John Rubin, 919.962.2498, rubin@sog.unc.edu
Shea Denning, 919.843.5120, denning@sog.unc.edu

Criminal Case Update

2016 Winter Webinar

(includes selected cases decided between June 1, 2016 and November 15, 2016)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to the Criminal Case Compendium. Summaries of Fourth Circuit cases were prepared by Bob Farb. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

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Seizures

The attenuation doctrine applies when an officer makes an unconstitutional investigatory stop, learns that the suspect is subject to a valid arrest warrant, and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest

Utah v. Strieff, 579 U.S. ___, 136 S. Ct. 2056 (June 20, 2016). An officer stopped the defendant without reasonable suspicion. An anonymous tip to the police department reported "narcotics activity" at a particular residence. An officer investigated and saw visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs. One visitor was the defendant. After observing the defendant leave the house and walk toward a nearby store, the officer detained the defendant and asked for his identification. The defendant complied and the officer relayed the defendant's information to a police dispatcher, who reported that the defendant had an outstanding arrest warrant for a traffic violation. The officer then arrested the defendant pursuant to the warrant. When a search incident to arrest revealed methamphetamine and drug paraphernalia, the defendant was charged. The defendant unsuccessfully moved to suppress, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. He was convicted and appealed. The Utah Supreme Court held that the evidence was inadmissible. The Court reversed. The Court began by noting that it has recognized several exceptions to the exclusionary rule, three of which involve the causal relationship between the unconstitutional act and the discovery of evidence: the independent source doctrine; the inevitable discovery doctrine; and—at issue here—the attenuation doctrine. Under the latter doctrine, "Evidence is admissible when the connection

between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." Turning to the application of the attenuation doctrine, the Court first held that the doctrine applies where—as here—the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant. It then concluded that the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on the defendant's s person. In this respect it applied the three factors articulated in *Brown v. Illinois*, 422 U. S. 590 (1975): the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct. It concluded:

> Applying these factors, we hold that the evidence discovered … was admissible because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant. Although the illegal stop was close in time to [the] arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for … arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling [the] Officer … to arrest [the defendant]. And, it is especially significant that there is no evidence that [the] Officer['s] … illegal stop reflected flagrantly unlawful police misconduct.

Fourth Circuit rules that officer did not unconstitutionally prolong traffic stop based on odor of marijuana emanating from vehicle

State v. White, 836 F.3d 437 (4th Cir. Sept. 9, 2016). A local West Virginia law enforcement officer stopped a car that had veered out of its lane. In addition to the driver, there was a front seat passenger, the defendant, and one back seat passenger, Bone. When approaching the driver's window, he smelled an odor of burned marijuana emanating from the car. The driver, whom the officer concluded was not impaired, denied knowledge of the marijuana. The officer requested that the defendant exit the car and asked him about the marijuana odor, but he denied anything illegal in the car. While talking with Bone, the officer saw a firearm in a piece of plastic molding on the front side of the passenger seat where the defendant had been sitting. The defendant was arrested and later convicted in federal district court of possession of a firearm by a felon.

> The defendant conceded that the stop of the vehicle was supported by reasonable suspicion of a traffic violation under West Virginia law, but he contended that the officer unconstitutionally prolonged the stop. The fourth circuit noted that its case law provides that the odor of marijuana alone can provide probable cause to believe that marijuana is present in a particular place. So the officer had reasonable suspicion to extend the traffic stop to investigate the marijuana odor. And during that investigation the officer found the firearm. The court ruled that therefore the officer did not unconstitutionally prolong

the traffic stop.

Officer's mistaken belief that the requirement in G.S. 20-126(b) for a driver's side mirror applied to vehicles registered in another state was not objectively reasonable under *Heien v. North Carolina* and thus did not provide a lawful basis for the stop

State v. Eldridge, ___ N.C. App. ___, 790 S.E.2d 740 (Sept. 20, 2016). The trial court erred by denying the defendant's motion to suppress where a stop was based on an officer's mistake of law that was not objectively reasonable. An officer stopped a vehicle registered in Tennessee for driving without an exterior mirror on the driver's side of the vehicle. The officer was not aware that the relevant statute—G.S. 20-126(b)—does not apply to vehicles registered out-of-state. A subsequent consent search led to the discovery of controlled substances and drug charges. On appeal, the State conceded, and the court concluded, following *Heien v. North Carolina*, 135 S. Ct. 530 (2014), that the officer's mistake of law was not reasonable. Looking for guidance in other jurisdictions that have interpreted *Heien,* the court noted that cases from other jurisdictions "establish that in order for an officer's mistake of law while enforcing a statute to be objectively reasonable, the statute at issue must be ambiguous." "Moreover," the court noted, "some courts applying *Heien* have further required that there be an absence of settled case law interpreting the statute at issue in order for the officer's mistake of law to be deemed objectively reasonable." The concluded that the statue at issue was clear and unambiguous; as a result "a reasonable officer reading this statute would understand the requirement that a vehicle be equipped with a driver's side exterior mirror does not apply to vehicles that—like Defendant's vehicle—are registered in another state."

Trial court erred by denying the defendant's motion to suppress where the officer continued to question the defendant in his patrol car after issuing a warning ticket for speeding and no reasonable suspicion supported extending the stop

State v. Reed, ___ N.C. App. ___, 791 S.E.2d 486 (Sept. 20, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Oct. 5, 2016). Applying *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), in this drug case, the court held, over a dissent, that trial court erred by denying the defendant's motion to suppress. After stopping the defendant's vehicle for speeding, the officer told the defendant to come with him to the patrol car. The officer frisked the defendant and found a pocketknife. The defendant sat in the front passenger seat of the patrol car with the door open and one leg outside of the car. The officer's canine was in the backseat. The officer told the defendant to close the door; when the defendant hesitated the officer ordered him to do so and the defendant complied. The officer ran the defendant's New York license through record checks on his mobile computer asking the defendant about New York and where he was headed. The officer also asked the defendant about his criminal history, his living arrangements with his fiancée, a passenger in his car, and other questions. When the officer noticed that the rental agreement he had been given was for a different vehicle, he told the defendant to remain seated while he returned to the vehicle to get the correct rental agreement. The officer then approached the defendant's fiancé and asked for the rental agreement and about her travel plans and the nature of her trip. After the defendant's fiancé failed to locate the correct rental

agreement, the trooper told her that he would issue the defendant a speeding ticket and the two could be on their way. The officer then returned to the patrol car, explained that the defendant's fiancé couldn't find the correct rental agreement and continued to question the defendant about his trip. He then called the rental company and confirmed that everything was in order with the rental. The officer issued the defendant a warning ticket. The officer told the defendant he was "completely done with the traffic stop" but wanted to ask the defendant additional questions. The officer asked the defendant if he was carrying controlled substances, firearms, or illegal cigarettes. When the officer asked the defendant for consent to search the car, the defendant told him to ask his fiancée. The officer also asked the defendant's fiancé the same questions and for permission to search the car. The fiancé eventually gave consent to search. The officer's authority to seize the defendant for the speeding infraction ended when he issued the warning ticket. No reasonable suspicion supported extending the traffic stop beyond this point.

