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Criminal Case Update

2015 Winter Webinar
(Includes selected cases decided between June 2, 2015 and December 1, 2015)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to www.sog.unc.edu/programs/crimlaw/index.html. To obtain the summaries automatically by email, go to the above site and click on Criminal Law Listserv.

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Investigation Issues

Seizures

(1) Officer had reasonable suspicion for stop where he saw vehicle drive through red light; (2) Officer had probable cause to arrest for DWI based on a strong odor of alcohol, the defendant's red glassy eyes and admission to drinking before driving, etc.

State v. Miller, ___ N.C. App. ___, 777 S.E.2d 337 (Oct. 20, 2015). (1) Because the officer saw the defendant drive through a red light, the officer had reasonable suspicion to stop the defendant's vehicle. (2) Where upon stopping the defendant's vehicle the officer smelled a strong odor of alcohol and saw that the defendant had red glassy eyes, the defendant failed field sobriety tests, and admitted to drinking before driving, the officer had probable cause to arrest the defendant for DWI.

In a post-*Rodriguez* case, the Court held, over a dissent, that officer had reasonable suspicion to extend routine traffic stop to allow a police dog to perform a drug sniff outside the defendant's vehicle.

State v. Warren, ___ N.C. App. ___, 775 S.E.2d 362 (Aug. 4, 2015). In this post-*Rodriguez* case, the court held, over a dissent, that the officer had reasonable suspicion to extend the scope and duration of a routine traffic stop to allow a police dog to perform a drug sniff outside the defendant's vehicle. The court noted that under *Rodriguez v. United States*, ___ U.S. ___, 191 L.Ed. 2d 492 (2015), an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop. It further noted that earlier N.C. case law applying the de minimus rule to traffic stop extensions had been overruled by *Rodriguez.* The court continued, concluding that in this case the trial court's findings support the conclusion that the officer developed reasonable suspicion of illegal drug activity during the course of his investigation of the traffic offense and was therefore justified to prolong the traffic stop to execute the dog sniff. Specifically:

> Defendant was observed and stopped "in an area [the officer] knew to be a high crime/high drug activity area[;]" that while writing the warning citation, the officer observed that Defendant "appeared to have something in his mouth which he was not chewing and which affected his speech[;]"that "during his six years of experience [the officer] who has specific training in narcotics detection, has made numerous 'drug stops' and has observed individuals attempt to hide drugs in their mouths and . . . swallow drugs to destroy evidence[;]" and that during their conversation Defendant denied being involved in drug activity "any longer."

Reversing the Court of Appeals, the Court held that an officer had reasonable suspicion for a *Terry* stop based on the defendant walking away from companion twice upon police officer's approach in area known for drug activity

State v. Jackson, 368 N.C. 75 (June 11, 2015). Reversing the decision below, *State v. Jackson*, __ N.C. App. __, 758 S.E.2d 39 (2014), the court held that an officer had reasonable suspicion for the stop. The stop occurred at approximately 9:00 pm in the vicinity of Kim's Mart. The officer knew that the immediate area had been the location of hundreds of drug investigations. Additionally, the officer

personally had made drug arrests in the area and was aware that hand to hand drug transactions occurred there. On the evening in question the officer saw the defendant and another man standing outside of Kim's Mart. Upon spotting the officer in his patrol car, the two stopped talking and dispersed in opposite directions. In the officer's experience, this is typical behavior for individuals engaged in a drug transaction. The officer tried to follow the men, but lost them. When he returned to Kim's Mart they were standing 20 feet from their original location. When the officer pulled in, the men again separated and started walking in opposite directions. The defendant was stopped and as a result contraband was found. The court found these facts sufficient to create reasonable suspicion to justify the initial investigatory stop. The court noted that its conclusion was based on more than the defendant's presence in a high crime and high drug area.

An officer's conduct of taking the defendant's driver's license to his patrol car to investigate the status of the license constituted a seizure that was not justified by reasonable suspicion

State v. Leak, ___ N.C. App. ___, 773 S.E.2d 340 (June 2, 2015), *temporary stay allowed*, ___ N.C. ___, 773 S.E.2d 75 (June 23, 2015). In a case in which there was a dissenting opinion, the court held that the defendant's Fourth Amendment rights were violated when an officer, who had approached the defendant's legally parked car without reasonable suspicion, took the defendant's driver's license to his patrol vehicle. Until the officer took the license, the encounter was consensual and no reasonable suspicion was required: "[the officer] required no particular justification to approach defendant and ask whether he required assistance, or to ask defendant to voluntarily consent to allowing [the officer] to examine his driver's license and registration." However, the officer's conduct of taking the defendant's license to his patrol car to investigate its status constituted a seizure that was not justified by reasonable suspicion. Citing the recent U.S. Supreme Court case *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) (police may not extend a completed vehicle stop for a dog sniff, absent reasonable suspicion), the court rejected the suggestion that no violation occurred because any seizure was "de minimus" in nature.

Searches

(1) Court held, over a dissent, that no Fourth Amendment violation occurred when law enforcement officers obtained the defendant's cell cite location information from his service provider without a warrant; (2) Even if Fourth Amendment was violated, good faith exception applies

State v. Perry, ___ N.C. App. ___, 776 S.E.2d 528 (Sept. 15, 2015). In this drug case, no fourth amendment violation occurred when law enforcement officers obtained the defendant's cell cite location information (CSLI) from his service provider, AT&T, without a warrant based on probable cause. The court noted that while courts have held that "real time" CSLI may be obtained only pursuant to a warrant supported by probable cause, the Stored Communications Act (SCA) allows for access to "historical" information upon a lesser showing. It continued: "The distinguishing characteristic separating historical records from "real-time" information is the former shows where the cell phone has been located at some point in the past, whereas the latter shows where the phone is presently located through the use of GPS or precision location data." The court concluded that the CSLI at issue was historical information:

> [Officers] followed Defendant's historical travel by entering the coordinates of cell tower "pings" provided by AT&T into a Google Maps search engine to determine the physical location of the last tower "pinged." Defendant's cell phone was never contacted, "pinged," or its precise location directly tracked by the officers. The officers

> did not interact with Defendant's cell phone, nor was any of the information received either directly from the cell phone or in "real time." All evidence shows the cell tower site location information provided by AT&T was historical stored third-party records and properly disclosed under the court's order as expressly provided in the SCA.

The court found it significant that an officer testified that there was a 5- to 7-minute delay in the CSLI that he received from AT&T. The court went on to conclude that retrieval of the "historical" information was not a search under the fourth amendment. Noting that the U.S. Supreme Court has not decided whether "historical" CSLI raises a fourth amendment issue, the question is one of first impression North Carolina. The court distinguished the U.S. Supreme Court's recent decision in *United States v. Jones,* 132 S. Ct. 945 (2012) (the government's installation of a GPS tracking device on a vehicle and its use of that device to monitor the vehicle's movements on public streets constitutes a "search" within the meaning of the Fourth Amendment) in three respects. First, unlike in *Jones*, here, there was no physical trespass on the defendant's property. Second, the tracking in question here was not "real-time" the court reiterated: "officers only received the coordinates of historical cell tower 'pings' after they had been recorded and stored by AT&T, a third party." Third, the trespass in *Jones* was not authorized by a warrant or a court order of any kind whereas here a court order was entered. And, "[m]ost importantly," *Jones* did not rely on the third-party doctrine. Citing decisions from the Third, Fifth and Eleventh Circuits, the court held that obtaining the CSLI did not constitute a search under the fourth amendment. The court distinguished the recent Fourth Circuit opinion in United *States v. Graham,* on grounds that in that case the government obtained the defendant's historical CSLI for an extended period of time. Here, only two days of information were at issue. The court rejected the *Graham* court's conclusion that the third-party doctrine did not apply to CSLI information because the defendants did not voluntarily disclose it to their service providers. The court continued, concluding that even if it were to find that a search warrant based on probable cause was required, the good faith exception would apply. One judge concurred in the final disposition but disagreed with the majority's characterization of the information as historical rather than real-time. That judge "believe[d that] allowing the majority's characterization of the information provided by AT&T to law enforcement, based on the facts in this case, would effectively obliterate the distinction between 'historical' and 'real-time' cell site information." However, she agreed that the good faith exception applied.

Reversing the Court of Appeals, the Court held that probable cause existed for search warrant for the defendant's apartment where an anonymous citizen reported suspected drug-related activity at the apartment and a search of a person who had recently left the apartment revealed marijuana, cash, and drug-related text messages

State v. McKinney, 368 N.C. 161 (Aug. 21. 2015). Reversing the court of appeals in this drug case, the court held that the trial court properly denied the defendant's motion to suppress, finding that probable cause existed to justify issuance of a search warrant authorizing a search of defendant's apartment. The application was based on the following evidence: an anonymous citizen reported observing suspected drug-related activity at and around the apartment; the officer then saw an individual named Foushee come to the apartment and leave after six minutes; Foushee was searched and, after he was found with marijuana and a large amount of cash, arrested; and a search of Foushee's phone revealed text messages between Foushee and an individual named Chad proposing a drug transaction. The court rejected the defendant's argument that the citizen's complaint was unreliable because it gave no indication when the citizen observed the events, that the complaint was only a "naked assertion" that the observed activities were narcotics related, and that the State failed to establish a nexus between Foushee's vehicle and defendant's apartment, finding none of these arguments persuasive, individually or collectively. The court held that "under the totality of

circumstances, all the evidence described in the affidavit both established a substantial nexus between the marijuana remnants recovered from Foushee's vehicle and defendant's residence, and also was sufficient to support the magistrate's finding of probable cause to search defendant's apartment."

Broken window, unlocked front door, and unanswered knock did not create exigent circumstances justifying warrantless search of residence

State v. Jordan, ___ N.C. App. ___, 776 S.E.2d 515 (Aug. 4, 2015). In this drug case, the trial court erred in denying the defendant's motion to suppress evidence obtained as a result of a warrantless search of her residence. According to the court: "The trial court's findings that the officers observed a broken window, that the front door was unlocked, and that no one responded when the officers knocked on the door are insufficient to show that they had an objectively reasonable belief that a breaking and entering had *recently* taken place or *was still in progress*, such that there existed an urgent need to enter the property" and that the search was justified under the exigent circumstances exception to the warrant requirement. It continued:

> In this case, the only circumstances justifying the officers' entry into defendant's residence were a broken window, an unlocked door, and the lack of response to the officers' knock at the door. We hold that although these findings may be sufficient to give the officers a reasonable belief that an illegal entry had occurred *at some point*, they are insufficient to give the officers an objectively reasonable belief that a breaking and entering was in progress or had occurred recently.

(1) Warrant to search a home was supported by probable case; (2) Officers exceeded the scope of the warrant where they searched a vehicle parked in the driveway that was not owned or controlled by the home's resident; (3) The good faith exception did not apply

State v. Lowe, ___ N.C. App. ___, 774 S.E.2d 893 (July 21, 2015), *temporary stay allowed*, ___ N.C. ___, 774 S.E.2d 840 (Aug. 11, 2015). Although a search warrant to search a home was supported by probable cause, law enforcement exceeded the scope of the warrant when they searched a vehicle parked in the driveway but not owned or controlled by the home's resident; the trial court thus erred by denying the defendant's motion to suppress. The affidavit supporting the warrant indicated that one Terrence Turner was selling, using and storing controlled substances at a home he occupied at 529 Ashebrook Dr. No vehicles were specified in the warrant. When executing the warrant officers found Turner inside the home, as well as two overnight guests, the defendant and his girlfriend, Margaret Doctors. Parked in the driveway was a rental car, which the officers learned was being leased by Doctors and operated by both her and the defendant. Although the officers knew that Turner had no connection to the vehicle, they searched it and found controlled substances inside. As a result the defendant was charged with drug offenses. Prior to trial he unsuccessfully moved to suppress, arguing that the warrant was not supported by probable cause and alternatively that the search of his vehicle exceeded the scope of the warrant. (1) The court held that the warrant was supported by probable cause. The affidavit stated that after receiving information that Turner was involved in drug activity at the home the officer examined trash and found correspondence addressed to Turner at the home and a small amount of marijuana residue in a fast food bag. (2) The court agreed that the search of the defendant's vehicle exceed the scope of the warrant issued to search Turner's home. Noting that the officers could have searched the vehicle if it belonged to Turner, the court further noted that they knew Turner had no connection to the car. The court stated that the issue presented, "whether the search of a vehicle rented and operated by an overnight guest at a residence described in a search warrant may be validly searched under the scope of that warrant," was one of first impression. The court rejected the State's argument that a warrant to

search a home permitted a search of any vehicle found within the curtilage, reasoning: "The State's proffered rule would allow officers to search any vehicle within the curtilage of a business identified in a search warrant, or any car parked at a residence when a search is executed, without regard to the connection, if any, between the vehicle and the target of the search." (3) Finally, the court rejected the State's argument that the good faith exception should apply because police department policy allowed officers to search all vehicles within the curtilage of premises specified in a warrant. The court found the good faith exception "inappropriate" where the error, as here, is attributable to the police, not a judicial official who issued the warrant.

(1) Facial challenges under the Fourth Amendment are not categorically barred; (2) Provision of municipal code requiring motel owners to turn over hotel registry information to police is facially unconstitutional because it fails to provide hotel operators with an opportunity for precompliance review

Los Angeles v. Patel, 576 U.S. ___, 135 S. Ct. 2443 (June 22, 2015). (1) In this case where a group of motel owners and a lodging association challenged a provision of the Los Angeles Municipal Code (LAMC) requiring motel owners to turn over to the police hotel registry information, the Court held that facial challenges under the Fourth Amendment are not categorically barred. With respect to the relevant LAMC provisions, §41.49 requires hotel operators to record information about their guests, including: the guest's name and address; the number of people in each guest's party; the make, model, and license plate number of any guest's vehicle parked on hotel property; the guest's date and time of arrival and scheduled departure date; the room number assigned to the guest; the rate charged and amount collected for the room; and the method of payment. Guests without reservations, those who pay for their rooms with cash, and any guests who rent a room for less than 12 hours must present photographic identification at the time of check-in, and hotel operators are required to record the number and expiration date of that document. For those guests who check in using an electronic kiosk, the hotel's records must also contain the guest's credit card information. This information can be maintained in either electronic or paper form, but it must be "kept on the hotel premises in the guest reception or guest check-in area or in an office adjacent" thereto for a period of 90 days. LAMC section 41.49(3)(a) states, in pertinent part, that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection," provided that "[w]henever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business." A hotel operator's failure to make his or her guest records available for police inspection is a misdemeanor punishable by up to six months in jail and a $1,000 fine. The respondents brought a facial challenge to §41.49(3)(a) on Fourth Amendment grounds, seeking declaratory and injunctive relief. As noted, the Court held that facial challenges under the Fourth Amendment are not barred. (2) Turning to the merits of the claim, the Court held that the challenged portion on the LAMC is facially unconstitutional because it fails to provide hotel operators with an opportunity for precompliance review. The Court reasoned, in part:

> [A]bsent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. And, we see no reason why this minimal requirement is inapplicable here. While the Court has never attempted to prescribe the exact form an opportunity for precompliance review must take, the City does not even attempt to argue that §41.49(3)(a) affords hotel operators any opportunity whatsoever. Section 41.49(3)(a) is, therefore, facially invalid. (citations omitted)

Clarifying the scope of its holding, the Court continued, "As they often do, hotel operators remain free to consent to searches of their registries and police can compel them to turn them over if they have a proper administrative warrant—including one that was issued ex parte—or if some other exception to the warrant requirement applies, including exigent circumstances." The Court went on to reject Justice Scalia's suggestion that hotels are "closely regulated" and that the ordinance is facially valid under the more relaxed standard that applies to searches of that category of businesses.

Modifying and affirming the Court of Appeals, the Court held that the district court exceeded its statutory authority by ordering a search of the defendant's person, vehicle, and residence for weapons pursuant to a Domestic Violence Order of Protection, and that the search violated the defendant's constitutional rights

State v. Elder, 368 N.C. 70 (June 11, 2015). Modifying and affirming the decision below, *State v. Elder*, __ N.C. App. __, 753 S.E.2d 504 (2014), the supreme court held that the district court exceeded its statutory authority under G.S. 50B-3 by ordering a search of defendant's person, vehicle, and residence pursuant to an ex parte civil Domestic Violence Order of Protection ("DVPO") and that the ensuing search violated the defendant's constitutional rights. Relying on G.S. 50B-3(a)(13) (authorizing the court to order "any additional prohibitions or requirements the court deems necessary to protect any party or any minor child") the district court included in the DVPO a provision stating: "[a]ny LawEnforcement officer serving this Order shall search the Defendant's person, vehicle and residence and seize any and all weapons found." The district court made no findings or conclusions that probable cause existed to search the defendant's property or that the defendant even owned or possessed a weapon. Following this mandate, the officer who served the order conducted a search as instructed. As a result of evidence found, the defendant was charged with drug crimes. The defendant unsuccessfully moved to suppress, was convicted and appealed. The supreme court concluded that the catch all provision in G.S. 50B-3 "does not authorize the court to order law enforcement, which is not a party to the civil DVPO, to proactively search defendant's person, vehicle, or residence." The court further concluded "by requiring officers to conduct a search of defendant's home under sole authority of a civil DVPO without a warrant or probable cause, the district court's order violated defendant's constitutional rights" under the Fourth Amendment.

