the court stated that the defendant's reckless flight and wanton violation of traffic laws caused or directly contributed to the collision between the defendant's car and the officers' car, which resulted in the victim's death. (2) The court ruled that the trial judge did not err in the jury instruction on proximate cause by failing to instruct on intervening or superseding causes. The court stated that no reasonable person could conclude that the officers' decisions and actions, viewed separately or collectively, so entirely intervened in or superseded the operation of the defendant's reckless flight and wanton traffic violations to constitute the sole cause of the victim's death.

Prosecution for Solicitation of Crime Against Nature Was Not Unconstitutional Under *Lawrence v. Texas*

State v. Pope, 168 N.C. App. 592, 608 S.E.2d 114 (15 February 2005). The court ruled that a prosecution for solicitation of crime against nature based on the defendant's encounters with undercover law enforcement officers in which she indicated she would perform oral sex in exchange for money was not unconstitutional under Lawrence v. Texas, 539 U.S. 558 (2003) (state statute prohibiting two people of same sex to engage in consensual sex act violated privacy interest in Due Process Clause of Fourteenth Amendment when consensual sex act occurred between two adults in private residence). The court noted that because *Lawrence* expressly excluded prostitution and public conduct from its ruling, the state may properly criminalize the solicitation of a sexual act under crime against nature under those circumstances.

Sufficient Evidence Supported Convictions of Armed Robbery When Defendant Told Victims That He Had a Gun and Victims Reasonably Believed Defendant Had a Gun

State v. Jarrett, 167 N.C. App. 336, 607 S.E.2d 661 (7 December 2004). The defendant was convicted of two separate armed robberies of two grocery stores. During each robbery, the defendant told the victim that he had a gun, demanded money, and the victim reasonably believed that the defendant had a gun. The defendant did not display or indicate in any other way that he actually possessed a gun—other than his statement that he had a gun. The court ruled, relying on State v. Lee, 128 N.C. App. 506, 495 S.E.2d 373 (1998), and other cases, and distinguishing State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969), that this was sufficient evidence to support the defendant's convictions. The state in an armed robbery trial need only prove that the defendant represented that he had a firearm and circumstances led the victim reasonably to believe that the defendant had a firearm and might use it.

Under G.S. 14-34.7, State Need Only Prove That Assault on Law Enforcement Inflicted Serious Injury, Not Serious Bodily Injury

State v. Crawford, 167 N.C. App. 777, 606 S.E.2d 375 (4 January 2005). The defendant was indicted for a violation of G.S. 14-34.7, and the indictment alleged that the assault on the law enforcement officer inflicted "serious injury." The court noted that the title of the statute uses "serious injury," while the statute's text uses "serious bodily injury." Relying on the ruling in State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004) (possession of any amount of cocaine is a felony), the court ruled that the legislature's "manifest purpose" (a term from the *Jones* ruling) in enacting G.S. 14-34.7 was to make an assault

inflicting "serious injury" or "serious bodily injury" a felony. The court noted that if G.S. 14-34.7 is interpreted to require proof of "serious bodily injury," it then would be a repetition of G.S. 14-32.4 and would create no additional punishment for assaulting a law enforcement officer, which was the legislature's intent in enacting a law enforcement specific statute. However, if G.S. 14-34.7 is interpreted to require proof of "serious injury," then the statute would aggravate the punishment for assault on a law enforcement officer from a misdemeanor to a Class F felony, which was the legislature's "manifest purpose." Thus, the indictment was not erroneous in alleging "serious injury."

Defendant May Not Be Convicted of Both Attempted Voluntary Manslaughter and Assault with Deadly Weapon Inflicting Serious Injury Involving Shooting of Same Victim Because These Two Offenses Were Mutually Exclusive

State v. Hames, 170 N.C. App. 312, 612 S.E.2d 408 (17 May 2005). The defendant was charged with attempted voluntary manslaughter and assault with a deadly weapon with intent to kill inflicting serious injury involving a shooting of the same victim and was convicted of both attempted voluntary manslaughter and assault with a deadly weapon inflicting serious injury. The court agreed with the defendant's argument that the jury's determination that the defendant did not commit assault with a deadly weapon with intent to kill inflicting serious injury excluded the possibility that the defendant committed attempted voluntary manslaughter, because the latter offense requires the jury to find that the defendant had the intent to kill but the heat of passion, arising from sudden provocation, negated that element. The court ruled that these two offenses were mutually exclusive and ordered a new trial for both charges. The trial judge should have submitted these offenses alternatively to the jury.

Double Jeopardy Did Not Bar Two Assault Convictions Involving Same Victim Because They Were Based on Separate Facts

State v. Spellman, 167 N.C. App. 374, 605 S.E.2d 696 (21 December 2004). The court ruled that double jeopardy did not bar the defendant's convictions of assault with a deadly weapon on a government official and assault with a deadly weapon involving the same victim, when separate facts supported the two convictions. One assault conviction was based on the defendant's driving his vehicle, striking the victim, and running over his leg. The other assault conviction was based on the defendant's later reentering his vehicle and driving it toward the victim, placing him in fear of injury.

Double Jeopardy Did Not Bar Convictions of Assault With Deadly Weapon With Intent to Kill Inflicting Serious Injury and Discharging Weapon into Occupied Property Based on Same Incident

State v. Allah, 168 N.C. App. 190, 607 S.E.2d 311 (18 January 2005). The court ruled, relying on State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977), that double jeopardy did not bar convictions of assault with a deadly weapon with the intent to kill inflicting serious injury and discharging a weapon into occupied property based on the same incident.

(1) Stalking Statute (G.S. 14-277.3) Is Not Unconstitutionally Vague
(2) "Person" in Definition of "Harasses" and "Harassment" in Stalking Statute Refers to Reasonable Person

State v. Watson, 169 N.C. App. 331, 610 S.E.2d 472 (5 April 2005). The defendant was convicted of felony stalking (apparently based on the fact that she had been previously convicted of stalking). (1) The court ruled that the stalking statute is not unconstitutionally vague. (Author's note: Although the court ruled that the felony stalking statute is not unconstitutionally vague, its ruling clearly applies to both felony and misdemeanor stalking because the statutory language to which the court referred applies to

both offenses.) (2) The court ruled that "person" (the person who is the object of harassment) in the definition of "harasses" and "harassment" in the stalking statute refers to a reasonable person.

Sufficient Evidence to Support Conviction of Felony Stalking

State v. Snipes, 168 N.C. App. 525, 608 S.E.2d 381 (15 February 2005). The defendant was indicted for felony stalking under G.S. 14-277.3, which makes stalking a Class H felony if the offense is committed when there is a court order in effect prohibiting stalking behavior. The state's evidence showed that during the nine-month period alleged in the indictment, there was a court order in effect that required the defendant to refrain from contacting the stalking victim. During those nine months, about 50 different times the defendant followed the victim a short distance away on his bicycle as she walked to her cousin's house. On the night he assaulted her, he approached her with a knife, causing her to immediately begin knocking on the door of a nearby residence, and she feared for her life.

(1) Sufficient Evidence Existed That Defendant Assumed Position of Parent Under G.S. 14-27.7(a)
(2) Evidence of Photographs of Other Young Males Found in Defendant's Home in Trial For Violation of G.S. 14-27.7(a) Was Admissible and Did Not Violate *Lawrence v. Texas*

State v. Oakley, 167 N.C. App. 318, 605 S.E.2d 215 (7 December 2004). The defendant was convicted of two counts of sexual activity by a substitute parent under G.S. 14-27.7(a). The defendant, a male, had sexual relations with a sixteen year old male. (1) The court ruled, distinguishing State v. Bailey, 163 N.C. App. 84, 592 S.E.2d 738 (2004), that there was sufficient evidence that the defendant assumed a position of a parent under G.S. 14-27.7(a). The defendant, a law enforcement officer, was initially involved in a sexual relationship with the victim's mother. The defendant provided clothing for the victim, took him to court when he was required to appear as a defendant, and allowed him to stay at his house. Following an arrest of the victim, the defendant posted bail for the victim and represented himself as the victim's temporary custodian and obtained permission from his parole officer so the victim could live with him. The defendant supported the victim financially. The defendant also represented himself as the victim's temporary custodian in seeking an evaluation of the victim for involuntary commitment for substance abuse. The court stated that the state's evidence showed the defendant's emotional trust, disciplinary authority, and supervisory responsibility over the victim. (2) The state was permitted to introduce fifteen photographs found in the defendant's home that depicted a number of unidentified males to corroborate the victim's testimony concerning his sexual relationship with the defendant. Relying on State v. Creech, 128 N.C. App. 592, 495 S.E.2d 752 (1998), the court ruled that this evidence was properly admitted for this purpose. The court also rejected the defendant's argument that the ruling in Lawrence v. Texas, 539 U.S. 558 (2003), established constitutional protection for homosexual relationships and therefore the admission of this evidence showing the defendant to be a homosexual was grossly prejudicial. The court noted that *Lawrence* indicated that the ruling does not provide constitutional protection to sexually activity with minors, as existed in this case.