Mere presence in area known for unlawful drug activity cannot provide reasonable suspicion and the manner in which the defendant left the area could not reasonably be described as headlong flight

State v. Goins, ___ N.C. App. ___, 789 S.E.2d 466 (July 5, 2016), *temporary stay allowed*, ___ N.C. ___, 787 S.E.2d 398 (July 22, 2016). Over a dissent the court held that the trial court erred by denying the defendant's motion to suppress all evidence obtained pursuant to a stop of his vehicle. The stop occurred in an area of high crime and drug activity. The defendant's mere presence in such an area, however, cannot standing alone provide the necessary reasonable suspicion for the stop. Although headlong flight can support a finding of reasonable suspicion, the court found the evidence of flight insufficient in this case to show headlong flight. Among other things it noted that there was no evidence that the defendant personally observed the police car across the street before he left the premises and the defendant did not break any traffic laws in his exit from the premises. Additionally, although the officers suspected that the defendant might be approaching a man at the premises to conduct a drug transaction, the officers did not see those individuals conducting any suspicious activity. Officers' suspicion that the defendant was fleeing from the scene, without more, did not justify the stop.

DWI arrest based on golf cart accident supported by probable cause

State v. Williams, ___ N.C. App. ___, 786 S.E.2d 419 (June 21, 2016). An officer had probable cause to arrest the defendant for DWI. The officer responded to a call involving operation of a golf cart and serious injury to an individual. The defendant admitted to the officer that he was the driver of the golf cart. The defendant had "very red and glassy" eyes and "a strong odor of alcohol coming from his breath." The defendant's clothes were bloody, and he was very talkative, repeating himself several times. The defendant's mannerisms were "fairly slow" and the defendant placed a hand on the deputy's patrol car to maintain his balance. The defendant stated that he had "6 beers since noon" and he submitted to an Alco-Sensor test, which was positive for alcohol.

Reasonable suspicion supported stop of vehicle that left location known for criminal activity two minutes after arriving

State v. Crandell, ___ N.C. App. ___, 786 S.E.2d 789 (June 7, 2016). Reasonable suspicion supported the stop of the defendant's vehicle. The vehicle was stopped after the defendant left premises known as "Blazing Saddles." Based on his experience making almost two dozen arrests in connection with drug activity at Blazing Saddles and other officers' experiences at that location, the officer in question was aware of a steady pattern the people involved in drug transactions visit Blazing Saddles when the gate was down and staying for approximately two minutes. The defendant followed this exact pattern: he visited Blazing Saddles when the gate was down and stayed approximately two minutes. The court distinguished these facts from those where the defendant was simply observed in a high drug area, noting that Blazing Saddles was a "notorious" location for selling drugs and dealing in stolen property. It was an abandoned, partially burned building with no electricity, and there was no apparent legal reason for anyone to go there at all, unlike neighborhoods in high drug or crime areas where people live and naturally would be present.

Vehicle stop justified by reasonable suspicion where officer saw defendant and another male, who was dragging an impaired female, get into a vehicle and drive away

State v. Sawyers, ___ N.C. App. ___, 786 S.E.2d 753 (June 7, 2016). (1) A stop of the defendant's vehicle was justified by reasonable suspicion. While on patrol in the early morning, the officer saw the defendant walking down the street. Directly behind him was another male, who appeared to be dragging a drugged or intoxicated female. The defendant and the other male placed the female in the defendant's vehicle. The two then entered the vehicle and left the scene. The officer was unsure whether the female was being kidnapped or was in danger. Given these circumstances, the officer had reasonable suspicion that the defendant was involved in criminal activity. (2) Additionally, and for reasons discussed in the opinion, the court held that the stop was justified under the community caretaking exception.

Searches

Search warrant was not supported by probable cause where application and affidavit failed to connect the property to be searched and the objects sought; court recognizes that no good faith exception to the exclusionary rule exists under the state constitution

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.

Search warrant was supported by sufficient probable cause based on the information provided by a confidential informant under the totality of the circumstances

State v. Jackson, ___ N.C. App. ___, 791 S.E.2d 505 (Oct. 4, 2016). Over a dissent, the court held that the search warrant was supported by sufficient probable cause in this drug case. At issue was the reliability of information provided by a confidential informant. Applying the totality of the circumstances test, and although the informant did not have a "track record" of providing reliable information, the court found that the informant was sufficiently reliable. The court noted that the information provided by the informant was against her penal interest (she admitted purchasing and possessing marijuana); the informant had a face-to-face communication with the officer, during which he could assess her demeanor; the face-to-face conversation significantly increase the likelihood that the informant would be held accountable for a tip that later proved to be false; the informant had first-hand knowledge of the information she conveyed; the police independently corroborated certain information she provided; and the information was not stale (the informant reported information obtained two days prior).

Vague and inaccurate search warrant inventory list did not provide basis for suppression of evidence seized

State v. Downey, ___ N.C. App. ___, 791 S.E.2d 257 (Sept. 6, 2016). In this drug case, the court rejected the defendant's argument that the trial court erred by denying his motion to suppress evidence collected from his residence on the grounds that the inventory list prepared by the detective was unlawfully vague and inaccurate in describing the items seized. The defendant argued that the evidence gathered from his residence was obtained in substantial violation of G.S. 15A-254, which requires an officer executing a search warrant to write and sign a receipt itemizing the items taken. Specifically, he asserted that the inventory receipt was vague and inaccurate and thus failed to satisfy the statute's requirements. In order for suppression to be warranted for a substantial violation of the statute, G.S. 15A-974 requires that the evidence be obtained as a result of officer's unlawful conduct and that it would not have been obtained but for the unlawful conduct. Here, citing prior case law, the court held, in part, that because the evidence was seized before the inventory required by the statute had to be prepared, the defendant failed to show that the evidence would not have been obtained but for the alleged violations of G.S. 15A-254. The court held that G.S. 15A-254 "applies only after evidence has been obtained and does not implicate the right to be free from unreasonable search and seizure. In turn, because evidence cannot be obtained 'as a result of' a violation of [G.S.] 15A-254, [G.S.] 15A-

974(a)(2) is inapplicable to either alleged or actual [G.S.] 15A-254 violations."

Knock and talk did not result in illegal seizure of the defendant and exigent circumstances justified the officers' warrantless entry into the defendant's home

State v. Marrero, ___ N.C. App. ___, 789 S.E.2d 560 (Aug. 2, 2016). In this drug case, the trial court properly denied a motion to suppress where no illegal seizure of the defendant occurred during a knock and talk and where exigent circumstances justified the officers' warrantless entry into the defendant's home. The court rejected the defendant's argument that he was illegally seized during a knock and talk because he was coerced into opening the front door. The officers knocked on the front door a few times and stated that they were with the police only once during the 2-3 minutes it took the defendant to answer the door. There was no evidence that the defendant was aware of the officer's presence before he opened the door. Blue lights from nearby police cars were not visible to the defendant and no takedown lights were used. The officers did not try to open the door themselves or demand that it be opened. The court concluded: "the officers did not act in a physically or verbally threatening manner" and no seizure of defendant occurred during the knock and talk. (2) Exigent circumstances supported the officers' warrantless entry into the defendant's home (the defendant did not challenge the existence of probable cause). Officers arrived at the defendant's residence because of an informant's tip that armed suspects were going to rob a marijuana plantation located inside the house. When the officers arrived for the knock and talk, they did not know whether the robbery had occurred, was in progress, or was imminent. As soon as the defendant opened his door, an officer smelled a strong odor of marijuana. Based on that odor and the defendant's inability to understand English, the officer entered the defendant's home and secured it in preparation for obtaining a search warrant. On these facts, the trial court did not err in concluding that exigent circumstances warranted a protective sweep for officer safety and to ensure the defendant or others would not destroy evidence.

Odor of marijuana emanating from inside a vehicle stopped at a checkpoint did not provide an officer with probable cause to conduct an immediate warrantless search of the driver.

