

Criminal Case Update

2016 Summer Webinar

(includes selected cases decided between December 15, 2015 and May 23, 2016)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to the [Criminal Case Compendium](#). To obtain the summaries automatically by email, sign up for the [Criminal Law Listserv](#).

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Investigation Issues

Seizures

Officer lacked reasonable suspicion for traffic stop despite observing abrupt acceleration and fishtailing

[State v. James Johnson](#), ___ N.C. App. ___, 784 S.E.2d 633 (April 5, 2016), *temporary stay allowed*, ___ N.C. ___, 784 S.E.2d 483 (Apr. 22, 2016). Because a police officer lacked reasonable suspicion for a traffic stop in this DWI case, the trial court erred by denying the defendant's motion to suppress. While on routine patrol, the officer observed the defendant's truck stopped at a traffic light waiting for the light to change. The defendant revved his engine and when the light changed to green, abruptly accelerated into a left-hand turn. Although his vehicle fishtailed, the defendant regained control before it struck the curb or left the lane of travel. The officer was unable to estimate the speed of the defendant's truck. Snow was falling at the time and slush was on the road. These facts do not support the conclusion that the officer had reasonable suspicion that the defendant committed a violation of unsafe movement or traveling too fast for the conditions.

Officer unlawfully extended traffic stop when he told the defendant he was giving him a warning ticket for traffic violations but then required the defendant to exit his car, patted him down, and had him sit in patrol car while the officer ran checks

[State v. Bullock](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 10, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 23, 2016). In this post-*Rodriguez* case, the court held, over a dissent, that the officer unlawfully extended a traffic stop. Because the officer initiated the traffic stop for speeding and following too closely, "the mission of the stop was to issue a traffic infraction warning ticket to defendant for speeding and following a truck too closely." Thus, the stop "could ... last only as long as necessary to complete that mission and certain permissible unrelated 'checks,' including checking defendant's driver's license, determining whether there were outstanding warrants against defendant, and inspecting the automobile's registration and proof of insurance." The officer completed the mission of the traffic stop when he told the defendant that he was giving him a warning for the traffic violations. While it was permissible for the officer to conduct "permissible checks" of the car rental agreement (the equivalent of inspecting a car's registration and proof of insurance) and of the defendant's license for outstanding warrants, he was not allowed to "do so in a way that prolong[ed] the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." (quotation omitted). Here, rather than taking the defendant's license back to his patrol car and running the checks, the officer required the defendant to exit his car, subjected him to a pat down search, and had him sit in the patrol car while the officer ran his checks. Additionally, the officer ran the defendant's name "through various law enforcement databases while questioning him at length about subjects unrelated to the mission of the stop. The court held:

Even assuming [the officer] had a right to ask defendant to exit the vehicle while he ran defendant's license, his actions that followed certainly extended the stop beyond what was necessary to complete the mission. The issue is not whether [the officer] could lawfully request defendant to exit the vehicle, but rather whether he unlawfully extended and prolonged the traffic stop by frisking defendant and then requiring defendant to sit in the patrol car while he was questioned. To resolve that issue, we

follow *Rodriguez* and focus again on the overall mission of the stop. We hold, based on the trial court's findings of fact, that [the officer] unlawfully prolonged the detention by causing defendant to be subjected to a frisk, sit in the officer's patrol car, and answer questions while the officer searched law enforcement databases for reasons unrelated to the mission of the stop and for reasons exceeding the routine checks authorized by *Rodriguez*.

The court went on to find that reasonable suspicion did not support extending the stop. It also held that because the officer lacked reasonable suspicion to extend the stop, whether the defendant may have later consented to the search is irrelevant as consent obtained during an unlawful extension of a stop is not voluntary.

(1) Defendant's nervous behavior and association with a known drug dealer did not amount to reasonable suspicion to support extension of traffic stop, (2) Defendant's consent to search vehicle was not obtained during a consensual encounter where the officer had not returned her license at the time she gave consent

[*State v. Bedient*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). (1) In this post-*Rodriguez* case, the court held that because no reasonable suspicion existed to prolong the defendant's detention once the purpose of a traffic stop had concluded, the trial court erred by denying the defendant's motion to suppress evidence obtained as a result of a consent search of her vehicle during the unlawful detention. The court found that the evidence showed only two circumstances that could possibly provide reasonable suspicion for extending the duration of the stop: the defendant was engaging in nervous behavior and she had associated with a known drug dealer. It found the circumstances insufficient to provide the necessary reasonable suspicion. Here, the officer had a legitimate basis for the initial traffic stop: addressing the defendant's failure to dim her high beam lights. Addressing this infraction was the original mission of the traffic stop. Once the officer provided the defendant with a warning on the use of high beams, the original mission of the stop was concluded. Although some of his subsequent follow-up questions about the address on her license were supported by reasonable suspicion (regarding whether she was in violation of state law requiring a change of address on a drivers license), this "new mission for the stop" concluded when the officer decided not to issue her a ticket in connection with her license. At this point, additional reasonable suspicion was required to prolong the detention. The court agreed with the defendant that her nervousness and association with a drug dealer did not support a finding of reasonable suspicion to prolong the stop. Among other things, the court noted that nervousness, although a relevant factor, is insufficient by itself to establish reasonable suspicion. It also concluded that "a person's mere association with or proximity to a suspected criminal does not support a conclusion of particularized reasonable suspicion that the person is involved in criminal activity without more competent evidence." These two circumstances, the court held, "simply give rise to a hunch rather than reasonable, particularized suspicion." (2) The defendant's consent to search the vehicle was not obtained during a consensual encounter where the officer had not returned the defendant's drivers license at the time she gave her consent.

Reasonable suspicion supported extension of traffic stop where officer smelled marijuana on defendant's person and masking odors in vehicle, and defendant stated he had an impaired driving conviction based on marijuana, gave a "bizarre" story regarding his travel, and was extremely nervous

[*State v. Castillo*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). (1) In this post-*Rodriguez* case, the court held that reasonable suspicion supported the officer's extension of the duration of the stop, including: the officer smelled marijuana on the defendant's person, the officer learned from the

defendant him that he had an impaired driving conviction based on marijuana usage, the defendant provided a “bizarre” story regarding the nature of his travel, the defendant was extremely nervous, and the officer detected “masking odors.” (2) The defendant’s consent to search his car, given during a lawful extension of the stop, was clear and unequivocal.

(1) Officer had reasonable suspicion to extend traffic stop where, among other things, driver could not answer basic questions, changed his story, and was extremely nervous; (2) Officer properly frisked defendant based on reasonable suspicion that the defendant was armed and dangerous

[*State v. Taseen Johnson*](#), ___ N.C. App. ___, 783 S.E.2d 753 (April 5, 2016). (1) In this drug trafficking case, the officer had reasonable suspicion to extend a traffic stop. After Officer Ward initiated a traffic stop and asked the driver for his license and registration, the driver produced his license but was unable to produce a registration. The driver’s license listed his address as Raleigh, but he could not give a clear answer as to whether he resided in Brunswick County or Raleigh. Throughout the conversation, the driver changed his story about where he resided. The driver was speaking into one cell phone and had two other cell phones on the center console of his vehicle. The officer saw a vehicle power control (VPC) module on the floor of the vehicle, an unusual item that might be associated with criminal activity. When Ward attempted to question the defendant, a passenger, the defendant mumbled answers and appeared very nervous. Ward then determined that the driver’s license was inactive, issued him a citation and told him he was free to go. However, Ward asked the driver if he would mind exiting the vehicle to answer a few questions. Officer Ward also asked the driver if he could pat him down and the driver agreed. Meanwhile, Deputy Arnold, who was assisting, observed a rectangular shaped bulge underneath the defendant’s shorts, in his crotch area. When he asked the defendant to identify the item, the defendant responded that it was his male anatomy. Arnold asked the defendant to step out of the vehicle so that he could do a patdown; before this could be completed, a Ziploc bag containing heroin fell from the defendant’s shorts. The extension of the traffic stop was justified: the driver could not answer basic questions, such as where he was coming from and where he lived; the driver changed his story; the driver could not explain why he did not have his registration; the presence of the VPC was unusual; and the defendant was extremely nervous and gave vague answers to the officer’s questions. (2) The officer properly frisked the defendant. The defendant’s nervousness, evasiveness, and failure to identify what was in his shorts, coupled with the size and nature of the object supported a reasonable suspicion that the defendant was armed and dangerous.

Officer had reasonable suspicion for a stop after witnessing what he believed to be a hand-to-hand drug transaction

[*State v. Travis*](#), ___ N.C. App. ___, 781 S.E.2d 674 (Jan. 19, 2016). In this drug case, the officer had reasonable suspicion for the stop. The officer, who was in an unmarked patrol vehicle in the parking lot of a local post office, saw the defendant pull into the lot. The officer knew the defendant because he previously worked for the officer as an informant and had executed controlled buys. When the defendant pulled up to the passenger side of another vehicle, the passenger of the other vehicle rolled down his window. The officer saw the defendant and the passenger extend their arms to one another and touch hands. The vehicles then left the premises. The entire episode lasted less than a minute, with no one from either vehicle entering the post office. The area in question was not known to be a crime area. Based on his training and experience, the officer believed he had witnessed a hand-to-hand drug transaction and the defendant’s vehicle was stopped. Based on items found during the search of the vehicle, the defendant was charged with drug crimes. The trial court denied the defendant’s motion to suppress. Although it found the case to be a “close” one, the court found that reasonable suspicion

supported the stop. Noting that it had previously held that reasonable suspicion supported a stop where officers witnessed acts that they believed to be drug transactions, the court acknowledged that the present facts differed from those earlier cases, specifically that the transaction in question occurred in daylight in an area that was not known for drug activity. Also, because there was no indication that the defendant was aware of the officer's presence, there was no evidence that he displayed signs of nervousness or took evasive action to avoid the officer. However, the court concluded that reasonable suspicion existed. It noted that the actions of the defendant and the occupant of the other car "may or may not have appeared suspicious to a layperson," but they were sufficient to permit a reasonable inference by a trained officer that a drug transaction had occurred. The court thought it significant that the officer recognized the defendant and had past experience with him as an informant in connection with controlled drug transactions. Finally, the court noted that a determination that reasonable suspicion exists need not rule out the possibility of innocent conduct.

In a post-Rodriguez case, officer had reasonable suspicion to extend scope and duration of routine traffic stop to perform dog sniff

[*State v. Warren*](#), ___ N.C. ___, 782 S.E.2d 509 (Mar. 18, 2016). On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 775 S.E.2d 362 (2015), the court per curiam affirmed. In this post-Rodriguez case, the court of appeals had held 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 of appeals noted that under *Rodriguez v. United States*, ___ U.S. ___, 135 S.Ct. 1609 (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 of appeals 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."

Court of Appeals holding that seizure was not justified by reasonable suspicion and that de minimum doctrine did not apply remanded for reconsideration in light of Rodriguez

[*State v. Leak*](#), ___ N.C. ___, 780 S.E.2d 553 (Dec. 18, 2015). The supreme court vacated the decision below, [*State v. Leak*](#), ___ N.C. App. ___, 773 S.E.2d 340 (2015), and ordered that the court of appeals remand to the trial court for reconsideration of the defendant's motion to suppress in light of *Rodriguez v. United States*, ___ U.S. ___, 135 S.Ct. 1609 (2015). The court of appeals had 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. The court of appeals concluded that 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 court of appeals concluded that 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 *Rodriguez* (police may not extend a completed vehicle stop for a dog sniff, absent reasonable suspicion), the court of appeals rejected the suggestion that no violation occurred because any seizure was “de minimus” in nature.

Searches

Trial court erred by denying defendant’s motion to suppress evidence obtained in a warrantless search of external hard drives

[*State v. Ladd*](#), __ N.C. App. __, 782 S.E.2d 397 (Mar. 15, 2016). In this peeping with a photographic device case, the trial court erred by denying the defendant’s motion to suppress with respect to evidence obtained during a search of the defendant’s external hard drives. The court rejected the notion that the defendant consented to a search of the external hard drives, concluding that while he consented to a search of his laptops and smart phone, the trial court’s findings of fact unambiguously state that he did not consent to a search of other items. Next, the court held that the defendant had a reasonable expectation of privacy in the external hard drives, and that the devices did not pose a safety threat to officers, nor did the officers have any reason to believe that the information contained in the devices would have been destroyed while they pursued a search warrant, given that they had custody of the devices. The court found that the Supreme Court’s *Riley* analysis with respect to cellular telephones applied to the search of the digital data on the external data storage devices in this case, given the similarities between the two types of devices. The court concluded: “Defendant possessed and retained a reasonable expectation of privacy in the contents of the external data storage devices The Defendant’s privacy interests in the external data storage devices outweigh any safety or inventory interest the officers had in searching the contents of the devices without a warrant.”

No Fourth Amendment violation occurred when officers entered the defendant’s driveway to investigate a shooting

[*State v. Smith*](#), __ N.C. App. __, 783 S.E.2d 504 (Mar. 1, 2016). No Fourth Amendment violation occurred when officers entered the defendant’s driveway to investigate a shooting. When detectives arrived at the defendant’s property they found the gate to his driveway open. The officers did not recall observing a “no trespassing” sign that had been reported the previous day. After a backup deputy arrived, the officers drove both of their vehicles through the open gate and up the defendant’s driveway. Once the officers parked, the defendant came out of the house and spoke with the detectives. The defendant denied any knowledge of a shooting and denied owning a rifle. However, the defendant’s wife told the officers that there was a rifle inside the residence. The defendant gave oral consent to search the home. In the course of getting consent, the defendant made incriminating statements. A search of the home found a rifle and shotgun. The rifle was seized but the defendant was not arrested. After leaving and learning that the defendant had a prior felony conviction from Texas, the officers obtained a search warrant to retrieve the other gun seen in his home and a warrant for the defendant’s arrest. When officers returned to the defendant’s residence, the driveway gate was closed and a sign on the gate warned “Trespassers will be shot exclamation!!! Survivors will be shot again!!!” The team entered and found multiple weapons on the premises. At trial the defendant unsuccessfully moved to

suppress all of the evidence obtained during the detectives' first visit to the property and procured by the search warrant the following day. He pled guilty and appealed. The court rejected the defendant's argument that a "no trespassing" sign on his gate expressly removed an implied license to approach his home. While the trial court found that a no trespassing sign was posted on the day of the shooting, there was no evidence that the sign was present on the day the officers first visited the property. Also, there was no evidence that the defendant took consistent steps to physically prevent visitors from entering the property; the open gate suggested otherwise. Finally, the defendant's conduct upon the detectives' arrival belied any notion that their approach was unwelcome. Specifically, when they arrived, he came out and greeted them. For these reasons, the defendant's actions did not reflect a clear demonstration of an intent to revoke the implied license to approach. The court went on to hold that the officers' actions did not exceed the scope of a lawful knock and talk. Finally, it rejected the defendant's argument his Fourth Amendment rights were violated because the encounter occurred within the curtilage of his home. The court noted that no search of the curtilage occurs when an officer is in a place where the public is allowed to be for purposes of a general inquiry. Here, they entered the property by through an open driveway and did not deviate from the area where their presence was lawful.

Strip search of defendant did not violate Fourth Amendment

[*State v. Collins*](#), ___ N.C. App. ___, 782 S.E.2d 350 (Feb. 2, 2016). In this drug case, the court held, over a dissent, that a strip search of the defendant did not violate the Fourth Amendment. When officers entered a residence to serve a warrant on someone other than the defendant, they smelled the odor of burnt marijuana. When the defendant was located upstairs in the home, an officer smelled marijuana on his person. The officer patted down and searched the defendant, including examining the contents of his pockets. The defendant was then taken downstairs. Although the defendant initially gave a false name to the officers, once they determined his real name, they found out that he had an outstanding warrant from New York. The defendant was wearing pants and shoes but no shirt. After the defendant declined consent for a strip search, an officer noticed a white crystalline substance consistent with cocaine on the floor where the defendant had been standing. The officer then searched the defendant, pulling down or removing both his pants and underwear. Noticing that the defendant was clenching his buttocks, the officer removed two plastic bags from between his buttocks, one containing what appeared to be crack cocaine and the other containing what appeared to be marijuana. The court held that because there was probable cause to believe that contraband was secreted beneath the defendant's clothing (in this respect, the court noted the crystalline substance consistent with cocaine on the floor where the defendant had been standing), it was not required to officially deem the search a strip search or to find exigent circumstances before declaring the search reasonable. Even so, the court found that exigent circumstances existed, given the observation of what appeared to be cocaine near where the defendant had been standing and the fact that the concealed cocaine may not have been sealed, leading to danger of the defendant absorbing some of the substance through his large intestine. Also, the court noted that the search occurred in the dining area of a private apartment, removed from other people and providing privacy.

