Recent Cases Affecting Criminal Law and Procedure
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North Carolina Supreme Court

Criminal Law and Procedure

Using Hands to Beat Robbery Victim Was Not "Dangerous Weapon, Implement or Means" to Support Conviction of Armed Robbery

State v. Hinton, 361 N.C. 207, 639 S.E.2d 437 (26 January 2007), *affirming*, 176 N.C. App. 191, 625 S.E.2d 918 (21 February 2006) (unpublished opinion). The defendant was convicted of armed robbery based on using his fists to beat the robbery victim. The court ruled that the use of hands to beat a robbery victim is not a "dangerous weapon, implement or means" to support a conviction of armed robbery under G.S. 14-87. The court determined that the North Carolina General Assembly intended to require the state to prove that a defendant used an external dangerous weapon or means to convict a defendant of armed robbery. Thus, the use of hands, fists, or feet is insufficient. [Author's note: This ruling does not affect prior rulings that the element of "deadly weapon" in various assault offenses may be satisfied by the use of hands or feet.]

Insufficient Factual Basis to Support Judge's Acceptance of Guilty Plea

State v. Agnew, 361 N.C. 333, 643 S.E.2d 581 (4 May 2007), *reversing*, 178 N.C. App. 234, 630 S.E.2d 743 (20 June 2006) (unpublished opinion). On June 9, 2004, in taking the defendant's guilty plea to trafficking cocaine by possession, the trial judge asked defense counsel if counsel stipulated that there was a factual basis to support the plea and whether the defendant waived the formal presentation of evidence. Defense counsel responded affirmatively. Pursuant to the plea arrangement, the trial judge ordered that the sentencing hearing be continued until scheduled by the state. On March 10, 2005, a different trial judge held the sentencing hearing. The defendant told the judge that he had never seen the evidence in his case, never possessed the drugs, did not understand how he could be charged with trafficking by possession, had been under the influence of marijuana when he pled guilty on June 9, 2004, and had been under the impression that he would receive probation based on his cooperation. Treating the defendant's request as a motion to withdraw the guilty plea, the trial judge denied the motion and asked the prosecutor to tell the judge about the case. The prosecutor summarized the facts, and after further colloquy with the defendant, the judge sentenced the defendant. The court ruled that when the trial judge accepted the defendant's guilty plea on June 9, 2004, the judge did not comply with G.S. 15A-1022(c) because the judge did not determine that there was a factual basis for the plea. The transcript, defense counsel's stipulation, and the indictment taken together did not contain enough information for an independent determination of the defendant's actual guilt in this case. The court noted that the prosecutor's summary of facts on March 10, 2005, could not serve as the factual basis in this case because that summary occurred months after the plea had been accepted.

Trial Court Did Not Have Jurisdiction to Revoke Probation When Hearing Was Conducted After Probationary Period Had Ended, and Judge Failed to Make Required Finding Under G.S. 15A-1344(f)(2)—Ruling of Court of Appeals Is Affirmed

State v. Bryant, 361 N.C. 100, 637 S.E.2d 532 (15 December 2006), *affirming*, 176 N.C. App. 190, 625 S.E.2d 916 (21 February 2006) (unpublished opinion). The court ruled that the trial court did not have jurisdiction to revoke the defendant's probation when the revocation hearing was conducted after the probationary period had ended, and the judge revoking probation failed to make a finding required under G.S. 15A-1344(f)(2) that the state had made a reasonable effort to notify the probationer and to conduct the hearing earlier.

Trial Judge Abused Discretion in Granting Defendant and Counsel Five Minutes to Decide Whether to Present Evidence—Ruling of Court of Appeals Is Reversed

State v. Williams, 361 N.C. 78, 637 S.E.2d 523 (15 December 2006), *reversing*, 175 N.C. App. 640, 625 S.E.2d 147 (7 February 2006). The defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. At the close of the state's case around 4:00 p.m. on the second day of trial, defense counsel asked for an adjournment for the day or at least some time to decide whether to present evidence. The trial judge stated that he would give five minutes. Defense counsel asked for fifteen minutes. The trial judge denied that request. Defense counsel told the judge that he did not know the extent of the state's evidence until it was presented. The judge again said five minutes. The defendant did not present any evidence. The court ruled that the judge abused his discretion in only giving five minutes. The court noted that defense counsel had a list of twenty to thirty witnesses that the state might call, but the state rested on the afternoon of the second day of trial having only called twelve witnesses. Also, the defendant and defense counsel had a great deal to consider given the weaknesses in the testimony of the state's witnesses. The court also noted the gravity of the charge of first-degree murder.

Proper Remedy Under Defendant's Motion for Appropriate Relief When Defendant Was Sentenced to Illegal Concurrent Sentence Pursuant to Plea Agreement Was to Allow Defendant to Withdraw Guilty Plea; Judge Had No Authority to Order Sentence to Run Concurrently

State v. Ellis, 361 N.C. 200, 639 S.E.2d 425 (26 January 2007), *reversing*, 167 N.C. App. 276, 605 S.E.2d 168 (7 December 2004). The defendant pled guilty to armed robbery in 1992 when the law required the sentence to run consecutively to any sentences being served. However, the state and the defendant in the plea agreement agreed that the sentence would run concurrently with the sentences the defendant was then serving. The judge sentenced the defendant for the armed robbery, but did not indicate whether it was to run concurrently or consecutively. The Department of Correction recorded the sentence as consecutive to the sentence he then was serving. The defendant filed a motion for appropriate relief requesting that he be allowed to withdraw his guilty plea. The trial court judge hearing the motion for appropriate relief instead ordered the sentence to run concurrently. The court ruled, relying on State v. Wall, 348 N.C. 671, 502 S.E.2d 585 (1998), that the proper remedy was to allow the defendant to withdraw his guilty plea, and the defendant could proceed to trial or attempt to negotiate another plea agreement. The judge at the MAR hearing had no authority to order the sentence to run concurrently. The defendant was not entitled to specific performance of the plea agreement that would result in an illegal sentence.

(1) Fourteen-Year-Old Juvenile Who Had Consensual Fellatio With Twelve-Year-Old Was Properly Adjudicated Delinquent of Crime Against Nature

(2) Crime Against Nature Offense Was Not Unconstitutionally Applied to Juvenile

In re R.L.C., 361 N.C. 287, 643 S.E.2d 920 (4 May 2007), *affirming*, 179 N.C. App. 311, 635 S.E.2d 1 (5 September 2006). A fourteen-year-old juvenile was adjudicated delinquent of crime against nature for having consensual fellatio with a twelve-year-old. (1) The court ruled the fact that other offenses involving this sex act require certain age differentials as elements did not show a legislative intent that the juvenile could not be adjudicated delinquent of crime against nature with a person who was only two years younger than the juvenile. (2) The court ruled, distinguishing Lawrence v. Texas, that the crime against nature offense was not unconstitutionally applied to the juvenile. The court noted that, unlike *Lawrence v. Texas*, this case involved minors. The court also recognized that preventing sexual conduct between minors furthers a legitimate governmental interest and application of the crime against nature offense is a reasonable means of promoting that interest.

Capital Case Issues

(1) Doctrine of Invited Error Applies When Trial Judge in Capital Sentencing Hearing Erroneously Submits Mitigating Factor G.S. 15A-2000(f)(1) (No Significant Prior Criminal History) at Defendant's Request
(2) Trial Judge's Failure to Submit Aggravating Factor in Capital Sentencing Hearing Is Not Structural Error

State v. Polke, 361 N.C. 65, 638 S.E.2d 189 (15 December 2006). The defendant was convicted of first-degree murder and sentenced to death. (1) The defendant at the capital sentencing hearing requested that the trial judge submit mitigating factor G.S. 15A-2000(f)(1) (no significant prior criminal history), and the judge did so. The defendant on appeal argued that the trial judge erroneously submitted this mitigating factor. The court ruled that the doctrine of invited error applies when a trial judge in a capital sentencing hearing erroneously submits this mitigating factor at the defendant's request, and thus the defendant cannot be prejudiced by an error resulting from his own conduct. [Author's note: The court noted, on the other hand, its recent ruling in State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006), that the doctrine of invited error does not apply when mitigating factor G.S. 15A-2000(f)(1) is withheld at the defendant's request.] (2) The court ruled that a trial judge's failure to submit an aggravating factor in a capital sentencing hearing is not structural error and thus not subject to structured error analysis.

Arrest, Search, and Confession Issues

(1) Court Rules That Officers Did Not Have Exigent Circumstances to Enter House Without Search Warrant to Look for Possible Missing Person
(2) Court Remands to Trial Court for Determination Whether Defendant Had Reasonable Expectation of Privacy in House to Contest Officers' Entry into House
(3) Court Remands to Trial Court for Determination Whether Independent Source Exception to Fourth Amendment's Exclusionary Rule Would Support Finding Probable Cause for Search Warrant With Exclusion of Illegally-Obtained Information That Had Been Included in Search Warrant's Affidavit

State v. McKinney, 361 N.C. 53, 637 S.E.2d 868 (15 December 2006), *affirming in part and reversing in part*, 174 N.C. App. 138, 619 S.E.2d 901 (18 October 2005). The defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. Amy advised law enforcement that her roommate, Aja, had told her that Aja's friend, the defendant, had killed

his roommate. An address of the residence where the defendant and victim apparently lived was supplied to law enforcement. Officers arrived at the residence and were advised there that the defendant was reportedly driving the victim's vehicle, which was not in the driveway. The victim's sister arrived and informed officers that the victim lived there. The victim's brother arrived shortly thereafter. Officers learned that neither the brother nor sister had any contact with the victim in several days, and the victim had not reported for work the prior day, which was very unusual. The officers also learned that the defendant had told Aja that the victim had pulled a knife on the defendant, and the victim "wouldn't be coming back." The victim's brother then entered the house through a window and officers followed him. The officers saw what appeared to be blood spatter in the front bedroom and other indications of blood elsewhere in the house, secured the house, obtained a search warrant, and thereafter discovered the victim's body in a large garbage can in the house. (1) The court ruled that the officers did not have exigent circumstances to enter the house without a search warrant to look for the possible missing victim. (2) The court remanded to the trial court for a determination whether the defendant had a reasonable expectation of privacy in the house to contest the officers' entry into the house (had the defendant permanently abandoned the house?). (3) The court remanded to the trial court for a determination whether the independent source exception to the Fourth Amendment's exclusionary rule [Murray v. United States, 487 U.S. 533 (1988)] would support finding probable cause for the search warrant with the exclusion of illegally-obtained information (the apparent blood spatter and other indications of blood in the house) that had been included in search warrant's affidavit.