State v. Pigford, ___ N.C. App. ___, 789 S.E.2d 857 (Aug. 2, 2016). In this drug case, the court held, deciding an issue of first impression, that an odor of marijuana emanating from inside a vehicle stopped at a checkpoint did not provide an officer with probable cause to conduct an immediate warrantless search of the driver. The defendant was driving the stopped vehicle; a passenger sat in the front seat. The officer was unable to establish the exact location of the odor but determined that it was coming from inside the vehicle. Upon smelling the odor, the officer ordered the defendant out of the vehicle and searched him, finding cocaine and other items. On appeal the defendant argued that although the officer smelled marijuana emanating from the vehicle, there was no evidence that the odor was attributable to the defendant personally. It was not contested that the officer had probable cause to search the vehicle. The State offered no evidence that the marijuana odor was attributable to the defendant. The court held: the officer "may have had probable cause to search the vehicle, but he did not have probable cause to search defendant."

(1) Warrantless breath testing of impaired driving suspects is permissible as a search incident to arrest; a person who refuses to submit to such testing may be subjected to sanctions ranging from license revocation to criminal prosecution. (2) Warrantless blood testing of impaired driving suspects is not permissible as a search incident to arrest and a person who refuses to submit to such testing may not be criminally prosecuted for that refusal.

Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160 (June 23, 2016). In three consolidated cases the Court held that while a warrantless breadth test of a motorist lawfully arrested for drunk driving is permissible as a search incident to arrest, a warrantless blood draw is not. It concluded: "Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation." Having found that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, the Court turned to the argument that blood tests are justified based on the driver's legally implied consent to submit to them. In this respect it concluded: "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."

Miranda

Probationer handcuffed for safety reasons was not in custody for purposes of *Miranda*

State v. Barnes, ___ N.C. App. ___, 789 S.E.2d 488 (July 19, 2016). Although the defendant was in handcuffs at the time of the questioning, he was not, based on the totality of the circumstances, "in custody" for purposes of *Miranda*. While the defendant was visiting his cousin's house, a parole officer arrived to search of the cousin's home. The parole officer recognized the defendant as a probationer and the officer advised him that he was also subject to a warrantless search because of his probation status. The officer put the defendant in handcuffs "for officer safety" and seated the two men on the front porch while officers conducted a search. During the search, the parole officer found a jacket with what appeared to be crack cocaine inside a pocket. The officer asked the defendant and his cousin to identify the owner of the jacket. The defendant claimed the jacket and was charged with a drug offense. The court held: "Based on the totality of circumstances, we conclude that a reasonable person in Defendant's situation, though in handcuffs would *not* believe his restraint rose to the level of the restraint associated with a formal arrest." The court noted that the regular conditions of probation include the requirement that a probationer submit to warrantless searches. Also, the defendant was informed that he would be placed in handcuffs for officer safety and he was never told that his detention was anything other than temporary. Further, the court reasoned, "as a probationer subject to random searches as a condition of probation, Defendant would objectively understand the purpose of the restraints and the fact that the period of restraint was for a temporary duration."

State supreme court orders new hearing on motion to suppress during which trial court is to apply test from *Howes v. Fields*, 132 S. Ct. 1181 (2012), to determine whether involuntarily committed defendant was in custody when questioned about armed robbery

State v. Hammonds, 368 N.C. 906 (June 10, 2016). Vacating the opinion of the Court of Appeals and the trial court's order denying the defendant's motion to suppress, the court ordered the case certified to the trial court for a new hearing on the defendant's motion to suppress for the trial court to apply the totality of the circumstances test as set out in *Howes v. Fields*, 132 S. Ct. 1181, 1194 (2012). At issue was whether the defendant was in custody when he made statements to law enforcement officers while under an involuntary commitment order. The court further stated that the trial court "shall consider all factors, including the important factor of whether the involuntarily committed defendant was told that he was free to end the questioning."

(1) Handcuffed and arrested defendant was in custody; (2) Officer's question, "Do you have anything else on you?" was interrogation; (3) Public safety exception did not apply

State v. Crook, ___ N.C. App. ___, 785 S.E.2d 771 (June 7, 2016). (1) Because the defendant was handcuffed and placed under arrest, the trial court erred by concluding that the defendant was not in custody when he made a statement to the officer. (2) The defendant was subject to an interrogation when, after handcuffing the defendant, placing him under arrest, and conducting a pat down, the officer asked, "Do you have anything else on you?" The defendant, who was in front of a doorway to a motel room, stated, "I have weed in the room." (3) The court rejected the State's argument that the public safety exception established in *New York v. Quarles*, 467 U.S. 649 (1984) applied. The court found the facts of the case at hand "noticeably distinguishable" from those in *Quarles,* noting that the defendant was not suspected of carrying a gun or other weapon; rather, he was sitting on the ground in handcuffs and already had been patted down.

Hospitalized defendant was not in custody for *Miranda* purposes

State v. Portillo, ___ N.C. App. ___, 787 S.E.2d 822 (June 7, 2016). (1) The defendant was not in custody when he gave statements to officers at the hospital. The victim was killed in a robbery perpetrated by the defendant and his accomplice. The defendant was shot during the incident and brought to the hospital. He sought to suppress statements made to police officers at the hospital, arguing that they were elicited during a custodial interrogation for which he had not been given his *Miranda* warnings. There was no evidence that the defendant knew a guard was present when the interview was conducted; the defendant was interrogated in an open area of the ICU were other patients, nurses, and doctors were situated and he had no legitimate reason to believe that he was in police custody; none of the officers who were guarding him spoke with him about the case prior to the interview; the detectives who did so wore plain clothes; and there was no evidence that the defendant's movements were restricted by anything other than the injuries he had sustained and the medical equipment connected to him. Additionally, based on the evidence, the court rejected the defendant's argument that the interrogation was custodial because he was under the influence of pain and other medication that could

have affected his comprehension. It also rejected the defendant's argument that he was in custody because the detectives arrived at the hospital with the intention of arresting him. Although they may have had this intention, it was not made known to the defendant and thus has no bearing on whether the interview was custodial. (2) Where there was no evidence that the defendant's first statement, given in the hospital, was coerced, there was no support for his contention that his second statement was tainted by the first. (3) The court rejected the defendant's argument that his inculpatory statements resulted from substantial violations of Chapter 15A requiring suppression.

Pretrial and Trial Procedure

Jurisdiction

Superior court had no jurisdiction over misdemeanor and infraction after dismissal before trial of related felony charge

State v. Armstrong, ___ N.C. App. ___, 786 S.E.2d 830 (June 21, 2016). In a case in which the defendant was originally charged with habitual impaired driving, driving while license revoked and speeding, the superior court did not have subject matter jurisdiction to try the misdemeanor or the infraction where the State dismissed the felony DWI charge before trial. The case came on for trial in superior court about one month after the State dismissed the felony DWI charge. Without the felony offense, the misdemeanor fell under none of the exceptions in G.S. 7A-271(a) giving jurisdiction to the superior court, and the infraction fell under none of the exceptions in subsection (d) of that provision. Under G.S. 7A-271(c), once the felony was dismissed before trial, the court should have transferred the two remaining charges to the district court.

Pleadings

Indictment sufficiently charged burning of building in violation of G.S. 14-62 although it omitted term "wantonly" from allegations

State v. Hunt, ___ N.C. App. ___, ___ S.E.2d ___ (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.