A search warrant application failed to provide probable cause to search defendant's residence where it insufficiently identified facts indicating that controlled substances would be found in the residence

[*State v. Allman*](#), ___ N.C. App. ___, 781 S.E.2d 311 (Jan. 5, 2016). Over a dissent the court held in this drug case that the application in the search warrant failed to establish probable cause to search the defendant's residence. The court found the case indistinguishable from *State v. Campbell*, 282 N.C. 125

(1972), where the affidavit stated that the defendant and two other residents of the premises had been involved with drug sales and possession but insufficiently identified facts indicating that controlled substances would be found in the dwelling to be searched. Here, the affidavit alleged that two individuals residing at the residence were engaged in drug trafficking. However, nothing in the application indicated that the officer had observed or received information that drugs were possessed or sold at the premises in question. The court rejected the State's argument that such an inference arose naturally and reasonably from circumstances indicating that the two individuals were engaged in drug transactions, including the fact that both previously had been convicted of drug crimes and that an officer found marijuana, cash, and a cell phone with messages consistent with marijuana sales in one man's possession during a traffic stop. These facts were relevant to whether those individuals were engaged in drug dealing, but as in *Campbell*, information that a person is an active drug dealer is "not sufficient, without more, to support a search of the dealer's residence." The fact that the men lied about living in the house "while perhaps suggestive that drugs might be present" there, "does not make the drug's presence probable." The court distinguished all cases offered by the State on grounds that in those cases, the relevant affidavits contained "some specific and material connection between drug activity and the place to be searched."

Miranda

Officer's statement that heroin had been recovered from another person in vehicle was not interrogation or functional equivalent of interrogation

[*State v. Baskins*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 17, 2016). The court held that the defendant's statements, made during the stop were voluntary and not the result of any custodial interrogation. None of the officers asked or said anything to the defendant to elicit the statement in question. Rather, the defendant volunteered the statement in response to one officer informing another that suspected heroin and had been recovered from a person in the vehicle.

Defendant did not invoke 5th Amendment right to counsel where he made ambiguous statements regarding whether he wanted assistance of counsel

[*State v. Taylor*](#), ___ N.C. App. ___, 784 S.E.2d 224 (April 19, 2016). On remand from the NC Supreme Court the court held, in this murder case, that the defendant's Fifth Amendment rights were not violated. The defendant argued on appeal that the trial court erred in denying his motion to suppress because he invoked his Fifth Amendment right to counsel during a custodial interrogation. The court disagreed, holding that the defendant never invoked his right to counsel. It summarized the relevant facts as follows:

[D]uring the police interview, after defendant asked to speak to his grandmother, Detective Morse called defendant's grandmother from his phone and then handed his phone to defendant. While on the phone, defendant told his grandmother that he called her to "let [her] know that [he] was alright." From defendant's responses on the phone, it appears that his grandmother asked him if the police had informed him of his right to speak to an attorney. Defendant responded, "An attorney? No, not yet. They didn't give me a chance yet." Defendant then responds, "Alright," as if he is listening to his grandmother's advice. Defendant then looked up at Detective Morse and asked, "Can I speak to an attorney?" Detective Morse responded: "You can call one, absolutely." Defendant then relayed Detective Morse's answer to his grandmother: "Yeah, they said

I could call one.” Defendant then told his grandmother that the police had not yet made any charges against him, listened to his grandmother for several more seconds, and then hung up the phone.

After the defendant refused to sign a *Miranda* waiver form, explaining that his grandmother told him not to sign anything, Morse asked, “Are you willing to talk to me today?” The defendant responded: “I will. But [my grandmother] said—um—that I need an attorney or a lawyer present.” Morse responded: “Okay. Well you’re nineteen. You’re an adult. Um—that’s really your decision whether or not you want to talk to me and kind-of clear your name or—” The defendant then interrupted: “But I didn’t do anything, so I’m willing to talk to you.” The defendant then orally waived his *Miranda* rights. The defendant’s question, “Can I speak to an attorney?”, made during his phone conversation with his grandmother “is ambiguous whether defendant was conveying his own desire to receive the assistance of counsel or whether he was merely relaying a question from his grandmother.” The defendant’s later statement —“But [my grandmother] said—um—that I need an attorney or a lawyer present”—“is also not an invocation since it does not unambiguously convey *defendant’s* desire to receive the assistance of counsel.” (quotation omitted). The court went on to note: “A few minutes later, after Detective Morse advised defendant of his *Miranda* rights, he properly clarified that the decision to invoke the right to counsel was defendant’s decision, not his grandmother’s.”

Trial court erred by determining that defendant voluntarily waived *Miranda* rights where the State did not show defendant had meaningful awareness of the rights and the consequences of waiving them

[*State v. Knight*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). Over a dissent, the majority held that although the trial court erred in concluding that the defendant voluntarily waived his *Miranda* rights, the defendant was not prejudiced by the error. The court found that “there is no persuasive evidence that the defendant actually understood his *Miranda* rights” before waiving them. Although the defendant had experience in the criminal justice system, there was no evidence that he had ever been *Mirandized* before or that if he had, he understood his rights on those previous occasions. Additionally, the court concluded, “[j]ust because defendant appeared to have no mental disabilities does not mean he understood the warnings expressly mandated by *Miranda*.” The court found “no indication that defendant understood he did not have to speak with [the Detective], and that he could request counsel.” Finally, the court noted that when asked if he understood his rights, the defendant never affirmatively acknowledged that he did. In this respect, the court held: “As a constitutional minimum, the State had to show that defendant intelligently relinquished a known and understood right.” Thus, while the State presented sufficient evidence of an implied waiver, it did not show that the defendant had a meaningful awareness of his *Miranda* rights and the consequences of waiving them. The dissenting judge believed that the State failed to demonstrate that the error was harmless beyond a doubt.

Pretrial and Trial Procedure

Right to Counsel

Defendant's right to secure counsel was violated when government froze defendant's legitimate untainted assets

[*Luis v. United States*](#), 578 U.S. ___, 136 S. Ct. 1083 (Mar. 30, 2016). The defendant's Sixth Amendment right to secure counsel of choice was violated when the government, acting pursuant to 18 U. S. C. §1345, froze pretrial the defendant's legitimate, untainted assets and thus prevented her from hiring counsel to defend her in the criminal case. Critical to the Court's analysis was that the property at issue belonged to the defendant and was not "loot, contraband, or otherwise 'tainted.'"

(1) In murder case, trial counsel's closing argument did not exceed scope of defendant's consent given during *Harbison* inquiry; (2) *Harbison* standard did not apply to trial counsel's comments that were not concessions of guilt

[*State v. Cook*](#), ___ N.C. App. ___, 782 S.E.2d 569 (Mar. 15, 2016). (1) In this murder case, counsel's statement in closing argument did not exceed the scope of consent given by the defendant during a *Harbison* inquiry. In light of the *Harbison* hearing, the defendant knowingly, intelligently and voluntarily, and with full knowledge of the awareness of the possible consequences agreed to counsel's concession that he killed the victim and had culpability for some criminal conduct. The court noted that counsel's trial strategy was to argue that the defendant lacked the mental capacity necessary for premeditation and deliberation and therefore was not guilty of first-degree murder. (2) The *Harbison* standard did not apply to counsel's comments regarding the "dreadfulness" of the crimes because these comments were not concessions of guilt. Considering these statements under the *Strickland* standard, the court noted that counsel pointed out to the jury that while the defendant's crimes were horrible, the central issue was whether the defendant had the necessary mental capacity for premeditation and deliberation. The defendant failed to rebut the strong presumption that counsel's conduct was reasonable. Additionally no prejudice was established given the overwhelming evidence of guilt.

In murder case, trial counsel did not render IAC by failing to produce evidence of self-defense or justification promised in counsel's opening statement

[*State v. Givens*](#), ___ N.C. App. ___, 783 S.E.2d 42 (Mar. 1, 2016). In this murder case, trial counsel did not render ineffective assistance by failing to produce evidence, as promised in counsel's opening statement to the jury, that the shooting in question was justified or done in self-defense. After the trial court conducted a *Harbison* inquiry, defense counsel admitted to the jury that the defendant had a gun and shot the victim but argued that the evidence would show that the shooting was justified. The concession regarding the shooting did not pertain to a hotly disputed factual matter given that video surveillance footage of the events left no question as to whether the defendant shot the victim. The trial court's *Harbison* inquiry was comprehensive, revealing that the defendant knowingly and voluntarily consented to counsel's concession. The court also rejected the defendant's argument that making unfulfilled promises to the jury in an opening statement constitutes per se ineffective assistance of counsel. And it found that because counsel elicited evidence supporting a defense of justification, counsel did not fail to

fulfill a promise made in his opening statement. The court stated: “Defense counsel promised and delivered evidence, but it was for the jury to determine whether to believe that evidence.”

Trial court erred by requiring defendant to proceed pro se where defendant never asked to proceed pro se and never indicated an intent to proceed to trial without the assistance of counsel; defendant did not forfeit right to counsel

[*State v. Blakeney*](#), ___ N.C. App. ___, 782 S.E.2d 88 (Feb. 16, 2016). The trial court erred by requiring the defendant to proceed pro se. After the defendant was indicted but before the trial date, the defendant signed a waiver of the right to assigned counsel and hired his own lawyer. When the case came on for trial, defense counsel moved to withdraw, stating that the defendant had been rude to him and no longer desired his representation. The defendant agreed and indicated that he intended to hire a different, specifically named lawyer. The trial court allowed defense counsel to withdraw and informed the defendant that he had a right to fire his lawyer but that the trial would proceed that week, after the trial court disposed of other matters. The defendant then unsuccessfully sought a continuance. When the defendant’s case came on for trial two days later, the defendant informed the court that the lawyer he had intended to hire wouldn’t take his case. When the defendant raised questions about being required to proceed pro se, the court indicated that he had previously waived his right to court-appointed counsel. The trial began, with the defendant representing himself. The court held that the trial court’s actions violated the defendant’s Sixth Amendment right to counsel. The defendant never asked to proceed pro se; although he waived his right to court-appointed counsel, he never indicated that he intended to proceed to trial without the assistance of any counsel. Next, the court held that the defendant had not engaged in the type of severe misconduct that would justify forfeiture of the right to counsel. Among other things, the court noted that the defendant did not fire multiple attorneys or repeatedly delay the trial. The court concluded:

[D]efendant’s request for a continuance in order to hire a different attorney, even if motivated by a wish to postpone his trial, was nowhere close to the “serious misconduct” that has previously been held to constitute forfeiture of counsel. In reaching this decision, we find it very significant that defendant was not warned or informed that if he chose to discharge his counsel but was unable to hire another attorney, he would then be forced to proceed pro se. Nor was defendant warned of the consequences of such a decision. We need not decide, and express no opinion on, the issue of whether certain conduct by a defendant might justify an immediate forfeiture of counsel without any preliminary warning to the defendant. On the facts of this case, however, we hold that defendant was entitled, at a minimum, to be informed by the trial court that defendant’s failure to hire new counsel might result in defendant’s being required to represent himself, and to be advised of the consequences of self-representation.

Pleadings

(1) Fatal variance existed in theft case where State failed to allege the owner or person in lawful custody of the stolen property, (2) Award of restitution from a larceny for which defendant was acquitted was improper

[*State v. Hill*](#), ___ N.C. App. ___, 785 S.E.2d 178 (May 3, 2016). (1) Fatal variance issues not raised at trial are waived on appeal. Exercising discretion to consider one such argument with respect to a theft of

money and an iPod from a frozen yogurt shop, the court held that a fatal variance existed. The State alleged that the property belonged to Tutti Frutti, LLC, but it actually belonged to Jason Wei, the son of the sole member of that company, and the State failed to show that Tutti Frutti was in lawful custody and possession of Wei's property when it was stolen. It clarified: "there is no fatal variance between an indictment and the proof at trial if the State establishes that the alleged owner of stolen property had lawful possession and custody of the property, even if it did not actually own the property." (3) The court rejected the defendant's fatal variance argument regarding injury to real property charges, noting that the North Carolina Supreme Court recently held that an indictment charging this crime need only identify the real property, not its owner. (2) An award of restitution that included restitution from a larceny for which the defendant was acquitted was improper.

Court declines to hold citation as charging instrument to the same standard as indictments

[State v. Allen](#), ___ N.C. App. ___, 783 S.E.2d 799 (April 19, 2016). A citation charging transporting an open container of spirituous liquor was not defective. The defendant argued that the citation failed to state that he transported the fortified wine or spirituous liquor in the passenger area of his motor vehicle. The court declined the defendant's invitation to hold citations to the same standard as indictments, noting that under G.S. 15A-302, a citation need only identify the crime charged, as it did here, putting the defendant on notice of the charge. The court concluded: "Defendant was tried on the citation at issue without objection in the district court, and by a jury in the superior court on a trial *de novo*. Thus, once jurisdiction was established and defendant was tried in the district court, he was no longer in a position to assert his statutory right to object to trial on citation." (quotation omitted).

(1) Indictment charging possession of methamphetamine precursors was defective for failing to allege necessary specific intent or knowledge; (2) Indictment charging manufacturing methamphetamine was sufficient though it contained surplusage regarding how manufacturing occurred

[State v. Oxendine](#), ___ N.C. App. ___, 783 S.E.2d 286 (April 5, 2016). (1) Over a dissent, the court held that an indictment charging possession of methamphetamine precursors was defective because it failed to allege either the defendant's intent to use the precursors to manufacture methamphetamine or his knowledge that they would be used to do so. The indictment alleged only that the defendant processed the precursors in question; as such it failed to allege the necessary specific intent or knowledge. (2) An indictment charging manufacturing of methamphetamine was sufficient. The indictment alleged that the defendant "did knowingly manufacture methamphetamine." It went on to state that the manufacturing consisted of possessing certain precursor items. The latter language was surplusage; an indictment need not allege how the manufacturing occurred.

(1) Indictment charging possession of Hydrocodone as a Schedule II controlled substance was sufficient to allow jury to convict on possession of Hydrocodone as a Schedule III controlled substance after amendment; (2) Court applied same holding to an indictment charging trafficking in an opium derivative

[State v. Stith](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). (1) In this drug case, the court held, over a dissent, that an indictment charging the defendant with possessing hydrocodone, a Schedule II controlled substance, was sufficient to allow the jury to convict the defendant of possessing hydrocodone under Schedule III, based on its determination that the hydrocodone pills were under a certain weight and combined with acetaminophen within a certain ratio to bring them within Schedule III. The original indictment alleged that the defendant possessed "acetaminophen and hydrocodone

bitartrate,” a substance included in Schedule II. Hydrocodone is listed in Schedule II. However, by the start of the trial, the State realized that its evidence would show that the hydrocodone possessed was combined with a non-narcotic such that the hydrocodone is considered to be a Schedule III substance. Accordingly, the trial court allowed the State to amend the indictment, striking through the phrase “Schedule II.” At trial the evidence showed that the defendant possessed pills containing hydrocodone bitartrate combined with acetaminophen, but that the pills were of such weight and combination to bring the hydrocodone within Schedule III. The court concluded that the jury did not convict the defendant of possessing an entirely different controlled substance than what was charged in the original indictment, stating: “the original indictment identified the controlled substance ... as hydrocodone, and the jury ultimately convicted Defendant of possessing hydrocodone.” It also held that the trial court did not commit reversible error when it allowed the State to amend the indictment. The court distinguished prior cases, noting that here the indictment was not changed “such that the identity of the controlled substance was changed. Rather, it was changed to reflect that the controlled substance was below a certain weight and mixed with a non-narcotic (the identity of which was also contained in the indictment) to lower the punishment from a Class H to a Class I felony.” Moreover, the court concluded, the indictment adequately apprised the defendant of the controlled substance at issue. (2) The court applied the same holding with respect to an indictment charging the defendant with trafficking in an opium derivative, for selling the hydrocodone pills.