Multiple Acts of Incest Supported Multiple Incest Convictions

State v. Shelton, 167 N.C. App. 225, 605 S.E.2d 228 (7 December 2004). The defendant was convicted of four counts of incest with one daughter and three counts of incest with another daughter. The court ruled, distinguishing State v. Vincent, 278 N.C. 63, 178 S.E.2d 608 (1971), that the multiple acts of incest supported multiple incest convictions. The court rejected the defendant's argument that a pattern of recurrent incestuous behavior constituted only one offense.

Trial Judge Did Not Err in Not Submitting Lesser Offense in Trial of Assault with Deadly Weapon on Government Official Because Defendant's Driving His Vehicle at High Speed Toward Officers Constituted Deadly Weapon As Matter of Law

State v. Batchelor, 167 N.C. App. 797, 606 S.E.2d 422 (4 January 2005). The defendant was convicted of multiple charges, including four counts of assault with a deadly weapon on a government official. The defendant drove his vehicle directly at an officer standing near a driveway and later during a chase drove his vehicle directly toward three law enforcement vehicles, crashing into one of them. The court ruled that the trial judge did not err in not submitting assault on a government official as a lesser offense because the defendant's driving his vehicle at a high speed toward the officers constituted a deadly weapon as a matter of law.

Allegation of "City of Asheville Transit and Parking Services" as Owner of Parking Meters Was Not Legal Entity Capable of Owning Property and Thus Convictions of Larceny and Injury to Personal Property Must Be Vacated, But Convictions of Breaking Into Coin-Operated Machine Need Not Be Vacated

State v. Price, 170 N.C. App. 672, 613 S.E.2d 60 (7 June 2005). The court ruled that the allegation of "City of Asheville Transit and Parking Services" as the owner of parking meters was not a legal entity capable of owning property, and thus the defendant's convictions of larceny and injury to personal property must be vacated. The court relied on State v. Strange, 58 N.C. App. 756, 294 S.E.2d 403 (1982) ("Granville County Law Enforcement Association" did not state legal entity capable of owning property), and distinguished State v. Turner, 8 N.C. App. 73, 173 S.E.2d 642 (1970) ("City of Hendersonville" denoted municipal corporation authorized to own personal property). However, the court ruled that the allegation of "City of Asheville Transit and Parking Services" as the owner of the parking meters did not require vacating the defendant's convictions of breaking into a coin-operated machine under G.S. 14-56.1, because an allegation of ownership was not required for that offense. The court relied on an analogous ruling in State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453 (2002) (unnecessary to allege ownership of building for breaking or entering; it is only necessary to identify building with reasonable particularity).

(1) Trial Judge Did Not Err in Granting State's Motion to Join Offenses for Trial
(2) Sufficient Evidence of Intent to Permanently Deprive Common Law Robbery Victim of Property

State v. Simmons, 167 N.C. App. 512, 606 S.E.2d 133 (21 December 2004). (1) The trial judge did not err in granting the state's motion to join for trial offenses occurring five days apart when the earlier offense (common law robbery of a guest in the murder victim's home) was an essential part of the chain of events explaining the defendant's motive for committing an offense (first-degree murder of victim) five days later. (2) The evidence was sufficient concerning the intent to permanently deprive the victim of her property to support the defendant's conviction of common law robbery. The defendant slapped a cell phone from the victim's hand, declared it to be his new phone, and began dialing on it immediately thereafter. Evidence that the defendant returned the phone within a few days did not bar the jury from determining that the defendant had the intent to permanently deprive the victim of the phone when it was taken from her.

(1) Trial Judge Erred in Habitual DWI Trial in Not Submitting Necessity Defense
(2) Trial Judge Erred Under G.S. 15A-928 in Allowing State in Habitual DWI Trial to Introduce Evidence of Prior DWI Convictions Before Arraigning Defendant to Determine Whether He Would Admit to the Convictions

State v. Hudgins, 167 N.C. App. 705, 606 S.E.2d 443 (4 January 2005). The defendant was convicted of habitual DWI. (1) The court ruled that the trial judge erred in not submitting the necessity defense based on the defendant's evidence that he jumped into a truck that was rolling down a steep hill in the wrong lane of a public road, creating a substantial risk of physical harm to other drivers or the occupants of a nearby house. The defendant jumped into the truck in an attempt to prevent it from hitting another car or the house. The court ruled that a defendant must prove three elements to establish the necessity defense: (i) reasonable action; (ii) taken to protect life, limb, or heath of a person; and (iii) no other acceptable choices available. The court remanded the case for a new trial. (2) The court ruled that the trial judge erred under G.S. 15A-928(c)(1) in the habitual DWI trial in allowing the state to introduce evidence of the defendant's prior DWI convictions before arraigning the defendant to determine whether he would admit to the convictions (if the defendant admitted to the convictions, the statutory provision would then bar the state from introducing evidence of the convictions).

(1) Sufficient Evidence of Constructive Possession of Cocaine
(2) Insufficient Evidence of Possessing Cocaine with Intent to Sell
(3) Insufficient Evidence of Maintaining Dwelling for Purpose of Selling Cocaine

State v. Battle, 167 N.C. App. 730, 606 S.E.2d 418 (4 January 2005). The defendant was convicted of possessing cocaine with intent to sell and intentionally maintaining a dwelling for the purpose of selling cocaine. (1) The court ruled that there was sufficient evidence of the defendant's constructive possession of cocaine. The state's evidence showed that the defendant was found in a motel room where marijuana and cocaine were located, playing video games and sleeping on the bed. Although the room was rented to another person, it contained a number of the defendant's effects, including clothing and personal papers. Also, the defendant's car was parked in the motel parking lot. (2) The court ruled that there was insufficient evidence of the defendant's possessing cocaine with intent to sell. Only 1.9 grams of compressed cocaine power was found, which according to the state's expert was small enough to have been for personal use. Officers did not find any implement with which to cut the cocaine, scales to weigh cocaine doses, and containers for selling cocaine doses. No drugs or paraphernalia were found in the defendant's car. The court remanded the case for the trial court to sentence the defendant for possession of cocaine. (3) The court ruled that there was insufficient evidence of maintaining a dwelling for the purpose of selling cocaine for the same reasons the court found insufficient evidence of possessing cocaine with the intent to sell.

(1) Sufficient Evidence of Constructive Possession of Cocaine
(2) Insufficient Evidence of Possessing Cocaine with Intent to Sell or Deliver

State v. Turner, 168 N.C. App. 152, 607 S.E.2d 19 (18 January 2005). The defendant was convicted of possessing cocaine with the intent to sell and deliver. Law enforcement officers entered a residence to serve an arrest warrant. They found two people in the kitchen, one of whom was the subject of the arrest warrant. Seated on a loveseat in the adjoining living room were the defendant and another person. A tube containing approximately ten rocks of crack cocaine was found concealed under a blanket draped over the loveseat between them. The defendant appeared agitated and his hands were jumbling around nervously. He and the other person appeared to be passing the tube back and forth under the blanket. (1) The court ruled, relying on State v. Butler, 356 N.C. 141, 567 S.E.2d 137 (2002), and State v. Harrison, 14 N.C. App. 450, 188 S.E.2d 541 (1972), and other cases, that this evidence was sufficient to establish the defendant's constructive possession of the cocaine. (2) The court ruled that there was insufficient

evidence of the defendant's possessing the cocaine with the intent to sell or deliver. The court noted that the state did not present evidence of statements by the defendant concerning his intent; no money was found on the defendant; no paraphernalia or equipment used in drug sales was found; there was no drug packaging indicating an intent to sell the cocaine; and there was no behavior or other circumstances associated with drug transactions. An officer's testimony about the amount of the crack cocaine, its street value, and quantities carried for personal use was insufficient by itself to show the intent to sell and deliver. The court remanded the case for the trial court to sentence the defendant for possession of cocaine.

(1) Sufficient Evidence of Constructive Possession of Cocaine
(2) Insufficient Evidence of Possessing Cocaine with Intent to Sell or Deliver

State v. Nettles, 170 N.C. App. 1002, 612 S.E.2d 172 (3 May 2005). The defendant was convicted of possessing cocaine with the intent to sell or deliver. Officers executing a search warrant at the defendant's home, jointly owned by the defendant and his siblings, seized a safety pin in the living room which contained a residual amount of cocaine. The officers also seized a certificate of title to a Mercedes Benz, registered to the defendant's deceased nephew, an expired insurance policy for that vehicle insured in the defendant's name, and $411.00 from the defendant's pocket. The defendant consented to a search of four vehicles in the yard, including the Mercedes Benz for which the defendant had the key. Officers found in the Mercedes Benz 1.2 grams of cocaine under the floor mat rolled in a napkin. Based on these and other facts, the court ruled that there was: (1) sufficient evidence of the defendant's constructive possession of the cocaine in the Mercedes Benz; and (2) insufficient evidence of possessing cocaine with the intent to sell or deliver. The court remanded the case for sentencing for the lesser offense of possessing cocaine.

