

Recent Cases Affecting Criminal Law and Procedure
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North Carolina Supreme Court

Criminal Law and Procedure

Sufficient Evidence Existed That Defendant Had Reasonable Grounds to Believe Building Was Occupied to Support Conviction of Discharging Firearm into Occupied Property

State v. Everette, 361 N.C. 646, 652 S.E.2d 241 (9 November 2007). The defendant was convicted of discharging a firearm into occupied property. Officers responded to a fight in downtown Greenville. The defendant cursed at an officer and was told to leave. A vehicle arrived and the defendant entered the front passenger seat. As the vehicle departed, one of the officers saw the defendant shooting from the vehicle. Evidence showed that at least seven shots were fired and two people were seriously injured. In addition, two shots entered a restaurant where the owner was still present after it had closed. The restaurant was located in an area where other establishments were still open. The court ruled that there was sufficient evidence that the defendant had reasonable grounds to believe the restaurant was occupied to support the defendant's conviction.

Trial Judge Erred Under G.S. 15A-910 In Sanctioning Defendant By Excluding Testimony of Two of Defendant's Mental Health Experts—Ruling of Court of Appeals Is Modified and Affirmed

State v. Gillespie, 362 N.C. 150, 655 S.E.2d 355 (25 January 2008), *modifying and affirming*, 180 N.C. 514, 638 S.E.2d 481 (19 December 2006). The court ruled that the trial judge erred under G.S. 15A-910 (sanctions for failing to comply with discovery) in sanctioning the defendant by excluding the testimony of two of the defendant's mental health experts. The court reviewed the facts in this case and concluded that it was readily apparent that the trial judge based his ruling to sanction the defendant solely on the conduct of the defendant's expert witnesses, thus acting under a misapprehension of law that the actions of a non-party in a criminal proceeding can trigger a trial judge's authority under G.S. 15A-910 to sanction a party.

Trial Judge Abused Discretion in Failing to Grant Continuance When State Had Failed to Provide Timely Discovery to Defendant—Ruling of Court of Appeals Is Reversed in Part

State v. Cook, 362 N.C. 285, 661 S.E.2d 874 (12 June 2008), *reversing in part*, 184 N.C. App. 401 (3 July 2007). The defendant was convicted of second-degree murder and two counts of felonious assault resulting from a vehicle crash in which the defendant was impaired and had also committed other traffic violations. Although the state expert's report on the defendant's blood alcohol retrograde extrapolation was completed five weeks before the trial was scheduled to begin, the state failed to provide notice that it planned to call the expert as a witness until five days before trial. Even then, the state only provided the expert's curriculum vitae, which was insufficient to put the defendant on notice of the state's intent to use extrapolation evidence at trial. The report was provided only three days before trial, giving the defendant just the weekend

to find his own expert and to decide whether to call such a witness to counter the state's evidence. The court concluded that the state's last-minute piecemeal disclosures were not "within a reasonable time prior to trial" as required by G.S. 15A-903(a)(2). The court ruled that the trial judge abused his discretion in failing to grant the defendant's motion for a continuance. The court stated, however, that it was not establishing a bright line rule automatically mandating a continuance whenever a party is untimely in providing discovery. The court also ruled that any assumed violation of the defendant's constitutional rights by denial of the continuance was harmless beyond a reasonable doubt.

(1) Sufficient Evidence Existed to Support Perjury Conviction—Ruling of Court of Appeals Is Reversed

(2) Insufficient Evidence of Making False Statements Under G.S. 7A-456—Ruling of Court of Appeals Is Affirmed

State v. Denny, 361 N.C. 662, 652 S.E.2d 212 (9 November 2007), *reversing in part and affirming in part*, 179 N.C. App. 822, 635 S.E.2d 438 (17 October 2006). The defendant completed an affidavit of indigency to obtain court-appointed counsel. The evidence tended to show that he wrote "0" under the category of assets titled "real estate" although he was record co-owner of real property. (1) The court ruled, reversing the court of appeals ruling, that there was sufficient evidence to support the defendant's conviction of perjury under G.S. 14-209. (See the court's discussion of the facts supporting the conviction.) (2) The court ruled, affirming the court of appeals ruling, that there was insufficient evidence to support the defendant's conviction of making false statements under G.S. 7A-456. The court noted that the state did not present evidence as required by G.S. 7A-456(b) that the clerk making the indigency determination notified the defendant of the provisions of G.S. 7A-456(a), which sets out the elements of the offense.

Trial Judge Did Not Err in Not Submitting Second-Degree Murder as Lesser Offense of First-Degree Felony Murder When Evidence of Armed Robbery Was Not in Conflict—Ruling of Court of Appeals Is Reversed

State v. Gwynn, 362 N.C. 334, 661 S.E.2d 706 (12 June 2008), *reversing*, 182 N.C. App. 343 (6 March 2007). The court ruled that the trial judge did not err in not submitting second-degree murder as a lesser offense of first-degree felony (armed robbery) murder when evidence of the armed robbery was not in conflict. The robbery involved the defendant as a buyer of marijuana from the murder victim. The victim gave the defendant limited and temporary access to the marijuana by tossing it in the backseat of a vehicle, where the defendant was seated, shortly before entering the vehicle himself. The victim did so only because he was expecting payment from the defendant. The victim in no way granted the defendant permission to depart with the property. The defendant's shooting of the victim and then departing with the marijuana constituted armed robbery, and the evidence of that offense was not in conflict.

Defendant's Act of Restraint and Removal in Preventing Victim's Escape from Her Residence, When Defendant's Later Armed Robbery Had Not Yet Begun, Was Sufficient Evidence to Support Second-Degree Kidnapping—Ruling of Court of Appeals Is Affirmed

State v. Boyce, 361 N.C. 670, 651 S.E.2d 879 (9 November 2007), *affirming*, 175 N.C. App. 663 (7 February 2006). After the defendant forced his way into the victim's house, the victim fled to the back door, but the defendant dragged her back into the house. He then pointed a handgun at her and obtained money from her. The court ruled that the defendant's act of restraint and removal in preventing the victim's escape from her residence, when the defendant's later armed

robbery had not yet begun, was sufficient evidence to support the defendant's conviction of second-degree kidnapping. The defendant's kidnapping of the victim was a separate criminal transaction, complete before the armed robbery begun, and facilitated the later armed robbery.

Trial Judge Did Not Err in Allowing State to Amend Indictment to Correct Statutory Citation to Sexual Offenses Alleged in Indictments—Ruling of Court of Appeals Is Reversed

State v. Hill, 362 N.C. 169, 655 S.E.2d 831 (25 January 2008), *reversing ruling for reasons given in dissenting opinion*, 185 N.C. App. 216, 647 S.E.2d 475 (7 August 2007). The defendant was convicted of five counts of first-degree statutory sexual offense under G.S. 14-27.4(a)(1) (victim under 13 years old). The allegations in the indictments conformed with the short-form indictment language authorized in G.S. 15-144.2(b) to charge first-degree statutory sexual offense under G.S. 14-27.4(a)(1). However, the indictments stated that the offenses were committed in violation of G.S. 14-27.7A (statutory rape or sexual offense of person who is 13, 14, or 15 years old). The trial judge granted the state's motion at the close of the state's case to amend the indictments to allege a violation of G.S. 14-27.4. The majority opinion of the North Carolina Court of Appeals ruled that the trial judge erred in allowing the state to amend the indictments. The dissenting opinion stated that the trial judge did not err: the trial judge properly allowed the state to cure a mere clerical defect and the amendment did not fundamentally change the nature of the charges against the defendant. The North Carolina Supreme Court ruled, per curiam and without an opinion, that the judgment of the North Carolina Court of Appeals is reversed for the reasons given in the dissenting opinion.

Defendant, Who Was Employed By Company Under Contract with Mecklenburg County Jail to Provide Mental Health Care for Inmates, Was Agent of Sheriff to Support Conviction Under G.S. 14-27.7(a)—Ruling of Court of Appeals Is Modified and Affirmed

State v. Wilson, 362 N.C. 162, 655 S.E.2d 359 (25 January 2008), *modifying and affirming*, 183 N.C. App. 100, 643 S.E.2d 620 (1 May 2007). The court ruled that the defendant, who was employed by company under contract with the Mecklenburg County jail to provide mental health care for inmates, was an agent of the sheriff to support his conviction under G.S. 14-27.7(a) (sexual acts committed by agent of person or institution having custody of victim). The defendant engaged during treatment in several sex acts with an inmate.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling That There Was Sufficient Evidence of Defendant's Knowledge That His License Was Revoked to Support Conviction of Driving While License Revoked

State v. Coltrane, 362 N.C. 284, 658 S.E.2d 656 (11 April 2008), *affirming*, 184 N.C. App. 140, 645 S.E.2d 793 (19 June 2007). The court, per curiam and without an opinion, affirmed the ruling by the North Carolina Court of Appeals that there was sufficient evidence of the defendant's knowledge that his license was revoked to support his conviction of driving while license revoked. The state produced a signed certificate of an employee of the Division of Motor Vehicles (DMV) stating that the employee deposited the notice of revocation in the United States mail in a postage paid envelope, addressed to the address shown by DMV records as the defendant's address. The court of appeals ruled that this certification constituted the giving of notice under G.S. 20-48(a). Therefore, the state raised a prima facie presumption of receipt, and the defendant was obligated to rebut the presumption. The defendant chose not to present any evidence at trial and the presumption was clearly not rebutted. The court concluded that the state met its burden on the element of knowledge. [Author's note: The current version of G.S. 20-48(a)

was not applicable to this case, but the result would be the same (that is, sufficient evidence of knowledge).]

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling That Defendant’s Double Jeopardy Challenge to Convictions of Two Sexual Offenses Arising From Single Transaction Was Not Preserved for Appellate Review, and Even If It Was Preserved, Double Jeopardy Was Not Violated Because Multiple Sex Acts Occurring During Single Transaction Are Separate Offenses

State v. Gobal, 362 N.C. 342, 661 S.E.2d 732 (12 June 2008), *affirming*, 186 N.C. App. 308, 651 S.E.2d 279 (16 October 2007). The defendant was convicted of two counts of first-degree sexual offense (cunnilingus and fellatio) and other offenses. All offenses arose from a single transaction involving a child, the child’s mother (the defendant), and a male. The court, per curiam and without an opinion, affirmed the ruling of the North Carolina Court of Appeals that the defendant’s double jeopardy challenge to the convictions of two sexual offenses arising from a single transaction was not preserved for appellate review, and even if it was preserved, double jeopardy was not violated because multiple sex acts occurring during a single transaction are separate offenses, citing *State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (2007), and *State v. Dudley*, 319 N.C. 656 (1987).

Double Jeopardy Clause Does Not Bar Criminal Prosecution of Registered Sex Offender for Failing to Register Change of Address With Sheriff After Same Conduct Was Basis to Revoke Offender’s Post-Release Supervision—Ruling of Court of Appeals Is Affirmed

State v. Sparks, 362 N.C. 181, 657 S.E.2d 655 (7 March 2008), *affirming*, 182 N.C. App. 45 (2007). The court ruled that the Double Jeopardy Clause did not bar the criminal prosecution of a registered sex offender for failing to register a change of address with a sheriff after the same conduct had been basis to revoke the offender’s post-release supervision. The court concluded: (1) a post-release revocation hearing (as well as a probation or parole revocation hearing) is not a criminal prosecution subject to the Double Jeopardy Clause; and (2) the Double Jeopardy Clause does not bar a criminal prosecution for conduct that also serves as the basis for a revocation of post-release supervision (as well as revocation of probation or parole).

City Ordinance Prohibiting Registered Sex Offenders from Knowingly Entering Any Public Park Owned, Operated, or Maintained by City Did Not Violate Their Due Process Rights to Intrastate Travel—Ruling of Court of Appeals Is Affirmed

Standley v. Town of Woodfin, 362 N.C. 328, 661 S.E.2d 728 (12 June 2008), *affirming*, 186 N.C. App. 134, 650 S.E.2d 618 (2 October 2007). The court ruled that a city ordinance prohibiting registered sex offenders from knowingly entering any public park owned, operated, or maintained by the city did not violate their due process right to intrastate travel. The court determined that this right is not fundamental, so the ordinance needed only to meet a rational basis test, which the court concluded it did.