Evidence

(1) Medical Expert's Opinion Testimony That Child Had Been Sexually Abused Was Admissible When It Was Based on Physical Evidence
(2) Medical Expert's Opinion Testimony That, Based on Child's Statements to Her, She Would Believe Child and Diagnose Sexual Abuse Even in Absence of Physical Evidence Was Inadmissible, But Error Was Not Plain Error Requiring New Trial—Ruling of Court of Appeals Is Reversed

State v. Hammett, 361 N.C. 92, 637 S.E.2d 518 (15 December 2006), *reversing*, 175 N.C. App. 597, 625 S.E.2d 168 (7 February 2006). The defendant was convicted of multiple charges concerning sexual abuse of his daughter. (1) The court ruled that the medical expert's opinion testimony that the child had been sexually abused was admissible when it was based on physical evidence and the child's statements. The physical findings by the expert included a notch in the six o'clock position of the victim's hymenal ring. (2) The court ruled that the medical expert's opinion testimony that based on the child statements to her, she would believe the child and diagnose sexual abuse even in absence of physical evidence was inadmissible. This testimony improperly vouched for the child's credibility. The court, however, also ruled that this error was not plain error requiring a new trial.

(1) Evidence of Killing Committed Ten Years Before Murder Being Tried Was Not Too Dissimilar or Remote to Be Admitted Under Rule 404(b)
(2) Trial Judge Erred in Allowing Conviction to Be Admitted Under Rule 404(b)

State v. Badgett, 361 N.C. 234, 644 S.E.2d 206 (4 May 2007). The defendant was convicted of a first-degree murder committed in 2002. The trial judge admitted under Rule 404(b) evidence of the facts involving the defendant's killing of another person in 1992 as well as the defendant's conviction of voluntary manslaughter for that killing. (1) The court ruled that evidence of the killing was not too dissimilar or remote to be admitted. The court reviewed the evidence and

concluded that there were remarkable similarities between the two killings, including fatal stab wounds to an unarmed victim's neck with a folding pocketknife that occurred during an argument with the victim in the victim's home. Concerning the temporal requirement, the defendant was in prison for five of the ten years between the two killings (such time is excluded by case law), leaving only five years between them. (2) The court ruled that the trial judge erred in allowing the state to introduced evidence of the defendant's conviction of voluntary manslaughter for the 1992 killing. The court relied on its ruling in State v. Wilkerson, 356 N.C. 418, 571 S.E.2d 583, *reversing per curiam*, 148 N.C. App. 310, 559 S.E.2d 5 (2002) (for reasons stated in dissenting opinion of the Court of Appeals). Evidence of the prior conviction was inadmissible when the state had introduced evidence of the underlying facts and circumstances of the conviction and, in this case, the defendant did not testify so the conviction was not admissible under Rule 609.

Sentencing

(1) Court Discusses Use of Special Verdicts in Criminal Cases
(2) Court Rules Trial Judge's Finding of Aggravating Factor in Violation of *Blakely v. Washington* Was Harmless Error Beyond Reasonable Doubt
(3) Trial Judge's Finding of Aggravating Factor Did Not Violate Constitution of North Carolina

State v. Blackwell, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006). The defendant was convicted of second-degree murder and other offenses when he drove his vehicle while impaired and crashed into another vehicle, killing one of the occupants. In a sentencing hearing held before the ruling in Blakely v. Washington, 542 U.S. 296 (2004), the trial judge found the statutory aggravating factor that the defendant was on pretrial release for another charge and imposed a sentence in the aggravated range for the second-degree murder conviction and two other felony convictions. (1) In responding to one of the defendant's arguments that *Blakely* error was not harmless beyond a reasonable doubt because trial judge allegedly lacked a procedural mechanism by which to submit the aggravating factor to the jury, the court discussed the use of special verdicts in criminal cases. The court stated that North Carolina law permits the submission of aggravating factors to a jury by using a special verdict. [Author's note: The court's discussion was in the context of a sentencing hearing conducted before the *Blakely* ruling and the enactment of the legislation setting out procedures for the jury to find aggravating factors.] (2) The court reviewed the state's evidence at trial, the defendant's failure to object to the prosecutor's statement at sentencing about the defendant being on pretrial release, and the defendant's failure at sentencing to present any arguments or evidence contesting the aggravating factor. It then ruled that the trial judge's finding of aggravating factor in violation of Blakely v. Washington, 542 U.S. 296 (2004), was harmless error beyond reasonable doubt. (3) The court ruled that the trial judge's finding of the aggravating factor did not violate Article I, Section 24 of the Constitution of North Carolina. *See also* State v. Speight, 361 N.C. 106, 637 S.E.2d 539 (15 December 2006) (court set aside North Carolina Court of Appeals ruling that sentence was erroneously imposed under *Blakely* and remanded case to that court for harmless error analysis not inconsistent with ruling in State v. Blackwell, discussed above).

North Carolina Court of Appeals

Criminal Law and Procedure

(1) Sufficient Evidence of Strangulation to Support Conviction of Assault by Strangulation
(2) Sufficient Evidence of Restraint to Support Kidnapping Conviction

(3) Sufficient Evidence to Support Kidnapping Conviction Because Restraint Was Separate and Independent From Assault by Strangulation

(4) Court Upholds Sufficiency of Evidence to Support One Conviction of Intimidating Witness But Finds Insufficient Evidence of Ten Other Convictions of Intimidating Witness

State v. Braxton, 183 N.C. App. 36, 643 S.E.2d 637 (1 May 2007). The defendant was convicted of one count of second-degree kidnapping, two counts of assault by strangulation, two counts of assault on a female, and eleven counts of intimidating a witness. (1) The court upheld the defendant's convictions of assault by strangulation based on the victim's testimony that there were separate incidents in which the defendant grabbed her by the throat, causing her to have difficulty breathing. The court rejected the defendant's argument that the definition of strangulation should be the complete closure of one's airways causing an inability to breathe. The court noted with approval the definition of strangulation in footnote one to the offense in N.C.P.I.—Crim. 208.61 (2005): "strangulation is defined as a form of asphyxia characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck brought about by hanging, ligature, or the manual assertion of pressure." (2) The court ruled that there was sufficient evidence of restraint to support the kidnapping conviction because the defendant restrained the victim by pinning her on the bed by pushing his knee into her chest, grabbing her hair, and preventing her from escaping from him. (3) The court ruled that there was sufficient evidence to support the kidnapping conviction because the restraint of the victim was separate and independent from the assault by strangulation: pinning the victim on the bed by pushing his knee into her chest, grabbing her hair, and preventing her from leaving the motel room. (4) The court upheld the sufficiency of evidence to support one conviction of intimidating a witness (G.S. 14-226) but found insufficient evidence to support ten other convictions. The state's eleven indictments alleged the defendant attempted to deter the victim from attending court by means of threats. The court noted that the state did not also allege by "menaces or in any other manner" and thus was confined to the allegation of threats only. The court examined the evidence and found only one communication that constituted a threat. The defendant in the other communications merely told her not to testify, which was insufficient evidence of a threat.

Sufficient Evidence of "Serious Bodily Injury" to Support Conviction of Assault Inflicting Serious Bodily Injury When Victim Lost Natural Tooth

State v. Downs, 179 N.C. App. 860, 635 S.E.2d 518 (17 October 2006). The court ruled there was sufficient evidence of "serious bodily injury," as defined in G.S. 14-32.4(a), to support the defendant's conviction of assault inflicting serious bodily injury when the victim lost his natural tooth as a result of the defendant's assault. The natural tooth was located in the top front row of teeth. The court stated that the defendant suffered "serious permanent disfigurement" (a term included in the statutory definition), despite the planned substitution of a dental implant in place of the natural tooth.

Trial Judge Erred in Giving Peremptory Jury Instruction on Element of Serious Injury in Felonious Assault Trial

State v. Bagley, 183 N.C. App. 514, 644 S.E.2d 615 (5 June 2007). The defendant was convicted of assault with a deadly weapon inflicting serious injury and other offenses. The assault victim suffered a bullet wound in the leg that went completely through it. He was treated at a hospital for the wound and suffered pain for two or three weeks afterward. Although the court ruled that this evidence was sufficient to support the element of serious injury, the court also ruled that the trial judge erred in giving a peremptory jury instruction on this element.

(1) Sufficient Evidence to Support Two Rape Convictions When Defendant Vaginally Penetrated Victim on Couch While Facing Defendant, Withdrew His Penis, Turned Her on Her Side, and Then Vaginally Penetrated Her from Behind
(2) Evidence Supported Conviction of Kidnapping in Addition to Rape Convictions When Defendant's Removal of Victim from Bedroom to Kitchen and Then to Family Room and His Commission of Other Acts Were Not Necessary to Accomplish Rapes and Placed Her in Greater Danger Than That Inherent in the Rapes
(3) When Kidnapping Indictment Alleged "Confined, Restrained, and Removed," Jury Instruction Permitting Conviction on Finding That Defendant "Restrained *or* Removed" Victim Was Not Error
(4) Sufficient Evidence to Support Conviction of Attempted Second-Degree Burglary

State v. Key, 180 N.C. App. 286, 636 S.E.2d 816 (21 November 2006). The defendant was convicted of two counts of first-degree rape, one count of second-degree kidnapping, one count of attempted second-degree burglary, and one count of first-degree burglary. The defendant broke into the victim's home and threatened her with a knife in the bedroom. He forced her at knife point to go into the kitchen where he taped her eyes shut, took the phone off the hook, and told her to go into the family room and remove her clothing. The defendant vaginally penetrated the victim on a couch while she faced the defendant, withdrew his penis, turned her on her side, and then vaginally penetrated her from behind. (1) The court ruled, relying on State v. Lancaster, 137 N.C. App. 37, 527 S.E.2d 61 (2000), that there was sufficient evidence to convict the defendant of two counts of rape. (2) The court ruled, distinguishing State v. Cartwright, 177 N.C. App. 531, 629 S.E.2d 318 (16 May 2006), that the evidence supported the conviction of kidnapping in addition to the rape convictions when the defendant's removal of the victim from the bedroom to the kitchen and then to the family room and his commission of other acts were not necessary to accomplish the rapes and placed her in greater danger than that inherent in the rapes. (3) The court ruled, relying on State v. Lancaster, 137 N.C. App. 37, 527 S.E.2d 61 (2000), that when the kidnapping indictment alleged "confined, restrained, and removed," the jury instruction permitting a conviction on the jury's finding that the defendant "restrained *or* removed" the victim was not error. (4) In a separate incident unrelated to the rapes and kidnapping, the defendant was convicted of attempted second-degree burglary. On February 9, 2001, the defendant acted as an interested buyer of a home being sold by the victim and observed the inside of the home and took photographs. On the evening of February 15, 2001, a neighbor saw a suspicious van slow down and drive by the victim's residence and called 911. The neighbor then saw the defendant park his vehicle in the adjoining neighborhood, enter the rear of the victim's property, and come to the front doorway, where he stood on the door sill for thirty to sixty seconds before walking away from the door. Evidence was also introduced that the defendant searched homes for sale on the Internet, approached the homeowners to learn about them and their property, and later returned at night to make a "credit card entry." The court ruled that this evidence was sufficient to support the defendant's conviction of attempted second-degree burglary.