Trial court erred by instructing jury it could convict defendant of safecracking offense by means not alleged in indictment

State v. Jackson, ___ N.C. App. ___, 791 S.E.2d 505 (Oct. 4, 2016). The trial court committed plain error in this safecracking case by instructing the jury that it could convict the defendant if it determined that he obtained the safe combination "by surreptitious means" when the indictment charged that he committed the offense by means of "a fraudulently acquired combination." One essential element of the crime is the means by which the defendant attempts to open a safe. Here, there was no evidence that the defendant attempted to open the safe by the means alleged in the indictment.

Variance between indictment and evidence as to date defendant received images of child pornography was not fatal

State v. Jones, ___ N.C. App. ___, 789 S.E.2d. 651 (July 19, 2016). In this second-degree sexual exploitation of a minor case, there was no fatal variance between the indictments and the evidence presented at trial. The indictments alleged a receipt date of December 17, 2009; the evidence established the date of receipt as October 18, 2009. A variance regarding time becomes material if it deprives the defendant of his ability to prepare a defense. Here, the defendant did not advance an alibi or other time-based defense at trial.

Indictment charging habitual misdemeanor larceny that failed to list prior convictions in a separate count was fatally defective.

State v. Brice, ___ N.C. App. ___, 786 S.E.2d 812 (June 7, 2016), *temporary stay allowed*, ___ N.C. ___, 787 S.E.2d 390 (June 28, 2016). The indictment charging the defendant with habitual misdemeanor larceny failed to comply with G.S. 15A-928 with respect to alleging the required prior convictions and thus was defective. A single indictment charged the defendant with habitual misdemeanor larceny and listed the defendant's prior convictions; the prior convictions were not alleged in a separate count. The court rejected the State's argument that the error did not warrant reversal unless the defendant was prejudiced. The court vacated the defendant's conviction and remanded for entry of judgment and sentence on misdemeanor larceny.

Motion to Suppress

NC Supreme Court modifies and affirms court of appeals ruling upholding trial court's denial of defendant's motion to suppress; Court holds that defendant failed to preserve issue regarding timing of officer's observation of powder on floor when he did not raise it at the hearing on the motion to suppress

State v. Collins, ___ N.C. ___, 791 S.E.2d 458 (Sept. 23, 2016) (per curiam). In a drug case in which the

court of appeals had held that a strip search of the defendant did not violate the fourth amendment, *State v. Collins,* ___ N.C. App. ___, 782 S.E.2d 350 (2016), the Supreme Court affirmed solely on the ground that because the defendant failed to raise in the trial court the timing of the officer's observation of powder on the floor, he failed to preserve that issue on appeal. The defendant had argued in the court of appeals that because the officer did not see the powder until after the search, the trial court was barred from considering the officer's observation in ruling on the defendant's suppression motion. The court of appeals determined that because the defendant failed to raise the timing of the officer's observation at the hearing on his motion to suppress, the issue was not properly before the appellate court.

Trial court acted within its statutory authority in denying motion to suppress that was not filed within statutory time limits

State v. Smith, ___ N.C. App. ___, 789 S.E.2d 873 (Aug. 2, 2016). The trial court did not err by denying the defendant's motion to suppress as untimely under G.S. 15A-976 where the defendant failed to file the motion to suppress medical records seized pursuant to a search warrant within 10 working days following receipt of the State's notice.

Pleas

Trial court did not err in refusing to allow defendant to withdraw guilty plea after he entered it but before sentencing.

State v. McGill, ___ N.C. App. ___, 791 S.E.2d 702 (Oct. 18, 2016). (1) 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. (2) There was a sufficient factual basis to support the defendant's guilty plea to robbery charges. The defendant stipulated that a factual basis existed to support his guilty plea and then stipulated to the State's summary of the factual basis which it provided to the trial court. After the State entered its summary into the record, the trial court asked the defendant if he had any additions or corrections and he responded in the negative.

Right to Counsel

Sovereign citizen knowingly and voluntarily waived right to counsel for probation violation hearing

State v. Faulkner, ___ N.C. App. ___, ___ S.E.2d ___ (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.

Absolute impasse rule does not require an attorney to comply with client's request to assert frivolous or unsupported claims

State v. Ward, ___ N.C. App. ___, ___ S.E.2d ___ (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 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.

Other Procedural Issues

District court acted within its authority in dismissing case for failure to prosecute where, after district court denied the State's motion to continue and directed the State to call the case or dismiss, the State refused to take any action

State v. Loftis, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 15, 2016). In this DWI case, the district court properly dismissed the charges *sua sponte*. After the district court granted the defendant's motion to suppress, the State appealed to superior court, which affirmed the district court's pretrial indication and remanded. The State then moved to continue the case, which the district court allowed until June 16, 2015, indicating that it was the last continuance for the State. When the case was called on June 16th the State requested another continuance so that it could petition the Court of Appeals for writ of certiorari to review the order granting the defendant's motion to suppress. The district court judge denied the State's motion to continue and filed the final order of suppression. The district court judge then directed the State to call the case or move to dismiss it. When the State refused to take any action, the district court, on its own motion, dismissed the case because of the State's failure to prosecute. Affirming, the court noted that when the case came on for final hearing on June 16th, the State had failed to seek review of the suppression motion. And, given that the prosecutor knew that there was no admissible evidence supporting the DWI charge in light of the suppression ruling, a State Bar Formal Ethics Opinion required dismissal of the charges. The court noted: the "State found itself in this position by its own in action."

Due process required that a supreme court justice recuse himself from the capital defendant's post-conviction challenge where the justice had been the district attorney who approved seeking the death penalty

Williams v. Pennsylvania, 579 U.S. ___, 136 S. Ct. 1899 (June 9, 2016). Due process required that a Pennsylvania Supreme Court Justice recuse himself from the capital defendant's post-conviction challenge where the justice had been the district attorney who gave his official approval to seek the death penalty in the case. The Court stated: "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." It went on to hold that the justice's authorization to seek the death penalty against the defendant constituted significant, personal involvement in a critical trial decision. Finally, it determined that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote; as such the error was not subject to harmless

error review.

The Double Jeopardy Clause bars Puerto Rico and the United States from successively prosecuting a single person for the same conduct under equivalent criminal laws.

Puerto Rico v. Sanchez Valle, 579 U.S. ___, 136 S. Ct. 1863 (June 9, 2016). Puerto Rican prosecutors indicted the defendant for illegally selling firearms in violation of the Puerto Rico Arms Act of 2000. While those charges were pending, federal grand juries also indicted them, based on the same transactions, for violations of analogous federal gun trafficking statutes. The Court held that the separate sovereign doctrine (double jeopardy does not bar successive prosecutions if they are brought by separate sovereigns) did not apply. If two entities derive their power to punish from independent sources, then they may bring successive prosecutions. Conversely, if the entities draw their power from the same ultimate source, then they may not. While States are separate sovereigns from the federal government, Puerto Rico is not.

