

Criminal Case Law Update

Including Significant Cases Decided October 4, 2016 through June 6, 2017
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Criminal Procedure

Capacity to Proceed

[*State v. Mobley*](#), ___ N.C. App. ___, 795 S.E.2d. 437 (Jan. 17, 2017). In this drug trafficking case, the trial court erred by failing to appoint an expert to investigate the defendant’s competency to stand trial. Prior to the start of trial, defense counsel expressed concern about the defendant having fallen asleep in the courtroom. The trial court conducted a discussion with the defendant and defense counsel and ruled that the defendant was competent to proceed to trial. The colloquy revealed, among other things, that the defendant was having difficulty hearing and understanding the judge and that the defendant took over 25 medications daily in connection with a heart condition and being diagnosed as a bipolar schizophrenic. Defense counsel related never having seen the defendant so lethargic. Although the defendant seemed to understand the charges against him and possible sentences he might receive, he had little memory of meeting with counsel prior to trial. After the trial began, defense counsel informed the court that the defendant was sleeping during the trial. The court concluded that the evidence indicated a significant possibility at the time of trial that the defendant was incompetent, requiring the trial

court to appoint an expert to ascertain whether the defendant was competent to proceed to trial. The court noted that its holding was based on “long-standing legal principles” and that it “should not be interpreted as articulating a new rule or standard.” It was careful to state that the trial court is not required to order a competency evaluation in every case where a criminal defendant is drowsy or suffers from mental or physical illness.

Collateral Estoppel

[*State v. Williams*](#), ___ N.C. App. ___, 796 S.E.2d 823 (Mar. 7, 2017). The trial court properly applied the doctrine of collateral estoppel when it denied the defendant’s second motion to suppress. The defendant was in possession of a bag containing two separate Schedule I substances, Methydone and 4-Methylethcathinone. He was charged with possession with intent to manufacture, sell or deliver Methydone (Charge 1) and with possession with intent to manufacture, sell or deliver Methylethcathinone (Charge 2). Before trial he filed a motion to suppress, which was denied. He was convicted on both counts. On appeal, the court affirmed his conviction on the first charge but vacated the second because of a defective indictment. The State then re-indicted on the second charge. The then defendant filed a motion to suppress that was functionally identical to the motion to suppress filed before his first trial. The trial court denied the second motion based on the doctrine of collateral estoppel. The defendant was tried and found guilty. The trial court properly applied the doctrine of collateral estoppel when it denied the defendant’s second motion where the parties and the issues raised by the motions were the same; the issues were raised and fully litigated during the hearing on the first motion; the issue was material and relevant to the disposition of the prior action; and the trial court’s determination was necessary and essential to the final judgment.

Colloquy with Defendant Re: Right to Testify

[*State v. Little*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this armed robbery case, the trial court did not err in its colloquy with the defendant about the right to testify. The trial court conducted a colloquy with the defendant in which it warned the defendant that he would be subject to cross-examination if he testified at trial, including cross-examination about his prior convictions. On appeal, the defendant argued that the trial court’s instructions impermissibly chilled his right to testify and incorrectly advised him regarding the scope of cross-examination pertaining to his prior convictions. Reviewing the trial court’s colloquy with the defendant, the court disagreed, finding the advisement was consistent with the use of prior convictions to impeach under Rule 609 and that the trial court accurately informed the defendant about the limiting instruction that would be provided with respect to his prior convictions.

Counsel Issues

Absolute Impasse

[*State v. Floyd*](#), ___ N.C. ___, 794 S.E.2d 460 (Dec. 21, 2016). The court reversed the Court of Appeals’ determination that the defendant was entitled to a new trial based on the trial court’s alleged failure to recognize and address an impasse between the defendant and his attorney during trial. The court concluded that the record did not allow it to determine whether the defendant had a serious disagreement with his attorney regarding trial strategy or whether he

simply sought to hinder the proceedings. It remanded for entry of an order dismissing the defendant's ineffective assistance of counsel claim without prejudice to his right to assert it in a motion for appropriate relief.

State v. Ward, ___ N.C. App. ___, 792 S.E.2d 579 (Nov. 1, 2016). Where the defendant and counsel reached an impasse regarding whether to cross-examine the State's DNA analyst witness on an issue of sample contamination in this child sexual assault case, the trial court did not violate the defendant's Sixth Amendment rights by ruling that it would be improper for counsel to pursue a frivolous line of questioning. Prior to the witness's testimony, the trial court heard ex parte from the defendant and his lawyer about their disagreement regarding a proposed line of cross-examination of the analyst. The trial court ruled in favor of defense counsel and the trial resumed. The absolute impasse rule does not require an attorney to comply with the client's request to assert frivolous or unsupported claims. Here, although the defendant wanted to challenge the analyst with respect to contamination, there was no factual basis for such a challenge. The court went on to conclude that even if the defendant's Sixth Amendment rights had been violated, in light of the overwhelming evidence of guilt the error was harmless beyond a reasonable doubt.

Waiver of Right to Counsel

State v. Curlee, ___ N.C. App. ___, 795 S.E.2d 266 (Dec. 20, 2016). The trial court erred by requiring the defendant to proceed to trial pro se. On February 7, 2013, the defendant was determined to be indigent and counsel was appointed. On May 30, 2014, the defendant waived his right to assigned counsel, indicating that he wished to hire a private lawyer, Mr. Parker. Between May 2014 and May 2015 the trial was continued several times to enable the defendant to obtain funds to pay Parker. On May 11, 2015, Parker informed the court that the defendant had not retained him and that if the court would not agree to continue the case, Parker would move to withdraw. Although the defendant was employed when he first indicated his desire to hire Parker, he subsequently lost his job and needed time to obtain funds to pay counsel. The trial court continued the case for two months, to give the defendant more time to obtain funds to pay Parker. On June 29, 2015, Parker filed a motion to withdraw for failure to pay. On July 6, 2015, after the trial court allowed Parker to withdraw, the defendant asked for new counsel. The trial court declined this request, the case proceeded pro se, and the defendant was convicted. The court found that the trial court's ruling requiring the defendant to proceed pro se was based in part on the ADA's false representation that at the May 11, 2015 hearing the defendant was asked if he wanted counsel appointed, was warned that the case would be tried in July regardless of whether he were able to hire Parker, and was explicitly warned that if he had not retained counsel by July he would be forced to proceed to trial pro se. The court concluded: "None of these representations are accurate." Thus, the court held that the trial court's denial of defendant's request for appointed counsel and its ruling that the defendant had waived the right to appointed counsel were not supported by competent evidence.

State v. Faulkner, ___ N.C. App. ___, 792 S.E.2d 836 (Nov. 15, 2016). Because the trial court properly conducted the inquiry required by G.S. 15A-1242, the court rejected the defendant's argument that his waiver of counsel, in connection with a probation violation hearing, was not knowing and voluntary. In addition to finding that the trial court's colloquy with the defendant

established that the waiver was knowing and voluntary, the court noted that its conclusion was consistent with G.S. 7A-457(a). That provision states that a waiver of counsel shall be effective only if the court finds that the indigent person acted with “full awareness of his rights and of the consequences of the waiver,” and that in making such a finding the court must consider among other things the person’s age, education, familiarity with the English language, mental condition and complexity of the crime charged. Here, the defendant was 23 years old, spoke English, had a GED degree, had attended college for one semester, and had no mental defects of record; additionally, there were no factual or legal complexities associated with the probation violation. The defendant described himself as a “Moorish National” and a “sovereign citizen.” The court rejected the defendant’s argument that certain responses to the judge’s statements during the waiver colloquy indicated that the waiver was not knowing and voluntary. The court noted that a defendant’s contention that he does not understand the proceedings is a common aspect of a sovereign citizen defense.

Ineffective Assistance of Counsel

Buck v. Davis, 580 U.S. ___, 137 S. Ct. 759 (Feb. 22, 2017). In this Texas capital murder case, the defendant’s Sixth Amendment right to effective assistance of counsel was violated when his lawyer introduced evidence from a psychologist that the defendant was statistically more likely to act violently because he is black. A Texas jury convicted the defendant of capital murder. Under state law, the jury could impose a death sentence only if it found that the defendant was likely to commit acts of violence in the future. The defendant’s attorney called a psychologist to offer his opinion on that issue. The psychologist testified that the defendant probably would not engage in violent conduct. But he also stated that one of the factors pertinent in assessing a person’s propensity for violence was his race, and that the defendant was statistically more likely to act violently because he is black. The jury sentenced the defendant to death. With respect to first prong of the *Strickland* attorney error standard, the Court held that counsel’s performance fell outside the bounds of competent representation. Counsel knew that the expert’s report reflected the view that the defendant’s race disproportionately predisposed him to violent conduct; he also knew that the principal point of dispute during the trial’s penalty phase was whether the defendant was likely to act violently in the future. Counsel nevertheless called the expert to the stand and specifically elicited testimony about the connection between the defendant’s race and the likelihood of future violence. Additionally counsel put into evidence the expert’s report stating that the defendant’s race, “Black,” suggested an “[i]ncreased probability” as to future dangerousness. This report “said, in effect, that the color of [the defendant’s] skin made him more deserving of execution. It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race.” The Court went on to hold that the second prong of the *Strickland* test—prejudice--also was satisfied, finding that it was reasonably probable that the proceeding would have ended differently had counsel rendered competent representation. It noted that the evidence at issue was “potent” and “appealed to a powerful racial stereotype—that of black men as ‘violence prone.’” The expert’s opinion “coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing.” The court concluded: “the effect of this unusual confluence of factors was to provide support for making a decision on life or death on the basis of race.” This effect was heightened because the witness took the stand as a medical expert, “bearing the court’s imprimatur.” The Court rejected the notion that any mention of race

was de minimis, concluding “Some toxins can be deadly in small doses.” [This case also addresses a number of procedural issues that apply in federal court; because they are not relevant to state court proceedings they are not summarized here.]

State v. Moore, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this case involving charges of fleeing to allude arrest, resisting an officer, driving without a license and other charges, the trial court did not err by denying the defendant’s motion for a continuance. Following the defendant’s arrest on May 22, 2015 attorney Doyle was appointed to represent the defendant. The defendant was later charged with first-degree murder in an unrelated case and attorney Mannette was appointed to represent him on that charge. On March 9, 2016, the defendant’s homicide case was continued until September 2016. Attorney Doyle was present at the hearing and moved the trial court to allow him to withdraw as counsel on the charges at issue in this case and appoint Ms. Mannette. The prosecutor informed the court that the charges were scheduled for trial on April 18, 2016. Mannette said that she believed the charges were headed towards resolution but that she would not be prepared to try the case in a month. The trial court indicated that the “bottom line” was that the case was “going to get continued” if the State was prepared to proceed to trial on April 18th. When the case was called for trial on April 18, 2006, Mannette orally moved for a continuance, explaining that when she took the case she indicated that if the parties could not reach a non-trial disposition she would not be prepared to try the case. Defense counsel acknowledged that she had received discovery a month earlier. Counsel stated that she had not interviewed a witness or conducted legal research to support her pretrial motions. The trial court denied the continuance motion. On appeal the defendant argued that the denial of his motion to continue deprived him of his constitutional right to effective assistance of counsel because counsel had insufficient time to prepare a defense. The court rejected this argument. First, it rejected the defendant’s argument that the trial court’s remark made at the March 9th hearing constituted a judgment or order that could not be overruled by another judge. The court noted that an order rendered in open court is not enforceable until it is entered, that is, reduced to writing, signed by the judge, and filed with the clerk of court. Thus, the oral statement by the judge, which was not reduced to writing or entered as an order or judgment, was not a judgment or order that may not be overruled by another judge. Second, the court rejected the defendant’s argument regarding his need for additional time to prepare a defense. At the pretrial hearing, defense counsel stated that there was a lay witness she had not interviewed, a suppression motion for which she had not conducted the necessary research, and other unspecified motions in limine that needed to be filed and argued. Defense counsel did not identify the witness or articulate any material factual issue upon which the witness might testify. Nor did counsel offer an explanation, other than her reliance on the prior judge’s comment at the earlier hearing, for failure to interview the witness, conduct the necessary research, or file a properly supported written motion to continue. Additionally, the trial was not unusual or complex. The court thus concluded that the defendant had failed to establish that the denial of his continuance motion violated his constitutional rights.

State v. Hyman, ___ N.C. App. ___, 797 S.E.2d 308 (Feb. 21, 2017), *writ of certiorari allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 3, 2017). Over a dissent, the court reversed the trial court’s order denying the defendant’s motion for appropriate relief (MAR). In the defendant’s capital murder trial, he was represented by lawyers Smallwood and High. When the State called eyewitness Speller to testify, Smallwood told High that she previously represented Speller in an

unrelated probation matter and had spoken to him about the defendant's case. Smallwood's notes from the conversation undermined Speller's trial testimony. Smallwood attempted to cross-examine Speller about their conversation to show that Speller had previously identified another person as the shooter. Speller conceded that he spoke with Smallwood but denied making statements reflected in her notes. The trial court did not allow Smallwood to show Speller her notes or to admit the notes into evidence. The defendant was convicted and appealed. The appellate court remanded for evidentiary hearing on the attorney conflict of interest claim. The MAR judge concluded that Smallwood's representation of the defendant was not adversely affected by her previous representation of Speller. The Court of Appeals affirmed. The defendant then filed a writ of habeas corpus in Federal District Court. The federal court concluded that the defendant was entitled to relief and vacated his conviction, concluding that Smallwood's actual conflict of interest adversely affected her performance. The State appealed to the Fourth Circuit which ended up staying the appeal to provide the North Carolina courts with an opportunity to weigh in on the relevant issues. The defendant then filed a MAR asserting that his sixth amendment right to effective, conflict free counsel was violated because one of his lawyers was also a crucial defense witness who did not testify due to her conflict of interest. At a hearing on the MAR the defendant could not produce Smallwood, who had been disbarred for separate misconduct and had left the state. The trial court denied the MAR concluding that any evidence Smallwood would have offered was inadmissible and that the defendant had presented no credible evidence that the conversation between Smallwood and Speller ever took place or that Smallwood's notes were made contemporaneously with the conversation. The court erred by concluding that the defendant's claim had no evidentiary support. It was undisputed that at the time of trial Smallwood had evidence that Speller gave a prior inconsistent statement concerning the shooter's identity. The exculpatory witness claim raised in the defendant's MAR was whether Smallwood's failure to withdraw and testify as to that alleged prior inconsistent statement was ineffective assistance of counsel. Evidence that Smallwood was privy to a conversation in which Speller identified the shooter as someone other than the defendant would have been both relevant and material had it been offered at trial. It was thus error to conclude that the claim was meritless for lack of evidentiary support. The trial court also erred by concluding that the defendant could demonstrate neither deficient performance nor prejudice in connection with his *Strickland* ineffective assistance of counsel claim. Citing precedent, the court analyzed the defendant's claim under the *Strickland* attorney error standard rather than under the *Cuyler* conflict of interest standard. The court went on to reject the MAR judge's conclusion that Smallwood's testimony would not have been admissible at trial, noting that "It cannot seriously be disputed that the identity of the shooter was a material issue in defendant's murder trial." Smallwood, who possessed evidence of Speller's prior inconsistent statement regarding the shooter's identity was not bound to accept Speller's answers on cross-examination. Smallwood's testimony, had it been offered, would have been admissible to impeach Speller. The court continued, holding that contrary to the trial court's conclusion, "we do not believe such exculpatory evidence would have been inconsequential so as to justify Smallwood's failure to withdraw." The court concluded that by failing to withdraw and testify, Smallwood's conduct fell below an objective standard of reasonableness. The court further held that the defendant satisfied the requisite showing of prejudice.

[*State v. Cholon*](#), ___ N.C. App. ___, 796 S.E.2d 504 (Feb. 7, 2017). In this case, involving charges of statutory sexual offense and taking indecent liberties with a child, no *Harbison* error

occurred when defense counsel admitted some elements of the charged offenses. In his closing argument to the jury, defense counsel conceded that the victim was a minor and that the defendant's oral and written confessions to the police were true. In those statements, the defendant admitted engaging in sexual activity with the victim, who had represented himself to be 18 years old. With respect to those statements, counsel argued to the jury that the defendant was truthful with the police. The court rejected the defendant's argument that this constituted a *Harbison* error, reasoning that counsel "only implicitly conceded some--but not all--of the elements of each charge and urged jurors to find Defendant not guilty of each charge." The court noted that *Harbison* and its progeny applies when counsel concedes the defendant's guilt to either the offense charged or to a lesser included offense without the defendant's consent. It continued, stating that the courts have distinguished cases, like this one, where counsel did not expressly concede guilt or admitted only certain elements of the charged offense. Finally, the court held that even if the defendant could establish that counsel's conduct was deficient under the *Strickland* standard, he could not show prejudice in light of the overwhelming evidence of guilt.

[*State v. Hunt*](#), ___ N.C. App. ___, 792 S.E.2d 552 (Nov. 1, 2016). (1) Counsel did not render ineffective assistance by failing to object to a witness's expert testimony. The expert testified that the fire was intentionally set with the use of an accelerant. The defendant's trial defense did not challenge this issue but rather focused on whether the State had proved that the defendant was the perpetrator. In light of this, counsel made a reasonable, strategic decision not to object to the witness's testimony. (2) Counsel did not render ineffective assistance by failing to renew a motion to dismiss at the close of all of the evidence. The defendant could not show prejudice where such a motion, had it been made, would have been denied.

Discovery

[*State v. Mylett*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this assault on a government officer case, no *Brady* violation occurred when recordings from police body cameras were reviewed by the defendant's original trial counsel and then destroyed pursuant to the police department's evidence retention schedule. The defendant's original trial counsel reviewed the video recordings but opted not to obtain copies or use the footage at the defendant's district court trial. The defendant was convicted and appealed for trial de novo to superior court. In the meantime, the original recordings were destroyed in accordance with the police department's evidence retention schedule. The defendant's new trial counsel moved for a continuance to allow time for counsel to prepare a motion to dismiss, arguing that such a remedy was warranted because the recordings had been destroyed and thus were unavailable for use by the defense. The trial court denied the motion. The defendant was convicted and appealed. The court stated: "Defense counsel's decision not to make or preserve copies of the videos — regardless of counsel's reason for declining to do so — cannot serve as a basis for arguing a *Brady* violation was committed by the State."

[*State v. Mendoza*](#), ___ N.C. App. ___, 794 S.E.2d 828 (Dec. 6, 2016). In this child sexual assault case, the court rejected the defendant's argument that the trial court erred by permitting certain testimony by the State's experts because of a discovery violation. The experts included Blair Cobb, a licensed clinical social worker and pediatric therapist who testified as an expert in child

counseling, and Cynthia Stewart, a social worker who testified as an expert in interviewing children in cases of suspected abuse or neglect. The defendant argued that the State violated G.S. 15A-903(a)(2) by not timely providing Stewart's report and Cobb's records and that as a result, he was prejudiced by lack of time to adequately prepare for cross-examination. The State served notice of expert witnesses on November 24, 2014, listing Stewart and Cobb, and indicating that the State would make the expert's reports available during discovery and that their CVs would be forthcoming. The State provided initial discovery on December 2, 2014, including Stewart's report, prepared after her interview with the child and stating her impressions and recommendations as well as a 30-page report by Cobb regarding her visits with the child and comprehensive clinical assessment. On January 29, 2015, the defendant filed a motion for additional materials, requesting that each expert prepare a meaningful and detailed report. At a hearing on February 2, 2015, the trial court instructed the State to have Stewart and Cobb couch their diagnoses in the form of opinions. In mid-February 2015, the State provided further discovery, including additional therapy notes from Cobb and a revised letter from Cobb outlining the basis of her opinion, as well as a DVD recording of Stewart's interview with the child. The defendant then asked the trial court to either exclude the expert opinions or give the defense additional time to prepare. The trial court continued the matter until April 13, 2015. On these facts, the court rejected the defendant's argument that he did not have time to adequately prepare to effectively cross-examine the experts.

Double Jeopardy

[*Bravo-Fernandez v. United States*](#), 580 U.S. ___, 137 S. Ct. 352 (Nov. 29, 2016). The issue-preclusion component of the Double Jeopardy Clause does not bar the Government from retrying the defendants after a jury has returned irreconcilably inconsistent verdicts of conviction and acquittal and the convictions are later vacated on appeal because of error in the judge's instructions on related to the verdicts' inconsistency.

[*State v. Reynolds*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 19, 2017). In this sex offender registration case, double jeopardy barred convictions under both G.S. 14-208.11(a)(2) and (a)(7). The defendant was convicted of two separate crimes: one pursuant to G.S. 14-208.11(a)(2) (failure to notify the last registering sheriff of a change in address) and one pursuant to 14-208.11(a)(7) (failure to report in person to the sheriff's office as required by, here, G.S. 14-208.9(a) (in turn requiring that a person report in person and provide written notice of an address change)). The court noted that it has previously held that the elements of an offense under G.S. 14-208.11(a)(2) and under G.S. 14-208.9(a) are the same: that the defendant is required to register; that the defendant changed his or her address; and that the defendant failed to notify the last registering sheriff of the change. It concluded: "Because in this case North Carolina General Statute § 14-208.11(a)(2) and (a)(7) have the same elements, one of defendant's convictions must be vacated for violation of double jeopardy." The court went on to reject the State's argument that the legislature intended to allow separate punishment under both subsection (a)(2) and (a)(7).