Sufficient Evidence of Overt Act to Support Conviction of Attempted First-Degree Statutory Sexual Offense

State v. Henderson, 182 N.C. App. 406, 642 S.E.2d 509 (3 April 2007). The defendant was convicted of attempted first-degree statutory sexual offense with his eight-year-old daughter. The court ruled that there was sufficient evidence of an overt act to support the defendant's conviction. The evidence showed that the defendant removed his pants, walked into a room where his daughter was seated, stood in front of her, and asked her to put his penis in her mouth. The

defendant had threatened the victim many times in the past, and the victim stated that she was afraid of the defendant. The court noted that violence is not a necessary component of an overt act.

(1) Sufficient Evidence Existed to Support Element of First-Degree Kidnapping That Defendant Did Not Release Victims in Safe Place
(2) Confinement, Removal, and Restraint of Kidnapping Victims Were Separate and Independent of Commission of Armed Robberies

State v. Anderson, 181 N.C. App. 655, 640 S.E.2d 797 (20 February 2007). The defendant was convicted of six counts of first-degree kidnapping, three counts of armed robbery, one count of first-degree burglary, and one count of a felonious assault. The defendant and an accomplice forced their way into a residence, committed robberies there, and eventually left. Three of the kidnapping victims were children who had been awoken and placed in another bedroom in the residence. Two adult female victims were eventually taken by the defendant by gunpoint to the garage and one of them was then taken to the front of the house, where the defendant left when he realized the adult male victim was calling the police. (See other pertinent facts set out in the opinion). (1) The court ruled, relying on State v. Love, 177 N.C. App. 614, 630 S.E.2d 234 (6 June 2006), that the defendant never released the six kidnapping victims and thus found it unnecessary to decide whether the residence was a safe place. The court upheld all six first-degree kidnapping convictions. (2) The court also rejected the defendant's argument that the confinement, removal, and restraint of the kidnapping victims were not separate and independent of the commission of the armed robberies. The defendant bound the two adult female victims after he had forced one of them to load valuables into trash bags. The defendant subjected the three child victims to danger and abuse that were manifestly unnecessary to the completion of the burglary. Also, the adult female victims and the children were held as hostages, and the adult female victims were used as human shields as well. The adult male victim was forcibly moved at gunpoint to another place in the house after he had been robbed.

(1) Confinement, Removal, and Restraint of Bound Kidnapping Victims Were Separate and Independent of Commission of Armed Robberies
(2) Sufficient Evidence Existed to Support Element of First-Degree Kidnapping That Defendant Did Not Release Victims in Safe Place

State v. Morgan, 183 N.C. App. 160, 645 S.E.2d 93 (15 May 2007). The defendants broke into a motel room carrying a gun, restrained two victims with duct tape, stole property, and left. (1) The court ruled, relying on State v. Beatty, 347 N.C. 555, 495 S.E.2d 367 (1998), that the confinement, removal, and restraint of the kidnapping victims were separate and independent of the commission of armed robberies. The bound victims were placed in greater danger than the restraint and removal inherent in the armed robberies. (2) The court ruled, relying on State v. Love, 177 N.C. App. 614, 630 S.E.2d 234 (6 June 2006), that there was sufficient evidence to support the element of first-degree kidnapping that defendant did not release the victims in a safe place. The defendants did not affirmatively or willfully act to release the victims.

New Trial Ordered When Trial Judge Instructed on Several Theories of Kidnapping, Jury Returned General Verdict of Guilty of Kidnapping, and Evidence Did Not Support One of the Theories of Kidnapping

State v. Johnson, 183 N.C. App. 576, 646 S.E.2d 123 (5 June 2007). The court ruled, relying on State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987), and other cases, the trial judge committed error requiring a new trial when he instructed on several theories of kidnapping, the

jury returned a general verdict of guilty of kidnapping, and the evidence did not support one of the theories of kidnapping.

Insufficient Evidence to Support Convictions of Second-Degree Murder

State v. Myers, 181 N.C. App. 310, 639 S.E.2d 1 (2 January 2007). The court ruled that the state's evidence was insufficient to support the defendants' convictions of second-degree murder. (See the discussion of the evidence in the court's opinion.)

Sufficient Evidence to Support Conviction of Armed Robbery When Defendant Brandished Knife and Threatened to Cut Victim, a Store Employee, Who Had Followed Defendant After He Had Stolen Chainsaw and Left Store

State v. Hurley, 180 N.C. App. 680, 637 S.E.2d 919 (19 December 2006). The defendant was convicted of armed robbery. The court ruled that there was sufficient evidence to support the conviction when the defendant brandished a knife and threatened to cut the victim, a store employee, who had followed the defendant after he had stolen a chainsaw and left the store. A continuous transaction occurred from the taking of the chainsaw to the defendant's brandishing the knife.

Sufficient Evidence of Armed Robbery When Defendant Pushed Victim and Took Victim's Wallet That Was Lying on Ground, Victim Chased Defendant, and Defendant Threatened Victim With Knife

State v. Blair, 181 N.C. App. 236, 638 S.E.2d 914 (2 January 2007). The court ruled, relying on State v. Bellamy, 159 N.C. App. 143, 582 S.E.2d 663 (2003), and other cases, that there was sufficient evidence of armed robbery when the defendant pushed the victim and then took the victim's wallet that was lying on the ground, the victim chased the defendant, and the defendant threatened the victim with a knife.

Habitual Misdemeanor Assault Offense Is Not Unconstitutional Under *Apprendi v. New Jersey*, *Blakely v. Washington*, or Double Jeopardy Clause

State v. Massey, 179 N.C. App. 803, 635 S.E.2d 528 (17 October 2006). The court ruled that the habitual misdemeanor assault offense is not unconstitutional under the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004), or under the Double Jeopardy Clause.

(1) Habitual Felon Statute Is Not Unconstitutional Under Double Jeopardy Clause Based on Rulings in *Apprendi v. New Jersey* or *Blakely v. Washington*
(2) Court Notes That Convictions of Habitual Misdemeanor Assault for Habitual Assault Offenses Committed Before December 1, 2004, May Be Used to Prove Habitual Felon Status

State v. Artis, 181 N.C. App. 601, 641 S.E.2d 314 (6 February 2007). The defendant was convicted of malicious conduct by prisoner and habitual misdemeanor assault. He then was found to be an habitual felon, based on three prior felony convictions—two for habitual misdemeanor assault and one for felony eluding arrest. (1) The court ruled that the habitual felon statute is not unconstitutional under the Double Jeopardy Clause based on the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004). (2) The court discussed the ratification clause of 2004 legislation and noted that convictions of habitual

misdemeanor assault for habitual assault offenses committed before December 1, 2004, may be used to prove habitual felon status. The prohibition against using these convictions to prove habitual felon status only applies to offenses of habitual misdemeanor assault committed on or after December 1, 2004.

(1) Habitual DWI Offense Is Not Unconstitutional Under Double Jeopardy Clause Based on Rulings in *Apprendi v. New Jersey* or *Blakely v. Washington*
(2) No Violation of State Constitutional Right to Unanimous Verdict When Habitual DWI Verdict Sheet Did Not Set Out Two Prongs of Offense

State v. Bradley, 181 N.C. App. 557, 640 S.E.2d 432 (6 February 2007). The defendant was convicted of habitual DWI. (1) The court ruled that the habitual DWI offense is not unconstitutional under the Double Jeopardy Clause based on the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004). (2) The court ruled, relying on State v. Oliver, 343 N.C. 202, 470 S.E.2d 16 (1996), that there was no violation of the defendant's state constitutional right to a unanimous verdict when the habitual DWI verdict sheet did not set out two prongs of offense (0.08 and impaired prongs). There is only one offense, and it does not violate the unanimity right if some jurors find one prong and other jurors find the other prong.

(1) Sufficient Evidence of Possession of Firearm to Support Conviction of Possession of Firearm by Felon
(2) Sufficient Evidence of Assault When Defendant Reached for Weapon During Struggle with Law Enforcement Officers
(3) Trial Judge Erred in Instructing on Attempted Assault, Which Is Not Recognized Crime

State v. Barksdale, 181 N.C. App. 302, 638 S.E.2d 579 (2 January 2007). The defendant was convicted of attempted assault with a deadly weapon on a law enforcement officer and possession of firearm by a felon. After chasing the defendant, three officers tackled him and then struggled in trying to subdue him on the ground. After an officer had handcuffed the defendant's right wrist, he noticed a chrome-plated handgun in the grass about six inches from the defendant's left hand. Although none of the officers saw the defendant touch the gun, the defendant was reaching for the gun with his outstretched hand. They applied even greater force and finally subdued him. They then retrieved the gun, which was dry and warm even though the ground was wet from rain earlier in the evening and the weather was cool. (1) The court ruled that there was sufficient circumstantial evidence of the defendant's possession of the firearm before he was tackled to support the conviction of possession of a firearm by a felon. (2) Based on the common law definition of assault (the pertinent part of the definition, "the unequivocal appearance of an attempt" with force and violence to do some immediate physical injury), the court ruled that there was sufficient evidence of assault when the defendant reached for the weapon during his struggle with the law enforcement officers. (3) The court ruled, relying on State v. Currence, 14 N.C. App. 263, 188 S.E.2d 10 (1972), that the trial judge erred in instructing on the offense of attempted assault, because attempted assault is not a recognized crime.

Possession of Closed Pocketknife on Educational Property Violates G.S. 14-269.2(d) (Weapon on Educational Property); Operability of Pocketknife Is Irrelevant

In re B.N.S., 182 N.C. App. 155, 641 S.E.2d 411 (6 March 2007). A juvenile had a closed pocket knife in his coat pocket at a high school. The pocketknife's blade was 2.5 inches long. The court ruled that this evidence was sufficient to support the juvenile's adjudication of delinquency for a

violation of G.S. 14-269.2(d) (weapon on educational property). The court also stated that the operability of the pocketknife was irrelevant. The court noted that none of the statutory exemptions to this offense in G.S. 14-269.2(g) and (h) applied in this case. [Author's note: As a result of this ruling, disregard a contrary view on this issue set out on page 412 of the Institute of Government's publication, *North Carolina Crimes: A Guidebook on the Elements of Crime* (5th ed. 2001).]

Defendant Was Properly Convicted of Two Counts of Felony Larceny

State v. West, 180 N.C. App. 664, 638 S.E.2d 508 (19 December 2006). The defendant was convicted of second-degree murder, two counts of felony larceny, and one count of breaking and entering a vehicle. The defendant entered a truck owned by the victim's employer and stole the victim's shotgun that was locked behind the truck's seat. The defendant then stole an automobile owned by the victim. Both vehicles were parked in the same driveway and both takings occurred during the same time period. The court ruled, distinguishing State v. Marr, 342 N.C. 607, 467 S.E.2d 236 (1996), that the defendant was properly convicted of two counts of felony larceny. The defendant's motive for stealing the shotgun was to use it as an outlet for his anger when he shot and killed a stranger. The defendant's motive for stealing the automobile was to use it to travel to his mother's house. These were two separate takings to support the two larceny convictions.

