Criminal Law Update
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Criminal Procedure

Competency to Stand Trial

State v. Leyshon, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTQ0LTEucGRm). The court rejected the defendant's argument that his due process rights were violated when the trial judge failed to provide him with a hearing before ordering an examination of his capacity to proceed. G.S. 15A-1002 does not require a hearing before such an examination. A defendant may request a hearing after the examination but failure to do so—as happened here—constitutes a waiver.

State v. Whitted, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MzktMS5wZGY). The trial court erred by failing to sua sponte inquire into the defendant's competency. In light of the defendant's history of mental illness, including paranoid schizophrenia and bipolar disorder, her remarks that her appointed counsel was working for the State and that the trial court wanted her to plead guilty, coupled with her irrational behavior in the courtroom, constituted substantial evidence and created a bona fide doubt as to competency. The court rejected the State's argument that the trial court did in fact inquire into competency when, after defense counsel mentioned that she had recently undergone surgery and was taking pain medication, the trial court asked the defendant and counsel whether the medication was impairing her ability to understand the proceedings or her decision to reject the plea bargain offered by the State. Both replied in the negative. The trial court also asked the defendant about her ability to read and write and whether she understood the charges against her. However, this inquiry pertained only to effects of the pain medication. More importantly, it was not timely given that the defendant's refusal to return to the courtroom and resulting outbursts occurred two days later. The court remanded for a determination of whether a meaningful retrospective competency hearing could be held.

Counsel Issues

State v. Lane, __ N.C. __ (Mar. 11. 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS82MDZBMDUtMS5wZGY). This capital case came back before the N.C. Supreme Court after that court remanded in *State v. Lane*, 362 N.C. 667 (Dec. 12, 2008) (*Lane I*), for consideration under *Indiana v. Edwards*, 554 U.S. 164 (2008), as to whether the trial judge should have exercised discretion to deny the defendant's request to represent himself. *Edwards* held that states may require

counsel to represent defendants who are competent to stand trial but who suffer from severe mental illness to the extent that they are not competent to represent themselves. At trial, the trial court had accepted the defendant's waiver of counsel and allowed the defendant to proceed pro se. Following a hearing, held on remand after *Lane I*, the trial court concluded that the defendant was competent to stand trial and to discharge his counsel and proceed pro se. The N.C. Supreme Court held that because the defendant never was denied his constitutional right to self-representation (he was allowed to proceed pro se), the U.S. "Supreme Court's holding in *Edwards*, that the State may deny that right if a defendant falls into the "gray area" of competence, does not guide our decision here." Slip op. at 22. Rather, the N.C. Supreme Court clarified, because the trial court found the defendant competent to stand trial, the issue was whether the defendant made a knowing and voluntary waiver of his right to counsel. On that issue, and after a detailed review of the trial court's findings, the court concluded that the trial court's inquiry was sufficient to support its determination that the defendant knowingly and voluntarily waived his right to counsel. In the course of that ruling, the court reaffirmed that a defendant's technical legal knowledge is not relevant to an assessment of a valid waiver of counsel.

While *Lane I* could be read to suggest that the trial court always must undertake an *Edwards* inquiry before allowing a defendant to proceed pro se, *Lane II* suggests otherwise. In *Lane II*, the court clarified the options for the trial court, stating:

> For a defendant whose competence is at issue, he must be found [competent] before standing trial. If that defendant, after being found competent, seeks to represent himself, the trial court has two choices: (1) it may grant the motion to proceed *pro se*, allowing the defendant to exercise his constitutional right to self-representation, if and only if the trial court is satisfied that he has knowingly and voluntarily waived his corresponding right to assistance of counsel . . . ; or (2) it may deny the motion, thereby denying the defendant's constitutional right to self-representation because the defendant falls into the "gray area" and is therefore subject to the "competency limitation" described in *Edwards.* The trial court must make findings of fact to support its determination that the defendant is "unable to carry out the basic tasks needed to present his own defense without the help of counsel."

Slip op. at 21 (citations omitted).

In Re P.D.R., __ N.C. App. __, __ S.E.2d __ (June 7, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTE5LTEucGRm). In a termination of parental rights (TPR) case, the trial court erred by allowing the respondent mother to waive counsel and represent herself. Analogizing to criminal cases, the court held that trial court's inquiry into the respondent's desire to waive counsel was insufficient because it did not determine, among other things, whether she comprehended the nature of the proceedings. Citing *Indiana v. Edwards*, 554 U.S. 164 (2008) (holding that states may require counsel to represent defendants who are competent to stand trial but who suffer from severe mental illness to the extent that they are not competent to represent themselves) and record evidence regarding the respondent's competency, the court also concluded that "the trial court had a duty to inquire into respondent mother's competence not only to waive counsel, but also to represent herself in the TPR proceedings."

State v. Leyshon, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTQ0LTEucGRm). (1) The trial court did not err by appointing counsel for the defendant where there was no clear and unequivocal waiver. The defendant refused to answer whether he waived or asserted his right to counsel and made contradictory statements on the issue. He stated: "I'm not waiving my right to assistance of counsel," "I want to retain my right", and "I'm reserving my rights". He also said: "I don't need an attorney", "I refuse his counsel", and "I'll have no counsel". (2) The trial court did not err by allowing the defendant to proceed pro se where the defendant forfeited his right to counsel. In July 2007, the defendant refused to sign a waiver of counsel form. At a Jan. 2008 hearing, the court twice advised the defendant of his right to counsel and repeatedly asked if he wanted a lawyer. The defendant refused to answer, arguing, "I want to find out if the Court has jurisdiction before I waive anything". Even after the court explained the basis of its jurisdiction, the defendant refused to state if he wanted an attorney, persistently refusing to waive anything until jurisdiction was established. At a July 2008 hearing, the defendant would not respond to the court's inquiry regarding counsel, asserting, "I'm not waiving my right to assistance of counsel," but also refusing the assistance of the appointed attorney. At the next hearing, he continued to challenge the court's jurisdiction and would not answer the court's inquiry regarding whether he wanted an attorney or to represent himself. Instead, he maintained, "If I hire a lawyer, I'm declaring myself a ward of the Court . . . and the Court automatically acquires jurisdiction . . . and I'm not acquiescing at this point to the jurisdiction of the Court." The defendant willfully

obstructed and delayed the proceedings and thus forfeited his right to counsel.

State v. Paterson, __ N.C. App. __, 703 S.E.2d 755 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00NDYtMS5wZGY). (1) The defendant's waiver of counsel was sufficient even though a box on the waiver form was left blank and the form was executed before the court advised the defendant of the charges and the range of punishment. Citing *State v. Heatwole*, 344 N.C. 1, 18 (1996), and *State v. Fulp*, 355 N.C. 171, 177 (2002), the court first concluded that a waiver of counsel form is not required and any deficiency in the form will not render the waiver invalid, if the waiver was knowing, intelligent, and voluntary. Next, the court concluded that the waiver was not invalid because the trial court failed to go over the charges and potential punishments prior to the defendant signing the waiver form. The trial court discussed the charges and potential punishments with the defendant the following day, and defendant confirmed his desire to represent himself in open court. Although the waiver form requires the trial judge to certify that he or she informed the defendant of the charges and punishments, given that the form is not mandatory, no prejudice occurs when the trial court does, in fact, provide that information in accordance with the statute and the defendant subsequently asserts the right to proceed pro se. (2) The trial court conducted an adequate inquiry under G.S. 15A-1242. The court noted that there is no mandatory formula for complying with the statute. Here, the trial judge explicitly informed the defendant of his right to counsel and the process to secure a court-appointed attorney; the defendant acknowledged that he understood his rights after being repeatedly asked whether he understood them and whether he was sure that he wanted to waive counsel; the judge informed him of the charges and potential punishments; and the judge explained that he would be treated the same at trial regardless of whether he had an attorney. The trial court's colloquies at the calendar call and before trial, coupled with the defendant's repeated assertion that he wished to represent himself, demonstrate that the defendant clearly and unequivocally expressed his desire to proceed *pro se* and that such expression was made knowingly, intelligently, and voluntarily.

In Re Watson, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNjUtMS5wZGY). (1) Because the trial court failed to comply with the statutory mandates of G.S. 15A-1242, 122C-268(d), and IDS Rule 1.6, the respondent's waiver of counsel in his involuntary commitment hearing was ineffective. The court adopted language from *State v. Moore*, 362 N.C. 319, 327-28 (2008), endorsing a fourteen-question checklist for taking a waiver of counsel. [Author's note: this same checklist appears in the Superior Court Judges On-Line Bench Book (The "Survival Guide") at: http://www.sog.unc.edu/faculty/smithjess/documents/CounselIssues.pdf]. The court also noted with approval language from an Arizona case suggesting the proper inquiry in involuntary commitment cases. (2) The fact that the respondent had standby counsel did not cure the improper waiver of counsel.

State v. Howell, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NzYtMS5wZGY=). The trial court did not err by considering the defendant's pro se speedy trial motion, filed when he was represented by counsel.

State v. Williamson, __ N.C. App. __, __ S.E.2d __ (June 7, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04ODMtMS5wZGY=). Because the defendant's lawyer adopted the defendant's pro se filing under G.S. 15A-711 by submitting evidence to the trial court in support of it, the trial court properly considered the pro se filing, made while the defendant was represented by counsel.

Discovery and Related Issues

State v. Lane, __ N.C. __ (Mar. 11. 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS82MDZBMDUtMS5wZGY). In a capital murder case, the trial court did not abuse its discretion by excluding expert testimony by a neuropharmacologist and research scientist who studies the effects of drugs and alcohol on the brain, proffered by the defense as relevant to the jury's determination of the reliability of the defendant's confession. The trial court barred the expert's testimony on grounds that the expert's report provided to the State was insufficient to satisfy the discovery rules; repeated requests were made by the State for the report and the trial court had ordered production. Relevant to the court's finding of no abuse of discretion was its separate conclusion that the expert's testimony was not relevant.

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011)

(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The defendant was not entitled to a new trial on grounds that the SBI Crime Lab refused to test four hair and fiber lifts taken from an item of clothing. The defendant did not argue that the prosecutor failed to make the lifts available to him for testing. In fact, one of the defendant's previous attorneys made a motion for independent testing of the clothing item and received the results of the testing. Because police do not have a constitutional duty to perform particular tests on crime scene evidence, no error occurred.

DWI Procedure

State v. Daniel, __ N.C. App. __, 702 S.E.2d 306 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS0xMjY0LTEucGRm). Over a dissent, the court held that the trial court did not err by denying the defendant's *Knoll* motion in an impaired driving case in which the defendant was detained for almost 24 hours. The court upheld the trial court's finding that an individual who appeared to take responsibility for the defendant was not a sober responsible adult; a police officer smelled alcohol on the individual's breath and the individual indicated that he had been drinking. The only statutory violation alleged was a failure to release to a sober, responsible adult, but the individual who appeared was not a sober, responsible adult. The trial court's conclusions that no violation occurred or alternatively that the defendant failed to show irreparable prejudice was supported by the evidence. The defendant was advised that she could request an attorney or other witness to observe her Intoxilyzer test but she declined to request a witness. Also, the individual who appeared was allowed to see the defendant within 25 minutes of her exiting the magistrate's office, to meet personally with the defendant, and to talk with and observe the defendant for approximately eight minutes.

Hartman v. Robertson, __ N.C. App. __, 703 S.E.2d 811 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC02MzYtMS5wZGY). (1) In an appeal of a driver's license revocation under G.S. 20-16.2(e), the court declined to consider the defendant's argument that the officer lacked reasonable and articulable suspicion to stop his vehicle. Reasonable and articulable suspicion for the stop is not relevant to determinations in connection with a license revocation; the only inquiry with respect to the officer, the court explained, is that he or she have reasonable grounds to believe that the person has committed an implied consent offense. Here, the evidence supported that conclusion. (2) The exclusionary rule does not apply in a civil license revocation proceeding.

State v. Petty, __ N.C. App. __, __ S.E.2d __ (June 7, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NDYtMS5wZGY=). (1) After accepting a defendant's guilty plea to DWI, the district court had no authority to arrest judgment. (2) Once the defendant appealed to superior court from the district court's judgment for a trial de novo, the superior court obtained jurisdiction over the charge and the superior court judge erred by dismissing the charge based on alleged non-jurisdictional defects in the district court proceedings.

Habitual Felon

State v. Eaton, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNTg2LTEucGRm). A defendant may be sentenced as a habitual felon for an underlying felony of drug trafficking.

Inconsistent and Mutually Exclusive Offenses

State v. Mumford , 364 N.C. 394 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/32PA10-1.pdf). The court reversed *State v. Mumford*, __ N.C. App. __, 688 S.E.2d 458 (Jan. 5, 2010), and held that because a not guilty verdict under G.S. 20-138.1 (impaired driving) and a guilty verdict under G.S. 20-141.4(a3) (felony serious injury by vehicle) were merely inconsistent, the trial court did not err by accepting the verdict where it was supported with sufficient evidence. To require reversal, the verdicts would have to be both inconsistent and legally contradictory, also referred to as mutually exclusive verdicts (for example, guilty verdicts of embezzlement and obtaining property by false pretenses; the verdicts are mutually exclusive because property cannot be obtained simultaneously pursuant to both lawful and unlawful means). The court overruled *State v. Perry*, 305 N.C. 225 (1982) (affirming a decision to vacate a sentence for felonious larceny when the jury returned a guilty verdict for felonious larceny but a not guilty verdict of breaking

or entering), and *State v. Holloway*, 265 N.C. 581 (1965) (per curiam) (ordering a new trial when the defendant was found guilty of felonious larceny, but was acquitted of breaking or entering and no evidence was presented at trial to prove the value of the stolen goods), to the extent they were inconsistent with its holding.

State v. Melvin, __ N.C. __, __ S.E.2d __ (Dec. 20, 2010) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMC8zODJQQTA5LTEucGRm). Reversing the court of appeals in ___ N.C. App. ___, 682 S.E.2d 238 (2009) (the trial court committed plain error by failing to instruct the jury that it could convict the defendant of either first-degree murder or accessory after the fact to murder, but not both), the court held that although the trial court erred by failing to give the instruction at issue, no plain error occurred. Citing its recent decision in *State v. Mumford*, 364 N.C. 394, 398-402 (2010), the court held that because guilty verdicts of first-degree murder and accessory after the fact to that murder would be legally inconsistent and contradictory, a defendant may not be punished for both. The court went on to explain that mutually exclusive offenses may be joined for trial; if substantial evidence supports each offense, both should be submitted to the jury with an instruction that the defendant only may be convicted of one of the offenses, but not both. Having found error, the court went on to conclude that no plain error occurred in light of the overwhelming evidence of guilt, the fact that the jury found the defendant guilty of both offenses, suggesting that it would have convicted him of the more serious offense, had it been required to choose between charges, and that the trial judge arrested judgment on the accessory after the fact conviction.

State v. Blackmon, __ N.C. App. __, 702 S.E.2d 833 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00MTctMS5wZGY). The trial court properly denied the defendant's motion for judgment notwithstanding the verdict based on inconsistent verdicts. The jury found the defendant guilty of felonious larceny after a breaking or entering and of being a habitual felon but deadlocked on a breaking or entering charge. Citing, *State v. Mumford* , 364 N.C. 394 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/32PA10-1.pdf), the court held that the verdicts were merely inconsistent and not mutually exclusive.

State v. Johnson, __ N.C. App. __, 702 S.E.2d 547 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC01MTktMS5wZGY). Guilty verdicts of breaking or entering and discharging a firearm into occupied property were not mutually exclusive. The defendant argued that he could not both be in the building and shooting into the building at the same time. The court rejected this argument noting that the offenses occurred in succession, the defendant would be guilty of the discharging offense regardless of whether or not he was standing on a screened-in porch at the time, and that in any event the defendant was not in the building when he was standing on the porch.

Indictment Issues

In Re A.W., __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MTMtMS5wZGY). There was no fatal variance between a juvenile delinquency petition for indecent liberties alleging an offense date of November 14, 2008, and the evidence which showed an offense date of November 7-9, 2008. The juvenile failed to show that his ability to present an adequate defense was prejudiced by the variance.

State v. Burge, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00OTMtMS5wZGY=). Because an arrest warrant charged the defendant with a violation of G.S. 67-4.2 (failing to confine a dangerous dog), it could not support a conviction for a violation of G.S. 67-4.3 (attack by a dangerous dog). Even though the warrant cited G.S. 67-4.2, it would have been adequate if it had alleged all of the elements of a G.S. 67-4.3 offense. However, it failed to do so as it did not allege that the injuries required medical treatment costing more than $100.

State v. Cole, __ N.C. App. __, 703 S.E.2d 842 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzktMS5wZGY). An indictment charging accessory after the fact to first-degree murder was sufficient to support a conviction of accessory after the fact to second-degree murder. The indictment alleged that a felony was committed, that the defendant knew that the person he assisted committed that felony, and that he rendered personal assistance to the felon; it thus provided adequate notice to prepare a defense and protect against double jeopardy.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). In an indecent liberties case, the trial judge's jury instructions were supported by the indictment. The indictment tracked the statute and did not allege an evidentiary basis for the charge. The jury instructions, which identified the defendant's conduct as placing his penis between the child's feet, was a clarification of the evidence for the jury.

State v. McNeill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). An indictment for felonious larceny that failed to allege ownership in the stolen handgun was fatally defective.

State v. Chillo, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC02MjItMS5wZGY). (1) An indictment for breaking or entering a motor vehicle alleging that the vehicle was the personal property of "D.L. Peterson Trust" was not defective for failing to allege that the victim was a legal entity capable of owning property. The indictment alleged ownership in a trust, a legal entity capable of owning property. (2) Because the State indicted the defendant for breaking or entering a motor vehicle with intent to commit larceny therein, it was bound by that allegation and had to prove that the defendant intended to commit larceny.

State v. Clark, __ N.C. App. __, 702 S.E.2d 324 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yMzUtMS5wZGY). (1) Although the State is not required to allege the felony or larceny intended in an indictment charging breaking or entering a vehicle, if it does so, it will be bound by that allegation. (2) An indictment properly alleges the fifth element of breaking and entering a motor vehicle—with intent to commit a felony or larceny therein—by alleging that the defendant intended to steal the same motor vehicle.

State v. Hinson, 354 N.C. 414 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/176A10-1.pdf). For the reasons stated in the dissenting opinion below, the court reversed *State v. Hinson*, __ N.C. App. __, 691 S.E.2d 63 (April 6, 2010). The defendant was indicted for manufacturing methamphetamine by "chemically combining and synthesizing precursor chemicals to create methamphetamine." However, the trial judge instructed the jury that it could find the defendant guilty if it found that he produced, prepared, propagated, compounded, converted or processed methamphetamine, either by extraction from substances of natural origin or by chemical synthesis. The court of appeals held, over a dissent, that this was plain error as it allowed the jury to convict on theories not charged in the indictment. The dissenting judge concluded that while the trial court's instructions used slightly different words than the indictment, the import of both the indictment and the charge were the same. The dissent reasoned that the manufacture of methamphetamine is accomplished by the chemical combination of precursor elements to create methamphetamine and that the charge to the jury, construed contextually as a whole, was correct.