[*State v. Schalow*](#), ___ N.C. App. ___, 795 S.E.2d 567 (Dec. 20, 2016), *review allowed*, ___ N.C. ___, 796 S.E.2d 791 (Mar. 16, 2017). The court vacated the defendant's attempted murder conviction on double jeopardy grounds. The defendant was originally charged and indicted for

attempted murder of his wife. After the trial began, the trial court, over the defendant's objection, ruled that the indictment was fatally defective because it failed to allege that the defendant acted with malice aforethought and declared a mistrial. When the defendant was re-indicted for attempted murder, he asserted that the second prosecution was barred by double jeopardy. The defendant argued that there was no fatal defect in the first indictment; that the trial court abused its discretion in declaring the mistrial; and that once jeopardy attached on the dismissed indictment for attempted voluntary manslaughter, the defendant could not be prosecuted again for the greater offense of attempted murder. The trial court denied the defendant's motion to dismiss and the defendant was convicted. The court first determined that although the original indictment failed to properly charge attempted first-degree murder, it sufficiently alleged of attempted voluntary manslaughter. Thus, the trial court's decision to terminate the first prosecution was based on the erroneous belief that the defect in the indictment deprived the court of jurisdiction. An order of mistrial after jeopardy has attached may only be entered over the defendant's objection where manifest necessity exists. If a mistrial results from manifest necessity, double jeopardy does not bar retrial. However if there is no manifest necessity and the order of mistrial has been improperly entered over a defendant's objection, jeopardy bars a subsequent prosecution. Here, the original indictment was not fatally defective because it sufficiently alleged attempted voluntary manslaughter. Since the trial court retained jurisdiction, it could have proceeded on attempted voluntary manslaughter, as the defendant requested. The court was careful to distinguish this case from those in which a dismissal or mistrial is entered on the defendant's motion or with the defendant's consent, noting: "if a *defendant* successfully seeks to avoid his trial prior to its conclusion by actions or a motion of mistrial or dismissal, the Double Jeopardy Clause is generally not offended by a second prosecution." Having found that no manifest necessity existed to declare a mistrial on the first indictment that properly charged attempted voluntary manslaughter, the court held that double jeopardy precluded a second prosecution for the greater offense of attempted first-degree murder.

Indictment & Pleading Issues **Child Abuse**

[*State v. Frazier*](#), ___ N.C. App. ___, 795 S.E.2d 654 (Feb. 7, 2017). In this child abuse case the trial court erred by allowing the State to amend the indictment. The defendant was indicted for negligent child abuse under G.S. 14-318.4(a5) after police discovered her unconscious in her apartment with track marks on her arms and her 19-month-old child exhibiting signs of physical injury. Under that statute, a parent is guilty of negligent child abuse if the parent's "willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life" and the parent's act or omission "results in serious bodily injury to the child." The indictment charged that the defendant committed this offense by negligently failing to treat her child's wounds. At trial, the trial court allowed the State to amend the indictment "to include failure to provide a safe environment as the grossly negligent omission as well." This amendment was improper because it constituted a substantial alteration of the indictment. The amendment alleged conduct that was not alleged in the original indictment and which constituted the "willful act or grossly negligent omission," an essential element of the charge. The amendment thus allowed the jury to convict the defendant of conduct not alleged in the original indictment. Additionally, the amendment violated the North Carolina Constitution, which requires the grand jury to indict and the petit jury to convict for offenses charged by the grand jury.

Sex Offender Crimes

State v. Reynolds, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 19, 2017). Indictments charging the defendant with failing to register under G.S. 14-208.11(a)(2) and (a)(7) were not fatally defective where the indictments substantially tracked the language of the statute.

Larceny, Frauds & Related Offenses

State v. Mostafavi, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). Citing prior case law the court held, over a dissent, that an indictment alleging obtaining property by false pretenses was defective where it described the property obtained as “United States Currency.” The court stated: the cases instruct that where money is the thing obtained, “the money must be described at least by the amount, as, for instance, so many dollars and cents” (quotation omitted). Noting prior opinions of the court that approved of such language, the court found that it was bound to follow Supreme Court precedent. The court further rejected the notion that G.S. 15-149 compelled a different holding.

State v. Garner, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). (1) A felonious larceny indictment alleging that the defendant took the property of “Pinewood Country Club” was fatally defective. The State conceded that the indictment was defective because it failed to allege that the named victim was an entity capable of owning property. The court noted however that the indictment’s failure to specify the country club as an entity capable of owning property was not fatal with respect to a separate charge of possession of stolen goods.

State v. Fink, ___ N.C. App. ___, 798 S.E.2d 537 (Mar. 21, 2017). There was no fatal variance in a larceny by employee indictment where the indictment alleged that the defendant’s employer was “Precision Auto Care, Inc. (PACI), a corporation” but the evidence at trial showed the actual name of the corporation to be “Precision Franchising, Inc.” doing business as “Precision Tune Auto Care.” The court noted in part: “Our courts have repeatedly held that minor variations between the name of the corporate entity alleged in the indictment and the evidence presented at trial are immaterial, so long as [t]he defendant was adequately informed of the corporation which was the accuser and victim. A variance will not be deemed fatal where there is no controversy as to who in fact was the true owner of the property.” The court noted that the variation in names did not impair the defendant’s ability to defend against the charges.

Burglary & Related Offenses

State v. McNair, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). There was no fatal variance in a possession of burglar’s tools indictment. The indictment identified the tools as a prybar and bolt cutters. The trial court instructed the jury that it could find the defendant guilty if he possessed either a prybar, bolt cutters, or work gloves. The court held that the indictment’s identification of the specific tools was mere surplusage.

Injury to Property Offenses

[*State v. McNair*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). (1) There was no fatal defect in an indictment charging the defendant with injury to personal property. The defendant asserted that the indictment was invalid because it failed to allege that the owner, a church, as an entity capable of owning property. In *State v. Campbell*, 368 N.C. 83 (2015), the Supreme Court held that alleging ownership of property in an entity identified as a church or other place of religious worship is sufficient to allege an entity capable of owning property. Here, count one of the indictment alleged breaking or entering a place of religious worship and identified the church expressly as “a place of religious worship.” The count alleging injury to personal property simply referred to the church by name. The court found that identifying the church as a place of religious worship in the first count and subsequently listing the church as the owner of the personal property in a later count was sufficient. A contrary ruling, requiring the church to be identified as a place of worship in each portion of the indictment, “would constitute a hypertechnical interpretation of the requirements for indictments.” (2) By failing to assert a claim of fatal variance between the indictment and the evidence with respect to a charge of injury to personal property, the defendant failed to preserve the issue for appellate review. Nevertheless, the court considered the issue and rejected the defendant’s claim. The indictment alleged that the defendant injured the personal property of the church, specifically a lock on a door. The defendant asserted that the evidence showed that the damaged device was owned not by the church but rather by the lessor of the property. The court concluded however that the evidence was sufficient to allow the jury to find that the church owned the lock and that it was damaged.

Arson & Burning Offenses

[*State v. Hunt*](#), ___ N.C. App. ___, 792 S.E.2d 552 (Nov. 1, 2016). The indictment properly charged the defendant with burning of a building in violation of G.S. 14-62. The indictment alleged that the “defendant . . . unlawfully, willfully and feloniously did set fire to, burn, cause to be burned and aid the burning” of a specified building. The court rejected the defendant’s argument that the indictment was defective because it did not allege that the defendant acted “wantonly,” noting that North Carolina courts have held that the terms “willfully” and “wantonly” are essentially the same.

Weapons Offenses

[*State v. McLean*](#), ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). The State conceded, and the court held, that the indictment was insufficient to support a conviction for discharging a firearm within an enclosure to incite fear. The indictment improperly alleged that the defendant discharged a firearm “into” an occupied structure; the statute, G.S. 14-34.10, requires that the defendant discharge a firearm “within” an occupied building.

Drug Offenses

[*State v. Stith*](#), ___ N.C. ___, 796 S.E.2d 784 (Mar. 17, 2017). The court per curiam affirmed the decision below, [*State v. Stith*](#), ___ N.C. App. ___, 787 S.E.2d 40 (April 5, 2016). In that decision, the court of appeals held, over a dissent, that an indictment charging the defendant with

possessing hydrocodone, a Schedule II controlled substance, was sufficient to allow the jury to convict the defendant of possessing hydrocodone under Schedule III, based on its determination that the hydrocodone pills were under a certain weight and combined with acetaminophen within a certain ratio to bring them within Schedule III. The original indictment alleged that the defendant possessed “acetaminophen and hydrocodone bitartrate,” a substance included in Schedule II. Hydrocodone is listed in Schedule II. However, by the start of the trial, the State realized that its evidence would show that the hydrocodone possessed was combined with a non-narcotic such that the hydrocodone is considered to be a Schedule III substance. Accordingly, the trial court allowed the State to amend the indictment, striking through the phrase “Schedule II.” At trial the evidence showed that the defendant possessed pills containing hydrocodone bitartrate combined with acetaminophen, but that the pills were of such weight and combination to bring the hydrocodone within Schedule III. The court concluded that the jury did not convict the defendant of possessing an entirely different controlled substance than what was charged in the original indictment, stating: “the original indictment identified the controlled substance ... as hydrocodone, and the jury ultimately convicted Defendant of possessing hydrocodone.” It also held that the trial court did not commit reversible error when it allowed the State to amend the indictment. The court distinguished prior cases, noting that here the indictment was not changed “such that the identity of the controlled substance was changed. Rather, it was changed to reflect that the controlled substance was below a certain weight and mixed with a non-narcotic (the identity of which was also contained in the indictment) to lower the punishment from a Class H to a Class I felony.” Moreover, the court concluded, the indictment adequately apprised the defendant of the controlled substance at issue. The court of appeals applied the same holding with respect to an indictment charging the defendant with trafficking in an opium derivative, for selling the hydrocodone pills.

State v. Maloney, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). An indictment charging the defendant with possession of methamphetamine precursors was fatally defective and the defect could not be cured by amendment. Specifically, the indictment failed to allege that the defendant possessed the precursors knowing or having reasonable cause to believe that they would be used to manufacture methamphetamine. The trial court allowed the State to amend the indictment to add this allegation at trial. The amendment was improper and the indictment was fatally defective.

Initial Appearance Procedure

State v. Cox, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). In this impaired driving second-degree murder case, the trial court did not err by denying the defendant’s motion to dismiss which had asserted that violation of G.S. 15A-501 required dismissal of the charges. Under G.S. 15A-501, a law enforcement must bring a person arrested before a judicial official without unnecessary delay and must without unnecessary delay advise the person of his right to communicate with counsel and friends and must allow him a reasonable time and opportunity to do so. The vehicle crash occurred at 2:37 AM. An officer arrived at the scene between 3:15 and 3:20 AM and conducted field sobriety testing on the defendant. The defendant was arrested without a warrant for impaired driving and violation of his .04 BAC drivers license restriction. The defendant was taken to a hospital to have blood drawn. He arrived at the hospital around 4:33 AM. The officer advised the defendant of his rights and the defendant signed a rights form;

he did not ask to have a witness or attorney present. A telephone was available to the defendant in the hospital room. The defendant's blood was drawn at 4:55 AM and he was examined by a physician and cleared. The defendant was then taken to a law enforcement center where the lead detective arrived to interview the defendant at about 5:52 AM. The interview began at about 6:15 AM, at which time the defendant was read his *Miranda* rights and waived his rights. The interview concluded after an hour. The defendant was then charged with second-degree murder and felony serious injury by vehicle. After the detective checked the defendant's criminal and driving history, an officer transported the defendant to the county jail for processing at 9:35 AM. He was brought before magistrate at approximately 11:11 AM. Prior to seeing the magistrate, the defendant made a phone call to a friend but did not ask the friend come to the jail until after he knew the conditions of his release. Reviewing these facts, the court noted that there was a seven hour delay between the defendant's arrest and his appearance before a magistrate. The court noted that the defendant was afforded multiple opportunities to have witnesses or an attorney present and chose not to take advantage of those opportunities. It concluded: "Defendant cannot now assert that he was prejudiced to gain relief, either by the absence of a witness or attorney or by the time period between his arrest and appearance before a magistrate."

Jury Trial, Waiver

[*State v. Swink*](#), ___ N.C. App. ___, 797 S.E.2d 330 (Mar. 7, 2017). In this child sexual assault case, the court upheld the defendant's conviction, obtained after a bench trial. (1) The court rejected the defendant's argument that the trial court lacked authority to try him without a jury. The defendant asserted that the statute allowing a jury trial waiver applies only to cases arraigned on or after December 1, 2014. The defendant argued that the statute did not apply to him because he was never formally arraigned and thus should not have been allowed to waive his jury trial right. The court noted in part that arraignment is not mandatory, and will be held only if a defendant files a written request for arraignment. Here, the defendant never made such a request. Additionally, the March 2, 2015 hearing on the defendant's motion to waive a jury trial--a hearing date after the statute's effective date--"essentially served the purpose of an arraignment." (2) The defendant's waiver of his jury trial right was knowing and voluntary where the court engaged in a full colloquy with the defendant.

Jury Selection

[*State v. Martinez*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sexual assault case, the court rejected the defendant's argument that a statement made by a prospective juror violated his constitutional right to an impartial jury and constituted plain error. Specifically, the defendant argued that the prospective juror's statement that her uncle was a local defense attorney who had told her his job was to "get the bad guys off" amounted to a comment on the defendant's guilt from a reliable source. The court found that the statement in question was generic and did not imply any particular knowledge of the defendant's case or the possibility that the defendant might be guilty.

Jury Argument

State v. Dalton, ___ N.C. ___, 794 S.E.2d 485 (Dec. 21, 2016). Affirming the Court of Appeals in this murder case, the court held that the prosecutor's closing argument exaggerating the defendant's likelihood of being released from civil commitment upon a finding of not guilty by reason of insanity and constituted prejudicial error requiring a new trial. At trial the defendant asserted the insanity defense. At the charge conference, the prosecutor asked the trial court if he could comment on the civil commitment procedures that would apply if the defendant was found not guilty by reason of insanity. The trial court agreed to permit the comment, but cautioned the prosecutor not to exaggerate the defendant's chance of being released after 50 days. During closing arguments the prosecutor stated that it was "very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home." The defendant unsuccessfully objected to this comment and the prosecutor continued, arguing "She very well could be back home in less than two months." The court began by rejecting the State's argument that because the defendant failed to object to the prosecutor's second statement, that statement should be reviewed under a stricter standard of review. The court concluded that the second statement was not separate and distinct from the first. Turning to the propriety of the prosecutor's argument, it noted that if the jury finds a defendant not guilty by reason of insanity, the trial court must order the defendant civilly committed. Within 50 days of commitment, the trial court must provide the defendant with a hearing. If at that time the defendant shows by a preponderance of the evidence that she no longer has a mental illness or is dangerous to others the court will release the defendant. Clear, cogent and convincing evidence that an individual has committed homicide in the relevant past is prima facie evidence of dangerousness to others. Here, the evidence did not support the prosecutor's assertion that if the defendant was found not guilty by reason of insanity it is "very possible" that she would be released in 50 days. Instead, it demonstrated that the defendant will suffer from mental illness and addiction "for the rest of her life" and that her "risk of recidivism would significantly increase if she were untreated and resumed her highly unstable lifestyle." Additionally, the homicide for which she was convicted is prima facie evidence of dangerousness to others. Therefore the only reasonable inference from the evidence is that it is highly unlikely that the defendant would be able to demonstrate by a preponderance of the evidence within 50 days that she no longer is dangerous to others.

State v. Martinez, ___ N.C. App. ___, 795 S.E.2d 386 (Dec. 20, 2016). (1) During closing statements to the jury, the prosecutor did not impermissibly comment on the defendant's failure to take the stand. In context, the prosecutor's statements summarized the evidence before the jury and asserted that no evidence was presented to support defense counsel's assertions in his opening statement. Even if the prosecutor's statements constituted an impermissible comment on the defendant's right to remain silent, the error was harmless beyond a reasonable doubt. (2) The court rejected the defendant's argument that the prosecutor improperly misled the jury during closing argument by asserting facts not in evidence. The defendant failed to show any gross impropriety that was likely to influence the verdict. (3) The defendant failed to show gross impropriety warranting intervention ex mero motu to when the prosecutor handled a rifle in evidence by pointing it at himself. The defendant argued that the prosecutor's actions inflamed the jurors' emotions and causing them to make a decision based on fear (4) Notwithstanding these conclusions, the court noted that it found the prosecutor's words and actions

“troublesome,” stating: “the prosecutor flew exceedingly close to the sun during his closing argument. Only because of the unique circumstances of this case has he returned with wings intact.” It went on to emphasize that a prosecutor “has the responsibility of the Minister of Justice and not simply that of an advocate; the prosecutor’s duty is to seek justice, not merely to convict” (quotation omitted).

Jury Deliberations

[*State v. Harris*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). No plain error occurred with respect to a supplemental jury instruction given by the trial court in response to the jury’s note that it was “stuck” during deliberations. The note indicated that the jury was split 11 to 1. Neither party objected to the trial court’s suggestion to give the jury an instruction urging them to do what they could to arrive at a unanimous verdict. The defendant argued that the trial court’s instruction violated G.S. 15A-1235. Although the court found that the trial court’s failure to give the full instructions as directed by the statute did not rise to the level of plain error, it stated: “[W]e must clarify that at the time the instruction was given, the trial court should reasonably have believed that the jury was deadlocked. Because the trial court gave some of the instructions, but not all of them, it did commit error.”

Jury Instructions

Flight

[*State v. Bradford*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). In this assault and discharging a firearm into occupied property case, the trial court did not abuse its discretion by providing a jury instruction on flight. The defendant fired his weapon at the victims as a vehicle carrying the defendant sped from a gas station. The court rejected the defendant’s argument because he was a passenger in the car—and not the driver—that there was no evidence supporting a flight instruction. The court noted that the bar for an instruction on flight “is low.” Here, the defendant fired his gun while the vehicle in which he was a passenger was speeding away from the gas station; the defendant later told the driver to stop at a specified location and then abandoned the vehicle and left the area on foot; and the defendant intentionally disposed of his weapon shortly thereafter. This evidence “plainly supports an instruction on flight in spite of the fact that Defendant was not actually driving the [vehicle] when it fled the ... station.”

Proximate Cause

[*State v. Cox*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) In this impaired driving second-degree murder case, the court rejected the defendant’s argument that the trial court’s instruction on proximate cause was erroneous and that the trial court committed plain error by failing to instruct the jury on intervening negligence. The trial court instructed the jury that it had to find that “[T]he death of the victim was proximately caused by the unlawful act of the defendant” and that “[T]he State must prove beyond a reasonable doubt only that the defendant’s negligence was a proximate cause.” The court rejected the notion that the jury probably would have reached a different result if an instruction on intervening negligence was given. Overwhelming evidence showed that the defendant drove through a red light while grossly impaired and caused the crash. The only evidence hinting that the victim may have been

negligent in causing the crash was the defendant's offhand question to an officer who arrived on the scene about whether the officer had tested "the person that ran the red light." Even if the victim had somehow been negligent, her negligent would most be a concurring proximate cause of her own death. (2) The trial court did not err in instructing the jury with respect to proximate cause as to the charge of felonious serious injury by vehicle. The defendant argued that the language of the statute "forecloses the possibility of the state proving proximate cause in conjunction with some other concurrent cause." The court disagreed, citing prior case law rejecting this argument.

Homicide

State v. Juarez, ___ N.C. ___, 794 S.E.2d 293 (Dec. 21, 2016). Reversing the Court of Appeals in this first-degree felony murder case, the court held that the trial court did not commit reversible error by failing to instruct the jury on the lesser included offenses of second-degree murder and voluntary manslaughter. The underlying felony for first-degree felony murder was discharging a firearm into an occupied vehicle in operation. The trial court denied the defendant's request for instructions on second-degree murder and voluntary manslaughter. The Court of Appeals held that it was error not to instruct on the lessers because the evidence was conflicting as to whether the defendant acted in self-defense. The court found this reasoning incorrect, noting that self-defense is not a defense to felony murder. Perfect self-defense may be a defense to the underlying felony, which would defeat the felony murder charge. Imperfect self-defense however is not available as a defense to the underlying felony use to support a felony murder charge because allowing such a defense when the defendant is in some manner at fault "would defeat the purpose of the felony murder rule." In order to be entitled to instructions on the lesser included offenses, "the conflicting evidence must relate to whether defendant *committed* the crime charged, not whether defendant was legally *justified* in committing the crime." Here, there is no conflict regarding whether the defendant committed the underlying felony. The defendant does not dispute that he committed this crime; rather he claims only that his conduct was justified because he was acting in self-defense.