(1) Sufficient Evidence to Support Conviction of Obtaining Property by False Pretenses by Using Stolen Credit Cards at Store
(2) Sufficient Evidence of Breaking or Entering by Unauthorized Entry of Law Office Area Not Open to Public
(3) Sufficient Evidence of Felony Larceny By Acting in Concert With Accomplice
(4) Trial Judge Erred in Finding That Verdicts of Misdemeanor Breaking or Entering and Felony Larceny Were Inconsistent

State v. Perkins, 181 N.C. App. 209, 638 S.E.2d 591 (2 January 2007). The defendant was seen in the morning with another person (Brooks) in a hallway of a law office and beyond the public reception area. Neither had permission to be there, and the defendant gave a false explanation for her presence. That afternoon a person matching Brooks' description was seen coming from a lawyer's office, where it was later discovered that the lawyer's credit and check cards were stolen and used by the defendant and Brooks to buy merchandise at a grocery store. The defendant admitted to an officer that she was given the cards by "Steve" (the first name of Brooks), and the stolen cards were found at the same house where the defendant and Brooks were arrested. The jury returned verdicts finding the defendant guilty of misdemeanor breaking or entering, felony larceny, and obtaining property by false pretenses. The trial judge determined that the verdicts of misdemeanor breaking or entering and felony larceny were legally inconsistent and ordered further deliberations. The jury deliberated and found the defendant guilty of felony breaking or entering and felony larceny. (1) The court ruled that there was sufficient evidence to support the defendant's conviction of obtaining property by false pretenses by using stolen credit cards at the store. The court rejected the defendant's argument that the evidence was insufficient because the state did not present evidence of any verbal misrepresentations by the defendant. The state's evidence at trial included a videotape of the purchases by the defendant and her signed receipts. Verbal misrepresentations need not be proved; conduct alone is sufficient. (2) The court ruled, relying on State v. Brooks, 178 N.C. App. 211, 631 S.E.2d 54 (20 June 2006) (sufficient evidence to support conviction of felonious breaking or entering when defendant entered inner office of law firm to which public access was not allowed and committed theft), that there was sufficient evidence to support the defendant's conviction of misdemeanor breaking or entering. (3) The

court ruled there was sufficient evidence of felony larceny by acting in concert with Brooks. (4) The court ruled that the trial judge erred in finding that the verdicts of misdemeanor breaking or entering and felony larceny were inconsistent. The court stated that a jury could reasonably find that the defendant had committed an unauthorized entry in the morning but the state had failed to prove the defendant's intent to commit a larceny then. The jury also could have determined that the defendant did not act in concert with Brooks' entry in the afternoon but she did act in concert concerning the larceny.

Defendant Was Properly Convicted of Three Counts of Indecent Liberties for Three Sexual Distinct Acts During Same Transaction

State v. James, 182 N.C. App. 698, 643 S.E.2d 34 (17 April 2007). The defendant was convicted of three counts of indecent liberties for three sexual acts that occurred during the same transaction: (1) fondling the victim's breasts; (2) oral sex; and (3) sexual intercourse. Distinguishing State v. Laney, 178 N.C. App. 337, 631 S.E.2d 522 (5 July 2006) (defendant's conduct in touching victim's breast over her shirt, putting his hand under the waistband of her pants, and touching the victim over her pants supported only one conviction of indecent liberties), the court ruled that the three convictions were proper. The court noted that in *Laney* the sole act was touching, while in this case there was a touching and two distinct sexual acts. The court stated that these were three distinctive acts even though they occurred within a short time span.

Defendant's Right to Unanimous Verdict Was Not Violated Although There Was Evidence of More Sexual Acts Than Charges of Statutory Sexual Offense

State v. Wallace, 179 N.C. App. 710, 635 S.E.2d 455 (17 October 2006). The defendant was convicted of three counts of statutory sexual offense. There was evidence of more sexual acts than charged offenses. The court ruled, relying on State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (2006), that the defendant's right to a unanimous verdict was not violated.

Defendant's Right to Unanimous Verdict Was Not Violated When Jury Instruction for Contributing to Delinquency of Minor Did Not Require Jury to Be Unanimous in Finding Which of Three Criminal Acts Juvenile Could Have Been Adjudicated Delinquent

State v. Cousart, 182 N.C. App. 150, 641 S.E.2d 372 (6 March 2007). The defendant was convicted of contributing to the delinquency of a minor. The jury instruction did not require that the jury be unanimous in finding one of the three criminal acts (driving without a license; breaking into a motor vehicle; larceny) the juvenile could have been adjudicated delinquent. The court ruled, relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), that the defendant's right to a unanimous verdict was not violated. The court stated that the gravamen of the crime is the defendant's conduct, and the jury need only be unanimous that the juvenile committed an act for which he could be adjudicated delinquent, but need not be unanimous on the specific act.

Sufficient Evidence to Prove Defendant Inflicted Injuries to Child in Trial of Felony Child Abuse Inflicting Serious Bodily Injury

State v. Wilson, 181 N.C. App. 540, 640 S.E.2d 403 (6 February 2007). The defendant was convicted of felony child abuse inflicting serious bodily injury involving her twenty-three-month-old child. The court ruled that there was sufficient evidence to prove the defendant inflicted the injuries. The defendant had exclusive custody of the child when the injuries were sustained. The treating doctors and medical experts agreed that the injuries were not accidental, but rather

intentionally inflicted. The defendant did not present rebuttal experts. The defendant during her testimony often changed her account of the cause of the injuries and also contradicted herself.

(1) Communicating Threats Charge Was Not Fatally Defective
(2) Sufficient Evidence to Support Adjudication of Communicating Threats
(3) Court Rules on Validity of Various Conditions of Juvenile Probation

In re S.R.S., 180 N.C. App. 151, 636 S.E.2d 277 (7 November 2006). The juvenile was adjudicated delinquent of communicating threats. As the juvenile was being restrained in an elementary school from going into a hallway, he shouted at a teacher in the hallway that he was going to bring a gun to school the next day and kill the teacher's daughter. The teacher's daughter was a student in the school whom the juvenile had previously assaulted. (1) The juvenile petition charging communicating threats alleged that the juvenile threatened to physically injure the person and damage the property of the teacher and was communicated by orally stating to the victim that he was going to bring a gun to school the next day and kill the teacher's daughter. The court noted problems in the pleading that included allegations of damage to property as well as injury to a person and alleging the juvenile's threatening injury to the teacher instead of the teacher's child. However, the court ruled that the charge was not fatally defective because any confusion in the pleading was clarified by the allegation setting forth the precise conduct forming the basis of the charge—the threat to kill the teacher's daughter. The juvenile had sufficient notice of the offense to defend himself. [Author's note: The fact that the pleading alleged both injury to a person and damage to property does not create a fatal defect because the state is only required to prove one of the alleged alternative ways of committing an offense, and the language concerning damage to property is surplusage that does not adversely affect the validity of the charge. See the discussion in paragraph 13 on page five of Robert L. Farb, "Criminal Pleadings, State's Appeal from District Court, and Double Jeopardy Issues," posted on the Institute of Government's website at http://ncinfo.iog.unc.edu/programs/crimlaw/pleadjep.pdf.] (2) The court ruled that the evidence was sufficient to support the adjudication of communicating threats. Based on the juvenile's prior assault of the teacher's daughter, the juvenile's threat in the school's hallway would cause a reasonable person to believe that the threat was likely to be carried out, and that the teacher actually believed the threat was likely to be carried out. (3) The court ruled on the validity of the following conditions of special probation: (i) the juvenile must abide by rules set out by the court counselor and the juvenile's parents, including, but not limited to, curfew rules and rules concerning those with whom he may or may not associate (ruled valid); (ii) the juvenile must cooperate with any out-of-home placement if deemed necessary, or if arranged by the court counselor, including, but not limited to, a wilderness program (ruled invalid, an impermissible delegation to the court counselor of the judge's authority; the court noted that the record did not show any statement by the court counselor indicating that an out-of-home placement was recommended or necessary); and (iii) two conditions, the juvenile must cooperate with any counseling recommended by the court counselor and comply with any assessment recommended by the court counselor (ruled invalid, an impermissible delegation to the court counselor of the judge's authority without a more specific statement by the judge concerning what type of counseling or assessment).

(1) Indictment for Eluding Arrest (G.S. 20-141.5) Need Not Allege Duty Officer Was Lawfully Performing When Defendant Committed Offense
(2) Guilty Verdicts Need Not Be Set Aside on Ground That They Were Inconsistent With Not Guilty Verdicts in Same Trial

State v. Teel, 180 N.C. App. 446, 637 S.E.2d 288 (5 December 2006). The defendant was indicted for felony eluding arrest (G.S. 20-141.5) based on the factors of reckless driving and

speeding in excess of fifteen miles per hour over the speed limit; reckless driving (G.S. 20-140(b)); and resisting a public officer (G.S. 14-223). He was convicted of misdemeanor eluding arrest and reckless driving and found not guilty of resisting a public officer. (1) The court ruled, distinguishing State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972) (charge of resisting public officer must describe duty the officer was discharging or attempting to discharge), that an indictment for eluding arrest (G.S. 20-141.5) need not allege the duty the officer was lawfully performing when the defendant committed the offense. (2) The court ruled that the defendant did not cite any authority for his assignment of error concerning his motion for appropriate relief to set aside the guilty verdicts because they were inconsistent with the not guilty verdicts (a verdict of misdemeanor eluding arrest instead of felony eluding arrest and not guilty of resisting arrest), and thus the assignment of error was considered abandoned. The defendant's argument rested on: (1) the inconsistency between the guilty verdict of reckless driving and the jury's failure to find the defendant guilty of felony eluding arrest, with one of the elements being reckless driving; and (2) the inconsistency between the guilty verdict of misdemeanor eluding arrest, which was based on the defendant's failure to stop, and the not guilty verdict of resisting a public officer, which also was based on failure to stop. The court also noted that the defendant's assignment of error was without merit even if the court would reach the merits. It stated, relying on State v. Rosser, 54 N.C. App. 660, 284 S.E.2d 130 (1981), United States v. Powell, 469 U.S. 57 (1984), and other cases, that a jury is not required to be consistent, and that incongruity alone will not invalidate a verdict.

In First-Degree Murder Trial in Which State Sought Conviction Based Solely on Felony Murder Theory, Trial Judge Erred in Not Submitting Second-Degree Murder to Jury When There Was Conflicting Evidence Concerning Commission of Underlying Felony of Armed Robbery

State v. Gwynn, 182 N.C. App. 343, 641 S.E.2d 719 (20 March 2007). The court ruled, based on the principles set out in State v. Millsaps, 356 N.C. 556, 572 S.E.2d 767 (2002) (when to submit lesser-included offenses of first-degree felony murder), that in a first-degree murder trial in which the state sought a conviction based solely on the felony murder theory, the trial judge erred in not submitting second-degree murder to the jury when there was conflicting evidence concerning the commission of the underlying felony of armed robbery.