Indictment charging injury to real property was not fatally defective for failing to identify owner of property as a corporation or entity capable of owning property

[*State v. Spivey*](#), ___ N.C. ___, 782 S.E.2d 872 (Mar. 18, 2016). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 769 S.E.2d 841 (2015), the court reversed, holding that an indictment charging the defendant with injury to real property “of Katy’s Great Eats” was not fatally defective. The court rejected the argument that the indictment was defective because it failed to specifically identify “Katy’s Great Eats” as a corporation or an entity capable of owning property, explaining: “An indictment for injury to real property must describe the property in sufficient detail to identify the parcel of real property the defendant allegedly injured. The indictment needs to identify the real property itself, not the owner or ownership interest.” The court noted that by describing the injured real property as “the restaurant, the property of Katy’s Great Eats,” the indictment gave the defendant reasonable notice of the charge against him and enabled him to prepare his defense and protect against double jeopardy. The court also rejected the argument that it should treat indictments charging injury to real property the same as indictments charging crimes involving personal property, such as larceny, embezzlement, or injury to personal property, stating:

Unlike personal property, real property is inherently unique; it cannot be duplicated, as no two parcels of real estate are the same. Thus, in an indictment alleging injury to real property, identification of the property itself, not the owner or ownership interest, is vital to differentiate between two parcels of property, thereby enabling a defendant to prepare his defense and protect against further prosecution for the same crime. While the owner or lawful possessor’s name may, as here, be used to identify the specific parcel of real estate, it is not an essential element of the offense that must be alleged in the indictment, so long as the indictment gives defendant reasonable notice of the specific parcel of real estate he is accused of injuring.

The court further held that to the extent *State v. Lilly*, 195 N.C. App. 697 (2009), is inconsistent with its opinion, it is overruled. Finally, the court noted that although “[i]deally, an indictment for injury to real property should include the street address or other clear designation, when possible, of the real

property alleged to have been injured,” if the defendant had been confused as to the property in question, he could have requested a bill of particulars.

Statement of charges alleging disorderly conduct in or near a public building or facility sufficiently charged the offense

[*State v. Dale*](#), ___ N.C. App. ___, 783 S.E.2d 222 (Feb. 16, 2016). A statement of charges, alleging that the defendant engaged in disorderly conduct in or near a public building or facility sufficiently charged the offense. Although the statute uses the term “rude or riotous noise,” the charging instrument alleged that the defendant did “curse and shout” at police officers in a jail lobby. The court found that the charging document was sufficient, concluding that “[t]here is no practical difference between ‘curse and shout’ and ‘rude or riotous noise.’”

There was no fatal variance in an indictment where State successfully moved to amend indictment to change date of offense but neglected to actually amend the charging instrument

[*State v. Gates*](#), ___ N.C. App. ___, 781 S.E.2d 883 (Feb. 16, 2016). There was no fatal variance in an indictment where the State successfully moved to amend the indictment to change the date of the offense from May 10, 2013 to July 14, 2013 but then neglected to actually amend the charging instrument. Time was not of essence to any of the charged crimes and the defendant did not argue prejudice. Rather, he asserted that the very existence of the variance was fatal to the indictment.

(1) State was not required to prove specific case number alleged in indictment charging deterring an appearance by a State witness; (2) Two-count indictment properly charged habitual misdemeanor assault

[*State v. Barnett*](#), ___ N.C. App. ___, 784 S.E.2d 188 (Jan. 19, 2016), *review allowed*, ___ N.C. ___, 784 S.E.2d 474 (Apr. 13, 2016). (1) The State was not required to prove a specific case number alleged in an indictment charging deterring an appearance by a State witness in violation of G.S. 14-226(a). The case number was not an element of the offense and the allegation was mere surplusage. (2) A two-count indictment properly alleged habitual misdemeanor assault. Count one alleged assault on a female, alleging among other things that the defendant’s conduct violated G.S. 14-33 and identifying the specific injury to the victim. The defendant did not contest the validity of this count. Instead, he argued that count two, alleging habitual misdemeanor assault, was defective because it failed to allege a violation of G.S. 14-33 and that physical injury had occurred. Finding that *State v. Lobohe*, 143 N.C. App. 555 (2001) (habitual impaired driving case following the format of the indictment at issue in this case) was controlling, the court held that the indictment complied with G.S. 15A-924 & -928.

Obtaining property by false pretense indictment alleging defendant obtained “a quantity of U.S. currency” from victim was not defective

[*State v. Ricks*](#), ___ N.C. App. ___, 781 S.E.2d 637 (Jan. 5, 2016). Over a dissent, the court held that an obtaining property by false pretenses indictment was not defective where it alleged that the defendant obtained “a quantity of U.S. currency” from the victim. The court found that G.S. 15-149 (allegations regarding larceny of money) supported its holding.

Discovery

Expert testimony about general characteristics of child sexual assault victims and possible reasons for delayed reporting of such allegations is expert testimony subject to disclosure in discovery under G.S. 15A-903(a)(2)

[*State v. Davis*](#), __ N.C. __, __ S.E.2d __ (April 15, 2016). Modifying and affirming the unanimous decision of the Court of Appeals below, __ N.C. App. __, 768 S.E.2d 903 (2015), in this child sexual assault case, the court held that expert testimony about general characteristics of child sexual assault victims and the possible reasons for delayed reporting of such allegations is expert opinion testimony subject to disclosure in discovery under G.S. 15A-903(a)(2). The court rejected the State's argument that because its witnesses did not give expert opinion testimony and only testified to facts, the discovery requirements of G.S. 15A-903(a)(2) were not triggered. Recognizing "that determining what constitutes expert opinion testimony requires a case-by-case inquiry in which the trial court (or a reviewing court) must look at the testimony as a whole and in context," the court concluded that the witnesses gave expert opinions that should have been disclosed in discovery. Specifically, both offered expert opinion testimony about the characteristics of sexual abuse victims. In this respect, their testimony went beyond the facts of the case and relied on inferences by the experts to reach the conclusion that certain characteristics are common among child sexual assault victims. Similarly, both offered expert opinion testimony explaining why a child victim might delay reporting abuse. Here again the experts drew inferences and gave opinions explaining that these and other unnamed patients had been abuse victims and delayed reporting the abuse for various reasons. The court continued: "These views presuppose (*i.e.*, opine) that the other children the expert witnesses observed had actually been abused. These are not factual observations; they are expert opinions." However, the court found that the defendant failed to show that the error was prejudicial.

Prosecution's failure to disclose material evidence violated defendant's due process rights

[*Wearry v. Cain*](#), 577 U.S. __, 136 S. Ct. 1002 (Mar. 7, 2016) (per curiam). In this capital case, the prosecution's failure to disclose material evidence violated the defendant's due process rights. At trial the defendant unsuccessfully raised an alibi defense and was convicted. The case was before the Court after the defendant's unsuccessful post-conviction *Brady* claim. Three pieces of evidence were at issue. First, regarding State's witness Scott, the prosecution withheld police records showing that two of Scott's fellow inmates had made statements that cast doubt on Scott's credibility. One inmate reported hearing Scott say that he wanted to make sure the defendant got "the needle cause he jacked over me." The other inmate told investigators that he had witnessed the murder. However, he recanted the next day, explaining that "Scott had told him what to say" and had suggested that lying about having witnessed the murder "would help him get out of jail." Second, regarding State's witness Brown, the prosecution failed to disclose that, contrary to its assertions at trial that Brown, who was serving a 15-year sentence, "hasn't asked for a thing," Brown had twice sought a deal to reduce his existing sentence in exchange for his testimony. And third, the prosecution failed to turn over medical records on Randy Hutchinson. According to Scott, on the night of the murder, Hutchinson had run into the street to flag down the victim, pulled the victim out of his car, shoved him into the cargo space, and crawled into the cargo space himself. But Hutchinson's medical records revealed that, nine days before the murder, Hutchinson had undergone knee surgery to repair a ruptured patellar tendon. An expert witness testified at the state collateral-review hearing that Hutchinson's surgically repaired knee could not have withstood running, bending, or lifting substantial weight. The State presented an expert witness who

disagreed regarding Hutchinson's physical fitness. Concluding that the state court erred by denying the defendant's *Brady* claim, the Court stated: "Beyond doubt, the newly revealed evidence suffices to undermine confidence in [the defendant's] conviction. The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than [the defendant's] alibi." It continued: "Even if the jury—armed with all of this new evidence—could have voted to convict [the defendant], we have no confidence that it would have done so." (quotations omitted). It further found that in reaching the opposite conclusion, the state post-conviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively, emphasized reasons a juror might disregard new evidence while ignoring reasons she might not, and failed even to mention the statements of the two inmates impeaching Scott.

Jury Issues: Selection, Instructions, and Deliberations

Court found purposeful discrimination in State's exercise of two peremptory challenges to strike Black prospective jurors

[*Foster v. Chatman*](#), 578 U.S. ____ (May 23, 2016). The Court reversed this capital murder case, finding that the State's "[t]wo peremptory strikes on the basis of race are two more than the Constitution allows." The defendant was convicted of capital murder and sentenced to death in a Georgia court. Jury selection proceeded in two phases: removals for cause and peremptory strikes. The first phase whittled the list of potential jurors down to 42 "qualified" prospective jurors. Five were black. Before the second phase began, one of the black jurors—Powell—informed the court that she had just learned that one of her close friends was related to the defendant; she was removed, leaving four black prospective jurors: Eddie Hood, Evelyn Hardge, Mary Turner, and Marilyn Garrett. The State exercised nine of its ten allotted peremptory strikes, removing all four of the remaining black prospective jurors. The defendant immediately lodged a *Batson* challenge. The trial court rejected the objection and empaneled the jury. The jury convicted the defendant and sentenced him to death. After the defendant unsuccessfully pursued his *Batson* claim in the Georgia courts, the U.S. Supreme Court granted certiorari. Before the Court, both parties agreed that the defendant demonstrated a prima facie case and that the prosecutor had offered race-neutral reasons for the strikes. The Court therefore addressed only *Batson*'s third step, whether purposeful discrimination was shown. The defendant focused his claim on the strikes of two black prospective jurors, Marilyn Garrett and Eddie Hood. With respect Garrett, the prosecutor had told the trial court that Garrett was "listed" by the prosecution as "questionable" and its strike of her was a last-minute race-neutral decision. However, evidence uncovered after the trial showed this statement to be false; the evidence showed that the State had specifically identified Garrett in advance as a juror to strike. In fact, she was on a "definite NO's" list in the prosecution's file. The Court rejected attempts by the State "to explain away the contradiction between the 'definite NO's' list and [the prosecutor's] statements to the trial court as an example of a prosecutor merely 'misspeak[ing].'" Regarding Hood, the Court noted that "[a]s an initial matter the prosecution's principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual." It further found that the State's asserted justifications for striking Hood "cannot be credited." In the end, the Court found that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury."

(1) Trial court did not err by sustaining the State’s reverse *Batson* challenge; (2) State’s closing argument that defendant had killed a named witness was not grossly improper

[*State v. Hurd*](#), ___ N.C. App. ___, 784 S.E.2d 528 (Mar. 15, 2016). (1) In this capital murder case involving an African American defendant and victims, the trial court did not err by sustaining the State’s reverse *Batson* challenge. The defendant exercised 11 peremptory challenges, 10 against white and Hispanic jurors. The only black juror that the defendant challenged was a probation officer. The defendant’s acceptance rate of black jurors was 83%; his acceptance rate for white and Hispanic jurors was 23%. When the State raised a *Batson* challenge, defense counsel explained that he struck the juror in question, Juror 10, a white male, because he indicated that he favored capital punishment as a matter of disposition. Yet, the court noted, that juror also stated that being in the jury box made him “stop and think” about the death penalty, that he did not have strong feelings for or against the death penalty, and he considered the need for facts to support a sentence. Also, the defendant accepted Juror 8, a black female, whose views were “strikingly similar” to those held by Juror 10. Additionally, the defendant had unsuccessfully filed a pretrial motion to prevent the State from exercising peremptory strikes against any prospective black jurors. This motion was not made in response to any discriminatory action of record and was made in a case that is not inherently susceptible to racial discrimination. In light of the record, the court concluded that the trial court did not err by sustaining the State’s *Batson* objection. (2) The State’s closing argument in this capital murder case was not grossly improper. During closing the prosecutor argued that the defendant had killed a named witness. Because the State introduced testimony of two witnesses that the defendant had told them that he had killed the only witness who could put them in the relevant location at the time of the murder, the State’s argument was not grossly improper.

Trial court did not commit plain error giving in jury instruction that required State to prove element not required by statute because defendant did not suffer prejudice

[*State v. Dale*](#), ___ N.C. App. ___, 783 S.E.2d 222 (Feb. 16, 2016). The trial court did not commit plain error in instructing the jury on disorderly conduct in a public building or facility where it required the State to prove an element not required by the statute (that the “utterance, gesture or abusive language that was intended and plainly likely to provoke violent retaliation, and thereby caused a breach of the peace”). Because the State had to prove more than was required to obtain a conviction, the defendant did not suffer prejudice.

Trial court erred by failing to exercise discretion in connection with jury’s request to review certain testimony

[*State v. Chapman*](#), ___ N.C. App. ___, 781 S.E.2d 320 (Jan. 5, 2016). Although the trial court erred by failing to exercise discretion in connection with the jury’s request to review certain testimony, the defendant failed to show prejudice. In this armed robbery case, during deliberations the jury sent a note to the trial court requesting several items, including a deputy’s trial testimony. The trial court refused the request on grounds that the transcript was not currently available. This explanation was “indistinguishable from similar responses to jury requests that have been found by our Supreme Court to demonstrate a failure to exercise discretion.” However, the court went on to find that no prejudice occurred.

Other Procedural Issues

Speedy trial clause does not generally apply to sentencing phase of criminal prosecution, but court did not decide whether it applies in bifurcated proceedings or upon renewed prosecution following a defendant's successful appeal

[*Betterman v. Montana*](#), 578 U.S. ___, 136 S. Ct. 1609 (May 19, 2016). The Sixth Amendment's speedy trial guarantee does not apply to the sentencing phase of a criminal prosecution. After pleading guilty to bail-jumping, the defendant was jailed for over 14 months awaiting sentence on that conviction. The defendant argued that the 14-month gap between conviction and sentencing violated his speedy trial right. Resolving a split among the courts on the issue, the Court held:

[T]he guarantee protects the accused from arrest or indictment through trial, but does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges. For inordinate delay in sentencing, although the Speedy Trial Clause does not govern, a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments.

The Court reserved on the question of whether the speedy trial clause "applies to bifurcated proceedings in which, at the sentencing stage, facts that could increase the prescribed sentencing range are determined (e.g., capital cases in which eligibility for the death penalty hinges on aggravating factor findings)." Nor did it decide whether the speedy trial right "reattaches upon renewed prosecution following a defendant's successful appeal, when he again enjoys the presumption of innocence."

Defendant was not denied right to speedy trial despite more than three-year delay between indictment and trial

[*State v. Kpaeyeh*](#), ___ N.C. App. ___, 784 S.E.2d 582 (April 5, 2016). In this child sexual abuse case, the defendant was not denied his right to a speedy trial. The more than three-year delay between indictment and trial is sufficiently long to trigger analysis of the remaining speedy trial factors. Considering those factors, the court found that the evidence "tends to show that the changes in the defendant's representation caused much of the delay" and that miscommunication between the defendant and his first two lawyers, or neglect by these lawyers, also "seems to have contributed to the delay." Also, although the defendant made pro se assertions of a speedy trial right, he was represented at the time and these requests should have been made by counsel. The court noted, however, that the defendant's "failure of process does not equate to an absence of an intent to assert his constitutional right to a speedy trial." Finally, the defendant failed to show prejudice caused by the delay. Given that DNA testing confirmed that he was the father of a child born to the victim, the defendant's argument that the delay hindered his ability to locate alibi witnesses failed to establish prejudice.