(1) Trial court was authorized to accept waiver of jury trial from defendant who was arraigned after waiver provision became effective; (2) Trial judge's exclusion of confession from evidence at trial did not render judge unable to serve as a fair and impartial factfinder

State v. Jones, ___ N.C. App. ___, 789 S.E.2d. 651 (July 19, 2016). (1) The court rejected the defendant's argument that the trial court lacked authority to allow him to waive his right to a trial by jury because he was not arraigned before the effective date of the constitutional amendment and statute allowing such a waiver. The new provision on jury trial waivers became effective December 1, 2014 and applies to criminal cases arraigned in Superior Court on or after that date. The defendant never requested a formal arraignment pursuant to G.S. 15A-941; his arraignment occurred on the first day of trial, May 11, 2015. Because the defendant's arraignment occurred after the effective date of the constitutional amendment and accompanying session law, the trial court was constitutionally authorized to accept the defendant's waiver of jury trial. (2) The court rejected the defendant's argument that because the trial judge had ruled in favor of the defendant's pretrial motion in limine, excluding an involuntary confession, he was unable to serve as a fair and impartial factfinder and that the non-jury trial was "tainted" by the trial judge's knowledge of the inadmissible statements. Because the defendant chose to waive his right to a trial by jury and proceed with a bench trial, he could not argue on appeal that he was prejudiced as a result of his own strategic decision. Furthermore, the trial court is presumed to disregard incompetent evidence in making decisions as a finder of fact.

Evidence

Authentication

Store surveillance video was properly authenticated

State v. Ross, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 4, 2016). The trial court did not commit plain error by admitting store surveillance video in a safecracking case. Citing *State v. Snead*, ___ N.C. ___, 783 S.E.2d 733 (2016), the court held that the surveillance video was properly authenticated. The store manager testified that the surveillance system included 16 night vision cameras; he knew the cameras were working properly on the date in question because the time and date stamps were accurate; and a security company managed the system and routinely checked the network to make sure the cameras remained online. The store manager also testified that the video being offered into evidence at trial was the same video he viewed immediately following the incident and that it had not been edited or altered in any way.

(1) Videotape of detective's interview with defendant was properly admitted for illustrative purposes; (2) Store surveillance video was properly authenticated

State v. Fleming, ___ N.C. App. ___, 786 S.E.2d 760 (June 7, 2016). (1) The trial court properly admitted a videotape of a detective's interview with the defendant for illustrative purposes. The detective testified that the video was a fair and accurate description of the interview. This met the requirements for authentication of a video used for illustrative purposes. (2) Citing the North Carolina Supreme Court's recent decision in *State v. Snead,* the court held that a store surveillance video of a theft was properly authenticated. The State's witness testified that the surveillance video system was functioning properly at the time and that the video introduced at trial was unedited.

Expert Testimony

Trial court committed plain error by allowing officer to testify about results of HGN test without qualifying him as expert

State v. Killian, ___ N.C. App. ___, ___ S.E.2d ___ (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), 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.

Where fire investigator was not offered as expert and testified without objection, trial court did not err by failing *sua sponte* to inquire whether he was qualified to testify as expert

State v. Hunt, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 1, 2016). In this burning of a building case, the trial court did not commit plain error by allowing Investigator Gullie to offer opinion testimony about his inspection of fire. Investigator Gullie was neither tendered nor admitted as expert in field of fire investigation and testified 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.

(1) Testimony from forensic analyst regarding his analysis of a sample of the pills seized sufficiently established a trafficking amount of opium; (2) Analyst's testimony was properly admitted under Rule 702

State v. Hunt, ___ N.C. App. ___, 790 S.E.2d 874 (Sept. 6, 2016). (1) In this drug case, testimony from the State's expert sufficiently established a trafficking amount of opium (over 4 grams). Following lab protocol, the forensic analyst grouped the pharmaceutically manufactured pills seized into four categories based on their unique physical characteristics. He then chemically analyzed one pill from three categories and determined that they tested positive for oxycodone. He did not test the pill in the final category because the quantity was already over the trafficking amount. Following prior case law, the court held that the analyst was not required to chemically analyze each individual tablet; his testimony provided sufficient evidence for a trafficking amount of opium such that an instruction on lesser included drug offenses was not required. The court also noted that any deviation that the analyst might have taken from the established methodology for analyzing controlled substances went to the weight of his testimony not its admissibility. (2) The analyst's testimony was properly admitted under Rule 702. The court began by holding that the analyst's testimony was the product of reliable principles and methods. Next, the court rejected the defendant's central argument that the analyst should not have been permitted to testify regarding pills that were not chemically analyzed and therefore that his testimony was not based on sufficient facts or data and that he did not apply the principles and methods reliably to the facts of the case. Rejecting this argument, the court noted the testing and visual inspection procedure employed by the analyst, as described above.

Trial court did not abuse its discretion by ruling that the defendant's proffered expert testimony from an expert in law enforcement training about the defendant's conscious and unconscious responses to a perceived threat from the victim did not meet the standard for admissibility under Rule 702(a) and *Daubert*

State v. McGrady, 368 N.C. 880 (June 10, 2016). Affirming the decision below, the court held that the trial court did not abuse its discretion by ruling that the defendant's proffered expert testimony did not meet the standard for admissibility under Rule 702(a). The defendant offered an expert in law enforcement training to testify on three principal topics: that, based on the "pre-attack cues" and "use of force variables" present in the interaction between the defendant and the victim, the defendant's use of force was a reasonable response to an imminent, deadly assault that the defendant perceived; that the defendant's actions and testimony are consistent with those of someone experiencing the sympathetic nervous system's "fight or flight" response; and that reaction times can explain why some of the defendant's defensive shots hit the victim in the back. Holding that the trial court did not abuse its discretion by excluding this testimony, the court determined that the 2011 amendment to Rule 702(a) adopts the federal standard for the admission of expert witness articulated in the *Daubert* line of cases. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Rape Shield

Trial court did not err by excluding the defendant's evidence that the victim had previously been sexually active that her parents punished her for this activity

State v. Mbaya, ___ N.C. App. ___, 791 S.E.2d 266 (Sept. 20, 2016). (1) In this sexual assault case, the trial court did not err by excluding the defendant's evidence that the victim had previously been sexually active that her parents punished her for this activity. The defendant did not argue that the victim's past sexual activity was admissible under one of the four exceptions to the Rape Shield statute. Rather, he argued that her past sexual activity and parental punishment for it was relevant to show that she had a motive to fabricate accusations against him. Here, the evidence showed that the victim had not engaged in sexual activity for several months prior to the incident at issue. The victim's parents knew that she had been sexually active for several years prior to the incident and the victim testified that she was not worried about being punished for engaging in sexual conduct. No evidence tied her past sexual activity or parental punishment to the incident in question. Additionally, unlike other cases where evidence of sexual activity was deemed admissible, this case did not turn primarily on the victim's testimony. Here, there was other "compelling physical evidence submitted by the State" including, among other things, DNA evidence and GPS records. (2) The trial court did not violate the defendant's constitutional right to present a defense by excluding irrelevant evidence.

Rule 404(b)

Defendant's sexual act with wife was sufficiently similar to the child's allegation of sexual abuse and was admissible to show common scheme or plan, pattern, or modus operandi

State v. Godbey, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 15, 2016). 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."

State's excessive references to Rule 404(b) evidence created error

State v. Reed, ___ N.C. App. ___, 789 S.E.2d 703 (Aug. 16, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Sep. 6, 2016). In case where the defendant was convicted of misdemeanor child abuse and contributing to the delinquency of a minor, the court held, over a dissent, that although the trial court did not abuse its discretion in admitting 404(b) evidence, reference to the 404(b) evidence at trial created error. The evidence showed that when the defendant went to use the bathroom in her home for a few minutes, her toddler fell into their outdoor pool and drowned. The 404(b) evidence showed that some time earlier while the defendant was babysitting another child, Sadie Gates, the child got out of the house and drowned just outside of her home. Although the evidence was properly admitted under Rule 404(b), the State used the evidence of Sadie's death "far beyond the bounds allowed by the trial court's order." The prosecutor mentioned Sadie 12 times in its opening statement, while the actual victim was mentioned 15 times; during the State's direct examination Sadie was mentioned 28 times, while the actual victim was mentioned 33 times; and during closing Sadie was mentioned 12 times while the actual victim was mentioned 15 times. The court concluded: "The State's use of the evidence regarding Sadie went far beyond showing that defendant was aware of the dangers of water to small children or any other proper purpose as found by the trial court."