Insufficient Evidence to Support Conviction of Conspiracy to Traffic in Cocaine

State v. Euceda-Valle, 182 N.C. App. 268, 641 S.E.2d 858 (20 March 2007). The defendant was convicted of trafficking by possessing over 400 grams of cocaine and conspiracy to traffic in cocaine by transporting over 400 grams of cocaine. The defendant was stopped for a traffic offense, and cocaine was found in the vehicle's trunk. There also was a passenger in the vehicle. The court ruled there was insufficient evidence to support the trafficking conspiracy conviction. There was no evidence of: (1) conversations between the defendant and passenger; (2) unusual movements or actions by either of them; (3) large amounts of cash on the passenger; (4) possession of weapons; or (5) anything else suggesting an agreement.

Trial Judge Erred in Assault Trial in Failing to Instruct Jury on Defendant's Lack of Duty to Retreat on His Own Premises

State v. Beal, 181 N.C. App. 100, 638 S.E.2d 541 (2 January 2007). The defendant was convicted of a felonious assault. The defendant and the alleged victim lived in the same mobile home, which was owned by the alleged victim. The defendant paid rent to live there. The assault occurred in the mobile home and its curtilage. The court ruled, relying on State v. Browning, 28

N.C. App. 376, 221 S.E.2d 375 (1976) and other cases, that the trial judge erred in failing to instruct the jury on the defendant's lack of duty to retreat on his own premises.

Work-Release Escape Indictment's Improper Statutory Citation to Non-Work-Release Escape Under G.S. 148-45(b) Was Irrelevant When Indictment's Allegations Correctly Charged Offense Under G.S. 148-45(g)

State v. Lockhart, 181 N.C. App. 316, 639 S.E.2d 5 (2 January 2007). The defendant was convicted under G.S. 148-45(g) of escape by failing to return to the prison unit while on work release. The indictment alleged the statutory citation as G.S. 148-45(b), escape from a prison unit. The court ruled, relying on State v. Allen, 112 N.C. App. 419, 435 S.E.2d 802 (1993), and other cases, that the defendant was properly charged. An indictment's incorrect statutory citation is immaterial when the charging language properly alleges the correct offense.

Trial Judge Did Not Err in Imposing Sanction of Prohibiting Testimony by Defense Expert on Reliability of Confidential Informants When Defendant Failed to Give Proper Notice to State Under G.S. 15A-905(c)(2)

State v. Leyva, 181 N.C. App. 491, 640 S.E.2d 394 (6 February 2007). The defendant was convicted of cocaine trafficking offenses. The court ruled that the trial judge did not err in imposing the sanction of prohibiting testimony by a defense expert on the reliability of confidential informants when the defendant failed to give proper notice to the state under G.S. 15A-905(c)(2) (give notice to state of expert witnesses defendant reasonably expects to call as witness at trial). The defendant did not give notice to the state until it had presented the testimony of several officers about confidential informants. The trial judge ruled that the defendant could have anticipated the issue concerning confidential informants because the defendant was aware of the state's use of a confidential informant, and the defendant's proposed expert testimony was not required by the interests of justice.

(1) Trial Judge Did Not Abuse Discretion in Denying Defendant's Motion for Bill of Particulars to Provide Exact Dates and Times of Child Sexual Abuse Charges
(2) Trial Judge Did Not Err in Allowing State to Amend Dates Specified in Indictments Charging Statutory Rape and Sexual Offense

State v. Whitman, 179 N.C. App. 657, 635 S.E.2d 906 (17 October 2006). The defendant was convicted of statutory rape, statutory sexual offense, indecent liberties, and incest. (1) The court ruled that the trial judge did not abuse his discretion in denying the defendant's motion for a bill of particulars providing the exact dates and times of the charges. The court noted that the defendant was provided with open-file discovery. In addition, there was no factual information introduced at trial that had not been provided in discovery and necessary to prepare the defendant's defense. Neither the victim's testimony nor other evidence introduced at trial was more specific concerning dates, times, and places than the information made available in discovery. (2) The court ruled that the trial judge did not err in allowing the state to amend the dates specified in the indictments charging statutory rape and sexual offense (from "January 1998 through June 1998" to "July 1998 through December 1998"). The amendment did not substantially alter the offense because the victim would have been 15 under both the original and amended dates. Also, the amendment did not impair the defendant's ability to prepare an alibi defense because an incest indictment tried with these charges covered the entire 1998 calendar year, and the defendant would have to address all of 1998. See also State v. Wallace, 179 N.C. App. 710, 635 S.E.2d 455 (17 October 2006) (no error in amending date of statutory sexual

offense indictment from "November 2001" to "June through August 2001"; defendant did not present an alibi defense that was adversely affected by the change in dates).

Defendant Was Not Entitled to Defense of Duress in Second-Degree Vehicular Murder Trial

State v. Brown, 182 N.C. App. 115, 646 S.E.2d 775 (6 March 2007). The defendant was convicted of second-degree murder and other offenses (willful speed competition, reckless driving, and driving left of center) as a result of a collision of his vehicle (vehicle A) with another vehicle (vehicle B) as they sped together on a highway, and vehicle B crashed into the decedent's vehicle (vehicle C), which was traveling in the opposite direction from vehicles A and B. The court ruled that the defendant was not entitled to a jury instruction on the defense of duress. The defendant did not have a well-grounded apprehension of death or serious bodily harm. Also, he had a reasonable opportunity to avoid his conduct without undue exposure to death or serious bodily harm: he had ample opportunity to either maintain a safe speed or to pull over off the highway. (See the court's discussion of the facts in its opinion.)

Trial Judge Erred in Denying Defense Counsel's Motion to Withdraw Based on Counsel's Representation of Both Defendant and Potential Defense Witness

State v. Ballard, 180 N.C. App. 637, 638 S.E.2d 474 (19 December 2006). The defendant was convicted of two counts of first-degree murder and other offenses. At the close of the state's case, the prosecutor told the trial judge and defense counsel that he had learned that James Turner, who was represented on federal criminal charges by the same defense counsel, had revealed potentially exculpatory information during an interview with officers on other matters. Defense counsel spoke to Turner and stated that Turner had credible, material, and exculpatory information, but Turner's testimony could implicate Turner in unrelated criminal charges. Thus, defense counsel could not call Turner as a witness for the defendant, creating a clear conflict of interest. Defense counsel sought to withdraw and moved for a mistrial, which was denied. The defendant wanted to keep defense counsel as his lawyer and have Turner testify. The court ruled that the trial judge erred in denying defense counsel's motion to withdraw. The court rejected the state's argument that the defendant had waived the conflict of interest issue, noting that the trial judge failed to properly question and advise the defendant on this matter.

Trial Judge Erred in Not Conducting a Hearing Concerning Defense Counsel's Potential Conflict of Interest When the Potential Conflict Had Been Brought to Judge's Attention

State v. Mims, 180 N.C. App. 403, 637 S.E.2d 244 (5 December 2006). In a pretrial hearing on a motion to dismiss drug charges, evidence showed that law enforcement officers arrested Chavis, who was in a residence when the officers found illegal drugs there. The owner of the residence, who was neither Chavis nor the defendant, was not there. The defendant arrived at the residence a few minutes later and told law enforcement officers that the drugs found in the house were hers. Her defense to be offered at trial was that she did so to protect Chavis, the father of her child, but the drugs did not belong to her or Chavis. Both Chavis and the defendant were charged with possessing the drugs, and they were represented by different lawyers in the same law firm. The prosecutor mentioned to the judge that there may be a conflict of interest with the same law firm representing both the defendant and Chavis, but the judge stated that it was an ethical issue and not a concern of the state. The defendant was tried alone, and Chavis did not testify for her at the defendant's trial. The court ruled, relying on State v. James, 111 N.C. App. 785, 433 S.E.2d 755 (1993), and State v. Hardison, 126 N.C. App. 52, 483 S.E.2d 459 (1997), that the trial judge erred by failing to conduct a hearing concerning defense counsel's potential conflict of interest that had

been brought to the judge's attention by the prosecutor. The court remanded the matter to the trial court for a hearing on this issue.

No Prejudicial Error Resulted When Trial Judge Failed to Impanel Jury Until After State's Opening Statement

State v. Pointer, 181 N.C. App. 93, 638 S.E.2d 909 (2 January 2007). The court ruled, distinguishing State v. Stephens, 51 N.C. App. 244, 275 S.E.2d 564 (1981), that no prejudicial error resulted when the trial judge failed to impanel the jury until after the state's opening statement.

No Error In Allowing State to Amend Indictment to Change Name of Victim

State v. Hewson, 182 N.C. App. 196, 642 S.E.2d 459 (20 March 2007). The court ruled, relying on State v. Bailey, 97 N.C. App. 472, 313 S.E.2d 556 (1990) (amendment permitted to change name from "Pettress Cebron" to "Cebron Pettress"), and other cases, and distinguishing State v. Abrahams, 338 N.C. 315, 451 S.E.2d 131 (1994) (error to allow amendment to change name from "Carlose Antoine Latter" to "Joice Hardin"), and other cases, that the trial judge did not err in allowing the state to amend the indictment to change the victim's name from "Gail Hewson Tice" to "Gail Tice Hewson."

Poker Is a Game of Chance Under G.S. 14-292

Joker Club v. Hardin, 183 N.C. App. 92, 643 S.E.2d 626 (1 May 2007). The court ruled that poker is a game of chance, not a game of skill, and thus in violation of G.S. 14-292 when anything of value is bet.

Trial Court Had Jurisdiction to Hold Probation Revocation Hearing After Probation Term Had Ended Because Trial Court Found That Probationer Had Absconded

State v. High, 183 N.C. App. 443, 645 S.E.2d 394 (5 June 2007). A probation revocation hearing was held after the defendant's probation term had ended and the trial judge revoked the suspended sentence and activated the sentence. The only issue on appeal under G.S. 15A-1344(f) was whether the state had made "reasonable efforts" to notify the probationer and to conduct the hearing earlier. The probation officer had filed a probation report before the term ended that stated the defendant had violated probation by absconding. The court ruled that the state satisfied the "reasonable efforts" standard because the trial court found that the defendant had absconded, and the probation officer had turned the case over to a surveillance officer who from time to time checked to see if there was any record of the defendant's arrest or whether the defendant was in jail.

Judge's Failure to Personally Address Juvenile on Two of Six Matters Set Out in G.S. 7B-2407(a) in Accepting His Admission to Act of Delinquency Required That Adjudication of Delinquency Be Set Aside

In re A.W., 182 N.C. App. 159, 641 S.E.2d 354 (6 March 2007). The court ruled, relying on In re T.E.F., 359 N.C. 570, 614 S.E.2d 296 (2005), that the trial judge erred in accepting the juvenile's admission to an act of delinquency by failing to fully comply with G.S. 7B-2407(a). The court failed to orally address the juvenile concerning two of the six matters set out in the statute. The court stated that even though the juvenile apparently completed a transcript of admission form

that covered these two matters, the failure to address the juvenile orally required that the adjudication of delinquency be set aside.