Interrogation

(1) The defendant was not automatically in custody for purposes of *Miranda* based simply upon his involuntary commitment, and a reasonable person in the defendant's position would understand that the restriction on his movement was not due to police interrogation; **(2) The defendant's confession was not involuntary**

State v. Hammonds, ___ N.C. App. ___, 777 S.E.2d 359 (Oct. 20, 2015). (1) In this armed robbery case, and over a dissent, the court rejected the defendant's argument that when police interrogated him in the hospital for approximately 1 ½ hours and procured a confession, he was in custody, triggering his right to *Miranda* warnings. The defendant argued that because he had been involuntarily committed, he was automatically "in custody" for purposes of *Miranda*. Agreeing that involuntary commitment is different from a voluntary hospitalization, the court found instructive cases holding that the fact that a person is incarcerated does not automatically mean that he or she is in custody for purposes of *Miranda*. In continued: "Since involuntary commitment is arguably less restrictive than incarceration, and certainly not more restrictive, we do not adopt a more restrictive rule for involuntary commitment

than for incarceration." It went on to consider the circumstances of the interrogation as it would for an incarcerated defendant, specifically: whether the person was free to refuse to go to the place of the interrogation; whether the person was told that participation in the interrogation was voluntary and that he was free to leave at any time; whether the person was physically restrained from leaving the place of interrogation; and whether the person was free to refuse to answer questions. Here, the court noted, the officers told the defendant he was not under arrest, they never told him that he could not stop the conversation or could not request that they leave, the officers never raised their voices, and the defendant was not isolated from others such as nurses. The court went on to "hold that a reasonable person in defendant's position would understand that the restriction on his movement was due to his involuntary commitment to receive medical treatment, not police interrogation." (2) Based on the trial court's findings, the court concluded, over a dissent, that the defendant's confession was not involuntary. Among other things, the trial court found that the officers never threatened the defendant and that their exhortations that he tell the truth did not make his confession involuntary.

Trial court erred by suppressing defendant's statements without making specific findings related to whether his statements were voluntary and by failing to resolve the material conflict in evidence regarding whether police coercion occurred

State v. Ingram, ___ N.C. App. ___, 774 S.E.2d 433 (July 7, 2015). On the State's appeal from a trial court order granting the defendant's motion to suppress, the court vacated and remanded for new findings of fact and if necessary, a new suppression hearing. After being shot by police, the defendant was taken to the hospital and given pain medication. He then waived his *Miranda* rights and made a statement to the police. He sought to suppress that statement, arguing that his *Miranda* waiver and statements were involuntarily. The court began by rejecting the State's claim that the trial court erred by considering hearsay evidence in connection with the suppression motion and by relying on such evidence in making its findings of fact. The court noted that the trial court had "great discretion" to any relevant evidence at the suppression hearing. However, the court agreed with the State's argument that the trial court erred by failing to resolve evidentiary issues before making its findings of fact. It explained:

> [T]he trial court suppressed Defendant's statements on the grounds Defendant was "in custody, in severe pain, and under the influence of a sufficiently large dosage of a strong narcotic medication[;]" however, the trial court failed to make any specific findings as to Defendant's mental condition, understanding, or coherence—relevant considerations in a voluntariness analysis—at the time his *Miranda* rights were waived and his statements were made. The trial court found only that Defendant was in severe pain and under the influence of several narcotic pain medications. These factors are not all the trial court should consider in determining whether his waiver of rights and statements were made voluntarily.

Furthermore, although the defendant moved to suppress on grounds that police officers allegedly coerced his *Miranda* waiver and statements by withholding pain medication, the trial court failed to resolve the material conflict in evidence regarding whether police coercion occurred.

An ambiguous statement by a juvenile implicating his statutory right to have a parent present during a custodial interrogation requires the law enforcement officer conducting the interview to clarify the meaning of the juvenile's statement before continuing questioning

State v. Saldierna, ___ N.C. App. ___, 775 S.E.2d 326 (July 21, 2015), *review allowed*, ___ N.C. ___, 776 S.E.2d 846 (Sep. 24, 2015). Deciding an issue of first impression, the court held that an ambiguous statement by a juvenile implicating his statutory right to have a parent present during a custodial

interrogation requires that the law enforcement officer conducting the interview clarify the meaning of the juvenile's statement before continuing questioning. The 16-year-old defendant was arrested in connection with several home break-ins. During a custodial interrogation, the defendant waived his rights on the Juvenile Waiver of Rights form and indicated that he wished to proceed without a parent. However, at the beginning of the interrogation, the defendant asked to call his mother. The defendant tried to call his mother but was unable to reach her. The interrogation then continued and the defendant gave incriminating statements, which he unsuccessfully moved to suppress. (1) The court found that rather than being an unambiguous request to have his mother present during questioning, the defendant's question, "Can I call my mom?" was an ambiguous request. (2) The court continued, holding that, in the face of this ambiguous statement, the interrogating officer was required to clarify the defendant's desire to proceed without his mother before continuing with questioning. The officer's failure to do so violated G.S. 7B-2101.

Pretrial and Trial Procedure

Right to Counsel

Court held that advice provided by the defendant's attorney regarding immigration consequences of the guilty plea did not comply with *Padilla v. Kentucky,* and remanded for determination of prejudice

State v. Nkiam, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2015), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Nov. 23, 2015). In this appeal from a motion for appropriate relief (MAR), the court held that advice provided by the defendant's counsel in connection with his plea and did not comply with *Padilla v. Kentucky*, 559 U.S. 356 (2010) (incorrect advice regarding the immigration consequences of a guilty plea may constitute ineffective assistance). The defendant was a permanent resident of the United States. After he pled guilty to aiding and abetting robbery and conspiracy to commit robbery, the federal government initiated deportation proceedings against him. The defendant then filed a MAR asserting ineffective assistance of counsel. At issue was counsel's advice regarding the immigration consequences of the defendant's guilty plea. It was undisputed that defense counsel informed the defendant that his plea carried a "risk" of deportation. The court noted that "[t]his case is the first in which our appellate courts have been called upon to interpret and apply *Padilla*'s holding." The court interpreted *Padilla* as holding: "when the consequence of deportation is unclear or uncertain, counsel need only advise the client of the risk of deportation, but when the consequence of deportation is truly clear, counsel must advise the client in more certain terms." In this case, "there was no need for counsel to do anything but read the statute," to understand that the deportation consequences for the defendant were truly clear. Thus, counsel was required, under *Padilla*, "'to give correct advice' and not just advise defendant that his 'pending criminal charges may carry a risk of adverse immigration consequences.'" The court remanded for determination of whether the defendant was prejudiced by counsel's deficient performance.

In a trial for with breaking or entering a church, counsel was not ineffective by failing to challenge the admissibility of evidence that the defendant broke into a home on the night in question as the evidence was admissible under Rules 404(b) and 403

State v. Campbell, ___ N.C. App. ___, 777 S.E.2d 525 (Oct. 20, 2015), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Nov. 10, 2015). In a case involving a breaking or entering of a church, counsel was

not ineffective by failing to challenge the admissibility of evidence that the defendant broke into a home on the night in question. The court noted that because the issue pertains to the admission of evidence no further factual development was required and it could be addressed on appeal. It went on to hold that the evidence was admissible under Rule 404(b) to show that the defendant's intent in entering the church was to commit a larceny therein and to contradict his testimony that he entered the church for sanctuary. The evidence also was admissible under Rule 403. As to the defendant's argument that counsel should have requested a limiting instruction that the jury could not consider the evidence to show his character and propensity, the court agreed that a limiting instruction would have mitigated any potential unfair prejudice. But it held: "any resulting unfair prejudice did not substantially outweigh the evidence's probative value, given the temporal proximity of the breaking or entering offenses and the evidence's tendency to show that defendant's intent in entering the church was to commit a larceny therein." Because the defendant failed to show that admission of the evidence was error he could not prevail on his ineffective assistance claim.

US Supreme Court reversed the state decision that held the defendant's lawyers were ineffective for failing to challenge the legitimacy of Comparative Bullet Lead Analysis evidence

Maryland v. Kulbicki, 577 U.S. ___, 136 S. Ct. 2 (Oct. 5, 2015). The Court reversed the state decision below which had held that the defendant's lawyers were ineffective under *Strickland.* At the defendant's 1995 murder trial, the State offered FBI Agent Peele as an expert witness on Comparative Bullet Lead Analysis (CBLA). Peele's testimony linked a bullet fragment removed from the victim's brain to the defendant's gun. In 2006, the defendant asserted a post-conviction claim that his defense attorneys were ineffective for failing to question the legitimacy of CBLA. At this point—eleven years after his conviction--CBLA had fallen out of favor. In fact, in 2006, the Court of Appeals of Maryland held that CBLA evidence was not generally accepted by the scientific community and was therefore inadmissible. Although the defendant's post-conviction claim failed in the trial court, he appealed and the Maryland appellate court reversed. According to the Maryland court, defendant's lawyers were deficient because they failed to unearth a report co-authored by Peele in 1991 and containing a single finding which could have been used to undermine the CBLA analysis. The Supreme Court reversed, noting at the time of the defendant's trial "the validity of CBLA was widely accepted, and courts regularly admitted CBLA evidence." And in fact, the 1991 report at issue "did not question the validity of CBLA, concluding that it was a valid and useful forensic tool to match suspect to victim." The Court held: "Counsel did not perform deficiently by dedicating their time and focus to elements of the defense that did not involve poking methodological holes in a then-uncontroversial mode of ballistics analysis." Furthermore the Court noted, it is unclear that counsel would have been able to uncover the report, if a diligent search was made.

(1) Trial court did not abuse its discretion by allowing withdrawal of counsel upon counsel's assertion that his withdrawal was mandatory in light of his professional considerations; (2) Trial court was not required to appoint substitute counsel; (3) Limited time for review did not render private counsel presumptively ineffective

State v. Smith, ___ N.C. App. ___, 773 S.E.2d 114 (June 16, 2015). (1) Where appointed counsel moved, on the sixth day of a bribery trial, for mandatory withdrawal pursuant to Rule 1.16(a) of the N.C. Rules of Professional Conduct, the trial court did not abuse its discretion by allowing withdrawal upon counsel's citation of Comment 3 to Rule 1.16 as grounds for withdrawal. Comment 3 states in relevant part:

> Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the

> withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

In light of the Comment, the trial court did not abuse its discretion by accepting counsel's assertion that his withdrawal was mandatory in light of his professional considerations. (2) After allowing the withdrawal, the trial court was not required to appoint substitute counsel. Under G.S. 7A-450(b), appointment of substitute counsel at the request of either an indigent defendant or original counsel is constitutionally required only when it appears that representation by original counsel could deprive the defendant of his or her right to effective assistance. The also provides that substitute counsel is required and must be appointed when the defendant shows good cause, such as a conflict of interest or a complete breakdown in communications. Here, counsel's representation did not fail to afford the defendant his constitutional right to counsel nor did the defendant show good cause for the appointment of substitute counsel. Nothing in the record suggests a complete breakdown in communications or a conflict of interest. Indeed, the court noted, "there was no indication that [counsel]'s work was in any way deficient. Rather, [his] withdrawal was caused by [defendant] himself demanding that [counsel] engage in unprofessional conduct. (3) The court rejected the defendant's argument that private counsel retained after this incident was presumptively ineffective given the limited time he had to review the case. The defendant noted that his new counsel entered the case on the seventh day of trial and requested only a four-hour recess to meet to prepare. Given the status of the trial and the limited work to be done, the court rejected the defendant's argument. The court also rejected the defendant's argument that new counsel rendered deficient performance by failing to request a longer or an additional continuance.

Pleadings

Indictment charging discharging firearm into occupied dwelling was not defective where it used the term "apartment" rather than the statutory term "dwelling"

State v. Bryant, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 17, 2015). An indictment charging discharging a firearm into an occupied dwelling was not defective. The indictment alleged that the defendant "discharge[d] a firearm to wit: a pistol into an apartment 1727 Clemson Court, Kannapolis, NC at the time the apartment was occupied by Michael Fezza" and that the defendant violated G.S. 14-34. The defendant was convicted of discharging a weapon into an occupied dwelling in violation of G.S. 14-34.1. The court rejected the defendant's argument that the term "apartment," as used in the indictment, was not synonymous with the term "dwelling," the term used in the statute. On this issue the court stated: "We refuse to subject defendant's … indictment to hyper technical scrutiny with respect to form." Next, the court held that although the indictment incorrectly referenced G.S. 14-34 instead of G.S. 14-34.1(b), the error was not a fatal defect.

Fatal variance existed where larcency indictment alleged two owners of property but State failed to prove that both alleged owners had a property interest in the stolen items

State v. Campbell, ___ N.C. App. ___, 777 S.E.2d 525 (Oct. 20, 2015), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Nov. 10, 2015). The trial court erred by failing to dismiss a larceny charge due to a fatal variance with respect to ownership of the stolen property. The indictment alleged that the property was owned by Pastor Stevens and Manna Baptist Church. The court held that when an indictment alleges multiple owners, the State must prove multiple owners. Here, there was no evidence

that the property was owned by Pastor Stevens; it showed only that it was owned by the church. The fact that Stevens was an employee of the church, the true owner of the property, did not cure the fatal variance. The State was required to demonstrate that both alleged owners had at least some sort of property interest in the stolen items; here it failed to do that.

(1) No fatal variance where indictment for burning personal property alleged that the defendant set fire to bed, jewelry, and clothing while the evidence showed only that he set fire to bedding; (2) Trial court did not err by failing to instruct jury regarding the defendant's presence at the crime scene; (3) Trial court erred by instructing the jury that it could find that the defendant attained habitual felon status based on a prior conviction for selling cocaine where the indictment did not allege this conviction

State v. Jeffries, ___ N.C. App. ___, 776 S.E.2d 872 (Oct. 6, 2015). (1) In this burning of personal property case where the indictment charged that the defendant set fire to the victim's bed, jewelry, and clothing and the evidence showed only that he set fire to her bedding, no fatal variance occurred. The State was not required to show that the defendant also set fire to her jewelry and clothing. The court rejected the defendant's argument that there was a fatal variance between the indictment's allegation that he set fire to her bed and the evidence, which showed he set fire to her bedding. Any variance in this regard was not material, given that there was no evidence that the "bedding" was found anywhere other than on the bed. It concluded: "we are unable to discern how Defendant was unfairly surprised, misled, or otherwise prejudiced in the preparation of his defense by the indictment's failure to identify the 'bedding' rather than the 'bed.'" (2) The trial court did not err by failing to instruct the jury regarding the defendant's presence at the crime scene. Contrary to the defendant's argument, his presence at the scene is not an element of the offense. (3) The trial court erred by instructing the jury that it could find that the defendant attained habitual felon status based on a prior conviction for selling cocaine where the indictment did not allege this conviction. The indictment alleged three predicate felonies to establish habitual felon status. However, the trial court instructed the jury on four felonies, the three identified in the indictment as well as sale of cocaine, which was not alleged in the indictment. Because it was impossible for the court to determine whether the jurors relied on the fourth felony not alleged in the indictment, a new hearing on habitual felon was required.

Reversing the Court of Appeals, the Court held that an information charging injury to personal property owned by NCSU was not fatally flawed where it alleged the existence of at least one victim capable of owning property

State v. Ellis, ___ N.C. ___, 776 S.E.2d 675 (Sept. 25, 2015). Reversing the opinion below, *State v. Ellis*, __ N.C. App. __, 763 S.E.2d 574 (Oct. 7, 2014), the court held that an information charging injury to personal property was not fatally flawed. The information alleged the victims as: "North Carolina State University (NCSU) and NCSU High Voltage Distribution." The court noted that the defendant did not dispute that North Carolina State University is expressly authorized to own property by statute, G.S. 116-3, "and is, for that reason, an entity inherently capable of owning property." Rather, the defendant argued that the information was defective because "NCSU High Voltage Distribution" was not alleged to be an entity capable of owning property. The court held: "Assuming, without deciding, that the … information did not adequately allege that 'NCSU High Voltage Distribution' was an entity capable of owning property, that fact does not render the relevant count facially defective." In so holding the court rejected the defendant's argument that when a criminal pleading charging injury to personal property lists two entities as property owners, both must be adequately alleged to be capable of owning property. The court continued:

> [A] criminal pleading purporting to charge the commission of a property-related crime like injury to personal property is not facially invalid as long as that criminal pleading adequately alleges the existence of at least one victim that was capable of owning property, even if the same criminal pleading lists additional victims who were not alleged to have been capable of owning property as well.

Court of Appeals decision that indictment alleging obtaining property by false pretenses was not fatally defective stands as Supreme Court justices equally divided

State v. Pendergraft, ___ N.C. ___, 776 S.E.2d 679 (Sept. 25, 2015) (per curiam). Because the participating Justices were equally divided, the decision below, *State v. Pendergraft*, ___ N.C. App. ___, 767 S.E.2d 674 (Dec. 31, 2014), was left undisturbed and without precedential value. In the decision below the court of appeals had held, over a dissent, that an indictment alleging obtaining property by false pretenses was not fatally defective. After the defendant filed false documents purporting to give him a property interest in a home, he was found to be occupying the premises and arrested. The court of appeals rejected the defendant's argument that the indictment was deficient because it failed to allege that he made a false representation. The indictment alleged that the false pretense consisted of the following: "The defendant moved into the house … with the intent to fraudulently convert the property to his own, when in fact the defendant knew that his actions to convert the property to his own were fraudulent." Acknowledging that the indictment did not explicitly charge the defendant with having made any particular false representation, the court of appeals found that it "sufficiently apprise[d] the defendant about the nature of the false representation that he allegedly made," namely that he falsely represented that he owned the property as part of an attempt to fraudulently obtain ownership or possession of it. The court of appeals also rejected the defendant's argument that the indictment was defective in that it failed to allege the existence of a causal connection between any false representation by him and the attempt to obtain property, finding the charging language sufficient to imply causation.