Capital Case Issues

Although Trial Judge Has Authority in Pretrial Hearing to Determine Existence of Aggravating Circumstances and to Declare Case To Be Noncapital Based on Lack of Evidence of Aggravating Circumstances, Trial Judge Lacks Authority to Declare Case To Be Noncapital Based on Insufficient Evidence of First-Degree Murder

State v. Seward, 362 N.C. 210, 657 S.E.2d 356 (7 March 2008). The court ruled that although a trial judge has the authority in a pretrial hearing to determine the existence of aggravating circumstances and to declare a case to be noncapital based on a lack of evidence of aggravating circumstances, the trial judge lacks authority to declare a case to be noncapital based on insufficient evidence of first-degree murder.

Evidence

Trial Judge Did Not Abuse Discretion in Admitting Under Rule 404(b) Evidence of Death of Another That Occurred 16 Years Before Death of Victim For Whom Defendant Was Being Tried for Murder

State v. Peterson, 361 N.C. 587, 652 S.E.2d 216 (9 November 2007), *affirming*, 179 N.C. 437, 634 S.E.2d 594 (2006). The defendant was convicted of first-degree murder of A. The court ruled, relying on *State v. Stager*, 329 N.C. 278 (1990), that the trial judge did not abuse his discretion in admitting under Rule 404(b) evidence of the death of B that occurred 16 years before the death of A. The court noted that the state was not required to present direct evidence of the defendant's involvement in the death of B, but could present circumstantial evidence that tends to support a reasonable inference that the same person committed both homicides. The trial judge's findings of fact indicated not only significant similarities between the deaths of A and B, but also sufficient circumstantial evidence that the defendant was involved in B's death.

Jail Detention Center Incident Reports and Statements Contained in These Reports Were Not Testimonial Under *Crawford v. Washington*, 541 U.S. 36 (2004)

State v. Raines, 362 N.C. 1, 653 S.E.2d 126 (7 December 2007). During a capital sentencing hearing, a state's witness in charge of the county detention center testified about the defendant's behavior while awaiting trial. He referred to jail detention center reports and statements contained in these reports. The court ruled that these reports and statements were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). The court noted that there was no indication in the record that these reports were prepared for use in later legal proceedings. Instead, the record indicated that they were created as internal documents concerning the administration of the detention center. The statements contained in the reports from detention officers and inmates were not taken in such a manner to be testimonial or to be used in later criminal proceedings.

Trial Court Abused Discretion in Excluding Defense Cross-Examination of Assault Victim Under Rule 403; Cross-Examination Related to Victim's Credibility Under Rule 611(b) and Should Have Been Admitted Under Rule 403—Ruling of Court of Appeals Is Reversed

State v. Whaley, 362 N.C. 156, 655 S.E.2d 388 (25 January 2008), *reversing*, 178 N.C. App. 563, 631 S.E.2d 893 (18 July 2006) (unpublished opinion). The defendant was convicted of simple assault. The trial judge barred under Rule 403 the defendant's proposed cross-examination of the assault victim concerning statements she had made in a questionnaire during her visit to a counselor. The court noted that the excluded testimony, specifically the victim's prior indication that she had difficulty recalling whether certain events actually occurred, bore on the victim's capacity to observe, recollect, and recount and should have been admitted under Rule 611(b) and Rule 403. The victim's testimony was crucial to the state's case and attacking her credibility represented the primary theory of the defense.

Arrest, Search, and Confession Issues

Search of Defendant's Genital Area Was Not Within Scope of Defendant's Consent to Search and Thus Violated Fourth Amendment

State v. Stone, 362 N.C. 50, 653 S.E.2d 414 (7 December 2007). The court ruled that a defendant who gave consent to a generic search for weapons or drugs during a routine traffic stop in which an officer shined a flashlight inside his underwear was not within the scope of the defendant's consent to search and thus violated the Fourth Amendment. An officer stopped a car for speeding. The officer asked the defendant, a passenger, whether he had any drugs or weapons on his person. The defendant said no, which prompted the officer to ask for consent to search. The defendant gave consent. The defendant was wearing a jacket and drawstring sweat pants. During the initial search, the officer found \$552.00 in cash in the lower left pocket of the sweat pants. He again asked the defendant if he had anything on him. Once again, the defendant denied having drugs or weapons and authorized the officer to continue the search. The officer checked the rear of the sweat pants and moved his hands to the front of the defendant's waistband. The officer then pulled the defendant's sweat pants away from his body and trained his flashlight on the defendant's groin area. The defendant objected, but by that time, the officer had already seen the white cap of what appeared to be a pill bottle tucked in between the defendant's inner thigh and testicles. The court concluded that a reasonable person would not have understood that his consent included such an examination. The scope of a general consent to search does not necessarily include consent for an officer to move clothing to directly observe the genitals of a clothed person. The court noted that its ruling is necessarily predicated on its facts and that different actions by the officer could have led to a different result. [Author's note: The only basis on which the state justified the officer's search was consent. Thus, the court did not discuss whether probable cause and exigent circumstances supported the search. See *State v. Smith*, 342 N.C. 407 (1995), reversing the court of appeals for reasons stated in the dissenting opinion, 118 N.C. App. 106 (1995), discussed in the court's opinion.]

Reasonable Suspicion Supported Stop of Vehicle Based on Vehicle's Remaining Stopped for Thirty Seconds After Light Had Turned Green and Officer's Testimony, Based on His Training and Experience, That Driver Might Be Impaired—Ruling of Court of Appeals Is Affirmed

State v. Barnard, 362 N.C. 244, 658 S.E.2d 643 (11 April 2008), *affirming*, 184 N.C. App. 25, 645 S.E.2d 780 (19 June 2007). An officer stopped his marked patrol vehicle behind the defendant's vehicle, which was stopped at a red light. When the light turned green, the vehicle remained stopped for approximately thirty seconds before making a legal left turn; the vehicle had remained at the light without any reasonable explanation for doing so. The officer initiated a stop of the vehicle. The court ruled that reasonable suspicion supported the stop of the vehicle based on these facts and the officer's testimony, based on his training and experience, that the driver might be impaired. The officer said that impairment slows reaction time, and that a red light turning green and the driver hesitating for thirty seconds would definitely be an indication of impairment. The court noted that it was irrelevant that part of the officer's motivation to stop the vehicle may have been for a perceived, though apparently nonexistent, statutory violation of impeding traffic. The court stated that the constitutionality of a traffic stop depends on objective facts, not an officer's subjective motivation; the court cited *Whren v. United States*, 517 U.S. 806 (1996), and *State v. McClendon*, 350 N.C. 630 (1999).

[Author's note: The court's opinion also stated that despite some initial confusion following the United States Supreme Court's ruling in *Whren*, courts have continued to hold that a traffic stop is constitutional if the officer has reasonable suspicion of criminal activity. The court cited *Illinois v. Wardlow*, 528 U.S. 119 (2000), and *United States v. Delfin-Colina*, 464 F.3d 392 (3d

Cir. 2006). For a discussion of a probable cause standard to stop a vehicle for a perceived traffic violation [State v. Ivey, 360 N.C. 562 (2006)], or for a readily observed traffic violation [State v. Wilson, 155 N.C. App. 89 (2002)], see the summary of the *Ivey* ruling on pages 12-13 of “2006 Supplement to Arrest, Search, and Investigation in North Carolina (Third Edition 2003),” available online at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0701.pdf> and note 103 on page 52 of Arrest, Search, and Investigation in North Carolina (3d ed. 2003).]

Court Affirms, Per Curiam and Without Opinion, Ruling of Court of Appeals That Reasonable Suspicion Did Not Support Officer’s Continued Detention of Vehicle Occupants After Completion of Traffic Stop

State v. Myles, 362 N.C. 344, 661 S.E.2d 732 (12 June 2008), *affirming*, 188 N.C. App. 42, 654 S.E.2d 752 (15 January 2008). The court affirmed, per curiam and without an opinion, the ruling of the North Carolina Court of Appeals that reasonable suspicion did not support an officer’s continued detention of vehicle occupants (defendant was a passenger) after the completion of a traffic stop. An officer stopped a vehicle for weaving on Interstate 40 and running slightly off the highway. The officer did not detect an odor of alcohol on the driver, learned that the car was being operated under a rental agreement executed by the defendant-passenger that was one day overdue, told the driver to be more careful, and asked him to come to the officer’s car so the officer could write a warning ticket. The officer noted that the driver was sweating profusely despite the fact it was a cool day. The officer talked with the driver about his travel plans. The officer then went back to the driver’s car and spoke to the defendant-passenger about the rental agreement and whether it had been extended. The defendant said he had done so. The officer noticed the defendant’s heart beating through his shirt. The officer eventually obtained consent to search the car from the driver and defendant. The court ruled that both the driver and the defendant-passenger were seized under the Fourth Amendment after the completion of the traffic stop, the issuance of the warning ticket, and the totality of circumstances did not support reasonable suspicion for the continued detention of the driver and defendant—the nervous behavior of the driver was insufficient. The court distinguished the ruling in *State v. McClendon*, 350 N.C. 630 (1999). The nervousness of the defendant could not be considered in establishing reasonable suspicion because the officer observed that behavior after the traffic stop had been completed.

North Carolina Court of Appeals

Criminal Law and Procedure

Hands Are Not Dangerous or Deadly Weapon For Offenses of First-Degree Rape and First-Degree Sexual Offense

State v. Adams, 187 N.C. App. 676, 654 S.E.2d 711 (18 December 2007). The court ruled, relying on the ruling in *State v. Hinton*, 361 N.C. 207 (2007) (hands are not dangerous weapon for offense of armed robbery), ruled that hands are not a dangerous or deadly weapon for the offenses of first-degree rape and first-degree sexual offense. The court reasoned that the legislature did not intend the term “dangerous or deadly weapon” to include parts of a human body, such as hands or feet. [Author’s note: Neither this ruling nor the *Hinton* ruling affects prior rulings that hands or feet can be deadly weapons for assault offenses.]

(1) Two Convictions of Rape Were Supported By Evidence of Separate Acts of Forcible Sexual Intercourse

(2) Sufficient Evidence to Convict Defendant of Rape Based on Acting in Concert Theory When Forcible Sexual Intercourse Was Committed by Accomplice

State v. Sapp, 190 N.C. App. 698, 661 S.E.2d 304 (3 June 2008). (1) The court ruled, relying on *State v. Key*, 180 N.C. App. 286 (2006), that two convictions of rape were supported by evidence of separate acts of forcible sexual intercourse. There was substantial evidence that after the defendant had forcible sexual intercourse with the victim on a couch, he withdrew before re-penetrating her a second time on the floor beside the couch. (2) The court ruled, distinguishing *State v. Bellamy*, 172 N.C. App. 649 (2005), that there was sufficient evidence to convict the defendant of rape based on the acting in concert theory when forcible sexual intercourse was committed by the defendant's accomplice. The defendant's rapes of the victim were committed during the course of the burglary and robbery, and the later rape of the victim by the accomplice was a natural or probable consequence of the robbery.

**(1) Defendant's Hands Were Deadly Weapon to Support Felonious Assault Conviction
(2) Sufficient Evidence to Prove Commission of Sexual Act to Support Conviction of First-Degree Sexual Offense**

State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701 (4 March 2008). The defendant was convicted of first-degree sexual offense and assault with a deadly weapon inflicting serious injury. (1) The deadly weapon element of the assault conviction was based on the defendant's use of his fists on the victim. The defendant weighed 175 pounds and the victim weighed 110 pounds. The court ruled that this and other evidence was sufficient to support the deadly weapon element. The court stated that ruling in *State v. Hinton*, 361 N.C. 207 (2007) (hands are not "dangerous weapon" for armed robbery), did not overrule prior cases in which hands and feet were found to be deadly weapons in assault prosecutions. (2) The court ruled that there was sufficient evidence to prove the commission of a sexual act to support the defendant's conviction of first-degree sexual offense. The victim was apparently rendered unconscious before the sexual act and could not testify about it. However, the physician who examined the victim testified that the intrusion of an object into the victim's rectum could have resulted in the injury to her colon. Also, there was evidence that the victim suffered extensive damage to her outer genital and rectal areas.