G.S. 7B-2407 (When Admission by Juvenile May Be Accepted) Does Not Apply When Judge Accepts Admissions by Juvenile Or by Juvenile Through Attorney That Juvenile Violated Conditions of Court Supervision (Probation)

In re D.J.M., 181 N.C. App. 126, 638 S.E.2d 610 (2 January 2007). The court ruled that G.S. 7B-2407 (when admission by juvenile may be accepted) does not apply when judge accepts admissions by juvenile or by juvenile through attorney that juvenile violated conditions of court supervision (probation). G.S. 7B-2407 does not apply to G.S. 7B-2510(e). The court ruled that the trial judge did not err by failing to make the specific inquires set out in G.S. 7B-2407 in accepting the juvenile's admissions to the probation violations.

Juvenile Trial Court Lacked Subject Matter Jurisdiction to Enter Adjudication and Disposition Orders Because Juvenile Petition Was Untimely Filed

In re M.C., 183 N.C. App. 152, 645 S.E.2d 386 (1 May 2007). The court noted that under G.S. 7B-1703(b), a juvenile petition must be filed within 15 days after the complaint is received by the juvenile court counselor, and an extension of an additional 15 days may be granted at the chief court counselor's discretion. Thus, the juvenile petition must be filed within a maximum of 30 days after the complaint is received by the juvenile court counselor. In this case, the court stated that the only indication when the juvenile court counselor received the complaint was the date (November 1, 2005) that the petition was verified by a detective. The juvenile petition was filed with the trial court on December 2, 2005, which was more than 30 days from November 1, 2005. The court ruled that the trial court was without jurisdiction to hear the matter. Although the juvenile did not raise the issue before the trial court, it may be raised for the first time on appeal. The court vacated the trial court's adjudication and disposition orders and ordered that the case be dismissed.

Evidence

(1) State Did Not Violate Defendant's Due Process Rights By Failing to Conduct Test Comparing State Witness's DNA With DNA From Hair Found on Cap at Crime Scene
(2) Discovery Statute Did Not Require State to Obtain DNA from State's Witness and Compare It with DNA From Hair on Cap
(3) Judge Lacked Authority to Issue Defense-Requested Nontestimonial Identification Order to Require State to Obtain DNA Sample from State's Witness for Testing
(4) Judge Did Not Err in Prohibiting Cross-Examination of State's Witness Whether He Was Willing to Submit DNA Sample
(5) Judge Did Not Err in Prohibiting Proposed Testimony of Defense Investigator Under Residual Hearsay Exception

State v. Ryals, 179 N.C. App. 733, 635 S.E.2d 470 (17 October 2006). The defendant was convicted of second-degree murder. State's witness Lee testified that she saw the defendant beat the victim with his fists and kick and stomp him. State's witness Winstead also testified about the defendant's beating of the victim. A police department crime technician recovered a black knit cap and other items from the crime scene. Negroid hair was found on the cap , but a state's witness testified it was not suitable for further analysis. A defense expert witness compared a DNA sample from the hair on the cap with the defendant's DNA sample and concluded that it could not have originated from the defendant. Before trial, a judge denied the defendant's motion

for a nontestimonial identification order to collect a DNA sample from Winstead to compare it with DNA from the hair on the cap; the defendant contended that Winstead had a motive to commit the murder, was present at the scene, and could have committed the murder. (1) The court ruled, relying on State v. McNeil, 155 N.C. App. 540, 574 S.E.2d 145 (2002), and State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732 (1999), that the state did not violate the defendant's due process rights under Brady v. Maryland, 373 U.S. 83 (1963), when it failed to collect DNA from Winstead and conduct a test comparing his DNA with the DNA from the hair on the cap. (2) The court ruled that the discovery provisions in G.S. 15A-903(e) did not require the state to obtain a DNA sample from Winstead for comparison with DNA from the hair on the cap. (3) The court ruled, relying on State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991), that the trial judge lacked the authority to issue a defense-requested nontestimonial identification order to require the state to obtain a DNA sample from state's witness Winstead to conduct comparison testing with DNA from the hair on the cap. (4) The court ruled that the trial judge did not err in prohibiting cross-examination of state's witness Winstead whether he was willing to submit a DNA sample for comparison testing with the DNA from the hair on the cap. The court noted that even if the answer of the state's witness was no, the proposed testimony was not relevant because there was conflicting evidence whether the perpetrator of the murder was wearing a hat. (5) The defendant proffered testimony under the residual hearsay exception, Rule 804(b)(5), by the defense investigator of a statement made by an unavailable witness that the defendant was at a party at the time of the murder. The court ruled that the trial judge did not err in prohibiting this proposed testimony because the statement (i) the statement lacked circumstantial guarantees of trustworthiness (a large amount of alcohol was consumed at the party and defendant chose not call other people present at the party), and (ii) the statement was not more probative than any other evidence that the defendant could secure through reasonable efforts (others had attended the party and were available as witnesses).

Affidavit Containing Defendant's Blood Alcohol Level Was Not Testimonial Statement Under *Crawford v. Washington* and Its Admission Did Not Violate Defendant's Confrontation Rights

State v. Heinricy, 183 N.C. App. 585, 645 S.E.2d 147 (5 June 2007). The defendant was convicted of second-degree murder based on his driving recklessly while impaired and killing a tow truck operator. The state was permitted to introduce an affidavit containing the defendant's blood alcohol level involving a prior DWI conviction that was introduced to prove malice. The chemist who tested the defendant's blood with a gas chromatograph and prepared the affidavit did not testify at the defendant's trial. The court ruled, based on State v. Forte, 360 N.C. 427, 629 S.E.2d 137 (2006), State v. Smith, 312 N.C. 361, 323 S.E.2d 316 (1984), and State v. Cao, 175 N.C. App. 626 S.E.2d 301 (2006), that the affidavit was not a testimonial statement under Crawford v. Washington, 541 U.S. 36 (2004), and its admission did not violate the defendant's confrontation rights.

(1) No Violation of Sixth Amendment Confrontation Rights Under *Crawford v. Washington* in Admitting Videotaped Interviews of Child Sexual Abuse Victims Because They Took Stand at Trial and Were Available for Cross-Examination
(2) Videotaped Interviews Between Child Sexual Abuse Victims and Pediatric Nurses Were Admissible Under Rule 803(4) (Statement Made for Medical Diagnosis or Treatment) and *State v. Hinnant*
(3) Child Sexual Assault Victim's Statement to Mother Within 24 Hours of Assault Was Admissible Under Rule 803(2) (Excited Utterance)

State v. Burgess, 181 N.C. App. 27, 639 S.E.2d 68 (2 January 2007). The defendant was convicted of six counts of first-degree sexual offense involving three children under thirteen years old. (1) The court ruled that there was no violation of the defendant's Sixth Amendment confrontation rights under Crawford v. Washington, 541 U.S. 36 (2004), in admitting videotaped interviews of child sexual abuse victims because they took the stand at trial and were available for cross-examination (the defendant did not cross-examine them). (2) The court ruled, relying on State v. Lewis, 172 N.C. App. 97, 616 S.E.2d 1 (2005), and State v. Isenberg, 148 N.C. App. 29, 557 S.E.2d 568 (2001), that videotaped interviews between child sexual abuse victims and pediatric nurses were admissible under Rule 803(4) (statement made for medical diagnosis or treatment) because they satisfied the standard set out in State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000). The children made the statements with the understanding that they would lead to medical diagnosis or treatment. The pediatric nurses at the children's medical center had interviewed the children before they were examined by a doctor, and the children were told they were there for a check up with a doctor. (3) The court ruled, relying on State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985), and State v. Thomas, 119 N.C. App. 708, 460 S.E.2d 349 (1995), that a child sexual assault victim's statement to her mother within 24 hours of assault was admissible under Rule 803(2) (excited utterance).

(1) Statements Made by Shooting Victim During 911 Call Were Nontestimonial under *Davis v. Washington*, 126 S. Ct. 2266 (2006), and *Crawford v. Washington*, 541 U.S. 36 (2004)
(2) Report Detailing Timeline of 911 Call and Responses Made by Law Enforcement Was Nontestimonial Under *Crawford v. Washington*, 541 U.S. 36 (2004), and Admissible as Business Record Under Hearsay Rule 803(6)
(3) Information Form Used by Neighborhood Security Guards Was Nontestimonial Under *Crawford v. Washington*, 541 U.S. 36 (2004), and Admissible as Business Record Under Hearsay Rule 803(6)

State v. Hewson, 182 N.C. App. 196, 642 S.E.2d 459 (20 March 2007). The defendant was convicted of the first-degree murder of his wife whom he shot while she was inside her home. (1) The wife called 911 to report that she had been shot by her husband. She died shortly after making the 911 call. The court ruled that her statements were nontestimonial under Davis v. Washington, 126 S. Ct. 2266 (2006), and Crawford v. Washington, 541 U.S. 36 (2004). The court stated that the 911 call described current circumstances requiring police assistance. (2) The court ruled, relying on State v. Forte, 360 N.C. 427, 629 S.E.2d 137 (2006), the an event report detailing the timeline of the 911 call and the responses made by law enforcement was nontestimonial under Crawford v. Washington, 541 U.S. 36 (2004), and was admissible as a business record under Rule 803(6). (3) The court ruled that a pass-on information form used by neighborhood security guards was nontestimonial under Crawford v. Washington, 541 U.S. 36 (2004), and was admissible as a business record under Rule 803(6). An entry by a security guard on the form included information that the victim's husband had been threatening her and to make sure that he does not use the pass system to get into the neighborhood.

Trial Judge in Child Abuse Homicide Trial Did Not Err in Allowing State's Expert To Testify on Rebuttal Concerning Normal Caretaking Reaction and Profile of Caretaking Behavior After Injury to Child

State v. Faulkner, 180 N.C. App. 499, 638 S.E.2d 18 (19 December 2006). The defendant was convicted of second-degree murder involving the child abuse homicide of a child who was twenty-two months old, and whose mother lived with the defendant. The defendant was alone with the child while the mother went shopping for about twenty to thirty minutes. When she arrived home and picked up the child, his eyes rolled into the back of his head, and his arms and legs were stiff. She called 911. An emergency responder testified that the defendant, when asked what had happened, appeared nervous, with color drained from his face, and did not respond. Cause of death was brain swelling caused by blunt force trauma to the head. A defense expert testified and suggested that there was an over diagnosis and perhaps rush to judgment of child abuse because of a belief that child abuse is underreported and everyone is "discombabobulated" by the death of a child. The state on rebuttal called a medical expert, a developmental and forensic pediatrician, who outlined three parameters to determine whether a child's injuries were accidentally or intentionally inflicted: (1) the consistency of history given by the caretaker; (2) the extent to which the caretaker's explanation is consistent with the extent of injuries; and (3) the caretaker's behavior. When a child has been accidentally injured, a caretaker who witnesses the accident seeks help right away. When a child is injured intentionally, it is very common that the assailant will leave and not seek care. Often the caretaker is not concerned about what has happened with the child, but with how it impacts on the caretaker. The court ruled, assuming without deciding such testimony would not be admissible on the state's direct case, that the defendant's evidence opened the door to its admissibility on rebuttal. Thus, the trial judge did not abuse his discretion in admitting the testimony.