Theory Not Supported by Evidence

State v. Martinez, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sex case, no prejudicial error occurred when the trial court instructed the jury on a sexual act that was not supported by the evidence. The defendant was convicted of four felonies under G.S. 14-27.4(a)(1) (first degree sexual offense with a child) and two felonies under G.S. 14-27.7(a) (sex offense in a parental role). Both statutes require that the defendant engage in a "sexual act" with the victim. The term sexual act is defined as cunnilingus, fellatio, anilingus, or anal intercourse. The evidence at trial showed that the defendant engaged in fellatio and anal intercourse with victim. There was however no evidence that the defendant engaged in anilingus with the victim. However, the trial court instructed the jury that it could find the defendant guilty of the six felonies if it found that he committed fellatio, anal intercourse, or anilingus with the victim. The court noted that it cannot be discerned from the verdict sheets which theory the jury relied upon to find the defendant guilty. In its first opinion in the case, the court held that the trial court's inclusion of anilingus, where no evidence of that act was offered at trial, constituted plain error *per se*. The Supreme Court however remanded, instructing the court to revisit its holding in light

of *State v. Boyd*, 366 N.C. 548 (2013). In *Boyd*, the trial court instructed the jury that it could convict the defendant of kidnapping based on three alternative theories: confinement, restraint, or removal. On appeal to the court of appeals, two members of the panel held that the instruction constituted plain error because there was no evidence that the defendant had removed the victim. A dissenting judge agreed with the majority that the trial court erred by instructing on the theory of removal but disagreed that the error rose to the level of plain error. The dissenting judge did not assume that the jury relied on the theory of removal to support the kidnapping conviction; rather, she cited the overwhelming evidence supporting the other kidnapping theories, confinement and restraint, to conclude that the defendant failed to show that absent the error the jury would have returned a different verdict. The Supreme Court reversed the court of appeals in *Boyd*, adopting the dissenting opinion from the intermediate appellate court. In this second appeal, the court noted that the Supreme Court's approach in *Boyd* represented a shift away from the per se rule that had been previously applied in cases involving disjunctive instructions where one of the theories was not supported by the evidence. Turning to the case at hand, the court concluded that the defendant failed to meet his burden of showing that the trial court's inclusion of analingus in the jury instruction had any probable impact on the verdict. It noted that the victim was clear in her testimony regarding the occasions where fellatio and anal intercourse had occurred.

State v. Fowler, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case, the trial court committed reversible error by instructing the jury that it could find the defendant guilty if he was driving under the influence of an impairing substance or had a blood alcohol concentration of .08 or more, where no evidence supported a conviction under the .08 prong of the impaired driving statute. Although disjunctive jury instructions generally are permissible for impaired driving, in this case the State presented no evidence supporting the .08 prong. The trial court improperly instructed the jury on alternative theories, one of which is not supported by the evidence. Because it is impossible to conclude, based on the record and the general verdict form, upon which theory the jury based its verdict, the court found that it must assume that the jury based its verdict on the theory for which it received an improper instruction. The court went on to reject the State's argument that the error was harmless or non-prejudicial and noted that this is not a case where there is overwhelming evidence of impaired driving.

State v. Malachi, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 4, 2017). In this felon in possession of a firearm case, the trial court erred by instructing the jury, over the defendant's objection, that it could find the defendant guilty based on actual or constructive possession of the firearm where no evidence supported a theory of constructive possession. After an officer's frisk of the defendant revealed a revolver in his waistband, the defendant was arrested and brought to trial. After the trial court instructed the jury, the jury sought clarification of the "legal definition" of "possession of a firearm." The trial court, again over defense counsel's objection, responded with definitions of both actual and constructive possession. The jury found the defendant guilty. Finding that the trial court erred, the court noted that "[a]n instruction related to a theory not supported by the evidence confuses the issues, introduces an extraneous matter, and does not declare the law applicable to the evidence." Additionally, cases "have consistently held that a trial court's inclusion of a jury instruction unsupported by the evidence presented at trial is reversible error. The court noted that when the trial court has instructed on alternative theories of guilt, one of

which is supported by the evidence and the other is unsupported, it has presumed that the defendant was found guilty based on the theory that was not supported by the evidence. This presumption has been applied regardless of whether a defendant properly objected to the instruction at trial. The court noted however that recently, in *State v. Boyd*, 366 N.C. 548, the Supreme Court declared that such an instructional error not objected to a trial is not plain error per se. The court however interpreted *Boyd* as applying only to plain error review and not as eliminating the long-established presumption that the jury relied on an erroneous disjunctive instruction not supported by the evidence when given over an objection. Here, the evidence supported only a theory of actual possession and the constructive possession instruction was given over defense counsel's objection.

Miscellaneous Cases

[*State v. Lyons*](#), ___ N.C. App. ___, 793 S.E.2d 755 (Dec. 6, 2016). In this murder case, although the trial court erred by making comments prior to closing arguments suggesting to the jury that it would be futile to request to review witness testimony, the error was not prejudicial. The trial judge had stated:

When you go back and start deliberating, if six of you say, Well, I remember this witness says things this way and the other six of you say, No, I don't remember it that way . . . you don't have the option of saying, Well, let's go ask the judge and let the judge tell us what did that witness really say. Because if you ask that question, my response it going to be, That's part of your job, to figure it out and to make that determination based on your recollection[.]

The court rejected the State's argument that the trial court's comments merely made it clear to the jurors that if they asked for his interpretation of witness testimony, the judge would instruct them to make that determination based on their own recollections. However, the court declined to find that the error was prejudicial.

Motion to Continue

[*State v. Bass*](#), ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). In this assault case involving self-defense the court held, over a dissent, that the trial court committed prejudicial error by denying the defendant's motion to continue, made after the prosecutor provided defense counsel with additional reports of the victim's assaultive behavior on the evening before trial, where that behavior was relevant to the defendant's self-defense assertion that the victim was the aggressor. The defendant should have been permitted adequate time to investigate these additional instances of the victim's violent and explosive conduct in order to adequately prepare his defense. The court concluded: "Failure to allow counsel any time to investigate after the State's disclosures, provided the night before trial, . . . violated Defendant's rights to effective assistance of counsel and to present a complete defense."

Motion to Suppress

[*State v. Thorpe*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). The trial court did not err by denying the defendant's motion to suppress filed under G.S. 15A-980. The defendant argued for suppression of a conviction used in two habitual misdemeanor assault indictments on grounds

that it was obtained in violation of his right to counsel. At hearing on the motion the defendant testified that when he pleaded guilty to the charge, he was not represented by counsel and did not waive his right to counsel. At the suppression hearing, an assistant clerk testified that the only remaining records of the proceeding indicated that the defendant was represented by a retained attorney. Specifically, the designations “R” and “N/A” appeared in the electronic record. She testified that the designation “R” was used to reflect the fact that a defendant had retained counsel. “N/A” was used when the handwritten notes on the shuck were not legible or the attorney’s name was unknown and the designation “N/A” was never used when a defendant was unrepresented. Applying the presumption of regularity, the court presumed that the information contained in the records was accurate and found that the defendant failed to rebut the presumption with competent, material and substantial evidence.

Pleas

[*State v. Ross*](#), ___ N.C. ___, 794 S.E.2d 289 (Dec. 21, 2016). Reversing the Court of Appeals, the court held that the defendant’s plea was knowing and involuntary. The Court of Appeals had held that because the defendant conditioned his plea on the appealability of an issue that was not appealable, the plea was not knowing and involuntary. The court however concluded that the defendant’s plea was not conditionally entered on such a right of appeal. Thus, the terms and conditions of the plea agreement did not attempt to preserve the right to appellate review of a non-appealable matter.

[*State v. Whitehurst*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court did not err by denying the defendant’s motion to withdraw his *Alford* plea. After finding that there was no support in the record for various factual assertions made by the defendant on appeal, the court found that the defendant had offered no fair and just reason for withdrawal of his plea. Among other things, the court rejected the defendant’s argument that he entered his plea while under duress because he was in custody at the time, holding: “Defendant cites no authority for the proposition that the fact that a defendant is incarcerated is *per se* evidence of coercion, and we decline to adopt the position proposed by defendant.”

[*State v. Zubierna*](#), ___ N.C. App. ___, 796 S.E.2d 40 (Dec. 30, 2016). The trial court did not err by denying the defendant’s post-sentence motion to withdraw her guilty plea. On appeal the defendant argued that the trial court erred by denying her motion because the plea agreement and plea colloquy contained no indication that a fine would be imposed as part of her punishment. In fact a fine of \$1000 was imposed. The court noted that under G.S. 15A-1024, if at the time of sentencing a judge decides to impose a sentence other than that provided for in a plea arrangement, the judge must inform the defendant of that fact and inform the defendant that he may withdraw the plea. If however the sentence imposed is consistent with the plea agreement, the defendant is entitled to withdraw his plea after sentencing only upon a showing of manifest injustice. Here, the plea agreement specified only three things: the crime to which the defendant would plead guilty; the charges that would be dismissed; and the defendant’s prior record level and number of prior record level points. The plea agreement did not contain any specific terms regarding the sentence. Thus, the court found itself unable to conclude that the trial court imposed a sentence other than that provided for in the plea arrangement. Having determined that the sentence was not inconsistent with the plea agreement and that the defendant was not entitled

to relief under G.S. 15A-1024 the court went on to conclude that no manifest injustice supported granting the post-sentence motion to withdraw the guilty plea. Here, the defendant provided no specific reason in support of her motion to withdraw, except that she had decided she would like to take her case to trial.

State v. Kirkman, ___ N.C. App. ___, 795 S.E.2d 379 (Dec. 20, 2016). As conceded by the State, the trial court erred by resentencing the defendant to a sentence greater than that provided for in his plea agreement without giving the defendant an opportunity to withdraw his plea, as required by G.S. 15A-1024.

State v. McGill, ___ N.C. App. ___, 791 S.E.2d 702 (Oct. 18, 2016). In this robbery case, the trial court did not err by denying the defendant’s motion to withdraw his guilty plea. Shortly after the jury was empaneled, the defendant decided to enter into a plea arrangement with the State. In exchange for his guilty plea, the defendant received a PJC, apparently so that he could provide the State with information concerning an unrelated criminal case in exchange for a potentially more lenient sentence. After entry of the plea and prior to sentencing, the State determined not to use the defendant as a witness in the other case. The defendant moved to withdraw his guilty plea, asserting that his trial counsel provided incomplete or erroneous advice concerning habitual felon sentencing which resulted in his misunderstanding the consequences of his plea and also conspired with the State to “trick” him into pleading guilty. Analyzing the case under the *State v. Handy*, 326 N.C. 532 (1990), “any fair and just reason” standard for withdrawal of a plea before sentencing, the court held that the trial court did not err by denying the defendant’s motion. It noted, in part, that the defendant did not assert legal innocence; that the State’s case was not weak; and that the defendant waited nine days to file his motion to withdraw his plea after the chance of receiving a more lenient sentence evaporated, suggesting “a well thought out and calculated tactical decision.” Citing the record, which “plainly and unambiguously” showed that the defendant was fully informed of the consequences of his plea, the court rejected the defendant’s contention that he was operating under a misapprehension of the law regarding habitual felon sentencing due to trial counsel’s incorrect legal advice, which he claimed was intentionally provided pursuant to a broad but undefined conspiracy between court appointed attorneys and the State to trick defendants into entering unfavorable pleas.

Sentencing **Allocution**

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). The defendant is entitled to a new sentencing hearing where the trial court violated his right to speak on his own behalf at sentencing. G.S. 15A-1334(b) provides that a defendant may make a statement on his behalf at sentencing. Here, defense counsel clearly informed the court that the defendant wanted to make a statement. Nevertheless, the defendant was sentenced without being afforded that opportunity.

Bulletproof Vest Enhancement

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d 126 (Dec. 20, 2016). In this assault inflicting serious injury case, the evidence was sufficient for a bulletproof vest sentencing enhancement. The victim testified that when he punched the defendant’s chest, it felt padded; the victim told

two police officers that both attackers wore bulletproof vests; and when the defendant's vehicle was stopped after the shooting, a bulletproof vest was found on the floor where the defendant was sitting.

State v. Robinson, ___ N.C. App. ___, 795 S.E.2d 136 (Dec. 20, 2016). The trial court's jury instruction regarding the bulletproof vest enhancement was not improper. The defendant argued that the trial court erred by instructing the jury that it could find this enhancement if it found that he wore *or* had in his immediate possession a bulletproof vest. The defendant argued that this instruction improperly presented the jury with two alternative theories, only one of which was supported by the evidence. The court rejected the defendant's argument that there was no evidence that he had such a vest in his immediate possession. Among other things, the police found a bulletproof vest in the back of the vehicle where the defendant had been sitting when fleeing the crime scene.

Eighth Amendment Issues

State v. Perry, ___ N.C. ___, 794 S.E.2d 280 (Dec. 21, 2016). The State conceded and the court agreed that pursuant to *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding that imposition of a mandatory sentence of life in prison without the possibility of parole upon a juvenile violates the Eighth Amendment), applies retroactively to cases that became final before *Miller* was decided.

State v. Young, ___ N.C. ___, 794 S.E.2d 274 (Dec. 21, 2016). The State conceded and the court agreed that pursuant to *Montgomery*, *Miller* applies retroactively. The court further rejected the State's argument that the defendant's sentence was not in violation of *Miller* because it allowed for a meaningful opportunity for the defendant to obtain release. The State argued that the defendant had an opportunity for release under G.S. 15A-1380.5, a repealed statute which applied to the defendant's case. Recognizing that the statute might increase the chance for a sentence to be altered or commuted, the court rejected the argument that the defendant's sentence did not violate *Miller*. It noted that under the statute although a defendant is entitled to review of the sentence by the trial court, the statute guarantees no hearing, no notice, and no procedural rights. Furthermore, it provides minimal guidance as to what type of circumstances would support alteration or commutation, it requires only that the judge "consider the trial record," and notes that the judge "may" review other information "in his or her discretion." Ultimately the decision of what to recommend is in the judge's discretion and the only effect of the judge's recommendation is that the Governor or a designated executive agency must "consider" that recommendation. The court stated:

Because of these provisions, the possibility of alteration or commutation pursuant to section 15A-1380.5 is deeply uncertain and is rooted in essentially unguided discretion. Accordingly, this section does not reduce to any meaningful degree the severity of a sentence of life imprisonment without the possibility of parole.

Moreover, section 15A-1380.5 does not address the central concern of *Miller*—that a sentencing court cannot treat minors like adults when imposing a sentence of life imprisonment without the possibility of parole. (citations omitted).

The court noted that the Supreme Court’s “foundational concern” in *Miller* was “that at some point during the minor offender’s term of imprisonment, a reviewing body will consider the possibility that he or she has matured.” It concluded:

Nothing in section 15A-1380.5 requires consideration of this factor. In fact, after the judge’s recommendation is submitted to “[t]he Governor or an executive agency designated under this section,” N.C.G.S. § 15A-1380.5(e), nothing in section 15A-1380.5 gives any guidance to the final decision maker because this framework simply was not developed to address the concerns the Supreme Court raised in *Miller* and *Montgomery*.

[*State v. Seam*](#), ___ N.C. ___, 794 S.E.2d 439 (Dec. 21, 2016). In a per curiam opinion, and for the reasons stated in *Young* (summarized immediately above), the court affirmed the trial court and remanded for resentencing.

[*State v. Jefferson*](#), ___ N.C. App. ___, 798 S.E.2d 121 (Mar. 7, 2017). The defendant’s sentence of life imprisonment with the possibility of parole after a term of 25 years does not violate the Eighth Amendment under *Miller v. Alabama*, 132 S. Ct. 2455 (2012). As a 15-year-old, the defendant was charged with first-degree murder. He was found guilty under the felony murder rule and under then-applicable law, was sentenced to a mandatory term of life without the possibility of parole. While the defendant’s appeal was pending, the United States Supreme Court decided *Miller*, holding that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment. The General Assembly then amended the statute to provide that the sentence for a defendant found guilty of first-degree murder solely under the felony murder rule shall be life in prison with the possibility of parole; a defendant sentenced under this provision must serve a minimum of 25 years before becoming eligible for parole. The defendant’s sentence was vacated on appeal and remanded to the trial court for resentencing pursuant to the new statute. The trial court held a resentencing hearing and imposed a life sentence with the possibility of parole after 25 years. The court declined the defendant’s invitation to extend *Miller* to sentences that include the possibility of parole. It added, however:

Nevertheless, we note there may indeed be a case in which a mandatory sentence of life with parole for a juvenile is disproportionate in light of a particular defendant’s age and immaturity. That case is not now before us. Defendant chooses only to assert that [the statute] fails to provide a trial judge with discretion to consider the mitigating factors of youth and immaturity. He does not show the existence of circumstances indicating the sentence is particularly cruel or unusual as-applied to him.

The court affirmed the sentence, noting that the defendant had failed to meet the burden of the facial constitutional challenge and did not bring an as-applied challenge.

Fees & Fines

[*State v. McLean*](#), ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). In this case involving armed robbery and other charges, the trial court erred by assessing a fee against the defendant for the State’s expert witness. The expert medical witness testified regarding treatment he administered to the victim. The trial court ordered that the defendant, as a condition of any early release or post-release supervision, reimburse the State \$780 for the expert’s testimony. The court

concluded that there was no statutory authority for the trial court to require this payment as a condition of early release or post-release supervision.

State v. Zubierna, ___ N.C. App. ___, 796 S.E.2d 40 (Dec. 30, 2016). The trial court did not err by ordering the defendant to pay a \$1000 fine as part of her sentence upon a conviction for assault by strangulation. North Carolina statutes provide that a person who has been convicted of a crime may be ordered to pay a fine as provided by law and that unless otherwise provided the amount of the fine is in the discretion of the court. The court noted that there is no statutory provision specifically addressing the fine amount that may be imposed for the offense at issue. Accordingly, the amount is left to the trial court’s discretion. Here, the court found itself unable to identify any basis for determining that the fine was an abuse of discretion or otherwise unlawful. The court specifically rejected the defendant’s argument that the fine violated the prohibition on excessive fines under the Eighth Amendment.

Prior Record Level

State v. Riley, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). To the extent the State failed to meet its burden at sentencing to establish that the defendant’s prior conviction in federal court was substantially similar to a Class G felony in North Carolina, the error was harmless. The court found that there is sufficient information in the record to conclude that the federal offense of being a felon in possession of a firearm is substantially similar to the North Carolina offense of possession of a firearm by a felon, a Class G felony.

State v. Wilson-Angeles, ___ N.C. App. ___, 795 S.E.2d 657 (Feb. 7, 2017). The trial court erred by assessing one prior record level point because the offense was committed while the offender was on probation, parole, or post-release supervision where the State did not give notice of its intent to seek this point. Including a prior record level worksheet in discovery materials is insufficient to meet the notice requirement.

Probation

State v. Regan, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) The trial court had jurisdiction to revoke the defendant’s probation. The court rejected the defendant’s argument that the trial court in Harnett County lacked jurisdiction to commence a probation revocation hearing because the probation originated in Sampson County. It held: “A trial court located in a county where a defendant resides and violates the terms of her probation is vested with jurisdiction to revoke the defendant’s probation.” The court added however:

In order to avoid disputes, uncertainty, and costly litigation, the better practice for probation officers is to specify on probation violation reports any address relevant to alleged probation violations, such as the last known address of a probationer who has left the jurisdiction without permission or the address of the probation office where a defendant failed to attend a scheduled meeting. Additionally, in a probation violation hearing, the better practice for the State is to introduce direct evidence of any address relevant to an alleged probation violation. In this case, the indirect evidence—sufficient to allow the reasonable inference that Defendant resided in Harnett County when she fled the jurisdiction and violated her

probation in Harnett County by failing to meet with her probation officer there— supports the trial court’s presumed findings necessary to support its judgment.

The court also rejected the defendant’s argument that the trial court lacked jurisdiction to revoke her probation because there was no record showing that her probation had been transferred from Sampson County to Harnett County. The court noted that the defendant had offered no authority to support this assertion. (2) The court rejected the defendant’s argument that the trial court erred by revoking her probation after its expiration because it did not make adequate findings of fact. Specifically, the defendant argued that the trial court erred by failing to make any written or oral findings of good cause to revoke her probation. The court noted that the statute at issue, G.S. 15A-1344(f), does not require that the trial court make any specific findings and that, here, the record indicates that the trial court found good cause to revoke.

State v. Moore, ___ N.C. App. ___, 795 S.E.2d 598 (Dec. 20, 2016). Over a dissent, the court held that the trial court properly revoked the defendant’s probation. The trial court revoked based on its determination that the defendant had committed new criminal offenses. The court rejected the defendant’s argument that the State failed to give adequate notice that it was alleging a revocation-eligible violation. The notice alleged that the defendant violated probation because of three expressly mentioned pending charges but failed to state that committing these offenses violated the condition of probation that he commit no new criminal offenses. The defendant had adequate notice that the State was alleging a revocation-eligible violation: “we conclude that where the notice fails to allege specifically which condition was violated but where the allegations in the notice could only point to a revocation-eligible violation, the notice is adequate to confer jurisdiction to revoke probation.” The court noted that its result may have been different if the violation report had stated that the defendant had been charged with the crime of possessing illegal drugs without referring to a specific condition violated; in such a case the defendant would have had to guess whether the State was alleging that he committed a non-revocation-eligible violation of possessing illegal drugs or a revocation-eligible violation of committing a new criminal offense. The court concluded by noting, “it is always the better practice for the State to *expressly* state which condition of probation it is alleging has been violated.”

Resentencing

State v. Hardy, ___ N.C. App. ___, 792 S.E.2d 564 (Nov. 1, 2016). (1) Over a dissent, the court held that the trial court properly conducted a de novo sentencing hearing on remand from the appellate division. Notwithstanding the fact that the new sentence was the same as the original sentence, the court rejected the defendant’s argument that the trial court merely deferred to the prior judge’s sentencing determination. (2) On remand the trial court did not err by leaving the original restitution order in place against the defendant. The appellate decision remanding the case found no error with respect to the amount of restitution; that decision thus “clearly resolved and foreclosed any consideration” of the originally entered restitution award.

Restitution

[*State v. Whitehurst*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court erred by ordering the defendant to pay \$200 in restitution where no evidence was offered to support the amount of restitution ordered.

[*State v. Hunt*](#), ___ N.C. App. ___, 792 S.E.2d 552 (Nov. 1, 2016). The trial court erred by ordering the defendant to pay \$5,000 in restitution where no evidence supported that award. Only an unsworn statement by the prosecutor was offered in support of the restitution award.