(1) An argument that an indictment is defective may be raised for the first time on appeal; (2) Indictments charging kidnapping with respect to victims under 16 were not defective where they failed to allege a lack of parental or custodial consent; (3) Defendant waived issue of fatal variance by not raising it at trial; (4) No fatal variance existed where kidnapping indictment alleged that victim was at least 16 years old but the evidence showed victim was 16

State v. Pender, ___ N.C. App. ___, 776 S.E.2d 352 (Sept. 1, 2015). (1) Because it is a jurisdictional issue, a defendant's argument that a criminal indictment is defective may be raised for the first time on appeal notwithstanding the defendant's failure to contest the validity of the indictment at trial. (2) Indictments charging kidnapping with respect to victims under 16 were not defective. The indictments alleged that the defendant unlawfully confined and restrained each victim "without the victim's consent." The court rejected the defendant's argument that because the indictments failed to allege a lack of parental or custodial consent, they were fatally defective. The court explained:

> "'[T] he victim's age is not an essential element of the crime of kidnapping itself, but it is, instead, a factor which relates to the state's burden of proof in regard to consent. If the victim is shown to be under sixteen, the state has the burden of showing that he or she was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian. Otherwise, the state must prove that the action was taken without his or her own consent.'" (quoting State v. Hunter, 299 N.C. 29, 40 (1980)).

The court concluded: "Because age is not an essential element of the crime of kidnapping, and whether the State must prove a lack of consent from the victim or from the parent or custodian is contingent upon the victim's age, … the indictments … are adequate even though they allege that the victim – and not the parent – did not consent." (3) The issue of fatal variance is not preserved for purposes of appeal if not asserted at trial. (4) The court rejected the defendant's argument that there was a fatal variance between a kidnapping indictment with respect to victim D.M. and the evidence at trial. The defendant argued that the indictment alleged that D.M. was at least 16 years old but the evidence showed that D.M. was 16 at the time. The court concluded: "because D.M.'s age does not involve an essential element of the crime of kidnapping, any alleged variance in this regard could not have been fatal." (5) There was no fatal variance between a kidnapping indictment that named "Vera Alston" as a victim and the evidence at trial that showed the victim's last name was "Pierson." The court concluded:

> [T]he evidence is undisputed that one of defendant's victims for kidnapping and assault on the date alleged in the indictment naming "Vera Alston" as the victim was defendant's mother-in-law, Vera Pierson. Given this, there was no uncertainty that the identity of the alleged victim "Vera Alston" was actually "Vera Pierson." Further, [a]t no time … did Defendant indicate any confusion or surprise as to whom Defendant was charged with having kidnapped and assaulted. (quotation omitted).

(1) Defendant waived issue of fatal variance by not raising it at trial; (2) Counsel provided ineffective assistance by failing to move to dismiss on grounds of fatal variance; (3) False pretenses indictments not fatally defective

State v. Holanek, ___ N.C. App. ___, 776 S.E.2d 225 (Aug. 18, 2015). (1) In a case involving charges of obtaining property by false pretenses arising out of alleged insurance fraud, the defendant waived the issue of fatal variance by failing to raise it at trial. (2) Counsel rendered ineffective assistance by failing to move to dismiss on grounds of fatal variance. The indictment alleged that the defendant submitted fraudulent invoices for pet boarding services by Meadowsweet Pet Boarding which caused the insurance company to issue payment to her in the amount of $11,395.00. The evidence at trial, however, showed that the document at issue was a valid estimate for future services, not an invoice. Additionally, the document was sent to the insurance company three days after the company issued a check to the defendant. Therefore the insurance company's payment could not have been triggered by the defendant's submission of the document. Additionally, the State's evidence showed that it was not the written estimate that falsely led the insurance company to believe that the defendant's pets remained at Meadowsweet long after they had been removed from that facility, but rather the defendant's oral representations made later. (3) The court rejected the defendant's argument that false pretenses indictments pertaining to moving expenses were fatally defective because they did not allege the exact misrepresentation with sufficient precision. The indictments were legally sufficient: each alleged both the essential elements of the offense and the ultimate facts constituting those elements by stating that the defendant obtained money from the insurance company through a false representation made by submitting a fraudulent invoice which was intended to, and did, deceive the insurance company.

(1) Count 1 of an indictment charging possession of a Schedule I controlled substance was fatally defective and trial court erred by allowing State to amend; (2) The defendant did not waive the issue by failing to object to amendment; (3) Count 2 of indictment was not required to allege that a certain Schedule I controlled substance fell within the "catch-all" provision of G.S. 90-89(5)(j)

State v. Williams, ___ N.C. App. ___, 774 S.E.2d 880 (July 21, 2015). (1) Count 1 of an indictment charging the defendant with possessing a Schedule I controlled substance, "Methylethcathinone," with

intent to manufacture, sell or deliver was fatally defective. Although 4-methylethcathinone falls within the Schedule I catch-all provision in G.S. 90-89(5)(j), "Methylethcathinone" does not. Therefore, even though 4-methylethcathinone is not specifically named in Schedule I, the trial court erred by allowing the State to amend the indictment to allege "4-Methylethcathinone" and the original indictment was fatally defective. (2) Noting that the indictment defect was a jurisdictional issue, the court rejected the State's argument that the defendant waived the previous issue by failing to object to the amendment. (3) Count two of the indictment charging the defendant with possessing a Schedule I controlled substance, "Methylone," with intent to manufacture, sell or deliver was not fatally defective. The court rejected the defendant's argument that the indictment was required to allege that methylone, while not expressly mentioned by name in G.S. 90-89, falls within the "catch-all" provision subsection (5)(j).

(1) Indictments charging drug crimes were fatally defective where they did not name controlled substances listed in Schedule III; (2) There was no fatal variance between indictment alleging that the defendant sold controlled substances to "A. Simpson" and the evidence at trial that Simpson's name was "Cedrick Simpson"

State v. Sullivan, ___ N.C. App. ___, 775 S.E.2d 23 (July 7, 2015). (1) Indictments charging the defendant with drug crimes were fatally defective where they did not name controlled substances listed in Schedule III. The possession with intent and sale and delivery indictments alleged the substances at issue to be "UNI-OXIDROL,", "UNIOXIDROL 50" and "SUSTANON" and alleged that those substances are "included in Schedule III of the North Carolina Controlled Substances Act." Neither Uni-Oxidrol, Oxidrol 50, nor Sustanon are included in Schedule III and none of these substances are considered trade names for other substances so included. (2) The court rejected the defendant's argument that there was a fatal variance between a sale and delivery indictment which alleged that the defendant sold the controlled substance to "A. Simpson" and the evidence. Although Mr. Simpson testified at trial that his name was "Cedrick Simpson," not "A. Simpson," the court rejected the defendant's argument, stating:

> [N]either during trial nor on appeal did defendant argue that he was confused as to Mr. Simpson's identity or prejudiced by the fact that the indictment identified "A. Simpson" as the purchaser instead of "Cedric Simpson" or "C. Simpson." In fact, defendant testified that he had seen Cedric Simpson daily for fifteen years at the gym. The evidence suggests that defendant had no question as to Mr. Simpson's identity. The mere fact that the indictment named "A. Simpson" as the purchaser of the controlled substances is insufficient to require that defendant's convictions be vacated when there is no evidence of prejudice, fraud, or misrepresentation.

Reversing court of appeals, the Court held that (1) larceny indictment was not fatally flawed for failing to allege that church could own property, and (2) State presented sufficient evidence of the defendant's intent to commit larceny

State v. Campbell, 368 N.C. 83 (June 11, 2015). (1) Reversing the decision below, *State v. Campbell*, __ N.C. App. __, 759 S.E.2d. 380 (2014), the court held that a larceny indictment was not fatally flawed even though it failed to specifically allege that a church, the co-owner of the property at issue, was an entity capable of owning property. The indictment named the victim as Manna Baptist Church. The supreme court held: "[A]lleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a 'company' or 'incorporated,' signifies an entity capable of owning property, and the line of cases from the Court of Appeals that has held otherwise is overruled." (2) The State presented sufficient evidence of the defendant's intent to commit larceny in a place of worship to support his conviction for felonious breaking or entering that facility. The evidence

showed that the defendant unlawfully broke and entered the church; he did not have permission to be there and could not remember what he did while there; and the church's Pastor found the defendant's wallet near the place where some of the missing items previously had been stored.

Trial court did not abuse discretion by denying motion for a bill of particulars where the defendant argued that because the State used a short-form indictment to charge murder, he lacked notice as to which underlying felony supported felony murder charge

State v. Hicks, ___ N.C. App. ___, 772 S.E.2d 486 (June 2, 2015). In this first-degree murder case, the trial court did not abuse its discretion by denying the defendant's motion for a bill of particulars. The defendant argued that because the State used a short-form indictment to charge murder, he lacked notice as to which underlying felony supported the felony murder charge. Although a defendant is entitled to a bill of particulars under G.S. 15A-925, the bill of particulars provides factual information not legal theories. The court concluded: "the State's legal theories are not 'factual information' subject to inclusion in a bill of particulars, and no legal mandate requires the State to disclose the legal theory it intends to prove at trial."

Jury Issues: Selection, Instructions, and Deliberations

In a discharging a barreled weapon into occupied property case, trial court did not err by instructing that the State need not prove that the defendant intentionally discharged the firearm into occupied property

State v. Bryant, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 17, 2015). In a discharging a barreled weapon into occupied property case, the trial court did not err by instructing the jury that because the crime was a general intent crime, the State need not prove that the defendant intentionally discharged the firearm into occupied property, and that it needed only prove that he intentionally discharged the firearm.

Trial judge acted within his discretion by declining to answer a question from the deliberating jury

State v. Hazel, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2015). In this felony murder case, the trial court acted within its discretion by declining to answer a question from the deliberating jury. Robbery was the underlying felony for the felony murder charge. During deliberations, the jury sent a note with the following question: "Can this defendant be found guilty of the robbery charge and then found not guilty of the murder charge?" After hearing from the parties, the trial court declined to answer the question yes or no, instead telling the jury to read the written jury instructions that it had previously provided. The court noted that whether to give additional instructions to the jury is within the trial court's discretion. Here, it was undisputed that the trial court correctly instructed the jury on all offenses and heard from the parties when the question was raised.

(1) Trial court did not err by denying the defendant's motion to strike the jury venire on the basis that it was racially disproportionate to the makeup of the county where the defendant did not show a systematic exclusion; (2) Trial court did not err by denying the defendant's request for a special instruction on sequestration

State v. Gettys, ___ N.C. App. ___, 777 S.E.2d 351 (Oct. 20, 2015). (1) The trial court did not err by denying the defendant's motion to strike the jury venire. The defendant alleged that his venire was

racially disproportionate to the demographics of Mecklenburg County, where he was tried, and therefore deprived him of his constitutional right to a jury of his peers. The court began by noting that the fact that a single venire that fails to proportionately represent a cross-section of the community does not constitute systematic exclusion. Rather, systematic exclusion occurs when a procedure in the venire selection process consistently yields non-representative venires. Here, the defendant argued that Mecklenburg County's computer program, Jury Manager, generated a racially disproportionate venire and thus deprived him of a jury of his peers. Although the defendant asserted that there was a disparity in the venire, he conceded the absence of systematic exclusion and thus his claim must fail. (2) The trial court did not err by denying the defendant's request for a special instruction on sequestration. In closing argument, the prosecutor argued, in part: "[Defendant is] cherry-picking the best parts of everybody's story after … he's had the entire trial to listen to what everybody else would say. You'll notice that our witnesses didn't sit in here while everybody else was testifying." After the jury was instructed and left the courtroom to begin deliberations, the defendant asked the trial court to instruct the jury as follows: "In this case, all witnesses allowed by law were sequestered at the request of the State. These witnesses could not be present in court except to testify until they were released from their subpoenas, or to discuss the matter with other witnesses or observers in court. By law, the defendant and lead investigator for the State cannot be sequestered." Given the trial court's conclusion that the requested instruction did not relate to a dispositive issue in the case, it did not abuse its discretion in denying the defendant's request.

(1) In a felony murder case, the trial court erred by denying the defendant's request to instruct the jury on the lesser offenses of second-degree murder and voluntary manslaughter where the defendant presented evidence that he committed the offense of discharging a barreled weapon in self-defense; (2) Trial court committed plain error by instructing the jury that the defendant could not benefit from self-defense if he was found to be the aggressor where there was evidence that the defendant withdrew from the conflict; (3) Felony discharging of a firearm into an occupied vehicle can serve as an underlying felony supporting a charge of felony murder

State v. Juarez, ___ N.C. App. ___, 777 S.E.2d 325 (Oct. 6, 2015), *temporary stay allowed*, ___ N.C. ___, 777 S.E.2d 762 (Oct. 27, 2015). (1) Where the defendant was charged with first-degree murder, the trial court erred by denying his request to instruct the jury on the lesser offenses of second-degree murder and voluntary manslaughter. The trial court denied the defendant's request and instructed the jury only on first-degree murder pursuant to the felony murder theory, with discharging a barreled weapon serving as the underlying felony. This was, however, error where the defendant presented evidence that he committed the offense of discharging a barreled weapon in self-defense. (2) The trial court committed plain error by instructing the jury that the defendant could not benefit from self-defense if he was found to be the aggressor. The court noted that cases consistently hold that it is reversible error to instruct the jury on the aggressor doctrine where there is no evidence that the defendant was the initial aggressor. Reviewing the relevant law, the court noted that the initial aggressor doctrine provides that the right of self-defense is only available to a person who is without fault, and if a person voluntarily enters into a fight, he or she cannot invoke the doctrine of self-defense unless the defendant first abandons the fight, withdraws from it and gives notice to his adversary that he has done so. It continued: "Although our courts have not explicitly defined an 'initial aggressor,' we have held that withdrawing from conflict is a means by which a person can avoid that status." Considering the evidence in the case, the court concluded that the defendant's withdrawal "remove[d] him from the realm of the initial aggressor." (3) Felony discharging of a firearm into an occupied vehicle can serve as an underlying felony supporting a charge of felony murder.

(1) No plain error occurred with respect to the trial court's jury instructions on armed and common law robbery; (2) The Court rejected the defendant's argument that he could not have been convicted of attempted armed robbery under the theory of acting in concert because the trial court did not specifically instruct the jury on that theory in its charge on that count

State v. Calderon, ___ N.C. App. ___, 774 S.E.2d 398 (July 7, 2015). (1) In this robbery case, no plain error occurred with respect to the trial court's not guilty mandate. The jury instructions for the offenses of armed and common law robbery conformed to the pattern jury instructions with one exception: the court did not expressly instruct the jury that it had a "duty to return a verdict of not guilty" if it had a reasonable doubt as to one or more of the enumerated elements of the offenses. Instead, for the offense of armed robbery, the court ended its charge to the jury with the following instruction: "If you do not so find or have a reasonable doubt as to one or more of these things, then you will not return a verdict of guilty of robbery with a firearm as to that defendant." For the offense of common law robbery, the court ended its charge similarly, substituting the words "common law robbery" for robbery with a firearm. Citing *State v. McHone,* 174 N.C. App. 289 (2005) (trial court erred by failing to instruct the jury that "it would be your duty to return a verdict of not guilty" if the State failed to meet one or more of the elements of the offense), the court held that the trial court's instructions were erroneous. However, it went on to hold that no plain error occurred, reasoning in part that the verdict sheet provided both guilty and not guilty options, thus clearly informing the jury of its option of returning a not guilty verdict. (2) In this case involving three accomplices and charges of armed robbery, common law robbery and attempted armed robbery, the court rejected the defendant's argument that he could not have been convicted of attempted armed robbery under the theory of acting in concert because the trial court did not specifically instruct the jury on that theory in its charge on that count. The trial court gave the acting in concert instruction with respect to the counts of armed and common law robbery; it did not however repeat the acting in concert instruction after it gave the instruction for attempted robbery with a firearm. Considering the jury instructions as a whole and the evidence, the court declined to hold that the trial court's failure to repeat the instruction was likely to have misled the jury.

(1) The trial court did not deprive the defendant of his right to a fair and impartial jury by failing to question jurors about a note they sent to the trial court; (2) The trial court violated the defendant's right to presence by failing to disclose the note to the defendant, but the error was harmless beyond a reasonable doubt; (3) G.S. 15A-1234 did not require disclosure of the note

State v. Mackey, ___ N.C. App. ___, 774 S.E.2d 382 (June 16, 2015). (1) In this murder and discharging a barreled weapon case in which the jury heard some evidence that the defendant was affiliated with a gang, the trial court did not deprive the defendant of his constitutional right to a fair and impartial jury by failing to question jurors about a note they sent to the trial court. The note read as follows:

> (1) Do we have any concern for our safety following the verdict? Based on previous witness gang [information] and large [number] of people in court during the trial[.] Please do not bring this up in court[.] (2) We need 12 letters—1 for each juror showing we have been here throughout this trial[.]

According to the defendant, the note required the trial court to conduct a voir dire of the jurors. The court disagreed, noting that the cases cited by the defendant dealt with the jurors being exposed to material not admitted at trial that constituted "improper and prejudicial matter." Here, the information about gang affiliation was received into evidence and the number of people in the courtroom cannot be deemed "improper and prejudicial matter." (2) The trial court violated the defendant's constitutional right to presence at every stage of the trial by failing to disclose the note to the defendant. However, the error was harmless beyond a reasonable doubt. (3) Although the court agreed that the trial court should

disclosure every jury note to the defendant and that failing to do so violates the defendant's right to presence, it rejected the defendant's argument that such disclosure is required by G.S. 15A-1234. That statute, the court explained addresses when a trial judge may give additional instructions to the jury after it has retired for deliberations, including in response to an inquiry by the jury. It continued: "nothing in this statute *requires* a trial judge to respond to a jury note in a particular way."