(1) Trial Judge Did Not Err in Not Giving Special Jury Instruction When Defendant Failed to Submit Request for Instruction in Writing
(2) Defendant Was Not Entitled to Jury Instruction on Justification as Defense to Possession of Firearm by Felon

State v. Craig, 167 N.C. App. 793, 606 S.E.2d 387 (4 January 2005). The defendant was convicted of possession of firearm by felon. At trial the defendant orally requested that N.C.P.I. Crim. 310.10 (compulsion, duress, or coercion) be given. (1) The court ruled that the trial judge did not err in not giving the special jury instruction when the defendant failed to submit the request for the instruction in writing as required by G.S. 1-181 and Rule 21 of the General Rules of Practice for the Superior and District Courts. (2) The court ruled, relying on State v. Napier, 149 N.C. App. 462, 560 S.E.2d 867 (2002), that the defendant was not entitled to the jury instruction. The court noted that the uncontroverted evidence showed that the defendant continued to possess the firearm when he was no longer under any imminent threat of harm.

(1) Judge in Trial of Motor Vehicle Offenses Erred in Allowing into Evidence Part of State's Exhibit Containing Defendant's Convictions
(2) Felony of Eluding Arrest Is Predicate Substantive Felony Subject to Habitual Felon Law
(3) Charging Language for Driving While License Revoked Need Not Allege Defendant Had Received Notice That License Was Revoked

State v. Scott, 167 N.C. App. 783, 607 S.E.2d 10 (4 January 2005). The defendant was convicted of driving while license revoked, reckless driving, and felony operating a motor vehicle to elude arrest. He was found to be an habitual felon for the felony operating charge. (1) The court ruled that the trial judge erred in allowing into evidence part of a state's exhibit that contained the defendant's prior convictions for which defendant's license was revoked, when the convictions were inadmissible under Rule 404(b). The multiple letters to the defendant in the exhibit containing notices of his license revocation were

properly admitted, but the prior convictions should have been redacted. (2) The court ruled that the felony of operating a motor vehicle to elude arrest under G.S. 20-141.5 is a proper predicate substantive felony whose punishment is subject to be elevated as a Class C felony under the habitual felon law. (3) The court ruled that the charging language for the offense of driving while license revoked need not allege that the defendant had received notice of his revocation.

Officer's Payments to State's Principal Witness Did Not Require Dismissal of Drug Charges

State v. Brice, 167 N.C. App. 72, 604 S.E.2d 356 (16 November 2004). The defendant was convicted of cocaine trafficking offenses. The state's principal witness, a cocaine user, worked closely with the police that resulted in the arrest of and charges against the defendant. Several weeks after the defendant's arrest and before his trial, an officer gave the witness a total of $350.00 in two payments so the witness could pay her bills. The defendant argued that this payment required the dismissal of the charges, arguing in effect that the state's witness was paid for her testimony. The court ruled, distinguishing dicta in United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1992), that this evidence did not support dismissal of the charges. The court noted that the state's witness and the officer were subjected to vigorous cross-examination on the issue of payment to the witness. Also, the payments were not made to secure her cooperation in the defendant's arrest or her testimony at trial.

(1) Multiple Convictions of Third-Degree Sexual Exploitation of Minor Are Permitted for Multiple Child Pornography Photographs on Defendant's Home Computer
(2) G.S. 14-190.17A(a) and G.S. 14-190.13 Are Not Constitutionally Overbroad
(3) Six Consecutive Suspended Sentences Within One Five-Year Probationary Term Does Not Violate Statutory Provision That Bars Consecutive Probationary Sentences

State v. Howell, 169 N.C. App. 58, 609 S.E.2d 417 (15 March 2005). The defendant was convicted of 43 counts of third-degree sexual exploitation of a minor. The defendant was sentenced to six consecutive terms of imprisonment of six to eight years, and these sentences were suspended and the defendant placed on supervised probation for five years. Evidence showed that there were many photographs depicting minors engage in sexual acts on the hard drive of the defendant's home computer. (1) The court ruled, distinguishing State v. Smith, 323 N.C. 439, 373 S.E.2d 435 (1988), that a defendant may be convicted of multiple charges for the 43 child pornography photographs on his computer's hard drive. (2) The court ruled that G.S. 14-190.17A(a) (third-degree sexual exploitation of minor) and G.S. 14-190.13 (definitions of "minor," "material," and "sexual activity") are not constitutionally overbroad. (3) The court ruled that the defendant's six consecutive suspended sentences within one five-year probationary term did not violate the statutory provision that bars consecutive probationary sentences [see G.S. 15A-1346 and State v. Canady, 153 N.C. App. 455, 570 S.E.2d 262 (2002)].

(1) Pre-Indictment Delay Did Not Violate Due Process
(2) Insufficient Evidence to Support Conviction of Taking Indecent Liberties

State v. Stanford, 169 N.C. App. 214, 609 S.E.2d 468 (15 March 2005). (1) The defendant was convicted of various sex offenses committed in 1987 with his niece when she was thirteen and fourteen years old. She did not report the offenses until September 2002. He was charged with the offenses in October 2002. The court ruled that the defendant's due process rights were not violated by the delay in the bringing of charges. The fifteen-year time period between the commission of the crimes and their later reporting to law enforcement was not delay attributable to the state under the due process clause. The state did not know about the crimes until the victim reported them to law enforcement in 2002. (2) The court ruled, relying on State v. Brown, 162 N.C. App. 333, 590 S.E.2d 433 (2004), that there was insufficient evidence to support the defendant's conviction of taking indecent liberties. The state's evidence consisted of the defendant's hand brushing against the victim's breast for only a couple of

seconds, for which he apologized. The court stated that this was insufficient evidence that the defendant committed this act for the purpose of arousing sexual desire.

State's Service of Order for Arrest on Defendant in Federal Custody Was Not a Detainer Under Interstate Agreement on Detainers (IAD) and Thus Did Not Trigger Trial Obligations Under IAD

State v. Prentice, 170 N.C. App. 593, 613 S.E.2d 498 (7 June 2005). The defendant was convicted and sentenced in federal court on August 7, 2001, and was transferred as a federal prisoner to the Orange County jail based on a contract to house federal prisoners between the federal government and Orange County. On August 21, 2001, the Orange County grand jury indicted the defendant for state offenses. The Orange County sheriff served the defendant with an order for arrest on August 28, 2001. The following day he appeared in state court, was informed of the charges against him, and was appointed an attorney. He then was returned to the Orange County jail and federal custody. On September 10, 2001, federal authorities transported the defendant to a federal prison in Kentucky. On May 28, 2003, the state prepared a writ of habeas corpus ad prosequendum to secure the defendant's presence in state court, and the defendant was transferred to state custody on July 15, 2003. The defendant remained in state custody through his trial, which ended on October 28, 2003. The court ruled that the state's service of the order for arrest on the defendant in federal custody was not a detainer under the Interstate Agreement on Detainers (IAD) and thus did not trigger the trial obligations under IAD (trial within 120 days once in state's jurisdiction). The court noted that the order for arrest was not filed with the Federal Bureau of Prisons or any other federal institution. Nor did the state request federal officials to hold the defendant at the end of his federal sentence or notify it before the defendant's release from federal custody.

Probation Condition ("Not Reside in a Household With Any Minor Child") for Defendant Convicted of Sex Offenses With Minor Was Constitutional Based on Facts in This Case

State v. Strickland, 169 N.C. App. 193, 609 S.E.2d 253 (15 March 2005). The defendant was living with his wife and young son in the home of the defendant's mother-in-law. Also residing in that home was the minor sister of the defendant's wife. The defendant was convicted of various sex offenses with the minor sister. The defendant was placed on probation with the special condition under G.S. 15A-1343(b2)(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. The court rejected the defendant's arguments that this probation condition (1) was overbroad and as applied to him constituted an impermissible deprivation without due process of his constitutional right to care and custody of his young son, and (2) was unconstitutional as applied to him because he represented no threat to his young son. The court ruled that the probation condition was valid based on the facts in this case and did not violate the defendant's due process rights.