Trial court's disjunctive jury instructions did not violate defendant's right to be convicted by unanimous verdict; evidence was sufficient to support jury finding that defendant kidnapped victim in order to facilitate assault on victim

[*State v. Walters*](#), ___ N.C. ___, 782 S.E.2d 505 (Mar. 18, 2016). On discretionary review from a unanimous unpublished Court of Appeals decision, the court reversed in part, concluding that the trial court's jury instructions regarding first-degree kidnapping did not violate the defendant's constitutional right to be convicted by a unanimous verdict. The trial court instructed the jury, in part, that to convict

the defendant it was required to find that he removed the victim for the purpose of facilitating commission of *or* flight after committing a specified felony assault. The defendant was convicted and appealed arguing that the disjunctive instruction violated his right to a unanimous verdict. Citing its decision in *State v. Bell*, 359 N.C. 1, 29-30, the Supreme Court disagreed, stating: “our case law has long embraced a distinction between unconstitutionally vague instructions that render unclear the offense for which the defendant is being convicted and instructions which instead permissibly state that more than one specific act can establish an element of a criminal offense.” It also found that, contrary to the opinion below, the evidence was sufficient to support a jury finding that the defendant had kidnapped the victim in order to facilitate an assault on the victim.

(1) Following a mistrial, the law of the case doctrine did not apply to bind a second trial judge to a first trial judge’s suppression ruling; (2) Following a mistrial, the rule that one trial judge cannot overrule another did not preclude the second trial judge from ruling on the suppression issue in this case; (3) Collateral estoppel did not bar the state from relitigating the suppression issue

[*State v. Knight*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). (1) The court rejected the defendant’s argument that on a second trial after a mistrial the second trial judge was bound by the first trial judge’s suppression ruling under the doctrine of law of the case. The court concluded that doctrine only applies to an appellate ruling. However, the court noted that another version of the doctrine provides that when a party fails to appeal from a tribunal’s decision that is not interlocutory, the decision below becomes law of the case and cannot be challenged in subsequent proceedings in the same case. However, the court held that this version of the doctrine did not apply here because the suppression ruling was entered during the first trial and thus the State had no right to appeal it. Moreover, when a defendant is retried after a mistrial, prior evidentiary rulings are not binding. (2) The court rejected the defendant’s argument that the second judge’s ruling was improper because one superior court judge cannot overrule another, noting that once a mistrial was declared, the first trial court’s ruling no longer had any legal effect. (3) The court rejected the defendant’s argument that collateral estoppel barred the State from relitigating the suppression issue, noting that doctrine applies only to an issue of ultimate fact determined by a final judgment.

Defendant waived assertion of error regarding shackling at trial by failing to object at trial

[*State v. Sellers*](#), ___ N.C. App. ___, 782 S.E.2d 86 (Feb. 16, 2016). By failing to object at trial, the defendant waived assertion of any error regarding shackling on appeal. The defendant argued that the trial court violated G.S. 15A-1031 by allowing him to appear before the jury in leg shackles and erred by failing to issue a limiting instruction. The court found the issue waived, noting that “other structural errors similar to shackling are not preserved without objection at trial.” However it continued:

Nevertheless, trial judges should be aware that a decision by a sheriff to shackle a problematic criminal defendant in a jail setting or in transferring a defendant from the jail to a courtroom, is not, without a trial court order supported by adequate findings of fact, sufficient to keep a defendant shackled during trial. Failure to enter such an order can, under the proper circumstances, result in a failure of due process.

No violation of double jeopardy occurred where defendant was convicted of attempted larceny and attempted common law robbery charges arising out of the same incident but involving different victims

[*State v. Miller*](#), ___ N.C. App. ___, 782 S.E.2d 328 (Feb. 2, 2016). No violation of double jeopardy occurred where the defendant was convicted of attempted larceny and attempted common law robbery when the offenses arose out of the same incident but involved different victims. The defendant committed the attempted larceny upon entering the home in question with the intent of taking and carrying away a resident's keys; he committed the attempted common law robbery when he threatened the resident's granddaughter with box cutters in an attempt to take and carry away the keys.

***Miller v. Alabama* announced a substantive rule of constitutional law and therefore applies retroactively to juvenile offenders whose convictions and sentences were final when *Miller* was decided**

[*Montgomery v. Louisiana*](#), 577 U.S. ___, 136 S. Ct. 718 (Jan. 25, 2016). *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012) (holding that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances), applied retroactively to juvenile offenders whose convictions and sentences were final when *Miller* was decided. A jury found defendant Montgomery guilty of murdering a deputy sheriff, returning a verdict of "guilty without capital punishment." Under Louisiana law, this verdict required the trial court to impose a sentence of life without parole. Because the sentence was automatic upon the jury's verdict, Montgomery had no opportunity to present mitigation evidence to justify a less severe sentence. That evidence might have included Montgomery's young age at the time of the crime; expert testimony regarding his limited capacity for foresight, self-discipline, and judgment; and his potential for rehabilitation. After the Court decided *Miller*, Montgomery, now 69 years old, sought collateral review of his mandatory life without parole sentence. Montgomery's claim was rejected by Louisiana courts on grounds the *Miller* was not retroactive. The Supreme Court granted review and reversed. The Court began its analysis by concluding that it had jurisdiction to address the issue. Although the parties agreed that the Court had jurisdiction to decide this case, the Court appointed an amicus curiae to brief and argue the position that the Court lacked jurisdiction; amicus counsel argued that the state court decision does not implicate a federal right because it only determined the scope of relief available in a particular type of state proceeding, which is a question of state law. On the issue of jurisdiction, the Court held:

[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.

Teague's conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. This holding is limited to *Teague's* first exception for substantive rules; the constitutional status of *Teague's* exception for watershed rules of procedure need not be addressed here.

Turning to the issue of retroactivity, the Court held that *Miller* announced a new substantive rule that applies retroactively to cases on collateral review. The Court explained: "*Miller* ... did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" The Court continued:

Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'" Because *Miller* determined that

sentencing a child to life without parole is excessive for all but “the rare juvenile offender whose crime reflects irreparable corruption,” it rendered life without parole an unconstitutional penalty for “a class of defendants because of their status”—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it “necessarily carr[ies] a significant risk that a defendant”—here, the vast majority of juvenile offenders—“faces a punishment that the law cannot impose upon him.” (citations omitted).

The Court went on to reject the State’s argument that *Miller* is procedural because it did not place any punishment beyond the State’s power to impose, instead requiring sentencing courts to take children’s age into account before sentencing them to life in prison. The Court noted: “*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” It explained: “Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence.” Noting that *Miller* “has a procedural component,” the Court explained that “a procedural requirement necessary to implement a substantive guarantee” cannot transform a substantive rule into a procedural one. It continued, noting that the hearing where “youth and its attendant characteristics” are considered as sentencing factors “does not replace but rather gives effect to *Miller*’s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.”

Evidence

Confrontation Clause

Defendant’s confrontation rights were violated by admission of anonymous 911 call and dispatcher’s call back

[*State v. McKiver*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 17, 2016). In this felon in possession case, the court held that the defendant’s confrontation rights were violated when the trial court admitted testimonial evidence of an anonymous 911 call and the 911 dispatcher’s call back. The anonymous 911 caller stated that a black man was outside with a gun and that there was a possible dispute. When the dispatcher asked whether the person in question was pointing a gun at anyone, the caller responded “I don’t know.” The dispatcher also asked whether the caller heard anything, such as arguments, and the caller responded in the negative. When the dispatcher asked whether the caller wanted the dispatcher to stay on the line until police arrived the caller responded, “No, I’ll be fine.” Officer Bramley, who responded to the scene, testified that when he arrived he did not see a black man with a gun. Bramley contacted the 911 dispatcher and asked the dispatcher to initiate a call back to get a better description of the suspect. The dispatcher did so and reported that the caller stated that “it was in the field in a black car “ and that “[s]omeone said he might have thrown the gun.” Officers eventually found the gun in question approximately 10 feet away from a black vehicle. When Bramley asked the dispatcher whether the caller provided a description of the suspect, the dispatcher replied, “black male, light plaid shirt.” Bramley connected this description to the defendant, who he had seen upon his arrival. The court concluded:

Our review of the record demonstrates that the circumstances surrounding both the initial 911 call and the dispatcher’s subsequent call back objectively indicate that no ongoing emergency existed. Indeed, even before ... officers arrived on the scene, the

anonymous caller's statements during her initial 911 call—that she did not know whether the man with the gun was pointing his weapon at or even arguing with anyone; that she was inside and had moved away from the window to a position of relative safety; and that she did not feel the need to remain on the line with authorities until help could arrive—make clear that she was not facing any bona fide physical threat. Moreover, [Officer] Bramley [testified] that when he arrived ..., the scene was “pretty quiet” and “pretty calm.” Although it was dark, ... officers had several moments to survey their surroundings, during which time Bramley encountered [the defendant] and determined that he was unarmed. While the identity and location of the man with the gun were not yet known to the officers when Bramley requested the dispatcher to initiate a call back, our Supreme Court has made clear that this fact alone does not in and of itself create an ongoing emergency and there is no other evidence in the record of circumstances suggesting that an ongoing emergency existed at that time. We therefore conclude the statements made during the initial 911 call were testimonial in nature.

We reach the same conclusion regarding the statements elicited by the dispatcher's call back concerning what kind of shirt the caller saw the man with the gun wearing and the fact that someone saw the man drop the gun. Because these statements described past events rather than what was happening at the time and were not made under circumstances objectively indicating an ongoing emergency, we conclude that they were testimonial and therefore inadmissible. (quotation and citation omitted).

The court went on to reject the State's argument that this error was harmless.

No confrontation clause violation occurred where child sexual assault victim's statements were made for the primary purpose of obtaining a medical diagnosis and were therefore nontestimonial

[*State v. McLaughlin*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this child sexual assault case, no confrontation clause violation occurred where the victim's statements were made for the primary purpose of obtaining a medical diagnosis. After the victim revealed the sexual conduct to his mother, he was taken for an appointment at a Children's Advocacy Center where a registered nurse conducted an interview, which was videotaped. During the interview, the victim recounted, among other things, details of the sexual abuse. A medical doctor then conducted a physical exam. A DVD of the victim's interview with the nurse was admitted at trial. The court held that the victim's statements to the nurse were nontestimonial, concluding that the primary purpose of the interview was to safeguard the mental and physical health of the child, not to create a substitute for in-court testimony. Citing *Clark*, the court rejected the defendant's argument that state law requiring all North Carolinians to report suspected child abuse transformed the interview into a testimonial one.

Expert Opinion Testimony

Error to prevent defendant from inquiring into the compensation of the State's expert witness

[*State v. Singletary*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). The trial court erred by preventing the defendant from making any inquiry into the compensation paid to the State's expert witness. “The source and amount of a fee paid to an expert witness is a permissible topic for cross-examination, as it

allows the opposing party to probe the witnesses' partiality, if any, towards the party by whom the expert was called." However, the defendant failed to show "harmful prejudice."

Defendant did not establish plain error with respect to claim that State's expert vouched for credibility of child sexual assault victim

[*State v. Watts*](#), ___ N.C. App. ___, 783 S.E.2d 266 (April 5, 2016), *temporary stay allowed*, ___ N.C. ___, 783 S.E.2d 747 (Apr. 13, 2016). The defendant did not establish plain error with respect to his claim that the State's expert vouched for the credibility of the child sexual assault victim. The expert testified regarding the victim's bruises and opined that they were the result of blunt force trauma; when asked whether the victim's account of the assault was consistent with her medical exam, she responded that the victim's "disclosure supports the physical findings." This testimony did not improperly vouch for the victim's credibility and amount to plain error. Viewed in context, the expert was not commenting on the victim's credibility; rather she opined that the victim's disclosure was not inconsistent with the physical findings or impossible given the physical findings.

Amended Evidence Rule 702 did not apply to case where defendant was indicted prior to date on which amendments were effective

[*State v. McLaughlin*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this child sexual assault case, the trial court rejected the defendant's argument that the State's expert witness was not qualified to give testimony under amended Rule 702. Because the defendant was indicted on April 11, 2011, the amendments to Rule 702 do not apply to his case.

Other Evidence Issues

Trial court did not err by failing to exclude testimony of two law enforcement officers who identified defendant in a surveillance video

[*State v. Hill*](#), ___ N.C. App. ___, 785 S.E.2d 178 (May 3, 2016). In this case involving breaking and entering, larceny and other charges, the trial court did not err by failing to exclude the testimony of two law enforcement officers who identified the defendant in a surveillance video. The officers were familiar with the defendant and recognized distinct features of his face, posture, and gait that would not have been evident to the jurors. Also, because the defendant's appearance had changed between the time of the crimes and the date of trial, the officer's testimony helped the jury understand his appearance at the time of the crime and its similarity to the person in the surveillance videos.

Trial court did not err by admitting staged photographs as visual aids to the testimony of an expert in crash investigation

[*State v. Moultry*](#), ___ N.C. App. ___, 784 S.E.2d 572 (April 5, 2016). In this case involving second-degree murder arising out of a vehicle collision, the trial court did not err by admitting staged photographs into evidence. An expert in crash investigation and reconstruction explained to the jury, without objection, how the accident occurred. The photographs were relevant as visual aids to this testimony. Furthermore, the trial court gave a limiting instruction explaining that the photographs were only to be used for the purpose of illustrating the witness's testimony.

In a child sexual assault case, the trial court committed reversible error by admitting 404(b) evidence of allegations of another person that resulted in defendant being charged with rape and breaking or entering, charges which were later dismissed

[*State v. Watts*](#), ___ N.C. App. ___, 783 S.E.2d 266 (April 5, 2016), *temporary stay allowed*, ___ N.C. ___, 783 S.E.2d 747 (Apr. 13, 2016). In this child sexual assault case, the court held, over a dissent, that the trial court committed reversible error by admitting 404(b) evidence. The evidence involved allegations by another person—Buffkin—that resulted in the defendant being charged with rape and breaking or entering, charges which were later dismissed. The court held that the trial court erred by determining that the evidence was relevant to show opportunity, explaining: “there is no reasonable possibility that Buffkin’s testimony concerning an alleged sexual assault eight years prior was relevant to show defendant’s opportunity to commit the crimes now charged.” The court further found that the evidence was not sufficiently similar to show common plan or scheme. The similarities noted by the trial court-- that both instances involved sexual assaults of minors who were alone at the time, the defendant was an acquaintance of both victims, the defendant’s use of force, and that the defendant threatened to kill each minor and the minor’s family--were not “unusual to the crimes charged.” Moreover, “the trial court’s broad labeling of the similarities disguises significant differences in the sexual assaults,” including the ages of the victims, the circumstances of the offenses, the defendant’s relationships with the victims, and that a razor blade was used in the Buffkin incident but that no weapon was used in the incident in question.

Victim’s statement that she “was scared of” defendant was admissible under the Rule 803(3) state of mind hearsay exception

[*State v. Cook*](#), ___ N.C. App. ___, 782 S.E.2d 569 (Mar. 15, 2016). In this murder case, the trial court did not err by admitting hearsay testimony under the Rule 803(3) state of mind hearsay exception. The victim’s statement that she “was scared of” the defendant unequivocally demonstrated her state of mind and was highly relevant to show the status of her relationship with the defendant on the night before she was killed.

In a child sexual assault case, trial court did not err by admitting victim’s statements to his mother as excited utterances despite 10-day gap between last incident of sexual abuse and the victim’s statement

[*State v. McLaughlin*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this child sexual assault case, the trial court did not err by admitting the victim’s statements to his mother under the excited utterance exception. The court rejected the defendant’s argument that a 10-day gap between the last incident of sexual abuse and the victim’s statements to his mother put them outside the scope of this exception. The victim made the statements immediately upon returning home from a trip to Florida; his mother testified that when the victim arrived home with the defendant, he came into the house “frantically” and was “shaking” while telling her that she had to call the police. The court noted that greater leeway with respect to timing is afforded to young victims and that the victim in this case was 15 years old. However it concluded: “while this victim was fifteen rather than four or five years of age, he was nevertheless a minor and that fact should not be disregarded in the analysis.” The court also rejected the defendant’s argument that because the victim had first tried to communicate with his father by email about the abuse, his later statements to his mother should not be considered excited utterances.