Second-Degree Murder

[*State v. Lail*](#), ___ N.C. App. ___, 795 S.E.2d 401 (Dec. 30, 2016). In this second-degree murder case, the trial court did not err by sentencing the defendant as a Class B1 felon. The defendant argued that the trial court erred because the jury returned a general verdict that failed to specify whether he had been found guilty of a Class B1 or B2 felony. The State proceeded under a deadly weapon implied malice theory arising from the defendant's alleged use of a butcher knife to slash the victim's throat. The trial judge instructed the jury on the definitions of express malice and deadly weapon implied malice (B1 second-degree murder) but not on depraved heart malice (B2 second-degree murder). The jury returned a general verdict second-degree murder. The court held that since the jury was not presented with evidence supporting a finding of depraved heart malice, its general verdict was unambiguous and the B1 sentence was proper. It noted however that where the jury is presented with both B2 depraved heart malice and a B1 malice theory a general verdict would be ambiguous. It stated: "in this situation, trial judges . . . should frame a special verdict requiring the jury to specify which malice theory supported its second-degree murder verdict." In the course of its ruling the court also noted that depraved heart malice is not limited to driving while intoxicated homicide cases.

Sex Offenders

Lifetime Registration

[*State v. Johnson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court erred by ordering lifetime registration for the defendant. Although the defendant was convicted of reportable convictions and is therefore required to register as a sex offender, neither sexual offense with a child under G.S. 14-27.4A(a) nor sexual activity by a substitute parent under G.S. 14-27.7(a) constitute aggravated offenses requiring lifetime registration.

[*State v. Moore*](#), ___ N.C. App. ___, 792 S.E.2d 540 (Oct. 18, 2016). The court reversed and remanded the trial court's order imposing lifetime SBM. The trial court erred by finding that the defendant was a recidivist where the only evidence presented by the State was the oral statement of the prosecutor that the defendant had obtained reportable offenses in 1989 and 2006. The State conceded that neither witness testimony nor documentary evidence was presented to establish the defendant's prior criminal history and that statements by the lawyers constituted the only basis to find that the defendant had been convicted of the two offenses. The court held: "Something more than unsworn statements, which are unsupported by any documentation, is required as evidence under the statute to allow the trial court to impose lifetime SBM." The court also rejected the

notion that defense counsel's statements to the court constituted a stipulation to the two prior convictions.

Termination of Registration

State v. Moir, ___ N.C. ___, 794 S.E.2d 685 (Dec. 21, 2016). In determining whether the defendant's convictions for taking indecent liberties with a child suffice to make him a Tier II offender as defined in 42 U.S.C. § 16911(3)(A)(iv), the court held that it was required to utilize the categorical approach, as supplemented by the "modified categorical approach" in the event that the defendant was convicted of violating a divisible statute. However, the court concluded that because it did not have the benefit of briefing and argument concerning numerous legal questions of first impression which must be resolved in order to determine the defendant's eligibility for removal from the registry, remand was required. It noted, among other things, that the trial court failed to determine whether the statute was a divisible one and whether a conviction requires proof that the defendant intentionally touched the victim in a specified manner. The court thus affirmed the Court of Appeals' decision that the trial court erred by applying the circumstance-specific approach in determining whether the defendant should be deemed eligible to terminate registration. However, it modified the Court of Appeals' decision to require the use of the modified categorical approach rather than the pure categorical approach in cases involving divisible statutes and remanded to the trial court for further proceedings. It specifically instructed:

On remand, the trial court should consider whether N.C.G.S. § 14-202.1 is a divisible statute. If the trial court deems N.C.G.S. § 14-202.1 to be divisible, it must then consider whether guilt of any separate offense set out in N.C.G.S. § 14-202.1(a)(2) requires proof of a physical touching and whether any such physical touching requirement necessitates proof that the defendant "intentional[ly] touch[ed], either directly or through the clothing, [] the genitalia, anus, groin, breast, inner thigh, or buttocks of" the victim. Finally, if guilt of any separate offense set out in N.C.G.S. § 14-202.1(a)(2) requires proof that defendant "intentional[ly] touch[ed], either directly or through the clothing, [] the genitalia, anus, groin, breast, inner thigh, or buttocks of" the victim, the trial court must determine whether any document that the trial court is authorized to consider under *Shepard* permits a determination that defendant was convicted of violating N.C.G.S. § 14-202.1(a)(2) rather than any specific offense set out in N.C.G.S. § 14-202.1(a)(1) or any generic offense made punishable pursuant to N.C.G.S. § 14-202.1(a). Finally, if necessary, the trial court should consider, in the exercise of its discretion, whether it should terminate defendant's obligation to register as a sex offender.

In Re Timberlake, ___ N.C. App. ___, 792 S.E.2d 525 (Oct. 18, 2016). The trial court lacked jurisdiction to reconsider the petitioner's request to terminate sex offender registration where the State failed to oppose termination at the initial hearing and did not appeal the initial order. At the initial hearing the trial court granted the defendant's motion to terminate registration. At that hearing, the assistant district attorney representing the State chose not to put on any evidence or argue in opposition to termination. At a rehearing on the matter, held after an assistant attorney general representing the North Carolina Division of Criminal Information wrote to the judge

suggesting that the judge had incorrectly concluded that termination of registration complies with the Jacob Wetterling Act, the judge reversed course and denied petition. It was this amended order that was at issue on appeal. The court found that the letter submitted to the trial judge by the assistant attorney general did not vest the trial court with jurisdiction to review the termination order for errors of law.

Satellite-Based Monitoring (SBM)

State v. Johnson, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court erred by ordering lifetime SBM without a determination that the program was a reasonable search as mandated under *Grady v. North Carolina*, ___ U.S. ___, 191 L. Ed. 2d 459 (2015). The parties agreed that no evidence was presented to demonstrate the reasonableness of lifetime SBM. The court thus reversed the SBM order and remanded for the reasonableness determination mandated by *Grady*.

State v. Stroessenreuther, ___ N.C. App. ___, 793 S.E.2d 734 (Dec. 6, 2016). In this appeal from the trial court's order imposing SBM, the court rejected the defendant's argument that the state's SBM laws are facially unconstitutional but remanded for a determination of the reasonableness of the imposition of SBM. Before the trial court, the defendant argued that imposition of SBM violated his fourth amendment rights under *Grady v. North Carolina*, 135 S. Ct. 1368 (2015). The trial court accepted the State's argument that there was no need to address reasonableness under the fourth amendment because SBM was required by the applicable statute. On appeal, the State conceded that the trial court erred by imposing SBM without first considering whether it was reasonable, once the defendant raised the fourth amendment issue. The court thus vacated the SBM order and remanded.

No Contact Order

State v. Barnett, ___ N.C. ___, 794 S.E.2d 306 (Dec. 21, 2016). If supported by appropriate findings as required by the statute, the trial court has authority to enter a "Convicted Sex Offender Permanent No Contact Order" under G.S. 15A-1340.50 prohibiting the defendant from any interaction with a rape victim's minor children. The defendant was convicted of a number of offenses including attempted second-degree rape. At sentencing the trial court entered a no contact order under the statute, stating that the order included the victim's minor children. The Court of Appeals vacated the no contact order and remanded for the trial court to remove mention of individuals other than the victim, concluding that the trial court lacked authority to enter a no contact order including persons who were not victims of the sex offense. On the State's petition for discretionary review, the court agreed that the statute protects victims of sex offense and not third parties and that its catchall provision cannot be read to expand the statute's reach. However, it held that the statute can authorize protection for the victim from indirect contact by the defendant to the victim's family or friends when appropriate findings are made. It specified: "By 'appropriate findings,' we mean findings indicating that the defendant's contact with specific individuals would constitute indirect engagement of any of the actions prohibited in subsections (f)(1) through (f)(7) [of the statute]." The court remanded for further proceedings.

Speedy Trial & Related Issues

[*State v. Evans*](#), ___ N.C. App. ___, 795 S.E.2d 444 (Jan. 17, 2017). No violation of the defendant's speedy trial right occurred. The court began by finding that the delay of two years and 10 months was extensive enough to trigger consideration of the other speedy trial factors. Rejecting the defendant's argument to the contrary, the court held that with respect to the second factor--reason for the delay--the defendant has the burden of producing evidence establishing a prima facie case that the delay resulted from the neglect or willfulness of the State. Once that showing is made, the burden shifts to the State to rebut the defendant's evidence. Here, the defendant failed to make the prima facie showing. The court noted that between the time of arrest and trial, the defendant was represented by five different attorneys, each of whom needed time to become familiar with the case and that a significant portion of the delay resulted from delays at the State Crime Lab. With respect to the third factor--the defendant's assertion of a speedy trial right--the court noted that the defendant asserted his right in a timely pro se motion, later adopted by counsel. Turning to the last factor--prejudice--the court noted that the defendant's primary claims of prejudice were supported by his own testimony and no other evidence. Conceding that the trial court did not find his testimony credible, the defendant argued that the trial court failed to give adequate consideration to the prejudice inherent in pretrial incarceration. The court was unpersuaded, noting that during the time that he was incarcerated on the present charges he also was incarcerated on unrelated felony charges. Balancing the factors, the court found no speedy trial violation.

[*State v. Johnson*](#), ___ N.C. App. ___, 795 S.E.2d 126 (Dec. 20, 2016). In a case where the trial was delayed because of backlogs at the crime lab and because of issues with counsel, the trial court properly denied the defendant's speedy trial motion, made shortly before trial. Applying the *Barker v. Wingo* four-part speedy trial analysis, the court began by noting that the 28-month delay between arrest and trial raises a question of reasonableness requiring the court to consider the additional *Barker* factors. As to the second factor--reason for the delay--it was undisputed that the last four months of delay resulted from issues with defense counsel. Delay caused by the defendant's indecision about counsel, counsel's lapse in communicating with the defendant, and counsel's scheduling conflicts should not be weighed against the State. The primary cause of the delay was a backlog at the state crime lab, a matter over which the prosecutor had no control. Acknowledging that governmental responsibility for delay should be weighed against the State, the court concluded that the defendant failed to make a prima facie showing that either the prosecution or the crime lab negligently or purposefully underutilized resources available to prepare the State's case for trial. Thus, the 18 months of delay caused by crime lab backlogs was a "neutral reason." Turning to the third factor in the analysis--the defendant's assertion of a speedy trial right--the court held that the "eleventh-hour nature of Defendant's speedy trial motion carries minimal weight in his favor." The court was also unpersuaded by the defendant's argument with respect to the fourth factor in the analysis, prejudice.

Verdict

Unanimous Verdict Issues

[*State v. Johnson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). In this case where the defendant was charged with three counts of first-degree sex offense with a child and three counts

of sex offense by a substitute parent, the trial court's jury instructions did not allow for a non-unanimous verdict. The indictments charged that the offenses all occurred within the same date range and did not provide details distinguishing the incidents. The evidence at trial showed multiple sexual interactions between the defendant and the victim. In its instructions to the jury, the trial court differentiated between the offenses based on where they were alleged to have occurred: inside the house, outside the house but on the property, and at the end of a dirt road near the house. The court rejected the defendant's argument that the trial court failed to sufficiently identify the incidents, thereby depriving him of his right to a unanimous jury verdict. Specifically, he asserted that the evidence presented at trial showed multiple, distinct incidents of sexual assault occurring inside the house and multiple, distinct instances of sexual assault occurring outside the house but on the property. The court rejected the defendant's arguments, noting that prior case law has held no violation of the unanimity rule occurs in sexual assault cases even if the jurors considered a greater number of incidents than the number of counts charged and if the indictments lacked specific details to identify the specific incidents. It concluded: "Jury unanimity was shown as there was evidence of fellatio inside the house both at the computer table and in the bathroom, or that there was evidence of fellatio outside the house but on the property both inside a car and in the driveway."

Impeaching the Verdict

Pena-Rodriguez v. Colorado, 580 U.S. ___, 137 S. Ct. 855 (Mar. 6, 2017).

Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the "no-impeachment rule" give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. A Colorado jury convicted the defendant of harassment and unlawful sexual contact. Following the discharge of the jury, two jurors told defense counsel that, during deliberations, Juror H.C. had expressed anti-Hispanic bias toward the defendant and the defendant's alibi witness. Counsel obtained affidavits from the two jurors describing a number of biased statements by H.C. The trial court acknowledged H.C.'s apparent bias but denied the defendant's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations in a proceeding inquiring into the validity of the verdict. The state appellate courts affirmed. The U.S. Supreme Court reversed. The no-impeachment rule evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. As the Court noted, this "case presents the question whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." The affidavits by the two jurors in the case described a number of biased statements made by Juror H.C. H.C. told the other jurors that he "believed the defendant was guilty because, in [H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." H.C. also stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, "I think he did it because he's Mexican and Mexican men take whatever they want." H.C. further explained that, in his experience, "nine times out of ten Mexican men were

guilty of being aggressive toward women and young girls.” And H.C. said that he did not find petitioner’s alibi witness credible because, among other things, the witness was “an illegal.” The Court noted that with respect to this last comment, the witness testified during trial that he was a legal resident of the United States. Noting that “It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons,” the Court held that the Constitution requires an exception to the no-impeachment rule when a juror’s statements indicate that racial animus was a significant motivating factor in his or her finding of guilt. The Court went on to elaborate that

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

Because the issue was not presented, the Court declined to address what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias. It likewise declined to decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted.

Evidence

Authentication

[*State v. Moore*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). The State failed to lay a proper foundation for the introduction of a video as either illustrative or substantive evidence. An officer testified that the day after the incident in question, he asked the manager of a Kangaroo convenience store for a copy of the surveillance video made by cameras at the store. The manager allowed the officer to review the video. The officer used the video camera function on his cell phone to make a copy of the surveillance footage. At trial he testified that the cell phone video accurately showed the contents of the video he had seen at the store. The store clerk also reviewed the video but was not asked any questions about the creation of the original video or whether it accurately depicted the events that he observed on the day in question. No testimony was elicited at trial concerning the type of recording equipment used to make the video, its condition on the day in question or its general reliability. No witness was asked whether the video accurately depicted events that he had observed, and no testimony was offered on the subject. However, the court went on to hold that the error was not prejudicial.

Rape Shield

[*State v. Jacobs*](#), ___ N.C. App. ___, 798 S.E.2d 532 (Mar. 21, 2017). In this child sexual assault case, the trial court did not err by concluding that evidence regarding the victim’s sexually-

transmitted diseases was inadmissible under Rule 412. The defendant had wanted to call an expert witness to testify that the victim—his daughter—had STDs but that the defendant tested negative for those diseases. The defendant argued that the evidence would make a sexual relationship between himself and the victim less likely and would show that someone else had sexual relations with the victim. The court began by holding that the presence of an STD is indicative of prior sexual behavior and thus implicates Rule 412. The court went on to reject the defendant’s argument that evidence of the STDs was admissible under the exception to the Rule that allows evidence of “specific instances of sexual behavior offered for the purposes of showing that the act or acts charge were not committed by the defendant.” The defendant offered no alternative explanation or specific act to prove that any sexual act committed was done by someone other than him. Rather, he offered evidence of the victim’s STDs and his own negative testing to raise speculation and insinuate that the victim must have been sexually active with someone else. The court found that the presence of an STD was not relevant and was properly excluded. One judge wrote separately, concurring in result only to emphasize that evidence regarding STDs “is not a class of evidence unto itself that should be included wholesale” under the Rule.

[*State v. Mendoza*](#), ___ N.C. App. ___, 794 S.E.2d 828 (Dec. 6, 2016). In this child sexual assault case, the trial court did not err by precluding the defendant from cross-examining the State’s expert witness about information in the treatment records regarding the child’s sexual activity with partners other than the defendant. The defendant unsuccessfully sought to cross-examine an expert who testified that the victim suffered from PTSD about information she learned regarding the victim’s sexual activity with other individuals. During voir dire the expert testified that any information about the victim’s consensual sexual activity with others did not play a role and was not relevant to her PTSD diagnosis. The trial court found the evidence to be irrelevant. The court noted that having so found, the trial court was not required to proceed under a Rule 403 balancing test.

Character Evidence

[*State v. Bass*](#), ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). In this assault case involving self-defense the court held, over a dissent, that the trial court committed prejudicial error by excluding the testimony of three character witnesses pertaining to the victim’s past instances of violent conduct. Under Rule 405(b), the defendant was entitled to present evidence of specific acts of the victim’s violent conduct to show that the victim, not the defendant, was the aggressor. This right applies regardless of whether the victim’s specific instances of conduct were known or unknown to the defendant. Here, the excluded evidence tends to show that the victim had a history not only of violence, but of explosive, unprovoked, and irrational violence, even with strangers. Citing *Holmes v. South Carolina*, 547 U.S. 319 (2006), the court held that by excluding this evidence the defendant was denied his constitutional right to present a complete defense.

[*State v. Rios*](#), ___ N.C. App. ___, 795 S.E.2d 234 (Dec. 20, 2016). In this drug case, a new trial was required where character evidence was improperly admitted. When cross-examining the defendant’s witness, the prosecutor elicited testimony that the defendant had been incarcerated for a period of time. The court viewed this testimony as being equivalent to testimony regarding

evidence of a prior conviction. Because the defendant did not testify at trial, the State could not attack his credibility with evidence of a prior conviction. The court rejected the State's argument that the defendant opened the door to this testimony, finding that the defendant did not put his good character at issue.

Crawford & the Confrontation Clause

[State v. Garner](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). In this case involving a larceny from a country club, the Confrontation Clause was not violated when the trial court admitted evidence that the owners of the country club received an anonymous phone call providing information about the perpetrator. The trial court admitted the statement with a limiting instruction that it was not to be considered for its truth but only to show the course of the officers' investigation based on the information provided by the caller. Because the statement was admitted for a purpose other than the truth of the matter asserted, it falls outside of the protections afforded by the Confrontation Clause.

[State v. Thompson](#), ___ N.C. App. ___, 792 S.E.2d 177 (Oct. 18, 2016). In this kidnapping and rape case, the defendant's confrontation rights were not violated when the trial court admitted, for the purposes of corroboration, statements made by deceased victims to law enforcement personnel. The statements were admitted to corroborate statements made by the victims to medical personnel. The court rejected the defendant's argument that because the statements contained additional information not included in the victims' statements to medical personnel, they exceeded the proper scope of corroborative evidence and were admitted for substantive purposes. The court noted in part, "the mere fact that a corroborative statement contains additional facts not included in the statement that is being corroborated does not render the corroborative statement inadmissible."

Cross-Examination & Impeachment

[State v. Martinez](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sexual assault case, the trial court erred by excluding evidence which tended to show the victim's mother's bias against the defendant. After concluding that the defendant failed to preserve his challenges with respect to three pieces of impeachment evidence, the court concluded that exclusion of impeachment evidence that the mother had previously accused the defendant of domestic abuse constituted error. The evidence at issue showed that the mother had accused the defendant of domestic violence, that the police declined to prosecute, that she subsequently took out a private warrant, and that she failed to prosecute those charges. The court agreed that exclusion of this evidence was error, explaining: "Evidence that Mother had accused Defendant of domestic violence could have indicated Mother's bias against Defendant and may have influenced the jury's assessment of her credibility as a witness." However, considering the entire record, the court went on to conclude that there was no reasonable possibility that had the jury heard the evidence a different result would have been reached at trial.

[State v. Cox](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). In this impaired driving second-degree murder case, the trial court did not err by preventing the defendant from cross-examining witness Cooke regarding the contents of a verified complaint that Cooke had filed against the

defendant and the estate of the deceased victim on behalf of himself and Cooke's son, who was injured in the crash. The State filed a motion in limine to prevent the defendant from cross-examining Cooke regarding the contents of the verified civil complaint. The trial court granted the State's motion and prohibited the defendant from cross-examining Cooke regarding the allegations in the complaint or about any bias that might result from Cooke's financial interest in the defendant's prosecution. Cooke was called by the State to testify about his family and the child's injuries. The State did not elicit any testimony from him regarding cause of the crash and he did not offer any testimony that would tend to sway the jury in deciding the defendant's guilt. The defendant failed to show that the trial court's decision to limit the scope of cross-examination influenced the jury's verdict.

State v. Mendoza, ___ N.C. App. ___, 794 S.E.2d 828 (Dec. 6, 2016). In this child sexual assault case, even if the trial court erred by denying the defendant's request to admit into evidence three letters to the editor written by the State's expert witness and published in a newspaper 10 years before the expert's interview with the child in question, the error was not prejudicial. The defendant contended that the letter showed possible bias or prejudice in child advocacy matters and that he should have been permitted to cross-examine the expert about their content. The court determined however that the defendant had failed to demonstrate a reasonable possibility that a different result at trial would have occurred if the letters have been admitted.

404(b) Evidence

State v. Carvalho, ___ N.C. ___, 794 S.E.2d 497 (Dec. 21, 2016). The court per curiam affirmed the Court of Appeals in ___, N.C. App. ___, 777 S.E.2d 78 (Oct. 6, 2015). In this murder case, the Court of Appeals held, over a dissent, that the trial court did not err by admitting under Rule 404(b) portions of an audiotape and a corresponding transcript, which included a conversation between the defendant and an individual, Anderson, with whom the defendant was incarcerated. Anderson was a key witness for the State and his credibility was crucial. The 404(b) evidence was not admitted for propensity but rather to show: that the defendant trusted and confided in Anderson; the nature of their relationship, in that the defendant was willing to discuss commission of the crimes at issue with Anderson; and relevant factual information to the murder charge for which the defendant was on trial. These were proper purposes. Additionally, the trial court did not abuse its discretion in admitting this evidence under the Rule 403 balancing test.