State v. Garnett, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEtMS5wZGY). Theories included in the trial judge's jury instructions were supported by the indictment. The indictment charged the defendant with maintaining a dwelling "for keeping *and* selling a controlled substance." The trial court instructed the jury on maintaining a dwelling "for keeping *or* selling marijuana." The use of the conjunctive "and" in the indictment did not require the State to prove both theories alleged.

State v. Cobos, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NTctMS5wZGY=). The trial court committed reversible error by allowing the State to amend an indictment charging conspiracy to engage in "trafficking to deliver Cocaine" to add the following language: "to deliver 28 grams or more but less than 200 grams of cocaine." To allege all of the essential elements, an indictment for conspiracy to traffic in cocaine must allege that the defendant facilitated the transfer of 28 grams or more of cocaine. Here, the indictment failed to specify the amount of cocaine. The court also concluded that a defendant cannot consent to an amendment that cures a fatal defect; the issue is jurisdictional and a party cannot consent to subject matter jurisdiction.

State v. Moore, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjQtMS5wZGY). Stating in dicta that an indictment alleging obtaining property by false pretenses need not identify a specific victim.

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTItMS5wZGY). (1) An obstruction of justice indictment properly charged a felony when it alleged that the act was done "with deceit and intent to interfere with justice." G.S. 14-3(b) provides that a misdemeanor receives elevated punishment when done with "deceit and intent to defraud." The language "deceit and intent to interfere with justice" adequately put the defendant on notice that the State intended to seek a felony conviction. Additionally, the indictment alleged that the defendant acted "feloniously." (2) A defendant may challenge the sufficiency of an indictment even after pleading guilty to the charge at issue.

State v. Twitty, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzIwLTEucGRm). The trial court's failure to dismiss the original indictment after a superseding indictment was filed did not render the superseding indictment void or defective.

Judgment

State v. Kerrin, __ N.C. App. __, 703 S.E.2d 816 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUzLTEucGRm). In a criminal case, entry of judgment occurs when a judge announces the ruling in open court or signs the judgment containing the ruling and files it with the clerk. A trial judge is not required to announce all of the findings and details of its judgment in open court, provided they are included in the signed judgment filed with the clerk. Based on these rules, a written order on form AOC-CR-317 (Forfeiture of Licensing Privileges Felony Probation Revocation) was not invalid for failure to announce the order's details in open court.

Jury Argument

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00ODMtMS5wZGY). The prosecutor's characterization of the defendant's statements as lies, while "clearly improper," did not require reversal. The court noted that the trial court's admonition to the prosecutor not to so characterize the defendant's statements neutralized the improper argument.

State v. Oakes, __ N.C. App. __, 703 S.E.2d 476 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMjgwLTEucGRm). The prosecutor's statements during closing argument were not so grossly improper as to require the trial court to intervene ex mero motu. Although disapproving a prosecutor's comparisons between criminal defendants and animals, the court concluded that the prosecutor's statements equating the defendant's actions to a hunting tiger were not grossly improper; the statements helped to explain the State's theory of premeditated and deliberate murder.

State v. Hartley, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NjQtMS5wZGY=). The trial court did not err by failing to intervene ex mero motu when, in a triple homicide case, the prosecutor argued, among other things, "If that . . . isn't murder, I don't know what is" and "I know when to ask for the death penalty and when not to. This isn't the first case, it's the ten thousandth for me."

State v. Twitty, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzIwLTEucGRm). The trial court did not err by failing to intervene ex mero motu when the prosecutor referred to the defendant as a con man, liar, and parasite. The defendant was charged with obtaining property by false pretenses, an offense committed by deceiving or lying to win the confidence of victims. Given that the defendant lied to a church congregation in order to convince them to give him money, there was no impropriety in the State's reference to the defendant as a liar and con man; the terms accurately characterize the charged offense and the evidence presented at trial. As for the term "parasite," the court

concluded: "this name-calling by the State was unnecessary and unprofessional, but does not rise to the level of gross impropriety."

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) No gross impropriety occurred in closing argument in the guilt-innocence phase of a capital trial when the prosecutor (a) asserted that a mark on the victim's forehead was caused by the defendant's shoe and evidence supported the statement; (b) suggested that the defendant's accomplice committed burglary at the victim's home; the comment only referred the accomplice, neither the defendant nor the accomplice were charged with burglary, and the trial court did not instruct the jury to consider burglary; or (c) suggested that the victim was killed to eliminate her as a witness when the argument was a reasonable extrapolation of the evidence made in the context of explaining mental state. (2) The trial court did not err by failing to intervene ex mero motu during the State's opening statement during the sentencing phase of a capital trial when the prosecutor stated that the "victim and the victim's loved ones would not be heard from." According to the defendant, the statement inflamed and misled the jury. The prosecutor's statement described the nature of the proceeding and provided the jury a forecast of what to expect. (3) The trial court did not err by failing to intervene ex mero motu during closing argument in the sentencing phase of a capital trial when the prosecutor (a) made statements regarding evidence of aggravating circumstances; the court rejected the argument that the prosecutor asked the jury to use the same evidence to find more than one aggravating circumstance; (b) properly used a neighbor's experience to convey the victim's suffering and nature of the crime; (c) offered a hypothetical conversation with the victim's father; (d) referred to "gang life" to indicate lawlessness and unstrained behavior, and not as a reference to the defendant being in a gang or that the killing was gang-related; also the prosecutor's statements were supported by evidence about the defendant's connection to gangs.

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The court rejected the defendant's argument that plain error occurred when the prosecutor misrepresented the results of the SBI Crime Lab phenolphthalein blood tests. At trial, a SBI agent explained that a positive test result would provide an indication that blood could be present. On cross-examination, he noted that certain plant and commercially produced chemicals may give a positive result. The defendant argued that the prosecutor misrepresented the results of the phenolphthalein blood tests during closing argument by stating that the agent tested the clothes and they tested positive for blood. Based on the agent's testimony, this argument was proper.

Jury Deliberations

State v. Stevenson, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzEzLTEucGRm). The trial court did not abuse its discretion by denying the jury's request, made during deliberations, for a transcript of a witness's testimony. The trial court expressly denied the request in its discretion; there is no requirement that the trial judge provide any further explanation to demonstrate that he or she is in fact exercising discretion.

State v. Starr, __ N.C. App. __, 703 S.E.2d 876 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NTItMS5wZGY). (1) Although the trial judge did not explicitly state that he was denying, in his discretion, the jury's request to review testimony, the judge instructed the jurors to rely on their recollection of the evidence that they heard and therefore properly exercised its discretion in denying the request. (2) When defense counsel consents to the trial court's communication with the jury in a manner other than in the courtroom, the defendant waives his right to appeal the issue. Here, although the trial judge failed to bring the jurors to the courtroom in response to their request to review testimony and instead instructed them from the jury room door, prior to doing so he asked for and received counsel's permission to instruct at the jury room door.

State v. Ross, __ N.C. App. __, 700 S.E.2d 412 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091021-1.pdf). The bailiff's delivery of an exhibit to the jury, with an instruction from the trial judge that it would need to be returned to the trial court did not prejudice the defendant, even though the trial court violated G.S. 15A-1233(a) by failing to bring the jury into the courtroom when the jury's asked to review the exhibit. As to the instruction delivered by the bailiff, the court distinguished prior case law, in part, because the communication did not pertain to matters material to the case.

Jury Instructions

State v. Adams, __ N.C. App. __, __ S.E.2d __ (June 7, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MDYtMS5wZGY=). In a case in which two defendants were convicted of attempted murder and felonious assault, the trial judge committed plain error by giving jury instructions that impermissibly grouped the defendants together in presenting the charges and issues to the jury. In its instructions, the trial court repeatedly referred to the defendants collectively (e.g.,: "For you to find *the defendants guilty* of this offense . . . ."; the State must prove "that [when] each of the defendant had this intent[,] *they performed an act* that was calculated and designed to accomplish the crime").

State v. Starr, __ N.C. App. __, 703 S.E.2d 876 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NTItMS5wZGY). In an assault on a firefighter with a firearm case, the trial court did not err by denying the defendant's request for a jury instruction on the elements of assault where the defendant failed to submit his requested instruction in writing.

State v. Wright, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03OTQtMS5wZGY=). Although the trial court erred by failing to give the final not guilty mandate, under the circumstances presented the error did not rise to the level of plain error.

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MzEtMS5wZGY=). No plain error occurred when the trial court instructed the jury on the 404(b) evidence using N.C. Pattern Jury Instruction – Crim. 104.15 but declined to instruct that the evidence could not be used to prove defendant's character or that he acted in conformity therewith.

State v. Walters, __ N.C. App. __, 703 S.E.2d 493 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yODEtMS5wZGY). Upon being notified that the jury was deadlocked, the trial judge did not err by giving an *Allen* instruction pursuant to N.C. Crim. Pattern Jury Instruction 101.40 and not G.S. 15A-1235, as requested by the defendant. Because there was no discrepancy between the pattern instruction and G.S. 15A-1235, it was not an abuse of discretion for the trial court to use the pattern instruction.

State v. Lawrence, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNDgtMS5wZGY). The evidence was sufficient to warrant an instruction on flight. During the first robbery attempt, the defendant and a co-conspirator fled from a deputy sheriff. During the second attempt, the defendant fled from an armed neighbor. After learning of the defendant's name and address, an officer canvassed the neighborhood, looking for the defendant. The defendant was later arrested in another state.

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). In a kidnapping, sexual assault, and murder case, the trial court did not err by instructing the jury on flight. The defendant and an accomplice left the victims bound, placed a two-by-four across the inside of the apartment door, hindering access from the outside, and exited through a window. Despite the fact that the defendant lived at the apartment, there was no indication he ever returned. Although a warrant for the defendant's arrest was issued immediately, ten years passed before the defendant was extradited.

State v. Hartley, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NjQtMS5wZGY=). In a triple murder case in which the defendant asserted an insanity defense, the trial court did not err by failing to give the defendant's requested jury instruction on the commitment process and instead instructing the jury on the issue pursuant to N.C.P.J.I—Crim. 304.10. The pattern instruction adequately charged the jury regarding procedures upon acquittal on the ground of insanity.

State v. Wiggins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011)

(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTAtMS5wZGY). In a murder case, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of second-degree murder. For reasons discussed in the opinion, the evidence showed that the defendant acted with premeditation and deliberation.

State v. Bedford, __ N.C. App. __, 702 S.E.2d 522 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yNTUtMS5wZGY). The trial court did not err by declining to instruct the jury on second-degree murder when no evidence negated the State's evidence of first-degree murder. The defendant argued that the evidence showed that he killed the victim in a "frenzied, crack-fueled explosion" of a long-simmering "rage of jealousy." However, the court noted, premeditation and deliberation do not imply a lack of passion, anger or emotion. Nor, the court noted, does the defendant's possible drug intoxication support an inference that he did not premeditate and deliberate. The State presented evidence of the defendant's conduct and statements before the killing, including threats towards the victim; ill-will and previous difficulties between the parties; lethal blows rendered after the victim had been felled and rendered helpless; the brutality of the killing; and the extreme nature and number of the victim's wounds.

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yODctMS5wZGY). In a child sexual offense case in which the indictment specified digital penetration and the evidence supported that allegation, the trial court was not required to instruct the jury that it only could find the defendant guilty if the State proved the specific sex act stated in the indictment.

Jury Misconduct/Improper Contact With Jurors

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MzEtMS5wZGY=). The trial court did not abuse its discretion by denying the defendant's mistrial motion. During a recess at trial, a juror was approached by a man who said, "Just quit, and I'll let you go home." Upon return to the courtroom, the trial court inquired and determined that six jurors witnessed the incident. The trial court examined each juror individually and each indicated that the incident would not affect his or her ability to follow the trial court's instructions or review of the evidence. Given the trial court's response and the lack of evidence showing that the jurors were incapable of impartially rendering their verdict, the trial court did not abuse its discretion by denying the motion.

State v. Boyd, __ N.C. App. __, 701 S.E.2d 255 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100025-1.pdf). The trial court did not abuse its discretion by denying a defense motion to dismiss a juror, made after the juror sent a letter to the trial judge requesting to see a DVD that had been played the previous day in court and stating that she thought the defendant's accent was fabricated. Despite being presented with only a suspicion of potential misconduct, the court made inquiry and determined that the juror had not made up her mind as to guilt or innocence and that she was willing to listen to the remainder of the evidence before considering guilt or innocence. The juror did not indicate that she was unable to accept a particular defense or penalty or abide by the presumption of innocence. Nothing suggested that the juror had spoken with other jurors about her thoughts, shared the note with anyone, or participated in any kind of misconduct. Given the trial court's examination, it was not required to allow the defense to examine the juror.

Jury Selection

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) The trial court did not err in denying a capital defendant's *Batson* challenge when the defendant failed to established a prima facie case that the prosecutor's use of a peremptory challenge against Juror Rogers, an African-American female, was motivated by race. Because Ms. Rogers was the first prospective juror peremptorily challenged, there was no pattern of disproportionate use of challenges against African-Americans. Ms. Rogers was the only juror who stated, when first asked, that she was personally opposed to the death penalty. (2) The trial court did not err in denying a capital defendant's *Batson* challenge to the State's peremptory challenge of a second juror. There did not appear to be a systematic effort by the State to prevent African-Americans from serving when the State accepted 50% of African-American prospective jurors. The prosecutor's race-neutral reasons were that the juror had not formulated views on

the death penalty, did not read the newspaper or watch the news, had been charged with a felony, and gave information regarding disposition of that charge that was inconsistent with AOC records. Considering these reasons in the context of the prosecutor's examination of similarly situated whites who were not peremptorily challenged, the court found they were not pretextual and that race was not a significant factor in the strike. (3) The court rejected the defendant's argument that a remand was required for further findings of fact under *Snyder v. Louisiana*, 552 U.S. 472 (2008). Unlike in *Snyder*, the case at hand did not involve peremptory challenges involving demeanor or other intangible observations that cannot be gleaned from the record. However, the court stated that "[c]onsistent with *Snyder*, we encourage the trial courts to make findings . . . to elucidate aspects of the jury selection process that are not preserved on the cold record so that review of such subjective factors as nervousness will be possible."

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yNi0xLnBkZg). The trial court did not improperly limit the defendant's voir dire questioning with respect to assessing the credibility of witnesses and the jurors' ability to follow the law on reasonable doubt. Because the trial judge properly sustained the State's objections to the defendant's questions, no abuse of discretion occurred. Even if any error occurred, the defendant suffered no prejudice.

Mistrial

State v. Dye, __ N.C. App. __, 700 S.E.2d 135 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091574-1.pdf). The trial court did not abuse its discretion by denying the defendant's mistrial motion, made after the jury returned guilty verdicts. The motion was based on the fact that the child victim in this sexual assault case twice interrupted defense counsel's closing argument. After the initial interruption, the trial court, out of the jury's presence, instructed the victim to remain quiet. After her second outburst, the victim was removed from the courtroom. Additionally, the trial provided the defendant with an opportunity to request remedial measures, including mistrial, an invitation that was declined until after the verdict was returned.

Motions

Motion to Continue

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). The trial court's denial of a motion to continue in a murder case did not violate the defendant's right to due process and effective assistance of counsel. The defendant asserted that he did not realize that certain items of physical evidence were shell casings found in defendant's room until the eve of trial and thus was unable to procure independent testing of the casings and the murder weapon. Even though the relevant forensic report was delivered to the defendant in 2008, the defendant did not file additional discovery requests until February 3, 2009, followed by *Brady* and *Kyles* motions on February 11, 2009. The trial court afforded the defendant an opportunity to have a forensic examination done during trial but the defendant declined to do so. The defendant was not entitled to a presumption of prejudice on grounds that denial of the motion created made it so that no lawyer could provide effective assistance. The defendant's argument that had he been given additional time, an independent examination *might* have shown that the casings were not fired by the murder weapon was insufficient to establish the requisite prejudice.

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The trial court did not abuse its discretion by denying the defendant's motion to continue to test certain hair and fiber lifts from an item of clothing. The defendant had six months to prepare for trial and obtain independent testing, but waited until the day of trial to file his motion, in violation G.S. 15A-952(c). This failure to file the motion to continue within the required time period constituted a waiver of the motion. Also, because the item had already been DNA tested by the State, the lifts were not the only physical evidence obtained.

Motion to Dismiss

State v. Buddington, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yODYtMS5wZGY). The trial court erred by

granting the defendant's motion to dismiss a charge of felon in possession of a firearm on grounds that the statute was unconstitutional as applied to him. The defendant's motion was unverified, trial court heard no evidence, and there were no clear stipulations to the facts. To prevail in a motion to dismiss on an as applied challenge to the statute, the defense must present evidence allowing the trial court to make findings of fact regarding the type of felony convictions and whether they involved violence or threat of violence; the remoteness of the convictions; the felon's history of law abiding conduct since the crime; the felon's history of responsible, lawful firearm possession during a period when possession was not prohibited; and the felon's assiduous and proactive compliance with amendments to the statute.

State v. Hayden, __ N.C. App. __, __ S.E.2d __ (June 7, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzA2LTEucGRm). In a case involving a 1972 homicide, the trial judge erred by denying the defendant's motion to dismiss due to insufficient evidence that he was the perpetrator. When the State presents only circumstantial evidence that the defendant is the perpetrator, courts look at motive, opportunity, capability and identity to determine whether a reasonable inference of the defendant's guilt may be inferred or whether there is merely a suspicion that the defendant is the perpetrator. Evidence of either motive or opportunity alone is insufficient to carry a case to the jury. Here, the evidence was sufficient to show motive; it showed hostility between the victim and the defendant that erupted at times in physical violence and threats. However, there was insufficient evidence of opportunity. The court noted that for there to be sufficient evidence of opportunity, the State must present evidence placing the defendant at the crime scene when the crime was committed. Here, the only evidence of opportunity was the defendant's statement, made 26 years after the murder, that he was briefly in a spot two miles away from the crime scene. Finally, the court agreed with the defendant's argument that State's evidence of his means to kill the victim was insufficient because it failed to connect the defendant to the murder weapon.

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). The evidence was sufficient to establish that the defendant perpetrated the murder. The defendant was jealous of the victim and made numerous threats toward him; four spent casings found in his bedroom were fired from the murder weapon; on the day of the murder, the victim got into a vehicle that matched a description of the defendant's vehicle; and a fiber consistent with the victim's jacket was recovered from the defendant's vehicle.

State v. Hill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zOTktMS5wZGY). Over a dissent, the court held that the evidence was sufficient to establish that the defendant acted in concert with another to commit robbery. After robbing Mr. Jones at an ATM, the robber ran to a two-toned maroon and silver or purple and white GMC pickup truck driven by another person. After robbing Mr. Cole four hours later at an ATM, the robber ran towards a parking lot where Cole found a maroon and silver GMC truck. Mr. Cole asked the driver if he had seen a man running from the ATM. The driver gave inconsistent responses and told Cole that he had an appointment at 10:40 p.m. Cole obtained the truck's license plate number and the defendant was found driving the vehicle near where Cole was robbed. The vehicle was owned by Mr. Webb, a suspect in the Jones robbery. This is substantial evidence that the defendant was waiting for an accomplice and that the two acted in concert to commit the robberies.