Although Trial Judge in Felonious Assault Trial Correctly Submitted Issue Whether 2x4 Board Was Deadly Weapon, Trial Judge Erred in Not Submitting Lesser Offense of Assault Inflicting Serious Injury

State v. Tillery, 186 N.C. App. 447, 651 S.E.2d 291 (16 October 2007). The defendant was convicted of assault with a deadly weapon inflicting serious injury. The court ruled, relying on *State v. Lowe*, 150 N.C. App. 682 (2002), and *State v. Palmer*, 293 N.C. 633 (1977), that although the trial judge correctly submitted the issue to the jury whether a 2x4 board was a deadly weapon, the trial judge erred in not submitting the lesser offense of assault inflicting serious injury. The 2x4 board used in this case was not a deadly weapon as a matter of law.

Sufficient Evidence of Culpable Negligence to Support Juvenile's Delinquency Adjudication of Involuntary Manslaughter When Juvenile, After Giving Illegal Drug to Victim Who Then Became Seriously Ill, Failed to Aid Her

In re Z.A.K., 189 N.C. App. 354, 657 S.E.2d 894 (18 March 2008). The juvenile was adjudicated delinquent of involuntary manslaughter. The court ruled that there was sufficient evidence of culpable negligence to support the juvenile's delinquency adjudication when the juvenile, after

giving an illegal drug (Ecstasy) to the victim who then became seriously ill, failed to aid her. (See the court's detailed discussion of the facts in its opinion.)

Sufficient Evidence of Element of Strangulation in Assault by Strangulation

State v. Little, 188 N.C. App. 152, 654 S.E.2d 760 (15 January 2008). The court ruled that there was sufficient evidence to support the element of strangulation in assault by strangulation when the defendant wrapped his hands around the victim's throat and applied pressure until the victim lost consciousness.

Sufficient Evidence to Support Common Law Robbery Conviction When Defendant Snatched Necklace from Victim's Neck

State v. Harris, 186 N.C. App. 437, 650 S.E.2d 845 (16 October 2007). The court ruled, relying on cases from other jurisdictions and distinguishing *State v. Robertson*, 138 N.C. App. 506 (2000), that there was sufficient evidence of the element of force to support the defendant's common law robbery conviction when the defendant came from behind the victim and snatched a necklace from the victim's neck.

- (1) **Armed Robbery Indictment Was Deficient Because It Failed to Allege That Implement Was Dangerous**
- (2) **Evidence Was Sufficient to Support Armed Robbery Conviction When Defendant Demanded Money While Keeping His Right Hand in His Coat and Hand Grip Was Visible to Victim, and Victim Believed Defendant Had a Weapon**

State v. Marshall, 188 N.C. App. 744, 656 S.E.2d 709 (19 February 2008). The defendant was convicted of two counts of armed robbery involving separate robberies. (1) The court ruled that one of the armed robbery indictments was deficient because it failed to allege that the implement used in the robbery was dangerous. The pertinent part of the indictment alleged "having in possession and threatening the use of an implement, to wit, keeping his hand in his coat demanding money." (2) The court ruled, relying on *State v. Joyner*, 312 N.C. 779 (1985), that the evidence was sufficient to support the other armed robbery conviction. The defendant demanded money while he kept his right arm inside his coat to simulate a weapon, and video surveillance depicted a bulge inside the defendant's jacket. The victim saw the defendant keep his right hand on an object with a black texture or grip inside his coat, and she testified that there was no doubt that the defendant possessed a gun.

Insufficient Evidence of Intent to Commit Felony Inside House to Support Conviction of First-Degree Burglary; Court Suggests Modification of Pattern Jury Instruction

State v. Goldsmith, 187 N.C. App. 162, 652 S.E.2d 336 (6 November 2007). The court ruled that there was insufficient evidence of the defendant's intent to commit the felony of armed robbery inside the house to support the defendant's conviction of first-degree burglary. The court stated that the defendant's act of pulling the victim outside the house was evidence to support an inference that the defendant intended to commit the robbery outside the home. The court also suggested that the pattern jury instruction should require the jury to find that the defendant at the time of the breaking and entering intended to commit the felony in the building that was broken into and entered.

No Double Jeopardy Bar to Prosecute Resisting, Delaying, or Obstructing Public Officer After Acquittal of Assault on Government Officer Based on Same Incident

State v. Newman, 186 N.C. App. 382, 651 S.E.2d 584 (16 October 2007). The defendant was tried in district court for resisting, delaying, or obstructing a public officer (RDO), second-degree trespass, and assault on a government officer. The defendant was convicted of the RDO and trespass charges and found not guilty of the assault. The defendant appealed the two convictions for trial de novo in superior court. The superior court judge dismissed the RDO charge, and the state appealed. The court ruled that the state had the right to appeal the dismissal. The court then ruled that there was no double jeopardy bar to prosecute RDO after the acquittal of the assault charge. The court noted North Carolina case law that RDO is neither the same nor a lesser offense of the assault charge. The court noted, however, that there could still be a double jeopardy bar based on the same-evidence test for double jeopardy set out in *State v. Summrell*, 282 N.C. 157 (1982). After examining the evidence, the court ruled there was no double jeopardy violation because there was different evidence to support the RDO and assault charges. [Author's note: The court was bound by the *Summrell* ruling and thus was required to apply the same-evidence test. However, that test does not appear to be a component of double jeopardy analysis, because the United States Supreme Court applies an elements test—but not an additional same-evidence test. See, for example, *United States v. Dixon*, 509 U.S. 688 (1993).]

Assault on Female Is Not Lesser-Included Offense of Assault by Strangulation

State v. Brunson, 187 N.C. App. 472, 653 S.E.2d 552 (4 December 2007). The court ruled that assault on a female is not a lesser-included offense of assault by strangulation. Each offense includes an element not present in the other.

Defendant's Knowledge of Victims' Ages Is Element in State's Prosecution of Statutory Rape When State Relies on Aiding and Abetting Theory to Prove Defendant's Guilt and Evidence Is Offered Concerning Defendant's Lack of Knowledge That Victims Were Under Statutory Age of Consent

State v. Bowman, 188 N.C. App. 635, 656 S.E.2d 638 (19 February 2008). The defendant was convicted of three counts of aiding and abetting statutory rape under G.S. 14-27.7A (statutory rape of 13, 14, or 15 year old). The court ruled, relying on *State v. Evans*, 279 N.C. 447 (1991), *State v. Capps*, 77 N.C. App. 400 (1985), *State v. Walker*, 35 N.C. App. 182 (1978), and other cases, that the defendant's knowledge of the victims' ages is an element in the state's prosecution of statutory rape when the state relies on the aiding and abetting theory to prove the defendant's guilt and evidence is offered concerning the defendant's lack of knowledge that the victims were under the statutory age of consent. The court stated that although statutory rape is a strict liability crime, aiding and abetting statutory rape is not. Evidence was presented that the defendant (prosecuted as an aider and abettor) did not know the victims' ages, and he thought they were over 18 years old. The court ruled that the defendant was entitled to a jury instruction requiring the state to prove the defendant knew that the victims were under 16 years old.

- (1) Trial Judge Did Not Err in Defining "Serious Injury" for First-Degree Kidnapping**
- (2) Sufficient Evidence to Support Conviction of First-Degree Kidnapping**
- (3) Sufficient Evidence to Support Conviction of Attempted Second-Degree Rape**

State v. Simpson, 187 N.C. App. 424, 653 S.E.2d 249 (4 December 2007). The defendant was convicted of first-degree kidnapping and attempted second-degree rape. The defendant was in the victim's home when he suddenly got on top of the victim and straddled her. The victim struggled with the defendant, who hit the victim in her face, tried to put a piece of duct tape over her mouth, and pinned her down, trying to lift up her shirt. He dragged her from a couch and toward the

kitchen. The victim noticed that the defendant's pants were unzipped. The defendant then tried to drag her outside the house, but she successfully prevented him from doing so and he left. (1) The court ruled that the trial judge did not err in defining "serious injury" for first-degree kidnapping as causing great pain and suffering and may also include serious mental injury that extends for some appreciable time beyond the crime. The court, distinguishing *State v. Baker*, 336 N.C. 58 (1994), and relying on *State v. Finney*, 358 N.C. 79 (2004), rejected the defendant's argument that the trial judge was also required to instruct the jury that serious mental injury must be a mental injury beyond that normally experienced by other sexual assault victims. (2) The court ruled that there was sufficient evidence to support the defendant's conviction of first-degree kidnapping. The defendant's restraint of the victim was more than that inherent in the crime of attempted second-degree rape. (3) The court ruled that there was sufficient evidence to support the defendant's conviction of attempted second-degree rape. The defendant straddled the victim and tried to pull up her shirt, and his pants were unzipped.

Insufficient Evidence to Support Conviction of False Report to Law Enforcement Agency or Officer (G.S. 14-225) Because State Failed to Prove That False Report Was Made With a Purpose Set Out in Statute

State v. Dietze, 190 N.C. App. 198, 660 S.E.2d 197 (6 May 2008). The court ruled that there was insufficient evidence to support the defendant's conviction of a false report to a law enforcement agency or officer (G.S. 14-225) because the state failed to prove that the false report was made with a purpose set out in the statute: "for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties." The court stated that the defendant's false report of misdemeanor stalking undoubtedly had the effect of interfering with the work of law enforcement because investigating her complaint took time and manpower away from work on actual crimes. However, there was no evidence that she acted with a purpose set out in the statute. Instead, the evidence suggested that the defendant believed that she had been stalked.

Insufficient Evidence to Support Conviction of Possession of Malt Beverage by Person Under 21 Years Old, G.S. 18B-302(b)(1)

State v. Hensley, 190 N.C. App. 600, 661 S.E.2d 18 (20 May 2008). The court ruled that there was insufficient evidence to support the defendant's conviction of possession of malt beverage by a person under 21 years old, G.S. 18B-302(b)(1). An officer who stopped the vehicle the defendant was driving found open beer bottles and "some type of wine" in the vehicle. The court noted that the state did not present any evidence that there was any liquid remaining in the beer bottles, nor any residue of a liquid, and not even the type of beer indicated by the label. In addition, the officer did not preserve the bottles as evidence. Although the state presented evidence that the defendant had an odor of alcohol about him, had admitted he had drunk a half bottle of red wine earlier in the evening, and had a blood alcohol concentration of 0.11, these facts merely demonstrate that the defendant had consumed some type of alcoholic beverage, but did not prove that he possessed a malt beverage.

(1) State Complied with G.S. 15A-903(a)(1) By Providing Substance of Oral Statements Made By State's Informant to Detective

(2) Insufficient Evidence to Support Defendant's Conviction of Trafficking By Possessing Cocaine

State v. Zamora-Ramos, 190 N.C. App. 420, 660 S.E.2d 151 (6 May 2008). The defendant was convicted of several cocaine offenses based on controlled buys made by an informant under the

supervision of a detective. (1) The court ruled that the state complied with G.S. 15A-903(a)(1) by providing the substance of oral statements made by the state's informant to the supervising detective after each of the controlled buys. The court noted that the state provided the defendant with all the reports contained in its file, which included reports of the dates of each offense, notations of the detective's meetings with the informant after each buy, as well as a summary of what the informant told the detective during each meeting. The defendant was provided with notice of the substance of the informant's statements, and he did not suffer prejudice or unfair surprise as a result of the admission of the informant's testimony. The court rejected the defendant's contention that the conversations between the detective and informant were not recorded in writing with sufficient detail to comply with G.S. 15A-903(a)(1). (2) The court ruled that there was insufficient evidence to support the defendant's conviction of trafficking by possessing cocaine. The state failed to produce evidence that the defendant himself transported the cocaine, or alternatively, that the defendant was present or constructively present when his accomplice transported the cocaine.

Trial Judge Erred in Failing to Specifically Instruct Jury on “Not Guilty” Verdict After Instructing on “Not Guilty” Verdict on Issue of Self-Defense; Court Also Comments on Apparent Ambiguity in N.C.P.I.—Crim. 308.45 (Self Defense)

State v. McArthur, 186 N.C. App. 373, 651 S.E.2d 256 (16 October 2007). The court ruled, relying on *State v. Dallas*, 253 N.C. 568 (1960), *State v. Ramey*, 273 N.C. 325 (1968), and *State v. Woods*, 278 N.C. 210 (1971), that the trial judge, after instructing on a “not guilty” verdict on the issue of self-defense, erred in failing to specifically instruct the jury on a “not guilty” verdict if the state failed to prove the elements of the offense beyond a reasonable doubt. The court also commented on an apparent ambiguity in N.C.P.I.—Crim. 308.45 (see the court's discussion).