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this possession of a firearm by a felon case, the court held, over a dissent, that the trial court erred by admitting 404(b) evidence. The current charges were filed after officers found an AK-47 rifle in the back seat of a vehicle and a Highpoint .380 pistol underneath the vehicle, next to the rear tire on the passenger side. At trial, the State offered, and the trial court admitted, evidence of a prior incident in which officers found a Glock 22 pistol in a different vehicle occupied by the defendant. The evidence was admitted to show the defendant's knowledge and opportunity to commit the crime charged. The defendant offered evidence tending to show that he had no knowledge of the rifle or pistol recovered from the vehicle. The trial court erred by admitting the evidence as circumstantial proof of the defendant's knowledge. The court reasoned, in part, that "[a]bsent an immediate character inference, the fact that defendant, one year prior, was found to be in possession of a different firearm, in a different car, at a different location, during a different

type of investigation, does not tend to establish that he was aware of the rifle and pistol in this case.” The court found that the relevance of this evidence was based on an improper character inference. The court further held that the trial court abused its discretion by admitting the evidence as circumstantial proof of the defendant’s opportunity to commit the crime charged. The court noted, in part, that the State offered no explanation at trial or on appeal of the connection between the prior incident, opportunity, and possession. The court went on to hold that the trial court’s error in admitting the evidence for no proper purpose was prejudicial and warranted a new trial. The dissenting judge believed that the defendant did not properly preserve his objection, that the issue should be reviewed under the plain error standard, and that no plain error occurred.

State v. Fink, ___ N.C. App. ___, 798 S.E.2d 537 (Mar. 21, 2017). In this larceny by employee case, the trial court did not err by admitting 404(b) evidence. The charges arose out of a 2014 incident in which the defendant, a manager of an auto shop, kept for himself cash paid by a customer for auto repairs. At trial, an officer testified that in 2010 he investigated the defendant for embezzlement. The defendant, who was working as a restaurant manager, admitted stealing from the restaurant by voiding out cash transactions and keeping the cash for himself. The court found that evidence showing that the defendant embezzled from a previous employer four years prior was clearly relevant to show intent, plan, or absence of mistake or accident. In both cases, the defendant worked for the business, held a managerial position, took cash paid and intended for the business, kept the cash for himself, and manipulated accounting procedures to cover his tracks. The prior incident was sufficiently similar to the current one and was not too remote in time. Additionally, the trial court gave a proper limiting instruction.

State v. Wilson-Angeles, ___ N.C. App. ___, 795 S.E.2d 657 (Feb. 7, 2017). In this arson case, the trial court properly admitted 404(b) evidence to show the defendant’s intent. The evidence in question pertained to another arson which was sufficiently similar to the incident in question. Both arsons occurred in the same town during nighttime hours and involved the same building location. In both instances the defendant was intoxicated, knew the buildings were occupied, and was angry about a perceived harm perpetrated against her by an occupant of the residence. Although the other incident occurred approximately four years earlier, there was a sufficient temporal proximity to the conduct at issue.

State v. Godbey, ___ N.C. App. ___, 792 S.E.2d 820 (Nov. 15, 2016), *review allowed*, ___ N.C. ___, 795 S.E.2d 213 (Jan. 26, 2017). In this child abuse case, the trial court did not abuse its discretion by admitting evidence regarding consensual sexual activity between the defendant and his wife. Here, after the child described to the wife a sexual act performed by the defendant, the wife signed a statement indicating that she and the defendant had engaged in the same act. The act in question was to turn her over on her stomach and “hump” and ejaculate on her back. The wife’s testimony was admissible to show common scheme or plan, pattern and/or common modus operandi and was sufficiently similar to the child’s allegation of sexual abuse. The court distinguished this case from one involving “a categorical or easily-defined sexual act” such as anal sex. Here, the case involved “a more unique sexual act.”

Hearsay

[*State v. Harris*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court did not err by allowing the introduction of a video recording of the State's witness being interviewed by law enforcement as substantive evidence where the statement fell within the Rule 803(5) hearsay exception for past recollection recorded. The court rejected the notion that the video had been introduced to refresh the witness's recollection.

[*State v. McLean*](#), ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). The trial court did not err by allowing a witness to testify that after the incident in question and while she was incarcerated, a jailer told her that the defendant was in an adjacent cell. The defendant argued that because the jailer did not testify at trial, this was inadmissible hearsay. The court disagreed, finding that the statement was not offered to prove its truth but rather to explain why the witness was afraid to testify.

[*State v. Rogers*](#), ___ N.C. App. ___, 796 S.E.2d 91 (Feb. 7, 2017), *temporary stay allowed*, ___ N.C. ___, 796 S.E.2d 21 (Feb. 23, 2017). In this drug case, the trial court did not err by allowing an officer to testify about information collected from a non-testifying witness during an investigation. The statement was not offered for its truth but rather to explain the officer's subsequent conduct and how the investigation of the defendant unfolded.

Expert Opinions

[*State v. Walston*](#), ___ N.C. ___, ___ S.E.2d ___ (May 5, 2017). Reversing the Court of Appeals in a case in which the amended version of Rule 702 applied, the Supreme Court held that the trial court did not abuse its discretion in excluding defense expert testimony regarding repressed memory and the suggestibility of memory. The case involved a number of child sex offense charges. Before trial, the State successfully moved to suppress testimony from a defense expert, Moina Artigues, M.D., regarding repressed memory and the suggestibility of children. The Court of Appeals had reversed the trial court and remanded for a new trial, finding that the trial court improperly excluded the expert's testimony based on the erroneous belief it was inadmissible as a matter of law because the expert had not interviewed the victims. The State petitioned the Supreme Court for discretionary review. Holding that the trial court did not abuse its discretion in excluding Dr. Artigues's testimony, the Court found that "the Court of Appeals was correct to clarify that a defendant's expert witness is not required to examine or interview the prosecuting witness as a prerequisite to testifying about issues relating to the prosecuting witness at trial." The Court noted: "Such a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts." The Court disagreed however with the Court of Appeals' determination that the trial court based its decision to exclude defendant's proffered expert testimony solely on an incorrect understanding of the law. It found that the Court of Appeals presumed that the testimony was excluded based on an erroneous belief that there was a per se rule of exclusion when an expert has not interviewed the victim. However, the trial court never stated that such a rule existed or that it based its decision to exclude the testimony solely on that rule. The Court went on to note that Rule 702 does not mandate any particular procedural requirements for evaluating expert testimony. Here, the trial court ordered arguments from both parties, conducted voir dire,

considered the proffered testimony, and considered the parties' arguments regarding whether the evidence could be excluded under Rule 403 even if it was admissible under Rule 702. With respect to the latter issue, the Court noted that Rule 403 allows for the exclusion of evidence that is otherwise admissible under Rule 702. The Court concluded that there is evidence to support the trial court's decision to exclude the testimony and that it properly acted as a gatekeeper in determining the admissibility of expert testimony

State v. Martinez, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sexual assault case, the State's medical expert did not impermissibly testify that the victim had been abused. Case law holds that in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility. Here however the expert's statement, considered in context, does not amount to an assertion that the child was in fact abused. Rather, the expert was speaking of a hypothetical victim when she made the statement in question. In fact, she testified that the victim's medical exam was normal and that she could not determine from the exam whether or not the child had been sexually abused.

State v. Babich, ___ N.C. App. ___, 797 S.E.2d 359 (Mar. 7, 2017). In this DWI case, the trial court erred by admitting retrograde extrapolation testimony by the State's expert witness. That expert used the defendant's 0.07 blood alcohol concentration 1 hour and 45 minutes after the traffic stop to extrapolate that the defendant had a blood alcohol concentration of 0.08 to 0.10 at the time of the stop. To reach this conclusion, the expert assumed that the defendant was in a post-absorptive state at the time of the stop, meaning that alcohol was no longer entering the defendant's bloodstream and thus her blood alcohol level was declining. The expert conceded that there were no facts to support this assumption. The expert made this assumption not because it was based on any facts in the case, but because her retrograde extrapolation calculations could not be done unless the defendant was in a post-absorptive state. The expert's testimony was inadmissible under the *Daubert* standard that applies to Evidence Rule 702. The court added: "Although retrograde extrapolation testimony often will satisfy the *Daubert* test, in this case the testimony failed *Daubert*'s 'fit' test because the expert's otherwise reliable analysis was not properly tied to the facts of this particular case." It explained:

[W]hen an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive or post-peak state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol.

When there are at least some facts that can support the expert's assumption that the defendant is post-peak or post-absorptive, the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing expert witness testimony. But where, as here, the expert concedes that her opinion is based entirely on a speculative assumption about the defendant—one not based on any actual facts—that testimony does not satisfy the *Daubert* "fit" test because the expert's otherwise reliable analysis is not properly tied to the facts of the case.

The court went on to find that in light of the strength of the State’s evidence that the defendant was appreciably impaired, the error was not prejudicial.

State v. Rogers, ___ N.C. App. ___, 796 S.E.2d 91 (Feb. 7, 2017), *temporary stay allowed*, ___ N.C. ___, 796 S.E.2d 21 (Feb. 23, 2017). In this drug case, officers did not offer improper opinion testimony. The defendant argued that the officers’ testimony constituted improper opinion testimony as to the defendant’s guilt. Both officers testified about the defendant’s conduct and how it related, in their experience, to activity by drug dealers. The officers’ testimony was not improper opinion testimony concerning guilt but rather ordinary testimony expressing their own experiences and observations.

State v. Killian, ___ N.C. App. ___, 792 S.E.2d 883 (Nov. 15, 2016). In this DWI case, the trial court committed plain error by denying the defendant’s motion to exclude an officer’s Horizontal Gaze Nystagmus (“HGN”) testimony and allowing the officer to testify about the results of the HGN test without qualifying him as an expert under Rule 702. Citing *State v. Godwin*, ___ N.C. App. ___, 786 S.E.2d 34, 37 (2016), *review allowed*, ___ N.C. ___, 795 S.E.2d 209 (Sept. 22, 2016), the court held that it was error to allow the officer to testify without being qualified as an expert. The court went on to conclude that the error did not have a probable impact on the jury’s verdict under the plain error standard.

State v. Hunt, ___ N.C. App. ___, 792 S.E.2d 552 (Nov. 1, 2016). In this burning of a building case, the trial court did not commit plain error by allowing Investigator Gullie to offer expert opinion testimony. Investigator Gullie testified at trial without objection. Noting the procedural posture of the case, the court stated:

In challenging the trial court’s performance of its gatekeeping function for plain error, defendant implicitly asks this Court to hold the trial court’s failure to *sua sponte* render a ruling that Investigator Gullie was qualified to testify as an expert pursuant to Rule 702 amounted to error. And to accept defendant’s premise would impose upon this Court the task of determining from a cold record whether Investigator Gullie’s opinion testimony *required* that he be qualified as an expert in fire investigation, where neither the State nor defendant respectively sought to proffer Investigator Gullie as an expert or challenge his opinion before the trial court.

The court went on to hold that even assuming the trial court erred, the defendant could not establish plain error in light of other evidence presented in the case.

Lay Opinions

State v. McLean, ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). In this case involving armed robbery and other charges, the trial court erred by allowing an officer to testify that when the victim provided a statement he “seemed truthful.” The error however did not rise to the level of plain error. At trial, the prosecutor asked the officer to describe the victim’s demeanor. The officer responded that he was agitated and seemed to be in pain but that “he was—to me, he seemed truthful.” This constituted improper vouching for the witness.

Privileges

[*State v. Godbey*](#), ___ N.C. App. ___, 792 S.E.2d 820 (Nov. 15, 2016), *review allowed*, ___ N.C. ___, 795 S.E.2d 213 (Jan. 26, 2017). The trial court did not err by applying G.S. 8-57.1 (husband-wife privilege waived in child abuse) in this child abuse case. The defendant asserted that the trial court erred by admitting privileged evidence about consensual sexual activity between the defendant and his wife. Specifically, he argued that the trial court erroneously concluded that the marital communications privilege was waived by G.S. 8-57.1. The defendant argued that the statute does not completely abrogate the privilege and is limited to judicial proceedings related to a report pursuant to the Child Abuse Reporting Law. The court disagreed, holding that the privilege was waived under the statute.

Photographs

[*State v. Little*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this armed robbery case, the trial court did not err by admitting photographs for illustrative purposes. The photographs were admitted solely to illustrate the testimony of witnesses and the trial court appropriately instructed the jury. The court rejected the defendant’s argument that photographs admitted for illustrative purposes must be authenticated in the same manner as photographs admitted as substantive evidence.

Sixth Amendment Issues

[*State v. Stroud*](#), ___ N.C. App. ___, 797 S.E.2d 34 (Mar. 7, 2017). Although the trial court erred by allowing the introduction of evidence regarding the defendant’s attempts to hire legal counsel prior to his arrest, the error did not rise to the level of plain error. On appeal, the defendant argued that admission of this testimony violated his Sixth Amendment rights. Although the court had “no difficulty” concluding that the evidence violated the defendant’s Sixth Amendment right to counsel and should not have been admitted, the error did not constitute plain error.

Arrest, Search, and Investigation

Stops

[*State v. Evans*](#), ___ N.C. App. ___, 795 S.E.2d. 444 (Jan. 17, 2017). Reasonable suspicion supported the stop. An officer patrolling a “known drug corridor” at 4 am observed the defendant’s car stopped in the lane of traffic. An unidentified pedestrian approached the defendant’s car and leaned in the window. The officer found these actions to be indicative of a drug transaction and thus conducted the stop.

[*State v. Downey*](#), ___ N.C. App. ___, 796 S.E.2d 517 (Feb. 7, 2017). Over a dissent, the court held that reasonable suspicion supported extension of the traffic stop. After an officer stopped the defendant for a traffic violation, he approached the vehicle and asked to see the driver’s license and registration. As the defendant complied, the officer noticed that his hands were shaking, his breathing was rapid, and that he failed to make eye contact. He also noticed a prepaid cell phone inside the vehicle and a Black Ice air freshener. The officer had learned

during drug interdiction training that Black Ice freshener is frequently used by drug traffickers because of its strong scent and that prepaid cell phones are commonly used in drug trafficking. The officer determined that the car was not registered to the defendant, and he knew from his training that third-party vehicles are often used by drug traffickers. In response to questioning about why the defendant was in the area, the defendant provided vague answers. When the officer asked the defendant about his criminal history, the defendant responded that he had served time for breaking and entering and that he had a cocaine-related drug conviction. After issuing the defendant a warning ticket for the traffic violation and returning his documentation, the officer continued to question the defendant and asked for consent to search the vehicle. The defendant declined. He also declined consent to a canine sniff. The officer then called for a canine unit, which arrived 14 minutes after the initial stop ended. An alert led to a search of the vehicle and the discovery of contraband. The court rejected the defendant's argument that the officer lacked reasonable suspicion to extend the traffic stop, noting that before and during the time in which the officer prepared the warning citation, he observed the defendant's nervous behavior; use of a particular brand of powerful air freshener favored by drug traffickers; the defendant's prepaid cell phone; the fact that the defendant's car was registered to someone else; the defendant's vague and suspicious answers to the officer's questions about why he was in the area; and the defendant's prior conviction for a drug offense. These circumstances constituted reasonable suspicion to extend the duration of stop.

State v. Miller, ___ N.C. App. ___, 795 S.E.2d 374 (Dec. 20, 2016), *temporary stay allowed*, ___ N.C. ___, 794 S.E.2d 534 (Jan. 4, 2017). (1) An officer unlawfully extended a traffic stop under *Rodriguez*. An officer stopped the vehicle for speeding and failure to pay insurance premiums. The owner of the vehicle was in the passenger seat; the defendant was driving. The officer asked the defendant for his drivers license. When he learned that the passenger was the registered owner of the vehicle, the officer inquired about the status of his insurance. The passenger handed the officer an insurance card showing that he recently purchased car insurance. At the officer's request the passenger also produced his drivers license and told the officer they were coming from a friend's house on Randleman Road. The officer found this response interesting in light of where the vehicle was stopped. He then ordered the passenger out of the vehicle. As the passenger complied, the officer asked him if he had any weapons or drugs. When the passenger said that he did not, he was motioned to stand with another officer who had arrived on the scene. The officer then asked the defendant to step out of the vehicle. As the defendant complied, the officer asked him if he had any weapons or drugs. The defendant said that he did not. According to the officer he then asked the defendant, "Do you mind if I check?" To which the defendant allegedly responded, "No." The officer then search the defendant and found cocaine. The defendant was charged with possession of cocaine and convicted. Applying *Rodriguez*, the court held that the officer unduly extended the traffic stop. The court noted that the officer "was more concerned with discovering contraband than issuing traffic tickets." It noted:

He readily accepted [the passenger's] insurance card as proof that [the passenger] had been paying the premiums, and he even testified at trial that he had no way to determine if the insurance card was invalid. Thereafter, [the] Officer . . . took no action to issue a citation, to address the speeding violation, or to otherwise indicate a diligent investigation into the reasons for the traffic stop. Instead, he ordered [the passenger] and defendant out of the vehicle and began an investigation into the presence of weapons and drugs.

Here, the State did not allege, nor did the evidence show, that the encounter had become consensual. Moreover, the court rejected the State's argument that the officer had reasonable suspicion to extend the stop. The only facts offered by the State to support this conclusion were that the officer observed the vehicle while patrolling "problem areas," that the defendant gave supposedly "incongruent" answers to questions about his travel, that the defendant raised his hands as he stepped out of the vehicle, and that the defendant was driving the vehicle instead of the passenger, its registered owner. The court noted in part that the defendant's responses in fact were not "incongruent." (2) Even assuming that the traffic stop was lawful up to the point when the defendant consented to the search, his consent was not valid. Although the officer testified that the defendant verbally agreed to the search, footage from the body camera revealed a different version of the interaction. Specifically, the officer had the defendant turned around, facing the rear of the vehicle with his arms and legs spread before he asked for his consent. The court concluded: "this was textbook coercion. If defendant did respond to Officer Harris's request—and it is still not apparent that he did—it was certainly not a free and intelligent waiver of his constitutional rights."

State v. Wilson, ___ N.C. App. ___, 793 S.E.2d 737 (Dec. 6, 2016). In this impaired driving case, the court held, over a dissent, that the trial court properly denied the defendant's motion to suppress where no seizure occurred. An officer went to a residence to find a man who had outstanding warrants for his arrest. While walking towards the residence, the officer observed a pickup truck leaving. The officer waved his hands to tell the driver—the defendant—to stop. The officer's intention was to ask the defendant if he knew anything about the man with the outstanding warrants; the officer had no suspicion that the defendant was the man he was looking for or was engaged in criminal activity. The officer was in uniform but had no weapon drawn; his police vehicle was not blocking the road and neither his vehicle's blue lights nor sirens were activated. When the defendant stopped the vehicle, the officer almost immediately smelled an odor of alcohol from inside the vehicle. After the defendant admitted that he had been drinking, the officer arrested the defendant for impaired driving. Because a reasonable person would have felt free to decline the officer's request to stop, no seizure occurred; rather, the encounter was a consensual one.

State v. Mangum, ___ N.C. App. ___, 795 S.E.2d 106 (Dec. 6, 2016). (1) In this impaired driving case, the defendant was not seized within the meaning of the fourth amendment until he submitted to the officer's authority by stopping his vehicle. The court rejected the defendant's argument that the seizure occurred when the officer activated his blue lights. Because the defendant continued driving after the blue lights were activated, there was no submission to the officer's authority and no seizure until the defendant stopped his vehicle. As a result, the reasonable suspicion inquiry can consider circumstances that arose after the officer's activation of his blue lights but before the defendant's submission to authority. (2) The vehicle stop was supported by reasonable suspicion. An officer received an anonymous report that a drunk driver was operating a black, four-door Hyundai headed north on Highland Capital Boulevard. The officer located the vehicle as reported and observed that the defendant drove roughly 15 miles below the 35 mph speed limit; that the defendant stopped at an intersection without a stop sign or traffic signal for "longer than usual"; that the defendant stopped at a railroad crossing and remained motionless for 15 to 20 seconds, although no train was coming and there was no signal to stop; that after the officer activated his blue lights, the defendant continued driving for

approximately two minutes, eventually stopping in the middle of the road, and in a portion of the road with no bank or curb, having passed several safe places to pull over.

State v. Watson, ___ N.C. App. ___, 792 S.E.2d 873 (Nov. 15, 2016). In this drug case, the trial court erred by denying the defendant's motion to suppress drug evidence seized after a traffic stop where the officer had no reasonable suspicion to stop the defendant's vehicle. Officers received a tip from a confidential informant regarding "suspicious" packages that the defendant had received from a local UPS store. The informant was an employee of the UPS store who had been trained to detect narcotics; the informant had successfully notified the police about packages later found to contain illegal drugs and these tips were used to secure a number of felony drug convictions. With respect to the incident in question, the informant advised the police that a man, later identified as the defendant, had arrived at the UPS store in a truck and retrieved packages with a Utah return address when in fact the packages had been sent from Arizona. After receiving this tip, the police arrived at the store, observed the defendant driving away, and initiated a traffic stop. During the stop they conducted a canine sniff, which led to the discovery of drugs inside the packages. Holding that the motion to suppress should have been granted, the court noted that there is nothing illegal about receiving a package with a return address which differs from the actual shipping address; in fact there are number of innocent explanations for why this could have occurred. Although innocent factors, when considered together may give rise to reasonable suspicion, the court noted that it was unable to find any case where reasonable suspicion was based solely on a suspicious return address. Here, the trial court made no finding that the informant or the police had any prior experience with the defendant; the trial court made no finding that the origination city was known as a drug source locale; and the trial court made no finding that the packages were sealed suspiciously, had a suspicious weight based on their size, had hand written labels, or had a suspicious odor.