State v. McNeill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). The State presented sufficient evidence that the defendant perpetrated a breaking and entering. The resident saw the defendant break into her home, the getaway vehicle was registered to the defendant, the resident knew the defendant from prior interactions, a gun was taken from the home, and the defendant knew that the resident possessed the gun.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjY2LTEucGRm). In a robbery case, the trial court did not err by denying the defendant's motion to dismiss where there was substantial evidence that the defendant was the perpetrator. The victim, who knew the defendant well, identified the defendant's voice as that of his assailant; identified his assailant as a black man with a lazy eye, two characteristics consistent with the defendant's appearance; consistently identified the defendant as his assailant; and had a high level of certainty with regard to this identification.

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00ODMtMS5wZGY). There was sufficient evidence that the defendant perpetrated a murder when, among other things, cuts on the defendant's hands were visible more than 10 days after the murder; neither the defendant's nor the victim's DNA could be excluded from a DNA sample from the scene; DNA from blood stains on the defendant's jeans matched the victim's DNA; and 22 shoe prints found in blood in the victim's residence were consistent with the defendant's shoes.

State v. Szucs, __ N.C. App. __, 701 S.E.2d 362 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100305-1.pdf). In a case involving felonious breaking or entering, larceny, and possession of stolen goods, the State presented sufficient evidence identifying the defendant as the perpetrator. The evidence showed that although the defendant did not know the victim, she found his truck in her driveway with the engine running; the victim observed a man matching the defendant's description holding electronic equipment subsequently determined to have been stolen; the man dropped the electronic equipment and jumped over a fence; a police dog tracked the man's scent through muddy terrain and lost the trail near Thermal Road; a canine officer observed fresh slide marks in the mud; the defendant was found on Thermal Road with muddy pants and shoes and in possession of a Leatherman tool, which could have been used to open the door of the residence; the defendant had approximately $30.00 in loose change, which could have been taken from the residence; and when police apprehended an accomplice, the defendant's roommate and known associate, he had the victim's electronic device in his possession.

State v. Blackmon, __ N.C. App. __, 702 S.E.2d 833 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00MTctMS5wZGY). Evidence of felonious larceny and breaking or entering was sufficient to survive a motion to dismiss. The victim's computer tower was left outside the victim's house after a break-in. A fingerprint from the tower matched the defendant's print. The tower was in full view of the victim's back door and anyone inspecting the equipment would be able to see broken glass in the back door. There was no path behind the house and the victim did not know defendant or give him permission to be at her house.

Suppression Motions

State v. Neal, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yMTAtMS5wZGY=). By orally denying the defendant's motion to suppress, the trial court failed to comply with G.S. 15A-977(f)'s requirement that it enter a written order with findings of fact resolving material conflicts in the evidence. The statute mandates a written order unless the trial court provides its rationale from the bench and there are no material conflicts in the evidence. Although the trial court provided its rationale from the bench, there were material conflicts in the evidence as to whether the defendant's consent to search was voluntary. The court remanded for the trial court to make the necessary findings of fact and for reconsideration of its conclusions of law in light of those findings.

State v. Baker, __ N.C. App. __, 702 S.E.2d 825 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC05OC0xLnBkZg). The trial court erred by failing to make findings of fact and conclusions of law in connection with its denial of the defendant's motion to suppress. When a trial court's failure to make findings of fact and conclusions of law is assigned as error, the trial court's ruling on a motion to suppress is fully reviewable for a determination as to whether (1) the trial court provided the rationale for its ruling from the bench; and (2) there was a material conflict in the evidence presented at the suppression hearing. If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court's denial of the motion to suppress and will be binding on appeal, if supported by competent evidence. If a reviewing court concludes that either of the criteria is not met, then a trial court's failure to make findings of fact and conclusions of law is reversible error. A material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter is likely to be affected. Turning to the case at hand, the court held that the defendant had presented evidence that controverts the State's evidence as to whether a seizure occurred. Because there was a material conflict in the evidence, the trial court's failure to make findings of fact and conclusions of law is fatal to the validity of its ruling. The court reversed and remanded for findings of fact and conclusions of law. The court noted that even when there is no material conflict in the evidence, the better practice is for the trial court to make findings of fact.

State v. Hernandez, __ N.C. App. __, 704 S.E.2d 55 (Dec. 21, 2010). Any alleged violation of the New Jersey constitution in connection with a stop in that state leading to charges in North Carolina, provided no basis for the suppression of evidence in a North Carolina court.

Pleas

State v. Santos, __ N.C. App. __ (Mar. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NjgtMS5wZGY). (1) Although the court treated the defendant's brief challenging his guilty plea as a writ of certiorari and addressed his contentions, it reviewed the law on the right to appeal after a plea, stating: A defendant who has entered a guilty plea is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. Thus, the court concluded, a defendant does not have an appeal as a matter of right to challenge the trial court's acceptance of his guilty plea as knowing and voluntary absent a denial of a motion to withdraw that plea. (2) The court rejected the defendant's argument that his guilty plea was not knowing and voluntary because it was the result of unreasonable and excessive pressure by the State and the trial court. The defendant asserted that the trial court pressured him to accept the plea during a 15 minute recess, denying him the time he needed to reflect on the decision. However, the plea offer was made some days earlier and the trial judge engaged in an extensive colloquy with the defendant, beyond statutory mandates, to ensure that the plea was knowing and voluntary.

State v. Shropshire, __ N.C. App. __ (Mar. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEzLTEucGRm). The trial court did not err by denying the defendant's motion to withdraw his guilty plea. When a defendant seeks to withdraw a guilty plea after being sentenced consistent with a plea agreement, the defendant is entitled to withdraw his plea only upon a showing of manifest injustice. Factors relevant to the analysis include whether the defendant was represented by competent counsel and is asserting innocence, and whether the plea was made knowingly and voluntarily or was the result of misunderstanding, haste, coercion, or confusion. None of these factors were present here. The defendant was represented by competent counsel, admitted his guilt, averred that he made the plea knowingly and voluntarily, and admitted that he fully understood the plea agreement and that he accepted the arrangement.

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTItMS5wZGY). The trial court did not violate G.S. 15A-1024 (withdrawal of guilty plea when sentence not in accord with plea arrangement) by sentencing the defendant in the presumptive range. Under G.S. 15A-1024, if the trial court decides to impose a sentence other than that provided in a plea agreement, the court must inform the defendant of its decision and that he or she may withdraw the plea; if the defendant chooses to withdraw, the court must grant a continuance until the next court session. Although the defendant characterized the agreement as requiring sentencing in the mitigated range, the court found that his interpretation was not supported by the plain language of the plea arrangement, which stated only that the State "shall not object to punishment in the mitigated range."

Trial in the Defendant's Absence

State v. McNeill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). The trial court did not err when, after the defendant failed to appear during trial, he explained to the jury that the trial would proceed in the defendant's absence. The trial judge instructed the jury that the defendant's absence was of no concern with regard to its job of hearing the evidence and rendering a fair and impartial verdict.

State v. Whitted, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MzktMS5wZGY). (1) The trial court did not err by failing to instruct the jury about the defendant's absence from the habitual felon phase of the trial. Because the trial court did not order the defendant removed from the courtroom, G.S. 15A-1032 did not apply. Rather, the defendant asked to be removed. (2) The trial court did not err by accepting the defendant's oral waiver of her right to be present during portions of her trial.

Sentencing

Aggravating Factors/Sentence

State v. Gillespie, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03OTgtMS5wZGY). Where the trial court determined that one aggravating factor (heinous, atrocious or cruel) outweighed multiple mitigating factors, it acted within its discretion in sentencing the defendant in the aggravated range.

State v. Mackey, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMzgyLTEucGRm). The defendant was improperly sentenced in the aggravated range when the State did not provide proper notice of its intent to present evidence of aggravating factors as required by G.S. 15A-1340.16(a6). The court rejected the State's argument that a letter regarding plea negotiations sent by the State to the defendant provided timely and sufficient notice of its intent to prove aggravating factors.

State v. Davis, __ N.C. App. __, 702 S.E.2d 507 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091537-1.pdf). The trial court did not violate G.S. 15A-1340.16(d) (evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation) by submitting, in connection with assault with a deadly weapon charges, the aggravating factor that the defendant "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." The court reasoned that for the assault charges the State was not required to prove that the defendant used a weapon or device which would normally be hazardous to the lives of more than one person.

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00ODMtMS5wZGY). The evidence was sufficient to support the aggravating factor that the offense committed was especially heinous, atrocious, or cruel. The defendant assaulted his 72-year-old grandmother, stabbing her, striking her in the head, strangling her, and impaling her with a golf club shaft eight inches into her back and chest.

Mitigating Factors/Sentence

State v. Garnett, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEtMS5wZGY). The trial court did not abuse its discretion by refusing the defendant's request for a mitigated sentence despite uncontroverted evidence of mitigating circumstances. The defendant offered uncontroverted evidence of mitigating factors and the trial court considered this evidence during the sentencing hearing. That the trial court did not, however, find any mitigating factors and chose to sentence the defendant in the presumptive range was within its discretion.

DWI Sentencing

State v. Green, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NC0xLnBkZg==). No *Blakely* error occurred in the defendant's sentence for impaired driving. The trial court found two aggravating factors, two factors in mitigation, and imposed a level four punishment. The level four punishment was tantamount to a sentence within the presumptive range, so that the trial court did not enhance defendant's sentence even after finding aggravating factors. Therefore, *Blakely* is not implicated.

Gang Offenses

State v. Dubose, __ N.C. App. __, 702 S.E.2d 330 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yMTMtMS5wZGY). The trial court erred by making a determination under G.S. 14-50.25 that the offenses involved criminal street gang activity outside of defendant's presence and without giving him an opportunity to be heard; vacating and remanding for a new sentencing hearing. A finding of criminal street gang activity was a "substantive change" in the judgments that must be made in defendant's presence and with an opportunity to be heard.

Impermissibly Based on Exercise of Rights

State v. Pinkerton, __ N.C. __, __ S.E.2d __ (Feb. 4, 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS8zMjFBMTAtMS5wZGY=). In a per curiam opinion, the court reversed, for the reasons stated in the dissenting opinion below, the decision of the court of appeals in *State v. Pinkerton*, __ N.C. App. __, 697 S.E.2d 1 (July 20, 2010). The court of appeals had held, over a dissent, that when sentencing the defendant in a child sexual assault case, the trial court impermissibly considered the defendant's exercise of his right to trial by jury. After the jury returned a guilty verdict and the defendant was afforded the right to allocution, the trial court stated that "if you truly cared–if you had one ounce of care in your heart about that child–you wouldn't have put that child through this." Instead, according to the trial court, defendant "would have pled guilty, and you didn't." The trial court stated: "I'm not punishing you for not pleading guilty . . . I would have rewarded you for pleading guilty." The dissenting judge found no indication of improper motivation by the trial court judge in imposing the defendant's sentence.

Presumptive Range Sentencing

State v. Twitty, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzIwLTEucGRm). The court rejected the defendant's argument that because his sentence at the top of the presumptive range overlapped with the low end of the aggravated range, it was improper without findings of an aggravating factor. No such findings are required to support the defendant's presumptive range sentence.

State v. Whitted, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MzktMS5wZGY). The trial judge's comments about the judgment and conviction form did not suggest that it incorrectly thought that it could not impose a sentence in the presumptive range when aggravating and mitigating factors were in equipoise.

Prior Record Level

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). Since the State failed to demonstrate the substantial similarity of out-of-state New York and Connecticut convictions to North Carolina crimes and the trial court failed to determine whether the out-of-state convictions were substantially similar to North Carolina offenses, a resentencing was required. The State neither provided copies of the applicable Connecticut and New York statutes, nor provided a comparison of their provisions to the criminal laws of North Carolina. Also, the trial court did not analyze or determine whether the out-of-state convictions were substantially similar to North Carolina offenses.

State v. Boyd, __ N.C. App. __, 701 S.E.2d 255 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100025-1.pdf). The State's evidence regarding the defendant's prior record level was insufficient. The State offered only an in-court statement by the prosecutor and the prior record level worksheet. The court rejected the State's argument that the prior record level was agreed to by stipulation, noting that defense counsel objected to the worksheet and to two listed convictions.

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTItMS5wZGY). Although the trial court incorrectly determined that the defendant had a total of 8 prior record level points rather than six, the error was harmless. The defendant was assigned to prior record level III, which requires 5-8 points. A correct calculation of defendant's points would have placed him in the same level.

Probation

State v. Crowder, __ N.C. App. __, 704 S.E.2d 13 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS0xMzY0LTEucGRm). (1) The trial court abused its discretion by revoking the defendant's probation when the State failed to present evidence that he violated the

condition of probation that he "not reside in a household with a minor child." Although the trial court interpreted the term "reside" to mean that the defendant could not have children anywhere around him, *State v. Strickland*, 169 N.C. App. 193 (2005), construed that term much more narrowly, establishing that the condition is not violated simply when a defendant sees or visits with a child. Because the evidence showed only that the defendant was visiting with his fiancée's child, it was insufficient to establish a violation. (2) The trial court improperly revoked the defendant's probation for violating conditions that he not (a) socialize or communicate with minors unless accompanied by an approved adult; or (b) be alone with a minor without approval. The conditions were not included in the written judgments and there was no evidence that the defendant ever was provided written notice of them. As such, they were not valid conditions of probation.

State v. Yonce, __ N.C. App. __, 701 S.E.2d 264 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091504-1.pdf). (1) The court lacked jurisdiction to consider an appeal when the defendant failed to timely challenge an order revoking his probation. If a trial judge determines that a defendant has willfully violated probation, activates the defendant's suspended sentence, and then stays execution of his or her order, a final judgment has been entered, triggering the defendant's right to seek appellate review of the trial court's decision. In this case, the defendant appealed well after expiration of the fourteen-day appeal period prescribed in the appellate rules. (2) The trial court did not abuse its discretion by declining to further stay another judge's order finding a probation violation for failure to pay restitution and activating the sentence but staying execution of the order when the defendant presented no evidence of an inability to pay.

State v. Kerrin, __ N.C. App. __, 703 S.E.2d 816 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUzLTEucGRm). (1) The trial court improperly ordered a forfeiture of the defendant's licensing privileges without making a finding of fact required by G.S. 15A-1331A that the defendant failed to make reasonable efforts to comply with the conditions of her probation. The court noted that form AOC-CR-317 does not contain a section specifically designated for the required finding and encouraged revision of the form to add this required finding. (2) The term of the forfeiture exceeded statutory limits. A trial court revoking probation may order a license forfeiture under G.S. 15A-1331A(b)(2) at any time during the probation term, but the term of forfeiture cannot exceed the original probation term set by the sentencing court at the time of conviction. The defendant was placed on 24 months probation by the sentencing court, to end on December 15, 2009. His probation was revoked on April 1, 2009, eight months before his probation was set to expire, and the trial court ordered the forfeiture for 24 months from the date of revocation. Because the forfeiture term extended beyond the defendant's original probation, it was invalid. The court encouraged further revision of AOC-CR-317 (specifically the following note: "*The 'Beginning Date' is the date of the entry of this judgment, and the 'Ending Date' is the date of the end of the full probationary term imposed at the time of conviction.*") "to clarify this issue and perhaps avoid future errors based upon misinterpretation of the form."

Restitution

State v. Mumford , 364 N.C. 394 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/32PA10-1.pdf). The court reversed *State v. Mumford*, __ N.C. App. __, 688 S.E.2d 458 (Jan. 5, 2010) (trial court erred in its order requiring the defendant to pay restitution; vacating that portion of the trial court's order), and held that although the trial court erred by ordering the defendant to pay restitution when the defendant did not stipulate or otherwise unequivocally agree to the amount of restitution ordered, the error was not prejudicial. As to prejudice, the court reasoned: "[A]t the time the judgment is collected, defendant cannot be made to pay more than what is actually owed, that is, the amount actually due to the various entities that provided medical treatment to defendant's victims. Because defendant will pay the lesser of the actual amount owed or the amount ordered by the trial court, there is no prejudice to defendant."

State v. Smith, __ N.C. App. __ (Mar. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MDQtMS5wZGY). The trial court committed plain error by ordering the defendant to pay restitution when no evidence supported the amount ordered. The court noted that no objection is required to preserve for appellate review issues concerning restitution. It held that the prosecutor's unsworn statements and the State's restitution worksheet were not competent evidence to support the restitution ordered. The court rejected the notion that the defendant's silence or lack of objection to the restitution amount constituted a stipulation.

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). The restitution order was not supported by evidence presented at trial or sentencing. The prosecutor's unsworn statement regarding the amount of restitution was insufficient to support the order.

State v. McNeil, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). The trial court committed reversible error by ordering the defendant to pay restitution when the State presented no evidence to support the award. Although there was evidence that the victim's home was damaged during the breaking and entering, there was no evidence as to the cost of the damage.

State v. Moore, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjQtMS5wZGY). (1) In an obtaining property by false pretenses case, the victim need not be identified in the indictment in order to receive restitution. (2) In a case in which the defendant obtained property by false pretenses when he received money for rental of a house that he did not own or have the right to rent, the homeowner was harmed as a direct and proximate cause of the defendant's actions. (3) Over a dissent, the court held that the evidence was insufficient to support an award of restitution in the amount of $39,332.49. Although the victim had testified that a "repair person" estimated that repairs would cost "[t]hirty-something thousand dollars," this was merely a guess or conjecture. The only record mention of $39,332.49 is on the restitution worksheet, which cannot support the award of restitution.

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTItMS5wZGY). Because no evidence was presented in support of restitution and the defendant did not stipulate to the amount, the trial court erred by ordering restitution. During sentencing, the prosecutor presented a restitution worksheet requesting restitution for the victim to compensate for stolen items. The victim did not testify, no additional documentation was submitted, and there was no stipulation to the worksheet.

Appeal

State v. Ziglar, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04MzktMS5wZGY=). Because the defendant was sentenced in the presumptive range, he was not entitled to an appeal as a matter of right on the issue whether his sentence was supported by the evidence. Furthermore, the defendant did not petition for review by way of a writ of certiorari.

Sex Offenders

Reportable Convictions

State v. Pell, __ N.C. App.__, __ S.E.2d __ (April 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MTUtMS5wZGY=). (1) G.S. 14-202(l) (requiring sex offender registration for certain peeping offenses when a judge finds, in part, that the defendant is "a danger to the community") is not unconstitutionally vague. (2) The trial court erred by requiring the defendant to register as a sex offender when there was no competent evidence to support a finding that he was a danger to the community. "A danger to the community" refers to those defendants who pose a risk of engaging in sex offenses following release from incarceration. Here, the State's expert determined that the defendant represented a low to moderate risk of re-offending and acknowledged that his likelihood of re-offending may be even lower after considering a revised risk assessment scale. The trial court also reviewed letters from the defendant's psychiatrist and counselor opining that the defendant's prior diagnoses of major depression, alcohol abuse, and paraphilia were in remission.