Reversing the Court of Appeals, Court held that trial court's jury instruction could have been reasonably interpreted by the jury as a mandate to accept certain disputed facts in violation of G.S. 15A-1222 and 15A-1232

State v. Berry, 368 N.C. 90 (June 11, 2015), In this child sexual assault case and for the reasons stated in the dissenting opinion below, the supreme court reversed the decision below, *State v. Berry,* __ N.C. App. __, 761 S.E.2d 700 (2014), which had held that the trial court did not express an opinion on a question of fact to be decided by the jury in violation of G.S. 15A-1222 or express an opinion as to whether a fact had been proved in violation of G.S. 15A-1232 when instructing the jury on how to consider a stipulation. The dissenting judge believed that the trial court's instruction could have been reasonably interpreted by the jury as a mandate to accept certain disputed facts in violation of G.S. 15A-1222 and 15A-1232. The stipulation at issue concerned a report by a clinical social worker who had interviewed the victim; in it the parties agreed to let redacted portions of her report come in for the purpose of corroborating the victim's testimony. The dissenting judge interpreted the trial court's instructions to the jury as requiring them to accept the social worker's report as true.

Reversing the Court of Appeals, the Court held no plain error occurred where the trial court instructed jurors to continue deliberations for thirty minutes and mentioned the possibility of retrial

State v. May, 368 N.C. 112 (June 11, 2015). The court reversed *State v. May,* __ N.C. App. __, 749 S.E.2d 483 (2013), which had held that the trial court committed reversible error when charging a deadlocked jury. The court of appeals held that the trial court erred when it instructed the deadlocked jury to resume deliberations for an additional thirty minutes, stating: "I'm going to ask you, since the people have so much invested in this, and we don't want to have to redo it again, but anyway, if we have to we will." The court of appeals concluded that instructing a deadlocked jury regarding the time and expense associated with the trial and a possible retrial is error. Additionally, court of appeals held that the trial court erred by giving only a portion of the G.S. 15A-1235(b) instruction. It reasoned that although the trial court is not required to reinstruct the jury under G.S. 15A-1235(b), if it chooses to do so it must give all of the statutory instructions. The court of appeals went on to hold that the State had failed to show that the error was harmless beyond a reasonable doubt. The State petitioned for discretionary review on whether the court of appeals had erred in holding that the State had the burden of proving that the purported error in the trial court's instructions was harmless beyond a reasonable doubt. The supreme court reversed, distinguishing *State v. Wilson*, 363 N.C. 478, 484 (2009), and concluding that because the defendant failed to raise the constitutional coercive verdict issue below, it was waived on appeal. Nevertheless, the supreme court continued, because the alleged constitutional error occurred during the trial court's instructions to the jury, it could review for plain error. With regard to the alleged statutory violation that the defendant also failed to raise at trial, the supreme court held that because the relevant provisions in G.S. 15A-1235 were permissive and not mandatory, plain error review applied to that claim as well. Turning to the substance of the defendant's claims, the supreme court concluded that most of the trial court's instructions were not coercive. With respect to the remaining challenged instructions, it held: "Assuming without deciding that the court's instruction to continue deliberations

for thirty minutes and the court's isolated mention of a retrial were erroneous, these errors do not rise to the level of being so fundamentally erroneous as to constitute plain error."

Based on the facts of this drug trafficking case, the trial court did not err by failing to give an instruction that the State must prove that the defendant "knew that what he possessed was cocaine"

State v. Galaviz-Torres, 368 N.C. 44 (June 11, 2015). Reversing an unpublished opinion below in this drug trafficking case, the supreme court held the trial court did not err in its jury instructions regarding the defendant's knowledge. The court noted that "[a] presumption that the defendant has the required guilty knowledge exists" when "the State makes a prima facie showing that the defendant has committed a crime, such as trafficking by possession, trafficking by transportation, or possession with the intent to sell or deliver, that lacks a specific intent element." However, the court continued: "when the defendant denies having knowledge of the controlled substance that he has been charged with possessing or transporting, the existence of the requisite guilty knowledge becomes 'a determinative issue of fact' about which the trial court must instruct the jury." As a result of these rules, footnote 4 to N.C.P.I. Crim. 260.17 (and parallel footnotes in related instructions) states that, "[i]f the defendant contends that he did not know the true identity of what he possessed," the italicized language must be added to the jury instructions.

> For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt: First, that the defendant knowingly possessed cocaine *and the defendant knew that what he possessed was cocaine*. A person possesses cocaine if he is aware of its presence and has (either by himself or together with others) both the power and intent to control the disposition or use of that substance.

The defendant argued that the trial court erred by failing to add the "footnote four" language to the jury instructions. The supreme court disagreed, reasoning:

> In this case, defendant did not either deny knowledge of the contents of the gift bag in which the cocaine was found or admit that he possessed a particular substance while denying any knowledge of the substance's identity. Instead, defendant simply denied having had any knowledge that the van that he was driving contained either the gift bag or cocaine. As a result, since defendant did not "contend[ ] that he did not know the true identity of what he possessed," the prerequisite for giving the instruction in question simply did not exist in this case. As a result, the trial court did not err by failing to deliver the additional instruction contained in footnote four . . . in this case. (citation omitted).

The court went on to distinguish the case before it from *State v. Coleman*, ___ N.C. App. ___, 742 S.E.2d 346 (2013).

Impaired Driving Procedures

Defendant had no right of appeal to Court of Appeals from the superior court's reversal of the preliminary determination of the district court suppressing the results of the defendant's blood alcohol test

State v. Hutton, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 17, 2015). In this DWI case where the district court judge entered a preliminary determination that the results of the defendant's blood alcohol test should be suppressed but the superior court reversed the preliminary determination on the State's appeal and remanded to the district court for further proceedings, the defendant had no right of appeal

to the court of appeals. Because the district court did not enter a final judgment pursuant to G.S. 20-38.6(f) denying the motion to suppress, the defendant could not seek review of the ruling on that motion. Although the court found it had authority to grant certiorari, it declined to do so.

(1) Defendant who pled guilty to DWI had no statutory right to appeal from the trial court's denial of her motion to dismiss based on a violation of G.S. 20-38.4 and *Knoll*; (2) The court lacked authority to consider the issue by way of a writ of certiorari; (3) The court declined to suspend the rules of appellate procedure

State v. Ledbetter, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2015). (1) In this case where the defendant pleaded guilty to driving while impaired, the court concluded that the defendant did not have a statutory right to appeal the issue raised. Following the trial court's denial of the defendant's motion to dismiss, the defendant entered a guilty plea. The plea arrangement stated: "[Defendant] expressly retains the right to appeal the Court's denial of her motion to dismiss/suppress her Driving While Impaired charge in this case and her plea of guilty is conditioned based on her right to appeal that decision[.]" The defendant then appealed, arguing that the trial court erred in denying her motion to dismiss, which had asserted that the State violated G.S. 20-38.4 and *Knoll.* The issue that the defendant attempted to appeal is not listed as one of the grounds for appeal of right as set forth in G.S. 15A-1444. The court rejected the defendant's argument that she had an appeal of right pursuant to G.S. 15A-979(b), noting that provision applies to preservation of the right to challenge a denial of a suppression motion, not a motion to dismiss. While the trial court's order denying the defendant's motion was styled as an "order on motion to suppress Defendant's DWI Charge" and the defendant's transcript of plea purported to reserve the right to appeal the denial of the "motion to dismiss/suppress," the record reveals that the only motion filed by the defendant was a motion to dismiss. In fact, her motion specifically cited G.S. 15A-954, the motion to dismiss statute. Thus, because the defendant did not file a motion to suppress, she had no right of appeal under G.S. 15A-979(b). The court rejected the defendant's argument that because the court had reviewed denials of motions to dismiss based on *Knoll* in *State v. Chavez*, ___ N.C. App. ___, 767 S.E.2d 581 (2014), and *State v. Labinski*, 188 N.C. App. 120 (2008), it should do the same in her case. The court noted that in both of those cases it had failed to consider G.S. 15A-1444 or G.S. 15A-979(b) and that it was bound to follow decisions of the Supreme Court and its own prior case law on this issue. (2) The court lacked authority to consider the issue by way of a writ of certiorari. In this respect, Appellate Rule 21 limits the court's ability to grant petitions for writ of certiorari to three specified situations, none of which were at issue in this case. (3) The court declined to exercise its authority under Appellate Rule 2 to suspend the rules of appellate procedure.

Defendant who pled guilty to DWI had no statutory right to appeal from the denial of his motion to dismiss or ground to request review by way of certiorari

State v. Miller, ___ N.C. App. ___, 777 S.E.2d 337 (Oct. 20, 2015). Where the defendant pleaded guilty in this DWI case "and preserved his right to appeal" the denial of his motion to dismiss, the court found that the defendant had no statutory right to appeal the issue or ground to request review by way of certiorari. The defendant's motion alleged that he was denied his constitutional right to communicate with counsel and friends and gather evidence on his behalf by allowing friends or family to observe him and form opinions as to his condition. The court thus dismissed the appeal without prejudice to the defendant's right to pursue relief by way of a MAR.

Other Procedural Issues

Detective's testimony that she was unable to reach the defendant to question him during her investigation was admissible and was not improper evidence of defendant's pre-arrest silence

State v. Taylor, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 1, 2015). In this larceny and obtaining property by false pretenses case, the court held: "[t]estimony that the investigating detective was unable to reach defendant to question him during her investigation was admissible to describe the course of her investigation, and was not improper testimony of defendant's pre-arrest silence." The testimony at issue involved the State's questioning of the detective about her repeated unsuccessful efforts to contact the defendant and his lack of participation in the investigation. Noting that pre-arrest silence may not be used as substantive evidence of guilt, the court noted that none of the relevant cases involved a situation where "there has been no direct contact between the defendant and a law enforcement officer." It continued: "Pre-arrest silence has no significance if there is no indication that a defendant was questioned by a law enforcement officer and refused to answer." Here, the detective never made contact with the defendant, never confronted him in person, and never requested that he submit to questioning. Additionally, the court noted there was no indication that the defendant knew the detective was trying to talk to him and that he refused to speak to her. Thus, the court concluded "it cannot be inferred that defendant's lack of response to indirect attempts to speak to him about an ongoing investigation was evidence of pre-arrest silence."

Trial court properly extended the session from Friday to Tuesday

State v. Lewis, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2015). The trial court properly extended the session. After the State rested on Friday, the trial court announced that it would be in recess until the following Tuesday. The defendant did not object to the announcement. Prior to dismissing the jurors on Friday, the trial court again informed them in open court that court would be in recess until Tuesday. Again, the defendant offered no objection. Court resumed on Tuesday, without objection from the defendant, and the defendant was convicted. The court found that the trial court sufficiently complied with G.S. 15-167 and properly extended the session.

(1) Trial court did not err by denying the defendant's motion to continue after rejecting his *Alford* plea where the defendant did not move for a continuance until the second week of trial; (2) Trial court did not abuse its discretion by denying the defendant's motion for discovery sanctions after the State destroyed evidence seized from the defendant's home

State v. Hicks, ___ N.C. App. ___, 777 S.E.2d 341 (Oct. 20, 2015). The trial court did not err by denying the defendant's motion to continue after rejecting his *Alford* plea, where the defendant did not move for a continuance until the second week of trial. The defendant argued that he had an absolute right to a continuance under G.S. 15A-1023(b) (providing in part that "[u]pon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court"). Here, where the defendant failed to move for a continuance until the second week of trial, his statutory right to a continuance was waived. (2) In this methamphetamine case, the trial court did not abuse its discretion by denying the defendant's motion for discovery sanctions after the State destroyed evidence seized from the defendant's home, without an order authorizing destruction, and despite a court order that the evidence be preserved. In its order denying the motion, the trial court found that the SBI destroyed the evidence under the belief that a destruction order was in place, that the defendant's preservation motion was filed some 30 days after the evidence had been destroyed, and that the item in question—

an HCL generator used to manufacture meth—is not regularly preserved. The court concluded that the record contained "ample evidence" to support the trial court's conclusion that law enforcement had a good faith belief that the items were to be destroyed and did not act in bad faith when they initiated destruction.

In a civil domestic violence protective order proceeding, district court violated witness' Fifth Amendment rights by threatening to imprison her if she invoked her right to remain silent

Herndon v. Herndon, ___ N.C. App. ___, 777 S.E.2d 141 (Oct. 6, 2015). Over a dissent, the court held that the district court violated Ms. Herndon's Fifth Amendment rights in a civil domestic violence protective order proceeding. Mr. Herndon sought the protective order against his wife, Ms. Herndon. When Ms. Herndon's counsel called her to testify, the trial court stated, "She ain't going to get up there and plead no Fifth Amendment?", "I'm not doing no Fifth Amendment" and that if Ms. Herndon attempted to invoke her Fifth Amendment rights "somebody might be going to jail." The trial court's threat to imprison Ms. Herndon if she invoked her right to remain silent violated her Fifth Amendment rights. It explained: "Ms. Herndon was left with the choice of forgoing her right to testify at a hearing where her liberty was threatened or forgoing her constitutional right against self-incrimination. It was error for the trial court to place her in that impossible situation." The court clarified:

> Under long-standing U.S. Supreme Court precedent, a witness does not automatically waive her Fifth Amendment rights by voluntarily taking the stand to testify in a civil case. Instead, the trial court must listen to the witness's testimony and determine whether the questions for which the witness invokes the right to remain silent concern "matters raised by her own testimony on direct examination." *Brown v. United States*, 356 U.S. 148, 156 (1958). If so, then the witness has waived her Fifth Amendment rights as to those questions.

No speedy trial violation occurred where there was a nine-year gap between indictment and hearing on speedy trial motion

State v. Carvalho, ___ N.C. App. ___, 777 S.E.2d 78 (Oct. 6, 2015). Applying the four-factor speedy trial balancing test of *Barker v. Wingo,* the court concluded that no speedy trial violation occurred. The nine-year gap between the time of indictment and the hearing on the speedy trial motion is presumptively prejudicial. However while extraordinary, this delay is not per se determinative and an examination of the remaining *Barker* factors is required. As to the second factor, reason for delay, the defendant failed to show that that the delay stemmed from the State's negligence or willfulness. The "more significant elements" that contributed to delay included: changing the proceedings from capital to noncapital; plea discussions; forensic issues regarding an audiotape; securing the testimony of the state's key witness; and the interconnectedness of the two murders. Regarding the third factor, assertion of the speedy trial right, the court noted that the defendant first asserted his right some eight years after he was indicted. Regarding the final factor, prejudice from delay, the court found that the defendant failed to show any affirmative proof of prejudice.

Reversing Court of Appeals, the Court held that a new suppression hearing was required as the judge who signed the order suppressing evidence was not the judge who held the hearing

State v. Bartlett, ___ N.C. ___, 776 S.E.2d 672 (Sept. 25, 2015). The court reversed the decision below, *State v. Bartlett*, __ N.C. App. __, 752 S.E.2d 237 (Dec. 17, 2013), holding that a new suppression hearing was required. At the close of the suppression hearing, the superior court judge orally granted the defendant's motion and asked counsel to prepare a written order. However, that judge did not sign

the proposed order before his term ended. The defendant presented the proposed order to a second superior court judge, who signed it, over the State's objection, and without conducting a hearing. The order specifically found that the defendant's expert was credible, gave weight to the expert's testimony, and used the expert's testimony to conclude that no probable cause existed to support defendant's arrest. The State appealed, contending that the second judge was without authority to sign the order. The court of appeals found it unnecessary to reach the State's contention because that court considered the first judge's oral ruling to be sufficient. Reviewing the law, the Supreme Court clarified, "our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing." It added that to the extent that cases such as *State v. Williams*, 195 N.C. App. 554 (2009), "suggest otherwise, they are disavowed." Turning to the case at hand, the court concluded that at the suppression hearing in this case, disagreement between the parties' expert witnesses created a material conflict in the evidence. Thus, a finding of fact, whether written or oral, was required. Here, however, the first judge made no such finding. The court noted that while he did attempt to explain his rationale for granting the motion, "we cannot construe any of his statements as a definitive finding of fact that resolved the material conflict in the evidence." Having found the oral ruling was inadequate, the Court considered whether the second judge had authority to resolve the evidentiary conflict in his written order even though he did not conduct the suppression hearing. It held that he did not, reasoning that G.S. 15A-977 contemplates that the same trial judge who hears the evidence must also find the facts. The court rejected the defendant's argument that G.S. 15A-1224(b) authorized the second judge to sign the order, concluding that provision applies only to criminal trials, not suppression hearings.

Court dismissed the defendant's untimely appeal and petition for writ of certiorari where defendant pled guilty without notifying State of his intent to appeal suppression ruling and failed to timely file notice of intent to appeal

State v. Harris, ___ N.C. App. ___, 776 S.E.2d 554 (Sept. 15, 2015). In a case where the defendant pled guilty pursuant to a plea agreement without notifying the State of his intent to appeal the suppression ruling and failed to timely file a notice of intent to appeal, the court dismissed the defendant's untimely appeal and his petition for writ of certiorari. Acknowledging *State v. Davis*, ___ N.C. App. ___, 763 S.E.2d 585, 589 (2014), a recent case that allowed, with no analysis, a writ in this very circumstance, the court found itself bound to follow an earlier opinion, *State v. Pimental*, 153 N.C. App. 69, 77 (2002), which requires dismissal of the defendant's efforts to seek review of the suppression issue.