(1) Trial Judge Did Not Abuse Discretion in Not Allowing Defense Eyewitness Identification Expert to Testify
(2) Trial Judge Did Not Err in Denying Defendant's Motion to Compel Disclosure of Attorney-Client Communications of Co-Defendants

State v. McLean, 183 N.C. App. 429, 645 S.E.2d 162 (5 June 2007). The defendant was convicted of first-degree murder, three counts of armed robbery, and other offenses. (1) The court ruled, relying on State v. 147 N.C. App. 637, 556 S.E.2d 666 (2001), and State v. Lee, 154 N.C. App. 410, 572 S.E.2d 170 (2002), that the trial judge did not abuse his discretion in not allowing the defense eyewitness identification expert to testify. The expert did not interview the eyewitnesses, did not observe their trial testimony, and did not visit the crime scene. (2) The court ruled, distinguishing In re Investigation of Eric Miller, 357 N.C. 316, 584 S.E.2d 772 (2003), and In re Investigation of Eric Miller, 358 N.C. 364, 595 S.E.2d 120 (2004), that the trial judge did not err in denying the defendant's motion to compel the disclosure of attorney-client communications of the co-defendants. The court noted that the *Miller* rulings were limited to deceased clients.

Evidence of Defendant's Prior Assaults and Robbery of Victim B Committed Within a Few Months Before Commission of Murder of Victim A Was Admissible in Murder Trial under Rule 404(b) to Show Defendant's Intent to Shoot Friends of Victim B and Victim B

State v. Christian, 180 N.C. App. 621, 638 S.E.2d 470 (19 December 2006). The defendant was convicted of first-degree murder of victim A when he shot into a car and killed an occupant. The

court ruled that evidence of the defendant's assaults and robbery of victim B committed within a few months before the murder of victim A was admissible under Rule 404(b) to show the defendant's intent to shoot friends of victim B who were in the car with the murder victim and victim B himself, who the defendant may have believed was in the car.

Evidence of Recent Armed Robberies and Convictions of Those Armed Robberies Was Admissible Under Rule 404(b) in Armed Robbery Trial [But See Author's Note}

State v. Morgan, 183 N.C. App. 160, 645 S.E.2d 93 (15 May 2007). The defendants were convicted of two counts of armed robbery and other offenses. The court ruled that evidence of recent armed robberies as well as the convictions of those armed robberies was admissible under Rule 404(b) to show the defendants' identity, motive, intent, common plan, knowledge, and opportunity. [Author's note: The ruling relating to the admissibility of the convictions appears to be in conflict with State v. Badgett, 361 N.C. 234, 644 S.E.2d 206 (4 May 2007) (evidence of the prior conviction was inadmissible under Rule 404(b) when the state had introduced evidence of the underlying facts and circumstances of the conviction and, in this case, the defendant did not testify so the conviction was not admissible under Rule 609).]

State Was Properly Permitted to Cross-Examine Defense Character Witness Concerning Knowledge of Defendant's Gang Membership When Character Witness Had Testified About Defendant's Reputation as a Good Marine

State v. Perez, 182 N.C. App. 294, 641 S.E.2d 844 (20 March 2007). The defendant was convicted of second-degree murder. He offered evidence of self-defense. He also offered testimony through a character witness about his good character and reputation as a good Marine. The state on cross-examination was allowed to question the character witness about his knowledge of the defendant's gang associations and whether his gang membership was consistent with his reputation as a good Marine. The court rejected the defendant's argument that the ruling in Dawson v. Delaware, 503 U.S. 159 (1996) (irrelevant evidence of defendant's gang membership was inadmissible), barred this testimony

Testimony About Defendant's Violent Past Was Admissible to Explain Chain of Events Leading to Ensuing Fight and Was Not Prohibited Character Evidence Under Rule 404

State v. Beal, 181 N.C. App. 100, 638 S.E.2d 541 (2 January 2007). The defendant was convicted of a felonious assault. The defendant and the alleged victim lived in the same mobile home, which was owned by the alleged victim. The defendant paid rent to live there. The assault occurred in the mobile home and its curtilage. The alleged victim testified that he and the defendant began to argue and he asked the defendant to leave. In response to a question why he had asked him to leave, the alleged victim testified that when the defendant drinks, he gets violent. Relying on State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990), the court ruled the evidence was admissible to explain the chain of events that led to the fight and was not improper character evidence under Rule 404.

Statements of Nontestifying Declarants Were Not Testimonial Under *Crawford v. Washington* Because They Were Not Offered to Prove Truth of Matters Asserted

State v. Leyva, 181 N.C. App. 491, 640 S.E.2d 394 (6 February 2007). The court ruled that statements of nontestifying declarants were not testimonial under Crawford v. Washington, 541 U.S. 36 (2004), because they were not offered to prove the truth of the matters asserted. They instead were offered to explain the officers' presence at certain places.

(1) Rules of Evidence Do Not Apply to Sentencing Hearings
(2) Ruling in Crawford v. Washington, 541 U.S. 36 (2004), Does Not Apply to Non-Capital Sentencing Hearing

State v. Sings, 182 N.C. App. 162, 641 S.E.2d 370 (6 March 2007). (1) The court ruled, citing Rule 1101(b)(3) and G.S. 15A-1334(b), that the rules of evidence do not apply at a sentencing hearing. (2) The court ruled, relying on the rationale of State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989), and distinguishing State v. Bell, 359 N.C. 1, 603 S.E.2d 2004), that the ruling in Crawford v. Washington, 541 U.S. 36 (2004), does not apply to a non-capital sentencing hearing.

Trial Judge Did Not Err in Allowing Opinion Testimony by State's Accident Reconstruction Expert

State v. Brown, 182 N.C. App. 115, 646 S.E.2d 775 (6 March 2007). The defendant was convicted of second-degree murder and other offenses (willful speed competition, reckless driving, and driving left of center) as a result of a collision of his vehicle (vehicle A) with another vehicle (vehicle B) as they sped together on a highway, and vehicle B crashed into the decedent's vehicle (vehicle C), which was traveling in the opposite direction from vehicles A and B. The court ruled that the trial judge did not err in allowing the state's accident reconstruction expert to offer his opinion that the driver of vehicle B was trying to get out of the way of oncoming traffic, based on statements made by the driver of vehicle B and the physical evidence. The court stated that the expert employed methods found to be reliable, such as a review of both the physical evidence and witness statements.

Arrest, Search, and Confession Issues

(1) Officer Conducted Valid Traffic Stop of Vehicle
(2) Officer Conducted Valid Search of Vehicle for Weapons
(3) Officer Conducted Valid Consent Search of Passenger's Purse
(4) Officer Had Probable Cause to Search Vehicle for Illegal Drugs, Including Locked Briefcase Found Inside Vehicle

State v. Parker, 183 N.C. App. 1, 644 S.E.2d 235 (1 May 2007). The defendant was convicted of various drug and drug-related offenses. A narcotics detective was conducting surveillance of the defendant in response to a citizen's complaint that the defendant was trafficking methamphetamine. He stopped a vehicle that the defendant was driving because it was going approximately 60 m.p.h. in a 45 m.p.h. zone and then passed another vehicle at approximately 80 m.p.h. in a 55 m.p.h. zone. The defendant stepped out of his vehicle and approached the detective's vehicle. The detective ordered the defendant to return to his vehicle, but he refused to do so. The detective then secured the defendant in the backseat of the defendant's vehicle. Two passengers (A and B) were also seated in the vehicle. The defendant told the detective there was a gun in the vehicle. The detective opened the door to the front passenger seat where A was sitting and saw a 12-gauge shotgun located between the seat and door. He assisted A out of the vehicle and, while doing so, saw a piece of newspaper fall to the ground and made a mental note of it. The detective removed B from the vehicle as well. The detective then conducted a "weapons frisk" of the vehicle for his own safety to make sure that were no other weapons there. He examined the newspaper and saw that it was covering a drawstring bag. Inside the bag he found a substance he believed to be methamphetamine and a smoking device. He found a pistol under the front passenger seat. Thereafter, A consented to a search of her purse, which the detective had

seen in the vehicle. The detective discovered in the purse a straw containing white powder residue that he believed to be drug paraphernalia used to ingest an illegal controlled substance. The detective then searched the vehicle's interior and found a locked briefcase in the hatchback portion. The defendant claimed ownership of the briefcase and gave the combination to the detective. When the combination did not unlock it, the detective's partner pried it open with a screwdriver. Inside was a plastic cylinder containing a bag of a substance the detective believed to be methamphetamine. The detective arrested the defendant for various drug offenses but did not charge him with any traffic violations. (1) The court ruled that the narcotics detective had probable cause to stop the defendant's vehicle for the speeding violations. The court noted prior case law [Whren v. United States, 517 U.S. 806 (1996); State v. McClendon, 350 N.C. 630 (1999)] that an officer's subjective motivation is irrelevant when a stop is supported by probable cause. Also, the fact that an officer conducting a traffic stop did not later issue a traffic citation is irrelevant to the validity of the stop [State v. Baublitz, 172 N.C. App. 801, 616 S.E.2d 615 (2005)]. (2) The court ruled that the officer conducted a valid "vehicle frisk" for weapons inside the defendant's vehicle under Michigan v. Long, 463 U.S. 1032 (1983). The detective had a reasonable belief that the defendant was dangerous and had immediate access to a weapon in the car. And the search of the drawstring bag was a valid part of the weapons search. (3) The court ruled that although the detective's request for consent to search A's purse was unrelated to the traffic infraction for which the detective initially stopped the defendant, the request was supported by reasonable suspicion that the purse would contain contraband or evidence of a drug crime. [Author's note: When an officer has lawfully detained a person, an officer's questioning of that person (including a request for consent), even if the questioning is unrelated to the purpose of the detention, is not a seizure under the Fourth Amendment (as long as the questioning does not unnecessarily prolong the detention) and therefore does not need any justification (for example, reasonable suspicion). See Muehler v. Mena, 544 U.S. 93 (2005); United States v. Mendez, 476 F.3d 1077 (9th Cir. 2007); United States v. Alcarez-Arellano, 441 F.3d 1252 (10th Cir. 2006); United States v. Slater, 411 F.3d 1003 (8th Cir. 2005). In this case, the detective clearly had reasonable suspicion to detain the vehicle's occupants based on the discovery of the contents of the drawstring bag and thus did not need any justification under the Fourth Amendment for asking for consent to search A's purse, even though that request was not related to the purpose of the traffic stop.] (4) The court ruled that the detective had probable cause to search the vehicle for illegal drugs, including the locked briefcase found inside the vehicle. The court relied on California v. Acevedo, 500 U.S. 565 (1991), and State v. Holmes, 109 N.C. App. 615 (1993).