(1) District Court Judge's Rescheduling Trial Before Another Judge After Trial Had Begun Was Functional Equivalent of Mistrial
(2) Mistrial Was Proper When District Court Judge Determined During Trial That He Was Familiar with Case
(3) Defendant's Failure to Object to Mistrial (Rescheduling of Trial) in District Court Waived Appellate Review of Propriety of Mistrial
(4) District Court Judge May Not Overrule Order of Another District Court Judge

State v. Cummings, 169 N.C. App. 249, 609 S.E.2d 423 (15 March 2005). After the state began presenting evidence in a DWI and reckless driving trial, the presiding district court judge (judge A) rescheduled the trial to begin anew before another district court judge because he discovered through the testimony of a state's witness that he was familiar with certain aspects of the case. The defendant did not object to the judge's order to reschedule the trial. At a hearing before judge B to whom the trial was rescheduled, the defendant's motion to dismiss the charges on double jeopardy grounds was denied and

the trial was rescheduled again. Before judge C, the defendant submitted another motion to dismiss the charges on double jeopardy grounds. Judge C granted the motion. The court ruled: (1) the district court judge's (judge A) rescheduling the trial before another judge (judge B) after the trial had begun was the functional equivalent of a mistrial; (2) the declaration of a mistrial was proper when district court judge A determined during the trial that he was familiar with the case; (3) the defendant's failure to object to the mistrial (rescheduling of the trial) in district court waived appellate review of the propriety of the mistrial; and (4) the rule that prohibits one superior court judge from modifying, overruling, or changing the judgment or order of another superior court judge also applies to district court judges; judge C had no authority to hear the defendant's second motion to dismiss the charges on double jeopardy grounds and thus had no authority to overrule judge B's order denying the defendant's motion to dismiss on the same ground.

Prosecutor's Jury Argument Was Improper; New Trial Ordered

State v. Millsaps, 169 N.C. App. 340, 610 S.E.2d 437 (5 April 2005). The defendant was on trial for first-degree murder and other offenses. His defense was insanity. In commenting on the mental commitment process if the defendant was found not guilty of insanity, the prosecutor stated during jury argument that it was "99 percent certain" that a judge in a mental commitment hearing would find the murder irrelevant and release him from commitment. The court ruled that there was no evidence to support the prosecutor's statement, which also was impermissibly prejudicial because it indicated to the jury that the defendant, if found not guilty by reason of insanity, would likely be released shortly. The court also ruled that the trial judge's failure to sustain defense counsel's objection to the argument was an abuse of discretion. The prosecutor in jury argument also suggested a comparison of the defendant's acts to the terrorist attacks in New York and Washington, D.C. on September 11, 2001. The court ruled that the prosecutor's remark was improper and prejudicial, and the defendant's objections to the remark should have been sustained. Based on a review of the evidence in this case and the standard for ordering a new trial, the court ruled that the defendant was entitled to a new trial.

Defense Attorney's Jury Argument Did Not Concede Defendant's Guilt and Thus Did Not Constitute Ineffective Assistance of Counsel

State v. Randle, 167 N.C. App. 547, 605 S.E.2d 692 (21 December 2004). No error occurred under the ruling in State v. Harbison, 315 N.C. 175, 337 S.E.2d 337 S.E.2d 504 (1985) (per se ineffective assistance of counsel when defendant's counsel admits defendant's guilt to jury without defendant's consent), when defense counsel during jury argument stated that the defendant was not guilty of first-degree rape and sexual offense in a trial in which the judge instructed the jury on lesser-included offenses of these offenses. Defense counsel never actually admitted the defendant's guilt of any offense, nor did counsel assert that the defendant should be found guilty of some offense. [Author's note: The *Harbison* ruling has been effectively modified by the United States Supreme Court ruling in Florida v. Nixon, 125 S. Ct. 551, 160 L. Ed. 2d 565 (13 December 2004), but the modification has no effect on the court of appeals ruling in this case.]

(1) No Error in Allowing State to Amend Indictment Charging Attempted Armed Robbery to Charge Armed Robbery
(2) No Due Process Violation When State Prayed Judgment on PJC

State v. Trusell, 170 N.C. App. 33, 612 S.E.2d 195 (3 May 2005). (1) The court ruled that the trial judge did not err in allowing the state to amend an indictment charging attempted armed robbery to charge armed robbery. (2) In 1997, the defendant was convicted of armed robbery of A, armed robbery of B, first-degree kidnapping, and assault with a deadly weapon. The trial judge sentenced the defendant for the armed robbery of A (77 to 102 months' imprisonment) and first-degree kidnapping (100 to 129 months'

imprisonment, plus a firearm enhancement). The judge *sua sponte* entered a PJC for the armed robbery of B and the assault with a deadly weapon. On appeal in 2000, the supreme court reversed the first-degree kidnapping conviction because the judge instructed on a theory not alleged in the indictment and remanded for sentencing as second-degree kidnapping. On remand, the trial judge sentenced the defendant for second-degree kidnapping (89 to 116 months' plus a firearm enhancement). In 2001, the state filed a motion praying judgment for the armed robbery conviction of B. The trial judge then sentenced the defendant for that armed robbery (69 to 92 months' imprisonment, with the sentence to begin at the expiration of all sentences being served by the defendant). The court ruled, after discussing United States Supreme Court rulings, that the 2001 sentencing for the conviction of the armed robbery of B did not constitute judicial or prosecutorial vindictiveness under the Due Process Clause concerning the defendant's exercise of his right to appeal his original convictions. The trial judge had reconsidered the appropriateness of the PJC for the armed robbery of B when the remand for sentencing for second-degree kidnapping resulted in a lesser sentence than at the original trial. The court noted that the new sentence (that is, with the sentence for the armed robbery of B) effectively equaled the difference in time between the defendant's original sentence and his later reduced sentence after appeal (see the trial judge's findings on this issue in the court's opinion).

Trial Judge Did Not Abuse Discretion in Determining That Meaningful Post-Trial Competency Hearing Could Be Held and Concluding That Defendant Had Had Capacity to Proceed at Trial

State v. Blancher, 170 N.C. App. 171, 611 S.E.2d 445 (3 May 2005). Before trial, an order was entered committing the defendant to Dorothea Dix Hospital to examine the defendant's capacity to proceed. The evaluation was not completed before trial because the hospital would not accept the defendant for evaluation. The defendant did not raise the issue of capacity to proceed before or during trial. After his conviction but before the defendant's habitual felon hearing nine months later, the trial judge conducted a retrospective competency hearing [see State v. McRae, 163 N.C. App. 359, 594 S.E.2d 71 (2004)] and found the defendant had been competent to stand trial. Based on the facts set out in the court's opinion, the court ruled that the trial judge did not abuse his discretion in determining that a meaningful post-trial competency hearing could be held and concluding that the defendant had had the capacity to proceed at his trial.

Prejudice Is Not Presumed When Defense Counsel Fails to Request That Jury Selection Be Recorded

State v. Moore, 167 N.C. App. 127, 606 S.E.2d 127 (21 December 2004). Under the standard for ineffective assistance of counsel set out in Strickland v. Washington, 466 U.S. 668 (1984), prejudice is not presumed when defense counsel fails to request that jury selection be recorded.

Defendant's Letters To Prosecutor While in Jail Constituted "Plea Discussion" Under G.S. 15A-1025 and Rule 410, and Thus the State Impermissibly Cross-Examined Defendant About Them at Trial

State v. Walker, 167 N.C. App. 110, 605 S.E.2d 647 (7 December 2004). While in jail, the defendant sent seven letters to the prosecutor concerning the disposition of the charges against him. The court ruled, distinguishing State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (1997), that the defendant's letters constituted a "plea discussion" under G.S. 15A-1025 and Rule 410, and thus the state impermissibly cross-examined the defendant about them at trial. While the defendant's letters indicated an admission of guilt, plea bargaining implies an offer to plead guilty upon condition. The letters stated that he was willing to confess and help in any way to obtain probation, which articulated the plea arrangement he sought. Even though the prosecutor did not initially respond to the defendant's letters, the letters

ultimately led to the prosecutor entering into plea discussions with the defendant. This resulted in the defendant's entering a guilty plea, which was later withdrawn.

Defendant Has No Right of Appeal or Appellate Review by Writ of Certiorari of Trial Judge's Denial of Defendant's Motion for Post-Conviction DNA Testing Under G.S. 15A-269

State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284 (7 June 2005). The court ruled that a defendant has no right of appeal or appellate review by writ of certiorari of a trial judge's denial of a defendant's motion for post-conviction DNA testing under G.S. 15A-269. The court also declined to review the trial judge's ruling under Rule 2 of the Rules of Appellate Procedure because review in this case was not necessary to prevent manifest injustice.

No Due Process Violation When State Filed Felonious Assault Juvenile Petition after Juvenile Had Been Charged with Misdemeanor Assault and Denied Allegations in Court

In re N.B., 167 N.C. App. 305, 605 S.E.2d 488 (7 December 2004). The juvenile was charged in a juvenile petition with misdemeanor assault and appeared in court and denied the allegations. Before a hearing was held on this petition, the state brought a petition charging the juvenile with felonious assault based on the same incident that was the basis of the misdemeanor assault petition. The state then tried the juvenile for felonious assault and later dismissed the misdemeanor assault petition. The court ruled, distinguishing State v. Bissette, 142 N.C. App. 669, 544 S.E.2d 266 (2001), that the juvenile's due process rights were not violated. The court noted that there was no evidence in the record that the filing of the felonious assault petition was in retaliation for the juvenile's denial of the allegations in the misdemeanor assault petition.