Evidence

Confrontation Clause

DMV records related to the revocation of the defendant's driver's license were non-testimonial

State v. Clark, ___ N.C. App. ___, 775 S.E.2d 28 (July 7, 2015). In this driving while license revoked case, the court held that DMV records were non-testimonial. The documents at issue included a copy of the defendant's driving record certified by the DMV Commissioner; two orders indefinitely suspending his drivers' license; and a document attached to the suspension orders and signed by a DMV employee and the DMV Commissioner. In this last document, the DMV employee certified that the suspension orders were mailed to the defendant on the dates as stated in the orders, and the DMV Commissioner certified

that the orders were accurate copies of the records on file with DMV. The court held that the records, which were created by the DMV during the routine administration of its affairs and in compliance with its statutory obligations to maintain records of drivers' license revocations and to provide notice to motorists whose driving privileges have been revoked, were non-testimonial.

Statements by child abuse victim to preschool teachers, who were required to report suspected abuse, were non-testimonial

Ohio v. Clark, 576 U.S. __, 135 S. Ct. 2173 (June 18, 2015). In this child abuse case the Court held that statement by the victim, L.P., to his preschool teachers were non-testimonial. In the lunchroom, one of L.P.'s teachers, Ramona Whitley, observed that L.P.'s left eye was bloodshot. She asked him "[w]hat happened," and he initially said nothing. Eventually, however, he told the teacher that he "fell." When they moved into the brighter lights of a classroom, Whitley noticed "[r]ed marks, like whips of some sort," on L.P.'s face. She notified the lead teacher, Debra Jones, who asked L.P., "Who did this? What happened to you?" According to Jones, L.P. "seemed kind of bewildered" and "said something like, Dee, Dee." Jones asked L.P. whether Dee is "big or little;" L.P. responded that "Dee is big." Jones then brought L.P. to her supervisor, who lifted the boy's shirt, revealing more injuries. Whitley called a child abuse hotline to alert authorities about the suspected abuse. The defendant, who went by the nickname Dee, was charged in connection with the incident. At trial, the State introduced L.P.'s statements to his teachers as evidence of the defendant's guilt, but L.P. did not testify. The defendant was convicted and appealed. The Ohio Supreme Court held that L.P.'s statements were testimonial because the primary purpose of the teachers' questioning was not to deal with an emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution. That court noted that Ohio has a "mandatory reporting" law that requires certain professionals, including preschool teachers, to report suspected child abuse to government authorities. In the Ohio court's view, the teachers acted as agents of the State under the mandatory reporting law and obtained facts relevant to past criminal conduct. The Supreme Court granted review and reversed. It held:

> In this case, we consider statements made to preschool teachers, not the police. We are therefore presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers. And considering all the relevant circumstances here, L.P.'s statements clearly were not made with the primary purpose of creating evidence for [the defendant's] prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.

The Court reasoned that L.P.'s statements occurred in the context of an ongoing emergency involving suspected child abuse. The Court continued, concluding that "[t]here is no indication that the primary purpose of the conversation was to gather evidence for [the defendant]'s prosecution. On the contrary, it is clear that the first objective was to protect L.P." In the Court's view, "L.P.'s age fortifies our conclusion that the statements in question were not testimonial." It added: "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." The Court continued, noting that as a historical matter, there is strong evidence that statements made in similar circumstances were admissible at common law. The Court noted, "although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L.P. was speaking to his teachers remains highly relevant." The Court rejected the defendant's

argument that Ohio's mandatory reporting statutes made L.P.'s statements testimonial, concluding: "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution."

Expert Opinion Testimony

Trial court improperly excluded the defendant's expert witness on the suggestibility of children in sexual assault case based on an erroneous belief that the testimony was not admissible as a matter of law

State v. Walston, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 1, 2015). In this sexual assault case involving adult victims and assaults that allegedly occurred when they were young children, the trial court improperly excluded the defendant's expert witness based on the erroneous belief that the testimony was not admissible as a matter of law. The defendant's expert, Dr. Artigues, would have given testimony concerning the suggestibility of children. Although the trial court did not make findings of fact and conclusions of law in rending its decision, the court reviewed the record and determined that the trial court excluded the testimony for two reasons. First, the trial court determined that the case did not involve repressed memory and therefore the testimony was not relevant. Second, the trial court agreed with the State that it could not allow an expert witness to testify about the general susceptibility of children to suggestion if the expert had not interviewed the alleged victims. The court rejected the notion that its decision in *State v. Robertson*, 115 N.C. App. 249, (1994), created a per se rule to that effect. Rather, *Robertson* simply held that the trial court had not abused its discretion by excluding the expert testimony under Rule 403. It continued: "Neither *Robertson* nor any other North Carolina appellate opinion we have reviewed recognizes any such *per se* rule. We hold that expert opinion regarding the general reliability of children's statements may be admissible so long as the requirements of Rules 702 and 403 … are met." The court went on to reject the notion that such expert testimony only can be allowed when the witness has interviewed the victims, noting that the defendant's expert here had no right to access the victims absent their consent. It continued: "The ability of a defendant to present expert witness testimony on his behalf cannot be subject to the agreement of the prosecuting witness, for that agreement will rarely materialize." The court continued:

> General opinions related to credibility and suggestibility are informed by ongoing practice and research, not based upon interviews with a particular alleged victim of sexual assault. If expert testimony concerning general traits, behaviors, or phenomena can be helpful to the trier of fact — and it satisfies the requirements of Rule 702 and Rule 403 — it is admissible. This is true whether or not the expert has had the opportunity to personally interview the prosecuting witness.

The court was careful to note that expressing an opinion concerning truthfulness of a prosecuting witness is generally forbidden. But here, the defendant's argument was not that the prosecuting witnesses were lying but rather that their alleged memories of abuse were the result of repeated suggestions from people close to them that the abuse had in fact occurred. The defendant argued that the evidence was more consistent with false memories implanted through suggestion than with repressed memories. Dr. Artigues' testimony was directly relevant to this defense; it would have supported the idea that the children's alleged memories have been the result of repeated suggestion.

There was sufficient evidence of conspiracy to traffic in opiates where the State's expert analyzed only one pill and visually examined the rest

State v. Lewis, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2015). In this conspiracy to traffic in opiates case, the evidence was sufficient to support the conviction where the State's expert analyzed only one of the pills in question and then confirmed that the remainder were visually consistent with the one that was tested. The police seized 20 pills weighing 17.63 grams. The State's expert analyzed one of the pills and determined that it contained oxycodone, an opium derivative with a net weight of 0.88 grams. The expert visually examined the remaining 19 pills and found them to have "the same similar size, shape and form as well as the same imprint on each of them." The defendant argued that the visual examination was insufficient to precisely establish how much opium derivative was present in the seized pills. The court rejected this argument, citing prior precedent establishing that a chemical analysis of each individual pill is not necessary; the scope of the analysis may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the entire quantity of pills under consideration.

(1) In a child sexual assault case, testimony from the victim's therapist did not constitute impermissible vouching for the victim's credibility; (2) Trial court did not err by allowing a nurse practitioner to testify that she recommended the victim for therapy and that she referred to the victim's mother as the "non-offending" caregiver

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2015). (1) In this child sexual assault case the trial court did not err by admitting testimony from the victim's therapist. The court rejected the defendant's argument that the therapist's testimony constituted impermissible vouching for the victim's credibility. The therapist specialized in working with children who have been sexually abused; she performed an assessment and used trauma-focused cognitive behavioral therapy (TFCBT) to help treat the victim. During treatment the victim talked about the sexual misconduct, how she felt, and wrote a "trauma narrative" describing what had happened. The court noted that the defendant was unable to point to any portion of the therapist's testimony where she opined that the victim was in fact sexually abused by the defendant or stated that sexual abuse did in fact occur. Rather, the therapist explained how TFCBT is used to help treat sexual abuse victims and described therapeutic techniques that she employs in her treatment. She testified that the victim had symptoms consistent with trauma, and explained the process and purpose of writing a trauma narrative. The court found that her explanation laid the foundation for the State to introduce the victim's trauma narrative, which included her written statement about what happened to her. It noted that the narrative was introduced solely for the purpose of corroborating the victim's testimony. It added, "[t]he mere fact that [the therapist's] testimony supports [the victim's] credibility does not render it inadmissible." (2) The trial court did not err by allowing a nurse practitioner to testify that she recommended the victim for therapy despite finding no physical evidence of abuse, and that she referred to the victim's mother as the "non-offending" caregiver. The defendant argued that this testimony impermissibly bolstered the victim's credibility and constituted opinion evidence as to guilt. The court noted that the nurse never asserted that the victim had been sexually abused or explicitly commented on her credibility. Rather, her testimony simply recounted what she did at the conclusion of her examination of the victim and was within the permissible range of expert testimony in child sexual abuse cases. As to her use of the term non-offending caregiver, the witness explained that her organization uses that term to refer to the person with whom the child will be going home and that any parent or caregiver suspected of being an offender is not allowed in the center. The court noted that the witness never testified that the defendant was an offending caregiver.

(1) Trial court did not err by allowing a fire marshal to testify that the fire had been intentionally set in a burning personal property case; (2) Prosecutor's comments regarding the credibility of certain witness testimony during closing arguments did not require the trial court to intervene ex mero motu

State v. Jeffries, ___ N.C. App. ___, 776 S.E.2d 872 (Oct. 6, 2015). (1) The court held, in this burning of personal property case, that the trial court did not err by allowing the State's expert in fire investigation, a fire marshal, to testify that the fire had been intentionally set. The expert testified that the fire was caused by "the application of open flame to … combustible material," and that it had been intentionally set. The court noted that in *State v. Hales*, 344 N.C. 419, 424-25 (1996), the North Carolina Supreme Court held that with the proper foundation, a fire marshal may offer an expert opinion regarding whether a fire was intentionally set. (2) The court held that although some of the prosecutor's comments regarding the credibility of certain witness testimony during closing arguments may have been objectionable, they did not rise to the level of requiring the trial court to intervene ex mero motu. The court noted as objectionable the prosecutor's statement that the victim's testimony was "extraordinarily credible."

(1) Trial court did not abuse its discretion by permitting field technician for Forensic Tests for Alcohol Branch of DHHS to qualify and testify as expert on retrograde extrapolation; (2) Trial court erred by allowing a law enforcement officer to testify as to the defendant's blood alcohol level based on results of HGN, but error did not arise to level of plain error

State v. Turbyfill, ___ N.C. App. ___, 776 S.E.2d 249 (Sept. 1, 2015). (1) In this DWI case, the trial court did not abuse its discretion by allowing the State's witness, a field technician in the Forensic Test of Alcohol Branch of the NC DHHS, who demonstrated specialized knowledge, experience, and training in blood alcohol physiology, pharmacology, and related research on retrograde extrapolation to be qualified and testify as an expert under amended Rule 702. (2) The trial court erred by allowing a law enforcement officer to testify as to the defendant's blood alcohol level testimony; however, based on the other evidence in the case the error did not rise to the level of plain error. The court noted that Rule 702(a1) provides:

> A witness, qualified under subsection (a) … and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> > (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

At trial, the officer's testimony violated Rule 702(a1) on the issue of the defendant's specific alcohol concentration level as it related to the results of the HGN Test.

Trial court did not err by permitting expert medical witness in child sexual assault case to testify that the victim's delay in reporting anal penetration was consistent with the general behavior of children who have been sexually abused in that manner

State v. Purcell, ___ N.C. App. ___, 774 S.E.2d 392 (July 7, 2015). In this child sexual assault case, no error occurred when the State's expert medical witness testified that the victim's delay in reporting anal penetration was a characteristic consistent with the general behavior of children who have been sexually abused in that manner. The court rejected the defendant's argument that the expert impermissibly opined on the victim's credibility. As conceded by the State, the trial court erred when it sentenced the defendant under a statute enacted after his offenses were committed. The court remanded for resentencing.

Trial court did not err by permitting medical doctor who examined victim in child sexual abuse case to explain why no signs of sexual abuse appeared in the examination and that the cutting behavior exhibited by the victim was common in abused children

State v. Chavez, ___ N.C. App. ___, 773 S.E.2d 108 (June 16, 2015). In this child sexual abuse case, no error occurred when the medical doctor who examined the victim explained the victim's normal examination, stating that 95% of children examined for sexual abuse have normal exams and explaining that "it's more of a surprise when we do find something." The doctor further testified that a normal exam with little to no signs of penetrating injury could be explained by the "stretchy" nature of the hymen tissue and its ability to heal quickly. For example, she explained, deep tears to the hymen can often heal within three to four months, while superficial tears can heal within a few days to a few weeks. Nor was it error for the doctor to testify that she was made aware of the victim's "cutting behavior" through the victim's medical history and that cutting behavior was significant to the doctor because "cutting, unfortunately, is a very common behavior seen in children who have been abused and frequently sexually abused." The doctor never testified that the victim in fact had been abused.

Rule 404(b)

(1) Trial court did not err by admitting under Rule 404(b) portions of an audiotape and transcript, which included a conversation between the defendant and a man with whom he was incarcerated; (2) State's closing arguments did not require the trial court to intervene ex mero moto

State v. Carvalho, ___ N.C. App. ___, 777 S.E.2d 78 (Oct. 6, 2015). (1) In this murder case, the court held, over a dissent, that the trial court did not err by admitting under Rule 404(b) portions of an audiotape and a corresponding transcript, which included a conversation between the defendant and an individual, Anderson, with whom the defendant was incarcerated. Anderson was a key witness for the State and his credibility was crucial. The 404(b) evidence was not admitted for propensity but rather to show: that the defendant trusted and confided in Anderson; the nature of their relationship, in that the defendant was willing to discuss commission of the crimes at issue with Anderson; and relevant factual information to the murder charge for which the defendant was on trial. These were proper purposes. Additionally, the trial court did not abuse its discretion in admitting this evidence under the Rule 403 balancing test. (2) The State's closing arguments did not require the trial court to intervene ex mero moto. With respect to comments regarding 404(b) evidence, the State did not ask the jury to use the evidence for an improper purpose. To the extent that the State referred to any improper evidence the references were not so grossly improper that the trial court should have intervened on its own motion.

Where the defendant was convicted of killing her boyfriend, trial court did not err by admitting 404(b) evidence pertaining to a prior incident between the defendant and another boyfriend

State v. Mangum, ___ N.C. App. ___, 773 S.E.2d 555 (July 7, 2015). In this case where the defendant was convicted of second-degree murder for killing her boyfriend, the trial court did not err by introducing 404(b) evidence pertaining to an incident between the defendant and another boyfriend, Walker, which occurred 14 months before the events in question. The court found strong similarities between the incidents, noting that both involved the defendant and her current boyfriend; the escalation of an argument that led to the use of force; the defendant's further escalation of the argument; and the defendant's deliberate decision to obtain a knife from the kitchen. Given these similarities, the court

found that the Walker evidence was probative of the defendant's motive, intent, and plan. Next, the court found that the prior incident was not too remote.

Rape Shield

(1) Trial court committed reversible error in determining that evidence about the victim watching a pornographic video and making prior allegations of sexual assault was barred by Rape Shield Statute; (2) Evidence of victim's prior allegations and inconsistent statements about sexual assaults committed by others were not barred by the Rape Shield Statute

State v. Rorie, ___ N.C. App. ___, 776 S.E.2d 338 (Aug. 18, 2015), *temporary stay allowed*, ___ N.C. ___, 776 S.E.2d 512 (Sept. 8, 2015). (1) In this child sex case, evidence that the victim was discovered watching a pornographic video, offered by the defendant to show the victim's sexual knowledge, is not evidence of sexual activity barred by the Rape Shield Statute. (2) Evidence offered by the defendant of the child victim's prior allegations and inconsistent statements about sexual assaults committed by others who were living in the house were not barred by the Rape Shield Statute, and the trial court erred by excluding this evidence. False accusations do not fall within the scope of the Rape Shield Statute and may be admissible to attack the victim's credibility. The court was careful however not to "hold the statements necessarily should have been admitted into evidence at trial;" it indicated that whether the victim's "prior allegations and inconsistent statements come into the evidence at trial should be determined on retrial subject to a proper Rule 403 analysis."

Trial court committed reversible error by concluding that the defendant's evidence was per se inadmissible under the Rape Shield Rule as evidence may have been admissible to show the victim's motive to falsely accuse the defendant

State v. Martin, ___ N.C. App. ___, 774 S.E.2d 330 (June 16, 2015). In this sexual offense with a student case, the trial court committed reversible error by concluding that the defendant's evidence was per se inadmissible under the Rape Shield Rule. The case involved charges that the defendant, a substitute teacher, had the victim perform oral sex on him after he caught her in the boys' locker room. At trial the defendant sought to introduce evidence that when he found the victim in the locker room, she was performing oral sex on football players to show that the victim had a motive to falsely accuse him of sexual assault. After an in camera hearing the trial court concluded that the evidence was per se inadmissible because it did not fit under the Rape Shield Rule's four exceptions. Citing case law, the court determined that "that there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute." Here, the defendant's defense was that he did not engage in any sexual behavior with the victim but that she fabricated the story to hide the fact that he caught her performing oral sex on the football players in the locker room. The court continued:

> Where the State's case in any criminal trial is based largely on the credibility of a prosecuting witness, evidence tending to show that the witness had a motive to falsely accuse the defendant is certainly relevant. The motive or bias of the prosecuting witness is an issue that is common to criminal prosecutions in general and is not specific to only those crimes involving a type of sexual assault.
>
> The trial court erred by concluding that the evidence was inadmissible per se because it did not fall within one of the four categories in the Rape Shield Statute. Here, the trial

> court should have looked beyond the four categories to determine whether the evidence was, in fact, relevant to show [the victim]'s motive to falsely accuse Defendant and, if so, conducted a balancing test of the probative and prejudicial value of the evidence under Rule 403 or was otherwise inadmissible on some other basis (e.g., hearsay). (footnote omitted).