Exigent Circumstances

State v. Burris, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case the trial court properly denied the defendant's motion to suppress where exigent circumstances supported a warrantless blood draw. The defendant tested at .10 on a roadside test, was arrested at 2:48 AM and then was transported to the police department, where he arrived 18 minutes later. When the defendant refused to comply with further testing within 2 to 3 minutes after arriving at the police department, the detective decided to compel a blood test. The closest hospital was approximately 4 miles away from the police department and 8 miles from the magistrate's office. The detective read the defendant his rights regarding the blood draw at the hospital at 3:24 AM and waited for the defendant to finish making a phone call before starting the blood draw at 3:55 AM. The detective testified that based on the information he had at the time, he thought the defendant was close to a blood alcohol level of .08. The detective further indicated that he thought it would have taken an additional hour to an hour and half to get a search warrant. The detective was the only officer on the scene and would have had to wait for another officer to arrive before he could travel to the magistrate to get the search warrant. The trial court's finding regarding the detective's reasonable belief that the delay would result in the dissipation of alcohol in the defendant's blood was supported by competent evidence. Thus, the trial court did not err in denying the defendant's motion to suppress the blood draw.

State v. Adams, ___ N.C. App. ___, 794 S.E.2d 357 (Dec. 6, 2016). Exigent circumstances justified the officers' warrantless entry into the defendant's home to arrest him. It was undisputed that the officers had reasonable suspicion to stop the defendant for driving while license revoked. They pulled into the defendant's driveway behind him and activated blue lights as the defendant was exiting his vehicle and making his way toward his front door. The defendant did not stop for the blue lights and continued hurriedly towards the front door after the officers told him to stop. "At that point," the court explained, "the officers had probable cause to arrest defendant for resisting a public officer and began a 'hot pursuit' of defendant." The officers arrived at the front door just as the defendant was making his way across the threshold and were able to prevent him from closing the door. The officers then forced the front door open and detained and arrested the defendant just inside the door. The court held that the warrantless entry and arrest was proper under *United States v. Santana*, 427 U.S. 38 (1976). It explained: Hot pursuit been recognized as an exigent circumstance sufficient to justify a warrantless entry into a residence where there is probable cause, without consideration of immediate danger or destruction of evidence.

Confessions

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d. 625 (Jan. 17, 2017). Although the trial court erred by concluding that the defendant's confession was voluntary, the error was harmless beyond a reasonable doubt. The defendant was asked to voluntarily show up at the police department for an interview in connection with a murder, after previously having denied ever having had contact with the murder victim. Approximately 20 minutes into the interview the defendant was shown a DNA analysis, indicating that his DNA was retrieved from under the victim's fingernails. At this point, a reasonable person would have believed that he was under arrest and the officer should have given *Miranda* warnings. The court noted that the detectives continued to reinforce the position that the defendant was not free to leave through their subsequent and continuing interrogation. They continued to challenge the defendant for over four hours until he was finally told that he was under arrest and given *Miranda* warnings. He subsequently confessed. The entirety of the interrogation, from when the defendant first should have been *Mirandized*, up until his inculpatory statements, rendered the inculpatory statements involuntary even though the defendant never confessed before being *Mirandized*. Finding these circumstances coercive, the court concluded:

Defendant was questioned for hours after he should have been *Mirandized* and, throughout this questioning, the detectives repeatedly told Defendant they knew he was lying; that they had DNA proof of Defendant's guilt; that only a guilty person would have known [the victim] was shot in the back of the neck; that this could be a capital case, and that Defendant's treatment would depend on his cooperation; that the district attorney's office would usually work with those who cooperated; that Detective Ward would consider testifying on Defendant's behalf; that Defendant would feel better if he confessed and did right by God and his children; and that Defendant should get the "best seat on the bus" by giving statements against the two other men involved. It is also clear that the detectives decided to arrest Defendant at the time they did in order to shake him up and, in Detective Ward's words: "I felt in my heart like the only thing that's going to

make you understand that this isn't going to go away is to charge you with murder. So I charged you with murder.”

The court however went on to find that the State proved that the error was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt.

***Miranda* Issues**

State v. Saldierna, ___ N.C. ___, 794 S.E.2d 474 (Dec. 21, 2016). Reversing the Court of Appeals, the court held that the juvenile defendant's request to telephone his mother while undergoing custodial questioning by police investigators was not a clear indication of his right to consult with a parent or guardian before proceeding with the questioning. The trial court had found that the defendant was advised of his juvenile rights and after receiving forms setting out these rights, indicated that he understood them; that the juvenile informed the officer that he wished to waive his juvenile rights and signed a form to that effect; and that although the defendant unsuccessfully tried to contact his mother by telephone, he did not at any time indicate that he had changed his mind regarding his desire to speak to the officer, indicate that he revoked his waiver of rights, or make an unambiguous request to have his mother present during questioning. The trial court thus found that the defendant's rights were not violated under G.S. 7B-2101 or the constitution. The Court of Appeals had concluded that a juvenile need not make a clear and unequivocal request in order to exercise his or her right to have a parent present during questioning. Instead, it concluded that when a juvenile between the ages of 14 and 18 makes an ambiguous statement that potentially pertains to the right to have a parent present, an interviewing officer must clarify the juvenile's meaning before proceeding with questioning. The court granted the State's petition for discretionary review. It first held that the defendant's statement--“Um. Can I call my mom?”--was not a clear and unambiguous invocation of his right to have his parent or guardian present during questioning and thus his rights under G.S. 7B-2101 were not violated. The court remanded for a determination of whether the defendant knowingly, willingly, and understandingly waived his rights.

State v. Burris, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case, the court rejected the defendant's argument that the trial court erred by denying his motion to suppress self-incriminating statements made without *Miranda* warnings, finding that the defendant was not in custody at the time. The standard for determining whether an individual is in custody for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement to a degree associated with a formal arrest. In this case, the defendant argued that when the detective retained his drivers license he was seized, not free to leave, and thus entitled to *Miranda* warnings. The court found that the defendant had erroneously conflated the *Miranda* custody standard with the standard for a seizure. Noting that the defendant was not under formal arrest at the time he was questioned, the court determined that under the totality of the circumstances the defendant's movement was not restrained to the degree associated with a formal arrest. The court noted that the inquiry is an objective one, not a subjective one. Here, the defendant was standing outside of his own vehicle while speaking with the detective. He was not told he was under arrest or handcuffed, and other than his license being retained, his movement was not stopped or limited further. No mention of any possible suspicion of the defendant being involved in criminal activity, impaired driving or

otherwise, had yet been made. A reasonable person in these circumstances would not have believed that he was under arrest at the time.

[*State v. Moore*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). The trial court properly denied the defendant's suppression motion where the defendant's statements were not made in response to police interrogation. Here, there was no dispute that the defendant made inculpatory statements while in custody and without being given his *Miranda* rights. The defendant made the statements in question after being arrested and while being transported to the police department. While en route to the police department, the defendant heard the officer's lieutenant asking questions of the officer over the police radio and offered the statements in question. The trial court found that the defendant's statements were spontaneous utterances and not made in response to questions posed to him. The court of appeals agreed, relying on prior case law and holding that the defendant's statements were not the result of an interrogation.

[*State v. Parlier*](#), ___ N.C. App. ___, 797 S.E.2d 340 (Mar. 7, 2017). In this child sexual assault case, the court rejected the defendant's argument that his confession was obtained in violation of *Miranda*. During an interview at the sheriff's department, the defendant admitted that he had sex with the victim. The transcript and videotape of the interview was admitted at trial. The court rejected the defendant's argument that a custodial interrogation occurred. The defendant contacted a detective investigating the case and voluntarily traveled to the sheriff's department. After the detective invited the defendant to speak with her, the defendant followed her to an interview room. The defendant was not handcuffed or restrained and the interview room door and hallway doors were unlocked. The defendant neither asked to leave nor expressed any reservations about speaking with the detective. A reasonable person in the defendant's position would not have understood this to be a custodial interrogation.

[*State v. Burton*](#), ___ N.C. App. ___, 796 S.E.2d 65 (Jan. 17, 2017). The court rejected the defendant's claim that counsel was ineffective by failing to object to the admission of his statement to an officer that the cocaine in question belonged to him and not a passenger in the vehicle; the court rejected the defendant's argument that the statements were obtained in violation of his Fifth Amendment rights because the officer failed to advise him of his *Miranda* rights before reading the warrants to him and the passenger in each other's presence. After the two were arrested and taken to the county detention center the officer read the arrest warrants to the defendant and the passenger in each other's presence. When the officer finished reading the charges, the defendant told the officer that the cocaine belonged to him. The court concluded that the defendant's admission is properly classified as a spontaneous statement, not the product of an interrogation.

[*State v. Watson*](#), ___ N.C. App. ___, 792 S.E.2d 171 (Oct. 18, 2016). In this robbery case, the court rejected the defendant's argument that the trial court erred by denying his motion to suppress statements to a police officer during an interrogation outside of the presence of his parent. Notwithstanding an issue about how the Juvenile Waiver of Rights Form was completed, the court held that because the defendant was advised of his right to have a parent present pursuant to G.S. 7B-2101 and failed to invoke that right, it was waived.

Knock & Talk

[*State v. Kirkman*](#), ___ N.C. App. ___, 795 S.E.2d 379 (Dec. 20, 2016). In this drug case, an officer lawfully approached the front of the defendant’s home and obtained information that was later used to procure a search warrant. Specifically, he heard a generator and noticed condensation and mold, factors which in his experience and training were consistent with the conditions of the home set up to grow marijuana. “It is well-established that an officer may approach the front door of a home, and if he is able to observe conditions from that position which indicate illegal activity, it is completely proper for him to act upon that information.”

Pretrial Detention

[*Manuel v. Joilet*](#), 580 U.S. ___, 137 S. Ct. 911 (Mar. 21, 2017). The Fourth Amendment governs a §1983 claim for unlawful pretrial detention even beyond the start of legal process. According to the petitioner’s complaint, he was arrested without probable cause and based solely on his possession of pills that had field-tested negative for an illegal substance. The complaint alleged that upon being brought to the police station an evidence technician tested the pills again and also got a negative result. But the petitioner alleged the technician lied in his report, claiming that one of the pills tested positive for ecstasy, a controlled substance. Also, one of the arresting officers wrote in his report that based on his training and experience, he knew the pills to be ecstasy. Another officer swore out a complaint charging the defendant with possession of a controlled substance and the defendant was brought before a judge for determination of probable cause. The judge relied exclusively on the complaint, which in turn relied exclusively on police fabrications, to support a finding of probable cause. Based on that determination, he sent the defendant to jail to await trial. The defendant’s subsequent detention was thus pursuant to “legal process” because it followed from, and was authorized by, the judge’s probable cause determination. The complaint alleged that while the defendant sat in jail, the State police lab re-examined the pills and issued a report concluding that they contained no controlled substances. For unknown reasons, however, the defendant remained in detention for another month until the prosecutor’s office sought and obtained dismissal of the drug charge. The defendant spent a total of 48 days in pretrial detention. He brought his 1983 action, alleging a violation of his Fourth Amendment rights, in part because of his detention for almost 7 weeks based on entirely made-up evidence. The lower courts dismissed his Fourth Amendment claim, finding that once a person is detained pursuant to legal process, a Fourth Amendment claim cannot be asserted. The Supreme Court rejected that analysis concluding:

[P]retrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case. The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge’s probable-cause determination is predicated solely on a police officer’s false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment’s probable-cause requirement. And for that reason, it cannot extinguish the detainee’s Fourth Amendment claim If the complaint is that a

form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment. (Citations omitted).

The Court remanded for further proceedings.

Search Warrants

[*State v. Allman*](#), ___ N.C. ___, 794 S.E.2d 301 (Dec. 21, 2016). Reversing the Court of Appeals, the court held that because the magistrate had a substantial basis to find that probable cause existed to issue the search warrant, the trial court erred by granting the defendant's motion to suppress. The affidavit stated that an officer stopped a car driven by Jeremy Black. Black's half-brother Sean Whitehead was a passenger. After K-9 alerted on the car, a search found 8.1 ounces of marijuana packaged in a Ziploc bag and \$1600 in cash. The Ziploc bag containing marijuana was inside a vacuum sealed bag, which in turn was inside a manila envelope. Both individuals had previously been charged on several occasions with drug crimes. Whitehead maintained that the two lived at Twin Oaks Dr. The officer went to that address and found that although neither individual lived there, their mother did. The mother informed the officer that the men lived at 4844 Acres Drive and had not lived at Twin Oaks Drive for years. Another officer went to the Acres Drive premises and determined that its description matched that given by the mother and that a truck outside the house was registered to Black. The officer had experience with drug investigations and, based on his training and experience, knew that drug dealers typically keep evidence of drug dealing at their homes. Supported by the affidavit, the officer applied for and received a search warrant to search the Acres Drive home. Drugs and paraphernalia were found. Based on the quantity of marijuana and the amount of cash found in the car, the fact that the marijuana appeared to be packaged for sale, and Whitehead's and Black's criminal histories, it was reasonable for the magistrate to infer that the brothers were drug dealers. Based on the mother's statement that the two lived at the Acres Drive premises, the fact that her description of that home matched its actual appearance, and that one of the trucks there was registered to Black, it was reasonable for the magistrate to infer that the two lived there. And based on the insight from the officer's training and experience that evidence of drug dealing was likely to be found at their home and that Whitehead lied about where the two lived, it was reasonable for the magistrate to infer that there could be evidence of drug dealing at the Acres Drive premises. Although nothing in the affidavit directly connected the defendant's home with evidence of drug dealing, federal circuit courts have held that a suspect drug dealer's lie about his address in combination with other evidence of drug dealing can give rise to probable cause to search his home. Thus, under the totality of the circumstances there was probable cause to support search warrant.

[*State v. Lowe*](#), ___ N.C. ___, 794 S.E.2d 282 (Dec. 21, 2016). Affirming the Court of Appeals, the court held that a search warrant authorizing a search of the premises where the defendant was arrested was supported by probable cause. The affidavit stated that officers received an anonymous tip that Michael Turner was selling, using and storing narcotics at his house; that Turner had a history of drug related arrests; and that a detective discovered marijuana residue in the trash from Turner's residence, along with correspondence addressed to Turner. Under the totality of the circumstances there was probable cause to search the home for controlled substances.

State v. Brody, ___ N.C. App. ___, 796 S.E.2d 384 (Feb. 7, 2017). In this drug case, a search warrant application relying principally upon information obtained from a confidential informant was sufficient to support a magistrate’s finding of probable cause and a subsequent search of the defendant’s home. The court rejected the defendant’s argument that the affidavit failed to show that the confidential informant was reliable and that drugs were likely to be found in the home. The affidavit stated that investigators had known the confidential informant for two weeks, that the informant had previously provided them with information regarding other people involved in drug trafficking and that the detective considered the informant to be reliable. The confidential informant had demonstrated to the detective that he was familiar with drug pricing and how controlled substances are packaged and sold for distribution. Moreover, the informant had previously arranged, negotiated and purchased cocaine from the defendant under the detective’s direct supervision. Additionally, the confidential informant told the detective that he had visited the defendant’s home approximately 30 times, including within 48 hours before the affidavit was prepared, and saw the defendant possessing and selling cocaine each time. The court noted: “The fact that the affidavit did not describe the precise outcomes of the previous tips from the [informant] did not preclude a determination that the [informant] was reliable.” It added: “although a general averment that an informant is ‘reliable’ -- taken alone -- might raise questions as to the basis for such an assertion,” the fact that the detective also specifically stated that investigators had received information from the informant in the past “allows for a reasonable inference that such information demonstrated the [confidential informant’s] reliability.” Moreover, the detective had further opportunity to gauge his reliability when the informant arranged, negotiated and purchased cocaine from the defendant under the detective’s supervision.

State v. Kirkman, ___ N.C. App. ___, 795 S.E.2d 379 (Dec. 20, 2016). In this drug case, a search warrant was properly supported by probable cause. At issue was whether a confidential informant was sufficiently reliable to support a finding of probable cause. The affidavit noted that the confidential informant was familiar with the appearance of illegal narcotics and that all previous information the informant provided had proven to be truthful and accurate. This information was sufficient to establish the confidential informant’s reliability.

State v. Parson, ___ N.C. App. ___, 791 S.E.2d 528 (Oct. 18, 2016). (1) In this methamphetamine trafficking case, the trial court erred by denying the defendant’s motion to suppress evidence seized during execution of a search warrant. Noting that a factual showing sufficient to support probable cause “requires a truthful showing of facts,” the court rejected the defendant’s argument that a statement in the affidavit supporting the search warrant was made in reckless disregard for the truth. However, the court went on to find that the application for the search warrant and attached affidavit insufficiently connected the address in question to the objects sought. It noted that none of the allegations in the affidavit specifically refer to the address in question and none establish the required nexus between the objects sought (evidence of a methamphetamine lab) and the place to be searched. The court noted that the defendant’s refusal of an officer’s request to search the property cannot establish probable cause to search. (2) Although federal law recognizes a good-faith exception to the exclusionary rule where evidence is suppressed pursuant to the federal Constitution, no good faith exception exists for violations of the North Carolina Constitution.

Searches

Consent Searches

[*State v. Miller*](#), ___ N.C. App. ___, 795 S.E.2d 374 (Dec. 20, 2016), *temporary stay allowed*, ___ N.C. ___, 794 S.E.2d 534 (Jan. 4, 2017). Even assuming that the traffic stop was lawful up to the point when the defendant consented to the search, his consent was not valid. Although the officer testified that the defendant verbally agreed to the search, footage from the body camera revealed a different version of the interaction. Specifically, the officer had the defendant turned around, facing the rear of the vehicle with his arms and legs spread before he asked for his consent. The court concluded: “this was textbook coercion. If defendant did respond to Officer Harris’s request—and it is still not apparent that he did—it was certainly not a free and intelligent waiver of his constitutional rights.”

Of Premises

[*State v. Huddy*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). Because an officer violated the defendant’s fourth amendment rights by searching the curtilage of his home without a warrant, the trial court erred by denying the defendant’s motion to suppress. The officer saw a vehicle with its doors open at the back of a 150-yard driveway leading to the defendant’s home. Concerned that the vehicle might be part of a break-in or home invasion, the officer drove down the driveway, ran the vehicle’s tags, checked—but did not knock—on the front door, checked the windows and doors of the home for signs of forced entry, “cleared” the sides of the house, and then went through a closed gate in a chain-link fence enclosing the home’s backyard and approached the storm door at the back of the house. As the officer approached the door, which was not visible from the street, he smelled marijuana, which led to the defendant’s arrest for drug charges. At the suppression hearing, the State relied on two exceptions to the warrant requirement to justify the officer’s search of the curtilage: the knock and talk doctrine and the community caretaker doctrine. The court found however that neither exception applies. First, the officer did more than nearly knock and talk. Specifically, he ran a license plate not visible from the street, walked around the house examining windows and searching for signs of a break-in, and went first to the front door without knocking and then to a rear door not visible from the street and located behind a closed gate. “These actions went beyond what the U.S. Supreme Court has held are the permissible actions during a knock and talk.” Likewise, the community caretaker doctrine does not support the officer’s action. “The presence of a vehicle in one’s driveway with its doors open is not the sort of emergency that justifies the community caretaker exception.” The court also noted that because the fourth amendment’s protections “are at their very strongest within one’s home,” the public need justifying the community caretaker exception “must be particularly strong to justify a warrantless search of a home.”

Of Vehicles

[*State v. Lowe*](#), ___ N.C. ___, 794 S.E.2d 282 (Dec. 21, 2016). Reversing the Court of Appeals, the court held that a search of a vehicle located on the premises was within the scope of the warrant. The vehicle in question was parked in the curtilage of the residence and was a rental car of the defendant, an overnight guest at the house. If a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains

no description of the car. In departing from this general rule, the Court of Appeals held that the search of the car was invalid because the officers knew that the vehicle in question did not belong to the suspect in the drug investigation. Noting that the record was unclear as to what the officers knew about ownership and control of the vehicle, the court concluded; “Nonetheless, regardless of whether the officers knew the car was a rental, we hold that the search was within the scope of the warrant.”

State v. Burton, ___ N.C. App. ___, 796 S.E.2d. 65 (Jan. 17, 2017). The court rejected the defendant’s claim that counsel was ineffective by failing to object to the admission of cocaine found during an officer’s warrantless search of the defendant’s vehicle; the court rejected the defendant’s argument that the State was required to prove that the defendant’s car was “readily mobile” in order for the automobile exception to the warrant requirement to apply. An officer searched the vehicle after smelling a strong odor of marijuana and seeing an individual sitting in the passenger seat with marijuana on his lap. The cocaine was found during a subsequent search of the vehicle. The vehicle was parked on the street when the search occurred and no evidence suggested that it was incapable of movement.