Defendant Who Successfully Challenged Sentence Under Motion for Appropriate Relief Had Right to Withdraw Guilty Plea Because Error in Original Sentencing Was Not Merely Clerical or Administrative

State v. Wall, 167 N.C. App. 312, 605 S.E.2d 205 (7 December 2004). The court ruled that the defendant had a right to withdraw his guilty plea under G.S. 15A-1024 after he had successfully challenged in a motion for appropriate relief his original sentence because he had been sentenced under prior record level V, when he should have been sentenced under prior record level IV. The defendant was not limited to being resentenced under level IV, because the error in original sentencing was not merely clerical or administrative.

Superior Court Did Not Have Jurisdiction for Trial of Misdemeanors Charged in Arrest Warrants That Were Transactionally Related to Felonies When There Was No Indictment, Information, or Presentment for Those Misdemeanors or Trial in District Court and Appeal for Trial De Novo

State v. Price, 170 N.C. App. 57, 611 S.E.2d 891 (3 May 2005). The defendant was charged in arrest warrants for felony drug offenses and transactionally-related misdemeanors. In district court, he waived his probable cause hearing on all offenses, and the judge issued orders transferring the misdemeanor charges to superior court with the felonies. However, the state did not obtain an indictment, information, or presentment for the misdemeanors. The court ruled that superior court had no jurisdiction over the misdemeanors under G.S. 7A-271.

Capital Case Issues

Defendant in Capital Case Who Had Retained Counsel But Was Otherwise Indigent Was Entitled to Appointment of Assistant Counsel Under G.S. 7A-450

State v. Davis, 168 N.C. App. 321, 608 S.E.2d 74 (1 February 2005). The court ruled that the trial judge erred in failing to appoint assistant counsel to the defendant's retained counsel when the defendant was otherwise indigent and the state was seeking the death penalty. Assistant counsel that the defendant cannot afford to retain in a capital case is a "necessary expense" under G.S. 7A-450 that the state must provide or the defendant must waive.

Arrest, Search, and Confession Issues

(1) Officer Had Probable Cause to Stop Vehicle for Seatbelt Violation, a Readily Observed Traffic Violation
(2) Officer Had Reasonable Suspicion to Require Passenger to Remain at Scene of Stopped Vehicle

State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648 (17 May 2005). The defendant was convicted of the felony of assault on a governmental officer with a deadly weapon, reckless driving, and being an habitual felon. An officer stopped a vehicle for a seatbelt violation by the driver; the defendant was a passenger. While talking to the driver, the officer made several observations of the defendant's suspicious conduct (see the facts set out in the court's opinion) and instructed him to remain in the vehicle. The driver was ordered out of the vehicle, and the officer conducted a consensual frisk and found cocaine on his person. While the officer was arresting the driver, the defendant moved behind the steering wheel and started to drive away. The officer attempted to stop the car by reaching for the key and was dragged by the moving vehicle. The defendant fled the scene and later was arrested in Ohio. The court ruled: (1) the officer had probable cause to stop the vehicle for the seatbelt violation, a readily-observed traffic violation (the officer saw that the driver was not wearing a seat belt); (2) the officer had reasonable suspicion to require the defendant to remain at the scene, based on the facts set out in the court's opinion (the court ruled, alternatively, that the car could be detained based on the discovery of cocaine on the driver, which provided probable cause to search the vehicle);

Officer Properly Ordered Passenger of Lawfully-Stopped Vehicle to Remain in Vehicle, and Frisk for Weapons Was Justified by Defendant's Behavior

State v. Shearin, 170 N.C. App. 222, 612 S.E.2d 371 (17 May 2005). Officer A stopped a vehicle because the license plate light was not working. The officer smelled alcohol on the driver and began administering sobriety tests. Officer B arrived to assist officer A and told the defendant, a passenger in the vehicle, to remain in the vehicle. Officer B noticed that the defendant was very agitated and appeared intoxicated. He saw a plastic bag at the defendant's feet, with what the officer believed to be a beer bottle sticking out of the bag. The defendant attempted to push the bag under the seat when questioned about it. Officer B asked the defendant to exit the vehicle and asked him if he had any weapons. The defendant did not respond, even after the officer asked him three more times about weapons. The defendant would not move his hands from his pockets despite the officer's repeated requests. The defendant became agitated and boisterous. When the officer began to frisk the defendant, he ran away. The officer eventually handcuffed and frisked him, finding marijuana and cocaine. The court ruled that the officer properly ordered the passenger to remain in the vehicle, and the frisk for weapons was justified by defendant's behavior. The court agreed with cases from other jurisdictions that have ruled, based on Maryland v. Wilson, 519 U.S. 408 (1997) (officer may automatically order passenger out of lawfully-stopped vehicle),

that an officer may automatically for safety purposes order a passenger to remain in a vehicle after it has been lawfully stopped.

(1) Officer Had Probable Cause to Stop Vehicle for Seat Belt Violation, a Readily Observed Traffic Violation
(2) Reasonable Suspicion Supported Detention of Driver After Officer Had Issued Traffic Citation to Him

State v. Hernandez, 170 N.C. App. 299, 612 S.E.2d 420 (17 May 2005). The defendant was convicted of trafficking in cocaine. An officer stopped a vehicle driven by the defendant for a seat belt violation. While in the patrol car with the defendant, the officer ran a license and registration check, questioned the defendant about his travel plans, and issued him a citation. The defendant then gave consent to search the vehicle, and cocaine was found in the vehicle. The consent to search was given within six minutes of the defendant's detention in the vehicle. The court ruled: (1) the officer had probable cause to stop the vehicle for the seat belt violation (the officer saw the defendant remove the seat belt while still driving), a readily-observed traffic violation; and (2) the officer had reasonable suspicion to detain the defendant after issuing the citation, based on the defendant's extreme nervousness, conflicting statements about his travel plans, and air fresheners in the defendant's vehicle emitting a strong odor.

Court Applies Reasonableness Standard of *New Jersey v. T.L.O.* to School Resource Officer's Detention of Student

In re J.F.M., 168 N.C. App. 143, 607 S.E.2d 304 (18 January 2005). T.B. and J.F.M. were adjudicated delinquent for resisting, delaying, and obstructing a public officer and assault on a public officer. A deputy sheriff, who was also a school resource officer, investigated an affray involving T.B. and another student. The affray occurred about 2:00 p.m., and while not seeing the affray, the officer observed a group of students gathered outside on the school campus. He saw T.B. leaving the grounds and gave her three commands to stop, which she ignored. Continuing his investigation, he spoke with a school administrator who told him that T.B. had been in the affray and was leaving the school campus. At approximately 3:00 p.m., the officer approached T.B. at a bus stop on the school campus and told her that she needed to come back to the school to talk to the school administrator about the affray. She refused to go with the officer, who responded by grabbing her arm and telling her she needed to come with him. J.F.M. then pushed the officer and told T.B. to run. T.B. later returned and struck the officer with an umbrella. The court ruled, relying on Wofford v. Evans, 390 F.3d 318 (4th Cir. 2004) (extending reasonableness standard of New Jersey v. T.L.O., 469 U.S. 325 (1985), to detentions of students), and In re D.D., 146 N.C. App. 309, 554 S.E.2d 346 (2001) (extending *T.L.O.* to searches by resource officers working in conjunction with school officials), that the reasonableness standard of *T.L.O.* applied to a resource officer's detention of a student when acting in conjunction with a school official. The court examined the facts in this case and found that the resource officer was acting in conjunction with the school administration and his detention of the student was reasonable under *T.L.O.*

Court Remands to Trial Court for Ruling on Issues Concerning Constitutionality of Checkpoint

State v. Rose, 170 N.C. App. 284, 612 S.E.2d 336 (17 May 2005). The defendant was convicted of various offenses resulting from evidence seized from a vehicle at a vehicle checkpoint. Four of the five law enforcement officers running the checkpoint were narcotics officers. The trial judge denied the defendant's motion to suppress evidence based on the asserted unconstitutionality of the checkpoint. The court ruled that the case must be remanded to the trial court to determine the primary purpose of the checkpoint under City of Indianapolis v. Edmond, 531 U.S. 32 (2000), and the reasonableness of the checkpoint under Illinois v. Lidster, 540 U.S. 419 (2004).