Self-Incrimination

Trial court did not violate the defendant's Fifth Amendment rights in a civil domestic violence protective order hearing by asking if the defendant planned to invoke the Fifth Amendment and telling defense counsel: "I'm not doing no Fifth Amendment."

Herndon v. Herndon, 368 N.C. 826 (June 10, 2016). Reversing the Court of Appeals, the court held that

the trial court did not violate the defendant's Fifth Amendment rights in connection with a civil domestic violence protective order hearing. During the defendant's case-in-chief, but before the defendant took the stand, the trial court asked defense counsel whether the defendant intended to invoke the Fifth Amendment, to which counsel twice responded in the negative. While the defendant was on the stand, the trial court posed questions to her. The court noted that at no point during direct examination or the trial court's questioning did the defendant, a voluntary witness, give any indication that answering any question posed to her would tend to incriminate her. "Put simply," the court held, the "defendant never attempted to invoke the privilege against self-incrimination." The court continued: "We are not aware of, and the parties do not cite to, any case holding that a trial court infringes upon a witness's Fifth Amendment rights when the witness does not invoke the privilege." The court further noted that in questioning the defendant, the trial court inquired into matters within the scope of issues that were put into dispute on direct examination by the defendant. Therefore, even if the defendant had attempted to invoke the Fifth Amendment, the privilege was not available during the trial court's inquiry.

Confrontation

Statements offered for corroborative purposes did not violate defendant's confrontation rights even though they included additional information

State v. Thompson, ___ N.C. App. ___, ___ S.E.2d ___ (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."

Privileges

G.S. 8-57.1 overrode husband-wife privilege in child abuse case

State v. Godbey, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 15, 2016). 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.

Crimes

Armed Robbery

Closed knife can constitute a dangerous weapon for purposes of armed robbery; State presented sufficient evidence to show that victim's life was endangered or threatened

State v. Whisenant, ___ N.C. App. ___, 791 S.E.2d 122 (Sept. 6, 2016). In this armed robbery case, the evidence was sufficient to establish that the defendant used a dangerous weapon in a way that endangered the victim. A store loss prevention officer questioned the defendant about having taken some store jewelry in the store foyer. During the exchange, the victim saw a knife in the defendant's pocket. The defendant attempted to force his way out of the store foyer and pulled the unopened knife out of his pocket. The victim grabbed the defendant's hand and wrestled the closed knife away from the defendant while the defendant repeatedly said, "I will kill you." Deciding an issue of first impression, the court cited cases from other jurisdictions and held that a closed knife can constitute a dangerous weapon for purposes of armed robbery. It stated: "Defendant's brandishing and use of the knife satisfied the element of a dangerous weapon. The manner and circumstances in which Defendant displayed the knife alludes to its purpose: Defendant yelled 'I will kill you,' attempted to push past [the victim], removed the knife from his pocket and brandished it when [the victim] mentioned police involvement." The court went on to hold that the State presented sufficient evidence tending to show that the victim's life was endangered or threatened by the defendant's actions and threats.

Child Abuse

Evidence was insufficient to support a conviction of misdemeanor child abuse where defendant's toddler fell into the family's outdoor pool and drowned while the defendant went to the bathroom for a few minutes

State v. Reed, ___ N.C. App. ___, 789 S.E.2d 703 (Aug. 16, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Sep. 6, 2016). Considering the defendant's evidence, along with the State's evidence, in this appeal from a denial of a motion to dismiss, the court held, over a dissent, that the evidence was insufficient to support a conviction of misdemeanor child abuse. The evidence showed that the defendant went to use the bathroom in her home for a few minutes, and her toddler, Mercadiez, managed to fall into their outdoor pool and drowned. The defendant's evidence, which supplemented

and did not contradict the State's evidence, showed that the defendant left the child in the care of another responsible adult while she used the bathroom. Although the concurring judge did not agree, the court went on to hold that the motion should also have been granted even without consideration of the defendant's evidence. Specifically, the State's evidence failed to establish that the defendant's conduct was "by other than accidental means." Reviewing prior cases, the court found: "the State's evidence never crossed the threshold from 'accidental' to 'nonaccidental.'" It continued:

> The known danger here was an outdoor pool. The only purposeful action defendant took, even in the light most favorable to the State, was that defendant went to the bathroom for five to ten minutes. In choosing to go to the restroom, defendant did not leave her child in a circumstance that was likely to create physical injury. . . . If defendant's conduct herein is considered enough to sustain a conviction for misdemeanor child abuse, it seems that any parent who leaves a small child alone in her own home, for even a moment, could be prosecuted if the child is injured during that time, not because the behavior she engaged in was negligent or different from what all other parents typically do, but simply because theirs is the exceedingly rare situation that resulted in a tragic accident.

(2) With the same lineup of opinions, the court held that the evidence was insufficient to support a conviction of contributing to the delinquency of a minor where the evidence showed that the defendant left the victim the care of a competent adult while she used the bathroom.

Subarachnoid hemorrhaging constitutes "serious bodily injury" for purpose of felony child abuse

State v. Bohannon, ___ N.C. App. ___, 786 S.E.2d 781 (June 7, 2016). Because subarachnoid hemorrhaging constitutes "serious bodily injury," the evidence was sufficient to convict the defendant of felonious child-abuse inflicting serious bodily injury under G.S. 14-318.4(a3). The court rejected the defendant's argument that since the child did not actually suffer acute consequences from the hemorrhages, his brain injury never presented a substantial risk of death. Among other things, a medical expert testified that bleeding on the brain could lead to a number of issues including developmental delays and even "acute illness and death." Citing this and other evidence, the court concluded that there was sufficient evidence that the child's brain injury created a substantial risk of death.

Conspiracy

Evidence was insufficient to show that defendant entered into agreement to commit the common law robbery that in fact occurred; defendant did not know of accomplice's use of violence or fear until after robbery was over

State v. Fleming, ___ N.C. App. ___, 786 S.E.2d 760 (June 7, 2016). The State presented insufficient evidence to show that the defendant entered into an agreement to commit common law robbery. The

mere fact that the crime the defendant allegedly conspired with others to commit took place does not, without more, prove the existence of a conspiracy. Lacking here was evidence that the defendant conspired to take the property by violence or fear. In fact, his accomplice's use of violence or fear was unknown to the defendant until after the robbery was completed.

Cyberbullying

Cyberbullying statute violates First Amendment

State v. Bishop, 368 N.C. 869 (June 10, 2016). Reversing the Court of Appeals, the court held that the cyberbullying statute, G.S. 14-458.1, was unconstitutional under the First Amendment. It concluded that the statute "restricts speech, not merely nonexpressive conduct; that this restriction is content based, not content neutral; and that the cyberbullying statute is not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying."

Homicide

(1) Merger doctrine does not bar conviction for first-degree felony murder based on the death of a single child resulting from a single assault; (2) State is not required to prove that defendant intended that injury be serious to prove child abuse based on the intentional commission of an assault that results in serious physical injury; (3) Trial court did not err by denying defendant's request to instruct the jury on premeditated murder and all lesser included offenses

State v. Frazier, ___ N.C. App. ___, 790 S.E.2d 312 (July 5, 2016). (1) In this case where the defendant was convicted of felony murder with the underlying felony being felony child abuse, the court rejected the defendant's argument that the merger doctrine prevents conviction of first-degree felony murder when there is only one victim and one assault. The court however noted that a defendant could not be sentenced for both the underlying felony and first-degree felony murder. (2) Child-abuse under G.S. 14-318.4(a) requires that the defendant intentionally inflict serious physical injury on a child or intentionally commit an assault on the child which results in serious physical injury. These are two separate prongs and the State is not required to prove that the defendant specifically intended that the injury be serious; proof that the defendant intentionally committed an assault on the child which results in serious physical injury is sufficient. (3) The trial court did not err by denying the defendant's request to instruct the jury on premeditated and deliberate murder and all lesser included offenses. There was no evidence that the defendant possessed a specific intent to kill formed after premeditation and deliberation the evidence showed that the defendant "snapped" and "lost control." Second-degree murder is not a lesser included offense of first-degree felony murder. The fact that the evidence was conflicting with respect to the defendant's intent to commit felony child abuse (the underlying felony for felony murder)

did not require the trial court to instruct the jury on lesser included offenses of felony child abuse. The fact that the trial court submitted the pattern of instruction on automatism, did not change this result; automatism is a complete defense to a criminal charge and did not render any of the elements of felonious child abuse in conflict.

Impaired Driving

(1) Moderate odor of alcohol combined with HGN results and other evidence provided probable cause to arrest the defendant for DWI, despite the absence of any evidence of poor driving; (2) Evidence that supported probable cause for arrest, combined with evidence that the defendant pulled into a handicapped parking space when stopped and the officer's opinion that the defendant was impaired were sufficient to survive defendant's motion to dismiss the charges.

State v. Lindsey, ___ N.C. App. ___, 791 S.E.2d 496 (Sept. 20, 2016). (1) An officer had probable cause to arrest the defendant for DWI. After the officer stopped the defendant's vehicle, he smelled a moderate odor of alcohol coming from the defendant and noticed that the defendant's eyes were red and glassy. Upon administration of an HGN test the officer observed five of six indicators of impairment. The defendant was unable to provide a breath sample for an alco-sensor, which the officer viewed as willful refusal. The defendant admitted that he had consumed three beers, though he said his last consumption was nine hours prior. The officer arrested at the defendant for DWI. The court held: "Without even considering defendant's multiple failed attempts to provide an adequate breath sample on an alco-sensor device, we hold the trial court's findings support its conclusion that there was probable cause to arrest defendant for DWI." (2) The trial court did not err by denying the defendant's motion to dismiss a DWI charge. The defendant pulled into a handicapped parking spot. The officer he noticed a moderate amount of alcohol coming from the defendant's breath, the defendant had red and glassy eyes, the defendant admitted to consuming alcohol hours before, the officer noted five out of six indicators of impairment on the HGN test and the officer believed that the defendant was impaired.

Defendant was not entitled to suppression of breath test results on grounds that he was denied opportunity to have witness observe breath test where evidence showed that defendant was allowed to retrieve numbers from his mobile phone and to make telephone calls

State v. Sawyers, ___ N.C. App. ___, 786 S.E.2d 753 (June 7, 2016). The trial court did not err by denying the defendant's motion to suppress the results of his breath test. The defendant argued that he was deprived of a reasonable opportunity to arrange to have a witness observe his breath test. Specifically, he asserted that officers deprived him of access to his cell phone address book, which in turn impeded his ability to contact a witness in a timely manner. However, the defendant did not challenge the trial court's finding of fact, supported by testimony from a law enforcement officer, that he was in fact allowed to retrieve phone numbers from his phone and make phone calls.

Indecent Exposure

Exposing one's private parts to multiple people, including a person less than 16 years of age, in a single incident cannot support charges for both felony and misdemeanor indecent exposure

State v. Hayes, ___ N.C. App. ___, 788 S.E.2d 651 (July 19, 2016). Where in the course of one instance the defendant exposed himself to multiple people, one of which was a minor and one of which was an adult, the defendant could not be found guilty of both misdemeanor indecent exposure under G.S. 14-190.9(a) and felonious indecent exposure under G.S. 14-190.9(a1). The misdemeanor indecent exposure statute provides in part: "Unless the conduct is punishable under subsection (a1) of this section" a person who exposes him or herself "in the presence of any other person or persons" shall be guilty of a class 2 misdemeanor. Subsection (a1) makes it a felony to expose oneself, in certain circumstances, to a person less than 16 years of age. The defendant was convicted of a felony under subsection (a1) because one of the victims was under 16. However, subsection (a), by its terms, forbids conduct from being the basis of a misdemeanor conviction if it is also punishable as felony indecent exposure. The court framed the issue as one of statutory construction, not double jeopardy.

Stealing Evidence

Theft of controlled buy money does not constitute crime of stealing evidence

State v. Dove, ___ N.C. App. ___, 788 S.E.2d 198 (June 21, 2016). The evidence was insufficient to support a conviction for altering, stealing, or destroying criminal evidence under G.S. 14-221.1. The charges were based on the defendant's alleged theft of money obtained from the controlled sale of illegal drugs. The money in question was not evidence as defined by the statute: "any article or document in the possession of a law-enforcement officer or officer of the General Court of Justice."

Kidnapping

Trial court properly denied the defendant's motion to dismiss a first-degree kidnapping charge

State v. James, ___ N.C. App. ___, 789 S.E.2d 543 (Aug. 2, 2016). (1) The restraint of the victim was not inherent in the also charged offense of assault by strangulation. The evidence showed two separate, distinct restraints sufficient to support the two offenses. After the initial restraint when the defendant choked the victim into unconsciousness, leaving her unresponsive on the ground, he continued to restrain her by holding her hair, wrapping his arm around her neck, and dragging her to a new location 100 to 120 feet away. (2) There was sufficient evidence that the defendant removed the victim for the purpose of terrorizing her where multiple witnesses heard the defendant threaten to kill her in broad

daylight. The defendant assaulted the victim, placed her in headlock, and choked her. Evidence showed that the victim was in a state of intense fright and apprehension; several witnesses heard her yelling for help. (3) The defendant did not leave the victim in a safe place where he dragged her to the middle of a gravel driveway and left her, unconscious and injured. The defendant did not consign her to the care of the witnesses who happened to be nearby; he was running away because they saw him. Additionally, the defendant took one of her cell phones, perhaps not realizing that she had a second phone. Additionally, the statute requires finding either that the victim was not left in a safe place or that the victim suffered serious injury (or sexual assault, not at issue here). Here, the State's evidence established that the victim suffered serious injury requiring emergency room treatment, as well as serious emotional trauma which required therapy for many months continuing through the time of trial. (3) The trial court did not err by failing to instruct the jury on the lesser-included offense of false imprisonment where substantial evidence showed that the defendant threatened and terrorized the victim.

Defenses

Defendant was not entitled to a no-duty-to-retreat instruction in place where he had lawful right to be, on facts of case

State v. Lee, ___ N.C. App. ___, 789 S.E.2d 679 (Aug. 2, 2016). In this second-degree murder case, the trial court did not err with respect to its self-defense instruction, where it instructed the jury that the defendant would not be guilty of murder or manslaughter if he acted in self-defense, was not the aggressor, and did not use excessive force. (1) The court rejected the defendant's argument that the trial court committed plain error by omitting a no duty to retreat instruction (specifically, the following sentence from N.C.P.I.—Crim. 206.10: "the defendant has no duty to retreat in a place where the defendant has a lawful right to be" as well as N.C.P.I.—Crim. 308.10 (the instruction for self-defense were retreat is at issue)). The court noted that where a person is attacked in a place that is not his or her own home, motor vehicle, or workplace the degree of force he or she may employ in self-defense is conditioned by the type of force used by the assailant. It continued, noting that the unqualified no duty to retreat defense is limited to a lawful occupant within his or her home, motor vehicle, or workplace. To the extent that the no duty to retreat defense in G.S. 14-51.3(a)(1) applies to "any place" where the defendant has a lawful right to be, it is limited to when the defendant reasonably believes that deadly force is necessary to prevent imminent death or great bodily harm to him or herself or to another. Here, where the defendant was standing in the intersection of a public street several houses down from his residence, no plain error occurred. (2) The trial court did not commit plain error by instructing the jury that the defendant was not entitled to the benefit of self-defense if he was the aggressor with the intent to kill or inflict serious bodily injury upon the deceased. The court rejected the defendant's argument that there was no evidence to support a finding that he was the aggressor. (3) The trial court did not commit plain error by omitting a jury instruction on lawful defense of another. At the time the defendant shot the victim, the defendant was aware that the threat of harm to the third-party had

concluded.

Jury Argument

Defendant's playing of a video of the traffic stop during cross-examination of the arresting officer constituted the introduction of evidence that deprived the defendant of right to final closing argument

State v. Lindsey, ___ N.C. App. ___, 791 S.E.2d 496 (Sept. 20, 2016). The trial court did not err by denying the defendant final closing arguments in this DWI case. Rule 10 of the General Rules of Practice for the Superior and District Courts provides that "if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." Here, the defendant did not call any witnesses or put on evidence but did cross-examine the State's only witness and sought to play a video of the entire traffic stop recorded by the officer's in-car camera during cross-examination. At issue on appeal was whether admitting the video of the stop during cross-examination constituted introducing evidence. Although the officer provided testimony describing the stop shown in the video, the video went beyond the officer's testimony and "is different in nature from evidence presented in other cases that was determined not to be substantive." Playing the video allowed the jury to hear exculpatory statements by the defendant to the police beyond those testified to by the officer and introduced evidence of flashing police lights that was not otherwise in evidence to attack the reliability of the HGN test. The video was not merely illustrative. It allowed the jury to make its own determinations concerning the defendant's impairment apart from the officer's testimony and therefore was substantive evidence.

Sentencing and Probation

Trial court erred by resentencing defendant to a longer prison sentence outside of his presence

State v. Briggs, ___ N.C. App. ___, 790 S.E.2d 671 (Aug. 16, 2016). (1) Because the trial court resentenced the defendant to a longer prison sentence without him being present, the court vacated and remanded for resentencing. After the defendant was sentenced, the Division of Adult Correction notified the court that the maximum prison term imposed did not correspond to the minimum prison term under Structured Sentencing. The trial court issued an amended judgment in response to this notice, resentencing the defendant, without being present, to a correct term that included a longer maximum sentence. (2) The evidence supported sentencing the defendant as a PRL II offender where defense counsel's lack of objection to the PRL worksheet, despite the opportunity to do so, constituted a stipulation to the defendant's prior felony conviction.

Trial court did not err by imposing consecutive sentences for multiple findings of contempt

State v. Burrow, ___ N.C. App. ___, 789 S.E.2d 923 (Aug. 2, 2016). The trial court did not err by imposing consecutive sentences for multiple findings of contempt as contempt is not a misdemeanor offense and nothing in Chapter 5A prohibits consecutive sentences for multiple findings of contempt. The trial court had sentenced the defendant to six consecutive 30-day terms of imprisonment based on six findings of direct criminal contempt.

Enhancement of DWI sentence based on prior convictions for which defendant had not received formal notice did not violate statute or Constitution

State v. Williams, ___ N.C. App. ___, 786 S.E.2d 419 (June 21, 2016). Where the trial court enhanced a DWI sentence based solely on the defendant's prior convictions, the defendant's Sixth Amendment rights were not violated. At sentencing, the trial court found the existence of two grossly aggravating factors, i.e., that defendant had two or more convictions involving impaired driving within seven years before the date of the offense. (1) The court rejected the defendant's argument that the State violated the notice provision for aggravating factors in G.S. 20-179(a1)(1), holding that provision only applied to cases appealed to superior court (the case in question was initiated in superior court by indictment). (2) The court also rejected the defendant's argument that the State's failure to comply with the statutory notice provision violated his constitutional rights under *Blakely* (any factor other than prior conviction that elevates the sentence beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt). The court reasoned that because the defendant's sentence was aggravated only because of prior convictions, *Blakely* did not apply.

Trial court erred by including prior record point for commission of offense while on probation as State failed to provide notice of its intent to prove this point

State v. Crook, ___ N.C. App. ___, 785 S.E.2d 771 (June 7, 2016). The trial court erred by including a prior record level point under G.S. 15A-1340.14(b)(7) where the State did not provide the defendant with notice of intent to prove the existence of the point as required by the statute.

Appeal and Post-Conviction

Superior court properly dismissed the State's notice of appeal from district court grant of defendant's motion to dismiss where State's notice of appeal did not specify any basis for appeal

State v. Loftis, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 15, 2016). In this DWI case, the superior court properly dismissed the State's notice of appeal from a district court ruling granting the defendant's motion to suppress where the State's notice of appeal failed to specify any basis for the appeal. Although such a notice may be sufficient for an appeal to the Court of Appeals, the State is required to

specify the basis for its appeal to superior court.

Defendant who pleads guilty to drug trafficking offense has no right to appeal sentence greater than allowed by statute; however, court set aside plea agreement on that basis

State v. Pless, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 4, 2016). A drug trafficking defendant who pled guilty and was sentenced pursuant to a plea agreement had no right to appeal the sentence, which was greater than that allowed by the applicable statute at the time. G.S. 15A-1444 allows for appeal after a guilty plea for terms that are unauthorized under provisions of Chapter 15A; the drug trafficking defendant here was sentenced under Chapter 90. However, the court granted the defendant's petition for certiorari and found that the defendant's plea was invalid and set aside the plea agreement on that basis.

Convictions vacated on grounds that ADA's failure to provide impeachment evidence regarding chief witness violated defendant's constitutional rights

State v. Sandy, ___ N.C. App. ___, 788 S.E.2d 200 (June 21, 2016). Invoking Rule 2 of the NC Rules of Appellate Procedure, the court considered emails outside of the record and granted the defendants' MAR, finding both a *Brady* violation and a *Napue* (failure to correct false testimony) violation. Specifically, the State failed to provide critical impeachment evidence regarding its star witness which would have supported the defendants' assertion that the witness was a drug dealer. Likewise, the State failed to correct testimony by the witness that he was not a drug dealer. The emails in question related to an ongoing investigation of the witness revealing that he was in fact involved with drugs.

Sex Offender Registration and Monitoring

Trial court lacked jurisdiction to reconsider its order terminating sex offender registration requirements.

In re Timberlake, ___ N.C. App. ___, ___ S.E.2d ___ (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. For a further discussion of this

decision, see John Rubin, When Agencies Disagree with Criminal Court Decisions, N.C. Crim. L. (Nov. 1, 2016).

Because evidence was insufficient to support trial court's finding that defendant was recidivist, court reversed order imposing lifetime satellite based monitoring

State v. Moore, ___ N.C. App. ___, ___ S.E.2d ___ (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.