Satellite-Based Monitoring (SBM)
Constitutionality

State v. Bowditch, 364 N.C. 335 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/448PA09-1.pdf). Subjecting defendants to satellite-based monitoring (SBM) does not violate the constitutional prohibition against ex post facto laws. The defendants all pleaded guilty to multiple counts of taking indecent liberties with a child; all of the offenses occurred before the SBM statutes took effect. The defendants challenged their eligibility for SBM, arguing that their participation would violate prohibitions against ex post facto laws. The court rejected this argument, concluding that the SBM program was not intended to be criminal punishment and is not punitive in purpose or effect. The court first determined that in enacting the SBM program, the General Assembly's intention was to enact a civil, regulatory scheme, not to impose criminal punishment. It further concluded that, applying the *Mendoza-Martinez* factors, the SMB program is not so punitive either in purpose or effect as to negate the General Assembly's civil intent. For related cases, see *State v. Wagoner*, 364 N.C. 422 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/396A09-1.pdf) (for the reasons stated in *Bowditch*, the court affirmed *State v. Wagoner*, ___ N.C. App. ___, 683 S.E.2d 391 (Sept. 1, 2009) (holding, over a dissent, that requiring the defendant to enroll in SBM does not violate the constitutional prohibition against ex post facto law or double jeopardy)); *State v. Morrow*, 364 N.C. 424 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/461A09-1.pdf). For the reasons stated in *Bowditch*, the court affirmed *State v. Morrow*, __ N.C. App. __, 683 S.E.2d 754 (Oct. 6, 2009) (concluding, over a dissent, that the SBM statute does not violate the ex post facto clause)); *State v. Vogt*, 364 N.C. 425 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/465A09-1.pdf) (for the reasons stated in *Bowditch*, the court affirmed *State v. Vogt*, __ N.C. App. __, 685 S.E.2d 23 (Nov. 3, 2009) (concluding, over a dissent, that the SBM statute does not violate the ex post facto clause)); *State v. Hagerman*, 364 N.C. 423 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/491A09-1.pdf) (for the reasons stated in *Bowditch*, the court affirmed *State v. Hagerman*, __ N.C. App. __, 685 S.E.2d 153 (Nov. 3, 2009) (rejecting the defendant's *Apprendi* challenge to SBM; reasoning that because SBM is a civil remedy, it did not increase the maximum penalty for the crime)). For post-*Bowditch* Court of Appeals cases reaching the same conclusion, see *State v. Williams*, __ N.C. App. __, 700 S.E.2d 774 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100347-1.pdf) (court rejected the defendant's arguments that SBM violates prohibitions against ex post facto and double jeopardy).

State v. Williams, __ N.C. App. __, 700 S.E.2d 774 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100347-1.pdf). Following prior case law, the court rejected the defendant's arguments that SBM violates prohibitions against ex post facto and double jeopardy.

Aggravated Offense

State v. Clark, __ N.C. App.__, __ S.E.2d __ (April 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MDMtMS5wZGY=). Applying an elemental analysis, the court determined that first-degree rape under G.S. 14-27.2(a)(1) fits within the definition of an aggravated offense in G.S. 14-208.6(1a). An aggravated offense includes engaging in a sexual act involving vaginal, anal, or oral penetration with a victim (1) of any age through the use of force or the threat of serious violence or (2) who is less than 12 years old. Rape under G.S. 14-27.2(a)(1) cannot satisfy the second prong because it occurs when a person engages in vaginal intercourse with a child under the age of 13, not 12. However, the offense does fall within the first prong of the aggravated offense definition. Such a rape requires proof that a defendant engaged in vaginal intercourse with the victim. This contrasts with G.S. 14-27.4(a)(1), which allows a defendant to be convicted of first-degree sexual offense on the basis of cunnilingus, an act that does not require penetration. Also, vaginal intercourse with a person under the age of 13 necessarily involves the use of force or the threat of serious violence.

State v. Brown, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjkzLTEucGRm). Citing *State v. Clark*, __ N.C. App. __, __ S.E.2d __ (2011), the court held that because rape of a child under the age of 13 necessarily involves the use of force or threat of serious violence, the offense is an aggravated offense requiring lifetime SBM. In dicta, it concluded: "Under the test created by this Court . . . there are no offenses that 'fit within' the second definition of 'aggravated offense,' i.e., an offense that includes 'engaging in a sexual act involving vaginal, anal, or

oral penetration with a victim who is less than 12 years old.'"

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MzEtMS5wZGY=). First-degree sexual offense under G.S. 14-27.4(a)(1) and indecent liberties with a minor under G.S. 14-202.1 are not aggravated offenses as defined by G.S. 14-208.6(1a) requiring lifetime satellite-based monitoring.

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yODctMS5wZGY). Following *State v. Phillips*, __ N.C. App. __, 691 S.E.2d 104 (2010), the court held that first-degree sexual offense under G.S. 14-27.4(a)(1) (child victim under 13) is not an aggravated offense for purposes of SBM. To be an aggravated offense, the child must be less than 12 years old; "a child under the age of 13 is not necessarily also a child less than 12 years old." The court reversed and remanded for consideration of whether the defendant is a sexually violent predator, a recidivist, or whether his conviction involved the physical, mental, or sexual abuse of a minor, and based on the risk assessment performed by the Department of Correction, defendant requires the highest possible level of supervision and monitoring.

State v. Santos, __ N.C. App. __ (Mar. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NjgtMS5wZGY). The trial court erred by finding that first-degree sexual offense with a child under 13 is an aggravated offense for purposes of ordering lifetime satellite-based monitoring (SBM). As the State conceded, when making the relevant determination, the trial court only is to consider the elements of the offense of conviction, not the underlying facts giving rise to the conviction. In a footnote, the court noted that although the record contains several judgments imposing SBM with respect to indecent liberties, courts have held that indecent liberties is not an aggravated offense. The court declined to rule on this issue because it was not raised on appeal.

Highest Level of Supervision and Monitoring

State v. Green, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTYzLTEucGRm). Although one of its factual findings was erroneous, the trial court did not err by requiring the defendant to enroll in SBM for five years after finding that he required the highest possible level of supervision. The trial court based its conclusion on a DOC risk assessment of "moderate-low" and on three additional findings: (1) the victims were especially young, neither was able to advocate for herself, and one was possibly too young to speak; therefore the risk to similarly situated individuals is substantial; (2) the defendant has committed multiple acts of domestic violence; and (3) the defendant obtained no sex offender treatment. Distinguishing the determination at issue from the "aggravated offense" determination and the determination as to whether an offense involves the physical, mental, or sexual abuse of a minor, the court rejected the defendant's argument that the first additional finding was erroneous because it relied on the underlying facts of the conviction. The court concluded that this finding was supported by competent evidence, specifically, the defendant's stipulation to the prosecutor's summary of facts provided at the defendant's *Alford* plea. The court concluded that additional finding two was not supported by competent evidence. The only relevant evidence was the State's representation that the defendant pled guilty to an assault charge involving the victim's mother and a list of priors on his Prior Record Level worksheet, containing the following entry: "AWDWIKI G/L AWDW AND CT". The court concluded that additional finding three was supported by the defendant's admission that he had not completed the treatment. Finally, the court determined that the risk assessment and additional findings one and three supported the trial court's order.

Jurisdiction

State v. Miller, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTEtMS5wZGY=). (1) The district court lacked subject matter jurisdiction to order the defendant to enroll in satellite-based monitoring (SBM) after a district court conviction for misdemeanor attempted sexual battery. G.S. 14-208.40B(b) requires that SBM hearings be held in superior court for the county in which the offender resides. (2) The superior court lacked subject matter jurisdiction to order the defendant to enroll in SBM after a de novo hearing on the district court's order than the

defendant enroll. Hearings on SBM eligibility are civil proceedings. Pursuant to G.S. 7A-27(c), an appeal from a final judgment in a civil action in district court lies in the court of appeals, not in the superior court.

Miscellaneous Issues

State v. Merrell, __ N.C. App. __, __ S.E.2d __ (June 7, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzA0LTEucGRm). The trial court erred by ordering the defendant to enroll in lifetime satellite-based monitoring. The defendant was convicted of attempted first-degree rape under G.S. 14-27.2, and indecent liberties under G.S. 14-202.1, both sexually violent offenses and thus reportable convictions. At the sentencing hearing, the court found that the offenses "did involve the physical, mental, or sexual abuse of a minor . . . but no risk assessment is required from the [DOC] because lifetime satellite-based monitoring is required . . . ." The trial court ordered that lifetime monitoring based upon a finding that defendant had been convicted of "rape of a child, G.S. 14-27.2A, or sexual offense with a child, G.S. 14-27.4A, or an attempt, solicitation, or conspiracy to commit such offense . . . as a principal." However, defendant was convicted under G.S. 14-27.2 and 14-202.1, not 14-27.2A or 14-27.4A. Moreover, the trial court did not find that defendant was a sexually violent predator or that defendant was a recidivist, and it found that the offense was not an aggravated offense. Therefore, the trial court erred in ordering lifetime satellite-based monitoring and in failing to order that a risk assessment be performed pursuant to G.S. 14-208.40A(d) prior to ordering enrollment in lifetime monitoring.

Speedy Trial

State v. Williamson, __ N.C. App. __, __ S.E.2d __ (June 7, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04ODMtMS5wZGY=). (1) G.S. 15A-711 is not a speedy trial statute. G.S. 15A-711 provides an imprisoned criminal defendant the right to formally request that the prosecutor make a written request for his or her return to the custody of local law enforcement officers in the jurisdiction in which the defendant has other pending charges. The temporary release of the defendant to the local jurisdiction may not exceed 60 days. If the prosecutor is properly served with the defendant's request and fails to make a written request to the custodian of the institution where the defendant is confined within six months from the date the defendant's request is filed with the clerk of court, the charges pending against the defendant must be dismissed. The State's compliance with G.S. 15A-711 does not require that the defendant's trial occur within a given time frame. The State satisfies its statutory duty when the prosecutor timely makes the written request for the defendant's transfer, whether or not the trial actually takes place during the statutory period of six months plus the 60 days temporary release to local law enforcement officials. (2) Because the trial court failed to make the proper inquiry in response to the defendant's motion under G.S. 15A-711 (the proper inquiry is whether the prosecutor made a timely written request for the defendant's transfer to a local law enforcement facility), the court vacated and remanded for a new hearing.

State v. Howell, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NzYtMS5wZGY=). (1) Remanding for additional findings of fact and conclusions of law, the court noted that G.S. 15A-711 does not guarantee a defendant the right to have a matter tried within a specific period of time and is not a "speedy trial" statute. (2) The court remanded for further action the trial court's order dismissing the charges based on a violation of the constitutional right to a speedy trial, finding that the trial court "reached its Sixth Amendment ruling under a misapprehension of the law and without conducting a complete analysis, including consideration of all the relevant facts and law in this case." The court's opinion details the required analysis.

State v. Twitty, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzIwLTEucGRm). (1) G.S. 15A-711(c) could not support the defendant's claim where he had no other criminal charges pending against him at the time he was confined and awaiting trial. (2) The court rejected the defendant's constitutional speedy trial claim. The defendant made no argument that the delay was caused by the neglect or willfulness of the prosecution; he did not properly assert his speedy trial right; and he failed to show actual prejudice.

State v. Leyshon, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTQ0LTEucGRm). The court rejected the

defendant's speedy trial claim, finding that any delay was caused by his failure to state whether he asserted or waived his right to counsel, requiring four hearings on the issue.

Verdict

State v. Sargeant, __ N.C. __ (Mar. 11, 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS8zNTVBMTAtMS5wZGY). The court agreed with the court of appeals' decision in *State v. Sargeant*, __ N.C. App. __, 696 S.E.2d 786 (Aug. 3, 2010), which had held, over a dissent, that the trial court erred by taking a partial verdict. However, because the court concluded that a new trial was warranted on account of a prejudicial ruling on an unrelated evidence issue, it did not analyze whether the verdict error was prejudicial. The court of appeals' decision described the verdict issue as follows. The defendant was convicted of first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property. At the end of the first day of deliberations, the jury had not reached a unanimous decision as to each of the charges. The trial court asked the jury to submit verdict sheets for any of the charges for which it had unanimously found the defendant guilty. The trial court then received the jury's verdicts finding the defendant guilty of first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property, as well as first-degree murder on the bases of both felony murder and lying in wait. The only issue left for the jury to decide was whether the defendant was guilty of first-degree murder on the basis of premeditation and deliberation. The next morning, the court gave the jury a new verdict sheet asking only whether the defendant was guilty of first-degree murder on the basis of premeditation and deliberation. The jury returned a guilty verdict later that day. The court of appeals concluded that the trial court erred by taking a verdict as to lying in wait and felony murder when the jury had not yet agreed on premeditation and deliberation. It reasoned that premeditation and deliberation, felony murder, and lying in wait are not crimes, but rather theories of first-degree murder and the trial court cannot take a verdict on a theory. Therefore, the court of appeals concluded, the trial court erred by taking partial verdicts on theories of first-degree murder. As noted above, the supreme court agreed that error occurred but declined to assess whether it was prejudicial.

Evidence

404(b) Evidence

General Standard

State v. Towe, __ N.C. App. __ (Mar. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MDEtMS5wZGY). Remanding for other reasons, the court admonished the trial court to carefully determine the materiality of *each* purpose for which 404(b) evidence is offered. The trial court had remarked that the incidents could show motive, identity, and common plan or scheme. The court noted: "admission of this evidence was clearly problematic in at least one respect: the trial court failed to determine whether the purposes for which the evidence was offered were at issue." The court clarified that the defendant's identity is not at issue when the case hinges on whether the alleged crime occurred, but it may be at issue when the defendant contends someone else committed the alleged crime. Motive is at issue, it explained, when a defendant denies committing the crime charged.

Evidence Admissible

State v. Twitty, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzIwLTEucGRm). In a case in which the defendant was charged with obtaining property by false pretenses by lying to church members about his situation, the trial court did not abuse its discretion by admitting 404(b) evidence of the defendant's similar conduct with regard to other churches, occurring after the incident in question. The evidence was properly admitting to show common scheme or plan and was admissible even though it occurred after the incident in question.

State v. Brown, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjkzLTEucGRm). In a case in which the defendant was charged with sexually assaulting his minor child, the court rejected, over a dissent, the defendant's argument that the trial court erred by admitting evidence that he possessed pornographic materials ("Family Letters," a publication purporting to contain letters regarding individuals' sexual exploits with family members). The defendant argued that the evidence was inadmissible under Rule 404(b) absent a showing that he used the

materials during the crimes or showed them to the victim at or near the time of the crimes. The court concluded that the evidence was properly admitted to show motive and intent. As to motive, it stated: "evidence of a defendant's incestuous pornography collection sheds light on that defendant's desire to engage in an incestuous relationship, and that desire serves as evidence of that defendant's motive to commit the underlying act – engaging in sexual intercourse with the victim/defendant's child – constituting the offense charged." As to intent, it concluded that the defendant's desire to engage in incestuous sexual relations may reasonably be inferred from his possession of the incestuous pornography, a fact relevant to the attempted rape charge. The court also found the evidence relevant to show a purpose of arousing or gratifying sexual desire in connection with an indecent liberties charge. Finally, the court concluded that the evidence passed the Rule 403 balancing test, noting that it was admitted with a limiting instruction.

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MzEtMS5wZGY=). In a case in which the defendant was charged with sexual offense, indecent liberties and crime against nature against a ten-year-old female victim, no plain error occurred when the trial court admitted evidence of the defendant's prior bad acts against two other teenaged females. The evidence was introduced to show common scheme or plan, identity, lack of mistake, motive and intent. The defendant's acts with respect to the victim and the first female were similar: the defendant had a strong personal relationship with one of their parents, used the threat of parental disbelief and disapproval to coerce submission and silence, initiated sexual conduct after wrestling or roughhousing, digitally penetrated her vagina, and forced her to masturbate him. Only two years separated the incidents and both involved a similar escalation of sexual acts. As to the evidence of the prior bad acts with the second female — that the defendant kissed her when she was thirteen — the court held that admission of that testimony was not plain error.

State v. Woodard, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTcyLTEucGRm). In a case involving charges arising out of a drug store break-in in which controlled substances were stolen, the trial court did not abuse its discretion by admitting 404(b) testimony from an accomplice that a few days before the break-in at issue, the same perpetrators broke into a different pharmacy but did not obtain any narcotics. The incidents were sufficiently similar, occurred only a few days apart, and involved the same accomplices.

Evidence Inadmissible

State v. Beckelheimer, __ N.C. App.__, __ S.E.2d __ (April 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yMDMtMS5wZGY=). In a child sexual assault case, the trial judge committed reversible error by admitting 404(b) evidence. The defendant was charged with first-degree sexual offense and indecent liberties. At the time of the alleged offense, the defendant was 27 and the male victim was 11. The trial judge allowed the victim's half-brother, Mr. Branson, to testify about sexual activity between himself and the defendant. The court found that the 404(b) evidence lacked sufficient similarity to the events charged. The acts involving Branson occurred when Branson was less than 13 years old and the defendant only was 3-4 years older. When Branson spent the night at the defendant's house they played, looked at pornography, and then got into the defendant's bed at night. The defendant rubbed Branson's "private," performed oral sex on Branson, and attempted to put his fingers in Branson's rectum. Branson performed oral sex on defendant. In the case at hand, however, the defendant was 27 and the victim was 11. The defendant invited the victim to his room to play a video game and onto his bed during the daytime. The defendant then got on top of the victim, at first pretending to be asleep but then holding the victim down, while kissing his penis. The defendant also put his hand on the victim's penis, while they both had their clothes on. The court found the acts to be dissimilar, noting the 16-year age difference between the adult defendant and the minor victim and the fact that the defendant and Branson were both minors and only 3-4 years apart in age. The court also noted the consensual nature of the contact with Branson compared to the forcible conduct at issue. Other differences included the lack of reciprocal sexual contact by the victim, that the defendant did not attempt to put his fingers in the victim's rectum, and that no pornography was used in the acts at issue.

State v. Gray, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zMDctMS5wZGY=). In a case in which the defendant was charged with committing a sexual offense and indecent liberties against a five-year-old female victim, the trial court committed prejudicial error by admitting evidence that the defendant had anal intercourse with

a four-year-old male 18 years earlier. The evidence was admitted to show identity, intent, and common scheme or plan. Noting confusion in the N.C. cases, the court concluded that temporal proximity continues to be relevant to the issue of admissibility of 404(b) evidence; the court rejected the notion that temporal proximity goes only to weight of the evidence. Turning to admission of the evidence for purposes of identity, the court found the 18-year gap between the incidents significant. It rejected the State's argument that the time period should be tolled during the defendant's incarceration on grounds that the State failed to offer competent evidence as to the length of his incarceration. Although the incidents both involved very young children and occurred at a caretaker's house where the defendant was a frequent visitor, the nature of the alleged assaults was very different. In light of these differences and "the great length of time" between them, the State failed to show sufficient unusual facts present in both or particularly similar acts which would indicate that the same person committed both crimes. The court went on to reach similar conclusions as to admissibility for the purposes of intent and prior scheme or plan.