Defendant Did Not Have Reasonable Expectation of Privacy in Vehicle to Contest Its Search

State v. Boyd, 169 N.C. App. 204, 609 S.E.2d 785 (15 March 2005). The court ruled that the defendant did not have a reasonable expectation of privacy in a vehicle to contest its search when the defendant did not own, rent, or lease the vehicle and fled from the law enforcement officers after the leaving the vehicle open and ajar at the scene of an assault. The court stated that even if he had permission to use the vehicle, he relinquished possession and control when he fled from the officers.

(1) Probable Cause and Exigent Circumstances Supported Administration of Gunshot Residue Test on Defendant Without Search Warrant or Nontestimonial Identification Order
(2) Trial Judge's Finding of Facts Supported Ruling That Defendant Consented to Test
(3) No Error in Admitting Results of Gunshot Residue Test Although Defendant Was Not Advised of His Statutory Right to Counsel at Test

State v. Page, 169 N.C. App. 127, 609 S.E.2d 432 (15 March 2005). The state introduced at the defendant's murder trial the results of a gunshot residue test administered on the defendant shortly after the homicide had occurred. (1) The court ruled, relying on State v. Coplen, 138 N.C. App. 48, 530 S.E.2d 313 (2000), that probable cause and exigent circumstances supported the administration of the test on the defendant without the necessity of a search warrant or nontestimonial identification order. The defendant was the last person to have seen the victim before the shooting. Witnesses arriving at the crime scene found the defendant to be the only person present. The defendant offered inconsistent statements to investigating officers concerning his whereabouts during the shooting. The gunshot residue test must be conducted within three to four hours of suspected firearm use, and evidence of firing a weapon could be destroyed by wiping or washing hands. (2) The court ruled that the trial judge's finding of facts supported the judge's ruling that defendant consented to the gunshot residue test. (3) The court ruled that there was no error in admitting the results of the gunshot residue test although the defendant was not advised of his right to counsel under G.S. 15A-279(d) at the test. Only statements made by the defendant would be suppressed, not the results of the test. [Author's note: Statements in State v. Odom, 303 N.C. 163, 277 S.E.2d 352 (1981) (no Sixth Amendment right to counsel at gunshot residue test), and State v. Coplen, cited above, that a defendant is statutorily entitled to counsel under G.S. 15A-279(d) during the administration of a gunshot residue test are highly questionable when an officer is not administering the test under Article 14 of Chapter 15A of the General Statutes. The statutory right to counsel in G.S. 15A-279(d) would appear to be required only when the state is conducting a procedure with the use of a nontestimonial identification order, but not when the state is properly conducting a procedure without such an order because there is probable cause and exigent circumstances, consent, or a search warrant.]

Defendant During Investigative Stop Was Not in Custody Under *Miranda* to Require Officer to Give *Miranda* Warnings When Questioning Defendant During the Investigative Stop

State v. Sutton, 167 N.C. App. 242, 605 S.E.2d 483 (7 December 2004). An officer received information from a pharmacist that he had just filled a prescription for Oxycontin under suspicious circumstances. An officer arrived at the pharmacy's parking lot, conducted surveillance, and observed an apparent drug sale from the defendant to another person. He then made an investigative stop of the defendant, which the court ruled was supported by reasonable suspicion. The defendant then consented to a frisk and told the officer that he had two knives. The officer found two pocket knives but no contraband. When asked if he had any narcotics, the defendant said he had just filled a prescription. The officer took a pill bottle containing tablets from the defendant and asked how many pills were in the bottle. The defendant said he had filled a prescription for 180 tablets. The officer asked again how many pills were in the bottle. The defendant responded that he had given 45 tablets to a person in the parking lot. The court ruled, relying on State v. Benjamin, 124 N.C. App. 734, 478 S.E.2d 651 (1996), the defendant was not in custody under

Miranda to require the officer to give *Miranda* warnings when questioning the defendant during this investigative stop.

Based on Recorded Notice Given by Phone Service Before Making Telephone Calls, Jail Inmate Impliedly Consented Under Federal and State Law to Monitoring and Recording of Calls

State v. Price, 170 N.C. App. 57, 611 S.E.2d 891 (3 May 2005). While in jail awaiting trial, the defendant placed telephone calls to his mother. The jail's phone system played for all outgoing calls from the jail a recording heard by both parties to the call that stated in pertinent part that "This call is subject to monitoring and recording." These calls were recorded, as were all inmate calls at the jail, and introduced into evidence at the defendant's trial. The court ruled that the defendant impliedly consented under both federal and state law to the monitoring and recording of the telephone calls.

Defendant Did Not Clearly Invoke Right to Counsel and Right to Remain Silent Under *Miranda*

State v. Ash, 169 N.C. App. 715, 611 S.E.2d 855 (19 April 2005). The defendant was arrested for murder and other offenses. After being advised during an officer's giving of *Miranda* rights of his right to have an attorney present, defendant asked, "Now?" The officer responded affirmatively. Defendant then asked, "Where's my lawyer at? [Inaudible] come down here?" The officer replied that the lawyer who was representing the defendant on a pending, but unrelated, breaking and entering charge had nothing to do "with what [he was] going to talk to [defendant] about." The defendant responded, "Oh, okay," and signed the waiver of rights form. The court ruled that the defendant did not clearly invoke his right to counsel under the ruling in Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), and thus his *Miranda* rights were not violated. [Author's note: Concerning the applicability of the *Davis* ruling to the waiver of *Miranda* rights, see page 203 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d. ed. 2003).] During the officer's interrogation, the defendant confessed that he and others had planned to commit a robbery, but ended their plan when they drove by the murder victim's mobile home and observed all the interior lights illuminated there. After the officer asked the defendant whether he was "scared" when the gun "went off," defendant stated, "I don't want to talk no more 'cause you're talking some crazy shit now." The officer continued to question the defendant, stating, "You didn't even know how many people was [sic] in the house, did you?" The defendant responded, "That's why the fuck I didn't stop," and the interrogation continued. The defendant continued to deny his involvement in the crime, but admitted his participation after further questioning. The court ruled, relying on State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), that the defendant did not clearly invoke his right to remain silent under *Miranda*. The court upheld the trial judge's finding that despite the defendant's statement about not talking any more, the defendant continued to talk without significant prompting by the officer.

(1) "Fruit of Poisonous Tree" Doctrine Did Not Apply to Bar Admission of Physical Evidence Discovered After *Miranda* Violation
(2) Officers' Statements to Defendant About His Cooperation Did Not Make Defendant's Statements Involuntary

State v. Houston, 169 N.C. App. 367, 610 S.E.2d 777 (5 April 2005). Officers arrested the defendant in a parking lot, did not give him *Miranda* warnings, took him to an apartment where he consented to a search, including a safe to which the defendant gave officers the combination. Cocaine, cash, and a handgun were found in the safe. The officers transported the defendant to the police station, where they advised him of his *Miranda* warnings and took a statement. None of the defendant's pre-*Miranda* warning statements were admitted at the defendant's trial. However, the evidence in the safe was admitted into evidence as well as the defendant's statements at the police station. (1) The court ruled, relying on United States v. Patane, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004), State v. May, 334 N.C. 609, 434

S.E.2d 180 (1993), and State v. Goodman, 165 N.C. App. 865, 600 S.E.2d 28 (2004), that the "fruit of poisonous tree" doctrine did not apply to bar admission of physical evidence discovered after the *Miranda* violation (that is, questioning the defendant after his arrest and obtaining the combination to the safe without giving *Miranda* warnings). Thus, evidence seized from the safe was admissible at the defendant's trial based on the defendant's valid consent to search it. [Author's note: An officer's request for a consent search is not interrogation. See page 203 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003).] (2) The court ruled that the defendant's statements at the police station were not involuntary. The court noted that the officers made general statements that they would advise the district attorney and judge of the defendant's cooperation and did not make any representations concerning what, if any, benefit the defendant's cooperation would bring.

Defendant Was Not in Custody Under *Miranda* When He Spoke with Military Superior About Criminal Charges

State v. Walker, 167 N.C. App. 110, 605 S.E.2d 647 (7 December 2004). The defendant, a U.S. Marine, was given *Miranda* warnings before questioning about a robbery by a deputy sheriff and military investigator. The next day while in the office of the defendant's military superior, a master gunnery sergeant, the sergeant asked the defendant why he had been questioned the prior day, if he had anything to do with "this mess," and if he was carrying a weapon during the incident involving the robbery. There was no evidence that the defendant felt he could not leave or that he had to answer the sergeant's questions. The court ruled that the defendant was not in custody under *Miranda* based on the ruling in State v. Davis, 158 N.C. 1, 582 S.E.2d 289 (2003) (discussing custody standard when military member gives statement to superior).

Trial Judge, Who Had Granted Defendant's Pretrial Suppression Motion, Did Not Err at Trial in Allowing Evidence to be Admitted That Had Been Subject to Suppression Ruling, Because Judge May Change Pretrial Ruling

State v. McNeill, 170 N.C. App. 574, 613 S.E.2d 43 (7 June 2005). The trial judge granted the defendant's pretrial motion to suppress evidence. However, at trial the judge changed his ruling and allowed the evidence to be admitted. The court ruled that the trial judge did not err in admitting the evidence. The court noted that a pretrial motion to suppress is a type of motion in limine, and such a motion is a preliminary or interlocutory decision that the trial judge can change. The court noted that the state has two options when a defendant's pretrial suppression motion is granted. It can appeal the ruling to the appellate courts. Or the state may proceed to trial, attempt to introduce the evidence subject to suppression, and allow the trial judge to either change the pretrial ruling or make the defendant object to the admission of the evidence.

Evidence

Statement of Unavailable State's Witness Made During Questioning by Law Enforcement Officer Was Inadmissible Under *Crawford v. Washington* When Defendant Did Not Have Prior Opportunity to Cross-Examine Witness

State v. Sutton, 169 N.C. App. 90, 609 S.E.2d 270 (15 March 2005). The defendant was convicted of the first-degree murder of victim A, felonious assault of victim B, and attempted armed robbery. Victim B did not testify at trial, and the state was permitted to introduce her statement to a law enforcement officer as an excited utterance under Rule 803(2). The defendant had not had a prior opportunity to cross-examine victim B. The court noted that a law enforcement officer approached victim B at the crime scene and questioned her. Her statement was neither spontaneous nor unsolicited. It was, in fact, the second statement that she had given to law enforcement after the crimes had been committed. An objective

witness would reasonably believe that the statement would be available for use at trial. The court ruled that the statement was made as a result of law enforcement interrogation and was testimonial; thus, it was inadmissible under *Crawford v. Washington*, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

State Firearms Expert's Opinion Testimony at Trial and Introduction of Lab Report Prepared by Another Expert Did Not Violate *Crawford v. Washington*

State v. Walker, 170 N.C. App. 632, 613 S.E.2d 330 (7 June 2005). The defendant was convicted of first-degree murder. A SBI agent (Santora), a firearms identification examiner, examined the evidence (two bullets retrieved from the victim's body and the defendant's gun), including test firings, and prepared a report that the bullets were fired from the defendant's gun. The agent did not testify at the defendant's trial. Another SBI agent (Ware), the supervisor of that agent, testified at the defendant's trial as a firearms identification expert, and he opined that the two bullets retrieved from the victim's body were fired from the defendant's gun. He testified that he reviewed the notes and report of the other agent, independently examined the firearms evidence, and his conclusions accorded with the other agent's report. The report was admitted into evidence. The court ruled the evidence was properly admitted for non-testimonial purposes under *Crawford v. Washington*, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), because it was corroborative of the testifying agent's testimony and helped form the basis of the testifying expert's opinion (the testifying agent was entitled to use the report to form his opinion). The court noted that under *Crawford* when evidence is admitted for a purpose other than the truth of the matter asserted, the protection afforded by the Confrontation Clause against testimonial statements is not at issue. And the defendant was afforded the opportunity to cross-examine the testifying agent about the basis of his expert opinion. The court ruled that there was no *Crawford* violation.

Evidence of Defendant's Prior Driving Record Was Admissible to Prove Malice in Second-Degree Vehicular Murder Trial

State v. Edwards, 170 N.C. App. 381, 612 S.E.2d 394 (17 May 2005). The defendant was convicted of second-degree murder as the result of driving while impaired and crashing into another vehicle, killing a passenger in that vehicle. The court ruled, distinguishing State v. Wilkerson, 356 N.C. 418, 571 S.E.2d 583 (2002), that the state was properly permitted to introduce the defendant's prior driving record, including DWI and DWLR convictions, as evidence of malice.

Trial Judge Erred in Admitting Videotaped Deposition of State's Witness Because Judge Failed to Find That Witness Was Unavailable To Testify at Trial

State v. Ash, 169 N.C. App. 715, 611 S.E.2d 855 (19 April 2005). Before the defendant's murder trial, a videotaped deposition was taken of the state's medical expert who testified about the cause of death of the victim. The defendant had the opportunity, which he availed himself of, to cross-examine the medical expert during the deposition. The deposition was introduced at trial. The trial judge made no finding concerning the medical expert's unavailability to testify at trial. The court ruled, relying on State v. Clark, 165 N.C. App. 279, 598 S.E.2d 213 (2004) [citing Crawford v. Washington, 124 S. Ct. 1354 (2004)], and State v. Nobles, 357 N.C. 433, 584 S.E.2d 765 (2003), that the admission of the deposition violated the defendant's Sixth Amendment right to confrontation. The judge's statement to the jury that the videotape was being used for the convenience of the medical expert was insufficient to establish unavailability.

(1) No Marital Communications Privilege Existed When Third Party Participated in Telephone Conversation Between Husband and Wife
(2) Defendant's Act of Retrieving Gun and Statement About Gun Were Not Within Marital Communications Privilege

State v. Gladden, 168 N.C. App. 548, 608 S.E.2d 93 (15 February 2005). The defendant was convicted of first-degree murder. (1) The court ruled that the defendant's telephone conversation with his wife in which his stepdaughter actively participated was not within the marital communications privilege. The conversation was not induced by the confidence of the marital relationship. In addition, the conversation occurred while the defendant was in jail and had been informed that all calls were subject to recording and monitoring. (2) The defendant's wife testified that the defendant retrieved a gun from their bedroom while she was there. The defendant also told her that he was using the gun to help his grandfather to kill some chicken hawks. The court ruled that neither the act nor the statement were within the marital communications privilege. The defendant did nothing to indicate that he intended his act of retrieving the gun to be a confidential communication. The defendant's statement was simply a casual remark that was not made within the confidence of the marital relationship.

(1) Evidence of Outstanding Warrant for Defendant's Arrest Was Admissible Under Rule 404(b) to Provide Explanation or Motive for Defendant's Conduct
(2) Evidence of Similar Ohio Traffic Stop One Month After Crimes Were Committed Was Admissible Under Rule 404(b) to Show Defendant's Motive and Intentions
(3) Trial Judge Has Inherent Authority to Conduct Hearing Sua Sponte to Clarify Questions of Admissibility of Evidence

State v. Brewington, 170 N.C. App. 284, 612 S.E.2d 648 (17 May 2005). The defendant was convicted of the felony of assault on a governmental officer with a deadly weapon, reckless driving, and being an habitual felon. An officer stopped a vehicle for a seatbelt violation by the driver; the defendant was a passenger. While talking to the driver, the officer made several observations of the defendant's suspicious conduct (see the facts set out in the court's opinion) and instructed him to remain in the vehicle. The driver was ordered out of the vehicle, and the officer conducted a consensual frisk and found cocaine on his person. While the officer was arresting the driver, the defendant moved behind the steering wheel and started to drive away. The officer attempted to stop the car by reaching for the key and was dragged by the moving vehicle. The defendant fled the scene and later was arrested in Ohio. The court ruled: (1) the state was properly permitted under Rule 404(b) to introduce evidence of an outstanding Virginia warrant for the defendant's arrest for a probation violation to provide a possible explanation or motive for the defendant's nervousness, giving the officer a fictitious name, and fleeing the scene; (2) the state was properly permitted under Rule 404(b) to introduce evidence of a substantially similar traffic stop in Ohio involving the defendant that occurred one month after the commission of the offenses in North Carolina that was offered to show the defendant's motive and intentions; and (3) based on Rules 102(a), 104(a), and 104(c), a trial judge has the inherent authority to conduct sua sponte an evidentiary hearing outside the jury's presence to clarify questions of the admissibility of evidence and to prevent undue delay in the proceedings.

In Prosecution of Kidnapping and Assault on Female, Evidence of Prior Assault of Another Female Was Properly Admitted Under Rule 404(b) and Rule 403 to Show Defendant's Common Plan or Design

State v. Petro, 167 N.C. App. 749, 606 S.E.2d 425 (4 January 2005). The defendant was convicted of second-degree kidnapping and habitual misdemeanor assault (based on assault on a female). The evidence showed that in 2001 the defendant restrained and assaulted the victim over a period of time. The court ruled that the trial judge did not err under Rule 404(b) and Rule 403 in allowing the state to introduce

evidence of an assault of another female in 1999 to show the defendant's common plan or design. The court noted that although the 1999 assault was dissimilar to the 2001 because the 1999 incident involved a sexual assault and the defendant used implements in addition to his hands, there were several similarities: (1) the defendant in each incident isolated and abused the victims, alternated between anger, repentance, and fear of going to jail, and caused an imminent fear of death; (2) the defendant offered to procure medical aid for the victims; and (3) after the assaults, the defendant continued to contact the victims and convinced them to accompany him to a hotel where he again held them against their will.