Detective's Seizure of Cigarette Butt Thrown by Defendant on His Patio Floor During Interview With Two Detectives Violated Defendant's Fourth Amendment Rights

State v. Reed, 182 N.C. App. 109, 641 S.E.2d 320 (6 March 2007). Two detectives investigating a burglary, sexual offense, and robbery, arrived at the defendant's apartment to talk with him. The defendant led the detectives to a small patio at the back of his apartment. After the defendant finished a cigarette, he flicked the butt at a pile of trash located in the corner of the concrete patio. The butt struck the pile of trash and rolled between the defendant and one of the detectives, who kicked the butt off of the patio into the grassy common area. The conversation ended and the detective, who had kept his eye on the still-burning cigarette butt, retrieved the butt after the other detective and the defendant turned to go back inside the apartment.. A DNA test of the cigarette butt resulted in evidence introduced against the defendant at trial. The court ruled, relying on State v. Rhodes, 151 N.C. App. 208, 565 S.E.2d 266 (2002) (officer's warrantless search of trash can located immediately by steps to side-entry door of defendant's house violated Fourth Amendment), and other cases, and distinguishing State v. Hauser, 342 N.C. 382, 464 S.E.2d 443 (1995), ruled that the seizure of the cigarette butt violated the defendant's Fourth Amendment rights. The court rejected the state's argument that the defendant discarded the cigarette butt and

thus lost his reasonable expectation of privacy. The cigarette butt was not abandoned within the curtilage of the defendant's home. [Author's note: The issue whether the detective had probable cause to seize the cigarette butt was not involved in this case.]

After Writing and Delivering Warning Ticket to Defendant, Officer Had Reasonable Suspicion to Detain Defendant Further So Drug Dog Could Conduct Sniff of Exterior of Vehicle

State v. Euceda-Valle, 182 N.C. App. 268, 641 S.E.2d 858 (20 March 2007). An officer stopped the defendant's vehicle for speeding and issued him a warning ticket. There was a passenger in the vehicle. After writing and delivering the warning ticket to the defendant, the officer ordered the defendant to remain so a drug dog could conduct a sniff of the exterior of the vehicle. The court ruled, relying on State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999), and State v. Hernandez, 170 N.C. App. 299, 612 S.E.2d 420 (2005), that the officer had reasonable suspicion to detain the defendant. The defendant was extremely nervous and refused to make eye contact with the officer. There was the smell of air freshener coming from the vehicle, which was not registered to the occupants. There was a disagreement between the defendant and the passenger about their itinerary.

Defendant Was Not in Custody to Require *Miranda* Warnings During Questioning

State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267 (7 November 2006) . The court ruled that the defendant was not in custody under *Miranda* when he was questioned in the sheriff's department. An officer went to the defendant's house and asked him to come to the department for questioning. The defendant came in a separate vehicle. He waited there about an hour while his wife was questioned and could have left at any time. He was told he was not in custody and was offered something to drink. As the questioning began, the defendant did indicate that he wanted to speak to an attorney, but he did not stop making statements. He stood up, became very upset, and made some incriminating statements.

Defendant's Statement in Response to Officer's Question Was Admissible Under Public Safety Exception to *Miranda*

State v. Hewson, 182 N.C. App. 268, 642 S.E.2d 459 (20 March 2007). Officers responded to a home in response to a 911 call by the victim of a shooting while she was inside her home, reporting that she had been shot by her husband. They saw the defendant outside the house and ordered him to lie face down on the ground. After handcuffing him, an officer asked him, without giving *Miranda* warnings, "Is there anyone else in the house, where is she?" The court ruled the defendant's statement in response to the officer's question was admissible under public safety exception to *Miranda* under New York v. Quarles, 467 U.S. 649 (1984). [See a discussion of the public safety exception on page 200 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003).

(1) Defendant Did Not Make Clear Request for Counsel During Custodial Interrogation to Require Officer to Stop Interrogation
(2) Confession Was Not Involuntary Based on Officer's Statements to Defendant

State v. Shelly, 181 N.C. App. 196, 638 S.E.2d 516 (2 January 2007). The defendant was convicted of first-degree murder. (1) During custodial interrogation the defendant asked general questions about when he would get a lawyer and the officer truthfully told him that unless he had a personal lawyer that one would be appointed when he went to court. (See additional facts

discussed in the court's opinion.) The court noted the informative nature of the conversation: the defendant asked questions and received answers from the officer in an effort to understand his rights and the interview process before choosing to invoke or forego his right to counsel. The court ruled, distinguishing State v. Torres, 330 N.C. 517, 412 S.E.2d 20 (1992), and State v. Steptoe, 296 N.C. 711, 252 S.E.2d 707 (1979), that the defendant did not make a clear request for counsel to require the officer to stop the interrogation. (2) The court ruled that the defendant's confession was not involuntary based on the officer's statements to the defendant. The officer said that a person who cooperates and shows remorse and is honest and has no criminal background has the best chance of obtaining leniency because he cooperated. The court upheld the trial judge's findings that no improper promises were made to the defendant. The officer did not promise the defendant any different or preferential treatment as a result of the defendant's cooperation. The officer did not create a hope of leniency that induced the defendant to confess to the murder.

Prosecutor's Cross-Examination of Defendant Did Not Impermissibly Comment on Defendant's Assertion of His Right to Remain Silent After Receiving *Miranda* Warnings

State v. Ezzell, 182 N.C. App. 417, 642 S.E.2d 274 (3 April 2007). The defendant was arrested for murder at the crime scene and spoke to an officer after waiving his *Miranda* rights. He made several statements concerning the events surrounding the murder. After arriving at the sheriff's office, the defendant asserted his right to remain silent after being given *Miranda* warnings. The prosecutor cross-examined the defendant at trial about what the defendant did and did not tell the officer at the crime scene. The court noted the it would have been natural and expected for the defendant to have mentioned certain details to the officer then. The court ruled that the prosecutor's cross-examination did not impermissibly comment on the defendant's assertion of his right to remain silent at the sheriff's office. (See the prosecutor's questions set out in the court' opinion.)

Sentencing

"Law of the Case" Doctrine Did Not Bar State at Resentencing Hearing From Presenting New Evidence and Arguing for Higher Prior Record Level

State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357 (6 March 2007). The defendant was convicted of second-degree sexual offense and was sentenced to an aggravated sentence in Prior Record Level I. The defendant appealed and the North Carolina Court of Appeals ordered a new sentencing hearing based on Blakely v. Washington, 542 U.S. 296 (2004). The state did not appeal any issue relating to the defendant's sentence. The trial judge on remand sentenced the defendant to a presumptive sentence in Prior Record Level I. Two days later during the same superior court term, the state presented evidence of a prior conviction that it had just discovered. The trial judge accepted the state's evidence and modified the sentence to a presumptive sentence in Prior Record Level II. The court ruled that the "law of the case" doctrine did not bar state at resentencing from presenting new evidence and arguing for a higher prior record level even though it had not previously raised the issue of an incorrect prior record level by appeal to the court of appeals from the original sentence. The court stated that the doctrine is limited to issues actually presented and necessary for the determination of the case.

When Calculating Points for Prior Convictions to Establish Prior Record Level, Convictions Obtained During a Single Trial Cannot Be Used in Establishing Prior Record Level for One of the Convictions

State v. West, 180 N.C. App. 664, 638 S.E.2d 508 (19 December 2006). The defendant at a single trial was convicted of second-degree murder, two counts of felony larceny, and one count of breaking and entering a vehicle. Before recessing for lunch, the trial judge sentenced the defendant for the convictions of the two larcenies and breaking and entering a vehicle. After lunch, the judge sentenced the defendant for second-degree murder and calculated the defendant's prior record level for the second-degree murder by assigning two points for one of the felony larceny convictions. The court ruled that the judge erred in doing so in contravention of legislative intent in calculating a prior record level for convictions obtained at a single trial.

Aggravating Factor G.S. 15A-1340.16(d)(8) (Knowingly Creating Great Risk of Death to More Than One Person By Weapon Normally Hazardous to Lives of More Than One Person) Was Properly Found for Second-Degree Murder and Felonious Assault Convictions Involving Vehicle Crash

State v. Borges, 183 N.C. App. 240, 644 S.E.2d 250 (15 May 2007). The defendant was convicted of second-degree murder and four counts of assault with a deadly weapon inflicting serious injury involving a vehicle crash in which the defendant was impaired. The jury found the aggravating factor G.S. 15A-1340.16(d)(8) (knowingly creating great risk of death to more than one person by weapon normally hazardous to lives of more than one person) for these convictions. The court ruled that the finding of the aggravating factor did not violate G.S. 15A-1340.16(d) (evidence necessary to prove element of offense may not be used to prove aggravating factor). The state was required to prove additional facts by additional evidence to prove the aggravating factor.

***Blakely v. Washington* Error in Judge's Finding of Aggravating Factors in DWI Sentencing Hearing Was Harmless Beyond Reasonable Doubt**

State v. McQueen, 181 N.C. App. 417, 639 S.E.2d 131 (16 January 2007). The court ruled, relying on Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and State v. Blackwell, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006), that Blakely v. Washington, 542 U.S. 296 (2004), error in the judge's finding of two aggravating factors in a DWI sentencing hearing was harmless beyond a reasonable doubt. The court ruled that there was overwhelming evidence to support the two aggravating factors (accident caused personal injury and property damage in excess of $500.00).

Trial Judge Had Authority to Submit Aggravating Factors to Jury as Required by *Blakely v. Washington* Even Though There Was No Statutory Authority to Do So

State v. Johnson, 181 N.C. App. 287, 639 S.E.2d 78 (2 January 2007). The court ruled, relying on State v. Blackwell, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006), that the trial judge had the authority to submit aggravating factors to the jury as required by Blakely v. Washington, 542 U.S. 296 (2004), even though there was no statutory authority to do so. (Author's note: The trial occurred when statutory law required a judge to make findings of the existence of aggravating factors.)

***Blakely v. Washington* Ruling Was Not Retroactively Applicable to Judgment Entered on 1998 Guilty Plea Because Defendant Did Not Take a Direct Appeal from That Judgment, and Appellate Court Issued Writ of Certiorari in 2002 Limited to Issues That Could Be Raised on Direct Appeal; Case Was Not Pending on Direct Review When *Blakely* Was Decided**

State v. Hasty, 181 N.C. App. 144, 639 S.E.2d 94 (2 January 2007). The court ruled, relying on State v. Pender, 176 N.C. App. 688, 627 S.E.2d 343 (21 March 2006), that the Blakely v. Washington, 542 U.S. 296 (2004), ruling was not retroactively applicable to a judgment entered on a 1998 guilty plea because the defendant did not take a direct appeal from the judgment, and the North Carolina Court of Appeals had issued a writ of certiorari in 2002 limited to issues that could be raised on direct appeal. The case was not pending on direct review when *Blakely* was decided.

Trial Judge Did Not Err in Ordering Defendant to Pay Restitution to One of Five Victims of Felonious Hit and Run For Which Defendant Was Convicted, Even Though Jury Was Unable to Reach Verdict on Felonious Assault of Same Victim

State v. Valladares, 182 N.C. App. 525, 642 S.E.2d 489 (3 April 2007).The defendant was convicted of one count of felonious hit and run involving five victims. The court ruled that the trial judge did not err in ordering the defendant to pay restitution to one of those five victims, even though the jury was unable to reach a verdict on a felonious assault of the same victim.