State v. Davis, __ N.C. App. __, 702 S.E.2d 507 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091537-1.pdf). The trial court committed prejudicial error by admitting, under rule 404(b), the defendant's prior impaired driving convictions to show malice for purposes of a second-degree murder charge. Three of the defendant's four prior impaired driving convictions occurred eighteen or nineteen years prior to the accident at issue and one occurred two years prior. Given the sixteen-year gap between the older convictions and the more recent one, the court held that there was not a clear and consistent pattern of criminality and that the older convictions were too remote to be admissible under rule 404(b).

Authentication

State v. Hartley, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NjQtMS5wZGY=). A rectal swab taken from the victim was properly authenticated. An officer processed evidence at the crime scene, was present for the victim's autopsy, and obtained evidence from the doctor who performed the autopsy, including the rectal swabs, on 24 June 2004. The swabs were then placed in the custody of the Sheriff's Office. They were submitted to the SBI for analysis and later returned to the Sheriff's Office where they were kept until the time of trial. The court rejected the defendant's argument that the chain of custody was insufficient because the swabs were taken on 19 June 2004, but were not picked up by the officer until 24 June 2004, concluding that there was no reason to believe that the evidence was altered and the possibility that it was tampered with is remote.

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). The trial court erred by allowing the State to introduce three photographs, which were part of a surveillance video, when the photographs were not properly authenticated. However, given the evidence of guilt, no plain error occurred.

Bruton Issues

State v. Boozer, __ N.C. App. __ (Mar. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDE4LTEucGRm). No *Bruton* issue occurred when the trial court admitted a co-defendant's admission to police that "I only hit that man twice." A co-defendant's statement which does not mention or refer to the defendant does not implicate the Confrontation Clause or *Bruton*. Here, the co-defendant's statement did not mention the defendant and thus its admission did not implicate his constitutional rights.

Competency of Witnesses

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). The trial court did not abuse its discretion in determining that a four-year-old child sexual assault victim was competent to testify. The child was 2½ years old at the time the incident occurred. At trial, the child was non-responsive to some questions and gave contradictory responses to others.

Corroboration

State v. Brown, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjkzLTEucGRm). In a case in which the defendant was charged with sexually assaulting his minor child, the court held that no plain error occurred when the trial judge admitted the victim's prior statements that at the time in question the defendant sexually assaulted both her and her sister. The victim testified at trial that her sister was present when the assault occurred did not state that the sister was assaulted. Although the victim's prior statements did not exactly mirror her in-court testimony, they did not contradict it and, in fact, the additional information strengthened and added credibility to her version of the events by explaining and expanding upon the sister's presence during the incident.

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yNi0xLnBkZg). A witness's written statement, admitted to corroborate his trial testimony, was not hearsay. The statement was generally consistent with the witness's trial testimony. Any points of difference were slight, only affecting credibility, or permissible because they added new or additional information that strengthened and added credibility to the witness's testimony.

Crawford Issues

Substitute Analyst and Related Cases

State v. Hartley, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NjQtMS5wZGY=). (1) In a triple murder case, no confrontation clause violation occurred when the State's expert medical examiner was allowed to testify in place of the pathologist who performed the autopsies. The medical examiner provided her own expert opinion and did not simply regurgitate the non-testifying examiner's reports. The testifying expert made minimal references to the autopsy reports, which were never introduced into evidence, and her testimony primarily consisted of describing the victims' injuries as depicted in 28 autopsy photographs. She described the type of wounds, the pain they would have inflicted, whether they would have been fatal, and testified to each victim's cause of death. With regard to one victim who had been sexually assaulted, the expert explained, through use of photographs, that the victim had been asphyxiated, how long it would have taken for her to lose consciousness, and that the blood seen in her vagina could have been menstrual blood or the result of attempted penetration. The expert's testimony as to the impact of the various trauma suffered by the victims was based primarily on her inspection of the photographs that were admitted into evidence and her independent experience as a pathologist. Although the expert referred to the non-testifying pathologist's reports, she did not recite findings from them. To the extent that she did, no prejudice resulted given her extensive testimony based strictly on her own personal knowledge as a pathologist, including the effect of the victims' various injuries and their cause of death. Finally, the court concluded, even if any error occurred, it was harmless beyond a reasonable doubt. (2) The court noted in a footnote that the autopsy photographs were properly admitted as the basis of the testifying expert's opinion and therefore admission of them did not violate the defendant's confrontation rights.

State v. Williams, __ N.C. App. __, 702 S.E.2d 233 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC01OC0xLnBkZg). The defendant's confrontation clause rights were violated when a substitute analyst testified about a non-testifying expert's report identifying a substance as a controlled substance. Forensic chemist Ann Charlesworth detailed lab processes for testing substances. Specifically, analysts conduct a preliminary color test and then extract a small amount of the substance to put with a solvent in a GC Mass Spec instrument. Charlesworth testified that in this case a color test was done twice and a GC Mass Spec test was done once. She testified that these are the same tests that she and other experts in her field reasonably rely upon when forming an opinion as to the weight and nature of substances. Charlesworth explained that the GC Mass Spec generates a graphical result which a forensic chemist must interpret. Chemists look at retention time, which is specific for each chemical substance, and the graphical result from the GC Mass Spec, to see how well the graph matches the known standard for the substance. Once a chemist completes an analysis, the case is peer reviewed. Explaining peer review, Charlesworth indicated that she looks at the worksheet, the description of the item, its weight, and the tests conducted; she looks at the printouts from the GC Mass Spec and interprets them to see if she agrees with the chemist's results; and she examines the report to make sure it appears correct. Charlesworth conducted the same type of review on the substance at issue that she would have done for a peer review. She agreed with the original forensic chemist, DeeAnne Johnson, "that from the printouts from the GC

Mass Spec that the cocaine did come out, and it chemically matche[d] with the cocaine standard . . . in [the] library." On cross-examination, she acknowledged that she did not analyze the substance, was not present when the tests were run, and did not generate her own report. Rather, she explained that it was her role to assure that Johnson followed the protocol and procedures to correctly analyze the substance. On this record, the court concluded that Charlesworth did not offer an independent opinion but rather merely summarized Johnson's report; admission of this testimony was reversible error.

State v. Garnett, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEtMS5wZGY). Holding, in a drug case, that although the trial court erred by allowing the State's expert witness to testify as to the identity and weight of the "leafy green plant substance" where the expert's testimony was based on analysis performed by a non-testifying forensic analyst, the error was not prejudicial in light of the overwhelming evidence of guilt. With regard to the *Crawford* substitute analyst issue, the court found the case indistinguishable from *State v. Williams*, __ N.C. App. __, 703 S.E.2d 233, No. 10-58 (Dec. 7, 2010), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (Dec. 20, 2010).

State v. Hurt, __ N.C. App. __, 702 S.E.2d 82 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090442-1.pdf). Applying *Crawford* to a non-capital *Blakely* sentencing hearing in a murder case, the court held that *Melendez-Diaz* prohibited the introduction of reports by non-testifying forensic analysts. The evidence at issue came from Special Agent Barker, an expert forensic biologist and serologist with the State Bureau of Investigation (SBI) and Special Agent Freeman with the SBI DNA unit. Barker testified that Special Agent Todd tested the evidence for the presence of blood and other bodily fluids and prepared a lab report of his results. Barker testified that Todd identified blood on the defendant's clothing and on a cigarette butt. Freeman testified that former SBI Special Agent Spittle performed DNA testing on several items and testified to the results of Spittle's analysis, including his conclusion that DNA on the defendant's clothing matched the victim's DNA profile. Freeman also testified that the saliva-end of the cigarette found at the crime scene matched the defendant's DNA. The court held that the reports at issue were testimonial under *Melendez-Diaz.* Noting that *Melendez-Diaz* would not bar admissibility if the reports merely provided a basis for the testifying experts' independent opinions, the court concluded that the reports were not limited to this permissible function. Although both Barker and Freeman performed peer review of the reports at issue, neither took part in any testing nor performed any independent analysis. In a footnote, the court distinguished this evidence from the testimony of Dr. Lantz, a forensic pathologist. Lantz testified regarding an autopsy done by former forensic pathologist Dr. Winston. Lantz testified to the wounds described in the final autopsy diagnosis and to his opinion that six of the wounds hit vital organs and could have been fatal. He opined that because of the nature of the wounds, it might have taken several minutes for the victim to lose consciousness and several more minutes to die. The court noted that Lantz's opinion regarding the wounds' impact and the time for loss of consciousness "was clearly based, not on the report at all, but on his own independent experience as a pathologist."

State v. Jones, __ N.C. App. __, 703 S.E.2d 772 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00NzUtMS5wZGY). In a drug case, the trial court committed plain error by admitting a report of a non-testifying crime lab technician, detailing the chemical analysis performed and the technician's conclusion that the substance was cocaine.

Testimonial/Nontestimonial Distinction

Michigan v. Bryant, 562 U.S. __ (Feb. 28, 2011). Justice Sotomayor, writing for the Court, held that a mortally wounded shooting victim's statements to first-responding officers were non-testimonial under *Crawford*. In the early morning, Detroit police officers responded to a radio dispatch that a man had been shot. When they arrived at the scene, the victim was lying on the ground at a gas station. He had a gunshot wound to his abdomen, appeared to be in great pain, and had difficulty speaking. The officers asked the victim what happened, who had shot him, and where the shooting occurred. The victim said that the defendant shot him about 25 minutes earlier at the defendant's house. The officers' 5-10 minute conversation with the victim ended when emergency medical personnel arrived. The victim died within hours. At trial, the victim's statements to the responding officers were admitted and the defendant was found guilty of, among other things, murder.

The Court held that because the statements were non-testimonial, no violation of confrontation rights occurred. The Court noted that unlike its previous decisions in *Davis* and *Hammon*, the present case involved a non-domestic dispute, a victim found in a public location suffering from a fatal gunshot wound, and a situation where the

perpetrator's location was unknown. Thus, it indicated, "we confront for the first time circumstances in which the 'ongoing emergency' . . . extends beyond an initial victim to a potential threat to the responding police and the public at large." Slip Op. at 12. This new scenario, the Court noted, "requires us to provide additional clarification . . . to what *Davis* meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'" *Id.* It concluded that when determining whether this is the primary purpose of an interrogation, a court must objectively evaluate the circumstances in which the encounter occurs and the parties' statements and actions. *Id.* It explained that the existence of an ongoing emergency "is among the most important circumstances informing the 'primary purpose' of an interrogation." *Id.* at 14. As to the statements and actions of those involved, the Court concluded that the inquiry must focus on both the declarant and the interrogator.

Applying this analysis to the case at hand, the Court began by examining the circumstances of the interrogation to determine if an ongoing emergency existed. Relying on the fact that the victim said nothing to indicate that the shooting was purely a private dispute or that the threat from the shooter had ended, the Court found that the emergency was broader than those at issue in *Davis* and *Hammon*, encompassing a threat to the police and the public. *Id.* at 27. The Court also found it significant that a gun was involved. *Id.* "At bottom," it concluded, "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]." *Id.* The Court continued, determining that given the circumstances of the emergency, it could not say that a person in the victim's situation would have had the primary purpose of establishing past facts relevant to a criminal prosecution. *Id.* at 29. As to the motivations of the police, the Court concluded that they solicited information from the victim to meet the ongoing emergency. *Id.* at 30. Finally, it found that the informality of the situation and interrogation further supported the conclusion that the victim's statements were non-testimonial.

Justice Thomas concurred in the judgment, agreeing that the statements were non-testimonial but resting his conclusion on the lack of formality that attended them. Justices Scalia and Ginsburg dissented. Justice Kagan took no part in the consideration or decision of the case.

Applicability to Sentencing Proceedings

State v. Hurt, __ N.C. App. __, 702 S.E.2d 82 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090442-1.pdf). *Crawford* and the confrontation clause applies to all "*Blakely*" sentencing proceedings in which a jury makes the determination of a fact or facts that, if found, increase the defendant's sentence beyond the statutory maximum. Because the trial court's admission of testimonial hearsay evidence during the defendant's non-capital sentencing proceeding violated the defendant's confrontation rights. The defendant pleaded guilty to second-degree murder. At the sentencing hearing, the jury found the aggravating factor that the murder was especially heinous, atrocious, or cruel and the trial judge sentenced the defendant in the aggravated range. The court distinguished *State v. Sings*, 182 N.C. App. 162 (2007) (declining to apply the confrontation clause in a non-capital sentencing hearing), on the basis that it involved a sentencing based on the defendant's stipulation to aggravating factors not a *Blakely* sentencing hearing and limited that decision's holding to its facts. The court explained that its rationale for applying *Crawford* to non-capital *Blakely* sentencing proceedings "mirrors the justification for securing the right to confrontation in the capital sentencing context," a right already recognized by the North Carolina Supreme Court. It stated: both the penalty phase of a capital case and a *Blakely* sentencing hearing in a non-capital case require the State to prove an element to a jury beyond a reasonable doubt, and without a finding of an aggravating factor by the trier of fact, the presumptive sentence is the maximum sentence that can be imposed for the crime. It continued: "Where confrontation rights apply in one context, they should apply equally to the other." Noting that other cases have held that the confrontation clause does not apply in non-capital sentencing, the court followed *State v. Rodriguez*, 754 N.W.2d 672 (Minn. 2008), to hold otherwise. The court also noted that its opinion "has no effect on the established inapplicability of other evidence rules at sentencing."

Cross-Examination, Impeachment, and Opening the Door

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) In the guilt phase of a capital trial, the trial court did not err by limiting the defendant's recross-examination of law enforcement officers about whether an alleged accomplice cooperated with the police. The defendant failed to establish how the accomplice's cooperation was relevant to the defendant's guilt. Furthermore, the State's questioning did not elicit responses that required explanation or rebuttal or otherwise opened the door for the defendant's questions. (2) In the sentencing

phase of a capital trial, the trial court did not abuse its discretion by overruling the defendant's objection to the State's cross-examination of a defense expert seeking to elicit a concession that other experts might disagree with his opinions regarding whether the defendant was malingering. (3) In the sentencing phase of a capital trial, the trial court did not err by failing to intervene ex mero motu when the prosecutor asked the defendant's expert witness whether he was ethically obligated to record the defendant's test results on a score sheet and about the defendant's scores in the scale for violence potential.

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). Because the witness admitted having made a prior statement to the police, it was not error to allow the State to impeach her with the prior inconsistent statement when she claimed not to remember what she had said and the trial court gave a limiting instruction. The court distinguished the case from one in which the witness denies having made the prior statement. Even if use of the prior inconsistent statement was error, no prejudice resulted.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). Any error in connection with the admission of statements elicited from a witness on cross-examination was invited. The defendant, having invited error, waived all right to appellate review, including plain error review.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjY2LTEucGRm). Although some portion of a videotape of the defendant's interrogation was inadmissible, the defendant opened the door to the evidence by, among other things, referencing the content of the interview in his own testimony.

State v. Gabriel, __ N.C. App. __, 700 S.E.2d 127 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091669-1.pdf). The trial court did not err by admitting a witness's out of court statements. When a State's witness gave trial testimony inconsistent with his prior statements to the police, the State cross-examined him regarding his prior statements. After the witness denied making the statements, the trial court overruled a defense objection and admitted, for purposes of impeachment by the State, a transcript of the witness's prior statements. (1) The court rejected the argument that this constituted improper use of extrinsic evidence for impeachment. The rule against using extrinsic evidence to impeach a witness on collateral matters prohibits the introduction of the substance of a prior statement to impeach a witness's denial that he or she made the prior statement because the truth or falsity of that denial was a collateral matter. However, when the witness not only denies making the prior statements but also testifies inconsistently with them, the rule does not prohibit impeaching a witness's inconsistent testimony with the substance of the prior statements. Here, the substance of the witness's prior statements properly was admitted to impeach his inconsistent testimony, not his denial. (2) The court rejected the defendant's argument that the State used the guise of impeaching its own witness as subterfuge for admitting otherwise inadmissible evidence. Distinguishing prior case law, the court noted that the trial judge gave an appropriate limiting instruction, the evidence was important to the State's case, and nothing suggested that the State expected the witness's testimony.

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yODctMS5wZGY). The defendant could not complain of the victim's hearsay statements related by an expert witness in the area of child mental health when the defendant elicited these statements on cross-examination.

Hearsay

Non-Hearsay

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). An officer's testimony as to a witness' response when asked if she knew what had happened to the murder weapon was not hearsay. The statement was not offered for the truth of the matter asserted but rather to explain what actions the officer took next (contacting his supervisor and locating the gun). Although other hearsay evidence was erroneously admitted, no prejudice resulted.

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). Statements offered to explain a witness's subsequent actions were not offered for the truth of the matter asserted and not hearsay.

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yODctMS5wZGY). (1) In a child sexual assault case, the trial court did not commit plain error by allowing a witness to testify about her step-granddaughter's statements. The evidence was properly admitted for the non-hearsay purpose of explaining the witness's subsequent conduct of relaying the information to the victim's parents so that medical treatment could be obtained. Also, the victim's statements corroborated her trial testimony. (2) The trial court did not commit plain error by allowing an expert in clinical social work to relate the victim's statements to her when the statements corroborated the victim's trial testimony.

Hearsay Exceptions

State v. Capers, __ N.C. App. __, 704 S.E.2d 39 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS0xNjEzLTEucGRm). A victim's statement to his mother, made in the emergency room approximately 50 minutes after a shooting and identifying the defendant as the shooter, was a present sense impression under Rule 803(1). The time period between the shooting and the statement was sufficiently brief. The court noted that the focus of events during the gap in time was on saving the victim's life, thereby reducing the likelihood of deliberate or conscious misrepresentation.

State v. Sneed, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xODktMS5wZGY=). In a case in which the defendant was charged with, among other things, armed robbery and possession of a stolen handgun, no plain error occurred when the trial court admitted, under Rule 803(6) (records of regularly conducted activity) testimony that the National Crime Information Center ("NCIC") database indicated a gun with the same serial number as the one possessed by the defendant had been reported stolen in South Miami, Florida. The court rejected the defendant's argument that the State failed to lay the necessary foundation for admission of the evidence. The defendant had argued that the State was required to present testimony from a custodian of records for NCIC that the information was regularly kept in the course of NCIC's business and that NCIC routinely makes such records in the course of conducting its business. The proper foundation was laid through the testimony of a local police officer who used the database in his regular course of business.

State v. Sargeant, __ N.C. __ (Mar. 11, 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS8zNTVBMTAtMS5wZGY). Modifying and affirming *State v. Sargeant*, __ N.C. App. __, 696 S.E.2d 786 (Aug. 3, 2010), the court held that the trial court committed prejudicial error by excluding defense evidence of hearsay statements made by a participant in the murder, offered under the Rule 804(b)(5) residual exception. The court noted that the only factor in dispute under the six-factor residual exception test was circumstantial guarantees of trustworthiness. To evaluate that factor, a court must assess, among other things, (1) the declarant's personal knowledge of the event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason for the declarant's unavailability. Because the record established that the declarant had personal knowledge and never recanted, the court focused it analysis on factors (2) and (4). The court found that the trial court's conclusions that these considerations had not been satisfied were made on the basis of inaccurate and incomplete findings of fact used to reach unsupported conclusions of law.