(1) In an involuntary manslaughter case involving a dog attack, the trial court did not err by admitting recording of defendant performing rap song which was introduced by the State to prove defendant knew his dog was vicious; (2) Trial court did not err by admitting screenshots of defendant's webpage over defendant's objection that the evidence was not properly authenticated; (3) Trial court did not commit plain error by allowing a pathologist to opine that victim's death was caused by dog bites

State v. Ford, ___ N.C. App. ___, 782 S.E.2d 98 (Feb. 16, 2016). In this involuntary manslaughter case, where the defendant's pit bull attacked and killed the victim, the trial court did not err by admitting a rap song recording into evidence. The defendant argued that the song was irrelevant and inadmissible under Rule 403, in that it contained profanity and racial epithets which offended and inflamed the jury's passions. The song lyrics claimed that the victim was not killed by a dog and that the defendant and the dog were scapegoats for the victim's death. The song was posted on social media and a witness identified the defendant as the singer. The State offered the song to prove that the webpage in question was the defendant's page and that the defendant knew his dog was vicious and was proud of that characteristic (other items posted on that page declared the dog a "killa"). The trial court did not err by determining that the evidence was relevant for the purposes offered. Nor did it err in determining that probative value was not substantially outweighed by prejudice. (2) The trial court did not err by admitting as evidence screenshots from the defendant's webpage over the defendant's claim that the evidence was not properly authenticated. The State presented substantial evidence that the website was actually maintained by the defendant. Specifically, a detective found the MySpace page in question with the name "Flexugod/7." The page contained photos of the defendant and of the dog allegedly involved in the incident. Additionally, the detective found a certificate awarded to the defendant on which the defendant is referred to as "Flex." He also found a link to a YouTube video depicting the defendant's dog. This evidence was sufficient to support a prima facie showing that the MySpace page was the defendant's webpage. It noted: "While tracking the webpage directly to defendant through an appropriate electronic footprint or link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique content belong to defendant." (3) The trial court did not commit plain error by allowing a pathologist to opine that the victim's death was due to dog bites. The court rejected the defendant's argument that the expert was in no better position than the jurors to speculate as to the source of the victim's puncture wounds.

(1) A recitation from an air pistol manual regarding the velocity capability of the pistol was not offered for the truth of the matter asserted but rather was offered to explain a detective's conduct when conducting a test fire; (2) Trial court did not err by admitting videotape showing detective's experimental test firing the air pistol

State v. Chapman, ___ N.C. App. ___, 781 S.E.2d 320 (Jan. 5, 2016). (1) In this armed robbery case, the statement at issue was not hearsay because it was not offered for the truth of the matter asserted. At trial one issue was whether an air pistol used was a dangerous weapon. The State offered a detective who performed a test fire on the air pistol. He testified that he obtained the manual for the air pistol to understand its safety and operation before conducting the test. He testified that the owner's manual indicated that the air pistol shot BBs at a velocity of 440 feet per second and had a danger distance of 325 yards. He noted that he used this information to conduct the test fire in a way that would avoid injury to himself. The defendant argued that this recitation from the manual was offered to prove that the gun was a dangerous weapon. The court concluded however that this statement was offered for a proper non-hearsay purpose: to explain the detective's conduct when performing the test fire. (2) The trial court did not err by admitting a videotape showing a detective test firing the air pistol in question.

The State was required to establish that the air pistol was a dangerous weapon for purposes of the armed robbery charge. The videotape showed a detective performing an experiment to test the air pistol's shooting capabilities. Specifically, it showed him firing the air pistol four times into a plywood sheet from various distances. While experimental evidence requires substantial similarity, it does not require precise reproduction of the circumstances in question. Here, the detective used the weapon employed during the robbery and fired it at a target from several close-range positions comparable to the various distances from which the pistol had been pointed at the victim. The detective noted the possible dissimilarity between the amount of gas present in the air cartridge at the time of the robbery and the amount of gas contained within the new cartridge used for the experiment, acknowledging the effect the greater air pressure would have on the force of a projectile and its impact on a target.

(1) In sexual assault case, trial court did not err by admitting, under Rule 404(b), evidence that defendant engaged in hazing techniques against high school wrestlers he coached; (2) Trial court did not abuse its discretion by admitting hazing testimony under Rule 403; (3) Trial court erred by excluding evidence that one victim was biased on basis that evidence was irrelevant because it did not fit into an exception to the Rape Shield Statute; (4) Trial court abused its discretion by excluding the bias evidence under Rule 403; (5) Trial court's errors were not prejudicial

State v. Goins, ___ N.C. App. ___, 781 S.E.2d 45 (Dec. 15, 2015). (1) In this sexual assault case involving allegations that the defendant, a high school wrestling coach, sexually assaulted wrestlers, the trial court did not err by admitting, under Rule 404(b), evidence that the defendant engaged in hazing techniques against his wrestlers. The evidence involved testimony from wrestlers that the defendant choked-out and gave extreme wedgies to his wrestlers, and engaged in a variety of hazing activity, including instructing upperclassmen to apply muscle cream to younger wrestlers' genitals and buttocks. The evidence was properly admitted to show that the defendant engaged in "grooming behavior" to prepare his victims for sexual activity. The court so concluded even though the hazing techniques were not overtly sexual or pornographic, noting: "when a defendant is charged with a sex crime, 404(b) evidence ... does not necessarily need to be limited to other instances of sexual misconduct." It concluded: "the hazing testimony tended to show that Defendant exerted great physical and psychological power over his students, singled out smaller and younger wrestlers for particularly harsh treatment, and subjected them to degrading and often quasi-sexual situations. Whether sexual in nature or not, and regardless of whether some wrestlers allegedly were not victimized to the same extent as the complainants, the hazing testimony had probative value beyond the question of whether Defendant had a propensity for aberrant behavior (quotations and citations omitted)." (2) The trial court did not abuse its discretion by admitting the hazing testimony under Rule 403, given that the evidence was "highly probative" of the defendant's intent, plan, or scheme to carry out the charged offenses. The court noted however "that the State eventually could have run afoul of Rule 403 had it continued to spend more time at trial on the hazing testimony or had it elicited a similar amount of 404(b) testimony on ancillary, prejudicial matters that had little or no probative value regarding the Defendant's guilt" (citing *State v. Hembree*, 367 N.C. 2 (2015) (new trial where in part because the trial court "allow[ed] the admission of an excessive amount" of 404(b) evidence regarding "a victim for whose murder the accused was not currently being tried")). However, the court concluded that did not occur here. (3) The trial court erred by excluding evidence that one of the victims was biased. The defendant sought to introduce evidence showing that the victim had a motive to falsely accuse the defendant. The trial court found the evidence irrelevant because it did not fit within one of the exceptions of the Rape Shield Statute. The court concluded that this was error, noting that the case was "indistinguishable" "in any meaningful way" from *State v. Martin*, ___ N.C. App. ___, 774 S.E.2d 330 (2015) (trial court erred by concluding that evidence was per se inadmissible because it did not fall within one of the Rape Shield Statute's exceptions). (4) The trial court abused its discretion

by excluding the bias evidence under Rule 403, because the evidence in question had a direct relationship to the incident at issue. Here, the defendant did not seek to introduce evidence of completely unrelated sexual conduct at trial. Instead, the defendant sought to introduce evidence that the victim told “police and his wife that he was addicted to porn . . . [and had] an extramarital affair[,] . . . [in part] because of what [Defendant] did to him.” The defendant sought to use this evidence to show that the victim “had a reason to fabricate his allegations against Defendant – to mitigate things with his wife and protect his military career.” Thus, there was a direct link between the proffered evidence and the incident in question. (5) The court went on to hold, however, that because of the strong evidence of guilt, no prejudice resulted from the trial court’s errors.

Reversing Court of Appeals, Supreme Court held that State properly authenticated surveillance video from a department store in a larceny case through testimony of regional loss prevention manager

[*State v. Snead*](#), ___ N.C. ___, 783 S.E.2d 733 (April 15, 2016). Reversing a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 344 (2015), the court held, in this larceny case, that the State properly authenticated a surveillance video showing the defendant stealing shirts from a Belk department store. At trial Toby Steckler, a regional loss prevention manager for the store, was called by the State to authenticate the surveillance video. As to his testimony, the court noted:

Steckler established that the recording process was reliable by testifying that he was familiar with how Belk’s video surveillance system worked, that the recording equipment was “industry standard,” that the equipment was “in working order” on [the date in question], and that the videos produced by the surveillance system contain safeguards to prevent tampering. Moreover, Steckler established that the video introduced at trial was the same video produced by the recording process by stating that the State’s exhibit at trial contained exactly the same video that he saw on the digital video recorder. Because defendant made no argument that the video had been altered, the State was not required to offer further evidence of chain of custody. Steckler’s testimony, therefore, satisfied Rule 901, and the trial court did not err in admitting the video into evidence.

The court also held that the defendant failed to preserve for appellate review whether Steckler’s lay opinion testimony based on the video was admissible.

Crimes

Generally

Evidence was sufficient to support conviction for unlawfully entering property operated as a domestic violence safe house where defendant attempted to open shelter’s locked door

[*State v. Williams*](#), ___ N.C. App. ___, 784 S.E.2d 232 (April 19, 2016). The evidence was sufficient to support the defendant’s conviction of unlawfully entering property operated as a domestic violence safe house by one subject to a protective order in violation of G.S. 50B-4.1(g1). The evidence showed that the defendant drove his vehicle to shelter, parked his car in the lot and walked to the front door of the building. He attempted to open the door by pulling on the door handle, only to discover that it was locked. The court rejected the defendant’s argument that the State was required to prove that he actually entered the shelter building. The statute in question uses the term “property,” an undefined

statutory term. However by its plain meaning, this term is not limited to buildings or other structures but also encompasses the land itself.

(1) Trial court did not err by denying defendant's motion to dismiss charge of obtaining property by false pretenses where evidence showed that defendant represented that he was lawful owner of stolen electrical wire in process of selling it as scrap; (2) Trial court erred by instructing jury on acting in concert where all evidence showed that defendant was the sole perpetrator of the crime

State v. Hallum, ___ N.C. App. ___, 783 S.E.2d 294 (April 5, 2016). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of obtaining property by false pretenses. The indictment alleged that the defendant obtained US currency by selling to a company named BIMCO electrical wire that was falsely represented not to have been stolen. The defendant argued only that there was insufficient evidence that his false representation in fact deceived any BIMCO employee. He argued that the evidence showed that BIMCO employees were indifferent to legal ownership of scrap metal purchased by them and that they employed a "nod and wink system" in which no actual deception occurred. However, the evidence included paperwork signed by the defendant representing that he was the lawful owner of the materials sold and showed that based on his representation, BIMCO paid him for the materials. From this evidence, it logically follows that BIMCO was in fact deceived. Any conflict in the evidence was for the jury to decide. (2) The trial court erred by instructing the jury on acting in concert with respect to an obtaining property by false pretenses charge where there was a "complete lack of evidence ... that anyone but defendant committed the acts necessary to constitute the crime." However, because all the evidence showed that the defendant was the sole perpetrator of the crime, no prejudice occurred.

Though trial court erred with respect to some of its analysis of defendant's as-applied challenge to the constitutionality of the possession of a firearm by a felon statute, the challenge failed as a matter of law

State v. Bonetsky, ___ N.C. App. ___, 784 S.E.2d 637 (April 5, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 13, 2016). The court rejected the defendant's contention that the possession of a firearm by a felon statute was unconstitutional as applied to him. Although rejecting the defendant's challenge, the court agreed that the trial court erred when it found that the defendant's 1995 Texas drug trafficking conviction "involve[d] a threat of violence." The trial court also erred by concluding that the remoteness of the 1995 Texas conviction should be assessed from the point that the defendant was released from prison--13 years ago--instead of the date of the conviction-- 18 years ago. The court went on to find that because the defendant's right to possess a firearm in North Carolina was never restored, he had no history of responsible, lawful firearm possession. And it found that the trial court did not err by concluding that the defendant failed to assiduously and proactively comply with the 2004 amendment to the firearm statute. The court rejected the defendant's argument that this finding was erroneous because there was no reason to believe that the defendant was on notice of the 2004 amendment, noting that it has never held that a defendant's ignorance of the statute's requirement should weigh in the defendant's favor when reviewing an as applied challenge. Finally, the court held that even though the trial court erred with respect to some of its analysis, the defendant's as applied challenge failed as a matter of law, concluding:

Defendant had three prior felony convictions, one of which was for armed robbery and the other two occurred within the past two decades; there is no relevant time period in which he could have *lawfully* possessed a firearm in North Carolina; and, as a convicted

felon, he did not take proactive steps to make sure he was complying with the laws of this state, specifically with the 2004 amendment to [the statute]. (footnote omitted).

Evidence of constructive possession of firearm was sufficient to withstand motion dismiss charge of felon in possession of firearm

[*State v. McKiver*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 17, 2016). The trial court did not err in denying the defendant's motion to dismiss a charge of felon in possession of a firearm. The court rejected the defendant's argument that there was insufficient evidence establishing that he had constructive possession of the weapon. The evidence showed, among other things, that an anonymous 911 caller saw a man wearing a plaid shirt and holding a gun in a black car beside a field; that someone saw that man dropped the gun; that an officer saw the defendant standing near a black Mercedes wearing a plaid shirt; that the defendant later returned to the scene and said that the car was his; and that officers found a firearm in the vacant lot approximately 10 feet from the Mercedes. This evidence was sufficient to support a reasonable juror in concluding that additional incriminating circumstances existed--beyond the defendant's mere presence at the scene and proximity to where the firearm was found--and thus to infer that he constructively possessed the firearm.

(1) State failed to present substantial evidence of constructive possession in controlled drug buy case; (2) Trial court did not err by denying defendant's motion to dismiss charge of conspiracy to sell methamphetamine; (3) Trial court did not err by denying defendant's motion to dismiss charge of possession of drug paraphernalia

[*State v. Garrett*](#), ___ N.C. App. ___, 783 S.E.2d 780 (April 5, 2016). (1) The court reversed the defendant's conviction for possession with intent to sell or deliver methamphetamine, concluding that the State failed to present substantial evidence of constructive possession. The case arose out of a controlled drug buy. However the State's evidence showed that "at nearly all relevant times" two other individuals--Fisher and Adams--were in actual possession of the methamphetamine. The defendant led Fisher and Adams to a trailer to purchase the drugs. The defendant entered the trailer with Fisher and Adams' money to buy drugs. Adams followed him in and ten minutes later Adams returned with the methamphetamine and handed it to Fisher. This evidence was insufficient to establish constructive possession. (2) The trial court did not err by denying the defendant's motion to dismiss a charge of conspiracy to sell methamphetamine, given the substantial evidence of an implied understanding among the defendant, Fisher, and Adams to sell methamphetamine to the informants. The informants went to Fisher to buy the drugs. The group then drove to the defendant's house where Fisher asked the defendant for methamphetamine. The defendant said that he didn't have any but could get some. The defendant led Fisher and Adams to the trailer where the drugs were purchased. (3) The trial court did not err by denying the defendant's motion to dismiss the charge of possession of drug paraphernalia. When the arresting officer approached the vehicle, the defendant was sitting in the back seat and did not immediately show his hands at the officer's request. Officers subsequently found the glass pipe on the rear floor board of the seat where the defendant was sitting. The defendant admitted that he smoked methamphetamine out of the pipe while in the car. Additionally Fisher testified that the pipe belonged to the defendant and the defendant had been carrying it in his pocket.

Defendant's due process rights were violated where he was convicted of strict liability offense of possession of pseudoephedrine by a person previously convicted of possessing methamphetamine because defendant lacked notice that such behavior was criminal

[*State v. Miller*](#), ___ N.C. App. ___, 783 S.E.2d 512 (Mar. 15, 2016), *temporary stay allowed*, ___ N.C. ___, 783 S.E.2d 502 (Mar. 31, 2016). The defendant's due process rights were violated when he was convicted under G.S. 90-95(d1)(1)(c) (possession of pseudoephedrine by person previously convicted of possessing methamphetamine is a Class H felony). The defendant's due process rights "were violated by his conviction of a strict liability offense criminalizing otherwise innocuous and lawful behavior without providing him notice that a previously lawful act had been transformed into a felony for the subset of convicted felons to which he belonged." The court found that "the absence of any notice to [the defendant] that he was subject to serious criminal penalties for an act that is legal for most people, most convicted felons, and indeed, for [the defendant] himself only a few weeks previously [before the new law went into effect], renders the new subsection unconstitutional as applied to him." The court distinguished the statute at issue from those that prohibit selling illegal drugs, possessing hand grenades or dangerous assets, or shipping unadulterated prescription drugs, noting that the statute at issue criminalized possessing allergy medications containing pseudoephedrine, an act that citizens would reasonably assume to be legal. The court noted that its decision was consistent with *Wolf v. State of Oklahoma*, 292 P.3d 512 (2012). It also rejected the State's effort to analogize the issue to cases upholding the constitutionality of the statute prescribing possession of a firearm by a felon.

Over a dissent, court held that trial court did not err by denying motion to dismiss kidnapping charge where restraint and removal of the victims was separate from an armed robbery that occurred at the premises

[*State v. Curtis*](#), ___ N.C. App. ___, 782 S.E.2d 522 (Mar. 1, 2016). Over a dissent, the court held that where the restraint and removal of the victims was separate and apart from an armed robbery that occurred at the premises, the trial court did not err by denying the defendant's motion to dismiss kidnapping charges. The defendant and his accomplices broke into a home where two people were sleeping upstairs and two others--Cowles and Pina-- were downstairs. The accomplices first robbed or attempted to rob Cowles and Pina and then moved them upstairs, where they restrained them while assaulting a third resident and searching the premises for items that were later stolen. The robberies or attempted robberies of Cowles and Pina occurred entirely downstairs; there was no evidence that any other items were demanded from these two at any other time. Thus, the court could not accept the defendant's argument that the movement of Cowles and Pina was integral to the robberies of them. Because the removal of Cowles and Pina from the downstairs to the upstairs was significant, the case was distinguishable from others where the removal was slight. The only reason to remove Cowles and Pina to the upstairs was to prevent them from hindering the subsequent robberies of the upstairs residents and no evidence showed that it was necessary to move them upstairs to complete those robberies. Finally, the court noted that the removal of Cowles and Pina to the upstairs subjected them to greater danger.

(1) State was not required to prove both confinement and restraint where kidnapping indictment alleged that defendant both confined and restrained victim; (2) There was sufficient evidence of restraint for purposes of kidnapping beyond that inherent in a charged sexual assault

[*State v. Knight*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). (1) Where a kidnapping indictment alleged that the defendant confined and restrained the victim for purposes of facilitating a forcible rape,

the State was not required to prove both confinement and restraint. (2) In a case where the defendant was charged with sexual assault and kidnapping, there was sufficient evidence of restraint for purposes of kidnapping beyond that inherent in the assault charge. Specifically, the commission of the underlying sexual assault did not require the defendant to seize and restrain the victim and to carry her from her living room couch to her bedroom.

Statute proscribing disorderly conduct in a public building or facility is not unconstitutionally vague

[*State v. Dale*](#), ___ N.C. App. ___, 783 S.E.2d 222 (Feb. 16, 2016). The court rejected the defendant's constitutional challenge to G.S. 14-132(a)(1), proscribing disorderly conduct in a public building or facility. Because the North Carolina Supreme Court has already decided that a statute "that is virtually identical" to the one at issue is not void for vagueness, the court found itself bound to uphold the constitutionality of the challenge the statute.

(1) To convict for deterring an appearance by a witness, the State is not required to prove the specific court proceeding the defendant attempted to deter victim from attending; (2) Trial court did not commit plain error in jury instructions

[*State v. Barnett*](#), ___ N.C. App. ___, 784 S.E.2d 188 (Jan. 19, 2016), *review allowed*, ___ N.C. ___, 784 S.E.2d 474 (Apr. 13, 2016). (1) The evidence was sufficient to support a conviction for deterring an appearance by a witness under G.S. 14-226(a). After the defendant was arrested and charged with assaulting, kidnapping, and raping the victim, he began sending her threatening letters from jail. The court concluded that the jury could reasonably have interpreted the letters as containing threats of bodily harm or death against the victim while she was acting as a witness for the prosecution. The court rejected the defendant's contention that the state was required to prove the specific court proceeding that he attempted to deter the victim from attending, simply because the case number was listed in the indictment. The specific case number identified in the indictment "is not necessary to support an essential element of the crime" and "is merely surplusage." In the course of its ruling, the court noted that the victim did not receive certain letters was irrelevant because the crime "may be shown by actual intimidation or attempts at intimidation." (2) The trial court did not commit plain error in its jury instructions on the charges of deterring a witness. Although the trial court fully instructed the jury as to the elements of the offense, in its final mandate it omitted the language that the defendant must have acted "by threats." The court found that in light of the trial court's thorough instructions on the elements of the charges, the defendant's argument was without merit. Nor did the trial court commit plain error by declining to reiterate the entire instruction for each of the two separate charges of deterring a witness and instead informing the jury that the law was the same for both counts.

There was insufficient evidence to sustain larceny conviction where defendant did not take funds by an act of actual trespass but rather withdrew funds mistakenly deposited into his account after becoming aware of the erroneous transfer

[*State v. Jones*](#), ___ N.C. App. ___, 781 S.E.2d 333 (Jan. 5, 2016), *review allowed*, ___ N.C. ___, 784 S.E.2d. 466 (Apr. 13, 2016). There was insufficient evidence to sustain the defendant's larceny conviction. The defendant worked as a trucker. After a client notified the defendant's office manager that it had erroneously made a large deposit into the defendant's account, the office manager contacted the defendant, notified him of the erroneous deposit and indicated that the client was having it reversed. However, the defendant withdrew the amount in question and was charged with larceny. The court held that because the client willingly made the deposit into the bank account, there was insufficient evidence

of a trespass. The defendant did not take the funds from the client by an act of actual trespass. Rather, the money was put into his account without any action on his part. Thus, no actual trespass occurred. Although a trespass can occur constructively, when possession is fraudulently obtained by trick or artifice, here no such act allowed the defendant to obtain the money. The defendant did not trick anyone into depositing the money; rather it was deposited by mistake by the client. The court rejected the State's argument that the taking occurred when the defendant withdrew the funds after being made aware of the erroneous transfer, noting that at this point the funds were in the defendant's possession not the client's.

Trial court did not err by instructing on common law robbery as a lesser of armed robbery where there was contradictory evidence as to whether gun was used

[*State v. Ricks*](#), ___ N.C. App. ___, 781 S.E.2d 637 (Jan. 5, 2016). Because there was contradictory evidence as to whether a gun was used, the trial court did not err by instructing the jury on common law robbery as a lesser of armed robbery.

Any error in trial court's jury instructions in a possession of weapon on educational property case did not rise to the level of plain error

[*State v. Huckelba*](#), ___ N.C. ___, 780 S.E.2d 750 (Dec. 18, 2015). In a per curiam decision and for the reasons stated in the dissenting opinion below, the supreme court reversed [*State v. Huckelba*](#), ___ N.C. App. ___, 771 S.E.2d 809 (2015). Deciding an issue of first impression, the court of appeals had held that to be guilty of possessing or carrying weapons on educational property under G.S. 14-269.2(b) the State must prove that the defendant "both knowingly possessed or carried a prohibited weapon and knowingly entered educational property with that weapon" and the trial court committed reversible error by failing to so instruct the jury. The dissenting judge concluded that "even accepting that a conviction ... requires that a defendant is knowingly on educational property and knowingly in possession of a firearm" any error in the trial court's instructions to the jury in this respect did not rise to the level of plain error, noting evidence indicating that the defendant knew she was on educational property.

There was sufficient evidence to support conviction for conspiracy to traffic in opium

[*State v. Winkler*](#), ___ N.C. ___, 780 S.E.2d 824 (Dec. 18, 2015). On appeal in this drug case from an unpublished opinion by the court of appeals, the supreme court held that there was sufficient evidence to support a conviction for conspiracy to traffic in opium. Specifically, the court pointed to evidence, detailed in the opinion, that the defendant agreed with another individual to traffic in opium by transportation. The court rejected the defendant's argument that the evidence showed only "the mere existence of a relationship between two individuals" and not an unlawful conspiracy.

There was sufficient evidence that crime against nature occurred in the state of North Carolina

[*State v. Goins*](#), ___ N.C. App. ___, 781 S.E.2d 45 (Dec. 15, 2015). Based on the victim's testimony that the alleged incident occurred in his bedroom, there was sufficient evidence that the charged offense, crime against nature, occurred in the state of North Carolina.

(1) The corpus delicti rule applies where the confession is the only evidence that the crime was committed; it does not apply where the confession is the only evidence that the defendant committed it; (2) Trial court properly denied defendant's motion to dismiss conspiracy charge based on corpus delicti rule where there was sufficient evidence corroborating confession

[State v. Ballard](#), ___ N.C. App. ___, 781 S.E.2d 75 (Dec. 15, 2015). (1) In a case involving two perpetrators, the trial court properly denied the defendant's motion to dismiss a robbery charge, predicated on the corpus delicti rule. Although the defendant's own statements constituted the only evidence that he participated in the crime, "there [wa]s no dispute that the robbery happened." Evidence to that effect included "security footage, numerous eyewitnesses, and bullet holes and shell casings throughout the store." The court concluded: "corpus delicti rule applies where the confession is the only evidence that the crime was committed; it does not apply where the confession is the only evidence that the defendant committed it." The court continued, citing *State v. Parker*, 315 N.C. 222 (1985) for the rule that " 'the perpetrator of the crime' is not an element of corpus delicti." (2) The trial court properly denied the defendant's motion to dismiss a conspiracy charge, also predicated on the corpus delicti rule. The court found that there was sufficient evidence corroborating the defendant's confession. It noted that "the fact that two masked men entered the store at the same time, began shooting at employees at the same time, and then fled together in the same car, strongly indicates that the men had previously agreed to work together to commit a crime." Also, "as part of his explanation for how he helped plan the robbery, [the defendant] provided details about the crime that had not been released to the public, further corroborating his involvement." Finally, as noted by the *Parker* Court, "conspiracy is among a category of crimes for which a 'strict application' of the corpus delicti rule is disfavored because, by its nature, there will never be any tangible proof of the crime."

Impaired Driving

Evidence Rule 702 requires a witness to be qualified as an expert before he or she may testify to the issue of impairment related to HGN test

[State v. Godwin](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016), *temporary stay allowed*, ___ N.C. ___, 785 S.E.2d 93 (May 9, 2016). In this appeal after a conviction for impaired driving, the court held that Rule 702 requires a witness to be qualified as an expert before he may testify to the issue of impairment related to Horizontal Gaze Nystagmus (HGN) test results. Here, there was never a formal offer by the State to tender the law enforcement officer as an expert witness. In fact, the trial court rejected the defendant's contention that the officer had to be so qualified. This error was prejudicial.

In post-McNeely case, trial court did not err by suppressing blood draw evidence after finding that no exigency existed to justify warrantless search

[State v. Romano](#), ___ N.C. App. ___, 785 S.E.2d 168 (April 19, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 25, 2016). In this DWI case, the court held that the trial court did not err by suppressing blood draw evidence that an officer collected from a nurse who was treating the defendant. The trial court had found that no exigency existed justifying the warrantless search and that G.S. 20-16.2, as applied in this case, violated *Missouri v. McNeely*. The court noted that in *McNeely*, the US Supreme Court held "the natural metabolism of alcohol in the bloodstream" does not present a "per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." Rather, it held that exigency must be

determined based on the totality of the circumstances. Here, the officer never advised the defendant of his rights according to G.S. 20-16.2 and did not obtain his written or oral consent to the blood test. Rather, she waited until an excess of blood was drawn, beyond the amount needed for medical treatment, and procured it from the attending nurse. The officer testified that she believed her actions were reasonable under G.S. 20-16.2(b), which allows the testing of an unconscious person, in certain circumstances. Noting that it had affirmed the use of the statute to justify warrantless blood draws of unconscious DWI defendants, the court further noted that all of those decisions were decided before *McNeely*. Here, under the totality of the circumstances and considering the alleged exigencies, the warrantless blood draw was not objectively reasonable. The court rejected the State's argument that the blood should be admitted under the independent source doctrine, noting that the evidence was never obtained independently from lawful activities untainted by the initial illegality. It likewise rejected the State's argument that the blood should be admitted under the good faith exception. That exception allows officers to objectively and reasonably rely on a warrant later found to be invalid. Here, however, the officers never obtained a search warrant.

(1) DMV's findings supported its conclusion that officer had reasonable grounds to believe Farrell was driving while impaired; (2) Over a dissent, court rejected argument that State's dismissal of DWI charge barred DMV from pursuing a drivers license revocation under implied consent laws

Farrell v. Thomas, ___ N.C. App. ___, 784 S.E.2d 657 (April 19, 2016). (1) The DMV's findings support its conclusion that the officer had reasonable grounds to believe that Farrell was driving while impaired. During a traffic stop Farrell refused the officer's request to take a breath test after being informed of his implied consent rights and the consequences of refusing to comply. Officers obtained his blood sample, revealing a blood alcohol level of .18. Because Farrell refused to submit to a breath test upon request, the DMV revoked his driving privileges. The Court of Appeals found that "DMV's findings readily support its conclusion." Among other things, Farrell had glassy, bloodshot eyes and slightly slurred speech; during the stop Farrell used enough mouthwash to create a strong odor detectable by the officer from outside car; and Farrell lied to the officer about using the mouthwash. The court held: "From these facts, a reasonable officer could conclude that Farrell was impaired and had attempted to conceal the alcohol on his breath by using mouthwash and then lying about having done so." (2) Over a dissent, the court rejected Farrell's argument that the State's dismissal of his DWI charge barred the DMV from pursuing a drivers license revocation under the implied consent laws. This dismissal may have been based on a Fourth Amendment issue. The majority determined that even if Farrell's Fourth Amendment rights were violated, the exclusionary rule would not apply to the DMV hearing. The dissent argued that the exclusionary rule should apply. A third judge wrote separately, finding that it was not necessary to reach the exclusionary rule issue.

Trial court did not err by denying DWI defendant's request for jury instruction that would have informed jury that intoximeter results were sufficient to support a finding of impaired driving but did not compel such a finding beyond a reasonable doubt

State v. Godwin, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016), *temporary stay allowed*, ___ N.C. ___, 785 S.E.2d 93 (May 9, 2016). In this DWI case, the trial court did not err by denying the defendant's request for a jury instruction concerning Intoximeter results. The defendant's proposed instruction would have informed the jury that Intoximeter results were sufficient to support a finding of impaired driving but did not compel such a finding beyond a reasonable doubt. Citing prior case law, the court rejected the defendant's argument that by instructing the jury using N.C.P.J.I. 270.20A, the trial court

impressed upon the jury that it could not consider evidence showing that the defendant was not impaired.

Supreme court affirmed trial court's denial of defendant's motion to dismiss DWI charge based on flagrant violation of his constitutional rights in connection with a warrantless blood draw but remanded case to Court of Appeals and trial court to consider suppression

[*State v. McCrary*](#), ___ N.C. ___, 780 S.E.2d 554 (Dec. 18, 2015). In a per curiam opinion, the supreme court affirmed the decision below, [*State v. McCrary*](#), ___ N.C. App. ___, 764 S.E.2d 477 (2014), to the extent it affirmed the trial court's denial of the defendant's motion to dismiss. In this DWI case, the court of appeals had rejected the defendant's argument that the trial court erred by denying his motion to dismiss, which was predicated on a flagrant violation of his constitutional rights in connection with a warrantless blood draw. Because the defendant's motion failed to detail irreparable damage to the preparation of his case and made no such argument on appeal, the court of appeals concluded that the only appropriate action by the trial court under the circumstances was to consider suppression of the evidence as a remedy for any constitutional violation. Noting that the trial court did not have the benefit of the United States Supreme Court's decision in *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013), in addition to affirming that portion of the court of appeals opinion affirming the trial court's denial of defendant's motion to dismiss, the supreme court remanded to the court of appeals "with instructions to that court to vacate the portion of the trial court's 18 March 2013 order denying defendant's motion to suppress and further remand to the trial court for (1) additional findings and conclusions—and, if necessary—a new hearing on whether the totality of the events underlying defendant's motion to suppress gave rise to exigent circumstances, and (2) thereafter to reconsider, if necessary, the judgments and commitments entered by the trial court on 21 March 2013."

Sexual Offenses

With respect to indecent liberties charge, trial court correctly allowed jury to determine whether evidence of repeated sexual assaults of victim were for the purpose of arousing or gratifying sexual desire

[*State v. Kpaeyeh*](#), ___ N.C. App. ___, 784 S.E.2d 582 (April 5, 2016). The trial court did not err by denying the defendant's motion to dismiss a charge of taking indecent liberties with a child. The victim testified that the defendant repeatedly raped her while she was a child living in his house and DNA evidence confirmed that he was the father of her child. The defendant argued that there was insufficient evidence of a purpose to arouse or gratify sexual desire; specifically he argued that evidence of vaginal penetration is insufficient by itself to prove that the rape occurred for the purpose of arousing or gratifying sexual desire. The court rejected the argument that the State must always prove something more than vaginal penetration in order to satisfy this element of indecent liberties. The trial court correctly allowed the jury to determine whether the evidence of the defendant's repeated sexual assaults of the victim were for the purpose of arousing or gratifying sexual desire.

Evidence was sufficient to convict defendant of both attempted sex offense and attempted rape where a jury could infer that defendant intended to engage in a sexual assault involving both fellatio and rape

[*State v. Marshall*](#), ___ N.C. App. ___, 784 S.E.2d 503 (Mar. 1, 2016). The evidence was sufficient to convict the defendant of both attempted sex offense and attempted rape. The court rejected the defendant's argument that the evidence was sufficient to permit the jury to infer the intent to commit only one of these offenses. During a home invasion, the defendant and his brother isolated the victim from her husband. One of the perpetrators said, "Maybe we should," to which the other responded, "Yeah." The defendant's accomplice then forced the victim to remove her clothes and perform fellatio on him at gunpoint. The defendant later groped the victim's breast and buttocks and said, "Nice." At this point, the victim's husband, who had been confined elsewhere, fought back to protect his wife and was shot. This evidence is sufficient for a reasonable jury to infer that the defendant intended to engage in a continuous sexual assault involving both fellatio (like his accomplice) and ultimately rape, and that this assault was thwarted only because the victim's husband sacrificed himself so that his wife could escape.

Trial court did not err by instructing on first-degree sexual offense where there was evidence to support finding that victim suffered serious personal injury

[*State v. Gates*](#), ___ N.C. App. ___, 781 S.E.2d 883 (Feb. 16, 2016). Where there was evidence to support a finding that the victim suffered serious personal injury, the trial court did not err in instructing the jury on first-degree sexual offense. The trial court's instructions were proper where an officer saw blood on the victim's lip and photographs showed that she suffered bruises on her ribs, arms and face. Additionally the victim was in pain for 4 or 5 days after the incident and due to her concerns regarding lack of safety the victim, terminated her lease and moved back in with her family. At the time of trial, roughly one year later, the victim still felt unsafe being alone. This was ample evidence of physical injury and lingering mental injury.

(1) Superior court lacked jurisdiction with respect to first-degree statutory rape charges where no evidence showed that defendant was at least 16 years old at the time of the offenses; (2) Over a dissent, majority held that jurisdiction was proper with respect to statutory rape charge with an alleged date range for the offense which included periods before and after defendant's 16th birthday because unchallenged evidence showed the offense occurred after defendant's birthday

[*State v. Collins*](#), ___ N.C. App. ___, 783 S.E.2d 9 (Feb. 16, 2016). (1) The superior court was without subject matter jurisdiction with respect to three counts of first-degree statutory rape, where no evidence showed that the defendant was at least 16 years old at the time of the offenses. The superior court may obtain subject matter jurisdiction over a juvenile case only if it is transferred from the district court according to the procedure set forth in Chapter 7B; the superior court does not have original jurisdiction over a defendant who is 15 years old on the date of the offense. (2) Over a dissent, the majority held that jurisdiction was proper with respect to a fourth count of statutory rape which alleged a date range for the offense (January 1, 2011 to November 30, 2011) that included periods before the defendant's sixteenth birthday (September 14, 2011). Unchallenged evidence showed that the offense occurred around Thanksgiving 2011, after the defendant's sixteenth birthday. The court noted the relaxed temporal specificity rules regarding offenses involving child victims and that the defendant could have requested a special verdict to require the jury to find the crime occurred after he turned sixteen or moved for a bill of particulars to obtain additional specificity.

Trial court erred by denying defendant's motion to dismiss attempted rape charge

[*State v. Baker*](#), ___ N.C. App. ___, 781 S.E.2d 851 (Jan. 19, 2016), *temporary stay allowed*, ___ N.C. ___, 781 S.E.2d 800 (Feb. 5, 2016). The trial court erred by denying the defendant's motion to dismiss an attempted statutory rape charge. The parties agreed that there were only two events upon which the attempted rape conviction could be based: an incident that occurred in a bedroom, and one that occurred on a couch. The court agreed with the defendant that all of the evidence regarding the bedroom incident would have supported only a conviction for first-degree rape, not attempted rape. The court also agreed with the defendant that as to the couch incident, the trial testimony could, at most, support an indecent liberties conviction, not an attempted rape conviction. The evidence as to this incident showed that the defendant, who appeared drunk, sat down next to the victim on the couch, touched her shoulder and chest, and tried to get her to lie down. The victim testified that she "sort of" lay down, but then the defendant fell asleep, so she moved. While sufficient to show indecent liberties, this evidence was insufficient to show attempted rape.

Defenses

Trial court committed reversible error in its jury instruction on self-defense, which deviated in part from pattern jury instructions

[*State v. Holloman*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 10, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 27, 2016). Construing the new self-defense statute, the court held that the trial court committed reversible error in its jury instruction on self-defense, which deviated in part from the pattern jury instructions. The court held: "The trial court's deviations from the pattern self-defense instruction, taken as a whole, misstated the law by suggesting that an aggressor cannot under any circumstances regain justification for using defensive force."

Trial court did not err by declining to instruct jury on voluntary manslaughter based on acting in the heat of passion upon adequate provocation

[*State v. Chaves*](#), ___ N.C. App. ___, 782 S.E.2d 540 (Mar. 1, 2016). The trial court did not err by declining to instruct the jury on voluntary manslaughter. The trial judge instructed the jury on first- and second-degree murder but declined the defendant's request for an instruction on voluntary manslaughter. The jury found the defendant guilty of second-degree murder. The defendant argued that the trial court should have given the requested instruction because the evidence supported a finding that he acted in the heat of passion based on adequate provocation. The defendant and the victim had been involved in a romantic relationship. The defendant argued that he acted in the heat of passion as a result of the victim's verbal taunts and her insistence, shortly after they had sex, that he allow his cell phone to be used to text another man stating that the victim and the defendant were no longer in a relationship. The court rejected this argument, concluding that the victim's words, conduct, or a combination of the two could not serve as legally adequate provocation. Citing a North Carolina Supreme Court case, the court noted that mere words, even if abusive or insulting, are insufficient provocation to negate malice and reduce a homicide to manslaughter. The court rejected the notion that adequate provocation existed as a result of the victim's actions in allowing the defendant to have sex with her in order to manipulate him into helping facilitate her relationship with the other man. The court also noted that there was a lapse in time between the sexual intercourse, the victim's request for the defendant's cell phone and

her taunting of him and the homicide. Finally the court noted that the defendant stabbed the victim 29 times, suggesting premeditation.

Sex Offender Registration and Satellite-Based Monitoring

Defendant was not eligible for SBM where conviction for statutory rape could not be considered a “reportable conviction”

[*State v. Kpaeyeh*](#), ___ N.C. App. ___, 784 S.E.2d 582 (April 5, 2016). Because the defendant’s conviction for statutory rape, based on acts committed in 2005, cannot be considered a “reportable conviction,” the defendant was not eligible for satellite-based monitoring.

Indictment alleging failure to register change of address was not defective

[*State v. James*](#), ___ N.C. ___, 782 S.E.2d 509 (Mar. 18, 2016). In an appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 774 S.E.2d 871 (2015), the court per curiam affirmed for the reasons stated in *State v. Williams*, ___ N.C. ___, 781 S.E. 2d 268 (Jan. 29, 2016) (in a case where the defendant, a sex offender, was charged with violating G.S. 14-208.11 by failing to provide timely written notice of a change of address, the court held that the indictment was not defective; distinguishing *State v. Abshire*, 363 N.C. 322 (2009), the court rejected the defendant’s argument that the indictment was defective because it alleged that he failed to register his change of address with the sheriff’s office within three days, rather than within three business days).

Evidence was sufficient to prove that sex offender failed to register change of address after being released from jail and thereafter failed to register another change of address involving an out-of-state address

[*State v. Crockett*](#), ___ N.C. ___, 782 S.E.2d 878 (Mar. 18, 2016). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 767 S.E.2d 78 (2014), the court affirmed the defendant’s convictions, finding the evidence sufficient to prove that he failed to register as a sex offender. The defendant was charged with failing to register as a sex offender in two indictments covering separate offense dates. The court held that G.S. 14-208.9, the “change of address” statute, and not G.S. 14-208.7, the “registration” statute, governs the situation when, as here, a sex offender who has already complied with the initial registration requirements is later incarcerated and then released. The court continued, noting that “the facility in which a registered sex offender is confined after conviction functionally serves as that offender’s address.” Turning to the sufficiency the evidence, the court found that as to the first indictment, the evidence was sufficient for the jury to conclude that defendant had willfully failed to provide written notice that he had changed his address from the Mecklenburg County Jail to the Urban Ministry Center. As to the second indictment, the evidence was sufficient for the jury to find that the defendant had willfully changed his address from Urban Ministries to Rock Hill, South Carolina without providing written notice to the Sheriff’s Department. As to this second charge, the court rejected the defendant’s argument that G.S. 14-208.9(a) applies only to in-state address changes. The court also noted that when a registered offender plans to move out of state, appearing in person at the Sheriff’s Department and providing written notification three days before he intends to leave, as required by G.S. 14-208.9(b) would appear to satisfy the requirement in G.S. 14-208.9(a) that he appear in person and provide written notice not later than three business days after the address change. Having affirmed on these grounds, the court declined to address the Court of Appeals’

alternate basis for affirming the convictions: that the Urban Ministry is not a valid address at which the defendant could register because the defendant could not live there.

Reversing Court of Appeals, Supreme Court held that evidence was sufficient to sustain defendant's conviction for failing to register as sex offender

[State v. Barnett](#), ___ N.C. ___, 782 S.E.2d 885 (Mar. 18, 2016). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 327 (2015), the court reversed, holding that the evidence was sufficient to sustain the defendant's conviction to failing to register as a sex offender. Following *Crockett* (summarized immediately above), the court noted that G.S. 14-208.7(a) applies solely to a sex offender's initial registration whereas G.S. 14-208.9(a) applies to instances in which an individual previously required to register changes his address from the address. Here, the evidence showed that the defendant failed to notify the Sheriff of a change in address after his release from incarceration imposed after his initial registration.

(1) Rule of Civil Procedure 62(d) cannot be used to stay SBM hearing; (2) Trial court erred by failing to determine whether SBM search was reasonable under the totality of the circumstances

[State v. Blue](#), ___ N.C. App. ___, 783 S.E.2d 524 (Mar. 15, 2016). (1) The court rejected the defendant's argument that because SBM is a civil, regulatory scheme, it is subject to the Rules of Civil Procedure and that the trial court erred by failing to exercise discretion under Rule 62(d) to stay the SBM hearing. The court concluded that because Rule 62 applies to a stay of execution, it could not be used to stay the SBM hearing. (2) With respect to the defendant's argument that SBM constitutes an unreasonable search and seizure, the trial court erred by failing to conduct the appropriate analysis. The trial court simply acknowledged that SBM constitutes a search and summarily concluded that the search was reasonable. As such it failed to determine, based on the totality of the circumstances, whether the search was reasonable. The court noted that on remand the State bears the burden of proving that the SBM search is reasonable.

In SBM case, trial court erred by failing to determine whether search was reasonable under the totality of the circumstances

[State v. Morris](#), ___ N.C. App. ___, 783 S.E.2d 528 (Mar. 15, 2016). The trial court erred by failing to conduct the appropriate analysis with respect to the defendant's argument that SBM constitutes an unreasonable search and seizure. The trial court simply acknowledged that SBM constitutes a search and summarily concluded that the search was reasonable. As such it failed to determine, based on the totality of the circumstances, whether the search was reasonable. The court noted that on remand the State bears the burden of proving that the SBM search is reasonable.

Based on binding precedent, trial court's order that defendant enroll in lifetime SBM did not violate ex post facto or double jeopardy

[State v. Alldred](#), ___ N.C. App. ___, 782 S.E.2d 383 (Feb. 16, 2016). Relying on prior binding opinions, the court rejected the defendant's argument that the trial court's order directing the defendant to enroll in lifetime SBM violated ex post facto and double jeopardy. The court noted that prior opinions have held that the SBM program is a civil regulatory scheme which does not implicate either ex post facto or double jeopardy.

Indictment charging sex offender with failure to provide timely written notice of address change was not defective

[*State v. Williams*](#), ___ N.C. ___, 781 S.E.2d 268 (Jan. 29, 2016). In a case where the defendant, a sex offender, was charged with violating G.S. 14-208.11 by failing to provide timely written notice of a change of address, the court held that the indictment was not defective. Distinguishing *State v. Abshire*, 363 N.C. 322 (2009), the court rejected the defendant's argument that the indictment was defective because it alleged that he failed to register his change of address with the sheriff's office within three days, rather than within three *business* days.

(1) Attempted second-degree rape does not fall within statutory definition of an aggravated offense for purposes of lifetime SBM and sex offender registration; (2) In issue of first impression, trial court erred by entering no contact order under G.S. 15A-1340.50 preventing defendant from contacting victim as well as her three children

[*State v. Barnett*](#), ___ N.C. App. ___, 784 S.E.2d 188 (Jan. 19, 2016), *review allowed*, ___ N.C. ___, 784 S.E.2d 474 (Apr. 13, 2016). (1) The trial court erroneously concluded that attempted second-degree rape is an aggravated offense for purposes of lifetime SBM and lifetime sex offender registration. Pursuant to the statute, an aggravated offense requires a sexual act involving an element of penetration. Here, the defendant was convicted of attempted rape, an offense that does not require penetration and thus does not fall within the statutory definition of an aggravated offense. (2) Deciding an issue of 1st impression, the court held that the trial court erred when it entered a permanent no contact order, under G.S. 15A-1340.50, preventing the defendant from contacting the victim as well as her three children. "[T]he plain language of the statute limits the trial court's authority to enter a no contact order protecting anyone other than the victim."

(1) Trial court's conclusion that defendant was a recidivist was not supported by competent evidence and therefore could not be used to support lifetime sex offender registration and SBM; (2) IAC claims cannot be asserted in SBM appeals

[*State v. Springle*](#), ___ N.C. App. ___, 781 S.E.2d 518 (Jan. 5, 2016). (1) The trial court's conclusion that the defendant was a recidivist was not supported by competent evidence and therefore could not support the conclusion that the defendant must submit to lifetime sex offender registration and SBM. The trial court's order determining that the defendant was a recidivist was never reduced to writing and made part of the record. Although there was evidence from which the trial court could have possibly determined that the defendant was a recidivist, it failed to make the relevant findings, either orally or in writing. The defendant's stipulation to his prior record level worksheet cannot constitute a legal conclusion that a particular out-of-state conviction is "substantially similar" to a particular North Carolina offense. (2) Ineffective assistance of counsel claims cannot be asserted in SBM appeals; such claims can only be asserted in criminal matters.

Sentencing and Probation

Trial court violated the defendant's sixth amendment right to a trial by jury by sentencing him under G.S. 14-27.4A(c) to a term above that normally provided for a Class B1 felony; statute fails to require notice that "egregious aggravation" factors may be used, and does not provide a mechanism for submitting such factors to a jury to be proved beyond a reasonable doubt

[State v. Singletary](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). In this sexual offense with a child by adult offender case, the State conceded, and the court held, that the trial court violated the defendant's sixth amendment right to a trial by jury by sentencing him under G.S. 14-27.4A(c) to a term above that normally provided for a Class B1 felony on the trial court's own determination, and without notice, that egregious aggravation existed. G.S. 14-27.4A(c) provides that a defendant may be sentenced to an active term above that normally provided for a Class B1 felony if the judge finds egregious aggravation. The court held that the statutory sentencing scheme at issue was unconstitutional under the *Apprendi/Blakely* rule. See *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that any factor, other than a prior conviction, that increases punishment beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt). Specifically, the statute fails to require notice that "egregious aggravation" factors may be used, does not require that such aggravation be proved beyond a reasonable doubt and does not provide any mechanism for submitting such factors to a jury. The court rejected the State's argument that under G.S. 14-27.4A, the trial court may submit egregious aggravation factors to a jury in a special verdict, concluding, in part, that the statute explicitly gives only "the court," and not the jury, the ability to determine whether the nature of the offense and the harm inflicted require a sentence in excess of what is otherwise permitted by law. Because the defendant did not challenge that portion of the statute setting a 300-month mandatory minimum sentence, the court did not address the constitutionality of that provision. The court remanded for resentencing.

(1) Trial court erred when sentencing defendant as habitual felon by assigning PRL points for an offense that was used to support habitual misdemeanor assault conviction and establish defendant's status as a habitual felon; (2) Trial court's restitution award was not supported by competent evidence

[State v. Sydnor](#), ___ N.C. App. ___, 782 S.E.2d 910 (Mar. 15, 2016). (1) The trial court erred when sentencing the defendant as a habitual felon by assigning prior record level points for an assault inflicting serious bodily injury conviction where that same offense was used to support the habitual misdemeanor assault conviction and establish the defendant's status as a habitual felon. "Although defendant's prior offense of assault inflicting serious bodily injury may be used to support convictions of habitual misdemeanor assault and habitual felon status, it may not also be used to determine defendant's prior record level." (2) The trial court's restitution award of \$5,000 was not supported by competent evidence.

(1) State failed to prove absconding probation violation where defendant's whereabouts were never unknown to probation officer; (2) Other alleged probation violations could not support revocation

[State v. Jakeco Johnson](#), ___ N.C. App. ___, 783 S.E.2d 21 (Mar. 1, 2016). (1) The trial court erred by revoking the defendant's probation where the State failed to prove violations of the absconding provision in G.S. 15A-1343(b)(3a). The trial court found that the defendant "absconded" when he told

the probation officer he would not report to the probation office and then failed to report as scheduled on the following day. This conduct does not rise to the level of absconding supervision; the defendant's whereabouts were never unknown to the probation officer. (2) The other alleged violations could not support a probation revocation, where those violations were "unapproved leaves" from the defendant's house arrest and "are all violations of electronic house arrest." This conduct was neither a new crime nor absconding. The court noted that the defendant did not make his whereabouts unknown to the probation officer, who was able to monitor the defendant's whereabouts via the defendant's electronic monitoring device.

Trial court did not err by revoking defendant's probation where evidence showed he willfully absconded

[*State v. Nicholas Johnson*](#), ___ N.C. App. ___, 782 S.E.2d 549 (Mar. 1, 2016). The trial court did not err by revoking the defendant's probation where the evidence showed that he willfully absconded. The defendant moved from his residence, without notifying or obtaining prior permission from his probation officer, willfully avoided supervision for multiple months, and failed to make his whereabouts known to his probation officer at any time thereafter.

Trial court lacked subject matter jurisdiction to revoke defendant's probation because violation reports were filed after the expiration of probation

[*State v. Peele*](#), ___ N.C. App. ___, 783 S.E.2d 28 (Mar. 1, 2016). The trial court lacked subject matter jurisdiction to revoke the defendant's probation because the State failed to prove that the violation reports were timely filed. As reflected by the file stamps on the violation reports, they were filed after the expiration of probation in all three cases at issue.

(1) Trial court erroneously sentenced defendant for sexual offense against a child by an adult when defendant was actually convicted of first-degree sexual offense; (2) 15-year-old defendant failed to establish that sentence for sexual offense against a six-year-old child was so grossly disproportionate as to violate the Eighth Amendment

[*State v. Bowlin*](#), ___ N.C. App. ___, 783 S.E.2d 230 (Feb. 16, 2016). (1) The trial court erred by erroneously sentencing the defendant for three counts of sexual offense against a child by an adult under G.S. 14-27.4A, when he was actually convicted of three counts of first-degree sexual offense under G.S. 14-27.4(a)(1). (2) The defendant's constitutional rights were not violated when the trial court sentenced him on three counts of first-degree sexual offense, where the offenses were committed when the defendant was fifteen years old. The court found that the defendant had not brought the type of categorical challenge at issue in cases like *Roper* or *Graham*. Rather, the defendant challenged the proportionality of his sentence given his juvenile status at the time of the offenses. The court concluded that the defendant failed to establish that his sentence of 202-254 months for three counts of sexual offense against a six-year-old child was so grossly disproportionate as to violate the Eighth Amendment.

Trial court improperly sentenced defendant in his absence where defendant was not present when trial court corrected an erroneous oral sentence in a written judgment

[*State v. Collins*](#), ___ N.C. App. ___, 782 S.E.2d 350 (Feb. 2, 2016). The trial court improperly sentenced the defendant in his absence. The trial court orally sentenced the defendant to 35 to 42 months in prison, a sentence which improperly correlated the minimum and maximum terms. The trial court's

written judgment sentenced the defendant to 35 to 51 months, a statutorily proper sentence. Because the defendant was not present when the trial court corrected the sentence, the court determined that a resentencing is required and remanded accordingly.

Trial court erred by assigning additional PRL point on ground that all elements of the present offense were included in a prior offense

[*State v. Eury*](#), ___ N.C. App. ___, 781 S.E.2d 869 (Feb. 2, 2016). In calculating the defendant's prior record level, the trial court erred by assigning an additional point on grounds that all the elements of the present offense were included in a prior offense. The defendant was found guilty of possession of a stolen vehicle. The court rejected the State's argument that the defendant's prior convictions for possession of stolen property and larceny of a motor vehicle were sufficient to support the additional point. The court noted that while those offenses are "similar to the present offense" neither contains all of its elements. Specifically, possession of a stolen vehicle requires that the stolen property be a motor vehicle, while possession of stolen property does not; larceny of a motor vehicle requires proof of asportation but not possession while possession of a stolen vehicle requires the reverse.

Florida's capital sentencing scheme violated the Sixth Amendment which requires that a jury, not a judge, find each fact necessary to impose death sentence

[*Hurst v. Florida*](#), 577 U.S. ___, 136 S. Ct. 616 (Jan. 12, 2016). The Court held Florida's capital sentencing scheme unconstitutional. In this case, after a jury convicted the defendant of murder, a penalty-phase jury recommended that the judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced the defendant to death. After the defendant's conviction and sentence was affirmed by the Florida Supreme Court, the defendant sought review by the US Supreme Court. That Court granted certiorari to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*. Holding that it does, the Court stated: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."

Capital Sentencing

Defendant was entitled to inform jury of his parole ineligibility where State put his future dangerousness at issue and the only sentencing alternative to death was life imprisonment without possibility of parole

[*Lynch v. Arizona*](#), 578 U.S. ___ (May 31, 2016). Where the State put the defendant's future dangerousness at issue and acknowledged that his only alternative sentence to death was life imprisonment without parole, the Arizona court erred by concluding that the defendant had no right to inform the jury of his parole ineligibility. Under *Simmons v. South Carolina*, 512 U. S. 154 (1994), and its progeny, where a capital defendant's future dangerousness is at issue and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, the Due Process Clause entitles the defendant to inform the jury of his parole ineligibility, either by a jury instruction or in arguments by counsel.

(1) Eighth Amendment does not require courts to instruct capital sentencing juries that mitigating circumstances need not be proved beyond a reasonable doubt; (2) Eighth Amendment was not violated by joint capital sentencing proceeding for two defendants

[*Kansas v. Carr*](#), 577 U.S. ___, 136 S. Ct. 633 (Jan. 20, 2016). (1) The Eighth Amendment does not require courts to instruct capital sentencing juries that mitigating circumstances “need not be proved beyond a reasonable doubt.” (2) The Eighth Amendment was not violated by a joint capital sentencing proceeding for two defendants. The Court reasoned, in part: “the Eighth Amendment is inapposite when each defendant’s claim is, at bottom, that the jury considered evidence that would not have been admitted in a severed proceeding, and that the joint trial clouded the jury’s consideration of mitigating evidence like ‘mercy.’”

In an RJA MAR case, trial court abused its discretion by denying State’s motion to continue where State received final version of defendant’s statistical study supporting his MAR approximately one month prior to the hearing on the motion

[*State v. Robinson*](#), ___ N.C. ___, 780 S.E.2d 151 (Dec. 18, 2015). In this capital case, before the supreme court on certiorari from an order of the trial court granting the defendant relief on his Racial Justice Act (RJA) motion for appropriate relief (MAR), the court vacated and remanded to the trial court. The supreme court determined that the trial court abused its discretion by denying the State’s motion to continue, made after receiving the final version of the defendant’s statistical study supporting his MAR approximately one month before the hearing on the motion began. The court reasoned:

The breadth of respondent’s study placed petitioner in the position of defending the peremptory challenges that the State of North Carolina had exercised in capital prosecutions over a twenty-year period. Petitioner had very limited time, however, between the delivery of respondent’s study and the hearing date. Continuing this matter to give petitioner more time would have done no harm to respondent, whose remedy under the Act was a life sentence without the possibility of parole.

It concluded: “Without adequate time to gather evidence and address respondent’s study, petitioner did not have a full and fair opportunity to defend this proceeding.” The court continued:

On remand, the trial court should address petitioner’s constitutional and statutory challenges pertaining to the Act. In any new hearing on the merits, the trial court may, in the interest of justice, consider additional statistical studies presented by the parties. The trial court may also, in its discretion, appoint an expert under N.C. R. Evid. 706 to conduct a quantitative and qualitative study, unless such a study has already been commissioned pursuant to this Court’s Order in *State v. Augustine*, ___ N.C. ___, ___ S.E.2d ___ (2015) (139PA13), in which case the trial court may consider that study. If the trial court appoints an expert under Rule 706, the Court hereby orders the Administrative Office of the Courts to make funds available for that purpose.

RJA MAR vacated based on *Robinson* error

[*State v. Augustine*](#), ___ N.C. ___, 780 S.E.2d 552 (Dec. 18, 2015). In this second RJA case the supreme court held that “the error recognized in this Court’s Order in [*Robinson* (summarized immediately above)], infected the trial court’s decision, including its use of issue preclusion, in these cases.” The court vacated the trial court’s order granting the defendant’s RJA MAR and remanded with parallel instructions. It also concluded that the trial court erred when it joined the three cases for an evidentiary hearing.

Appeal and Post-Conviction

(1) Portion of trial court's order granting MAR claim alleging violation of post-conviction DNA statutes was void because trial court did not have subject matter jurisdiction; (2) State could appeal trial court's order granting defendant's MAR; (3) Trial court erred by failing to conduct evidentiary hearing before granting MAR

[*State v. Howard*](#), ___ N.C. App. ___, 783 S.E.2d 786 (April 19, 2016). (1) Because the trial court did not have subject matter jurisdiction to rule on the defendant's MAR claim alleging a violation of the post-conviction DNA statutes, the portion of the trial court's order granting the MAR on these grounds is void. The court noted that the General Assembly has provided a statutory scheme, outside of the MAR provisions, for asserting and obtaining relief on, post-conviction DNA testing claims. (2) The State could appeal the trial court's order granting the defendant's MAR. (3) The trial court erred by failing to conduct an evidentiary hearing before granting the MAR. An evidentiary hearing "is not automatically required before a trial court grants a defendant's MAR, but such a hearing is the general procedure rather than the exception." Prior case law "dictates that an evidentiary hearing is mandatory unless summary denial of an MAR is proper, or the motion presents a pure question of law." Here, the State denied factual allegations asserted by the defendant. The trial court granted the MAR based on what it characterized as "undisputed facts," faulting the State for failing to present evidence to rebut the defendant's allegations. However, where the trial court sits as "the post-conviction trier of fact," it is "obligated to ascertain the truth by testing the supporting and opposing information at an evidentiary hearing where the adversarial process could take place. But instead of doing so, the court wove its findings together based, in part, on conjecture and, as a whole, on the cold, written record." It continued, noting that given the nature of the defendant's claims (as discussed in the court's opinion), the trial court was required to resolve conflicting questions of fact at an evidentiary hearing.

Trial court did not err by refusing to appoint counsel to litigate defendants pro se motion for post-conviction DNA testing where defendant offered only conclusory statement regarding materiality of testing

[*State v. Cox*](#), ___ N.C. App. ___, 781 S.E.2d 865 (Feb. 2, 2016). In this child sexual assault case, the trial court did not err by refusing to appoint counsel to litigate the defendant's pro se motion for post-conviction DNA testing. Under G.S. 15A-269(c), to be entitled to counsel, the defendant must establish that the DNA testing may be material to his wrongful conviction claim. The defendant's burden to show materiality requires more than a conclusory statement. Here, the defendant's conclusory contention that testing was material was insufficient to carry his burden. Additionally, the defendant failed to include the lab report that he claims shows that certain biological evidence was never analyzed. The court noted that the record does not indicate whether this evidence still exists and that after entering a guilty plea, evidence need only be preserved until the earlier of 3 years from the date of conviction or until the defendant is released.

(1) Trial court erred by failing to conduct evidentiary hearing where defendant's MAR alleging IAC raised disputed issues of fact; (2) Appellate court remanded for trial court to address whether State complied with post-conviction discovery obligations

[*State v. Martin*](#), ___ N.C. App. ___, 781 S.E.2d 339 (Jan. 5, 2016). (1) Because the defendant's motion for appropriate relief (MAR) alleging ineffective assistance of counsel in this sexual assault case raised

disputed issues of fact, the trial court erred by failing to conduct an evidentiary hearing before denying relief. The defendant claimed that counsel was ineffective by failing to, among other things, obtain a qualified medical expert to rebut testimony by a sexual abuse nurse examiner and failing to properly cross-examine the State's witnesses. The defendant's motion was supported by an affidavit from counsel admitting the alleged errors and stating that none were strategic decisions. The court concluded that these failures "could have had a substantial impact on the jury's verdict" and thus the defendant was entitled to an evidentiary hearing. The case was one of "he said, she said," with no physical evidence of rape. The absence of any signs of violence provided defense counsel an opportunity to contradict the victim's allegations with a medical expert, an opportunity he failed to take. Additionally, trial counsel failed to expose, through cross-examination, the fact that investigators failed to collect key evidence. For example, they did not test, collect, or even ask the victim about a used condom and condom wrapper found in the bedroom. Given counsel's admission that his conduct was not the product of a strategic decision, an evidentiary hearing was required. (2) With respect to the defendant's claim that the trial court erred by denying his motion before providing him with post-conviction discovery pursuant to G.S. 15A-1415(f), the court remanded for the trial court to address whether the State had complied with its post-conviction discovery obligations.

(1) Defendant had no statutory right to appeal where appeal pertained to voluntariness of his plea; (2) Defendant could not seek review by way of certiorari where his claim did not fall within the grounds set forth in Appellate Rule 21(a)(1); (3) Court declined to exercise discretion to suspend rules of appellate procedure

[*State v. Biddix*](#), ___ N.C. App. ___, 780 S.E.2d 863 (Dec. 15, 2015). (1) The defendant, who pleaded guilty in this drug case, had no statutory right under G.S. 15A-1444 to appeal where his appeal pertained to the voluntariness of his plea. (2) Notwithstanding prior case law, and over a dissent, the court held that the defendant could not seek review by way of certiorari where the defendant's claim did not fall within any of the three grounds set forth in Appellate Rule 21(a)(1). The court distinguished prior cases in which certiorari had been granted, noting that none addressed the requirements of Rule 21. (3) The court declined to exercise its discretion under Appellate Rule 2 to suspend the rules of appellate procedure, finding that the defendant had not demonstrated exceptional circumstances warranting such action.

G.S. 15A-1027 precluded defendant's assertions in his MAR that his plea was invalid because the trial court failed to follow the procedural requirements of G.S. 15A-1023 and -1024

[*State v. McGee*](#), ___ N.C. App. ___, 780 S.E.2d 916 (Dec. 15, 2015). The defendant's assertions in his MAR, filed more than seven years after expiration of the appeal period, that his plea was invalid because the trial court failed to follow the procedural requirements of G.S. 15A-1023 and -1024 were precluded by G.S. 15A-1027 ("Noncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired.").