Other Evidence Issues

Admission of arrest warrant violated statute but was not plain error

State v. Bryant, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 17, 2015). Although the trial court violated G.S. 15A-1221(b) by admitting an arrest warrant into evidence, the error did not constitute plain error.

Trial court did not err by failing to intervene during State's closing arguments

State v. McNeill, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2015). The trial court did not err by failing to intervene sua sponte during the prosecutor's closing argument. Here, the prosecutor argued facts in evidence regarding a prior assault by the defendant and the trial court gave an appropriate limiting instruction regarding the defendant's prior conviction. Thus, the prosecutor's reference to this incident and his comment suggesting that the defendant was a "cold person" were not so grossly improper that the trial court was required to intervene on its own motion.

A report generated from the NPLEx database about the defendant's pseudoephedrine purchases was properly admitted as a business record

State v. Hicks, ___ N.C. App. ___, 777 S.E.2d 341 (Oct. 20, 2015). In this methamphetamine case, a report about the defendant's pseudoephedrine purchases was properly admitted as a business record. The report was generated from the NPLEx database. The defendant argued that the State failed to lay a proper foundation, asserting that the State was required to present testimony from someone associated with the database, or the company responsible for maintaining it, regarding the methods used to collect, maintain and review the data in the database to ensure its accuracy. The court disagreed. Among other things, an officer testified about his knowledge and familiarity with the database and how it is used by pharmacy employees. This testimony provided a sufficient foundation for the admission of the report as a business record.

Trial court did err by allowing the State to cross-examine the defendant on prior convictions that occurred more than 10 years before

State v. Joyner, ___ N.C. App. ___, 777 S.E.2d 332 (Oct. 20, 2015). In this larceny trial, the trial court did err by allowing the State to cross-examine the defendant on his previous convictions for uttering a forged instrument, forgery, and obtaining property by false pretenses, all of which occurred more than 10 years ago. The court noted that it has held that under Rule 609 trial court must make findings as to the specific facts and circumstances demonstrating that the probative value of an older conviction outweighs its prejudicial effect and that a conclusory finding that the evidence would attack the defendant's credibility without prejudicial effect does not satisfy this requirement. It continued, however, stating that a trial court's failure to follow this requirement "does not [necessarily constitute] reversible error." (quotation omitted). It explained: "Where there is no material conflict in the evidence,

findings and conclusions are not necessary." (quotation omitted). Here, other than making a general objection, the defendant offered no evidence and made no attempt to rebut the State's argument for admitting the prior convictions. Furthermore, a trial court's failure to make the necessary findings is not error when the record demonstrates the probative value of prior conviction evidence to be obvious, and that principle applied in the case at hand. The court held: "although the trial court's findings were conclusory and would normally be inadequate under Rule 609(b), the record contains facts and circumstances showing the probative value of the evidence." Among other things, it noted that the defendant's credibility was central to the case and that all of the prior crimes involved dishonesty.

(1) Trial court did not abuse its discretion by admitting a recording of a witness's interview with the police for corroboration and impeachment although some of her testimony was not consistent with the earlier interview; (2) Trial court did not abuse its discretion by allowing a detective to read portions of the transcript of the recording that the State believed were not clearly audible

State v. Gettys, ___ N.C. App. ___, 777 S.E.2d 351 (Oct. 20, 2015). (1) The trial court did not abuse its discretion by admitting a recording of a witness's interview with the police for corroboration and impeachment. The witness in question testified for the State. Although much of her testimony was consistent with her earlier interview, it diverged in some respects. The court rejected the defendant's argument that the State had called the witness in pretext so as to be able to introduce her prior inconsistent statements as impeachment. In this respect it noted the trial court's finding that her testimony was "90 percent consistent with what she said before." Additionally the trial court gave appropriate limiting instructions. The court went on to reject the defendant's argument that admitting the recording for both corroboration and impeachment is "logically contradictory and counterintuitive," noting that the State did not introduce a single pretrial statement for both corroboration and impeachment; rather, it introduced a recording of the witness's interview, which included many pretrial statements, some of which tended to corroborate her testimony and some of which tended to impeach her testimony. (2) The trial court did not abuse its discretion by allowing a detective to read portions of the transcript of the recording. The defendant argued that the trial court's decision to allow the detective to read portions of the transcript that the State believed were not clearly audible from the recording intruded upon the province of the jury. The court concluded, however, that because the detective interviewed the witness, she had personal knowledge of the interview and could testify about it at trial. Additionally, the trial court gave a proper limiting instruction.

Marital privilege did not bar the defendant's then-wife from testifying that the defendant wept upon seeing a composite sketch of the victim's assailant in the newspaper

State v. Matsoake, ___ N.C. App. ___, 777 S.E.2d 810 (Oct. 20, 2015). In this rape case, the marital privilege did not bar the defendant's then-wife from testifying that the defendant wept upon seeing a composite sketch of the victim's assailant in the newspaper. The wife did not observe the defendant looking at the composite sketch and weeping until she heard a teardrop hit the newspaper. No testimony indicated that the defendant intended to communicate anything to his wife by crying at the sight of the composite sketch and thus the privilege did not apply.

The defendant's statement to a third party that he had confessed to a pastor about the murder was not privileged

State v. Crisco, ___ N.C. App. ___, 777 S.E.2d 168 (Oct. 20, 2015). In this murder case, the court rejected the defendant's argument that the clergy-communicated privilege prohibited admission of evidence

regarding the defendant's confession to his pastor. The court noted that there are two requirements for this privilege to apply: the defendant must be seeking the counsel and advice of his or her minister; and the information must be entrusted to the minister as a confidential communication. Here, the evidence in question was not the defendant's confession to the pastor; it was evidence that the defendant told a third-party who was not a member of the clergy that he had confessed to the pastor about the murder. Because no recognized privilege existed between the defendant and that third-party, the defendant's statement to the third-party that he had confessed to a preacher was not privileged. The court continued, concluding that even if error had occurred the defendant failed to show prejudice.

Trial court did not abuse its discretion by requiring the defendant to wait until the defense case to examine a State's witness about the victim's reputation for violence

State v. Henry, ___ N.C. App. ___, 777 S.E.2d 166 (Oct. 6, 2015). The trial court did not err with respect to the defendant's request to cross-examine the State's witness, Collins, regarding the victim's reputation for violence. Although the State objected to the defendant's attempt to so cross-examine the witness, it acknowledged that it would be appropriate to allow such testimony during the defendant's case; the trial court agreed and noted that defense counsel could recall the witness during the defense case. Although the defendant presented other evidence of the victim's reputation for violence, he did not recall Collins. The court noted that under Rule 611 trial courts have discretion to exercise reasonable control over the mode and order of interrogating witnesses. Here, the trial court did not abuse its discretion by requiring the defendant to wait until the defense case to examine Collins about the victim's reputation for violence.

(1) A new trial was required where the trial court failed to intervene on its own motion when the State made improper statements during closing arguments regarding the credibility of the defendant, the defendant's mental health expert, and defense counsel; (2) Trial court properly instructed the jury on flight where there was evidence that the defendant took steps to avoid apprehension

State v. Huey, ___ N.C. App. ___, 777 S.E.2d 303 (Oct. 6, 2015), *temporary stay allowed*, ___ N.C. ___, 777 S.E.2d 761 (Oct. 26, 2015). (1) In this homicide case, a new trial was required where the trial court failed to intervene on its own motion to the State's improper statements made during closing argument. The State argued to the jury not only that the defendant was a liar but that he had lied on the stand in cooperation with defense counsel and the defendant's mental health expert. The prosecutor's argument suggested that the defendant's expert would say whatever the defense wanted him to say because he was being paid to do so. Further, the State implied that the expert was committing perjury because "he [was] just a $6,000 excuse man[,]" and would do "exactly what he was paid to do." The State also indicated that the jury should not trust defense counsel because he was "paid to defend the defendant." (2) The trial court properly instructed the jury on flight where evidence showed that the defendant shot the victim, got into his vehicle, drove off for a short period of time, and returned; the firearm used to shoot the victim was never recovered. Noting that mere evidence that the defendant left a crime scene is not enough to support an instruction on flight, the court noted that here there was evidence that the defendant took steps to avoid apprehension. Specifically the evidence supported the theory that the defendant drove away briefly to dispose of the firearm used in the homicide.

Identification procedure did not violate the Eyewitness Identification Reform Act although a non-independent administrator was used and the administrator could not identify the filler photographs used for the lineup

State v. Gamble, ___ N.C. App. ___, 777 S.E.2d 158 (Oct. 6, 2015). The court rejected the defendant's argument that the identification procedure used violated the Eyewitness Identification Reform Act (EIRA). Although a non-independent administrator was used, the administrator satisfied the requirements of G.S. 15A-284.52(c) for such administrators (he used the folder method specified in the statute). Additionally, the administrator met the other requirements of the EIRA. The court rejected the defendant's argument that plain error occurred because the administrator could not identify the specific five filler photographs that were used out of the seven total selected for the lineup. The court concluded that the administrator's failure to recall which of the five filler photographs were used went to the weight of his testimony, not its admissibility. The court went on to hold that the trial court did not err by admitting the filler photographs into evidence.

Admission of detective's testimony that victim "seemed to be telling the truth" did not rise to the level of plain error

State v. Taylor, ___ N.C. ___, 776 S.E.2d 680 (Sept. 25, 2015) (per curiam). The court reversed the opinion below, *State v. Taylor*, ___ N.C. App. ___, 767 S.E.2d 585 (Dec. 16, 2014), for the reasons stated in the dissenting opinion. Over a dissent, the court of appeals had held that the trial court committed plain error by permitting a Detective to testify that she moved forward with her investigation of obtaining property by false pretenses and breaking or entering offenses because she believed that the victim, Ms. Medina, "seemed to be telling me the truth." The court of appeals held that the challenged testimony constituted an impermissible vouching for Ms. Medina's credibility in a case in which the only contested issue was the relative credibility of Ms. Medina and the defendant. The dissenting judge did not believe that admission of the testimony in question met the threshold needed for plain error.

Court of Appeals erred by awarding the defendant a new trial on first-degree murder charges based upon the admission of evidence related to civil actions establishing that he killed the victim

State v. Young, 368 N.C. 188 (Aug. 21. 2015). In this murder case the court held that the court of appeals erred by concluding that the trial court committed reversible error in allowing into evidence certain materials from civil actions. The relevant materials included a default judgment and complaint in a wrongful death suit stating that the defendant killed the victim and a child custody complaint that included statements that the defendant had killed his wife. The court of appeals had held that admission of this evidence violated G.S. 1-149 ("[n]o pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it") and Rule 403. The court held that the defendant did not preserve his challenge to the admission of the child custody complaint on any grounds. It further held that the defendant failed to preserve his G.S. 1-149 objection as to the wrongful death evidence and that his Rule 403 objection as to this evidence lacked merit. As to the G.S. 1-149 issue, the court found it dispositive that the defendant failed to object at trial to the admission of the challenged evidence on these grounds and concluded that the court of appeals erred by finding that the statutory language was mandatory and allowed for review absent an objection. On the 403 issue as to the wrongful death evidence, the court rejected the court of appeals' reasoning that substantial prejudice resulting from this evidence "irreparably diminished" defendant's presumption of innocence and "vastly outweighed [its] probative value." Instead, the court found that evidence concerning the defendant's response to the wrongful death and declaratory judgment action had material probative value. Although the evidence posed a significant risk of unfair prejudice, the trial court "explicitly instructed the jury concerning the manner in which civil cases are heard and decided, the effect that a failure to respond has on the civil plaintiff's ability to obtain the requested relief, and the fact that '[t]he entry of a civil

judgment is not a determination of guilt by any court that the named defendant has committed any criminal offense.'"

Trial court did not abuse discretion by prohibiting the defendant from introducing certain evidence that was minimally relevant and had weak probative value

State v. Triplett, 368 N.C. 172 (Aug. 21. 2015). Reversing the court of appeals in this murder and robbery case, the court held that the trial court did not abuse its discretion by prohibiting the defendant from introducing a tape-recorded voice mail message by the defendant's sister, a witness for the State, to show her bias and attack her credibility. Although the court found that the voice mail message was minimally relevant to show potential bias, the trial court did not abuse its discretion in its Rule 403 balancing. Because the sister was not a key witness for the State, any alleged bias on her part "becomes less probative." The trial court properly weighed the evidence's weak probative value against the confusion that could result by presenting the evidence, which related to a family feud that was tangential to the offenses being tried.

In false pretenses case, trial court did not err by admitting testimony that constituted circumstantial evidence that the defendant's acts were done with required state of mind

State v. Holanek, ___ N.C. App. ___, 776 S.E.2d 225 (Aug. 18, 2015). In a case involving charges of obtaining property by false pretenses arising out of alleged insurance fraud, the trial court did not err by admitting testimony that the defendant did not appear for two scheduled examinations under oath as required by her insurance policy and failed to respond to the insurance company's request to reschedule the examination. The court rejected the defendant's argument that this evidence was not relevant, noting that to prove its case the State had to show that the defendant's acts were done "knowingly and decidedly … with intent to cheat or defraud." The evidence in question constituted circumstantial evidence that the defendant's acts were done with the required state of mind.

Trial court did not abuse discretion by allowing the investigating detective to testify that while investigating the case, he took screen shots of anything that appeared to be evidence of cyberbullying

State v. Bishop, ___ N.C. App. ___, 774 S.E.2d 337 (June 16, 2015), *review allowed*, ___ N.C. ___, 775 S.E.2d 843 (Aug. 20, 2015). In this cyberbullying case that was based on electronic messages, the trial court did not abuse its discretion by allowing the investigating detective to testify that while investigating the case, he took screen shots of anything that appeared to be evidence of cyberbullying. The defendant argued that the detective's testimony was inadmissible opinion testimony regarding the defendant's guilt. The detective testified at trial as a lay witness about what he found on Facebook and about the course of his investigation. When asked how he searched for electronic comments concerning the victim, he explained that examined the suspects' online pages and "[w]henever I found anything that appeared to have been to me cyber-bullying I took a screen shot of it." He added that "[i]f it appeared evidentiary, I took a screen shot of it." This testimony was not proffered as an opinion of the defendant's guilt; it was rationally based on the detective's perception and was helpful in presenting to the jury a clear understanding of his investigative process and thus admissible under Rule 701.

Crimes

Generally

(1) Defendant who was on his own property was in a "public place" within meaning of indecent exposure statute where the place was open to view of the public; (2) Trial court did not commit plain error by failing to instruct the jury that the defendant must have been in view of the public with the naked eye and without resort to technological aids where no evidence supported the instruction

State v. Pugh, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 1, 2015). (1) The trial court properly denied the defendant's motion to dismiss in this felony indecent exposure case. The evidence showed that a neighbor and her 4-year-old daughter saw the defendant masturbating in front of his garage. The court rejected the defendant's argument that because he was on his own property he was not in a "public place" within the meaning of the statute. The court noted that prior case law has held that a public place includes one that is open to the view of the public at large. Here, the defendant's garage was directly off a public road and was in full view from the street and from the front of his neighbor's house. (2) Where the neighbor and her daughter saw the defendant as they exited their car, the trial court did not commit plain error by failing to instruct the jury that the defendant must have been in view of the public with the naked eye and without resort to technological aids. Even if such an instruction may be appropriate in some cases here it was wholly unsupported by the evidence.

Conspiracy to manufacture methamphetamine was properly punished as a Class C felony

State v. Warren, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 17, 2015). The trial court properly determined that a charge of conspiracy to manufacture methamphetamine was a Class C felony. The court rejected the defendant's argument that G.S. 14-2.4(a) required punishment as a Class D felony ("Unless a different classification is expressly stated, a person who is convicted of a conspiracy to commit a felony is guilty of a felony that is one class lower than the felony he or she conspired to commit[.]"). Here, G.S. 90-98 requires that conviction for conspiracy to manufacture methamphetamine is punished at the same level as manufacture of methamphetamine.

Unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle

State v. Robinson, ___ N.C. ___, 777 S.E.2d 755 (Nov. 6, 2015). The court modified and affirmed the decision below, ___ N.C. App. ___, 763 S.E.2d 178 (2014), holding that unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle. The court noted that it has adopted a definitional test (as distinct from a factual test) for determining whether one offense is a lesser-included offense of another. Applying that rule, it reasoned that unauthorized use contains an essential element that is not an essential element of possession of a stolen vehicle (that the defendant took or operated a motor-propelled conveyance). The court overruled *State v. Oliver*, 217 N.C. App. 369 (2011) (holding that unauthorized use is not a lesser-included offense of possession of a stolen vehicle but, according to the *Robinson* court, mistakenly reasoning that *Nickerson* mandated that result), to the extent that it is inconsistent with its opinion.

(1) Sufficient evidence existed to submit felony murder to the jury on the basis of felony larceny with a deadly weapon where a broken beer bottle was used in connection with stealing a vehicle; (2) The trial court erred by failing to arrest judgment on the underlying felony larceny

State v. McNeill, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2015). (1) The evidence was sufficient to submit felony murder to the jury on the basis of felony larceny with a deadly weapon being the underlying felony. The court rejected the defendant's argument that the State failed to show that a beer bottle found at the crime scene was used as a "deadly weapon" within the meaning of the homicide statute, G.S. 14-17. The State's evidence showed, among other things that the murder victim's injuries could have been caused by the bottle. Thus, the State presented sufficient evidence that the broken beer bottle constituted a deadly weapon. The court also rejected the defendant's argument that the State failed to prove that the defendant used the broken bottle during the commission of the felonious larceny, noting that the evidence showed that after incapacitating the victim with the broken bottle the defendant stole the victim's vehicle. Finally, the court rejected the defendant's argument that the State failed to prove that the killing was committed in the perpetration of the larceny, finding sufficient evidence of a continuous transaction. (2) Where the defendant was convicted of felony murder with the underlying felony being felony larceny, the trial court erred by failing to arrest judgment on the underlying felony.