Judicial Notice

State v. Leyshon, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTQ0LTEucGRm). The trial court did not err by refusing to take judicial notice of provisions in the Federal Register when those provisions were irrelevant to the charged offense.

Objections and Motions to Strike

State v. McCain, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (No. COA10-647)

(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDctMS5wZGY=). The trial court did not abuse its discretion by denying the defendant's untimely motion to strike.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). When the defendant failed to object to a question until after the witness responded, the objection was waived by the defendant's failure to move to strike the answer.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjY2LTEucGRm). By objecting only on the basis that the subject matter of questioning had been "covered" the previous day, the defense failed to preserve other grounds for exclusion of the evidence and plain error review applied.

Opinions

State v. Towe, __ N.C. App. __ (Mar. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MDEtMS5wZGY). The trial court committed plain error by allowing the State's medical expert to testify that the child victim was sexually abused, when no physical findings supported this conclusion. On direct examination, the expert stated that 70-75% of sexually abused children show no clear physical signs of abuse. When asked whether she would put the victim in that group, the expert responded, "Yes, correct." This amounted to impermissible testimony that the victim was sexually abused.

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yODctMS5wZGY). The trial court erred when it allowed the State's expert in clinical social work to testify that she had diagnosed the victim with sexual abuse when there was no physical evidence consistent with abuse. However, the error did not constitute plain error given other evidence in the case.

State v. Woodard, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTcyLTEucGRm). In a case arising from a pharmacy break-in, the court rejected the defendant's argument that the trial court erred by failing to dismiss trafficking in opium charges because the State did not present a chemical analysis of the pills. Citing *State v. Ward*, 364 N.C. 133 (2010), and *State v. Llamas-Hernandez*, 363 N.C. 8 (2009), the court determined that State is not required to conduct a chemical analysis on a controlled substance in order to sustain a conviction under G.S. 90-95(h)(4), provided it has established the identity of the controlled substance beyond a reasonable doubt by another method of identification. In the case at hand, the State's evidence did that. The drug store's pharmacist manager testified that 2,691 tablets of hydrocodone acetaminophen, an opium derivative, were stolen from the pharmacy. He testified that he kept "a perpetual inventory" of all drug items. Using that inventory, he could account for the type and quantity of every item in inventory throughout the day, every day. Accordingly, he was able to identify which pill bottles were stolen from the pharmacy by examining his inventory against the remaining bottles, because each bottle was labeled with a sticker identifying the item, the date it was purchased and a partial of the pharmacy's account number. These stickers, which were on every pill bottle delivered to the pharmacy, aided the pharmacist in determining that 2,691 tablets of hydrocodone acetaminophen were stolen. He further testified, based on his experience and knowledge as a pharmacist, that the weight of the stolen 2,691 pill tablets was approximately 1,472 grams. Based on his 35 years of experience dispensing the same drugs that were stolen and his unchallenged and uncontroverted testimony regarding his detailed pharmacy inventory tracking process, the pharmacist's identification of the stolen drugs as more than 28 grams of opium derivative hydrocodone acetaminophen was sufficient evidence to establish the identity and weight of the stolen drugs and was not analogous to the visual identifications found to be insufficient in *Ward* and *Llamas–Hernandez*.

State v. Garnett, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEtMS5wZGY). An expert in forensic chemistry properly made an in-court visual identification of marijuana. Citing *State v. Fletcher*, 92 N.C. App. 50, 57 (1988), but not mentioning *State v. Ward*, 364 N.C. 133 (June 17, 2010), the court noted that it had previously held that a police officer experienced in the identification of marijuana may testify to a visual identification.

State v. Dobbs, __ N.C. App. __, 702 S.E.2d 349 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0zODgtMS5wZGY). The trial court did not err by denying the defendant's motion to dismiss a charge of trafficking by sale or delivery in more than four grams and less than fourteen grams of Dihydrocodeinone when the State's expert sufficiently identified the substance at issue as a controlled substance. Special Agent Aharon testified as an expert in chemical analysis. She compared the eight tablets at issue with information contained in a pharmaceutical database and found that each was similar in coloration and had an identical pharmaceutical imprint; the pharmaceutical database indicated that the tablets consisted of hydrocodone and acetaminophen. Agent Aharon performed a confirmatory test on one of the tablets, using a gas chromatograph mass spectrometer. This test revealed that the tablet was an opiate derivative. The tablets weighed a total of 8.5 grams. Relying on *State v. Ward*, 364 N.C. 133 (2010), the defendant argued that because the State cannot rely upon a visual inspection to identify a substance as a controlled substance, the State was required to test a sufficient number of pills to reach the minimum weight threshold for a trafficking offense. The court concluded that even if the issue had been properly preserved, the defendant's argument was without merit, citing *State v. Myers*, 61 N.C. App. 554, 556 (1983) (a chemical analysis test of a portion of pills, coupled with a visual inspection of the rest for consistency, supported a conviction for trafficking in 10,000 or more tablets of methaqualone).

State v. Green, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NC0xLnBkZg). (1) In an impaired driving case, the trial court did not abuse its discretion by allowing the State's witness to testify as an expert in pharmacology and physiology. Based on his knowledge, skill, experience, training, and education, the witness was better informed than the jury about the subject of alcohol as it relates to human physiology and pharmacology. (2) The court rejected the defendant's argument that the trial court erred by allowing the expert to give opinion testimony regarding the defendant's post-driving consumption of alcohol on grounds that such testimony was an opinion about the truthfulness of the defendant's statement that he consumed wine after returning home. The court concluded that because the expert's testimony was not opinion testimony concerning credibility, the trial court did not err by allowing the expert to testify as to how the defendant's calculated blood alcohol content would have been altered by the defendant's stated post-driving consumption; the expert's statements assisted the jury in determining whether the defendant's blood alcohol content at the time of the accident was in excess of the legal limit. (3) The trial court did not abuse its discretion by admitting the expert's opinion testimony regarding retrograde extrapolation in a case where the defendant asserted that he consumed alcohol after driving. The defendant's assertions of post-driving alcohol consumption went to the weight of the expert's testimony, not its admissibility.

State v. Davis, __ N.C. App. __, 702 S.E.2d 507 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091537-1.pdf). The trial court committed reversible error by allowing the State's expert to use "odor analysis" as a baseline for his opinion as to the defendant's blood-alcohol level (BAC) at the time of the accident, formed using retrograde extrapolation. When the defendant reported to the police department more than ten hours after the accident, she was met by an officer. Although the officer did not perform any tests on the defendant, he detected an odor of alcohol on her breath. The expert based his retrograde extrapolation analysis on the officer's report of smelling alcohol on the defendant's breath. He testified that based on "look[ing] at some papers, some texts, where the concentration of alcohol that is detectable by the human nose has been measured[,]" the lowest BAC that is detectable by odor alone is 0.02. He used this baseline for his retrograde extrapolation and opined that at the time of the accident, the defendant had a BAC of 0.18. The court noted that because odor analysis is a novel scientific theory, an unestablished technique, or a compelling new perspective on otherwise settled theories or techniques, it must be accompanied by sufficient indices of reliability. Although the expert testified that "there are published values for the concentrations of alcohol that humans . . . can detect with their nose," he did not specify which texts provided this information, nor were those texts presented at trial. Furthermore, there was no evidence that the expert performed any independent verification of an odor analysis or that he had ever submitted his methodology for peer review. Thus, the court concluded, the method of proof lacked the required indices of reliability. The court also noted that while G.S. 20-139.1 sets out a thorough set of procedures governing chemical analyses of breath, blood, and urine, the odor analysis lacked any of the rigorous standards applied under that provision. It concluded that the expert's retrograde extrapolation was not supported by a reliable method of proof, that the odor analysis was so unreliable that the trial court's decision was manifestly unsupported by reason, and that the trial court abused its discretion in admitting this testimony.

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). The trial court properly sustained the State's objection to the defendant's attempt to introduce opinion testimony regarding his IQ from a special education teacher who met the defendant when he was eleven years old. Because the witness had not been tendered as an expert, her speculation as to IQ ranges was inadmissible.

State v. Jennings, __ N.C. App. __, 704 S.E.2d 556 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MDMtMS5wZGY). (1) The trial court did not err by allowing the State's expert in family medicine to testify that if there had been a tear in the victim's hymen, it probably would have healed by the time the expert saw the victim. The testimony explained that the lack of physical findings indicative of sexual abuse did not negate the victim's allegations of abuse and was not an impermissible opinion as to the victim's credibility. Even if error occurred, it was not prejudicial in light of overwhelming evidence of guilt. (2) The trial court did not err by allowing the State's expert in forensic computer examination to testify that individuals normally try to hide proof of their criminal activity, do not normally save incriminating computer conversations, the defendant would have had time to dispose of incriminating material, and that someone who sets up a site for improper purposes typically would not include their real statistics. Law enforcement officers may testify as experts about the practices criminals use in concealing their identity or criminal activity. The testimony properly explained why, despite the victim's testimony that she and defendant routinely communicated through instant messaging and a web page and that defendant took digital photographs of her during sex, no evidence of these communications or photographs were recovered from defendant's computer equipment, camera, or storage devices. Even if error occurred, it was not prejudicial in light of overwhelming evidence of guilt.

State v. Crandell, __ N.C. App. __, 702 S.E.2d 352 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00MzktMS5wZGY). (1) In a murder case involving a shooting, the trial court did not commit plain error by allowing a Special Agent with the State Bureau of Investigation to testify as an expert in the field of bullet identification, when his testimony was based on sufficiently reliable methods of proof in the area of bullet identification, he was qualified as an expert in that area, and the testimony was relevant. The trial court was not required to make a formal finding as to a witness' qualification to testify as an expert because such a finding is implicit in the court's admission of the testimony in question. (2) In a murder case involving a shooting, the trial court did not abuse its discretion by allowing a detective to give lay opinion testimony concerning the calibers of bullets recovered at the crime scene. The detective testified that as a result of officer training, he was able to recognize the calibers of weapons and ammunition. The detective's testimony was based upon on his own personal experience and observations relating to various calibers of weapons, and was admissible under Rule 701.

State v. Ziglar, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04MzktMS5wZGY). In a felony death by vehicle case, the trial court did not abuse its discretion by sustaining the State's objection when defense counsel asked the defendant whether he would have been able to stop the vehicle if it had working brakes. Because a lay opinion must be rationally based on the witness's perception, for the defendant's opinion to be admissible, some foundational evidence was required to show that he had, at some point, perceived his ability, while highly intoxicated, to slow down the vehicle as it went through the curve at an excessive speed. However, there was no evidence that the defendant ever had perceived his ability to stop the car under the hypothetical circumstances.

State v. Jones, __ N.C. App. __, 703 S.E.2d 772 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00NzUtMS5wZGY). The trial court committed plain error by allowing an officer to identify a substance, using visual identification, as crack cocaine. Citing *State v. Ward*, 364 N.C. 133, 142-43 (2010), and other cases, the court concluded that visual identification, even by a trained police officer with four years of experience, is insufficient to establish that a substance is a controlled substance. Note: it is not clear in this case whether the officer was giving lay or expert opinion.

State v. Williams, __ N.C. App. __, 702 S.E.2d 233 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC01OC0xLnBkZg). Lay testimony by an officer that a substance is crack cocaine is insufficient to establish that the substance is cocaine. "The State must . . . present evidence as to the chemical makeup of the substance."

State v. Nabors, __ N.C. App. __, 700 S.E.2d 153 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100176-1.pdf). The trial court erred by denying the defendant's motion to dismiss drug charges when the sole evidence that the substance at issue was crack cocaine consisted of lay opinion testimony from the charging police officer and an undercover informant based on visual observation. The court held that *State v. Ward*, 364 N.C. 133 (2010), calls into question "the continuing viability" of *State v. Freeman*, 185 N.C. App. 408 (2007) (officer can give a lay opinion that substance was crack cocaine), and requires that in order to prove that a substance is a controlled substance, the State must present expert witness testimony based on a scientifically valid chemical analysis and not mere visual inspection.

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). Although Rule 704 allows admission of lay opinion evidence on ultimate issues, the lay opinion offered was inadmissible under Rule 701 because it was not helpful to the jury. In this case, a detective was asked: After you received this information from the hospital, what were your next steps? Were you building a case at this point? He answered: "I felt like I was building a solid case. [The defendant] was, indeed, the offender in this case." However, the error did not constitute plain error.

State v. Dye, __ N.C. App. __, 700 S.E.2d 135 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091574-1.pdf). In a child sexual assault case, the court held that even assuming that the State's medical expert's testimony regarding "secondary gain" improperly vouched for the victim's credibility, the error did not rise to the level of plain error.

State v. Cole, __ N.C. App. __, 703 S.E.2d 842 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzktMS5wZGY). No plain error occurred when a detective testified that after his evaluation of the scene, he determined that the case involved a robbery and resulting homicide. The court rejected the defendant's argument that the trial court improperly allowed the detective to give a legal opinion, concluding that the detective merely was testifying about police procedure.

Personal Knowledge

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). In an armed robbery case, a store clerk's testimony that he thought the defendant had a gun was not inadmissible speculation or conjecture. Based on his observations, the clerk believed that the defendant had a gun because the defendant was hiding his arm under his jacket. The clerk's perception was rationally based on his firsthand observation of the defendant and was more than mere speculation or conjecture.

Relevancy

State v. Capers, __ N.C. App. __, 704 S.E.2d 39 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS0xNjEzLTEucGRm). The defendant's statement to an arresting officer that if the officer had come later the defendant "would have been gone and you would have never saw me again," was relevant as an implicit admission of guilt.

State v. Stevenson, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzEzLTEucGRm). (1) In a case involving murder and other charges, the trial court properly admitted a picture of the defendant with a silver revolver to illustrate a witness's testimony that she saw the defendant at her apartment with a silver gun with a black handle. Before being received into evidence, the witness testified that the gun depicted appeared to be the same gun that the defendant had at her apartment. (2) The trial court did not abuse its discretion by concluding that the prejudice caused by the photograph did not substantially outweigh probative value.

State v. Patterson, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MzgtMS5wZGY). In a second-degree murder case based on impaired driving, the trial court did not commit plain error under Rule 403 by admitting the results of a chemical analysis of the defendant's blood. The defendant had argued that because the blood sample was taken

approximately three hours after the accident, it was not taken "at any relevant time after the driving" as required by G.S. 20-138.1(a)(2). The court noted that the evidence suggested that the defendant did not consume any alcohol between the time of the accident and when the blood sample was drawn and that he did not allege that the test was improperly administered. The time interval between the defendant's operation of the vehicle and the taking of the sample goes to weight, not admissibility.

State v. Lane, __ N.C. __ (Mar. 11. 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS82MDZBMDUtMS5wZGY). In a capital murder case, the trial court did not abuse its discretion by excluding expert testimony from a neuropharmacologist and research scientist who studies the effects of drugs and alcohol on the brain, proffered by the defense as relevant to the jury's determination of the reliability of the defendant's confession. The expert would have testified concerning the defendant's pattern of alcohol use and the potential consequences of alcohol withdrawal, including seizures. However, the expert repeatedly stated that he could not opine as to whether the confession was false or true or what the defendant's condition was at the time of the confession. Evidence had been presented indicating that the defendant was not intoxicated at the time of the interrogation and that he was an alcoholic. Given this evidence, the jury could assess how alcohol withdrawal affected the reliability of the confession, if at all. As such, the expert's testimony would not assist the jury in understanding the evidence or determining a fact in issue under Rule 702.

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MzEtMS5wZGY=). The trial court did not commit plain error by allowing the State to question two witnesses on rebuttal about whether they received money from the victim in exchange for making up statements when the defendant raised the issue of the victim's veracity on his cross examination.

State v. Ross, __ N.C. App. __, 700 S.E.2d 412 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091021-1.pdf). In the habitual felon phase of the defendant's trial, questions and answers contained in the Transcript of Plea form for the predicate felony pertaining to whether, at the time of the plea, the defendant was under the influence of alcohol or drugs and his use of such substances were irrelevant. Although admission of this evidence did not result in prejudice, the court noted that "*preferred method* for proving a prior conviction includes the introduction of the judgment," not the transcript of plea.

Limits on Relevancy

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). In a capital murder case, the trial court did not abuse its discretion by allowing the State to introduce for illustrative purposes 18 autopsy photographs of the victim. Cynthia Gardner, M.D. testified regarding her autopsy findings, identified the autopsy photos, and said they accurately depicted the body, would help her explain the location of the injuries, and accurately depicted the injuries to which Dr. Gardner had testified. The photos were relevant and probative, not unnecessarily repetitive, not unduly gruesome or inflammatory, and illustrated both Gardner's testimony and the defendant's statement to the investigators.

State v. Gomez, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTEtMS5wZGY). The trial court did not abuse its discretion under Rule 403 by admitting a recording of phone calls between the defendant and other persons that were entirely in Spanish. The defendant argued that because there was one Spanish-speaking juror, the jurors should have been required to consider only the certified English translation of the recording.

State v. Walters, __ N.C. App. __, 703 S.E.2d 493 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yODEtMS5wZGY). The trial court did not abuse its discretion under Rule 403 by admitting, for purposes of corroboration, a testifying witness's prior consistent statement. The court noted that although the statement was prejudicial to the defendant's case, mere prejudice is not the determining factor under Rule 403; rather, the issue is whether unfair prejudice substantially outweighs the probative value.

State v. Capers, __ N.C. App. __, 704 S.E.2d 39 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS0xNjEzLTEucGRm). The trial court did not abuse its discretion under Rule 403 by admitting the defendant's statement to an arresting officer that if the officer had come later the defendant "would have been gone and you would have never saw me again."

State v. Bedford, __ N.C. App. __, 702 S.E.2d 522 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yNTUtMS5wZGY). In a murder case in which the victim suffered many distinct injuries to different parts of her body, the trial court did not abuse its discretion by admitting photographs of the victim's body, even though the defendant offered to stipulate to cause of death. Two of the photos were taken of the victim's body just after being removed from a grave and were used to illustrate the testimony of officers who unearthed the body. Eighteen color photographs of the victim's decomposing body were used to illustrate the testimony of the pathologist who did the autopsy and were projected onto a six-foot by eight-foot screen.

State v. Crandell, __ N.C. App. __, 702 S.E.2d 352 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00MzktMS5wZGY). In a murder case involving a shooting, the trial court did not abuse its discretion by allowing a detective to give lay opinion testimony concerning the calibers of bullets recovered at the crime scene. Although the testimony was prejudicial, the trial judge correctly ruled that its probative value (helping the jury understand the physical evidence) was not substantially outweighed by the degree of prejudice.

Arrest, Search, and Investigation
Abandoned Property

State v. Eaton, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNTg2LTEucGRm). Because the defendant had not been seized when he discarded a plastic baggie beside a public road, the baggie was abandoned property in which the defendant no longer retained a reasonable expectation of privacy. As such, no Fourth Amendment violation occurred when an officer obtained the baggie.