State v. Martinez, ___ N.C. App. ___, 795 S.E.2d 386 (Dec. 20, 2016). After the defendant’s arrest for impaired driving, officers properly searched his vehicle as a search incident to arrest. Applying *Arizona v. Gant*, the court found that the officer had a reasonable basis to believe that evidence of impaired driving might be found in the vehicle. The defendant denied ownership, possession, and operation of the vehicle to the officer both verbally and by throwing the car keys under the vehicle. Based on the totality of the circumstances, including the strong odor of alcohol on the defendant, the defendant’s efforts to hide the keys and refusal to unlock the vehicle, and the officer’s training and experience with regard to impaired driving investigations, the trial court properly concluded that the officer reasonably believed that the vehicle may contain evidence of the offense. In the factual discussion, the court noted that the officer had testified that he had conducted between 20-30 impaired driving investigations, that at least 50% of those cases involved discovery of evidence associated with impaired driving inside the vehicle, such as open containers of alcohol, and that he had been trained to search a vehicle under these circumstances.

Of Probationers & their Premises

State v. Powell, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). Because the State failed to meet its burden of demonstrating that a warrantless search was authorized by G.S. 15A-1343(b)(13), the trial court erred by denying the defendant’s motion to suppress. The defendant was subjected to the regular condition of probation under G.S. 15A-1343(b)(13). This provision requires that the probationer “Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision” Here, the search of the defendant’s home occurred as part of an ongoing operation of a US Marshal’s Service task force. The court noted that while prior case law makes clear that the presence or participation of law enforcement officers does not, by itself, render a warrantless search under the statute unlawful, the State must meet its burden of satisfying the “purpose” element of the statute. The State failed to meet its burden here. To conclude otherwise would require the court to read the phrase “for purposes directly related to the probation supervision” out of the statute.

The court emphasized however that its opinion should not be read as diminishing the authority of probation officers to conduct warrantless searches of probationers' homes or to utilize the assistance of law enforcement officers in conducting such searches. Rather, it held that on the specific facts of this case the State failed to meet its burden of demonstrating that the search was authorized under the statute.

Criminal Offenses

Acting in Concert

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d 126 (Dec. 20, 2016). The evidence was sufficient to sustain a charge of assault with a deadly weapon inflicting serious injury based on a theory of acting in concert. It was undisputed that the victim sustained serious injury; the only real issue was whether the evidence was sufficient to allow a reasonable inference that the defendant was a perpetrator of the crime. Another individual, Mr. Robinson, shot the victim. The evidence showed that the defendant and the victim's wife drove to the victim's residence, where the victim and his wife engaged in a dispute over custody of their children until the police arrived and required the defendant and the victim's wife to leave without the children. The next evening the defendant drove his vehicle, with Robinson and the victim's wife, back to the victim's residence, carrying with them firearms, bulletproof vests, and walkie-talkie radios that were turned on and set the same channel. The vehicle was waiting in the victim's apartment parking lot when he arrived home. Robinson, who did not know the victim, shot the victim and asked him if he wanted to die. The defendant assisted Robinson in restraining the victim, placed a handcuff on one of the victim's wrists, tried to cuff both of the victim's wrists, searched the victim's pockets, and escorted the victim's children from his apartment to the vehicle where the victim's wife was waiting. After neighbors found the victim bleeding from gunshot wounds, the defendant sped away from the scene with the victim's wife, Robinson, and the children. This evidence was sufficient to sustain and acting in concert charge.

State v. Holloway, ___ N.C. App. ___, 793 S.E.2d 766 (Dec. 6, 2016). In this drug case, the trial court committed plain error by instructing the jury on the theory of acting in concert. The State presented no evidence that the defendant had a common plan or purpose to possess the contraband with his alleged accomplice, McEntire. At most, the evidence showed that the two were acquainted and the defendant was present when the drugs were found at McEntire's home. Mere presence at the scene of a crime however is insufficient where the State presented no evidence that the two shared any criminal intent.

Conspiracy

State v. Glisson, ___ N.C. App. ___, 796 S.E.2d 124 (Feb. 7, 2017). (1) The evidence was sufficient to support a conviction for conspiracy to traffic in opium by sale and delivery. The defendant was indicted on multiple drug offenses arising from three separate controlled buys. On appeal the defendant argued that the State failed to present evidence, aside from an accomplice's mere presence at the second control buy, that the defendant conspired with the accomplice to traffic in opium. The court rejected this argument, noting, among other things that the defendant brought the accomplice to the drug transaction location for all three controlled buys. The location

of the second exchange was one the defendant did not like and the sale took place at or near dark. The drugs were maintained in the same vehicle as the accomplice and the defendant exchanged the drugs and counted the money in front of him. From this evidence, it would be reasonable for the jury to infer that the accomplice was present at the defendant's behest to provide safety and comfort to the defendant during the transaction. (2) The evidence supported multiple conspiracy charges. The court rejected the defendant's argument that the evidence showed only one agreement to engage in three separate transactions. It noted that the first two transactions were separated by one month and that approximately three months passed between the second and third buys. There was no evidence suggesting that the defendant planned the transactions as a series. Rather, the informant or the detective initiated each.

State v. Greene, ___ N.C. App. ___, 795 S.E.2d 815 (Jan. 17, 2017). The evidence was sufficient to support a charge of conspiracy to possess stolen goods, a pistol. After the defendant took the pistol and other items from the victims' purses, the pistol was found in the field near a residence. The defendant's alleged accomplice was present at the residence and admitted to officers that he was working with the defendant. This occurred after the defendant called the alleged accomplice from jail. From this evidence a jury could reasonably infer that the accomplice conspired with the defendant to possess the pistol.

Homicide

State v. Spruiell, ___ N.C. App. ___, ___ S.E.2d ___ (April 4, 2017). Rejecting the defendant's ineffective assistance of counsel claim with respect to his first-degree felony murder conviction, the court also rejected the proposition that a felony murder conviction cannot be predicated on a felony of shooting into occupied property where that felony also was the cause of the victim's death. Reviewing the relevant case law, the court concluded:

[I]t is clear that neither the Supreme Court nor this Court has ever expressly recognized an exception to the felony murder rule for the offense of discharging a weapon into occupied property. At most, North Carolina courts have recognized a very limited "merger doctrine" that precludes use of the felony murder rule in situations where the defendant has committed one assault crime against one victim and the State seeks to use that assault as the predicate felony for a felony murder conviction.

Assaults

State v. Floyd, ___ N.C. ___, 794 S.E.2d 460 (Dec. 21, 2016). The Court of Appeals improperly found that attempted assault is not a recognized criminal offense in North Carolina. The court rejected the notion that attempted assault is an "attempt of an attempt." Thus, a prior conviction for attempted assault with a deadly weapon inflicting serious injury can support a later charge of possession of a firearm by a felon and serve as a prior conviction for purposes of habitual felon status.

State v. Mylett, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). The evidence was sufficient to support a conviction for assault on a government officer under G.S. 14-33(c)(4). While attempting to separate the defendant from other individuals, the defendant spit at people walking

behind the officer, hitting the officer with his spit. The defendant argued that because he intended to assault individuals standing behind the officer, the State failed to establish that he intended to assault the officer. The court rejected this argument, holding that the offense was a general intent crime. Here, the defendant conceded that he knew the victim was a law enforcement officer and that he intended to commit an assault. The court concluded: “we are satisfied that when Defendant spat at members of the crowd and [the] Officer . . . was struck by Defendant’s spit, the requirements of [the statute] were satisfied.” It continued: “the knowledge element of assault on a government officer in violation of [G.S. 14-33(c)(4)] is satisfied whenever a defendant while in the course of assaulting another individual instead assaults an individual he knows, or reasonably should know, is a government officer.”

Abuse Offenses

[*State v. Varner*](#), ___ N.C. App. ___, 796 S.E.2d 834 (Mar. 7, 2017), *temporary stay allowed*, ___ N.C. ___, 797 S.E.2d 703 (Apr. 10, 2017). In this misdemeanor child abuse case, where the defendant hit his son with a paddle, the trial court committed reversible error with respect to the jury instructions. After the defendant paddled his 10-year-old son for refusing to eat at the family dinner table, the child experienced bruising and pain for several days. The defendant was charged with felony child abuse. At the charge conference, the trial judge told the parties that he would instruct the jury that it could not convict the defendant if it found that the child’s injuries were inflicted as a result of the defendant’s “moderate punishment to correct” his child. Neither party objected to this instruction. The trial judge further indicated that he would give an instruction defining “moderate punishment” as “punishment that does not cause lasting injury.” The State objected to this definition, arguing that moderate punishment should not be limited to that which produced lasting injuries. The trial judge agreed and, over the defendant’s objection, struck this definition. Thus, the trial judge left the term moderate punishment undefined. The jury found the defendant guilty of misdemeanor child abuse. On appeal the defendant argued that the trial court erred when it struck the proposed instruction defining moderate punishment as punishment which caused lasting injury to the child. The court agreed that the instructions impermissibly allowed the jury to convict the defendant simply because they thought his degree of punishment was excessive, even if they thought he was acting in good faith and did not inflict a lasting injury on the child. The court reversed and remanded for a new trial, noting that based on the case law discussed in the court’s opinion, “it would have been proper for the State to request an instruction advising the jury that it could nonetheless convict if it determined that Defendant acted out of ‘wickedness of purpose,’ irrespective of the extent of the physical injuries.”

Sexual Battery

[*In re S.A.A.*](#), ___ N.C. App. ___, 795 S.E.2d 602 (Dec. 20, 2016). The State failed to introduce sufficient evidence of sexual battery. The 13-year-old juvenile was adjudicated delinquent in part based on two counts of sexual battery against two 11-year-old female schoolmates. It was alleged that he draped his arms around the girls’ shoulders in order to smear a glowing liquid on them during an evening of Halloween trick-or-treating. The State failed to introduce sufficient evidence that the juvenile touch the tops of the girls’ breasts for a sexual purpose. One girl testified that the juvenile rubbed “this green glow stick stuff” on her leaving glowing liquid on

her shirt above her collarbone. The other girl testified that the juvenile reached his arm around her shoulder and “put this weird green glowing stuff” on her arm and back, also touching her “boobs” over her sweatshirt. In criminal cases involving adult defendants the element of acting for the purpose of sexual arousal, sexual gratification, or sexual abuse may be inferred from the very act itself. However, an intent to arouse or gratify sexual desires may not be inferred in children under the same standard. Rather, a sexual purpose does not exist without some evidence of the child’s maturity, intent, experience, or other factor indicating his purpose in acting. Here, the juvenile denied touching either girl’s breasts, saying that he only put his hand around their shoulders; this account was supported by witnesses. Neither the location nor the alleged manner of the touching was secretive in nature; rather, the incident occurred on a busy public street on Halloween. The evidence was undisputed that the juvenile have been wiping green glowing liquid on trees, signs, and other young people during the evening. Nothing about his attitude suggested a sexual motivation; neither girl said that he made any sexual remarks. And when the girls ran away, he did not try to pursue them.

Sex Offender Crimes

[State v. Reynolds](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 19, 2017). In this sex offender registration case where the defendant was charged with failing to notify of an address change, there was sufficient evidence that the defendant changed his address. After the defendant registered in 2011, he was incarcerated and then released in 2013. The Supreme Court has clarified that while incarcerated, a registrant’s address is that of the facility or institution in which he is confined and that when he is released from incarceration, his address necessarily changes. The court rejected the defendant’s argument that his incarceration for only a month was not long enough to establish a new address at his place of confinement.

Kidnapping

[State v. Curtis](#), ___ N.C. ___, 794 S.E.2d 501 (Dec. 21, 2016). The court per curiam affirmed the Court of Appeals, ___ N.C. App. ___, 782 S.E.2d 522 (2016). The Court of Appeals had held, over a dissent, that where the restraint and removal of the victims was separate and apart from an armed robbery that occurred at the premises, the trial court did not err by denying the defendant’s motion to dismiss kidnapping charges. The defendant and his accomplices broke into a home where two people were sleeping upstairs and two others--Cowles and Pina-- were downstairs. The accomplices first robbed or attempted to rob Cowles and Pina and then moved them upstairs, where they restrained them while assaulting a third resident and searching the premises for items that were later stolen. The robberies or attempted robberies of Cowles and Pina occurred entirely downstairs; there was no evidence that any other items were demanded from these two at any other time. Thus, the court could not accept the defendant’s argument that the movement of Cowles and Pina was integral to the robberies of them. Because the removal of Cowles and Pina from the downstairs to the upstairs was significant, the case was distinguishable from others where the removal was slight. The only reason to remove Cowles and Pina to the upstairs was to prevent them from hindering the subsequent robberies of the upstairs residents and no evidence showed that it was necessary to move them upstairs to complete those robberies.

Finally, the court noted that the removal of Cowles and Pina to the upstairs subjected them to greater danger.

[*State v. China*](#), ___ N.C. App. ___, 797 S.E.2d. 324 (Feb. 21, 2017), *temporary stay allowed*, ___ N.C. ___, 797 S.E.2d 303 (Mar. 27, 2017). Over a dissent, the court held that because there was no evidence that the defendant restrained the victim beyond the degree of restraint that is inherent in the commission of a sexual or physical assault, the evidence was insufficient on the restraint element of kidnapping. The case involved a sudden attack, in which the defendant broke down the door of an apartment, ran into the bedroom where the victim was dressing, and assaulted him. After the defendant entered the bedroom, he immediately punched the victim hard enough to throw the victim onto the bed. The defendant continued punching the victim while he committed a brief, brutal sexual attack. After the sexual offense, the defendant dragged the victim off the bed and the defendant and his companion kicked the victim in the head and body. The entire incident took no more than a few minutes. The court agreed with the defendant that there was no evidence that the victim was subjected to any restraint beyond that inherent in the defendant's commission of the sex offense and assault.

Larceny, Robbery & Possession of Stolen Goods

[*State v. Wright*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 4, 2017). In this armed robbery case, the trial court did not err by failing to instruct the jury on the lesser-included offense of common law robbery. The defendant entered three convenience stores with his face covered and a gun in his hand and stole money in the presence of the store clerks. The defendant argued that the State failed to present evidence that the victims' lives were endangered or threatened. With respect to two of the robberies, the defendant argued that there was no evidence that he actually pointed his gun at the clerks. With respect to the third, he noted that the clerk testified that she was "never scared." The court distinguished cases holding that mere possession of a weapon during a robbery is insufficient to support a finding that the victim's life was endangered or threatened on the basis that in those cases, neither the victim nor the bystanders actually saw the weapon. It went on to note that where the evidence establishes that a defendant held a dangerous weapon that was seen by the victim or a witness during the robbery, cases hold that this element is satisfied. Thus, with respect to the robberies where the clerks saw the defendant holding the gun, the evidence was sufficient. With respect to the third robbery, the court held, citing prior case law, that the State is not required to prove that the victim was in fact afraid.

[*State v. Rice*](#), ___ N.C. App. ___, 798 S.E.2d 432 (April 4, 2017). The evidence was sufficient to establish that the defendant constructively possessed two stolen firearms found in a van he had rented. The defendant was convicted of two counts of possession of stolen goods in violation of G.S. 14-71.1. The weapons in question were stolen during two separate home invasions. Officers learned that a van spotted on the premises of the second home was rented to Shirelanda Clark. Clark informed officers that she had re-rented the vehicle to the defendant and an individual named Dezmon Bullock. At the request of the police, Clark arranged a meeting with the defendant and Bullock. The two arrived in the van and consent was given to search the vehicle. As the search began, officers found a new basketball goal still in its box. After claiming ownership of the basketball goal, the defendant abruptly left the scene, leaving the item behind. The search continued, and the two stolen weapons were discovered. On appeal the court rejected

the defendant's contention that the evidence was insufficient to establish constructive possession of the weapons, reasoning that although the defendant did not have exclusive possession of the van, other incriminating circumstances existed to establish constructive possession. Those circumstances included: the defendant's "nervous disposition;" the fact that the defendant "admitted ownership of the basketball goal in proximity to the stolen firearms;" the fact that the defendant had rented the van from Clark; and that the defendant "exhibited irrational conduct tending to indicate he was fearful that the firearms would be discovered during the course of the search — specifically his sudden and abrupt departure from the area when [officers] began the search of the van . . . leaving behind his personal property for which he did not return."

State v. Fink, ___ N.C. App. ___, 798 S.E.2d 537 (Mar. 21, 2017). There was sufficient evidence to convict the defendant of larceny by employee. The victim brought her vehicle in for repairs at an auto shop. The defendant, who was the shop manager, provided an estimate for the work, which the victim accepted. When she was told her vehicle was ready, the victim paid the defendant in cash and took her vehicle, later learning that the work had not been done. The defendant deposited a portion of the cash paid by the victim to the shop's account and kept the remaining amount. As soon as the victim tendered payment to the defendant as the shop's manager and agent, the funds became the property of the shop for purposes of larceny by employee.

State v. McLean, ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). In this armed robbery case, there was sufficient evidence that the defendant committed a taking from the victim's person or presence. The evidence showed that the defendant and three other men entered a building in the early morning. The armed intruders ordered the occupants to lie face-down on the ground and take off their clothing. The defendant ordered, "Give me all your money," and the victim's cell phone was taken at this time.

State v. Greene, ___ N.C. App. ___, 795 S.E.2d 815 (Jan. 17, 2017). (1) The evidence was insufficient to support convictions of felony larceny from the person. Items were stolen from the victims' purses while they were sleeping in a hospital waiting room. At the time the items were stolen, the purses were not attached to or touching the victims. The court rejected the State's argument that the purses were under their owners' protection because hospital surveillance cameras operated in the waiting room. The court noted: "Video surveillance systems may make a photographic record of the taking, but they are no substitute for 'the awareness of the victim of the theft at the time of the taking.'" The court noted that the State's theory would convert any larceny committed in areas monitored by video to larceny from the person. (2) The court rejected the defendant's argument that one of the larceny convictions had to be arrested because both occurred as part of a single continuous transaction. The court reasoned that where the takings were from two separate victims, the evidence supported two convictions.

Obtaining Property by False Pretenses

State v. Buchanan, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). (1) The evidence was sufficient to sustain a conviction for obtaining property by false pretenses. After the defendant falsely reported that his girlfriend had written 3 checks on his account without authorization, he received a provisional credit on his bank account with respect to one of the checks. He asserted,

in part, that the provisional credit did not constitute a “thing of value.” The court disagreed, concluding that the provisional credit was the equivalent of money placed into his account, to which the defendant had access, at least temporarily. (2) The trial court did not commit plain error by failing to instruct the jury that the defendant could not be convicted of obtaining property by false pretenses and of attempting to obtain property by false pretenses based on a single transaction. The defendant attempted to obtain \$900 from his bank by making a false representation in an affidavit that 3 unauthorized checks were written on his account. He obtained \$600 of the \$900 he had attempted to obtain; this amount was attributable to one of the checks. He was charged and convicted of both obtaining property by false pretenses and of an attempted version of the crime with respect to the money he did not obtain. Construing the statute, the court concluded: “the General Assembly did not intend to subject a defendant to multiple counts of obtaining property by false pretenses where he obtains multiple items in a single transaction. Rather, the statute provides for an increase in punishment if the value of the property taken exceeds \$100,000.” Here, the defendant attempted to collect the value of three checks in a single transaction but was successful only in obtaining credit for one of the checks. Notwithstanding this, the court concluded that the trial court did not err in its jury instructions. The court reasoned that the error was a double jeopardy issue and because the defendant failed to object at trial, the issue was waived on appeal.

State v. Phillips, ___ N.C. App. ___, 797 S.E.2d 704 (Mar. 7, 2017). The trial court did not err by denying the defendant’s motion to dismiss a charge of attempting to obtain property by false pretenses. After an officer learned about larcenies of Michael Kors items from a local store, he found an online posting for similar items in an online flea market. Using a fake name and address, the officer created a social media account and started a conversation with the seller, later determined to be the defendant, to discuss purchase of the items. The two agreed to meet. Unbeknownst to the defendant, the officer decided to set up an undercover purchase for one of the items to determine if it in fact was stolen from the local store or whether it was counterfeit merchandise. The undercover purchase occurred and the item in question was determined to be counterfeit. Noting that actual deceit is not an element of attempting to obtain property by false pretenses, the court held that the evidence was sufficient to sustain the conviction. The court rejected the defendant’s argument that because he did not actually represent the item as an authentic Michael Kors item, there was no evidence of a false pretense or intent to deceive. The court noted that the defendant advertised the items as Michael Kors bags and described them as such to the undercover officer. Additionally, the defendant purchased the bags from a warehouse in Atlanta that sold them for only a fraction of their worth, suggesting that the defendant knew the merchandise was counterfeit. The court also rejected the defendant’s argument that because the offense was completed, a conviction for attempt was improper. The offense only occurs if the property actually is obtained in consequence of the victim’s reliance on the false pretense. Here, because of the undercover operation, the officer was never deceived by the defendant’s misrepresentation.