When Defendant on Direct Examination in Homicide Trial Testified That He Had Never Injured Anyone, State Was Properly Permitted to Cross-Examine Him About Prior Violent Acts

State v. Ammons, 167 N.C. App. 721, 606 S.E.2d 400 (4 January 2005). The defendant was convicted of voluntary manslaughter in a trial in which he asserted self-defense. The court ruled, distinguishing State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986), and State v. Mills, 83 N.C. App. 606, 351 S.E.2d 130 (1986), and relying on State v. Syriani, 333 N.C. 350, 428 S.E.2d 118 (1993), that when the defendant on direct examination testified that he had never injured anyone, the state was properly permitted to cross-examine him about prior violent acts. The state's questioning was relevant to the defendant's credibility once he placed his character for non-violence in issue.

Trial Judge Erred in Allowing State to Cross-Examine Defense Character Witness About Defendant's Prior Convictions When Witness Had Only Testified About Reputation of State's Witnesses for Truthfulness

State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774 (1 February 2005). The defendant was on trial for sexual offenses with two minors. The defendant offered a character witness who testified to the poor reputation of the two minors for truthfulness. This witness did not testify about the defendant's character. The court ruled that the trial judge erred in allowing the state to ask the witness if she knew that the defendant had been convicted of two counts of indecent liberties. The defendant's character had not been placed in issue by the witness's testimony.

State Was Improperly Permitted to Offer Extrinsic Evidence (Testimony by State's Witnesses in Rebuttal) to Impeach Defense Witnesses' Denials That They Had Previously Made Certain Statements

State v. Mitchell, 169 N.C. App. 417, 610 S.E.2d 260 (5 April 2005). The defendant was on trial for various sexual offenses involving his two minor granddaughters. The defendant offered testimony by his son and two daughters. During the state's cross-examination, the son denied making a statement to a social services department case manager that he once observed his father on top of one of his sisters. During rebuttal, the state was permitted to call the case manager to testify to his conversation with the son. During the state's cross-examination, a daughter denied making statements to a detective that the defendant had sexually abused her and her sister. During rebuttal, the state was permitted to call the detective to testify about her conversation with the daughter. The court ruled that the trial judge erred in permitting the state's rebuttal testimony. The defense witnesses' denials of having made the prior statements were conclusive for impeachment purposes, and the testimony of the state's witnesses on rebuttal was collateral and could not be used to impeach the defense witnesses.

Trial Judge Erred in Child Sexual Abuse Trial in Allowing State's Medical Expert to Testify That Child Probably Suffered Sexual Abuse When There Was No Evidence of Physical Injury; Although Defendant Failed to Object to Testimony at Trial, Plain Error Required New Trial

State v. Ewell, 168 N.C. App. 98, 606 S.E.2d 914 (18 January 2005). The defendant was convicted of multiple sex offenses with a child. The court ruled, relying on State v. Stancil, 355 N.C. 266, 559 S.E.2d 788 (2002), State v. Dixon, 150 N.C. App. 46, 563 S.E.2d 594 (2002), and other cases, that the trial judge erred in allowing the state's medical expert to testify that child probably suffered sexual abuse when there was no evidence of physical injury. Because the defendant did not object to this testimony at trial, the court examined the error under plain error review and ordered a new trial.

Videotape of Defendant Committing Sex Acts With Minor, Taken With Defendant's Camcorder, and Still Photographs Taken by Officer From Videotape, Were Properly Authenticated to Be Admitted as Substantive Evidence

State v. Prentice, 170 N.C. App. 593, 613 S.E.2d 498 (7 June 2005). The defendant was convicted of various sex offenses with a minor. The court ruled, relying the standard for the admissibility of videotapes set out in State v. Cannon, 92 N.C. App. 246, 374 S.E.2d 604 (1988), and other cases, that a videotape of the defendant committing sex acts with minor, taken with the defendant's camcorder, and still photographs taken by an officer from the videotape, were properly authenticated to be admitted as substantive evidence. (See the court's opinion for the facts underlying its ruling.)

Videotape of Armed Robbery of Convenience Store Was Properly Admitted into Evidence for Both Substantive and Illustrative Purposes

State v. Ayscue, 160 N.C. App. 548, 610 S.E.2d 389 (5 April 2005). The court ruled, relying the standard for the admissibility of videotapes set out in State v. Cannon, 92 N.C. App. 246, 374 S.E.2d 604 (1988), that a videotape of an armed robbery of a convenience store was properly admitted into evidence for both substantive and illustrative purposes. (See the facts recited in the court's opinion.)

When Defendant Gave Statement to Officer That Implicated Another Person in the Offenses Being Tried, But Officer Did Not Charge That Person, Officer Was Properly Permitted to Testify Why Person Was Eliminated as Suspect

State v. Carmon, 169 N.C. App. 750, 611 S.E.2d 211 (19 April 2005). The defendant was convicted of armed robbery, breaking and entering, and a misdemeanor assault. The defendant after his arrest gave a statement to an officer that he rode a bicycle to the victim's home with another person, got money from a bag, and left the home while that person remained there. The person named by the defendant was questioned by another officer but was not charged. One of the officers testified at trial concerning his impression of the other person's denial of involvement in the crimes. The court ruled, relying on State v. Richardson, 346 N.C. 520, 488 S.E.2d 148 (1997), and State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994), that this testimony was properly admitted to explain to the jury why this person was eliminated as a suspect, not for the impermissible purpose of commenting on the person's general credibility.

State's Expert Witness Was Properly Qualified to Offer Comparison of Glass Fragments Found at Crime Scene and in Defendant's Boot

State v. McVay, 167 N.C. App. 588, 606 S.E.2d 145 (21 December 2004). The court ruled that the trial judge did not err under Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674 (2004), in allowing a state's witness to testify as an expert in comparing glass fragments found at the crime scene with the glass fragments found in the defendant's boot and finding them to be consistent.

Sentencing

No Error Under *Blakely v. Washington* When Superior Court Judge in DWI Sentencing Hearing Found Existence of Grossly Aggravating Factors Involving Prior DWI Convictions

State v. Tedder, 169 N.C. App. 446, 610 S.E.2d 774 (5 April 2005). The defendant was convicted of DWI in superior court. The judge at the sentencing hearing found the existence of two grossly aggravating factors consisting of two prior convictions of DWI committed within seven years preceding the offense for which the defendant was being sentenced. The court rejected the defendant's argument that a jury must make the finding of these grossly aggravating factors, noting the exception from the jury requirement in Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), for the finding of prior convictions in imposing aggravated sentences.

State Failed to Offer Any Evidence of Prior Convictions to Support Defendant's Sentencing in Prior Record Level III; Court Orders Resentencing

State v. Quick, 170 N.C. App. 166, 611 S.E.2d 864 (3 May 2005). The defendant, pursuant to a plea agreement, pled no contest to possession of cocaine and being an habitual felon. The agreement provided for a specific sentence at the lowest end of the mitigated range in Prior Record Level III. However, the state failed to offer any evidence of the prior convictions to support the defendant's sentence in Prior Record Level III. Also, there was no stipulation concerning these prior convictions. The court reversed the defendant's sentence and remanded for resentencing.

Submission of Sentencing Worksheet in Conjunction with Plea Agreement Was Insufficient Evidence to Support Prior Record Level III

State v. Jeffery, 167 N.C. App. 575, 605 S.E.2d 672 (21 December 2004). Evidence that the state submitted a sentencing worksheet in conjunction with a plea agreement requiring six presumptive consecutive sentences of specified lengths was insufficient to prove prior record level III. There was no implied stipulation to that prior record level based on the plea agreement, and there was no explicit stipulation by defense counsel.

Finding of Aggravating Factor Is Not Required When Defendant Is Sentenced in Presumptive Range With Minimum Sentence That Overlaps With Same Minimum Sentence in Aggravated Range

State v. Allah, 168 N.C. App. 190, 607 S.E.2d 311 (18 January 2005). The court ruled, relying on State v. Ramirez, 156 N.C. App. 249, 576 S.E.2d 714 (2003), the finding of an aggravating factor is not required when a defendant is sentenced in the presumptive range with a minimum sentence that overlaps with the same minimum sentence in the aggravated range.

Judge in Juvenile Disposition Order Did Not Impermissibly Delegate Authority by Allowing Others to Determine Amount of Restitution and Specifics of Residential Treatment Program

In re M.A.B., 170 N.C. App. 192, 611 S.E.2d 886 (3 May 2005). The judge's disposition order for a juvenile adjudicated delinquent of a misdemeanor assault included, among other matters, that the juvenile: (1) pay restitution "in an amount to be determined" for the victim's medical bills; and (2) "cooperate and participate in a residential treatment program as directed by court counselor or mental health agency." The court ruled, distinguishing In re Hartsock, 158 N.C. App. 287, 580 S.E.2d 395 (2003), the judge did not impermissibly delegate his authority concerning these two matters.