Arrests and Investigatory Stops
Arrests

State v. Washington, 193 N.C. App. 670 (Nov. 18, 2008). There was probable cause to arrest the defendant for resisting, delaying, and obstructing when the defendant fled from an officer who was properly making an investigatory stop. Although the investigatory stop was not justified by the fact that a passenger in the defendant's car was wanted on several outstanding warrants, it was justified by the fact that the defendant was driving a car that had no insurance and with an expired registration plate. It was immaterial that the officer had not explained the proper basis for the stop before the defendant fled.

State v. Banner, __ N.C. App. __, 701 S.E.2d 355 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100123-1.pdf). Provided the underlying charges that form the basis for an order for arrest (OFA) for failure to appear remain unresolved at the time the OFA is executed, the OFA is not invalid and an arrest made pursuant to it is not unconstitutional merely because a clerk or judicial official failed to recall the OFA after learning that it was issued erroneously. On February 22, 2007, the defendant was cited to appear in Wilkes County Court for various motor vehicle offenses ("Wilkes County charges"). On June 7, 2007 he was convicted in Caldwell County of unrelated charges ("unrelated charges") and sent to prison. When a court date was set on the Wilkes County charges, the defendant failed to appear because he was still in prison on the unrelated charges and no writ was issued to secure his presence. The court issued an OFA for the failure to appear. When the defendant was scheduled to be released from prison on the unrelated charges, DOC employees asked the Wilkes County clerk's office to recall the OFA, explaining defendant had been incarcerated when it was issued. However, the OFA was not recalled and on October 1, 2007, the defendant was arrested pursuant to that order, having previously been released from prison. When he was searched incident to arrest, officers found marijuana and cocaine on his person. The court rejected the defendant's argument that the OFA was invalid because the Wilkes County clerk failed to recall it as requested, concluding that because the underlying charges had not been resolved at the time of arrest, no automatic recall occurred. The court further noted that even if good cause to recall existed,

recall was not mandatory and therefore failure to recall did not nullify the OFA. Thus, the officers were entitled to rely on it, and no independent probable cause was required to arrest the defendant. The court declined to resolve the issue of whether there is a good faith exception to Article I, Section 20 of the state Constitution.

Seizure

State v. Eaton, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNTg2LTEucGRm). Citing *California v. Hodari D*, 499 U.S. 621 (1991), the court held that the defendant was not seized when he dropped a plastic baggie containing controlled substances. An officer was patrolling at night in an area where illegal drugs were often sold, used, and maintained. When the officer observed five people standing in the middle of an intersection, he turned on his blue lights, and the five people dispersed in different directions. When the officer asked them to come back, all but the defendant complied. When the officer repeated his request to the defendant, the defendant stopped, turned, and discarded the baggie before complying with the officer's show of authority by submitting to the officer's request.

Vehicle Stops

Reasonable Suspicion for Stop

State v. Mello, 364 N.C. 421 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/490A09-1.pdf). The court affirmed per curiam *State v. Mello*, __ N.C. App. __, 684 S.E.2d 483 (Nov. 3, 2009) (holding, over a dissent, that reasonable suspicion supported a vehicle stop; while in a drug-ridden area, an officer observed two individuals approach and insert their hands into the defendant's car; after the officer became suspicious and approached the group, the two pedestrians fled, and the defendant began to drive off).

State v. Ford, __ N.C. App. __, 703 S.E.2d 768 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00NzAtMS5wZGY). (1) Citing *Whren v. United States*, 517 U.S. 806, 813 (1996), the court rejected the defendant's argument that a stop for an alleged violation of G.S. 20-129(d) (motor vehicle's rear plate must be lit so that it can be read from a distance of 50 feet) was pretextual. Under *Whren*, the reasonableness of a traffic stop does not depend on the actual motivations of the individual officers involved. (2) The trial court properly denied the defendant's motion to suppress when officers had reasonable suspicion to believe that the defendant committed a traffic violation supporting the traffic stop. The stop was premised on the defendant's alleged violation of G.S. 20-129(d), requiring that a motor vehicle's rear plate be lit so that under normal atmospheric conditions it can be read from a distance of 50 feet. The trial court found that normal conditions existed when officers pulled behind the vehicle; officers were unable to read the license plate with patrol car's lights on; when the patrol car's lights were turned off, the plate was not visible within the statutory requirement; and officers cited the defendant for the violation. The defendant's evidence that the vehicle, a rental car, was "fine" when rented did not controvert the officer's testimony that the tag was not sufficiently illuminated on the night of the stop.

State v. Chlopek, __ N.C. App. __, 704 S.E.2d 563 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjYtMS5wZGY). An officer lacked reasonable suspicion to stop the defendant's vehicle. Around midnight, officers were conducting a traffic stop at Olde Waverly Place, a partially developed subdivision. While doing so, an officer noticed the defendant's construction vehicle enter the subdivision and proceed to an undeveloped section. Although officers had been put on notice of copper thefts from subdivisions under construction in the county, no such thefts had been reported in Olde Waverly Place. When the defendant exited the subdivision 20-30 minutes later, his vehicle was stopped. The officer did not articulate any specific facts about the vehicle or how it was driven which would justify the stop; the fact that there had been numerous copper thefts in the county did not support the stop.

State v. Williams, __ N.C. App. __, 703 S.E.2d 905 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjU2LTEucGRm). Officers had reasonable suspicion to stop a vehicle in which the defendant was a passenger based on the officers' good faith belief that the driver had a revoked license and information about the defendant's drug sales provided by three informants. Two of the informants were confidential informants who had provided good information in the past. The third was a patron of the hotel where the drug sales allegedly occurred and met with an officer face-to-face. Additionally, officers

corroborated the informants' information. As such, the informants' information provided a sufficient indicia of reliability. The officer's mistake about who was driving the vehicle was reasonable, under the circumstances.

Duration of Stop

State v. Hernandez, __ N.C. App. __, 704 S.E.2d 55 (Dec. 21, 2010). The trial court properly denied a motion to suppress asserting that a vehicle stop was improperly prolonged. An officer stopped the truck after observing it follow too closely and make erratic lane changes. The occupants were detained until a Spanish language consent to search form could be brought to the location. The defendant challenged as unconstitutional this detention, which lasted approximately one hour and ten minutes. The court distinguished cases cited by the defendant, explaining that in both, vehicle occupants were detained after the original purpose of the initial investigative detention had been addressed and the officer attempted to justify an additional period of detention solely on the basis of the driver's nervousness or uncertainty about travel details, a basis held not to provide a reasonable suspicion that criminal activity was afoot. Here, however, since none of the occupants had a driver's license or other identification, the officer could not issue a citation and resolve the initial stop. Because the challenged delay occurred when the officer was attempting to address issues arising from the initial stop, the court determined that it need not address whether the officer had a reasonable suspicion of criminal activity sufficient to justify a prolonged detention. Nevertheless, the court went on to conclude that even if the officer was required to have such a suspicion in order to justify the detention, the facts supported the existence of such a suspicion. Specifically: (a) the driver did not have a license or registration; (b) a man was in the truck bed covered by a blanket; (c) the defendant handed the driver a license belonging to the defendant's brother; (d) the occupants gave inconsistent stories about their travel that were confusing given the truck's location and direction of travel; (e) no occupant produced identification or a driver's license; (f) the men had no luggage despite the fact that they were traveling from North Carolina to New York; and (g) the driver had tattoos associated with criminal gang activity.

Standing

State v. Hernandez, __ N.C. App. __, 704 S.E.2d 55 (Dec. 21, 2010). As a passenger in a vehicle that was stopped, the defendant had standing to challenge the stop.

Checkpoints

State v. Nolan, __ N.C. App.__, __ S.E.2d __ (April 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MTgtMS5wZGY=). The trial court did not err by concluding that the vehicle checkpoint passed constitutional muster. The trial court properly concluded that the primary programmatic purpose of the checkpoint was "the detection of drivers operating a motor vehicle while impaired and that the 'procedure was not merely to further general crime control'" and that this primary programmatic purpose was constitutionally permissible. Applying the three-pronged test of *Brown v. Texas*, 443 U.S. 47, 50 (1979), the trial court properly determined that the checkpoint was reasonable.

Consent

State v. Boyd, __ N.C. App. __, 701 S.E.2d 255 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100025-1.pdf). The defendant voluntarily consented to allow officers to take a saliva sample for DNA testing. The defendant was told that the sample could be used to exonerate him in ongoing investigations of break-ins and assaults on women that occurred in Charlotte in 1998. The defendant argued that because the detective failed to inform him of all of the charges that were being investigated—specifically, rape and sexual assault—his consent was involuntary. Following *State v. Barkley*, 144 N.C. App. 514 (2001), the court rejected this argument. The court concluded that the consent was voluntary even though the defendant did not know that the assaults were of a sexual nature and that a reasonable person in the defendant's position would have understood that the DNA could be used generally for investigative purposes.

Exclusionary Rule

Hartman v. Robertson, __ N.C. App. __, 703 S.E.2d 811 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC02MzYtMS5wZGY). The exclusionary rule does not apply in a civil license revocation proceeding.

Exigent Circumstances

Kentucky v. King, 563 U.S. ___ (May 16, 2011) (http://www.supremecourt.gov/opinions/10pdf/09-1272.pdf). The Court reversed and remanded a decision of the Kentucky Supreme Court and held that the exigent circumstances rule applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence. Police officers set up a controlled buy of crack cocaine outside an apartment complex. After an undercover officer watched the deal occur, he radioed uniformed officers to move in, telling them that the suspect was moving quickly toward the breezeway of an apartment building and urging them to hurry before the suspect entered an apartment. As the uniformed officers ran into the breezeway, they heard a door shut and detected a strong odor of burnt marijuana. At the end of the breezeway they saw two apartments, one on the left and one on the right; they did not know which apartment the suspect had entered. Because they smelled marijuana coming from the apartment on the left, they approached that door, banged on it as loudly as they could and announced their presence as the police. They heard people and things moving inside, leading them to believe that drug related evidence was about to be destroyed. The officers then announced that they were going to enter, kicked in the door, and went in. They found three people inside: the defendant, his girlfriend, and a guest who was smoking marijuana. During a protective sweep, the officers saw marijuana and powder cocaine in plain view. In a subsequent search, they found crack cocaine, cash, and drug paraphernalia. The police eventually entered the apartment on the right, where they found the suspected drug dealer who was the initial target of their investigation. On these facts, the state supreme court determined that the exigent circumstances rule did not apply because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. The U.S. Supreme Court rejected this interpretation stating, "the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable." It concluded: "Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." The Court did not rule on whether exigent circumstances existed in this case.

State v. Williams, __ N.C. App. __, 703 S.E.2d 905 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjU2LTEucGRm). Probable cause and exigent circumstances supported an officer's warrantless search of the defendant's mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow. Probable cause to believe that the defendant possessed illegal drugs and was attempting to destroy them was supported by information from three reliable informants, the fact that the defendant's vehicle was covered in talcum powder, which is used to mask the odor of drugs, while conducting a consent search of the defendant's person, the defendant attempted to swallow something, and that other suspects had attempted to swallow drugs in the officer's presence. Exigent circumstances existed because the defendant attempted to swallow four packages of cocaine, which could have endangered his health.

Identification of Defendant

State v. Rawls, __ N.C. App. __, 700 S.E.2d 112 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091029-1.pdf). (1) The Eyewitness Identification Reform Act, G.S. 15A-284.52, does not apply to show ups. (2) Although a show up procedure was unduly suggestive, there was no substantial likelihood of irreparable misidentification and thus the trial judge did not err by denying a motion to suppress the victim's pretrial identification. The show up was unduly suggestive when an officer told the witness beforehand that "they think they found the guy," and at the show up, the defendant was detained and several officers were present. However, there was no substantial likelihood of irreparable misidentification when, although only having viewed the suspects for a short time, the witness looked "dead at" the suspect and made eye contact with him from a table's length away during daylight hours with nothing obstructing her, the show up occurred fifteen minutes later, and the witness was "positive" about her identification of the three suspects, as "she could not forget their faces."

State v. Boozer, __ N.C. App. __ (Mar. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDE4LTEucGRm). (1) The trial court properly denied the defendant's motion to suppress asserting that an eyewitness's pretrial identification was unduly suggestive. The eyewitness had the opportunity to view the defendant at close range for an extended period of time and was focused on and paying attention to the defendant for at least fifteen minutes. Additionally, the eyewitness described the defendant by name as someone he knew and had interacted with previously, and immediately identified a photograph of him, indicating high levels of accuracy and confidence in the eyewitness's description and identification. Although, the eyewitness stated that he recognized but could not name all of the suspects on the night of the attack, he named the defendant and identified a photograph of him the next day. (2) No violation of G.S. 15A-284.52 (eyewitness identification procedures) occurred. The eyewitness told the detective that he had seen one of the perpetrators in a weekly newspaper called the The Slammer, but did not recall his name. The detective allowed the eyewitness to look through pages of photographs in The Slammer, and from this process the eyewitness identified one of the defendants. The detective did not know who the eyewitness was looking for and thus could not have pressured him to select one of the defendants, nor does any evidence suggest that this occurred.

Interrogation

Voluntariness of Statement

State v. Bordeaux, __ N.C. App. __, 701 S.E.2d 272 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091484-1.pdf). The trial court properly suppressed the defendant's confession on grounds that it was involuntary. Although the defendant received *Miranda* warnings, interviewing officers, during a custodial interrogation, suggested that the defendant was involved in an ongoing murder investigation, knowing that to be untrue. The officers promised to testify on the defendant's behalf and these promises aroused in the defendant a hope of more lenient punishment. The officers also promised that if the defendant confessed, he might be able to pursue his plans to attend community college.

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00ODMtMS5wZGY). The court rejected the defendant's argument that because he was under the influence of cocaine he did not knowingly, intelligently, and understandingly waive his *Miranda* rights or make a statement to the police. Because the defendant was not under the influence of any impairing substance and answered questions appropriately, the fact that he ingested crack cocaine several hours prior was not sufficient to invalidate the trial court's finding that his statements were freely and voluntarily made. At 11:40 pm, unarmed agents woke the defendant in his cell and brought him to an interrogation room, where the defendant was not restrained. The defendant was responsive to instructions and was fully advised of his *Miranda* rights; he nodded affirmatively to each right and at 11:46 pm, signed a *Miranda* rights form. When asked whether he was under the influence of any alcohol or drugs, the defendant indicated that he was not but that he had used crack cocaine, at around 1:00 or 2:00 pm that day. He responded to questions appropriately. An agent compiled a written summary, which the defendant was given to read and make changes. Both the defendant and the agent signed the document at around 2:41 am. The agents thanked the defendant for cooperating and the defendant indicated that he was glad to "get all of this off [his] chest." On these facts, the defendant's statements were free and voluntary; no promises were made to him, and he was not coerced in any way. He was knowledgeable of his circumstances and cognizant of the meaning of his words.

Miranda

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) A capital defendant was not in custody when he admitted that he stabbed the victim. The defendant is an adult with prior criminal justice system experience; the officer who first approached the defendant told him that he was being detained until detectives arrived but that he was not under arrest; when the detectives arrived and told him that he was not under arrest, the defendant voluntarily agreed to go to the police station; the defendant was never restrained and was left alone in the interview room with the door unlocked and no guard; he was given several bathroom breaks and offered food and drink; the defendant was cooperative; the detectives did not raise their voices, use threats, or make promises; the defendant was never misled, deceived, or confronted with false evidence; and once the defendant admitted his involvement in the killing, the interview ended and he was given his *Miranda* rights. Although the first officer told

the defendant that he was "detained," he also told the defendant he was not under arrest. Any custody associated with the detention ended when the defendant voluntarily accompanied detectives, who confirmed that he was not under arrest. The defendant's inability to leave the interview room without supervision or escort did not suggest custody; the defendant was in a non-public area of the station and prevention of unsupervised roaming in such a space would not cause a reasonable person to think that a formal arrest had occurred. (2) The court rejected the defendant's argument that by telling officers that he did not want to snitch on anyone and declining to reveal the name of his accomplice, the defendant invoked his right to remain silent requiring that all interrogation cease.

State v. Hartley, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NjQtMS5wZGY=). The defendant was not in custody when he confessed to three homicides. Officers approached the defendant as he was walking on the road, confirmed his identity and that he was okay, told him that three people had been injured at his residence, and asked him if he knew anything about the situation. After the defendant stated that he did not know about it, an officer conducted a pat down of the defendant. The defendant's clothes were damp and his hands were shaking. An officer told the defendant that the officer would like to talk to him about what happened and asked if the defendant would come to the fire department, which was being used as an investigation command post. The officer did not handcuff the defendant and told him that he was not under arrest. The defendant agreed to go with the officers, riding in the front passenger seat of the police car. The officers entered a code to access the fire department and the defendant followed them to a classroom where he sat at one table while two officers sat across from him at a different table. Officers asked the defendant if he wanted anything to eat or drink or to use the restroom and informed him that he was not under arrest. An officer noticed cuts on the defendant's hands and when asked about them, the defendant stated that he did not know how he got them. Although the officer decided that she would not allow the defendant to leave, she did not tell the defendant that; rather, she said that forensic evidence would likely lead to apprehension of the perpetrator. When she asked the defendant if there was anything else that he wanted to tell her, he confessed to the murders. Due to a concern for public safety, the officer asked where the murder weapon was located and the defendant told her where it was. The officer then left the room to inform others about the confession while another officer remained with the defendant. The defendant then was arrested and given *Miranda* warnings. He was not handcuffed and he remained seated at the same table. He waived his rights and restated his confession. The court concluded that the defendant was not in custody when he gave his initial confession, noting that he was twice told that he was not under arrest; he voluntarily went to the fire department; he was never handcuffed; he rode in the front of the vehicle; officers asked him if he needed food, water, or use of the restroom; the defendant was never misled or deceived; the defendant was not questioned for a long period of time; and the officers kept their distance during the interview and did not use physical intimidation. The court rejected the defendant's argument that the pat-down and the officer's subjective intent to detain him created a custodial situation. The court also rejected the defendant's argument that the interrogation was an impermissible two-stage interrogation under *Missouri v. Seibert*, 542 U.S. 600 (2004), concluding that the case was distinguishable from *Seibert* because the defendant was not in custody when he made his first confession.

State v. Clark, __ N.C. App.__, __ S.E.2d __ (April 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MDMtMS5wZGY=). A reasonable person in the defendant's position would not have believed that he or she was under arrest or restrained in such a way as to necessitate *Miranda* warnings. Key factors in the *Miranda* custody determination include: whether a suspect is told he or she is free to leave, is handcuffed, or is in the presence of uniformed officers and the nature of any security around the suspect. There was no evidence that officers ever explicitly told the defendant that he was being detained. The court rejected the defendant's argument that because he was moved to a patrol car and instructed to remain there when he came in contact with the victim's father and that he was told to "come back and stay" when he attempted to talk to his girlfriend, the victim's sister, this was tantamount to a formal arrest. The court concluded that the officers' actions were nothing more than an attempt to control the scene and prevent emotional encounters between a suspect and members of the victim's family. Moreover, even if the defendant was detained at the scene, his statements are untainted given that the detective expressly told him that he was not under arrest, the defendant repeatedly asked to speak with the detective, and the defendant voluntarily accompanied the detective to the sheriff's department.