Trial Judge Did Not Err in Instructing Jury on Aiding and Abetting False Pretenses Even Though Indictment Alleged Acting in Concert, Because Indictment's Allegation Was Surplusage

State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598 (16 October 2007). The court ruled, relying on *State v. Westbrook*, 345 N.C. 43 (1996), that the trial judge did not err in instructing the jury on aiding and abetting false pretenses even though the indictment alleged acting in concert, because the indictment's allegation was surplusage.

Sufficient Evidence of Constructive Force to Support Convictions of Sexual Battery

State v. Viera, 189 N.C. App. 514, 658 S.E.2d 529 (1 April 2008). The defendant was convicted of two counts of sexual battery involving two victims in separate incidents in which the defendant provided massage services in a spa. The court reviewed the facts of both incidents and ruled that there was sufficient evidence of constructive force to support both convictions. The court concluded that the defendant utilized his apparent status as a licensed, professional massage therapist to induce his victims to lie naked on the massage table, putting them in a position of complete vulnerability. Through his coercion, he forced them to submit to unwanted sexual contact. The defendant's implicit threat was delivered through his abuse of his position of trust and relative authority as a professional massage therapist. Also, both victims testified about their fear of saying anything to the defendant after he began touching them inappropriately. The court stated that the fear created by the victims' feelings of vulnerability also substantiated the element of constructive force.

Sufficient Evidence That Defendant Possessed Child Pornography on His Home Computer to Support Conviction of Third-Degree Sexual Exploitation of Child

State v. Dexter, 187 N.C. App. 587, 651 S.E.2d 900 (6 November 2007). The court ruled that there was sufficient evidence that the defendant possessed child pornography on his home computer to support his conviction of third-degree sexual exploitation of a child. The court stated that the evidence showed that the defendant knew exactly what temporary Internet files were, purposefully stored child pornography on his computer as temporary Internet files, revisited those files offline, and purposefully and habitually deleted those files so that he would avoid being caught with too many at once. The defendant clearly had the power and intent to control the disposition of the images. (See additional facts set out in the court's opinion.)

(1) Trial Judge Did Not Err in Allowing State to Amend Indictment Alleging Possession of Firearm by Felon

(2) No Double Jeopardy Violation Involving Conviction of Possession of Firearm by Felon

State v. Coltrane, 188 N.C. App. 498, 656 S.E.2d 322 (5 February 2008). The defendant was convicted of possession of a firearm by felon. (1) The court ruled, relying on *State v. Lewis*, 162 N.C. App. 277 (2004), that the trial judge did not err in allowing the state to amend the indictment to correct the date of offense (from December 9, 2004, to April 25, 2005) and the county in which the defendant was convicted of the underlying felony. (2) The court ruled, relying on *State v. Wood*, 185 N.C. App. 227, 647 S.E.2d 679 (2007), that there was no double jeopardy violation involving the defendant's conviction. The defendant was not punished twice for the underlying felony conviction; instead, he was punished for the first time for the offense under G.S. 14-415.1(a).

State Did Not Have Right to Appeal to Superior Court a District Court Judge's Dismissal of DWI Charge When Dismissal Was Based on Finding of Insufficient Evidence to Support DWI Charge, Even Though Dismissal Was Erroneous

State v. Morgan, 189 N.C. App. 716, 660 S.E.2d 545 (15 April 2008). The court ruled that the state did not have a right to appeal to superior court a district court judge's dismissal of a DWI charge when the dismissal was based on a finding of insufficient evidence to support the DWI charge, even though the dismissal was erroneous (see the court's opinion on the notary public issue that led to the dismissal). The state may not appeal a dismissal of a case to superior court if double jeopardy bars a retrial [G.S. 15A-1432(a)], and a finding of insufficient evidence bars a retrial under the Double Jeopardy Clause. The court noted that this case was tried before the enactment of G.S. 20-38.6, which requires (with limited exceptions) that motions to suppress evidence or dismiss DWI charges be made before trial.

Indictment Sufficiently Alleged Felonious Breaking or Entering

State v. Jones, 188 N.C. App. 562, 655 S.E.2d 915 (5 February 2008). The indictment for felonious breaking or entering alleged in pertinent part that the defendant did break and enter a building occupied by Lindsay Hardison, used as a residence. The evidence showed that the defendant broke into a freestanding garage located about 15 feet from the victim's home. The court ruled that the indictment was sufficient to charge the offense. The victim's occupation of the building was not an element of the offense, and the variance in the indictment and the evidence was not material and therefore not fatal. Also, the word "residence" in the indictment was surplusage.

Defendant's Federal Drug Convictions Did Not Bar State Prosecution of Drug Charges Under G.S. 90-97

State v. Delrosario, 190 N.C. App. 797, 661 S.E.2d 283 (3 June 2008). The court ruled that the defendant's federal drug convictions did not bar the state prosecution of drug charges under G.S. 90-97 (acquittal or conviction under federal law or another state's law of same act bars prosecution in North Carolina state court). The defendant was convicted in state court for offenses that occurred on July 20, 2001. Although the federal court had considered the defendant's offenses on July 20, 2001, for sentencing purposes, the defendant was neither charged nor convicted in federal court for acts committed on that date.

- (1) Sufficient Evidence to Prove Existence of "Playground" as Defined in Former Version of G.S. 90-95(e)(10) (Selling, Delivering, Etc., Drug in or Within 300 Feet of Property That Is Playground in Public Park)**
- (2) Sufficient Evidence to Prove Prior Convictions in Habitual Felon Hearing Based on Prima Facie Evidence Provision**

State v. Tyson, 189 N.C. App. 408, 658 S.E.2d 285 (1 April 2008). (1) The court ruled that there was sufficient evidence to prove the existence of a "playground" as defined in the former version of G.S. 90-95(e)(10) to support the defendant's conviction of possession of marijuana with the intent to sell or deliver in or within 300 feet of property that is a playground in a public park. [Author's note: Although not applicable to this case, effective for offenses committed on or after December 1, 2007, G.S. 90-95(e)(10) applies to all public parks, whether or not there is a playground there, and within 1,000 feet of them.] The court rejected the defendant's argument that the three separate apparatuses as defined in the term "playground" must be physically separate from each other. (2) The court ruled that there was sufficient evidence introduced in an habitual felon hearing to prove the defendant's three prior convictions, although the defendant's birth date as alleged in the indictment for two of the convictions was given as 24 December 1979 and as 24 December 1978 for the other conviction. Each of the three court judgments introduced by the state listed the name as "Noel John Tyson," which was the same name as the defendant charged in the indictment. The defendant did not introduce any evidence to rebut the prima facie showing by the state under G.S. 14-7.4. Any discrepancies in the judgments were for the jury to consider.

Assuming Without Deciding That Officer's Entry Into Defendant's Home Violated Fourth Amendment, Exclusionary Rule Did Not Bar Evidence of Defendant's Assault on Officer After Entering Home

State v. Parker, 188 N.C. App. 625, 655 S.E.2d 860 (5 February 2008). The defendant was convicted of assault with a firearm on a law enforcement officer. The court ruled, relying on *State v. Miller*, 282 N.C. 633 (1973), and *State v. Guevara*, 349 N.C. 243 (1998), that assuming without deciding that an officer's entry into the defendant's home violated the Fourth Amendment, the exclusionary rule did not bar evidence of the defendant's assault on the officer after entering the home.

Trial in Defendant's Absence Did Not Violate Defendant's Rights

State v. Russell, 188 N.C. App. 625, 655 S.E.2d 887 (5 February 2008). The defendant was convicted of breaking and entering a motor vehicle and being an habitual felon. The defendant was present in the courtroom for his trial when jury selection began. However, the defendant was absent during the remainder of jury selection and during the trial. The court reviewed the facts in

this case and ruled, relying on *State v. Richardson*, 330 N.C. 174 (1991), and *State v. Davis*, 186 N.C. App. 242, 650 S.E.2d 612 (2007), that the trial judge did not abuse his discretion in conducting the trial in the defendant's absence. Although a doctor's letter confirmed the defendant's location in a hospital, it was insufficient to show that his absence from trial was involuntary or due to immediately necessary medical treatment.

No Violation of Right to Unanimous Jury Verdict When Jury Instruction for Felony Eluding Officer (G.S. 20-141.5) Did Not Require Jury Unanimity on Which of Several Motor Vehicle Violations Constituted Two Aggravating Factors to Support Felony Conviction

State v. Hazelwood, 187 N.C. App. 94, 652 S.E.2d 63 (6 November 2007). The defendant was convicted of felony eluding officer under G.S. 20-141.5. The court ruled, relying on *State v. Funchess*, 141 N.C. App. 302 (2000), that there was no violation of the defendant's state constitutional right to a unanimous jury verdict when the jury instruction did not require jury unanimity on which of several motor vehicle violations constituted the two aggravating factors to support the felony conviction.

- (1) **Sufficient Circumstantial Evidence to Prove Element of Driving to Support DWI Conviction**
- (2) **Sufficient Evidence to Convict Passenger of Giving False Information (Orally Telling Officer That She Was the Driver) in Report of Reportable Accident Under G.S. 20-279.31(b)(1)**

State v. Hernandez, 188 N.C. App. 193, 655 S.E.2d 426 (15 January 2008). The male defendant and the female defendant were in a vehicle that was involved in an accident in which the vehicle hit a ditch and landed about thirty to forty feet in a bean field. Two officers arrived at the scene when no one was in the vehicle. Officer A saw that the steering wheel air bag had deployed and blood was on the air bag. He noticed that the male defendant had blood near his nose and on his shirt. Officer B saw that the female defendant had a fabric burn extending from her right shoulder to her collarbone. In addition, the driver's seat was pushed back too far for the female defendant to drive the vehicle. The female defendant later told the officer at the hospital that she was the driver of the vehicle. The male defendant took the Intoxilyzer and his BAC was 0.26. The male defendant was convicted of DWI. The female defendant was convicted under G.S. 20-279.31(b)(1) of giving false information in a report of a reportable accident. (1) The court ruled that there was sufficient circumstantial evidence to prove the element of driving to support the DWI conviction of the male defendant. The jury could reasonably infer from the physical evidence that the male defendant was the driver. (2) The court ruled that there was sufficient evidence to convict the female defendant of giving false information (orally telling officer that she was the driver) in a report of a reportable accident under G.S. 20-279.31(b)(1). The court rejected the female defendant's argument that the statute requires a written report and thus her oral statement to the officer did not constitute a report. The court also ruled that the identity of the driver is required to be included in a reportable accident report.

Trial Judge Did Not Err in Not Dismissing DWI Charge Under State v. Knoll Based on Magistrate's Substantial Violations of Defendant's Pretrial Release Statutory Rights, Because Defendant Failed to Show Violations Caused Irreparable Prejudice to Defendant's Preparation of Defense

State v. Labinski, 188 N.C. App. 120, 654 S.E.2d 740 (15 January 2008). The defendant was convicted of DWI. The court ruled that the trial judge did not err in not dismissing the DWI

charge under *State v. Knoll*, 322 N.C. 535 (1988), based on the magistrate’s substantial violations of the defendant’s pretrial release statutory rights because the defendant failed to show that the violations caused irreparable prejudice to the preparation of the defendant’s defense. (See the court’s discussion of the facts and its analysis of the legal issues.)

Denial of DWI Defendant’s Right to Have Witness Observe Intoxilyzer Testing Procedures Required Suppression of Intoxilyzer Test Result

State v. Hatley, 190 N.C. App. 639, 661 S.E.2d 43 (20 May 2008). The court ruled that the denial of the DWI defendant’s right to have a witness observe the Intoxilyzer testing procedures required the suppression of the Intoxilyzer test result. The defendant was arrested for DWI and advised of her chemical testing rights at 3:01 a.m. The defendant indicated that she wanted to call a witness and was successful in reaching her daughter at approximately 3:04 a.m. She told the arresting officer that her daughter was on the way. During the remainder of the 30-minute period the defendant was allowed to call her daughter to ascertain her whereabouts, but the defendant was unable to reach her. The test was delayed 34 minutes before the defendant was asked to submit to the test, which she did, and with a test result of 0.11. The evidence showed that the daughter had arrived at the sheriff’s office at approximately 3:20 a.m. and informed the front desk duty officer she was there for Deborah Hatley (the defendant’s name) for a “DUI,” but did not specifically state that she was there to witness an Intoxilyzer test. The court concluded that based on these facts—particularly the arresting officer’s knowledge that a witness had been contacted and the officer’s understanding that the witness was on her way to the sheriff’s office to observe the test—the trial court erred in denying the defendant’s motion to suppress the Intoxilyzer test result. The witness had arrived in a timely manner and had made reasonable efforts to gain access to the defendant.