Burglary, Breaking or Entering, and Related Offenses

State v. McNair, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). (1) The evidence was sufficient to convict the defendant of felony breaking or entering a building. The court rejected the defendant’s argument that the evidence showed only his presence at the scene, noting, among

other things, that responding to a possible break-in, officers found the defendant scaling a 10-foot brick wall near the barn. The court also found that the evidence was sufficient to support an inference that the defendant intended to commit a larceny when he entered the barn, noting, among other things, that items had been removed from the barn and placed in the fenced in area around it. (2) The evidence was insufficient to convict the defendant of breaking or entering into a place of religious worship. The defendant was alleged to have broken into a place of religious worship used by Vision Phase III International Outreach Center (“Vision”), a church engaged in international missions and renting a building called the “Chapel” for the purpose of conducting its church services. Several other structures were situated behind the Chapel, including a small barn, located approximately 50 away. The property owner allowed Vision to use the barn to store equipment that could not be kept in the Chapel. The only building that the defendant was alleged to have broken into was the barn, which the State conceded was not used for religious worship. However, the State argued that the barn was within the curtilage of the Chapel, and for this reason should be deemed an extension of the Chapel for purposes of the statute. The court rejected this argument reasoning, in part, that based on the statute’s wording “it is clear” that to be convicted of breaking or entering into a place of religious worship, the specific building broken into must be a “building that is regularly used, and clearly identifiable, as a place for religious worship.” (3) The evidence was sufficient to convict the defendant of possession of burglar’s tools. Specifically, there was sufficient evidence that the defendant had constructive possession of a prybar and bolt cutters found at the scene. These tools were found within the fenced in area. Although the defendant was not in exclusive possession of them, there were other incriminating circumstances, including, among other things, that the defendant was found alone inside a privately owned fenced in area at 1 am and was scaling a 10-foot brick wall in an apparent attempt to avoid apprehension.

Weapons Offenses

State v. Battle, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017), *temporary stay allowed*, ___ N.C. ___, 798 S.E.2d 528 (May 8, 2017). In this felon in possession case, there was insufficient evidence that the defendant possessed the rifle in question. While attempting to locate the defendant, deputies established a perimeter around a large section of woods and deployed a canine, Max, to track human sent in the area. Following a scent, Max brought the officers to a loaded assault rifle. While Max continued to track the scent, another man emerged from the woods. After losing the scent and taking a rest break outside of the woods, Max resumed tracking, picking up a scent, and leading the officers to the defendant, who was discovered lying on the ground. The distance between where the rifle was recovered and where the defendant was found was between 75 and 100 yards. No evidence was presented regarding ownership of the rifle. DNA swabs taken from the rifle and compared to the defendant’s DNA were inconclusive. No other evidence connected the defendant to the rifle. Notwithstanding the fact that Max was trained not to veer off of one human sent and on to another, the rifle was not found in the defendant’s physical possession or in the immediate area over which he had the ability to control. Additionally, another man was present in the woods. The court noted that it had upheld convictions where defendants were identified as the perpetrator by tracking canines but found those cases distinguishable. Here, testimony of the canine’s tracking behavior constituted the *only* evidence offered to establish constructive possession of the rifle. In one of those prior cases, hair and shoe print evidence also was presented to identify the defendant as the

perpetrator. In the other, the canines were offered a scent source of the defendant and the codefendant and were tracking a known scent, as compared to the case at hand where Max was tracking an unknown scent. Also, in neither of the prior cases did the canine lose the track, take a break, and then resume. Additionally, here the defendant was not alone in the area and no other evidence linked him to the rifle or the site where it was recovered. The court concluded:

The officers' testimony is insufficient to establish any link between Defendant and the firearm. The canine tracking evidence on an unknown scent fails to raise, as a matter of law, a reasonable inference of either actual or constructive possession of a firearm by Defendant as a convicted felon. Viewed in the light most favorable to the State, the evidence raises only a "suspicion [or] conjecture" that Defendant possessed the rifle. The trial court erred in denying Defendant's motion to dismiss.

Drug Offenses

Maintaining a Dwelling, Etc.

State v. Rogers, ___ N.C. App. ___, 796 S.E.2d 91 (Feb. 7, 2017), *temporary stay allowed*, ___ N.C. ___, 796 S.E.2d 21 (Feb. 23, 2017). Over a dissent, the court held that "[b]ecause the evidence did not establish continuous possession of a vehicle for the purpose of keeping or selling a controlled substance, the trial court erred in denying defendant's motion to dismiss the charge of maintaining a vehicle for the keeping and/or selling of a controlled substance." The State failed to demonstrate continuous maintenance or possession of the vehicle by the defendant beyond the brief period of time when he was observed by the police on the afternoon of his arrest or that the defendant had used the vehicle on a prior occasion to keep or sell drugs. The evidence showed only that the defendant possessed drugs in the vehicle on one occasion.

State v. Holloway, ___ N.C. App. ___, 793 S.E.2d 766 (Dec. 6, 2016). The evidence was insufficient with respect to the maintaining a dwelling charge. There was no evidence that the defendant was the owner or lessee of the residence, there was no evidence that he paid for its utilities or upkeep, there was no evidence that he had been seen in or around the dwelling and there was no evidence that he lived there.

Possession Offenses

State v. Holloway, ___ N.C. App. ___, 793 S.E.2d 766 (Dec. 6, 2016). In this drug case, there was insufficient evidence of constructive possession. Officers responded to a report of a breaking and entering at a residence. They heard a commotion inside and noticed smoke coming from the house. Two men, Robert McEntire and the defendant, left through the front door. Because the officers had responded to a breaking and entering in progress, they placed the men in custody. The source of the smoke turned out to be a quantity of marijuana burning in the oven. A subsequent search of the premises found over 19 pounds of marijuana and other items including drug paraphernalia. Officers later learned that McEntire lived at the premises. A photograph of the defendant was found in a container in a bedroom. The defendant was indicted on multiple drug charges including trafficking, possession with intent, maintaining a dwelling and possession of drug paraphernalia. At trial, the defendant's mother explained why McEntire had a photograph of the defendant. McEntire testified that the defendant was merely visiting on the day

in question, that the contraband belonged to McEntire and that the defendant did not know about its presence. The trial court denied the defendant's motion to dismiss, which asserted insufficiency of the evidence. The defendant was convicted. The court found that the State failed to present substantial evidence demonstrating the defendant's constructive possession of the contraband. The only evidence tying the defendant to the residence or the contraband was his presence on the afternoon in question and a single photograph of him found face down in a plastic storage bin located in a bedroom. There was no evidence that the defendant had any possessory interest in the house, that he had a key to the residence, that his fingerprints were found on any of the seized items, that any items belonging to him were found in the residence (on this issue it noted that the photograph belong to McEntire), or that any incriminating evidence was found on his person.

State v. Williams, ___ N.C. App. ___, 796 S.E.2d 823 (Mar. 7, 2017). Where the defendant was in possession of a bag containing two separate Schedule I controlled substances, Methylone and 4-Methylethcathinone, two convictions were proper. Noting that it had already rejected the argument advanced by the defendant in another case, the court held that the defendant could be punished for two offenses where two different drugs are found in the same mixture.

State v. Howell, ___ N.C. App. ___, 796 S.E.2d 898 (Dec. 6, 2016), *review allowed*, ___ N.C. ___, 796 S.E.2d 789 (Mar. 16, 2017). G.S. 90-95(e)(3) operates as a sentence enhancement not a separate offense. The defendant was charged with possession of marijuana of over ½ ounce but less than 1½ ounces, a Class I misdemeanor, of having previously been convicted of any offense in violation of the Controlled Substances Act, and with attaining the status of habitual felon. The defendant pled guilty to the possession charge, acknowledged his prior conviction subjecting him to enhanced punishment and acknowledged attaining habitual felon status. The trial court treated the marijuana misdemeanor as a Class I felony because of the prior conviction and then elevated that conviction to a Class E felony because of habitual felon status. On appeal the defendant argued that under G.S. 90-95(e)(3), the prior conviction was merely a sentence enhancement, and could not serve to elevate the misdemeanor offense to a felony offense. The court agreed, concluding: "it appears that our General Assembly intended that section (e)(3) to act as a sentence enhancement rather than a separate offense." It continued: "Thus, while defendant's Class 1 misdemeanor is punishable as a felony under the circumstances present here, the substantive offense remains a Class 1 misdemeanor." The court went on to conclude that as a result, the defendant's habitual felon status had no impact on his sentence as a misdemeanant.

Motor Vehicle Offenses

State v. Scaturro, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). In a hit and run case involving failure to remain at the scene, the trial court committed plain error by failing to instruct the jury with respect to willfulness where the defendant's sole defense was that his departure was authorized and required to get assistance for the victim. The court continued:

To prevent future confusion and danger, we also take this opportunity to address the State's argument that N.C.G.S. § 20-166 prohibits a driver from leaving the scene of an accident to obtain medical care for himself or others and instead only authorizes a driver to temporarily leave to in order to call for help. While it is true that subsection (a) instructs that a driver may not leave the scene

of an accident “for any purpose other than to call for a law enforcement officer, to call for medical assistance or medical treatment,” we do not read statutory subsections in isolation. Instead, statutes dealing with the same subject matter must be *construed in pari materia* and reconciled, if possible.

Applying that principle here leads us to conclude that, even though N.C.G.S. §20-166(a) instructs that drivers may only leave for the limited purpose of calling for aid, that authorization is expanded by N.C.G.S. § 20-166(b)’s requirement that drivers, among other things, “*shall* render to any person injured in such crash *reasonable assistance*, including the calling for medical assistance” permitted by subsection (a). (Emphasis added). The plain language of this provision indicates that a driver’s obligation to an injured person permits him to take action including but not limited to that which is authorized by subsection (a). Accordingly, it is clear that taking a seriously injured individual to the hospital to receive medical treatment is not prohibited by the statute in the event that such assistance is reasonable under the circumstances. In fact, the violation of that directive is itself a Class 1 misdemeanor.

[*State v. Burris*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case the court rejected the defendant’s argument that the trial court erred by denying his motion to dismiss at the close of the State’s evidence. The defendant had argued that there was no independent evidence, other than his admission, to establish that he was operating a motor vehicle at any relevant time period. Here, the defendant admitted to the detective that he had been driving the vehicle and described in detail the route he took to get to the scene. When the detective approached the vehicle, the engine was not running but it was parked under an overhang area by the front door of a hotel, where guests typically stop to check in. The detective observed the defendant sitting in the drivers seat and the vehicle was registered to the defendant. The circumstantial evidence, along with the defendant’s admissions to driving the vehicle and the route he took, was sufficient evidence for the jury to determine that the defendant drove the vehicle.

[*State v. Cox*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court did not err in instructing the jury with respect to proximate cause as to the charge of felonious serious injury by vehicle. The defendant argued that the language of the statute “forecloses the possibility of the state proving proximate cause in conjunction with some other concurrent cause.” The court disagreed, citing prior case law rejecting this argument.

Defenses

Accident

[*State v. Robinson*](#), ___ N.C. App. ___, 795 S.E.2d 136 (Dec. 20, 2016). In a case involving attempted murder and other charges, the defendant was not entitled to a jury instruction on the defense of accident. The defendant testified that his gun discharged accidentally during the fight with the victim. The evidence, however, even considered in the light most favorable to the defendant, shows the defendant was engaged in wrongdoing when he shot the victim. The defendant admitted that he physically assaulted the victim and had his hand on the trigger of his

gun when it discharged. By his own admission, he was engaged in wrongful conduct when he shot the victim. He thus was not entitled to a jury instruction on the defense of accident.

Automatism

State v. Frazier, ___ N.C. App. ___, 790 S.E.2d 312 (July 5, 2016). Where the trial court submitted an instruction on automatism as a defense to a charge of felony child abuse, it was not required to instruct the jury on lesser included child abuse offenses. Automatism is a complete defense to a criminal charge and did not render any of the elements of felonious child abuse in conflict.

Self-Defense

State v. Juarez, ___ N.C. ___, 794 S.E.2d 293 (Dec. 21, 2016). Reversing the Court of Appeals in this first-degree felony murder case, the court held that the trial court did not commit plain error when it instructed the jury on the aggressor doctrine of self-defense. The trial court instructed the jury on perfect self-defense including the aggressor doctrine (that a defendant is not entitled to the benefit of self-defense if he was the aggressor); the defendant did not object. When there is no evidence that a defendant was the initial aggressor, it is reversible error for the trial court to instruct on the aggressor doctrine. The Court of Appeals determined that there was no evidence that the defendant was the aggressor. It failed however to analyze whether such error had the type of prejudicial impact that seriously affected the fairness, integrity or public reputation of the judicial proceeding. Therefore, that court's analysis was insufficient to conclude that the alleged error constituted plain error. The court found it unnecessary to decide whether an instruction on the aggressor doctrine was improper because the defendant failed to show that the alleged error was so fundamentally prejudicial as to constitute plain error.

State v. Bass, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). In this assault case, the court held, over a dissent, that the trial court committed reversible error by failing to instruct the jury that the defendant had no duty to retreat before using deadly force in self-defense and by later instructing the jury that the law regarding no duty to retreat "does not apply to this case." Under G.S. 14-51.3, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has a lawful right to be if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm or under circumstances permitted by G.S. 14-51.2. G.S. 14-51.2(b) in turn provides that the lawful occupant of the home, motor vehicle or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm when using defensive force intended to cause death or serious bodily harm under certain conditions. The trial court, concluding that the defendant was not within the curtilage of his home, declined the defendant's requests for a no duty to retreat instruction. The court concluded that the trial court was under the erroneous impression that the no duty to retreat language only applies when the defendant acts in self-defense while in his home, workplace or motor vehicle in fact there is no duty to retreat whenever a defendant is in a place where he or she has a lawful right to be. During deliberations, the jury sent a note to the trial court asking for further explanation on the law regarding no duty to retreat. The trial court instructed the jury, in part, that law "does not apply in this case." The court found this "clearly contrary to law." It concluded:

Not only did the initial instructions fail to inform the jury that Defendant statutorily had no duty to retreat under the circumstances set forth in N.C. Gen. Stat. § 14-51.3(a)(1), the further instruction stated the “no duty to retreat” statute “does not apply,” and may have required the jury to conclude Defendant would have had a duty to retreat under the circumstances to avoid criminal liability. The court went on to reject the argument made in the dissenting opinion that *State v. Lee*, ___ N.C. App. ___, *disc. review allowed*, ___ N.C. ___, 797 S.E.2d 301 (2017), controlled.

Statute of Limitations

[*State v. Turner*](#), ___ N.C. App. ___, 793 S.E.2d 287 (Dec. 6, 2016), *review allowed*, ___ N.C. ___, 797 S.E.2d 4 (Mar. 16, 2017). Because the State failed to prosecute the defendant’s impaired driving misdemeanor charge within two years, the trial court did not err by dismissing that charge. According to the court, the defendant “received a citation for driving while impaired” and “was arrested and brought before a magistrate, who issued a magistrate’s order.” The court stated:

The issuance of a citation did not toll the statute of limitations pursuant to N.C. Gen. Stat. § 15-1; the State had two years to either commence the prosecution of its case, or to issue a warrant, indictment, or presentment which would toll the statute of limitations. Because the State failed to do so, the statute of limitations expired, and the State was barred from prosecuting this action. The trial court did not err in dismissing the charge.

Voluntary Intoxication

[*State v. Wilson-Angeles*](#), ___ N.C. App. ___, 795 S.E.2d 657 (Feb. 7, 2017). In this arson case, the evidence was not sufficient to entitle the defendant to a voluntary intoxication instruction. While the evidence showed that the defendant was intoxicated at the time in question, there was no evidence about how much alcohol she had consumed or about the length of time over which she had consumed it. The evidence showed only that the defendant had consumed some amount of some type of alcohol over some unknown period. The court also noted that the defendant’s conduct in committing the crime and behavior with law enforcement afterwards indicated some level of awareness of her situation.

Capital Law

Mental Retardation Issues

[*Moore v. Texas*](#), 581 U.S. ___, 137 S. Ct. 1039 (Mar. 28, 2017). Vacating and remanding in this capital case, the Court held that a Texas court was wrong to fault a lower court for using a current definition of intellectual disability and by focusing on superseded standards and non-clinical factors for determining intellectual disability. Consulting current medical diagnostic standards, a state habeas court found in 2014 that the defendant was intellectually disabled and recommended relief. The Texas Court of Criminal Appeals (CCA) rejected this recommendation and denied the defendant relief. It reasoned that the habeas court erred by using the most current

standards regarding the diagnosis of intellectual disability rather than the test set out in *Ex parte Briseno*, 135 S. W. 3d 1 (Tex. Crim. App. 2004) which incorporated older medical standards and set forth “seven evidentiary factors,” later described by the Supreme Court as being unsupported by any authority, medical or judicial. The CCA determined that the *Briseno* standards “remain[ly] adequately ‘informed by the medical community’s diagnostic framework.’” Applying them, that court found that relief was not warranted. One judge dissented, arguing that *Atkins* and *Hall* require courts to consult current medical standards to determine intellectual disability and criticizing the majority for relying on manuals superseded in the medical community. The dissenting judge also questioned the legitimacy of the seven *Briseno* factors, noting that they deviate from the current medical consensus. Before the Supreme Court the issue was whether the Texas court’s “adherence to superseded medical standards and its reliance on *Briseno* comply with the Eighth Amendment and this Court’s precedents.” The Court held that it did not. It noted that although its decisions in *Atkins* and *Hall* left to the States the task of developing appropriate ways to enforce the restriction on executing intellectually disabled individuals, that determination must be informed by the medical community’s diagnostic framework. Here, the habeas court applied current medical standards in concluding that the defendant is intellectually disabled and therefore not eligible for the death penalty. The CCA, however, faulted the habeas court for disregarding the CCA’s case law and using a current definition of intellectual disability. The CCA instead “fastened its intellectual-disability determination” on a 1992 American Association on Mental Retardation manual definition adopted in *Briseno*. “By rejecting the habeas court’s application of medical guidance and clinging to the standard it laid out in *Briseno*, including the wholly nonclinical *Briseno* factors, the CCA failed adequately to inform itself of the medical community’s diagnostic framework.” (quotation omitted).

[*Brumfield v. Cain*](#), 576 U.S. ___, 135 S. Ct. 2269 (June 18, 2015). Because the Louisiana state court’s decision rejecting the defendant’s *Atkins* claim without affording him an evidentiary hearing was based on an unreasonable determination of the facts, the defendant was entitled to have his claim considered on the merits in federal court. After the defendant was convicted, the U.S. Supreme Court held, in *Atkins*, that “in light of . . . ‘evolving standards of decency,’” the Eighth Amendment “‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.” The Court however left “to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.” The Louisiana Supreme Court later held that “a diagnosis of mental retardation has three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuropsychological disorder in the developmental stage.” That court further held that an *Atkins* evidentiary hearing is required when an inmate has put forward sufficient evidence to raise a “reasonable ground” to believe him to be intellectually disabled. In a post-conviction motion in the case at bar, the defendant sought an *Atkins* hearing. Without holding an evidentiary hearing or granting funds to conduct additional investigation, the state trial court dismissed the defendant’s petition. After losing in state court, the defendant pursued federal habeas relief. The defendant won at the federal district court but the Fifth Circuit reversed. The U.S. Supreme Court granted review and held that the state court’s decision denying his *Atkins* claim was premised on an “unreasonable determination of the facts.” In reaching this decision, the Court focused on the two underlying factual determinations on which the trial court’s decision was premised: that the defendant’s IQ score of 75 was inconsistent with a diagnosis of intellectual disability and that he

had presented no evidence of adaptive impairment. The Court held that both of the state court's critical factual determinations were unreasonable.

Post-Conviction Proceedings

Motions for Appropriate Relief

[*State v. Hyman*](#), ___ N.C. App. ___, 797 S.E.2d. 308 (Feb. 21, 2017), *writ of certiorari allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 3, 2017). Over a dissent, the court reversed the trial court's order denying the defendant's motion for appropriate relief (MAR). The trial court erred by concluding that the defendant's MAR was procedurally barred. In the defendant's capital murder trial, he was represented by lawyers Smallwood and High. When the State called eyewitness Speller to testify, Smallwood told High that she previously represented Speller in an unrelated probation matter and had spoken to him about the defendant's case. Smallwood's notes from the conversation undermined Speller's trial testimony. Smallwood attempted to cross-examine Speller about their conversation to show that Speller had previously identified another person as the shooter. Speller conceded that he spoke with Smallwood but denied making statements reflected in her notes. The trial court did not allow Smallwood to show Speller her notes or to admit the notes into evidence. The defendant was convicted and appealed. The appellate court remanded for evidentiary hearing on the attorney conflict of interest claim. The MAR judge concluded that Smallwood's representation of the defendant was not adversely affected by her previous representation of Speller. The Court of Appeals affirmed. The defendant then filed a writ of habeas corpus in Federal District Court. The federal court concluded that the defendant was entitled to relief and vacated his conviction, concluding that Smallwood's actual conflict of interest adversely affected her performance. The State appealed to the Fourth Circuit which ended up staying the appeal to provide the North Carolina courts with an opportunity to weigh in on the relevant issues. The defendant then filed a MAR asserting that his sixth amendment right to effective, conflict free counsel was violated because one of his lawyers was also a crucial defense witness who did not testify due to her conflict of interest. At a hearing on the MAR the defendant could not produce Smallwood, who had been disbarred for separate misconduct and had left the state. The trial court denied the MAR concluding that any evidence Smallwood would have offered was inadmissible and that the defendant had presented no credible evidence that the conversation between Smallwood and Speller ever took place or that Smallwood's notes were made contemporaneously with the conversation. The trial court also found that the defendant's exculpatory witness claim was procedurally barred. The defendant sought review. The court held that the defendant's claim was not procedurally barred under G.S. 15A-1419(a)(3) (upon a previous appeal the defendant was in a position to adequately raise the ground or issue but did not do so) because the defendant had in fact adequately raised the claim on direct appeal.

Recovery of Costs, Fees, Etc.

[*Nelson v. Colorado*](#), 581 U.S. ___, 137 S. Ct. 1249 (April 19, 2017). The Court held that when a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction. Absent conviction of a crime, one is presumed innocent. Under

the Colorado law in question, the State retains conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence. The Court held that this scheme offends the Fourteenth Amendment's guarantee of due process. It concluded: "To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated."