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Criminal Law Case Update
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Cases covered include published criminal and related decisions from the U.S. Supreme Court, the Fourth Circuit Court of Appeals, and North Carolina appellate courts decided between April 5, 2022, and Oct. 4, 2022. Summaries are prepared by School of Government faculty and staff. To view all of the case summaries, go the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Warrantless Stops and Seizures

(1) Stop based on alleged misplacement of the defendant's registration plate renewal sticker was supported by reasonable suspicion; (2) If officer was mistaken in believing that law required sticker to be placed on right side of plate, the mistake was reasonable

State v. Amator, ___ N.C. App. ___; 2022-NCCOA-293 (May 3, 2022). In this McDowell County case, the defendant appealed from a judgment finding her guilty of trafficking in methamphetamine. She was convicted based on the discovery of drugs found in her car during a traffic stop. On appeal, she argued that the trial court erred in denying her motion to suppress the evidence discovered during the traffic stop, contending that the officer did not have reasonable suspicion to initiate the stop based on an alleged misplacement of her registration plate renewal sticker.

The Court of Appeals concluded that the trial court did not err in denying the defendant's motion to suppress. Defendant was stopped for a violation of G.S. 20-66(c), which requires that the registration renewal sticker be displayed in the place prescribed by DMV. At the time the defendant was stopped, DMV had begun issuing single month/year renewal stickers but had not updated administrative code provisions that required that separate "month and year stickers . . . be displayed on the plate in the correct position." 19A N.C.A.C. 3C.0237 (2018). The registration card accompanying the single sticker instructed that the sticker be placed on the upper right corner of the plate; the defendant placed the sticker on the upper left corner of the plate. The Court held that the relevant law was ambiguous, that the officer relied on a quick reference guide and the instructions on the registration card in concluding there was a violation. This provided reasonable suspicion for the stop. If the officer was mistaken, the Court held, his mistake was a reasonable mistake of law.

(1) Stop was not unreasonably extended where officer had not yet determined whether to charge the defendant; (2) Consent was freely and voluntarily given

State v. Jordan, 282 N.C. App. 641; 2022-NCCOA-214 (April 5, 2022); *temp stay allowed*, ___ N.C. ___; 871 S.E.2d 808 (May 11, 2022). Law enforcement in Guilford County received information that the defendant was selling drugs from his girlfriend's apartment. They conducted a controlled buy at the location with the help of an informant, who identified the defendant as the seller. Police were later surveilling the home and saw the defendant leave with his girlfriend in her car. The car was stopped for

speeding 12 mph over the limit. The stopping officer saw the defendant reach for the center console and smelled a strong odor of marijuana upon approach. The officer removed the occupants from the car and searched it, leading to the discovery of marijuana. During the search, an officer contacted the drug investigators about the possibility of notifying the defendant of the wider drug investigation. This took approximately five to seven minutes. The on-scene officers then informed the pair of the ongoing drug investigation of the defendant and sought consent to search the apartment, which the girlfriend gave. A gun and cocaine were discovered there, and the defendant was charged with firearm by felon and possession of cocaine. He moved to suppress, arguing that the traffic stop was unreasonably extended and that any consent was invalid. The trial court denied the motion, and the defendant entered a guilty plea, preserving his right to appeal the denial of the motion. On appeal, the Court of Appeal unanimously affirmed.

(1) The defendant argued since the police never acted on the speeding or marijuana offenses discovered during the traffic stop, the mission of the stop was complete, and the officer deviated from the mission of the stop by delving into an unrelated drug investigation and seeking consent to search the apartment. The court disagreed:

> [A]t the time Officer Fisher asked for consent to search the Apartment, there is no evidence to suggest Officer Fisher had already made a determination to refrain from charging Defendant for the traffic violation or marijuana possession. Instead, the Record seems to indicate that at the time of Officer Fisher's request for consent to search the Apartment, the stop had not been 'otherwise-completed' as he had not yet made a decision on whether to charge Defendant for the marijuana possession." *Jordan* Slip op. at 9-10.

The act of asking for consent to search the apartment therefore occurred during the lawful course of the stop. Further, officers had reasonable suspicion that the defendant was selling drugs, justifying extension of the stop even if the original mission of the stop was complete at the time of the request for consent. Given the tip, the controlled purchase, law enforcement surveillance of the residence (which included observing a high volume of guests visiting the home), law enforcement likely had probable cause to arrest the defendant or obtain a warrant to search the apartment. "Consequently, the officer was justified in extending the seizure to question Defendant about the sale of heroin and crack-cocaine even though it was unrelated to the traffic violation." *Id*. at 12.

(2) Officers had informed the pair that police would seek a search warrant, or that they could consent to a search of the apartment. The defendant argued that this was improper coercion and that any consent was therefore involuntary and invalid. The court disagreed. The defendant and his girlfriend were informed of the right to refuse consent, the girlfriend signed a written consent form, and neither person objected or attempted to revoke consent during the search. Further, the officers did not use any threats or other "inherently coercive tactics" in obtaining consent. Thus, the trial court properly determined that consent was freely and voluntarily given. The trial court's judgment was consequently affirmed.

(1) The defendant had standing to contest the search of a building where he was a late-night occupant and exercised apparent control of the door and a safe within; (2) Potential loss of car keys tied to stolen car was not exigent circumstance justifying warrantless entry and drugs discovered inside the building likewise could not support warrantless entry; (3) Purported consent was invalid as the product of an illegal warrantless entry and was not sufficiently attenuated from the illegal police

actions; (4) Search warrant for safe based on sight of drugs inside the home did not establish probable cause

State v. Jordan, ___ N.C. App. ___; 2022 NCCOA 215 (April 5, 2022). Charlotte-Mecklenburg police received a report of a stolen car and information about its possible location. Officers went to the location, which was part residence and part commercial establishment. A car matching the description of the stolen vehicle was in the back parking lot. As police watched, a man came out of the building and approached the car as if to enter it. He noticed the unmarked police car and immediately returned to the building, alerting the occupants to the presence of police. Police pulled into the driveway intending to detain the man. The defendant opened the door of the building from inside and the man who had approached the stolen car went inside, although the door was left open. An officer approached and asked the man to come out and speak with police before immediately stepping into the building through the open door. That officer noticed a safe next to the defendant and saw the defendant close the safe, lock it, and place the key in his pocket. More officers arrived on scene and noticed drug paraphernalia in plain view. Officers swept the house and discovered a gun in a bedroom. At this point, officers established that a man inside either owned or leased the building and requested his consent to search. The man initially refused but assented when officers threatened to place everyone in handcuffs and to obtain a search warrant. The defendant informed officers that anything they found in the home was not his and that he did not live there. He denied owning the safe, but a woman who was present at the time later informed officers that the safe belonged to the defendant. Officers obtained a search warrant for the safe and discovered money, drugs, paraphernalia, and a gun inside. The defendant was subsequently charged with trafficking, firearm by felon, habitual felon, and other offenses. He moved to suppress. The trial court denied the motion, apparently on the basis that the defendant lacked standing (although because no written order was entered, the findings and conclusions of the trial court were not easily determined). The defendant was convicted at trial of the underlying offenses and pled guilty to having obtained habitual felon status. The trial court imposed a minimum term of 225 months in consecutive judgments. On appeal, a unanimous panel of the Court of Appeals reversed.

(1) The defendant had a reasonable expectation of privacy in the building. He opened the door when it was knocked and was one of only four people inside the home at a late hour. The defendant further had apparent permission to keep the safe inside and clearly had an interest in it as the person with its key and the ability to exclude others. While the defendant did not own or lease the property, this was not enough to defeat his expectation of privacy. The defendant also disclaimed ownership of the safe to police, and the State argued that this amounted to abandonment, defeating any privacy interest in the safe. The court disagreed, noting that the defendant only made that remark after the police illegally entered the home and that abandonment does not apply in such a situation. In its words:

> [W]hen an individual 'discards property as the product of some illegal police activity, he will not be held to have voluntarily abandoned the property or to have necessarily lost his reasonable expectation of privacy with respect to it[.]' *Jordan* Slip op. at 14 (citation omitted).

Thus, the defendant had standing to challenge the police entry and search.

(2) The trial court determined that officers had reasonable suspicion to speak with the man who was seen approaching the stolen car. However, this did not justify warrantless entry into the home. The State argued that the entry was supported by exigent circumstances, in that the keys to the stolen car and the drug paraphernalia seen inside the building could have been easily destroyed. However, there

was no evidence that the first officer who approached the home saw any drug paraphernalia at the time and the officer therefore could not have had a legitimate concern about its destruction. There was likewise no explanation from the State regarding the need for immediate warrantless entry to preserve the car keys evidence. Because officers had already seen the man approach the car with the keys and because possession of a stolen car may be established by constructive possession, there was no immediate need to obtain the car keys. Further, there was no immediate risk of destruction of evidence where the occupants of the home left the door open, and an officer entered the home within "moments" of arrival. Exigent circumstances therefore did not support the warrantless entry.

(3) The State also argued that the person with a property interest in the building gave valid consent, and that this consent removed any taint of the initial illegal entry. Illegally obtained evidence may be admissible where the link between the illegal police activity and the discovery of evidence is sufficiently attenuated. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). Here, the taint of the illegal entry had not dissipated. Officers obtained consent soon after entering the home, no intervening circumstances arose between the entry and the obtaining of consent, and officers purposefully and flagrantly entered the building without a warrant or probable cause. Any consent was therefore tainted by the initial police illegality and could not justify the search.

(4) Although police did ultimately obtain a search warrant for the safe, the information contained in the search warrant application was based on information obtained by police after they were inside the building. There was no evidence that officers saw any drugs prior to entry, so any evidence obtained as a result was the fruit of the poisonous tree. Without the drugs evidence, the stolen car in the parking lot, the man walking up to the stolen car, and his abrupt return from the car to the building did not supply probable cause to search the building or safe. According to the court:

> Because the affidavit supporting the issuance of the search warrant, stripped of the facts obtained by the officers' unlawful entry into the residence, does not give rise to probable cause to search the residence for the evidence of drugs and drug paraphernalia described in the warrant, 'the warrant and the search conducted under it were illegal and the evidence obtained from them was fruit of the poisonous tree.' *Id*. at 24.

The denial of the motion to suppress was therefore reversed and the case was remanded for any further proceedings.

Checking station to detect motor vehicle violations and impaired driving was reasonable and constitutional as the relevant factors weighed in favor of the public interest

State v. Cobb, 381 N.C. 161; 2022-NCSC-57 (May 6, 2022). In this Harnett County case, the defendant pled guilty to impaired driving after the trial court denied her motion to suppress evidence obtained at a checking station set up to ensure compliance with Chapter 20 and to detect impaired driving. The Court of Appeals vacated the trial court's order denying the motion to suppress, determining that the trial court did not adequately weigh the factors necessary to determine whether the public interest in the checking station outweighed its infringement on the defendant's Fourth Amendment privacy interests. The State appealed. The Supreme Court reversed and reinstated the order of the trial court, finding that the unchallenged findings of fact supported the conclusion that the checking station was reasonable and constitutional as the relevant factors (gravity of public concern, degree to which seizure advances public interest, and severity of the interference with individual liberty) weighed in favor of the public interest. The Supreme Court cited the trial court's findings that the checkpoint was carried out on a heavily

traveled road pursuant to a plan that required the stopping of all vehicles during a time frame conducive to apprehending impaired drivers. The Court further relied upon the trial court's findings that the checking station was operated under a supervising officer and that most drivers were stopped for less than one minute.

Totality of circumstances, including K-9 alert and additional evidence, supported probable cause to seize bag of possible marijuana during traffic stop

State v. Highsmith, ___ N.C. App. ___; 2022-NCCOA-560 (Aug. 16, 2022). In this Duplin County case, defendant appealed his conviction for felony possession of marijuana. The Court of Appeals found no error and no ineffective assistance of counsel.

Officers of the Duplin County Sheriff's Office observed a vehicle leaving a residence where they had received several complaints of narcotics being sold. Defendant was in the passenger seat of the vehicle, and the officers recognized him from past encounters and arrests for marijuana possession. The officers also observed a box of ammunition on the back seat and noted that the vehicle was not registered to any of the occupants. After a K-9 unit arrived and signaled the possible presence of illegal substances, the officers searched and found a vacuum-sealed bag of possible marijuana under defendant's seat. The search also turned up a digital scale and a large amount of cash. Chemical analysis later determined the substance was marijuana.

At trial, defendant made a motion to suppress the bag of marijuana, arguing that the K-9 alert could not support probable cause for the seizure due to the similarity of legal hemp and illegal marijuana. Examining the trial court's decision to deny, the Court of Appeals noted that the "totality of the circumstances" supported the seizure, because defendant made no statements about the bag containing hemp, and the officers found a digital scale and a large amount of cash in the same search, bolstering the assumption that the bag contained illegal marijuana. Slip op. at 20.

The Court of Appeals also examined defendant's claims that it was plain error not to instruct the jury that defendant must have actual knowledge the product in the bag was illegal marijuana, and that defendant's counsel was ineffective by not requesting this jury instruction. The court disagreed on both issues, pointing to the evidence that also supported the denial of the motion to suppress. Phil Dixon blogged about this case here.

"Stem pipe" provided probable cause to search the car, despite the possibility that the pipe could have been used to ingest legal hemp products

U.S. v. Runner, 43 F.4th 417 (Aug. 8, 2022). Local law enforcement in the Northern District of West Virginia received an anonymous tip that a woman was using intravenous drugs in a car in a Wal-Mart parking lot. The caller described the color and model of the car and stated that the car had Ohio plates. A responding officer found the car and saw a woman exit the passenger side as he approached. The woman denied using drugs, was not impaired, and showed the officer her arms to demonstrate the lack of recent needle marks. Another officer arrived on scene. He noticed scars on the woman's arms consistent with prior intravenous drug use but did not see any indications of recent use. The woman consented to a search of her purse but refused to consent to a search of the car, stating that it belonged to the defendant, who was inside of the store. While waiting for the man to exit the store, officers saw a glass "stem" pipe sitting in plain view within the center console. The officer could not tell if the pipe had

been used or what, if anything, had been in the pipe. An officer then went inside the store to find the defendant. The officer told the defendant to come outside with him and that he was not free to leave. More officers arrived on scene and the defendant was asked for consent to search the car. He declined. Officer then informed the defendant that the pipe provided probable cause to search, and the defendant unlocked the car for the search. Methamphetamine and other drugs were found inside, along with a firearm, clip, ammo, and more meth in the trunk.

The defendant was indicted for felon in possession of a firearm and moved to suppress. He argued that the pipe did not provide probable cause because its contraband nature was not immediately apparent to the officer. At suppression, officers testified that a pipe like the one observed was commonly used to ingest hard drugs such as crack cocaine and meth. A witness for the defendant testified about the increase in popularity of hemp products like CBD and stated that his hemp store sold pipes like the one at issue here for purposes of ingesting legal hemp. The district court ultimately denied the suppression motion, finding that officer properly observed the pipe in plain view and that, despite the existence of legal hemp, its contraband nature was nonetheless still immediately apparent. The defendant entered a guilty plea, preserving his right to appeal denial of his suppression motion. On appeal, a unanimous panel of the Fourth Circuit affirmed.

The court noted that plain view observations by law enforcement do not amount to a search. Where law enforcement can clearly observe an item from a place the officer is lawfully entitled to be and the contraband nature of the item is immediately apparent to the officer, that observation falls within the plain view exception to the warrant requirement. The court acknowledged that it had not decided whether a pipe, standing alone, could give rise to probable cause, but distinguished this situation from a "pipe-only" case. Officers were responding to an anonymous tip about intravenous drug use in a public place, and one officer—trained as a drug recognition expert—thought the pipe was contraband. "On its face, that evaluation meets the admittedly low standard: that the facts available warrant that items *may be* contraband or stolen property. *Runner* Slip op. at 9 (citation omitted) (emphasis in original). The court distinguished cases from other circuits where the alleged contraband seized in plain view was "intrinsically innocent" items which could not fairly be cast as immediately recognizable contraband. According to the court:

> A stem pipe is not such an object. . .[T]he predominate purpose of stem pipes has been—and continues to be—to smoke illegal substances. Despite the increased use of glass pipes to ingest legal substance such as CBD oil, it is still reasonable to a police officer would reach the belief that a glass pip was evidence of a crime supporting probable cause. *Id*. at 10.

The court noted that, while a pipe alone may not qualify, and that this case presented a "close question." The tip (albeit for drug use via a different method) was at least partially corroborated, as far as the woman with a history of drug use and the specific description of the car. That, coupled with the drug recognition officer's "expertise," was enough to establish probable cause. The district court was therefore unanimously affirmed.

Searches

Search warrants for cell phone and flash drives were supported by probable cause

U.S. v. Orozco, 41 F.4th 403 (July 25, 2022). The defendant was driving through Harnett County when officers ran his plate and discovered that the registered owner's license was suspended. They followed the car and stopped it after seeing it twice swerve across the center line. The defendant was not the registered owner and told the officers that he did not have a driver's license. Officer asked where the defendant was going. He responded by closing a GPS application open and running on his phone in his lap but did not answer the question. He eventually stated that he was looking for farm work in the area. The defendant was sweating heavily despite the air conditioning running, and officers noticed that the dashboard had toolmarks and other indications that it had been opened. A canine unit was called, which alerted on the car near the dashboard. Officers opened the dash, revealing over $100,00 in cash. The defendant then stated that he was hired to drive the car and disclaimed ownership of the money. One officer alerted the DEA to the situation and provided the defendant's phone number. A DEA agent informed the officer that the phone number was tied to an ongoing drug investigation. The defendant was then taken into custody for traffic offenses. A canine later alerted to the presence of drug residue on the cash. The defendant was searched at the station and an officer found a folded $100 bill in his show. When the bill was unfolded, five micro-SD cards (a type of flash drive) fell out. The defendant attempted to eat two of the cards and successfully ingested one. Based on these circumstances, officers obtained search warrants for the defendant's phone and the remaining SD cards. When officers began searching the contents of one SD card, they saw apparent child pornography. Two new search warrant was obtained to search the items for evidence of child pornography, which led to the discovery of hundreds of similar images on the SD cards and five additional images on the phone. The defendant was charged with possession of child pornography and moved to suppress, arguing that the initial warrant to search the phone and SD cards were not supported by probable cause to believe they would contain evidence of drug trafficking. The district court disagreed and denied the motion. The defendant was then convicted at trial and sentenced to twelve years.

On appeal, a unanimous panel of the Fourth Circuit affirmed. While (as the defendant argued) "cash is not contraband" and that it "is not illegal to be paid to drive a car," here there was a large amount of money with drug residue on it, wrapped in grocery bags, hidden behind the dash of the car. Coupled with the defendant's "sweating and nervous behavior," officers had probable cause to believe the defendant was involved in drug trafficking. Further, officers demonstrated a nexus between the SD cards and the crime of drug trafficking. Even if finding the SD cards hidden in the defendant's shoe was not enough of a nexus on its own, that the defendant attempted to destroy the cards by ingesting them upon discovery by the officers supplied the necessary nexus. According to the court:

> Intentionally destroying an item before it can be examined would permit someone to believe the item is inculpatory. . . And where police have probable cause to believe an arrestee is engaged in drug trafficking, the most reasonable inference is that the item relates to that crime." *Orozco* Slip op. at 11.

The court rejected the argument that officers were required to expressly state in the warrant application that drug traffickers store information related to the crime on SD cards in the officers' training and experience, finding that it was enough to show that the defendant attempted to destroy the cards. "[A] magic-words requirement for warrant affidavits runs headlong into the Supreme Court's clear instruction that we should not add technical requirements of elaborate specificity into the warrant application process . . .". *Id*. at 12 (cleaned up). Officers also had probable cause to believe that the defendant's phone would reveal evidence of the crime, given that officers had probable cause to believe the defendant was trafficking drugs and the phone was seemingly being used to navigate at the time

officers encountered the defendant. The court therefore unanimously affirmed, calling the case "a model example of a proper investigation under the Fourth Amendment." *Id*. at 15.

No standing to challenge search of rental car where the defendant failed to present any evidence showing he lawfully possessed the car

U.S. v. Daniels, 41 F.4th 412 (July 25, 2022). In this case from the Western District of North Carolina, police were attempting to locate the defendant to serve multiple arrest warrants. After obtaining his cell location data pursuant to a search warrant, the defendant was seen driving a gray Dodge Charger. A check of the plate showed the car was a rental. The defendant and car were found at a local hotel the next day. The defendant was arrested in his room. As he was walked to the patrol car, an officer asked the defendant about the Charger. The defendant disclaimed any knowledge of the car. Police then called the rental car company and explained that they had found their vehicle in the defendant's possession. The company determined that the defendant was not authorized as a driver under the rental contract and sent a tow truck to pick up the car. Police accompanied the car to the rental car company and requested permission to search it, leading to the discovery of a gun. The defendant's DNA was found on the gun, and he was charged with being a felon in possession. He moved to suppress, arguing that police lacked probable cause to search the car. The district court denied the motion, finding that the rental car company had validly consented, that the defendant abandoned any expectation of privacy in the vehicle, and that the gun would have been inevitably discovered. The defendant entered a conditional guilty plea and appealed. A unanimous panel of the Fourth Circuit affirmed. Under *Byrd v. U.S.*, 138 S. Ct. 1518 (2018), a person in lawful possession of a rental car may retain a legitimate expectation of privacy in the car, even without being an authorized driver under the rental contract. However, the defendant has the burden to show a he or she has a reasonable expectation of privacy by a preponderance of the evidence, and the defendant here failed to meet that burden. There was no evidence presented that the defendant had lawful possession of the car, and this was fatal to the defendant's argument. In the words of the court:

> In suppression hearings, criminal defendants have the burden of putting forward evidence to support all elements of their reasonable expectation of privacy. But here, [the defendant] did not introduce any evidence to support his lawful possession of the Charger. *Daniels* Slip op. at 6.

The judgment of the district court was therefore affirmed.

Pleadings

Indictment for going armed to the terror of the public must allege an act on a public highway; a private apartment complex parking lot does not represent a public highway for purposes of going armed to the terror of the public

State v. Lancaster, ___ N.C. App. ___; 2022-NCCOA-495 (July 19, 2022); *stay allowed*, ___ N.C. ___; 875 S.E.2d 533 (Aug. 26, 2022). In this Craven County case, defendant was convicted of possession of a firearm by a felon, resisting a public officer, injury to personal property, and going armed to the terror of the public for defendant's actions in an apartment complex parking lot. On appeal, the Court of Appeals determined that the trial court lacked jurisdiction for the charge of going armed to the terror of the

public because the indictment did not allege the acts supporting the conviction occurred on a public highway.

The court first established the four essential elements of going armed to the terror of the public, which are "(1) armed with unusual and dangerous weapons, (2) for the unlawful purpose of terrorizing the people of the named county, (3) by going about the public highways of the county, (4) in a manner to cause terror to the people." Slip op. at 7 (quoting *State v. Staten*, 32 N.C. App. 495, 497 (1977)). The court then examined the common law history of going armed to the terror of the public, explaining that historically "a defendant could commit the crime of 'going armed to the terror of the public' in any location that the public is likely to be exposed to his acts, even if committed on privately-owned property." Slip op. at 8.

Despite the common law interpretation of the crime, the court determined that the *Staten* requirement of an act on a "public highway" represented controlling precedent, and no North Carolina Supreme Court case had examined the public highway issue since *Staten*. After confirming that an act on a public highway was an essential element of the crime, the court found that the parking lot of a private apartment complex was not a "public highway" for purposes of going armed to the terror of the public.

Judge Griffin concurred in part and dissented in part with a separate opinion.

Failure to include the essential element of "abuse" rendered indictment for second-degree rape defective, leading to vacated conviction

State v. Singleton, ___ N.C. App. ___; 2022-NCCOA-656 (Oct. 4, 2022). In this Wake County case, defendant appealed his conviction for second-degree rape due to a missing element in the charging indictment, and his conviction for first-degree kidnapping due to insufficiency of the evidence. The Court of Appeals found the charging indictment was flawed and vacated defendant's rape conviction but affirmed his conviction for kidnapping.

In November of 2017, a college student went to a bar in downtown Raleigh with a group of friends and became intoxicated. Security camera footage showed defendant helping the victim into his vehicle around 2:25am. The student remembered dancing with her sister and friends around 2:00am; her next memory was around 5:30am when she found herself in defendant's vehicle while he was engaging in sexual intercourse with her. The student told defendant to stop, tried to find her cellphone, and then fled the vehicle when she could not find her phone. The student reported the incident and defendant was convicted of rape and kidnapping after a trial.

The Court of Appeals first reviewed the charging indictment for defendant's rape conviction, explaining that in North Carolina, one purpose of a charging indictment is to confer jurisdiction on the trial court. Failure to allege each element of a crime is a jurisdictional defect that cannot be waived. The court noted applicable precedent showing that an indictment may use different language that the statute that creates the offense, but the language used must be sufficiently similar to represent all elements of the crime alleged. In the current matter, the indictment used the phrase "engaged in vaginal intercourse" as opposed to the statute's "carnally know and abuse." Slip Op. at 7. The court explained that this was not sufficient because the indictment did not include "abuse," as "[t]he inclusion of 'abuse" is necessary to describe that [d]efendant knew and took advantage of [the victim's] physical inability to resist his

advances." *Id*. Because of this flaw, the court vacated the judgment of rape and dismissed the indictment without prejudice.

Reviewing defendant's argument of insufficiency of the evidence for his kidnapping conviction, the court found ample evidence in the record to support the elements of first-degree kidnapping. Explaining the evidence, the court found that defendant transported defendant for purposes of a felony and released her in an area that was unknown to her and not safe in her intoxicated condition.

Discovery

Trial court erred denying indigent defendant's request for transcript, but error was harmless beyond a reasonable doubt

State v. Gaddis, ___ N.C. ___; 2022-NCSC-102 (Aug. 19, 2022). In this Union County case, the Supreme Court affirmed the Court of Appeals majority opinion denying defendant's appeal of his convictions for driving while impaired and related driving offenses.

In 2018, defendant was charged with multiple offenses after driving a pickup truck with a blood-alcohol concentration of 0.12. Defendant was declared indigent and received appointed counsel; he went to trial on the charges July 15, 2019. The jury deadlocked, and the trial court declared a mistrial. After the first trial, defendant's counsel withdrew, and new counsel was appointed. On August 26, 2019, defendant's new counsel filed a motion for a transcript of the first hearing, and requested a continuance (because defendant was indigent, the transcript would have been provided for free). The trial court summarily denied the motions for transcript and continuance, and the matter went forward for a second trial on September 3, 2019. On the first day of the second trial, defendant's counsel submitted renewed motions for a transcript and a continuance, both of which were again denied by the trial court. Defendant was convicted of all charges and appealed, arguing that the trial court's denial of his motion for a transcript deprived him of the ability to impeach the State's witnesses.

The court disagreed. It explained that an indigent defendant does not have an absolute right to a free transcript. Instead, when considering an indigent's request for a free transcript, courts must apply a two-part test to determine (1) the value of the transcript to defendant, and (2) the availability of alternatives that would fulfil the same function. Slip op. at 16, quoting *Britt v. North Carolina,* 404 U.S. 226, 227 (1971). Here, the court determined that the trial court did not perform the *Britt* analysis and erred by denying the motion for transcript. Slip op. at 19. However, the court went on to explain that under the harmless-error doctrine and G.S. § 15A-1443(b), trial court's error is prejudicial "unless the appellate court finds that it was harmless beyond a reasonable doubt." Slip op. at 20. In this circumstance, "overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *Id.* at 21, quoting *State v. Bunch*, 363 N.C. 841, 845-46 (2010).

The Supreme Court found just such overwhelming evidence supporting the guilty verdicts in this case. The court noted that "[e]ven if defendant had the transcript of the prior trial to impeach the testimony of [State's witnesses], there still existed overwhelming evidence of defendant's guilt," including a recorded admission by defendant "that he was the driver of the vehicle when it was wrecked" and a blood sample taken from defendant showing he was intoxicated after being taken into custody. Slip op. at 24. Based on this overwhelming evidence, the trial court's error was harmless beyond a reasonable doubt.

Justice Earls dissented from the majority opinion.

Defendant was not entitled to laboratory's audit, non-conformity, and corrective-action records under G.S. § 15A-903

State v. See, ___ N.C. App. ___; 2022-NCCOA-599 (Sept. 6, 2022). In this Wake County case, defendant appealed her convictions of driving while impaired and felony death by vehicle, arguing the trial court erred by denying her requests for voluntary discovery of laboratory audits and records. The Court of Appeals found no error by the trial court.

While driving to work at 6:00 am in June of 2020, defendant struck and killed a pedestrian walking along the roadway. The section of roadway was straight, and conditions were clear that morning. When Raleigh Police responded to the scene, they did not suspect that alcohol was a factor, but an officer requested a blood sample for chemical analysis. After testing at the City-County Bureau of Identification (CCBI), it was determined that defendant had a blood alcohol concentration of 0.18. In May of 2021, defendant was convicted by a jury of driving while impaired and felony death by vehicle.

Defendant argued that she should have been granted the CCBI laboratory's audit, non-conformity, and corrective-action records under G.S. § 15A-903, as they "may have contained information demonstrating 'an increased possibility of user error in the operation of th[e] machine' used to analyze her blood sample." Slip op. at 19. The Court of Appeals disagreed, pointing out that defendant cited no cases to support this proposition. The court explained that while G.S. § 15A-903 provides that defendant was entitled to complete test results and data involving test procedures, normally "the State need not provide 'information concerning peer review of the testing procedure, whether the procedure has been submitted to the scrutiny of the scientific community, or is generally accepted in the scientific community.'" *Id*. at 23-24, quoting *State v. Fair*, 164 N.C. App. 770 (2004). After reviewing the extensive amount of information produced related to CCBI's testing and chain of custody, the court could not establish that defendant suffered any prejudice to her ability to cross-examine the prosecution's expert, or to her due process rights or right to a fair trial.

Defendant did not have a constitutional right to inspect the premises

State v. Joyner, ___ N.C. App. ___; 2022-NCCOA-525 (Aug. 2, 2022). In this Edgecombe County case, defendant appealed his convictions of obtaining property by false pretenses and exploitation of a disabled or elderly person in a business relationship. The defendant moved to inspect the victim's property, which the trial court denied. On appeal, the Court of Appeals affirmed. There is no general constitutional right to discovery in a criminal case, and defendant identified no clear grounds for discovery to be required in this matter. Although *State v. Brown*, 306 N.C. 151 (1982), provides criminal defendants a due process right to inspect a crime scene under limited circumstances, the court distinguished defendant's situation from the facts of *Brown*. Specifically, defendant performed the work here himself and was not deprived of the ability to find exculpatory evidence, as he would have firsthand knowledge of the work and locations in question. The court found no right to inspect the property in this case and no error by the trial court in denying defendant's request.

Right to Counsel

Once defendant waived counsel in district court, his waiver was effective at subsequent proceedings even though he did not sign a second waiver in superior court

State v. Harper, ___ N.C. App. ___; 2022-NCCOA-630 (Sept. 20, 2022). The defendant argued that the trial court erred by allowing defendant to waive counsel and represent himself in superior court after signing a waiver of counsel in district court. The Court of Appeals explained that G.S. § 15A-1242 contains the required colloquy for wavier of counsel and the appropriate procedure for the court to follow. Here defendant executed a waiver during district court proceedings, and the record contains no objection or request to withdraw the waiver. The court explained that "[o]nce the initial waiver of counsel was executed, it was not necessary for successive written waivers to be executed, nor for additional inquiries to be made by the district or superior court pursuant to N.C. Gen. Stat. § 15A-1242." Slip op. at 49. The waiver created a "rebuttable presumption," and no further inquiries were necessary. Since defendant did not identify any issue or deficiency in the initial waiver, there was no error.

Defense counsel's presentation of a disputed statement as truthful represented an implied admission of defendant's guilt

State v. Cholon, ___ N.C. App. ___;2022-NCCOA-415 (June 21, 2022). In this Onslow County case, defendant appealed the denial of his motion for appropriate relief ("MAR") due to ineffective assistance of counsel. In July of 2015, defendant went to jury trial for sexual offenses with a minor and was convicted. After the trial, defendant sent a letter to the trial court requesting a mistrial due to his counsel making an admission of guilt during closing argument. In March of 2016, defendant's MAR was rejected by the Court of Appeals because defendant's counsel did not expressly admit guilt or admit each element of each offense during the closing statement in question. Defendant petitioned the Supreme Court for review, which was granted in September of 2017.

The Supreme Court vacated the Court of Appeals decision on defendant's MAR and remanded with instructions for the trial court to hold an evidentiary hearing on defendant's motion. The trial court held this hearing in May of 2019, received only an affidavit from defense counsel with no other evidence or testimony, and then denied defendant's MAR.

After the trial court's denial, defendant filed a petition for writ of certiorari with the Court of Appeals. In February of 2020, the Court of Appeals determined that the trial court's evidentiary hearing was insufficient, vacated the trial court's order, and remanded the case for an evidentiary hearing. The trial court held a second hearing in September of 2020, allowing testimony from defendant and his counsel, and several documentary exhibits. However, the trial court again denied the MAR on March 31, 2021. Defendant filed a second petition for writ of certiorari and the Court of Appeals granted the petition in July of 2021.

With the current opinion, the Court of Appeals considered whether defendant's counsel made implied admissions of guilt by admitting that defendant engaged in a sexual act with the victim and that the victim was below the statutory age of consent. The defendant had denied making a statement to police admitting sexual conduct between himself and the victim, and the statement was the subject of a failed motion to suppress during the trial. However, defense counsel presented the disputed admission as truthful in the closing statement. The Court of Appeals found that this served as an implied admission of

guilt under the framework of *State v. Harbison*, 315 N.C. 175 (1985). The court reversed and remanded to the trial court for an evidentiary hearing to determine if defendant consented to this admission of guilt in advance.

A reasonable police officer would not have understood the defendant's statement after he was arrested to be an unambiguous request for counsel during interrogation

State v. Darr, ___ N.C. App. ___;2022-NCCOA-296 (May 3, 2022). In this Randolph County case, the defendant appealed from his conviction for statutory rape, arguing in part that the trial court erred in denying his motion to suppress evidence from his interrogation because he requested and did not receive counsel.

The defendant came to the sheriff's office for questioning at a detective's request. Detectives told him about the victim's allegations that they had vaginal intercourse over a two-year period beginning in 2016, when the victim was 14 and the defendant was 33. After the detectives played a recording of the defendant speaking to the victim, the defendant admitted he had engaged in vaginal intercourse with the victim multiple times in 2017 and 2018. A detective subsequently told the defendant he was under arrest and read the defendant *Miranda* rights. The defendant said, "I'll talk to you, but I want a lawyer with it, and I don't have the money for one." The detectives asked additional questions about whether the defendant wanted to speak without a lawyer present. One detective told the defendant that speaking with the detectives "can't hurt." This exchange culminated in the defendant signing a waiver of his right to counsel and continuing to speak with the detectives.

The defendant moved to suppress any statements from the interrogation. The trial court denied the motion. The Court of Appeals found no error, concluding that the defendant was not in custody when he initially confessed and that a reasonable police officer would not have understood the defendant's statement after he was arrested as an unambiguous request for counsel during interrogation. The court determined that the trial court's findings were supported by competent evidence that defendant's request for counsel was ambiguous, and the detectives' statements were an attempt to clarify the defendant's statements.

Crimes

Defendants' "tug of war" over child represented substantial risk of physical injury and provided sufficient evidence of child abuse

State v. Adams, ___ N.C. App. ___; 2022-NCCOA-596 (Sept. 6, 2022). In this Yadkin County case, two defendants appealed their convictions for misdemeanor child abuse, argui9ng that the trial court erred by denying their motions to dismiss for insufficient evidence. Defendants' convictions arose from a 2018 incident in the parking lot of the Yadkin County Sheriff's Office. An officer from the Yadkinville Police Department (located across the street) walked out of the police department to head home when he heard a commotion across the street and observed one defendant pulling on something in the back seat of a car. When the officer approached, he observed the two defendants having a "tug of war" over their child in the back seat of a car. Both defendants were tried and eventually convicted of misdemeanor child abuse in 2021.

The court first considered the motion to dismiss, reviewing whether substantial evidence of each element of child abuse under G.S. § 14-318.2 was present in the record. Because there was no dispute that the defendants were the parents of the child in question, and that the child was less than 16 years old, the only element in dispute was whether defendants "created or allowed to be created a substantial risk of physical injury" for the child. Slip op. at 11, quoting *State v. Watkins*, 247 N.C. App. 391 (2019). The court noted the "paucity" of caselaw, observing that *Watkins* appears to be the only reported case on the "substantial risk" theory under G.S. § 14-318.2. *Id*. at 13. However, after exploring *Watkins* and unreported caselaw, the court explained that even a brief period of time placing the child at risk of physical harm could represent "substantial risk," justifying the jury's consideration of the question. After examining the evidence against both defendants, the court found no error with the trial court.

Defendant's actions towards law enforcement officer were willful resistance, delay, or obstruction of official duties, not mere criticism

State v. Harper, ___ N.C. App. ___; 2022-NCCOA-630 (Sept. 20, 2022). In this Pitt County case, defendant appealed his conviction for willingly resisting, delaying, or obstructing a public officer; the Court of Appeals found no error by the trial court.

In September of 2019, two officers from the Winterville Police Department responded to a disturbance at a gas station. Defendant was allegedly arguing with another customer about police practices and race relations in the United States. When police arrived, defendant initially refused to provide identification, then produced a card with his name and a quotation from *City of Houston v. Hill*, 482 U.S. 451 (1987). After an extended exchange regarding the card and defendant's refusal to produce identification, officers arrested defendant for resisting, delaying, or obstructing a public officer. Later in 2019, defendant appeared at two traffic stops conducted by one of the arresting officers, once telling the officer he was watching him, and the second time driving by while making a hand gesture resembling a gun pointed at the officer. Defendant was subsequently charged for communicating threats, and both charges went to trial, where defendant was convicted of resisting, delaying, or obstructing an officer but acquitted of communicating threats.

Defendant first argued that the trial court erred by denying his motion to dismiss the resisting, delaying or obstructing an officer charge. The Court of Appeals reviewed the denial and the evidence in the record to determine if each element of the charge was present. In this case only three elements were at issue, specifically if: (1) the officer was lawfully discharging a duty, (2) the defendant resisted, delayed, or obstructed the officer in discharge of that duty, and (3) the defendant acted willfully and unlawfully. Examining (1), the court walked through the reasonable suspicion the officer formed while approaching defendant and explained that responding to the disturbance and attempting to identify defendant was well within the officer's duties. Turning to (2), the court made the distinction between mere criticism of the police and the actions of defendant, who was at that time a reasonable suspect in the disturbance that the officers were investigating and applied precent that "failure by an individual to provide personal identifying information during a lawful stop constitutes resistance, delay, or obstruction within the meaning of N.C. Gen. Stat. § 14-223." Slip op. at 31. Finally, considering (3), the court explained that since the stop was lawful and the officers were reasonably investigating defendant as the subject of the disturbance, his actions refusing to provide identification and cooperate were willful and intended to hinder the duty of the officer. *Id.* at 40.

Defendant's use of a fake name when being admitted to a hospital did not represent an attempt to use identifying information of another person for purposes of an identity theft charge

State v. Faucette, ___ N.C. App. ___;2022-NCCOA-629 (Sept. 20, 2022). In this New Hanover County case, defendant appealed his conviction for identity theft, challenging the denial of his motion to dismiss for insufficient evidence. Notably, the State conceded that "there was insufficient evidence presented at trial showing that [d]efendant knowingly used identifying information of another person living or dead within the meaning of the identity theft statute." Slip op. at 1. The Court of Appeals agreed with the parties and found that the trial court erred by denying defendant's motion to dismiss, vacating defendant's conviction.

In November of 2018, defendant was at a trailer where he was formerly a tenant, causing a disturbance. The owner of the trailer asked a friend to check on the situation at the trailer, which resulted in the owner's friend confronting defendant and telling him to leave. Defendant struck the other man with a machete in the head multiple times. After this encounter, defendant went to a local hospital and gave a fake name ("David Bostic") and birth date to avoid being arrested for a failure to appear warrant. Defendant was subsequently recognized by a police officer and arrested, admitting to the officer he went into the hospital under a fake name. In February of 2019, defendant was indicted for assault with a deadly weapon inflicting serious injury and identity theft. At trial, the State admitted the wrist band from the hospital with a fake name, and called a man from a neighboring county named David Bostic (who did not have the same birthdate) to testify that he did not know defendant and did not give defendant permission to use his identity.

Reviewing the denial of the motion to dismiss *de novo*, the court laid out the relevant element of identity theft from G.S. § 14-113.20, explaining "identity theft exists when "[a] person . . . knowingly obtains, possesses, or uses identifying information of another person, living or dead, *with the intent to fraudulently represent that the person is the other person* . . . for the purpose of avoiding legal consequences." Slip op. at 12. Applicable precedent supports that a person's name, date of birth, and address may be identifying information; however, in this case defendant did not use the name and birth date with the intent to represent himself as any real person named David Bostic. The court noted that no evidence connected the name and birth date used by defendant with any person identified by the State, and the birth date given was not that of the David Bostic the State found to testify in this matter. Explaining its conclusion, the court found "[t]here was insufficient evidence at trial to show that [d]efendant intended to fraudulently represent he was the David Bostic who testified at trial or that [d]efendant used the identifying information of any other actual person, living or dead." *Id.* at 16.

Defendant's malicious and willful act of arson justified a conviction for felonious cruelty to animals when the house fire set by defendant caused the death of a puppy in the house

State v. Charles, ___ N.C. App. ___;2022-NCCOA-628 (Sept. 20, 2022). In this Cumberland County case, defendant appealed after being convicted of second-degree arson and felonious cruelty to animals. The Court of Appeals found no error with the trial court.

In July of 2020, defendant lived in and around Fayetteville in a van with his sister. Defendant frequently spent time with his sister and her boyfriend, who had a residence in Fayetteville. After a confrontation between defendant and the sister's boyfriend, defendant went to the boyfriend's house and set fire to the residence; the fire also killed the boyfriend's puppy which was inside the house, leading to defendant's convictions for arson and animal cruelty.

On appeal, defendant first argued that the jury instruction including the doctrine of transferred intent regarding the animal cruelty charge was error. The Court of Appeals declined to determine whether transferred intent was applicable in the case, because the plain language of G.S. § 14-360 (cruelty to animals) supported the instruction to the jury. Regarding the elements of felonious cruelty to animals, the court pointed out that "one who merely acts maliciously is guilty of felonious cruelty to animals under the statute if that act 'cause[s] . . . to be . . . killed, any animal.'" Slip op. at 19. Because defendant was convicted of second-degree arson, a crime requiring malicious intent, "[i]t is enough to prove that the defendant acted maliciously and that the act proximately caused the death of an animal. *Id.*

Defendant also argued that the trial court's denial of his motion to dismiss was error as he was not aware there was an animal inside the house; again, the court disagreed. Referencing the jury instruction discussion above, the court explained that defendant's lack of knowledge regarding the puppy was irrelevant. Instead, "it was sufficient for the State to show that [d]efendant intentionally and maliciously started the fire which proximately resulted in the animal's death." *Id.* at 22.

Finally, defendant argued that the indictment was deficient as it lacked the elements of "maliciously" and "intentionally" from the charge of felonious cruelty to animals. The court noted that indictments are not subject to rigid rules of construction; while the indictment must adequately allege each element of the charge, it may do so in the words of the statute or similar language. *Id*. at 25. Here, the "maliciously" element of the charge was included in the accompanying second-degree arson charge, which stated defendant "unlawfully, willfully and feloniously did *maliciously* burn the dwelling." *Id.* at 27. The "intentionally" element was included as "willfully" in the animal cruelty charge, as the court noted that "'willfully' adequately expresses that the offense requires an intentional act." *Id*. at 28.

Defendant threatening a police dog with a knife and homemade spear represented willful attempt to cause serious harm, not self-defense

State v. Pierce, ___ N.C. App. ___; 2022-NCCOA-631 (Sept. 20, 2022). In this Randolph County case, defendant appealed a conviction for attempting to cause serious harm to a law enforcement animal, arguing the trial court committed error when it declined to instruct the jury on (1) a lesser-included offense, (2) self-defense, and (3) willfulness. The Court of Appeals disagreed, finding no error by the trial court.

The Archdale Police Department responded to a call that defendant was drunk, locked in his bedroom, and threatening self-harm in September 2018. When police responded, defendant was locked in his room and had a knife and a homemade spear, which consisted of a knife attached to the end of a level. Defendant refused to come out of the bedroom and said police would have to kill him if they entered. Officers used a police dog named Storm to subdue defendant; while the dog was in defendant's bedroom, defendant initially thrust the spear towards the dog, and also raised the hand holding the knife. The dog bit defendant's arm and he dropped the knife, leading to officers taking defendant into custody.

Reviewing defendant's first argument, the Court of Appeals noted that the trial court refused defendant's request for the lesser-included offense of attempting to harm a law enforcement animal, and the only distinction between the two offenses is the gravity of harm involved. Applying the definition of "serious harm" in G.S. § 14-163.1(a)(4), the court concluded that defendant communicated and intended serious harm to the police dog justifying the denial of his request for the lesser-included charge. Although defendant argued he was acting in self-defense, the court found "[d]efendant's

purportedly defensive actions do not negate or conflict with the evidence that he intended serious harm—through verbal threats of death and wielding a makeshift spear and knife against Storm." Slip op. at 16.

Regarding defendant's request for an instruction on self-defense, this defense is typically not available when the actions were taken against a law enforcement officer. Defendant argued that the officers were not acting in furtherance of their official duties because defendant was not committing a crime in his bedroom. The court explained that "official duties" for law enforcement is more expansive than simply investigating crime. Regarding defendant's situation, the court pointed out that "[d]efendant does not cite, and we cannot find, any North Carolina caselaw where a police response to a domestic disturbance or an emergency call involving threats of self-harm was deemed outside law enforcements' official duties." *Id*. at 20.

Extortion is unprotected speech as speech integral to criminal conduct and the "true threats" analysis does not apply to the offense

State v. Bowen, 282 N.C. App. 631; 2022-NCCOA-213 (April 5, 2022); *temp. stay allowed*, ___ N.C. ___; 871 S.E.2d 102 (April 22, 2022). The defendant and victim met on a website arranging "sugar daddy" and "sugar baby" relationships, and the two engaged in a brief, paid, sexual relationship. The victim was a married man with children at the time. Years later, the defendant contacted the man, stating that she planned to write a book about her experiences on the website and that she intended to include information about their relationship within. The woman repeatedly contacted the man and threatened to include information that the man had shared with her about his ex-wife and their marriage. She also threatened to contact the man's ex-wife, as well as his current wife. Eventually, she offered the man a confidentiality agreement, whereby she would keep the details of their relationship private in exchange for a large sum of money. The man went to the police, and the woman was charged with extortion. She was convicted at trial and appealed.

Although the defendant did not raise a constitutional challenge in her motions to dismiss at trial, her motion to dismiss for insufficient evidence preserved all sufficiency issues for review, including her constitutional argument.

Under the First Amendment to the U.S. Constitution, threat crimes must be interpreted to require a "true" threat. "A 'true threat' is an 'objectively threatening statement communicated by a party which possess the subjective intent to threaten a listener or identifiable group.'" *Bowen* Slip op. at 10 (citing *State v. Taylor*, 379 N.C. 589 (2021)). The defendant argued that extortion under G.S. 14-118.4 must be interpreted to require proof of a true threat. The court disagreed. It found that extortion falls within another category of unprotected speech—speech integral to criminal conduct, or speech that is itself criminal (such as solicitation to commit a crime). This approach to extortion is consistent with treatment of the offense by federal courts. Although an extortion statute may sweep too broadly in violation of the First Amendment, North Carolina's extortion statute requires that the defendant possess the intent to wrongfully obtain a benefit via the defendant's threatened course of action. The statute therefore only applies to "extortionate" conduct and does not reach other types of protected speech, such as hyperbole or political and social commentary. According to the unanimous court:

> Following the U.S. Supreme Court and federal appellate opinions, we hold extortionate speech is criminal conduct in and of itself and, as such, is not constitutionally protected

> speech. Therefore, the First Amendment does not require that the 'true threat' analysis be applied to N.C. Gen. Stat. § 14-118.4. *Bowen* Slip op. at 16.

Here, the evidence clearly established the defendant's wrongful intent and threats, and she was properly convicted of extortion.

There was sufficient circumstantial evidence that the defendant was the driver of a moped

State v. Ingram, ___ N.C. App. ___; 2022-NCCOA-264 (Apr. 19, 2022). In this Rowan County case, the defendant appealed after being convicted of impaired driving after a jury trial. The conviction stemmed from a 2017 incident in which the defendant was found unresponsive on a fallen moped in the middle of the road. Field sobriety tests and a toxicology test indicated that the defendant was impaired. The trial court denied the defendant's motion to dismiss, and the defendant was convicted. On appeal, the defendant contended that the trial court erred by denying his motion to dismiss because there was insufficient evidence that he drove the moped. Though no witness testified to seeing the defendant driving the moped, the Court of Appeals concluded that there was sufficient circumstantial evidence that he did. He was found alone, wearing a helmet, lying on the double yellow line in the middle of the road and mounted on the seat of the fallen moped. The Court thus found no error.

Confrontation Clause

Testimony from deceased witness at civil hearing was admissible under Rule 804(b)(1) and did not violate the defendant's confrontation rights

State v. Joyner, ___ N.C. App. ___; 2022-NCCOA-525 (Aug. 2, 2022). In this Edgecombe County case, defendant appealed his convictions of obtaining property by false pretenses and exploitation of a disabled or elderly person in a business relationship. The Court of Appeals found no error and affirmed defendant's convictions.

Defendant approached an 88-year-old woman at her home and offered to assist her with home improvement work. After claiming to perform several tasks and having the homeowner agree to invoices, an investigation determined that defendant did not perform the work he claimed, and he was indicted for the charges in this matter. Before the criminal trial, the elderly homeowner filed for a civil no-contact order against defendant. Defendant did not appear at the hearing and did not cross-examine any witnesses; the no-contact order was entered against defendant at the conclusion of the hearing. Defendant subsequently filed motions attempting to inspect the property in question, and the trial court denied those motions. The homeowner died prior to the criminal trial and the trial court entered an order admitting her testimony from the no-contact civil hearing.

Defendant argued that the admission of the testimony of the homeowner from the civil hearing, violated his Sixth Amendment right to confront and cross examine the witness. The Court of Appeals first considered the admission of testimony and the confrontation clause issues involved, applying the three-prong test articulated in *State v. Clark*, 165 N.C. App. 279 (2004). The court determined that defendant did have a meaningful opportunity to cross-examine the homeowner in the civil hearing, but he did not take advantage of that opportunity. Because that hearing was on matters substantially similar to the criminal trial, defendant waived his opportunity by not cross-examining the homeowner. The

similarity of matters also supported the court's hearsay analysis, as it found that the testimony was admissible under the exception in North Carolina Rule of Evidence 804(b)(1).

The defendant's Confrontation Clause rights were violated by the introduction of an unavailable witness's plea allocution in a related case; no "opening the door" exception to the right to confront

Hemphill v. New York, 595 U.S. __, 142 S. C.t 681 (2022). In this murder case, the Supreme Court determined that the defendant's Sixth Amendment right to confront witnesses against him was violated when the trial court admitted into evidence a transcript of another person's plea allocution. In 2006, a child in the Bronx was killed by a stray 9-millimeter bullet. Following an investigation that included officers discovering a 9-millimeter cartridge in his bedroom, Nicholas Morris was charged with the murder but resolved the case by accepting a deal where he pleaded guilty to criminal possession of a .357-magnum revolver in exchange for dismissal of the murder charge. Years later, the defendant Hemphill was charged with the murder. At trial, for which Morris was unavailable as a witness, Hemphill pursued a third-party culpability defense and elicited undisputed testimony from the State's law enforcement officer witness indicating that a 9-millimeter cartridge was discovered in Morris's bedroom. Over Hemphill's Confrontation Clause objection, the trial court permitted the State to introduce Morris's plea allocution for purposes of proving, as the State put it in closing argument, that possession of a .357 revolver, not murder, was "the crime [Morris] actually committed." Relying on state case law, the trial court reasoned that Hemphill had opened the door to admission of the plea allocution by raising the issue of Morris's apparent possession of the 9-millimeter cartridge.

After finding that Hemphill had preserved his argument by presenting it in state court and accepting without deciding that the plea allocution was testimonial, the Supreme Court determined that admission of Morris's plea allocution violated Hemphill's confrontation rights and rejected various arguments from the State advocating for an "opening the door" rule along the lines of that adopted by the trial court. Describing the "door-opening principle" as a "substantive principle of evidence that dictates what material is relevant and admissible in a case" the Court distinguished it from procedural rules, such as those described in *Melendez-Diaz*, that the Court has said properly may govern the exercise of the right to confrontation. The Court explained that it "has not held that defendants can 'open the door' to violations of constitutional requirements merely by making evidence relevant to contradict their defense." Thus, the Court reversed the judgment of the New York Court of Appeals which had affirmed the trial court.

Justice Alito, joined by Justice Kavanaugh, concurred but wrote separately to address the conditions under which a defendant can be deemed to have validly waived the right to confront adverse witnesses. Justice Alito wrote that while it did not occur in this case, there are circumstances "under which a defendant's introduction of evidence may be regarded as an implicit waiver of the right to object to the prosecution's use of evidence that might otherwise be barred by the Confrontation Clause." He identified such a situation as that where a defendant introduces a statement from an unavailable witness, saying that the rule of completeness dictates that a defendant should not be permitted to then lodge a confrontation objection to the introduction of additional related statements by the witness.

Justice Thomas dissented based on his view that the Court lacked jurisdiction to review the decision of the New York Court of Appeals because Hemphill did not adequately raise his Sixth Amendment claim there.

Lay and Expert Opinion

Admitting testimony from State's expert that exhibit was "in his opinion" cocaine was not plain error

State v. Campbell, ___ N.C. App. ___; 2022-NCCOA-627 (Sept. 20, 2022). In this Mecklenburg County case, defendant appealed his convictions for possession and sale of cocaine. Defendant argued that the trial court erred by admitting testimony from State's expert that in his opinion, the State's exhibit was cocaine. In 2018 a confidential informant told an officer of the Charlotte-Mecklenburg Police Department that defendant was selling cocaine in the Charlotte area. Officers opened an investigation and set up a purchase of cocaine from defendant. In February of 2018, an officer purchased what appeared to be cocaine from defendant. After testing the substance, police arrested defendant and he was indicted on charges related to trafficking and sale of cocaine.

The court applied a plain error standard because defendant did not object to the expert's opinion at trial. At trial the expert witness did not testify about the methodology of his "chemical analysis," but did state that in his opinion, the substance in question was cocaine. Slip op. at 11. Defendant argued that this did not meet the reliability test under by Rule of Evidence 702(a). Examining applicable precedent, the court explained "even assuming . . . that it was error for the trial court to allow [State's expert] to testify that, in his opinion, the substance he tested was cocaine, the error did not amount to plain error because [State's expert] testified that he performed a chemical analysis and testified to the results of that chemical analysis." *Id*. at 14, citing *State v. Sasek*, 271 N.C. App. 568 (2020).

Assuming without deciding that officer expressed improper lay opinion that the defendant was the operator of the moped that crashed, the error was not prejudicial because other admitted evidence included substantially similar information

State v. Delau, 381 N.C. 226; 2022-NCSC-61 (May 6, 2022). In this Buncombe County case, the Supreme Court reversed the decision of the Court of Appeals that the trial court committed prejudicial error in admitting an officer's testimony that the defendant was driving his moped when it crashed. The Supreme Court noted that a warrant application for the defendant's blood that was signed by the testifying officer was admitted without objection at the defendant's trial on impaired driving charges. That application stated the officer's conclusion, based on the circumstances he observed following the crash, that the defendant was operating the moped. In addition, the defendant's cross-examination of the officer brought out much of the same information. Thus, the Supreme Court held that the defendant did not meet his burden to establish that a different result would have been reached had the objected-to testimony been excluded.

Sentencing and Probation

Pennsylvania statutory sexual assault offense was substantially similar to North Carolina statutory rape offense for purposes of registration as sex offender under G.S. § 14-208.7(a).

In re: Pellicciotti, ___ N.C. App. ___; 2022-NCCOA-624 (Sept. 20, 2022). In this Durham County case, defendant appealed an order requiring him to register as a sex offender after his relocation to North Carolina. Defendant argued that his offense was not substantially similar to the reportable offense under North Carolina law; the Court of Appeals disagreed and affirmed the order.

Defendant pleaded guilty to the Pennsylvania offense of second-degree statutory sexual assault in 2011. After relocating to Durham County in 2020, the Durham County Sheriff's Office informed him that he was required to register as a sex offender as required by G.S. § 14-208.7(a). Defendant filed a petition contesting the registration and the petition was set for hearing in February of 2021. At the hearing, the trial court determined that defendant's conviction was substantially similar to G.S. § 14-27.25(a), statutory rape of a person 15 years or younger.

The Court of Appeals looked at the language of the Pennsylvania statute in effect when defendant pleaded guilty, and examined each element of the offense along with the corresponding portion of the North Carolina statute. The court noted that the type of intercourse required and the age requirement for offenders varied between the two statutes, but looked to *State v. Graham*, 379 N.C. 75 (2021), and related precedent to determine these minor variations did not push the offenses beyond substantial similarity. Slip op. at 18. The court also concluded that the rule of lenity was not applicable in the present case, as the statute was not ambiguous and the framework for comparison was well established. *Id*. at 25.

Right to confront or cross-examine witness during probation revocation hearing is limited; defendant failed to object or call witness for confrontation during probation revocation hearing, failing to preserve issue on appeal

State v. Jones, ___ N.C. ___; 2022-NCSC-103 (Aug. 19, 2022). In this Durham County case, the Supreme Court modified and affirmed the Court of Appeals opinion denying defendant's appeal of the revocation of his probation after a hearing.

Defendant was placed on probation in 2015 for discharging a weapon into occupied property and possession of a firearm by a convicted felon. Probation reports filed in 2017 alleged that defendant violated the terms of probation by committing new criminal offenses. The new criminal offenses were 2016 charges of possession of a firearm by a felon and carrying a concealed weapon that arose from a traffic stop. When the 2016 firearm charges went to trial, defendant filed a motion to suppress evidence obtained through the traffic stop; the trial court denied that motion, but the jury did not reach a unanimous verdict, resulting in a mistrial on July 14, 2017. Subsequently the probation violations went to hearing on September 14, 2017, and the State sought to admit the order from the motion to suppress over the objection of defense counsel. Notably, defense counsel did not attempt to call the arresting officer to testify or request that he otherwise remain available to testify at the probation hearing. When the trial court admitted the order, the court also admitted the hearing transcript with the arresting officer's testimony, and at the conclusion of the probation hearing the court found defendant had committed the violations and revoked defendant's probation.

On appeal, defendant argued that admission of the transcript with testimony from the arresting officer deprived him of his right to confront and cross-examine witnesses against him. Examining defendant's appeal, the Supreme Court explained that "a probation revocation proceeding is not a criminal trial," and defendant was not entitled to the full Sixth Amendment rights afforded in a criminal prosecution. Slip op. at 13. Instead, defendant was entitled to a more limited set of rights for probation revocation hearings. *Id.* at 14, quoting *Black v. Romano*, 471 U.S. 606, 612 (1985). The court noted that traditional rules of evidence do not apply, and G.S. § 15A-1345(e) establishes the procedural requirements for a probation revocation hearing. Slip op. at 15. In particular, G.S. § 15A-1345(e) provides that defendant "may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." However, defendant's objection during the probation hearing was not because of his

inability to cross-examine the arresting officer, but instead because the order on the motion to suppress was irrelevant since the jury did not convict defendant of the crimes. *Id.* at 19.

Because defendant's objection was not clearly about confrontational rights, and defendant never attempted to actually confront or cross examine the arresting officer at the probation hearing, the Supreme Court found that he failed to preserve the issue on appeal. Further, the court noted that this was not a situation where a statutory mandate would preserve the objection, because the "plain language of G.S. § 15A-1345(e) contains a conditional statutory mandate which means normal rules of preservation apply unless the trial court fails to make a finding of good cause when the court does not permit confrontation despite a defendant's request to do so." *Id.* at 26. The trial court never received a request for confrontation, and never indicated that it would not permit confrontation or examination, meaning no finding of good cause was necessary.

Justice Earls dissented from the majority opinion.

Trial court erred by requiring defendant to complete co-parenting classes while appeal was pending

State v. Adams, ___ N.C. App. ___; 2022-NCCOA-596 (Sept. 6, 2022). In this Yadkin County case, two defendants appealed their convictions for misdemeanor child abuse. The Court of Appeals found error when the trial court ordered one defendant to enroll and complete co-parenting classes while the appeal in this matter was pending. Under G.S. § 15A-1451(a)(4), a defendant's notice of appeal stays probation, meaning trial court's imposition of the co-parenting condition was error. As a result, the court remanded for resentencing of that defendant only.

Trial court improperly considered defendant's choice of jury trial when imposing consecutive sentence

State v. Pickens, ___ N.C. App. ___; 2022-NCCOA-527 (Aug. 2, 2022). In this Wake County case, defendant appealed his convictions for first-degree rape of a child and first-degree sexual offense with a child based on error in the admission of testimony regarding a prior alleged assault and in sentencing. The Court of Appeals found error due to the trial court's improper consideration of defendant's choice to receive a trial by jury. At the sentencing hearing, the trial court addressed defendant regarding the victim and 404(b) witness, saying "[a]nd in truth, they get traumatized again by being here, but it's absolutely necessary when a defendant pleads not guilty. They didn't have a choice and you, Mr. Pickens, had a choice." Slip op. at 32. Immediately after this quote, the trial court imposed three consecutive 300-month sentences. The Court of Appeals found a clear inference that the trial court imposed consecutive sentences because defendant did not plead guilty and went to trial. As such, the court vacated the sentence and remanded for resentencing.

Judge Murphy dissented by separate opinion.

Trial court deprived defendant of his right to allocution by failing to provide an opportunity for defendant to address the court after denying defendant's request to obtain his papers

State v. Wright, ___ N.C. App. ___; 2022-NCCOA-418 (June 21, 2022). In this Wake County case, defendant appealed on several grounds after being convicted of violating the provisions of the sex offender registry and attaining habitual felon status. The trial court did not adequately allow defendant to address the court and deprived him of his right to allocution. During an exchange between the trial

court and the defendant at sentencing, the defendant repeatedly asked to get his papers. The trial court refused to allow this and did not provide an opportunity for defendant to speak after he referenced needing his papers for the third time. Because defendant was not clearly told he could speak without his papers, and the court did not inquire about defendant's desire to speak without them, the trial court effectively refused to allow defendant to make a statement. Based upon this failure, the court vacated defendant's sentence and remanded to the trial court for a new sentencing hearing.

Trial court improperly considered a joined conviction as a prior conviction when applying G.S. § 90-96(a)

State v. Campbell, ___ N.C. App. ___;2022-NCCOA-627 (Sept. 20, 2022). In this Mecklenburg County case, defendant appealed his convictions for possession and sale of cocaine. Defendant argued that the trial court erred by failing to conditionally discharge the defendant due to his lack of prior convictions. The Court of Appeals agreed and remanded the case to the trial court for resentencing because defendant was eligible for conditional discharge.

Discussing the applicable statute, the court explained "according to the language of G.S. § 90-96(a), a trial court must place an eligible defendant under a conditional discharge, unless the trial court determines with a written finding . . . that the offender is inappropriate for a conditional discharge for factors related to the offense." Slip op. at 21. Here, the State argued that defendant's "same-day conviction" for sale of cocaine made him ineligible for conditional discharge. *Id*. at 22. The question of what "previously been convicted of" means for purposes of G.S. § 90-96(a) is not defined by statute. The court examined similar statutes and applicable precedent, arriving at the reasoning in a similar situation from *State v. West*, 180 N.C. App. 664 (2006), that joined convictions should not be considered as a prior conviction when applying G.S. § 90-96(a). *Id*. at 29. Because G.S. § 90-96 calls for an opportunity to discuss defendant's suitability for conditional discharge, and this was not done in defendant's sentencing, the court vacated the conviction and remanded for a new resentencing hearing.

Use of juvenile-age felony conviction to support violent habitual felon status does not violate the Eighth Amendment and mandatory life without parole is not a disproportionate sentence

State v. McDougald, ___ N.C. App. ___; 2022-NCCOA-526 (Aug. 2, 2022). In this Harnett County case, defendant appealed the denial of his motion for appropriate relief (MAR). The Court of Appeals affirmed the denial of defendant's MAR and the imposition of life without parole.

Defendant first pleaded guilty to second degree kidnapping, a class E felony, in 1984, when he was sixteen years old. Four years later in 1988, defendant pleaded no contest to second-degree sexual offense (class H felony), common law robbery (class D felony), and armed robbery (class D felony). In 2001, a jury found defendant guilty of second-degree kidnapping, and subsequently of violent habitual felon status due to his prior felonies. The sentence imposed was mandatory life without parole. Defendant appealed that judgment, but the Court of Appeals found no error in *State v. McDougald*, 190 N.C. App. 675 (2008) (unpublished). The current MAR at issue was filed in 2017. Defendant argued in part that applying violent habitual felon status due to defendant's 1984 felony, which was committed when defendant was a juvenile, violated the Eighth Amendment.

The court found that applying a felony committed while defendant was a juvenile did not violate the Eighth Amendment, because defendant was receiving a stiffer punishment for the felony committed as

an adult, not a life without parole sentence for the initial felony committed while he was a juvenile. The court reviewed and applied "United States Supreme Court precedent, North Carolina Supreme Court precedent, and in the persuasive precedent from other jurisdictions" to determine that "the application of the violent habitual felon statute to Defendant's conviction of second-degree kidnapping, committed when Defendant was thirty-three years old, did not increase or enhance the sentence Defendant received for his prior second-degree kidnapping conviction, committed when Defendant was sixteen." Slip op. at 27. Because the punishment of life without parole was not imposed for the juvenile conviction, the court found that it did not run afoul of United States Supreme Court precedent forbidding life sentences for juvenile convictions.

The court also established that the punishment of life without parole was not disproportionate for defendant's second-degree kidnapping conviction, applying *State v. Mason*, 126 N.C. App. 318 (1997) to affirm the constitutionality of the habitual violent offender statute.

Post-Conviction

Trial court erred by failing to conduct a hearing on the ineffective assistance of counsel (IAC) claims raised by the defendant in his motion for appropriate relief (MAR); Trial court further erred by barring the defendant from filing a future MAR

State v. Ballard, ___ N.C. App. ___; 2022-NCCOA-294 (May 3, 2022). In this Brunswick County case, the defendant appealed from an order denying his motion for appropriate relief ("MAR") filed after his conviction for robbery with a firearm and related offenses. The defendant argued on appeal that the trial court erred by (1) denying his MAR because law enforcement's loss of an eyewitness statement was a *Brady* violation; (2) denying his MAR because the State presented false testimony, (3) failing to hold an evidentiary hearing on his claims, and (4) barring the defendant from filing future MARs.

(1) The Court of Appeals affirmed the trial court's ruling deny the defendant's due process claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that the State suppressed favorable evidence. Noting that to establish a *Brady* violation, the defendant must show that the suppressed evidence was material, the Court of Appeals concluded that the lost statement from an eyewitness did not meet this standard. Central to the Court's conclusion was trial counsel's ability to cross-examine the witness about inconsistencies in his statements and to impeach him with other testimony.

(2) The Court of Appeals affirmed the trial court's ruling denying the defendant's due process claim under *Napue v. Illinois*, 360 U.S .264 (1959), that the State knowingly presented false evidence. The Court concluded that the record did not support the defendant's contention that the State knew testimony from one of the eyewitness victims was false as opposed to simply inconsistent with other testimony.

(3) The Court of Appeals determined that the trial court erred by failing to grant an evidentiary hearing on the defendant's IAC claims as the defendant stated facts that, if true, would entitle him to relief. Focusing its analysis on defendant's claim that trial counsel failed to investigate a known alibi witness – defendant's son, who claimed to have been with him the morning of the crime – the Court noted that the record did not reveal whether defendant's trial counsel made a strategic decision not to investigate this alibi witness. The Court reasoned that this factual issue could only be appropriately resolved at an evidentiary hearing.

(4) The Court of Appeals vacated the trial court's ruling that the defendant's failure to assert other grounds in his MAR "shall be treated in the future as a **BAR** to any other motions for appropriate relief [in this case]." The Court relied upon its holding in *State v. Blake*, 275 N.C. App. 699 (2020), that G.S. 15A-1419 does not authorize a trial court to bar MAR claims in advance and that gatekeeper orders normally are entered only when a defendant has previously asserted numerous frivolous claims. The Court noted that the current case was not one in which the defendant had filed many frivolous MARs asserting the same claims. [Phil Dixon blogged about the procedural bar and MARs here.]

Judge Murphy concurred, with the exception of a sole paragraph discussing precedent from other jurisdictions related to whether an attorney's representation is deficient for failing to contact and interview prospective alibi witnesses. Judge Griffin concurred by separate opinion, expressing his disagreement with North Carolina Supreme Court precedent requiring an evidentiary hearing on the defendant's IAC claim, which he said was not supported by statute and allowed a petitioning party to take away the gatekeeping function of the trial judge.