There was insufficient evidence of acting in concert where the defendant was not actually or constructively present when the crime was committed

State v. Hardison, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2015), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Nov. 23, 2015). Reversing the defendant's convictions for contaminating a public water system, the court held that because the defendant was not constructively present, the evidence was insufficient to support criminal liability under the doctrine of acting in concert. The evidence showed that the defendant offered to pay another person to intentionally break county water lines so that the defendant's company, which was under contract with the county to repair the lines, would be paid by the county for the necessary repairs. The defendant was never present when the accomplice broke the water lines. The court held that the defendant "was not physically close enough to aid or encourage the commission of the crimes and therefore was not actually or constructively present—a necessary element of acting-in-concert liability." The court rejected the State's argument that the defendant was constructively present because she planned the crimes, was accessible if needed by telephone, and later was at the crime scene to repair the broken water lines. In this respect, the court held, in part, that "one cannot be actually or constructively present for purposes of proving acting in concert simply by being available by telephone." The court noted that the evidence would have supported a conviction based on a theory of accessory before the fact, but the jury was not instructed on that theory of criminal liability, nor was the defendant charged with other offenses, such as conspiracy, that apply to those who help plan a criminal act.

No error where the defendant was held in criminal contempt for willfully violating Consent Order

State v. Mastor, ___ N.C. App. ___, 777 S.E.2d 516 (Oct. 6, 2015). Trial court did not err by holding the defendant in criminal contempt for willfully violating the Consent Order provision which forbade her from allowing the children to be in the presence of a convicted sex offender.

Sufficient evidence existed of possession of the precursor chemical pseudoephedrine where the substance was not chemically analyzed; the chemical analysis requirement is limited to controlled substances

State v. Hooks, ___ N.C. App. ___, 777 S.E.2d 133 (Oct. 6, 2015). The evidence was sufficient with respect to 35 counts of possession of the precursor chemicals pseudoephedrine with intent to

manufacture methamphetamine. As to possession, the State introduced evidence that the defendant purchased pseudoephedrine, was seen "cooking meth," and that others had purchased pseudoephedrine for him. The court rejected the defendant's argument that the evidence was insufficient because the substance was not chemically identified as pseudoephedrine. The court concluded that the holding of *State v. Ward* regarding the need to identify substances through chemical analysis was limited to identifying controlled substances, and pseudoephedrine is not listed as a controlled substance in the North Carolina General Statutes.

(1) Court rejected the defendant's argument that the State's evidence was too vague for the jury to infer that he pointed the gun at any particular individual; (2) For kidnapping charge, sufficient evidence existed that the defendant intended to terrorize victims; (3) A parent or legal custodian may not be prosecuted for kidnapping his or her minor child

State v. Pender, ___ N.C. App. ___, 776 S.E.2d 352 (Sept. 1, 2015). (1) In a case with multiple victims, the court rejected the defendant's argument that the State's evidence was too vague for the jury to infer that he pointed the gun at any particular individual. One witness testified that upon defendant's orders, "everybody ran in the room with us … and he was waiving [sic] the gun at us[.]" Another testified that "[w]hen [defendant] came down the hall, when he told everyone to get into one room, all of them came in there … [e]ven the two little ones …." She further testified, "I was nervous for the kids was down there hollering and carrying on, and he hollered – he point [sic] the gun toward everybody in one room. One room. And told them come on in here with me." A third testified that once everybody was in the same bedroom, defendant pointed the shotgun outward from his shoulder; (2) The court rejected the defendant's argument that kidnapping charges should have been dismissed because there was insufficient evidence that his purpose in confining the victims was to terrorize them. "A defendant intends to terrorize another when the defendant intends to place that person in some high degree of fear, a state of intense fright or apprehension." (quotation omitted). The court rejected the defendant's argument that the State had to prove that the kidnapping victims were terrorized; State only needs to prove that the defendant's intent was to terrorize the victims. The evidence was sufficient for the jury to infer such an intent. That defendant shot victim Nancy's truck parked outside the house so that everyone could hear it, cut the telephone line to the house at night, shot through the windows multiple times to break into the house, yelled multiple times upon entering the house that he was going to kill Nancy, corralled the occupants of the house into a single bedroom, demanded of those in the bedroom to know where Nancy was, exclaimed that he was going to kill her, and pointed his shotgun at them; (3) Vacating two of the defendant's second-degree kidnapping convictions on grounds that the plain language of G.S. 14-39(a) does not permit prosecution of a parent for kidnapping, at least when that parent has custodial rights with respect to the children. The court explained:

> "[T]here is no kidnapping when a parent or legal custodian consents to the unlawful confinement of his minor child, regardless whether the child himself consents to the confinement. The plain language requires that only one parent -- "a parent" -- consent to the confinement.

The court was careful to note "We do not address the question whether a parent without custodial rights may be held criminally liable for kidnapping." (footnote 2).

No error in denying the defendant's motion to dismiss a charge of maintaining a dwelling

State v. Williams, ___ N.C. App. ___, 774 S.E.2d 880 (July 21, 2015). The trial court did not err by denying the defendant's motion to dismiss a charge of maintaining a dwelling. The court first held that the evidence established that the defendant kept or maintained the dwelling where it showed that he

resided there. Specifically, the defendant received mail addressed to him at the residence; his probation officer visited him there numerous times to conduct routine home contacts; the defendant's personal effects were found in the residence, including a pay stub and protective gear from his employment; and the defendant placed a phone call from the Detention Center and informed the other party that officers had "come and searched his house." Next, the court held that the evidence was sufficient to show that the residence was being used for keeping or selling drugs. In assessing this issue, the court looks at factors including the amount of drugs present and paraphernalia found. Here, a bag containing 39.7 grams of 4-methylethcathinone and methylone was found in a bedroom closet alongside another plastic bag containing "numerous little corner baggies." A set of digital scales and $460.00 in twenty dollar bills also were found.

(1) Sufficient evidence of attempted armed robbery existed where there was evidence that the defendants acted in concert with a third party who —with shotgun in hand—approached a victim who was passed out and searched his pockets; (2) The court rejected the defendants' argument that the trial court erred by failing to instruct the jury on attempted larceny and attempted common law robbery as lesser-included offenses

State v. Calderon, ___ N.C. App. ___, 774 S.E.2d 398 (July 7, 2015). (1) The evidence was sufficient to support charges of attempted armed robbery against both defendants. The defendants and a third person, Moore, planned to rob Bobbie Yates of marijuana. However, once they learned there was a poker game going on in the apartment, they retrieved another weapon and returned to apartment to rob those present. Upon entering the apartment, Moore took the money off the kitchen table where several of the people were playing poker, and proceeded to search their pockets for more money. The robbery lasted between two and four minutes, during which time the defendants continuously pointed their weapons at the people in the apartment. After Moore took money from the people seated around the kitchen table, he—with shotgun in hand—approached Mr. Allen, who was "passed out" or asleep in the living room. One witness saw Moore search Allen's pockets, but no one saw Moore take money from Allen. When the three prepared to leave the apartment, they told the people to remain there for ten minutes or they would kill them. This evidence was sufficient to show that the defendants, acting in concert with Moore, had the specific intent to deprive Allen of his personal property by endangering or threatening his life with a dangerous weapon and took overt acts to bring about this result. (2) The court rejected the defendants' argument that the trial court erred by failing to instruct the jury on attempted larceny and attempted common law robbery as lesser-included offenses for the charge of attempted armed robbery of Allen. The defendant argued that because Allen was "passed out" or asleep, his life was not endangered or threatened. The court found that where, as here, the defendants were convicted of attempted robbery, their argument failed.

(1) Air conditioning unit attached to the exterior of a mobile home was real property; (2) Trial court erred by sentencing defendant for both felony larceny and felony possession of stolen goods when both convictions were based on the same items

State v. Hardy, ___ N.C. App. ___, 774 S.E.2d 410 (July 7, 2015). (1) In this injury to real property case, the court held that an air conditioning unit that was attached to the exterior of a mobile home is real property. The defendant dismantled and destroyed the unit, causing extensive water damage to the home. The trial court instructed the jury that "[a]n air conditioner affixed to a house is real property" and the jury found the defendant guilty of this offense. On appeal the defendant argued that the air conditioning unit was properly classified as personal property. The court rejected the argument that *State v. Primus*, 742 S.E.2d 310 (2013), controlled, finding that case did not resolve the precise issue at

hand. After reviewing other case law the court determined that the air-conditioner would be real property if it was affixed to the mobile home such that it "became an irremovable part of the [mobile home]." Applying this test, the court concluded:

> The air-conditioner at issue … comprised two separate units: an inside unit, referred to as the A-coil, which sat on top of the home's heater, and an outside condensing unit, which had a compressor inside of it. The two units were connected by copper piping that ran from the condenser underneath the mobile home into the home. [A witness] testified that the compressor, which was located inside the condensing unit, had been totally "destroyed," and that although the condensing unit itself remained in place, it was rendered inoperable. Thus, . . . the entire air-conditioner could not be removed but had to be "gutted" and removed in pieces. Moreover, when defendant cut the copper piping underneath the home, he caused significant damage to the water pipes that were also located in the crawlspace. Thus, here, not only could the air-conditioner not be easily removed from the mobile home but it also could not be easily removed from other systems of the home given the level of enmeshment and entanglement with the home's water pipes and heater.

The court went on to note that while the mobile home could serve its "contemplated purpose" of providing a basic dwelling without the air-conditioner, the purpose for which the air-conditioner was annexed to the home supports a conclusion that it had become part of the real property: the use and enjoyment of the tenant. (2) The trial court erred by sentencing the defendant for both felony larceny and felony possession of stolen goods when both convictions were based on the same items.

Defendant was not entitled to instruction on legal justification on grounds that he was engaged in religious hunting ceremony

State v. Oxendine, ___ N.C. App. ___, 775 S.E.2d 19 (July 7, 2015). (1) In this hunting without a license case, the trial court did not err by denying defendant Oxendine's request to instruct the jury on legal justification. The defendant argued that he was exempt under G.S. 113-276 from the requirement of a hunting license because he had been engaged in a Native American religious hunting ceremony. That statute applies to "member[s] of an Indian tribe recognized under Chapter 71A of the General Statutes." Although the defendant argued that he is "an enrolled member of the Haudenosaunee Confederacy of the Tuscarora Nation," he is not a member of a Native American tribe recognized under Chapter 71A. Additionally the defendant did not show that he was hunting on tribal land, as required by the statute. (2) The evidence was sufficient to convict defendant Pedro of hunting without a license. Based on the facts presented, the court rejected the defendant's argument that the State's evidence was insufficient to show that he "was preparing to immediately kill a dove."

On the facts, there was sufficient evidence to go to the jury on an armed robbery charge where a BB pistol and a pellet gun were found near the scene although the mandatory presumption that the weapons were dangerous did not apply

State v. Holt, ___ N.C. App. ___, 773 S.E.2d 542 (June 16, 2015). The trial court did not err by denying the defendant's motion to dismiss a charge of armed robbery. One of the victims testified that all three perpetrators had handguns. A BB pistol and a pellet gun were found near the scene of the robbery. The defendant argued that the State failed to produce any evidence that these items were dangerous weapons capable of inflicting serious injury or death. Distinguishing *State v. Fleming*, 148 N.C. App. 16 (2001) (trial court erred in denying the defendant's motion to dismiss charge of armed robbery when

the evidence showed that he committed two robberies using a BB gun and the State failed to introduce any evidence that the BB gun was capable of inflicting death or great bodily injury), the court held:

> [U]nlike in *Fleming*, where the weapon used to perpetrate the robbery was recovered from the defendant's direct physical possession, here there is no evidence that conclusively links either the BB pistol or the pellet gun to the robbery. Neither Defendant nor his co-conspirators were carrying any weapons when they were apprehended by police. Further, no evidence was offered regarding any fingerprints on, or ownership of, either gun, and neither the victims nor Defendant identified either of the guns as having been used during the robbery. Moreover, even assuming arguendo that both the BB pistol and the pellet gun could be conclusively linked to the robbery, [one of the victims] testified that all three of the men who robbed his home were armed with handguns. Although Defendant's counsel attempted to impeach [the victim] on this point, the trial court properly left the credibility of [his] testimony as a matter for the jury to resolve, and as such, it would have been permissible for a reasonable juror to infer that not all, if any, of the weapons used during the robbery had been recovered or accounted for. Indeed, if taken as true, Defendant's second post-arrest statement to Detective Snipes suggests that Defendant had the motivation and opportunity to "dump" the third weapon just like he claimed to have dumped the ounce of marijuana he purported to have stolen from the residence that investigators never recovered.

Thus, although the mandatory presumption that the weapons were dangerous did not apply, there was sufficient evidence for the case to go to the jury on the armed robbery charge.

Sufficient evidence existed for attempted first-degree burglary; it could be inferred that the defendant attempted to enter the home to commit a larceny inside where there was no evidence he had a different purpose

State v. Mims, ___ N.C. App. ___, 774 S.E.2d 349 (June 16, 2015). The evidence was sufficient to support a conviction for attempted first-degree burglary. In this case, which involved an attempted entry into a home in the wee hours of the morning, the defendant argued that the State presented insufficient evidence of his intent to commit a larceny in the premises. The court concluded that the case was controlled by *State v. McBryde*, 97 N.C. 393 (1887), and that because there was no evidence that the defendant's attempt to break into the home was for a purpose other than to commit larceny, it could be inferred that the defendant intended to enter to commit a larceny inside. The court rejected the defendant's argument that the evidence suggested that he was trying to enter the residence to seek assistance or was searching for someone. Applying the *McBryde* inference to an attempted breaking or entering that occurred during daylights hours, the court held that the evidence was sufficient to support a conviction for that offense.

Cyberbullying statute targets conduct, not speech, which falls outside the purview of the First Amendment

State v. Bishop, ___ N.C. App. ___, 774 S.E.2d 337 (June 16, 2015), *review allowed*, ___ N.C. ___, 775 S.E.2d 843 (Aug. 20, 2015). (1) The court upheld a provision of the cyberbullying statute, G.S. 14-458.1(a)(1)(d), rejecting the defendant's argument that the provision is an overbroad criminalization of protected speech. G.S. 14-458.1(a)(1)(d) makes it unlawful for any person to use a computer or computer network to, with the intent to intimidate or torment a minor, post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor. (2) Because the defendant failed to preserve the issue, the court declined to address the defendant's argument that the

statute was unconstitutionally vague. (3) Because the defendant's motion to dismiss for insufficient evidence was made on other grounds, the court declined to consider the defendant's argument on appeal that insufficient evidence was presented to show he posted private, personal, or sexual information pertaining to the victim.

Sufficient evidence existed of (1) first-degree murder based on premeditation and deliberation, and (2) discharging a firearm into occupied property (a vehicle), an offense used to support a felony-murder conviction

State v. Hicks, ___ N.C. App. ___, 772 S.E.2d 486 (June 2, 2015). In this first-degree murder case, the evidence was sufficient to go to the jury on the theory of premeditation and deliberation. Among other things, there was no provocation by the victim, who was unarmed; the defendant shot the victim at least four times; and after the shooting the defendant immediately left the scene without aiding the victim. The evidence was sufficient to support a conviction for discharging a firearm into occupied property (a vehicle), an offense used to support a felony-murder conviction. The defendant argued that the evidence was conflicting as to whether he fired the shots from inside or outside the vehicle. Citing prior case law, the court noted that an individual discharges a firearm "into" an occupied vehicle even if the firearm is inside the vehicle, as long as the individual is outside the vehicle when discharging the weapon. The court continued, noting that mere contradictions in the evidence do not warrant dismissal and that here the evidence was sufficient to go to the jury.

(1) Sufficient relationship existed between the felony supporting felony-murder (discharging a firearm into occupied property) and the death; (2) Because discharging a firearm into occupied property is a general intent crime, diminished capacity offers no defense

State v. Maldonado, ___ N.C. App. ___, 772 S.E.2d 479 (June 2, 2015). (1) In this first-degree murder case, the court rejected the defendant's argument that there was an insufficient relationship between the felony supporting felony-murder (discharging a firearm into occupied property) and the death. The law requires only that the death occur "in the perpetration or attempted perpetration" of a predicate felony; there need not be a causal "causal relationship"' between the felony and the homicide. All that is required is that the events occur during a single transaction. Here, the defendant stopped shooting into the house after forcing his way through the front door; he then continued shooting inside. The defendant argued that once he was inside the victim attempted to take his gun and that this constituted a break in the chain of events that led to her death. Even if this version of the facts were true, the victim did not break the chain of events by defending herself inside her home after the defendant continued his assault indoors. (2) The trial court did not err by denying the defendant's request for a diminished capacity instruction with respect to a charge of discharging a firearm into occupied property that served as a felony for purposes of a felony-murder conviction. Because discharging a firearm into occupied property is a general intent crime, diminished capacity offers no defense.

Sexual Offenses

Trial court erred by instructing the jury on sexual offense in violation of G.S. 14-27.4A(a) where the indictment charged the defendant with sexual offense in violation of G.S. 14-27.4(a)(1)

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2015). Where the indictment charged the defendant with sexual offense in violation of G.S. 14-27.4(a)(1) (first-degree statutory sex offense with a

child under the age of 13), the trial court erred by instructing the jury on sexual offense with a child in violation of G.S. 14-27.4A(a) (statutory sexual offense by an adult). The court noted that the charged offense was a lesser included of the offense of conviction, and that while the charged offense requires the State to prove that the defendant was at least 12 years old and at least 4 years older than the victim, the offense of conviction requires proof that the defendant is at least 18 years old. The court found itself bound by *State v. Hicks,* ____, N.C. App. ____, 768 S.E.2d 373 (Feb. 17, 2015), vacated the conviction and remanded for resentencing on the lesser included offense. [Author's note: As discussed here, in response to *Hicks* the General Assembly recently recodified the State's sexual assault crimes to eliminate the type of error that occurred here.]