One-Photo Identification Procedure Was Not Impermissibly Suggestive Under Due Process Clause

State v. Marsh, 187 N.C. App. 235, 652 S.E.2d 744 (20 November 2007). An officer stopped a truck matching the description of a truck that had been reported stolen. The defendant got out of the truck, but the officer ordered him back into the truck. Instead, the defendant ran away. The next day, the officer recalled that he had assisted another officer in making a traffic stop of the defendant. The officer viewed a Division of Motor Vehicles photo matching the name on the traffic citation resulting from that stop, and the officer confirmed that the man in the photo was the defendant. The court ruled that the use of a single photo in this context was not impermissibly suggestive under the Due Process Clause. [Author’s note: G.S. 15A-284.52, enacted by Session Law 2007-421 (House Bill 1625) and effective for offenses committed on or after March 1, 2008, sets out statutory requirements for photo lineups.]

(1) Jury Verdict Only Supported Conviction of Misdemeanor Possession of Stolen Property When Trial Judge Submitted Charge of Felonious Possession of Stolen Goods Solely on Theory of Goods Taken Pursuant to Felonious Breaking and Entering, and Jury Acquitted Defendant of That Charge

(2) Sufficient Evidence Supported Conviction of Possession of Stolen Goods

State v. Marsh, 187 N.C. App. 235, 652 S.E.2d 744 (235 2007). The defendant was charged with felonious breaking and entering of a garage, felonious larceny of tools from the garage, and felonious possession of stolen goods pursuant to the breaking and entering. The defendant was found guilty of felonious possession of stolen goods, but not guilty of felonious breaking and entering and felonious larceny. (1) The court ruled, relying on *State v. Matthews*, 175 N.C. App.

550 (2006), that the jury verdict only supported a conviction of misdemeanor possession of stolen property when the trial judge submitted the charge of felonious possession of stolen goods solely on theory of goods taken pursuant to the felonious breaking and entering, and the jury acquitted the defendant of that charge. The jury was not charged on the alternative felony theory that the stolen property was worth more than \$1,000.00. (2) The court ruled that there was sufficient evidence to support the conviction of possession of stolen goods (tools from the garage). The defendant was in possession of a stolen truck in which the stolen tools were visible. Both the truck and the tools were reported stolen just a few hours before an officer stopped the truck. And immediately after the officer stopped the truck, the defendant ran away.

Trial Judge in Capital Jury Selection Did Not Abuse Discretion in Removing on Own Motion Prospective Juror for Cause

State v. Brower, 186 N.C. App. 397, 651 S.E.2d 390 (16 October 2007). The defendant was tried capitally and convicted of second-degree murder involving a shooting during a drug deal. The trial judge asked a prospective juror if his feelings about the circumstances of the charged offense would cause him to be partial toward one side or the other, and the juror answered unequivocally “yes.” After ascertaining that the juror’s ability to evaluate the evidence would be affected by the circumstances of the charged offense, the trial judge ruled that the juror would be unable to give both parties a fair trial and removed him for cause on his own motion. The court ruled that the trial judge did not abuse his discretion in doing so.

No Reversal of Conviction When There Was a Variance Between Indictment’s Allegation and Proof of County Where Offense Was Committed

State v. Spencer, 187 N.C. App. 605, 654 S.E.2d 69 (18 December 2007). The indictment charged that the defendant committed felony larceny in Cleveland County. The evidence at trial in Cleveland County Superior Court proved that the offense was committed in Gaston County. The court ruled that the defendant was not entitled to a reversal of his conviction. First, the defendant waived any question of venue because he failed to make a pretrial motion to dismiss for improper venue; see G.S. 15A-631 and *State v. Brown*, 85 N.C. App. 583 (1987). Second, the variance in this case between the indictment and proof at trial was not fatal; see *State v. Brown*, *supra*.

- (1) Sufficient Evidence to Support Conviction of Third-Degree Sexual Exploitation of Minor**
- (2) State Was Properly Permitted to Amend Indictments During Trial to Amend Dates of Offenses**
- (3) Trial Judge Did Not Abuse Discretion in Allowing State to Present to Jury Twelve Brief Video Clips of Children Engaged in Sexual Activity to Support the Twelve Charges of Third-Degree Sexual Exploitation of Minor**

State v. Riffe, 191 N.C. App. 86, 661 S.E.2d 899 (17 June 2008). The defendant was convicted of twelve counts of third-degree sexual exploitation of a minor under G.S. 14-190.17A. (1) The court ruled that there was sufficient evidence that the defendant (i) knew the character or content of the material, and (ii) possessed the material. An officer testified that the defendant operated a business out of a warehouse where a computer was found with images of a minor engaging in sexual activity. The SBI agent who examined the computer’s contents found twelve files saved to the computer with names indicating that they contained child pornography. The computer was registered to the defendant. A receipt signed by the defendant, a payment receipt that included the defendant’s name and address, and two deposit slips (one bearing the defendant’s signature, the

other his name), were found in and around the desk where the computer was located. All the files that were saved on the hard drive had been opened on the day the computer was seized by the officers. (2) The indictments alleged the date of each offense as August 30, 2004. Defense counsel cross-examined all witnesses whether the defendant possessed the hard drive on that date. Each witness conceded that on that date the computer was in the possession of a law enforcement agency, not the defendant. During the trial, the trial judge allowed the state to amend the dates in the indictments. The court ruled that the trial judge did not err. The court noted that time was not an element of the offenses, and a variance about time is material when it deprives the defendant of an opportunity to adequately present a defense. The court noted that the defendant did not present an alibi defense. (3) The court ruled that the trial judge did not abuse his discretion in allowing the state to present to the jury twelve brief video clips of children engaged in sexual activity to support the twelve charges. The court noted that the clips were not duplicative and were not improperly displayed in the courtroom.

State Was Properly Permitted to Amend Robbery Indictments to Delete Amount of Money Alleged to Have Been Taken

State v. McCallum, 187 N.C. App. 628, 653 S.E.2d 915 (18 December 2007). The court ruled that state was properly permitted to amend armed robbery indictments to delete the amount of money alleged to have been taken. The amendments left the allegations as the defendant took an unspecified amount of “U.S. Currency.” The court relied on cases that have ruled that the kind and value of the property taken is not material for the offense of armed robbery. Thus, the amendments did not constitute substantial alterations of the indictments.

When Felony Stalking Indictment Had Improperly Alleged Prior Stalking Conviction in Same Count as Stalking Offense and State Moved to Amend Indictment to Transfer Allegation of Prior Stalking Conviction to Separate Count to Comply With G.S. 15A-928, Trial Judge Did Not Err in Allowing Amendment

State v. Stephens, 188 N.C. App. 286, 655 S.E.2d 435 (15 January 2008). The defendant was convicted of felony stalking. The indictment originally did not comply with G.S. 15A-928 because it alleged the prior stalking conviction in the same count as the stalking offense. The court ruled, distinguishing *State v. Moses*, 154 N.C. App. 332 (2002), and *State v. Sullivan*, 111 N.C. App. 441 (1993), that the trial judge did not err in granting the state’s motion to amend the indictment to transfer the allegation of the prior stalking conviction to a separate count in the indictment.

Trial Judge Did Not Err in Not Instructing Jury on Voluntary Intoxication

State v. Muhammad, 186 N.C. App. 355, 651 S.E.2d 569 (16 October 2007). The defendant was convicted of first-degree murder. The court ruled that the trial judge did not err in denying the defendant’s request for a jury instruction on diminished capacity by voluntary intoxication. There was testimony that the defendant was drinking tequila straight from a one-gallon bottle and also drank three or four beers in approximately a one-and-one-half hour period. The court noted that the defendant had the ability to drive and communicate with other people. There was no evidence suggesting that the defendant was incapable of forming a deliberate and premeditated purpose to kill.

Insufficient Evidence to Support Convictions of Defendants For Littering When They Placed Litter in Private Dumpster, and State Failed to Prove Dumpster Was Not “Litter Receptacle” Under G.S. 14-399

State v. Hinkle, 189 N.C. App. 762, 659 S.E.2d 34 (15 April 2008). The defendants were convicted of littering under G.S. 14-399 for placing dead animals in a private dumpster behind a grocery store. The court ruled that this evidence was insufficient to support the convictions because the state failed to prove that the dumpster was not a “litter receptacle” under G.S. 14-399. The court concluded that the “[i]nto litter receptacle” language of the statute was part of the definition of the littering offense for which the state had the burden of production and proof; it was not an exception to the offense constituting an affirmative defense. The court indicated that the defendants could have been charged with second-degree trespass (the dumpster had a sign affixed to it saying, “notice, private use only, violators will be prosecuted”) and a violation of G.S. 106-403 (unlawful disposition of dead domesticated animals).

Insufficient Evidence to Support Delinquency Adjudication of Disorderly Conduct in School, G.S. 14-288.4(a)(6)

In re S.M., 190 N.C. App. 579, 660 S.E.2d 653 (20 May 2008). The court ruled that there was insufficient evidence to support the juvenile’s delinquency adjudication of disorderly conduct in a school, G.S. 14-288.4(a)(6). The state’s evidence showed that: (1) the juvenile and a friend were walking in the hall when they should have been in class; (2) when asked to stop, they instead grinned, giggled, and ran down the hall; (3) the juvenile was stopped by the school resource officer after a brief chase down the hall; and (4) a few students and teachers looked into the hall while the resource officer escorted the juvenile to the school office. The court concluded there was no evidence that the school or classroom instruction was substantially disrupted, the juvenile was aggressive or violent, or the juvenile used disturbing or vulgar language.

Trial Judge Erred by Allowing Defendant to Represent Himself at Trial for Speeding in Excess of 15 M.P.H. (Class 2 Misdemeanor) Without Complying With G.S. 15A-1242

State v. Taylor, 187 N.C. App. 291, 652 S.E.2d 741 (20 November 2007). The defendant was convicted of two charges of speeding in excess of 15 m.p.h. and appealed to superior court for trial de novo. The court ruled that the superior court trial judge erred by allowing the defendant to represent himself at trial without fully complying with G.S. 15A-1242 (defendant’s waiver of right to counsel). Although the trial judge properly informed the defendant of a maximum 60-day imprisonment for a Class 2 misdemeanor, the judge failed to properly inform the defendant that he was also subject to a maximum \$1,000.00 fine for each charge. The court noted that under G.S. 7A-451(a)(1) an indigent defendant is entitled to appointment of counsel for any case in which imprisonment or a fine of \$500.00 or more is likely to be adjudged. Because the sentencing options in this case were limited to community service and a fine, the possibility of such a fine was likely in this case, especially given that total maximum possible fine was \$2,000.00 for the two charges. The defendant would have been entitled to appointment of counsel if it had been determined that he was indigent.

- (1) Trial Judge Erred in Allowing State’s Witness to Testify Because State Had Failed to Notify Defendant Under G.S. 15A-903(a)(2) That Expert Testimony Would Be Offered Concerning Identity of Substance Found in Defendant’s Shoe**
- (2) Sufficient Evidence Supported Defendant’s Conviction of Possession of Controlled Substance on Premises of Local Confinement Facility**
- (3) Only One Conviction for Possession of Marijuana Is Allowed Because Defendant Possessed All the Marijuana Simultaneously and for Same Purpose**

(4) Defendant Is Permitted to Raise on Appeal That One Felony Alleged in Habitual Felon Indictment Was Actually a Misdemeanor Even Though in Trial Court Defendant Stipulated to Convictions in Indictment

State v. Moncree, 188 N.C. App. 221, 655 S.E.2d 464 (15 January 2008). The defendant was convicted of two misdemeanor counts of possession of marijuana and one count of possession of a controlled substance (marijuana) on the premises of a local confinement facility. After a vehicle stop in which an officer discovered a marijuana joint and a chunk of marijuana in the front passenger seat, the defendant was arrested and transported to the sheriff's department where the jail was also located. He was required to take off his shoes and socks, and marijuana was found in his left shoe. The marijuana found in the defendant's shoe was not sent to the SBI for testing. Instead, an SBI agent with education and experience in forensic analysis was allowed to offer his opinion that the substance was marijuana. (1) The court determined that the SBI agent was an expert witness based on his education, training, and experience; he was not simply a lay person offering expert testimony. The court ruled that the trial judge erred in allowing the expert to testify because the state had failed to notify the defendant under G.S. 15A-903(a)(2) that expert testimony would be offered concerning the identity of substance found in the defendant's shoe. (2) The court ruled that sufficient evidence supported the defendant's conviction of possession of a controlled substance (marijuana) on the premises of a local confinement facility. "Premises" of a local confinement facility include secured areas in which arrestees are temporarily detained for search, booking, and other purposes. After appearing before a magistrate, he had been taken before a deputy sheriff to be processed because he was under a secured bond. (3) The defendant was convicted of three marijuana offenses. One for the marijuana found in his vehicle, one for the marijuana in his shoe, and one for possessing the marijuana found in his shoe on the premises of a local confinement facility. The court ruled, distinguishing the facts in *State v. Rozier*, 69 N.C. App. 38 (1984), that only one conviction was allowed because the defendant possessed all the marijuana simultaneously and for the same purpose. The state did not present evidence that the defendant came into possession of the marijuana in his shoe after he was arrested near the vehicle. (4) After his conviction of the felony of possession a controlled substance in a local confinement facility, the defendant stipulated to the convictions alleged in the habitual felon indictment and pled guilty to being a habitual felon. On appeal, the defendant was permitted to argue (successfully) that one of the convictions, which occurred in New Jersey, was actually a misdemeanor, not a felony. The court ruled that the defendant was permitted to raise this issue for the first time on appeal because the indictment failed to confer jurisdiction on the trial court by failing to allege three predicate felonies as required by the habitual felon statute.

Trial Judge Did Not Violate Defendant's Right to Proceed Pro Se

State v. Worrell, 190 N.C. App. 387, 660 S.E.2d 183 (6 May 2008). The trial judge, after making the appropriate inquiries of the defendant, allowed the defendant to represent himself. The court appointed the defendant's previously appointed counsel as standby counsel. The judge then heard several of the pro se defendant's pretrial motions. After the defendant appeared confused during one of the motions, the judge suggested that the defendant may want standby counsel to represent him. Later, after a denial of the defendant's motion to continue the trial, the defendant voluntarily revoked his waiver of appointed counsel and informed the judge that he would be represented by his court-appointed counsel. Based on these and other facts, the court ruled that the judge did not violate the defendant's right to proceed pro se.

No Violation of Constitutional Right to Speedy Trial

State v. McBride, 187 N.C. App. 496, 653 S.E.2d 218 (4 December 2007). The court ruled that a delay of three years and seven months from arrest to trial did not violate the defendant's constitutional right to a speedy trial. The court noted that although the delay was exceptionally long, (1) the appellate record did not indicate the reason for the delay; (2) the defendant did not assert his right to a speedy trial until trial; (3) the defendant showed no prejudice from the delay; and (4) the defendant was not incarcerated during the delay.

Trial Judge Erred in Ruling That Defendant Was Sexually Violent Predator Without Compliance with Provisions in G.S. 14-208.20

State v. Zinkland, 190 N.C. App. 765, 661 S.E.2d 290 (3 June 2008). The court ruled that the trial judge erred in ruling that the defendant was a sexually violent predator without compliance with the provisions in G.S. 14-208.20. The defendant was convicted of sex offenses and, on the state's oral motion at sentencing, the trial ruled that the defendant was a sexually violent predator. There was no evidence in the appellate record of compliance with the notice, investigation, and written findings required by G.S. 14-208.20.

Arrest, Search, and Confession Issues

Dog Sniff of Vehicle Whose Driver Had Been Lawfully Detained for Traffic Stop Did Not Violate Fourth Amendment When Driver's Detention Was Prolonged for Brief Time After Officer Issued Warning Ticket and Returned License and Registration to Driver

State v. Brimmer, 187 N.C. App. 451, 653 S.E.2d 196 (4 December 2007). An officer stopped a vehicle being driven by the defendant based on information that the vehicle may have fictitious tags. When the officer realized that the defendant was suspected of being involved in narcotics, he called for a canine officer. The stopping officer decided to issue a warning ticket. About seven minutes after the stop began, the canine officer arrived as the stopping officer was walking back to the defendant's vehicle to give him the warning ticket. The officer gave the defendant his license and registration and asked if he defendant had anything illegal in the vehicle. When the defendant responded "no," the officer explained to him that he was going to have a dog walk around the car. The dog sniff took a minute and a half to two minutes. The court ruled that the defendant's Fourth Amendment rights were not violated. The court discussed cases from other jurisdictions that had been decided after *Illinois v. Caballes*, 543 U.S. 405 (2005) (walking drug dog around vehicle while driver was lawfully detained for officer's issuance of warning ticket for speeding did not violate Fourth Amendment), which have ruled that even if a traffic stop has been effectively completed, a brief period to conduct a dog sniff is not considered to have prolonged the detention beyond the time reasonably necessary for the stop. The court ruled that the brief additional time (one and one half minutes for the dog sniff) did not prolong the detention beyond that reasonably necessary for the traffic stop. Thus, reasonable suspicion was not required to justify this brief additional time while the defendant was detained.

**(1) Officer Had Reasonable Suspicion to Make Investigative Stop and Frisk of Defendant
(2) Officer's Discovery of Crack Cocaine in Film Canister During Frisk of Defendant Did Not Violate Fourth Amendment**

State v. Robinson, 189 N.C. App. 454, 658 S.E.2d 501 (1 April 2008). An officer was on bicycle patrol in a community known for drug activity. He saw a car speeding down a street, crossing over the road, and jumping the curb onto the grass. The driver then drove the vehicle behind a building out of the officer's view. The officer was informed by radio that the defendant owned the vehicle, and the officer recalled that his agency had received a tip that named this building as

being a drug location and the defendant as selling a large amount of cocaine from it. The officer went to the building and saw the defendant talking to someone inside an apartment. The officer made eye contact with the defendant, who then stopped talking. The defendant straightened up abruptly and had a surprised or frightened look on his face. The officer thought he was going to take off running. When the officer asked him what he was doing, the defendant started to back away. He turned his right side away from the officer and reached into his right pocket. The officer told him to keep his hands out of his pockets. The officer did a pat frisk and felt a cylindrical object that made a rattling sound when moved. The object felt like a film canister. The officer asked if there was crack in his pocket. The defendant responded, "no," and lowered his head and slumped his shoulders. The officer then reached in the pocket, pulled out and opened the canister, and discovered rocks of crack cocaine. (1) The court ruled that the officer had reasonable suspicion to make an investigative stop and frisk of the defendant, based on the facts set out above. (2) The court ruled the officer's discovery of the crack cocaine in the film canister during the frisk of the defendant did not violate the Fourth Amendment. Under the "plain feel" doctrine set out in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), there was substantial evidence that the contents of the film canister were immediately identifiable by the officer as crack cocaine, based on the facts set out above.

- (1) Officer Had Reasonable Suspicion to Stop Bicyclist in Early Morning Hours in Response to Report of Breaking and Entering at Nearby Residence**
- (2) Officer Did Not Violate Fourth Amendment By Handcuffing and Frisking Bicyclist During Investigative Stop**
- (3) Officer Had Probable Cause to Arrest Bicyclist for Possession of Burglary Tools**

State v. Campbell, 188 N.C. App. 701, 656 S.E.2d 721 (19 February 2008). The defendant was convicted of possession of burglary tools and possession of drug paraphernalia. (1) At approximately 3:40 a.m., officer A responded to a report of a breaking and entering in progress at a residence. While driving to the residence (he arrived within three minutes of the report), the officer saw the defendant riding a bicycle on a road that was near the reported break-in (about a quarter-mile). The officer did not see anyone else in the vicinity. The officer continued on to the dwelling without making any contact with the bicyclist. He saw that a window had been opened with a small, flathead screwdriver or a pry tool and he notified other officers of that information. Officer B, aware of officer's A report about the bicyclist and the break-in, including the type of instrument that may have been used, eventually stopped the defendant, who had a backpack and was playing with something inside of it. Officer C arrived and recognized the defendant as having an extensive history of breaking and enterings as well as being a substance abuser. Officer B handcuffed the defendant and frisked him. A small flashlight and a Swiss Army-type knife were found in the defendant's pockets. The defendant was then arrested. (1) The court ruled that the officer B had reasonable suspicion to stop the defendant, noting the defendant's proximity to the break-in, the time of day, and the absence of other people in the area. (2) The court ruled that the officer did not violate the Fourth Amendment by handcuffing and frisking the defendant during the investigative stop. Handcuffing was supported by knowledge of one of the officers that the defendant was a flight risk based on prior history. The frisk for weapons was justified by the late hour and the nature of the crime committed. The defendant could have been carrying anything from a pen that had an enclosed knife to a small handgun. (3) The court ruled that the officers had probable cause to arrest the defendant for possession of burglary tools.

Officer Had Reasonable Suspicion for DWI Stop of Defendant Operating Two-Wheeled Motorized Vehicle

State v. Jones, 186 N.C. App. 405, 651 S.E.2d 589 (16 October 2007). The court ruled that an officer had reasonable suspicion for a DWI stop of a defendant operating a two-wheeled motorized vehicle, based on the following facts (quoted language is officer's testimony as recounted by the court): The officer saw the defendant operating a motorized vehicle in a "wobbly" manner, and the defendant had to "put her foot down" on the road to negotiate a right hand turn and "almost dropped the moped." The officer equated her operation of the vehicle as she was turning to that of "a child learning to ride a bicycle" for the first time. After the defendant made the turn, the officer saw the defendant for "two to three" minutes and followed her for "two to three blocks." During this time, he watched the defendant wobble on the moped and described her operation of it as "jerky."

Officer Did Not Have Reasonable Suspicion to Make Investigative Stop of Defendant

State v. Hayes, 188 N.C. App. 313, 655 S.E.2d 726 (15 January 2008). The court ruled, relying on *State v. Fleming*, 106 N.C. App. 165 (1992), that an officer did not have reasonable suspicion to make an investigative stop of the defendant. The officer saw the defendant and his companion driving on a Sunday afternoon in an area where several prior drug-related arrests had been made. They got out of the car and walked back and forth along a nearby sidewalk. The officer looked in the car and saw a gun under the seat where the companion had been sitting. The officer did not know anything about the defendant and his companion and did not believe that either man lived in the neighborhood.

- (1) Officer Had Reasonable Grounds to Believe Petitioner Had Committed Implied Consent Offense (DWI) to Support Revocation of License**
- (2) Officer Was Not Required to Wait Thirty Minutes Before Offering Intoxilyzer Test When Petitioner Did Not Clearly Indicate That She Wanted to Call Attorney**

White v. Tippett, 187 N.C. App. 285, 652 S.E.2d 728 (20 November 2007). Petitioner's driver's license was revoked because she willfully refused to take an Intoxilyzer test after being arrested for an implied consent offense (DWI). A superior court judge upheld her license revocation and she appealed to the court of appeals. (1) The court ruled that the arresting officer had reasonable grounds to believe that the petitioner had committed the DWI to support the license revocation. The petitioner evaded a license checkpoint and the officer later detected an odor of alcohol about her (see other facts in the court's opinion). (2) The court ruled that the officer was not required to wait thirty minutes to before offering the Intoxilyzer test when the petitioner did not clearly indicate that she wanted to call an attorney.