Trial court did not err in failing to instruct on attempted rape where evidence of rape was clear and not conflicting regarding penetration

State v. Matsoake, ___ N.C. App. ___, 777 S.E.2d 810 (Oct. 20, 2015). In this rape case, because the evidence was clear and positive and not conflicting with respect to penetration, the trial court did not err by failing to instruct on attempted rape. Here, among other things, a sexual assault nurse testified that the victim told her she was penetrated, the victim told the examining doctor at the hospital immediately after the attack that the defendant had penetrated her, and the defendant's semen was recovered from inside the victim's vagina.

Reversing the Court of Appeals, the Court found sufficient evidence existed to support all three counts of first-degree rape

State v. Blow, ___ N.C. ___, 776 S.E.2d 844 (Sept. 25, 2015). For the reasons stated in the dissenting opinion, the court reversed the opinion below, *State v. Blow*, ___ N.C. App. ___, 764 S.E.2d 230 (Nov. 4, 2014). In this child sexual assault case in which the defendant was convicted of three counts of first-degree rape, the court of appeals had held that the trial court erred by failing to dismiss one of the rape charges. The court of appeals agreed with the defendant that because the victim testified that the defendant inserted his penis into her vagina "a couple" of times, without identifying more than two acts of penetration, the State failed to present substantial evidence of three counts of rape. The court of appeals found that the defendant's admission to three instances of "sex" with the victim was not an admission of vaginal intercourse because the defendant openly admitted to performing oral sex and other acts on the victim but denied penetrating her vagina with his penis. The dissenting judge believed that the State presented substantial evidence that was sufficient, if believed, to support the jury's decision to convict of three counts of first-degree rape. The dissenting judge agreed with the majority that the victim's testimony about penetration "a couple" of times would have been insufficient to convict the defendant of three counts, but noted that the record contains other evidence, including the defendant's admission that he "had sex" with the victim "about three times."

Defenses

Trial court committed prejudicial error by overruling the defendant's objection to the prosecutor's statement during closing argument that if the jury found the defendant not guilty by reason of insanity, it was "very possible" that she could be released from civil commitment in fifty days

State v. Dalton, ___ N.C. App. ___, 776 S.E.2d 545 (Sept. 15, 2015), *temporary stay allowed*, ___ N.C. ___, 777 S.E.2d 72 (Oct. 6, 2015). In this murder case in which the defendant asserted the insanity

defense, the trial court committed prejudicial error by overruling the defendant's objection to the prosecutor's statement during closing argument that if the jury found the defendant not guilty by reason of insanity, it was "very possible" that she could be released from civil commitment in fifty days. This statement was improper because it was contrary to law. The court noted that if a jury finds a defendant not guilty by reason of insanity, the trial court must order the defendant to be civilly committed. Within fifty days of the commitment, the trial court will provide hearing to the defendant; if the defendant shows that he or she no longer has a mental illness or is no longer dangerous to others, the court will release the defendant. The relevant statute provides in part: "Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others." Here, no evidence suggests that the defendant's release in fifty days was "very possible"; instead it shows the opposite. The defendant's expert testified that she would suffer from bipolar disorder and borderline personality disorder for the rest of her life thus making it unlikely that after fifty days she could show that she was no longer mentally ill. Also the State's uncontroverted evidence showed that the defendant committed a homicide and, under the statute, this constitutes prima facie evidence of dangerousness to others. Based on the evidence, "a quick release would appear to be virtually impossible."

Sex Offender Registration and Monitoring

(1) Age of victim was a factual question to which the defendant could stipulate where the State was required to prove (in part) that the defendant was required to register because of a conviction where the victim was less than 16; (2) For a charge of sex offender being present at a location used by minors, State is not required to show the actual presence of children on the premises at the time when the defendant was there; (3) The Defendant lacked standing to assert challenge that statute was overly broad; (4) Court held that G.S. 14-208.18(a) was not unconstitutionally vague

State v. Fryou, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 17, 2015). (1) In a case involving charges under G.S. 14-208.18(a) (sex offender being present at a location used by minors, here a church preschool), where the State was required to prove (in part) that the defendant was required to register as a sex offender and was so required because of a conviction for an offense where the victim was less than 16 years old, the age of the victim was a factual question to which the defendant could stipulate. (2) The trial court did not err by denying the defendant's motion to dismiss, which had asserted that the State failed to produce substantial evidence that the defendant knew that a preschool existed on the church premises. The evidence showed that the church advertised the preschool with flyers throughout the community, on its website, and with signs around the church. Additionally, the entrance to the church office, where defendant met with the pastor, was also the entrance to the nursery and had a sign explicitly stating the word "nursery." The court rejected the defendant's argument that the State was required to show that he should have known children were actually on the premises at the exact time when he was there. It reasoned: "[T]he actual presence of children on the premises is not an element of the crime, and the State needed only to demonstrate that defendant was 'knowingly' '[w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors' whether the minors were or were not actually present at the time." (3) The court rejected the defendant's facial overbreadth challenge to the statute reasoning that because his argument was not based on First Amendment rights, he lacked standing to assert the challenge. (4) The court rejected the defendant's

argument that G.S. 14-208.18(a) was unconstitutionally vague as applied to him, stating: "[G.S.] 14-208.18(a)(2) may be many things, but it is not vague."

Reversing the court of appeals, the court held that G.S. 14-202.5 (unlawful for registered sex offender to access certain social networking websites) is constitutional on its face and as applied and is not overbroad or void for vagueness

State v. Packingham, ___ N.C. ___, 777 S.E.2d 738 (Nov. 6, 2015). Reversing the court of appeals, ___ N.C. App. ___, 748 S.E.2d 146 (2013), the court held that G.S. 14-202.5 (unlawful for registered sex offender to access certain social networking websites) is constitutional. The court of appeals had held that the statute was unconstitutional on its face and as applied to the defendant, as it violated the defendant's first amendment free speech rights. The court began by finding that the statute is a regulation on conduct, not speech, stating:

> [T]he essential purpose of section 14-202.5 is to limit conduct, specifically the ability of registered sex offenders to access certain carefully-defined Web sites. This limitation on conduct only incidentally burdens the ability of registered sex offenders to engage in speech after accessing those Web sites that fall within the statute's reach.

Next, the court held that rather than governing conduct on the basis of the content of speech, the statute is a content-neutral regulation. It explained:

> On its face, this statute imposes a ban on accessing certain defined commercial social networking Web sites without regard to any content or message conveyed on those sites. The limitations imposed by the statute are based not upon speech contained in or posted on a site, but instead focus on whether functions of a particular Web site are available for use by minors.

The court found that the purpose of the statute—protecting minors from registered sex offenders—is unrelated to any speech on a regulated site. Nor, the court noted, "does the statute have anything to say regarding the content of any speech on a regulated site." As a result, intermediate scrutiny applied. Having found that the statute is a content-neutral regulation that imposes only an incidental burden on speech, the court applied the four-factor test from *United States v. O'Brien,* 391 U.S. 367 (1968) (regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest). Here, the parties agreed that promulgating the statute is within the General Assembly's constitutional power and that protecting children from sexual abuse is a substantial governmental interest. The court then turned to the third *O'Brien* factor, whether this governmental interest is related to the suppression of free expression, and concluded: "The interest reflected in the statute at bar, which protects children from convicted sex offenders who could harvest information to facilitate contact with potential victims, is unrelated to the suppression of free speech." Next, the court found that the statute was narrowly tailored and left open ample alternative channels for communication that registered sex offenders may freely access, thus satisfying the fourth factor. Having so found, the court concluded that the defendant failed to show that the statute was facially invalid. Rejecting the defendant's as applied challenge, the court concluded: "the incidental burden imposed upon this defendant, who is barred from Facebook.com but not from many other sites, is not greater than necessary to further the governmental interest of protecting children from registered sex offenders." Next, the court rejected the defendant's argument that the statute was unconstitutionally overbroad, stating: "we conclude section 14-202.5 does not sweep too broadly in preventing registered sex offenders from accessing carefully delineated Web sites where vulnerable youthful users may congregate." Finally, the court held that the defendant's own conduct defeated his void for vagueness argument.

Indictment in failure to notify of change of address case was not fatally defective where it alleged that the defendant failed to notify within three days rather than within three *business* days

State v. James, ___ N.C. App. ___, 774 S.E.2d 871 (July 7, 2015). The indictment in a sex offender failure to notify of change of address case was not fatally defective. The indictment alleged that the defendant failed to notify the sheriff of a change of address "within three (3) days of the address change." The statute, however, requires that the notice be made within three *business* days. The defendant argued that omission of the "business" rendered the indictment fatally defective. The court disagreed:

> While we agree that the better practice would have been for the indictment to have alleged … that Defendant failed to report his change of address within "three business days," … the superseding indictment nevertheless gave Defendant sufficient notice of the charge against him and, therefore, was not fatally defective.

Among other things, the court noted that the defendant did not argue that the omission in the indictment prejudiced his ability to prepare for trial.

(1) The defendant was required to register in connection with an indecent liberties conviction (although his release date for that conviction was Sept. 24, 1995 and registration requirements did not take effect until January 1996) where he was not actually released until Jan. 24, 1999 because he was serving a consecutive term for crime against nature; (2) Evidence was insufficient to support a conviction for submitting information under false pretenses to the sex offender registry where there was no evidence that the defendant gave an address he knew to be false on a verification form

State v. Surratt, ___ N.C. App. ___, 773 S.E.2d 327 (June 2, 2015). (1) The State presented sufficient evidence to support a conviction for failure to register as a sex offender. The court rejected the defendant's argument that he was not required to register in connection with a 1994 indecent liberties conviction. The court took judicial notice of the fact that the defendant's prison release date for that conviction was Sept. 24, 1995 but that he was not actually released until Jan. 24, 1999 because he was serving a consecutive term for crime against nature. Viewing the later date as the date of the defendant's release from prison, the court held that the registration requirements were applicable to him because they took effect in January 1996 and applied to offenders then serving time for a reportable sexual offense. The court further held that because the defendant was a person required to register when the 2008 amendments to the sex offender registration statute took effect, those amendments applied to him as well. (2) Where there was no evidence that the defendant willfully gave an address he knew to be false, the evidence was insufficient to support a conviction for submitting information under false pretenses to the sex offender registry in violation of G.S. 14-208.9A(a)(1). The State's theory of the case was that the defendant willfully made a false statement to an officer, stating that he continued to reside at his father's residence. Citing prior case law, the court held that the statute only applies to providing false or misleading information on forms submitted pursuant to the sex offender law. Here, the defendant never filled out any verification form listing the address in question. It ruled: "An executed verification form is required before one can be charged with falsifying or forging the document."

Sentencing and Probation

Trial court erred by ordering $50 in restitution where victim did not testify regarding the value of the items stolen

State v. Hammonds, ___ N.C. App. ___, 777 S.E.2d 359 (Oct. 20, 2015). The court held, with the State's concession, that the trial court erred by ordering $50 in restitution where the victim did not testify regarding the value of the items stolen. Because there was some evidence to support an award of restitution but the evidence was not specific enough to support the award, the court vacated the restitution order and remanded for a new hearing to determine the appropriate amount of restitution.

(1) Trial court lacked jurisdiction to revoke where probation officer filed violation reports after the probation had expired; court rejected the State's argument that the period of probation did not begin until the defendant was released from incarceration; 2) court of appeals took judicial notice of the date of the defendant's release from incarceration

State v. Harwood, ___ N.C. App. ___, 777 S.E.2d 116 (Oct. 6, 2015). (1) Because the probation officer filed violation reports after the defendant's probation had expired, the trial court lacked jurisdiction to revoke the defendant's probation. The court rejected the State's argument that the defendant's period of probation did not begin until he was released from incarceration and thus that the violation reports were timely. The State acknowledged that the trial court failed to check the box on the judgment form indicating that the period of probation would begin upon release from incarceration, but argued that this was a clerical error. The court noted that under G.S. 15A-1346, the default rule is that probation runs concurrently with imprisonment. The court rejected the notion that the trial court's failure to check the box on the form was a clerical, in part because the trial court failed to do so five times with respect to five separate judgments. Additionally, the court held that if a mistake was made it was substantive not clerical, reasoning: "[c]hanging this provision would retroactively extend the defendant's period of probation by more than one year and would grant the trial court subject matter jurisdiction to activate [the sentences]."(2) The court of appeals took judicial notice of the date of the defendant's release from incarceration. This fact was obtained from an offender search on the Department of Public Safety website.

Trial court erred in revoking defendant's probation for absconding where evidence did not support that conclusion

State v. Williams, ___ N.C. App. ___, 776 S.E.2d 741 (Sept. 15, 2015). Under Justice Reinvestment Act (JRA) changes, the trial court erred by revoking the defendant's probation. After reviewing the requirements of the JRA, the court noted that the trial judge did not check the box on the judgment form indicating that it had made a finding that the defendant violated the statutory absconding provision, G.S. 15A–1343(b)(3a).

Defendant's stipulations that he had been convicted of carrying a concealed weapon in Michigan and that the offense was classified as a felony there were sufficient to support the default classification of the offense as a Class I felony

State v. Edgar, ___ N.C. App. ___, 777 S.E.2d 766 (Aug. 18, 2015). The trial court correctly calculated the defendant's PRL. The defendant argued that the trial court erred by basing its PRL calculation on an ineffective stipulation. The defendant's only prior conviction was one in Michigan for carrying a concealed weapon, which he contended is substantially similar to the NC Class 2 misdemeanor offense of carrying a concealed weapon. The court concluded that the defendant did not make any stipulation as to the similarity of the Michigan offense to NC offense. Instead, the prior conviction was classified as a Class I felony, the default classification for an out-of-state felony. Thus, defendant's stipulations in the

PRL worksheet that he had been convicted of carrying a concealed weapon in Michigan and that the offense was classified as a felony in Michigan, were sufficient to support the default classification of the offense as a Class I felony.

Trial court did not err in felony violation of DVPO case by sentencing defendant in aggravated range for taking advantage of a position of trust

State v. Edgerton, ___ N.C. App. ___, 774 S.E.2d 927 (Aug. 4, 2015). In this violation of a domestic violence protective order (DVPO) case, the trial court did not err by sentencing the defendant within the aggravated range based in part on the G.S. 15A-1340.16(d)(15) statutory aggravating factor (the "defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense"). The defendant argued that because a personal relationship between the parties is a prerequisite to obtaining a DVPO, the abuse of a position of trust or confidence aggravating factor cannot be used aggravate a sentence imposed for a DVPO violation offense. The court concluded that imposing an aggravated sentence did not violate the rule that evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation.

(1) The Court held that it had jurisdiction to review the trial court's sua sponte MAR by way of a writ of certiorari filed by the State; (2) The trial court abused its discretion in making certain findings of fact supporting its MAR; (3) The trial court erred by concluding that the defendant's sentence for statutory rape and statutory sex offense violated the Eighth Amendment

State v. Thomsen, ___ N.C. App. ___, 776 S.E.2d 41 (Aug. 4, 2015). (1) Over a dissent the court held that it had jurisdiction to review the trial court's sua sponte MAR (granting the defendant relief) by way of a writ of certiorari filed by the State. (2) The trial court abused its discretion in making certain findings of fact supporting its sua sponte MAR, which was grounded on the Eighth Amendment. The court found, in part, that the trial court's factual findings were irrelevant to the sentencing issue, "wholly unsupported by the facts in the record" or "unsupported by reason." (3) The trial court erred by concluding that the defendant's 300-month minimum, 420-month maximum sentence for statutory rape and statutory sex offense violated the Eighth Amendment. The court concluded: "A 300-month sentence is not grossly disproportionate to the two crimes to which Defendant pled guilty. Furthermore, Defendant's 300-month sentence … is less than or equal to the sentences of many other offenders of the same crime in this jurisdiction."

No violation of due process or equal protection occurred where the defendant received an aggravated sentence

State v. Harris, ___ N.C. App. ___, 775 S.E.2d 31 (July 7, 2015). (1) No violation of due process occurred when the defendant was sentenced in the aggravated range where proper notice was given and the jury found an aggravated factor (that the defendant committed the offense while on pretrial release on another charge). (2) Because G.S. 15A-1340.16 (aggravated and mitigated sentences) applies to all defendants, imposition of an aggravated sentence did not violate equal protection.

Because the trial court lacked jurisdiction to extend defendant's period of probation in 2009, the trial court lacked jurisdiction to revoke the defendant's probation in 2013

State v. Hoskins, ___ N.C. App. ___, 775 S.E.2d 15 (July 7, 2015). (1) In this case which came to the court on a certiorari petition to review the trial court's 2013 probation revocation, the court concluded that it

had jurisdiction to consider the defendant's claim that the trial court lacked jurisdiction to extend her probation in 2009. (2) The trial court lacked jurisdiction to extend the defendant's probation in 2009. The defendant's original period of probation expired on 27 June 2010. On 18 February 2009, 16 months before the date probation was set to end, the trial court extended the defendant's probation. Under G.S. 15A-1343.2(d), the trial court lacked statutory authority to order a three-year extension more than six months before the expiration of the original period of probation. Also the trial court lacked statutory authority under G.S. 15A-1344(d), because the defendant's extended period of probation exceeded five years. Because the trial court lacked jurisdiction to extend probation in 2009, the trial court lacked jurisdiction to revoke the defendant's probation in 2013.