Scope of Defendant's Consent to Search Included Strip Search

State v. Neal, 190 N.C. App. 453, 660 S.E.2d 586 (6 May 2008). The defendant was convicted of several cocaine offenses. The court ruled, relying on the standards set out in *Florida v. Jimeno*, 500 U.S. 248 (1991), and *State v. Stone*, 362 N.C. 50 (2007), that the scope of the defendant's consent to search included a strip search. An officer detected a mild odor of marijuana coming from the passenger side of a car in which the defendant was seated. The defendant consented to a pat-down search of her person to check for weapons and also consented to a search of her purse. A drug dog reacted to the passenger side. While the canine search was being conducted, the defendant acted very nervously and often put her hands in and out of the back of the waistband of her pants. A bulge was noticed in the back of her pants, and she was instructed to keep her hands away from the waistband. An officer informed the defendant that he wanted to conduct a better search to determine what was located in the back of her pants, and he had contacted a female officer for assistance. The female officer conducted a search of the defendant in the women's

bathroom, with another officer standing outside the door to prevent others from coming in. The female officer explained to the defendant that she would be conducting a more thorough search. The defendant indicated that she understood. During the search, the defendant was asked to lower her underwear and a package containing cocaine fell out. The female officer testified that the defendant was “very cooperative, extremely cooperative” during the search and never expressed any misgivings about the scope of the search.

***Miranda* Ruling Was Inapplicable to Officer’s Request for Consent Search After Defendant Had Asserted Right to Counsel**

State v. Cummings, 188 N.C. App. 598, 656 S.E.2d 329 (5 February 2008). The defendant was advised of his *Miranda* rights and waived them. Shortly after questioning began, he requested a lawyer and questioning stopped. However, an officer then asked for the defendant’s consent to search his vehicle, which he granted. The court upheld the trial judge’s denial of the defendant’s motion to suppress evidence seized as a result of the consent search. The court noted that *State v. Frank*, 284 N.C. 137 (1973), had ruled that *Miranda* warnings are inapplicable to searches and seizures. The court also stated that it found persuasive many federal court cases that have ruled that asking for a consent search is not interrogation under *Miranda*; for example, *United States v. Shlater*, 85 F.3d 1251 (7th Cir. 1996), and *United States v. McCurdy*, 40 F.3d 1111 (10th Cir. 1994).

Correctional Officer’s Statements to Prisoner During Transport from One Correctional Facility to Another Constituted “Interrogation” Under *Rhode Island v. Innis* and Thus Prisoner’s Response Was Inadmissible Because *Miranda* Warnings Had Not Been Given

State v. Rollins, 189 N.C. App. 248, 658 S.E.2d 43 (18 March 2008), *reversed on other grounds*, 363 N.C. 232, 675 S.E.2d 334 (1 May 2009). The court ruled that a correctional officer’s statements to a prisoner during transport from one correctional to another constituted “interrogation” under *Rhode Island v. Innis*, 446 U.S. 291 (1980), and thus the prisoner’s response was inadmissible because *Miranda* warnings had not been given. The officer initiated questioning related to a murder. By doing so, the officer steered the conversation to a topic which, if discussed by the defendant, was likely to elicit an incriminating statement.

No Fourth Amendment Violation Occurred When Officer Without Search Warrant Viewed Videotape Supplied by Private Person Who Had Viewed It and Decided to Give It to Law Enforcement, Even Though Officer’s Viewing of Videotape Was More Thorough Than Private Person’s Viewing

State v. Robinson, 187 N.C. App. 587, 653 S.E.2d 889 (18 December 2007). The defendant was convicted of multiple counts of first-degree statutory rape and sex offense with young girls. A videotape of the defendant’s engaging in the sexual activities was introduced at trial. The court ruled, relying on *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001), and *United States v. Simpson*, 904 F.2d 607 (11th Cir. 1990), that no Fourth Amendment violation occurred when an officer without a search warrant viewed the videotape supplied by a private person who had viewed it and decided to give it to law enforcement, even though the officer’s viewing of the videotape was more thorough than the private person. The private person’s viewing of the videotape did not violate the Fourth Amendment because he was not acting under the authority of the state. The viewing effectively frustrated the defendant’s expectation of privacy concerning the videotape’s contents, and thus the officer’s later viewing did not violate the defendant’s Fourth Amendment rights. While the private person stated that he had only viewed portions of the

videotape, his viewing “opened the container” of the videotape, and the later viewing of the entire videotape by the officer was not outside the scope of the private person’s viewing.

Probable Cause Existed to Support Search Warrant of Defendant’s Home and His Computer for Child Pornography

State v. Dexter, 186 N.C. App. 587, 651 S.E.2d 900 (6 November 2007). Officers received an email tip from a person they later verified as the defendant’s housemate. The email reported the defendant’s having child pornography on his home computer. The court noted that although the housemate later recanted her email tip, the officers confirmed the easily verified information from the tip which increased her credibility. The court reviewed the officers’ additional corroboration of the tip (see the facts set out in its opinion) and ruled that probable cause supported the issuance of a search warrant for the defendant’s home and his computer for child pornography.

- (1) Probable Cause Existed to Issue Search Warrant to Search Computer in Defendant’s Home Based on Instant Messages Between Defendant and Law Enforcement Officers Posing as Twelve-Year-Old Girl**
- (2) Impossibility Not Bar to Commission of Attempt Offenses Based on Conversations With Law Enforcement Officers Posing as Young Girl**

State v. Ellis, 188 N.C. App. 820, 657 S.E.2d 51 (19 February 2008). (1) The court ruled that probable cause existed to issue a search warrant to search a computer in the defendant’s home based on instant messages between the defendant and law enforcement officers posing as a twelve-year-old girl. The search warrant affidavit contained many sexually explicit instant message conversations in which the defendant asked to meet the “children” to engage in sexual conduct and stated that he transmitted a video of himself masturbating. Other conversations including his statements to a “mother” of young girls involving sexual contact with the girls. In other conversations the defendant admitted that he had penetrated children with his penis. (2) The court also stated that although it was not necessary to find in upholding the search warrant, the defendant’s conversations with officers posing as a young girl constituted attempted indecent liberties under G.S. 14-202.1 and attempted computer solicitation under the former version of G.S. 14-202.3. Impossibility of committing the completed offenses would not bar a person from attempting to commit these offenses; see *State v. Hageman*, 307 N.C. 1 (1982).

Court Upholds Anticipatory Search Warrant Whose Execution Was Contingent on Confidential Informant, Who Was Working Under Officers’ Directions, To Give Prearranged Signal to Officers After Informant Entered Residence and Purchased Marijuana There

State v. Stallings, 189 N.C. App. 376, 657 S.E.2d 915 (18 March 2008). The court, relying on *State v. Falbo*, 526 N.W.2d 814 (Wisc. Ct. App. 1994), and *State v. Smith*, 124 N.C. App. 565 (1996), upheld an anticipatory search warrant whose execution was contingent on a confidential informant, who was working under officers’ directions, to give a prearranged signal to the officers after the informant entered a residence and purchased marijuana there. The confidential informant during a prior one year period had purchased marijuana from the defendant at his residence. Based on the *Falbo* and *Smith* rulings, the court set out a test to consider the legality of this anticipatory search warrant and concluded that the warrant satisfied the test.

Evidence

Trial Judge Did Not Err in Allowing State to Impeach Defendant Under Rule 609 With Conviction Over Ten Years Old

State v. Muhammad, 186 N.C. App. 355, 651 S.E.2d 569 (16 October 2007). The defendant was convicted of first-degree murder based on shooting the victim with a pistol. The court ruled that the trial judge did not err in allowing the state to impeach the defendant under Rule 609 with a conviction over ten years old, a New Jersey felony aggravated assault conviction. The court stated the fact that the conviction was for a crime not involving dishonesty and was a different crime than the offense on trial was not dispositive of its admissibility. The trial judge had found that: (1) as a result of the prior conviction the defendant's status as a convicted felon made it illegal for him to possess a firearm at the time of the offense being tried; (2) the prior conviction, like the facts in the case on trial, involved eluding the police; and (3) the prior conviction manifested extreme indifference to human life and recklessly causing serious bodily injury.

- (1) Evidence of Prior Sexual Activity With Another Person Committed Eight Years Before Offenses Being Tried Was Properly Admitted Under Rule 404(b) and Rule 403**
- (2) Error to Admit Certified Copies of Defendant's Sexual Battery Convictions Under Rule 404(b)**
- (3) Error to Admit Victim Impact Evidence During Guilt-Innocence Stage of Trial**

State v. Bowman, 188 N.C. App. 635, 656 S.E.2d 638 (19 February 2008). The defendant was convicted of three counts of aiding and abetting statutory rape, three counts of indecent liberties, and two counts of second-degree kidnapping. The offenses occurred in 2005. (1) The court ruled that evidence of prior sexual activity with another person (not a victim in this trial) committed eight years before offenses being tried was properly admitted under Rule 404(b) and Rule 403. The evidence was admitted to show absence of mistake of age, specific intent in the kidnapping, and an intent for sexual gratification. Concerning temporal proximity, the defendant had been incarcerated for three years and had relocated to another state during the eight-year time period. (2) The court ruled that the trial judge erred in admitting certified copies of the defendant's sexual battery convictions under Rule 404(b). The court stated that although North Carolina appellate courts are liberal in their inclusion of prior sexual offenses for Rule 404(b) purposes, it found in this case there was little probative value in the defendant's prior convictions for any Rule 404(b) purpose because there was significant testimony concerning the facts underlying the defendant's convictions. (3) The court ruled that the trial judge erred in admitting victim impact evidence during the guilt-innocence stage of the trial because it was irrelevant to any issue in the trial.

Trial Judge Erred Under Rule 404(b) in Allowing State in Assault Trial to Cross-Examine Defendant About Two Prior Assaults of Other People

State v. Goodwin, 186 N.C. App. 638, 652 S.E.2d 36 (6 November 2007). The defendant was convicted of a felonious assault. The court ruled, relying on *State v. Morgan*, 315 N.C. 626 (1986), that the trial judge erred under Rule 404(b) in allowing the state to cross-examine the defendant about two prior assaults of other people (the state had voluntarily dismissed these assault charges). After examining the evidence in this case, the court concluded that the state's sole purpose for its cross-examination was to show the defendant's propensity for violence, which is not allowed under Rule 404(b).

Trial Judge Did Not Err Under Rule 404(b) in Admitting Evidence of Drug Transaction Occurring Seven Weeks After Drug Transaction Being Tried Based on Their Substantial Similarities

State v. Mack, 188 N.C. App. 365, 656 S.E.2d 1 (5 February 2008). The defendant was convicted of several drug offenses. The court ruled that the trial judge did not err under Rule 404(b) in admitting evidence of a drug transaction involving the defendant that occurred after the drug transaction being tried (approximately seven weeks later) based on their substantial similarities. (See the court's discussion of the substantial similarities.)

Evidence of Prior DWI Was Admissible to Show Malice Under Rule 404(b) in Second-Degree Vehicular Murder Trial

State v. Lloyd, 187 N.C. App. 174, 652 S.E.2d 299 (6 November 2007). The defendant was convicted of two counts of second-degree murder, felony fleeing to elude officers, and other offenses, based on a high-speed chase by officers in which the defendant crashed his vehicle into another vehicle, killing its two passengers. The state was allowed to introduce evidence of a DWI committed by the defendant about five months earlier and his conviction of the DWI. The trial judge limited the evidence under Rule 404(b) to show the defendant's knowledge that his license was suspended when he committed the second-degree murders and to show malice. The court ruled that the evidence was properly admitted.

Trial Judge Did Not Err Under Rule 412(b)(1) or 412(b)(3) in Excluding Evidence of Victim's Prior Sexual History in Prosecution for First-Degree Sexual Offense

State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701 (4 March 2008). The defendant was convicted of first-degree sexual offense. The defendant denied having a sexual encounter with the victim and did not raise consent as a defense. The court ruled that the trial judge did not err under Rule 412(b)(3) in excluding evidence of the victim's prior sexual history with others and did not err under Rule 412(b)(1) in excluding evidence of the victim's prior sexual history with the defendant. Such evidence under these subdivisions is only relevant to the issue of consent between a victim and a defendant.

Statement Made by Another Person That Was Included in Defendant's Statement to Officer Was Not Hearsay Because It Was Not Offered to Prove Truth of Matter Asserted

State v. Hazelwood, 187 N.C. App. 94, 652 S.E.2d 63 (6 November 2007). The defendant was convicted of second-degree vehicular murder in which he crashed his vehicle into a tree while attempting to elude chasing officers, killing his two passengers. The defendant gave a statement to an officer in which he said that before the crash, one of the passengers told the defendant to stop, but the defendant told her he was not going to jail tonight. The court ruled that the statement by the passenger was not hearsay within hearsay because the passenger's statement was not offered to prove the truth of the matter asserted (that the passenger wanted the defendant to stop the car). Instead, it was offered to prove that the defendant acted with malice (the defendant's continued high-speed flight despite the passenger's request to stop).

Defendant's Statement to His Spouse Was Not Within Marital Communications Privilege Because It Was Made Within Known Hearing of Third Person

State v. Kirby, 187 N.C. App. 367, 653 S.E.2d 174 (4 December 2007). The court ruled that a defendant's statement to his spouse was not within the marital communications privilege because it was made within the known hearing of a third person. The defendant yelled to his spouse in a voice loud enough so anyone in the house could have heard him, and he knew that a third person was in the house. The court also rejected the defendant's argument, based on 1918 and 1929

rulings that predated *State v. Freeman*, 302 N.C. 591 (1981), that only the third person could testify concerning the defendant's statement. The court ruled that the spouse could testify as well.

- (1) Statements by Dying Shooting Victim to Private Citizen Were Not Testimonial Under *Crawford v. Washington*, 541 U.S. 36 (2004)**
- (2) Dying Declaration Is Exception to Defendant's Right to Confrontation Under Sixth Amendment**

State v. Calhoun, 189 N.C. App. 166, 657 S.E.2d 424 (4 March 2008). The defendant was convicted of first-degree murder. The victim was shot in witness A's home when she was not there. Witness A and a law enforcement officer responded to the shooting and arrived at the home at the same time. The victim lay motionless on the living room floor. Witness A asked the victim who had shot him, and the victim told her it was "Chico" and "Worm." Witness A asked the victim to squeeze her hand to confirm that information, and the victim did so. The officer witnessed the identification. (1) The court ruled that the statements by the dying shooting victim to witness A, a private citizen, were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). (2) The court alternatively ruled, relying on cases from other jurisdictions, that a dying declaration is an exception to a defendant's right to confrontation under the Sixth Amendment.

- (1) Murder Victim's Statements to Law Enforcement Officers Were Admissible as Dying Declarations Under Rule 804(b)(2)**
- (2) Dying Declaration Is Exception to Defendant's Right to Confrontation Under Sixth Amendment**

State v. Boddien, 190 N.C. App. 505, 661 S.E.2d 23 (20 May 2008). The defendant was convicted of second-degree murder. (1) The court ruled that the murder victim's statements to law enforcement officers near the scene of the murder and at a hospital were admissible as dying declarations under Rule 804(b)(2). There was sufficient evidence that the victim believed his death was imminent. Three and a half minutes after the victim called 911, he told his mother that he was going to die. The victim had been shot five times and was bleeding. He was taken to the hospital, received medical treatment in the emergency room, and later died the same day. (2) The court ruled, relying on the ruling in *State v. Calhoun*, 189 N.C. App. 166, 657 S.E.2d 424 (4 March 2008), that a dying declaration is an exception to a defendant's right to confrontation under the Sixth Amendment.

No *Crawford v. Washington*, 541 U.S. 36 (2004), Violation When SBI DNA Expert Testified in Place of Another SBI DNA Expert Who Had Analyzed Sample in Rape Kit

State v. Little, 188 N.C. App. 152, 654 S.E.2d 760 (15 January 2008). The court ruled, distinguishing *State v. Cao*, 175 N.C. App. 434 (2006), that there was no *Crawford v. Washington*, 541 U.S. 36 (2004), violation when an SBI DNA expert testified in place of another SBI DNA expert who had analyzed the sample in a rape kit. The testifying expert confirmed that she could review the other expert's work, check the technical aspects of it, and verify his findings without conducting a new analysis of the sample.

Trial Judge Did Not Err in Prohibiting Defense-Proffered Evidence of Non-Testifying Accomplice's Guilty Plea

State v. Baskin, 190 N.C. App. 102, 660 S.E.2d 566 (6 May 2008). The court ruled, relying on *State v. McCullough*, 50 N.C. App. 184 (1980) (acquittal of third persons arrested with defendant was not relevant evidence at defendant's trial), and other cases, that the trial judge did not err in

prohibiting defense-proffered evidence of a non-testifying accomplice's guilty plea. The evidence was irrelevant to any issue at the defendant's trial.

Collateral Estoppel Did Not Bar State's Prosecution of Charges After Trial Judge Had Dismissed Related Charges for Insufficient Evidence at Prior Trial

State v. Spargo, 187 N.C. App. 115, 652 S.E.2d 50 (6 November 2007). The court ruled that the state was not collaterally estopped from prosecuting several counts of obtaining property by false pretenses after a trial judge had dismissed other counts of the same offense for insufficient evidence at a prior trial. It was not absolutely necessary to the defendant's convictions in the second trial that the second jury find against the defendant on an issue on which the first jury (or, in this case, the judge) found in his favor. (See the court's discussion of the facts underlying all these charges.)

Sentencing

- (1) Trial Court Erred in Sentencing Habitual Felon to Less Than Required Minimum and Maximum Terms of Imprisonment for Class C Felon, Prior Record Level IV**
- (2) Trial Court Erred in Requiring Habitual Felon Sentence to Run Concurrently with Federal Prison Sentence That Defendant Was Then Serving**

State v. Watkins, 189 N.C. App. 784, 659 S.E.2d 58 (15 April 2008). The defendant pled guilty to financial card theft and habitual felon status. The trial judge sentenced him as a Class C felon with Prior Record Level IV to a minimum term of 64 months and a maximum term of 86 months. The judge also entered findings of extraordinary mitigation and ordered the sentence to run concurrently with the federal sentence the defendant was then serving. (1) The court ruled that the state had a right of appeal from the trial court's sentencing the defendant below the statutory minimum and maximum sentences. The court then ruled that the trial court erred in sentencing the defendant below the required minimum and maximum sentences, which for a Class C felony in Prior Record Level IV was 80 months for the minimum and 107 months for the maximum. (2) The court ruled that the state did not have a right of appeal from the trial judge's imposing a concurrent sentence for habitual felon. However, the court suspended the appellate rules and elected to treat the state's appeal as a petition for a writ of mandamus, for the reasons set out in *State v. Ellis*, 361 N.C. 200 (2007). The court ruled that defendant's concurrent sentence was contrary to G.S. 14-7.6, and the court directed the trial judge on remand to enter a judgment that comports with that statute.

No Error in Calculating Prior Record Level For Murder and Attempted Murder Convictions to Assign Points to Both Prior Felony Drug Conviction and To Prior Conviction of Possession of Firearm by Felon, in Which Felony Drug Conviction Was Element of Possession of Firearm by Felon

State v. Goodwin, 190 N.C. App. 570, 661 S.E.2d 46 (20 May 2008). The court ruled that there was no error in calculating the defendant's prior record level for second-degree murder and attempted first-degree murder convictions to assign points to both a prior felony drug conviction and to a prior conviction of possession of firearm by felon, in which the felony drug conviction was an element of possession of firearm by felon. The court reasoned, distinguishing *State v. Gentry*, 135 N.C. App. 107 (1999), that possession of firearm by felon is a separate substantive offense from the defendant's prior felony drug conviction on which his status as a felon was based.

Trial Judge Did Not Err in Finding Virginia Conviction to Be Substantially Similar to North Carolina Class A1 or 1 Misdemeanor and Assigning One Point in Calculating Defendant's Prior Record Level

State v. Sapp, 190 N.C. App. 698, 661 S.E.2d 304 (3 June 2008). The court ruled that the trial judge did not err in finding a Virginia conviction to be substantially similar to a North Carolina Class A1 or 1 misdemeanor and assigning one point in calculating the defendant's prior record level. The Virginia conviction involved an assault on an employee of a secure juvenile facility while the defendant was confined there and the employee was attempting to break up a fight between prisoners. The court found the Virginia conviction to be "substantially similar" [statutory wording in G.S. 15A-1340.14(e)] to assault on a governmental employee under G.S. 14-33(c)(4), a Class A1 misdemeanor. The court noted that the Virginia statute need not contain the precise wording of the North Carolina statute to meet the "substantially similar" standard. Thus, the absence of language in the Virginia statute concerning the discharge of an official duty was not dispositive.

- (1) Defendant's Stipulation at Sentencing Hearing That Ohio Convictions Were Substantially Similar to North Carolina Offenses Was Ineffective Because Sentencing Judge Must Make Finding**
- (2) Trial Judge Did Not Err in Using Fact That Defendant Was on Probation and Pretrial Release When He Committed Offenses To Increase Both His Prior Record Level and To Aggravate His Sentence**

State v. Moore, 188 N.C. App. 416, 656 S.E.2d 287 (5 February 2008). The court ruled: (1) the defendant's stipulation that his Ohio convictions were substantially similar to North Carolina offenses was ineffective because the sentencing judge must make that finding, based on the ruling in *State v. Palmateer*, 179 N.C. App. 579 (2006); and (2) the trial judge did not err in using the fact that the defendant was on probation and pretrial release when he committed the offenses to increase both his prior record level and to aggravate his sentence.

- (1) Trial Judge Did Not Err in Awarding Restitution**
- (2) Court Sets Out Allocation of Burdens of Proof Concerning Award of Restitution**

State v. Tate, 187 N.C. App. 593, 653 S.E.2d 892 (18 December 2007). (1) The court ruled that the trial judge did not err in awarding restitution in the amount of \$40,588.60 for damages resulting from felonious assault and other offenses for which the defendant was convicted. The court noted that although the trial judge did not make specific findings of fact concerning the defendant's ability to pay restitution, such findings were not required [see G.S. 15A-1340.36(a)], and it was clear from the record that the trial judge considered the defendant's financial ability to pay restitution. The defendant failed to present evidence showing that he would not be able to make the required restitution payments. (2) Concerning the allocation of burdens of proof for an award of restitution, the court agreed with an analogous federal statute. The burden proof on showing the amount of loss is on the state. The burden of proof on showing the defendant's financial resources is on the defendant as well as the financial needs of the defendant's dependents.

Trial Court Had Jurisdiction to Revoke Probation After Probation Period Would Have Otherwise Ended Because G.S. 15A-1344(d) Provides That Probation Period Is Tolerated When Probationer Has Pending Criminal Charges That Upon Conviction Could Result in Revocation of Probation

State v. Patterson, 190 N.C. App. 193, 660 S.E.2d 155 (6 May 2008). The court ruled that the trial court had jurisdiction to revoke the defendant's probation after the probation period would have otherwise ended because G.S. 15A-1344(d) provides that the probation period is tolled when a probationer has pending criminal charges that upon conviction could result in revocation of probation. During the period of probation, the probation officer filed probation revocation reports about the pending charges and that their disposition was not expected until after the probationary period had ended. (See the court's detailed discussion of the facts in this case.)

Trial Judge Erred in Awarding Restitution

State v. Southards, 189 N.C. App. 152, 657 S.E.2d 419 (4 March 2008). The defendant was convicted of felonious possession of stolen goods. The court ruled that the trial judge erred in awarding restitution to the victim. The defendant could not be required to make restitution for the victim's unrecovered tools or lost wages when those losses were neither related to the criminal offense for which the defendant was convicted nor supported by evidence in the record.

Aggravating Factor (Taking Property of Great Monetary Value) Was Property Found for Class C Felony Embezzlement

State v. Cobb, 187 N.C. App. 295, 652 S.E.2d 699 (20 November 2007). The court ruled, relying on *State v. Simmons*, 65 N.C. App. 804 (1984), and other cases, that the aggravating factor of taking property of great monetary value [G.S. 15A-1340.16(d)(14)], was properly found for two counts of Class C felony embezzlement, which requires proof of loss of \$100,000 or more. One count involved a loss of \$404,436.00 and the other count a loss of \$296,901.00.

Capital Case Issues

When Jury During Its Deliberations in Capital Case Sent Written Note to Trial Judge With Questions About Jury Instructions, Trial Judge's Failure to Reveal Contents of Note to Defendant Violated Defendant's Unwaivable State Constitutional Right to Be Present at All Stages of Trial

State v. Smith, 188 N.C. App. 207, 654 S.E.2d 730 (15 January 2008). The jury during its deliberations in a capital case sent a written note to the trial judge with questions about the jury instructions. The judge did not share the contents of the note with the state, defense counsel, or the defendant. The court ruled the trial judge's failure to reveal the contents of the note to the defendant violated the defendant's unwaivable state constitutional right to be present at all stages of a capital trial.