State v. Bordeaux, __ N.C. App. __, 701 S.E.2d 272 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091484-1.pdf). Citing *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), the court held that the defendant's silence or refusal to answer the officers' questions was not an invocation of the right to remain silent.

Sixth Amendment Right to Counsel

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NzEtMS5wZGY=). No violation of the defendant's sixth amendment right to counsel occurred when detectives interviewed him on new charges when he was in custody on other unrelated charges. The sixth amendment right to counsel is offense specific and had not attached for the new crimes.

Juveniles

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NzEtMS5wZGY=). The trial court did not err by denying the defendant's motion to suppress statements made during a police interrogation where no violation of G.S. 7B-2101 occurred. The defendant, a 17-year-old juvenile, was already in custody on unrelated charges at the time he was brought to an interview room for questioning. When the defendant invoked his right to have his mother present during questioning, the detectives ceased all questioning. After the detectives had trouble determining how to contact the defendant's mother, they returned to the room and asked the defendant how to reach her. The defendant then asked them when he would be able to talk to them about the new charges (robbery and murder) and explained that the detectives had "misunderstood" him when he requested the presence of his mother for questioning. He explained that he only wanted his mother present for questioning related to the charges for which he was already in custody, not the new crimes of robbery and murder. Although the defendant initially invoked his right to have his mother present during his custodial interrogation, he thereafter initiated further communication with the detectives; that communication was not the result of any further interrogation by the detectives. The defendant voluntarily and knowingly waived his rights.

In Re K.D.L., __ N.C. App. __, 700 S.E.2d 766 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091653-1.pdf). The trial court erred by denying a juvenile's motion to suppress when the juvenile's confession was made in the course of custodial interrogation but without the warnings required by *Miranda* and G.S. 7B-2101(a), and without being apprised of and afforded his right to have a parent present. Following *In re J.D.B.*, 363 N.C. 664 (2009), *cert. granted*, 2010 WL 2215447 (U.S. 2010), the court concluded that when determining whether in-school questioning amounted to a custodial interrogation, the juvenile's age was not relevant. The court found that that the juvenile was in custody, noting that he knew that he was suspected of a crime, he was questioned by a school official for about six hours, mostly in the presence of an armed police officer, and he was frisked by the officer and transported in the officer's vehicle to the principal's office where he remained alone with the officer until the principal arrived. Although the officer was not with the juvenile at all times, the juvenile was never told that he was free to leave. Furthermore, the court held that although the principal, not the officer, asked the questions, an interrogation occurred, noting that the officer's conduct significantly increased the likelihood that the juvenile would produce an incriminating response to the principal's questioning. The court concluded that the officer's near-constant supervision of the juvenile's interrogation and "active listening" could cause a reasonable person to believe that the principal's interrogation was done in concert with the officer or that the person would endure harsher criminal punishment for failing to answer.

Recording of Interview

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NzEtMS5wZGY=). The trial court did not err by denying the defendant's motion to suppress asserting that his interrogation was not electronically recorded in compliance with G.S. 15A-211. The statute applies to interrogations occurring on or after March 1, 2008; the interrogation at issue occurred more than one year before that date.

Jurisdiction of Officers

State v. Scruggs, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MjEtMS5wZGY). Even if a stop and arrest of the defendant by campus police officers while off campus violated G.S. 15A-402(f), the violation was not

substantial. The stop and arrest were constitutional and the officers were acting within the scope of their mutual aid agreement with the relevant municipality.

Search Warrants

State v. McCain, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (No. COA10-534) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MzQtMS5wZGY=). The court held in this drug case, the search warrant was supported by probable cause. In his affidavit, the Investigator stated that he had received information within the past 30 days from confidential reliable informants ("CRIs") that the defendant was selling narcotics from his residence; during June and July of 2008, the sheriff's department had received information from anonymous callers and CRIs that drugs were being sold at the defendant's residence; in July 2008, the Investigator met with a "concerned citizen" who stated that the defendant was supplying drugs to his sister who was addicted to "crack" cocaine; the defendant's residence had been "synonymous with the constant sale and delivery of illegally controlled substances" as the defendant had been the subject of past charges and arrests for possession with intent to sell and deliver illegal controlled substances; and the defendant's criminal background check revealed a "prior history" of possession of narcotics. Given the specific information from multiple sources that there was ongoing drug activity at the defendant's residence combined with the defendant's past criminal involvement with illegal drugs, sufficient probable cause was presented the affidavit. The court further concluded that the information from the informants properly was considered, noting that the CRIs had been "certified" because information provided by them had resulted in arrests and convictions in the past, they were familiar with the appearance, packaging, and effects of cocaine, they provided statements against penal interest, the Investigator had met personally with the concerned citizen, and the CRIs, callers, and the concerned citizen had all given consistent information that during the months of June and July 2008, illegal drugs were being sold at the defendant's residence.

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00ODMtMS5wZGY). The court rejected the defendant's argument that a search warrant executed at a residence was invalid because the application and warrant referenced an incorrect street address. Although the numerical portion of the street address was incorrect, the warrant was sufficient because it contained a correct description of the residence.

Searches

Incident to Arrest

State v. Mbacke, __ N.C. App. __, 703 S.E.2d 823 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMzk1LTEucGRm). Over a dissent, the court held that a search of the defendant's vehicle after he was arrested for carrying a concealed weapon violated *Gant.* The court rejected the State's argument that the search was justified under *Gant* because the officers had reason to believe that they would find evidence in the vehicle supporting the crime of arrest, stating: "we find it unreasonable to believe an officer will find in, or even need to seek from, a defendant's vehicle further evidence of carrying a concealed weapon when the officer has found the defendant off the defendant's own premises and carrying a weapon which is concealed about his person."

State v. Foy, __ N.C. App. __, 703 S.E.2d 741 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0zMzEtMS5wZGY). The trial court erred by suppressing evidence obtained pursuant to a search incident to arrest. After stopping the defendant's vehicle, an officer decided not to charge him with impaired driving but to allow the defendant to have someone pick him up. The defendant consented to the officer to retrieving a cell phone from the vehicle. While doing that, the officer saw a weapon and charged the defendant with carrying a concealed weapon. Following the arrest, officers searched the defendant's vehicle, finding addition contraband, which was suppressed by the trial court. The court noted that under *Arizona v. Gant*, 556 U.S. ___, 173 L. Ed. 2d 485 (2009), officers may search a vehicle incident to arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. Citing *State v. Toledo*, ___ N.C. App. ___, 693 S.E.2d 201 (2010), the court held that having arrested the defendant for carrying a concealed weapon, it was reasonable for the officer to believe that the vehicle contained additional offense-related contraband, within the meaning of the second *Gant* exception.

Probable Cause to Search

State v. Williams, __ N.C. App. __, 703 S.E.2d 905 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjU2LTEucGRm). Probable cause and exigent circumstances supported an officer's warrantless search of the defendant's mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow. Probable cause to believe that the defendant possessed illegal drugs and was attempting to destroy them was supported by information from three reliable informants, the fact that the defendant's vehicle was covered in talcum powder, which is used to mask the odor of drugs, while conducting a consent search of the defendant's person, the defendant attempted to swallow something, and that other suspects had attempted to swallow drugs in the officer's presence. Exigent circumstances existed because the defendant attempted to swallow four packages of cocaine, which could have endangered his health.

Standing

State v. Mackey, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMzgyLTEucGRm). The defendant had no standing to challenge a search of a vehicle when he was a passenger, did not own the vehicle, and asserted no possessory interest in it or its contents.

Criminal Offenses

States of Mind

State v. Crandell, __ N.C. App. __, 702 S.E.2d 352 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00MzktMS5wZGY). There was sufficient evidence of premeditation and deliberation when, after having a confrontation with an individual named Thomas, the defendant happened upon Thomas and without provocation began firing at him, resulting in the death of the victim, an innocent bystander. Citing the doctrine of transferred intent, the court noted that "malice or intent follows the bullet."

Participants in Crime

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). In a capital case involving two perpetrators, the court rejected the defendant's argument that the State should have been obligated to prove that the defendant himself had the requisite intent. The trial court properly instructed on acting in concert with respect to the murder charge, in accordance with *State v. Barnes*, 345 N.C. 184 (1998).

State v. Hill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zOTktMS5wZGY). In a case in which there was a dissenting opinion, the court held that there was sufficient evidence that the defendant acted in concert with another to commit a robbery. The evidence showed that he was not present at the ATM where the money was taken, but was parked nearby in a getaway vehicle.

State v. Gabriel, __ N.C. App. __, 700 S.E.2d 127 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091669-1.pdf). There was sufficient evidence of acting in concert with respect to a murder and felony assault, notwithstanding the defendant's exculpatory statement that he "got caught in the middle" of the events in question. Other evidence permitted a reasonable inference that the defendant and an accomplice were shooting at the victims pursuant to a shared or common purpose.

General Crimes

Accessory After the Fact

State v. Cole, __ N.C. App. __, 703 S.E.2d 842 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzktMS5wZGY). (1) The State presented

sufficient evidence of accessory after the fact to a second-degree murder perpetrated by Stevons. After Stevons shot the victim, the defendant drove Stevons away from the scene. The victim later died. The court rejected the defendant's argument that because he gave aid after the victim had been wounded but before the victim died, he did not know that Stevons had committed murder. It concluded that because the defendant knew that Stevons shot the victim at close range, a jury could reasonably infer that the defendant knew that the shot was fatal. (2) The State presented sufficient evidence of accessory after the fact to armed robbery when it showed both that an armed robbery occurred and that the defendant rendered aid after the crime was completed. The court rejected the defendant's argument that the robbery was not complete until the defendant arrived at a safe place, concluding that a taking is complete once the thief succeeds in removing the stolen property from the victim's possession. (3) Although a mere presence instruction may be appropriate for aiding and abetting or accessory before the fact, such an instruction is not proper for accessory after the fact and thus the trial judge did not err by declining to give this instruction.

Conspiracy

State v. Lawrence, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNDgtMS5wZGY). (1) The evidence was insufficient to support two charges of conspiracy to commit armed robbery. Having failed to achieve the objective of the conspiracy on their first attempt, the defendant and his co-conspirators returned the next day to try again. When the State charges separate conspiracies, it must prove not only the existence of at least two agreements, but also that they were separate. There is no bright-line test for whether multiple conspiracies exist. The essential question is the nature of the agreement(s), but factors such as time intervals, participants, objectives, and number of meetings must be considered. Applying this analysis, the court concluded that only one agreement existed. In both attempts, the intended victim and participants were the same; the time interval between the two attempts was approximately 36 hours; on the second attempt the group did not agree to a new plan; and while the co-conspirators considered robbing a different victim, that only was a back-up plan. The court rejected the State's argument that because the co-conspirators met after the first attempt, acquired additional materials, made slight modifications on how to execute their plan, and briefly considered robbing a different victim, they abandoned their first conspiracy and formed a second one. (2) The trial judge committed plain error by failing to instruct the jury on all elements of conspiracy to commit armed robbery. The judge instructed the jury that armed robbery involved a taking from the person or presence of another while using or in the possession of a firearm. The judge failed to instruct on the element of use of the weapon to threaten or endanger the life of the victim.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjY2LTEucGRm). In a conspiracy to commit robbery case, the evidence was sufficient to establish a mutual, implied understanding between the defendant and another man to rob the victim. The other man drove the defendant to intercept the victim; the defendant wore a ski mask and had a gun; after the defendant hesitated to act, the other person assaulted the victim and took his money; and the two got into the car and departed.

State v. Dubose, __ N.C. App. __, 702 S.E.2d 330 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yMTMtMS5wZGY). The trial court did not err by denying the defendant's motion to dismiss a charge of conspiracy to discharge a firearm into occupied property. The defendant, Ray, Johnson, and Phelps left a high school basketball game because of the presence of rival gang members. As they left, the defendant suggested that he was going to kill someone. A gun was retrieved from underneath the driver's side seat of Johnson's vehicle and Johnson let Ray drive and the defendant to sit in the front because the two "were about to do something." Ray and the defendant argued over who was going to shoot the victim but in the end Ray drove by the gym and the defendant fired twice at the victim, who was standing in front of the gym. The court rejected the defendant's argument that the evidence failed to show an agreement to discharge the firearm into occupied property, noting that the group understood and impliedly agreed that the defendant would shoot the victim as they drove by, the victim was standing by the gym doors, and there was a substantial likelihood that the bullets would enter or hit the gym.

State v. Sanders, __ N.C. App. __, 701 S.E.2d 380 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100233-1.pdf). Evidence of the words and actions of the defendant and others, when viewed collectively, provided sufficient evidence of an implied agreement to assault

the victim. The court noted that the spontaneity of the plan did not defeat the conspiracy and that a meeting of the minds can occur when a party accepts an offer by actions.

Attempt

State v. Lawrence, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNDgtMS5wZGY). (1) The evidence was sufficient to prove attempted kidnapping. To prove an overt act for that crime, the State need not prove that the defendant was in the presence of his intended victim. In this case, the defendant and his accomplices stole get-away cars and acquired cell phones, jump suits, masks, zip ties, gasoline, and guns. Additionally, the defendant hid in the woods behind the home of his intended victim, waiting for her to appear, fleeing only upon the arrival of officers and armed neighbors. (2) The court rejected the defendant's argument that the evidence of attempted kidnapping was insufficient because the restraint he intended to use on his victim was inherent to his intended robbery of her. The defendant planned to intercept the victim outside of her home and force her back into the house at gunpoint, bind her hands so that she could not move, and threaten to douse her with gasoline if she did not cooperate. These additional acts of restraint by force and threat provided substantial evidence that the defendant's intended actions would have exposed the victim to greater danger than that inherent in the armed robbery itself. (3) The court rejected the defendant's argument that to prove an overt act for attempted robbery the State had to prove that the defendant was in the presence of his intended victim. For the reasons stated in (1), above, the court found that there was sufficient evidence of an overt act. (4) The court rejected the defendant's argument that because the evidence failed to show that he and his co-conspirators entered the property in question, they could not have attempted to enter her residence.

Homicide

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). In a first-degree murder case, there was sufficient evidence of premeditation, deliberation, and intent to kill. After the defendant and an accomplice beat and kicked the victim, they hog-tied him so severely that his spine was fractured, and put tissue in his mouth. Due to the severe arching of his back, the victim suffered a fracture in his thoracic spine and died from a combination of suffocation and strangulation.

State v. Parlee, __ N.C. App. __, 703 S.E.2d 866 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00OTctMS5wZGY). (1) There was sufficient evidence to survive a motion to dismiss in a case in which the defendant was charged with second-degree murder under G.S. 14-17 for having a proximately caused a murder by the unlawful distribution and ingestion of Oxymorphone. There was sufficient evidence of malice where the victim and a friend approached the defendant to purchase prescription medication, the defendant sold them an Oxymorphone pill for $20.00, telling them that it was "pretty strong pain medication[,]" and not to take a whole pill or "do anything destructive with it." The defendant also told a friend that he liked Oxymorphone because it "messe[d]" him up. The jury could have reasonably inferred that the defendant knew Oxymorphone was an inherently dangerous drug and that he acted with malice when he supplied the pill. (2There was sufficient evidence to survive a motion to dismiss in a case in which the defendant was charged with second-degree murder under G.S. 14-17 for having a proximately caused a murder by the unlawful distribution and ingestion of Oxymorphone. There was sufficient evidence that the defendant's sale of the pill was a proximate cause of death where the defendant unlawfully sold the pill to the two friends, who later split it in half and consumed it; the victim was pronounced dead the next morning, and cause of death was acute Oxymorphone overdose. (3) For purposes of double jeopardy, a second-degree murder conviction based on unlawful distribution of and ingestion of a controlled substance was not the same offense as sale or delivery of a controlled substance to a juvenile or possession with intent to sell or deliver a controlled substance.

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00ODMtMS5wZGY). There was sufficient evidence of malice in a first-degree murder case. The intentional use of a deadly weapon which proximately results in death gives rise to the presumption of malice. Here, the victim was stabbed in the torso with a golf club shaft, which entered the body from the back near the base of her neck downward and forward toward the center of her chest to a depth of eight inches, where it perforated her aorta just above her heart; she was stabbed with a knife to a

depth of three inches; her face sustained blunt force trauma consistent with being struck with a clothes iron; and there was evidence she was strangled. The perforation by the golf club shaft was fatal.

State v. Patterson, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MzgtMS5wZGY). The trial court did not err by denying the defendant's motion to dismiss charges of second-degree murder, felony serious injury by vehicle, and impaired driving. The evidence showed that the defendant was under the influence of an impairing substance at the time of the accident. A chemical analysis of blood taken from the defendant after the accident showed a BAC of 0.14 and the State's expert estimated that his BAC was 0.19 at the time of the accident. The defendant admitted having consumed 5 or 6 beers that day. Four witnesses testified that they detected a strong odor of alcohol emanating from the defendant immediately after the accident. The defendant had bloodshot eyes and was combative with emergency personnel immediately after the accident. Finally, the defendant's speed exceeded 100 miles per hour and he failed to use his brakes or make any attempt to avoid the collision.

State v. DeBiase, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTMtMS5wZGY=). In a case in which the defendant was convicted of second-degree murder, the trial court committed reversible error by denying the defendant's request for a jury instruction on involuntary manslaughter. The evidence tended to show that the defendant did not intend to kill or seriously injure the victim: the victim became angry at the defendant when the defendant offered drugs to the victim's girlfriend; after the victim punched or shoved the defendant, others separated the men; the victim then charged at the defendant, who struck him on the head or neck with a beer bottle, shattering the bottle; the defendant and the victim struggled and fell; and the defendant did not stab the victim. Cause of death was a large laceration to the neck. The court rejected the State's argument that the defendant's admission that he intentionally hit the victim with the bottle supported the trial court's refusal to instruct on involuntary manslaughter. Although the intentional use of a deadly weapon causing death creates a presumption of malice, if the defendant adduces evidence or relies on a portion of the State's evidence raising an issue on the existence of malice and unlawfulness, the presumption disappears, leaving only a permissible inference which the jury may accept or reject. Here, the defendant's evidence sufficed to so convert the presumption.

Assaults

State v. Starr, __ N.C. App. __, 703 S.E.2d 876 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NTItMS5wZGY). In a case involving assault on a firefighter with a firearm, there was sufficient evidence that the defendant committed an assault. To constitute an assault, it is not necessary that the victim be placed in fear; it is enough if the act was sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm. "It is an assault, without regard to the aggressor's intention, to fire a gun at another or in the direction in which he is standing." Here, the defendant shot twice at his door while firefighters were attempting to force it open and fired again in the direction of the firefighters after they forced entry. The defendant knew that people were outside the door and shot the door to send a warning.

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). (1) The trial court did not err by failing to instruct the jury on the lesser-included offense of assault with a deadly weapon inflicting serious injury to the charge of assault with a deadly weapon with intent to kill inflicting serious injury. The defendant broke into a trailer in the middle of the night and used an iron pipe to repeatedly beat in the head an unarmed, naked victim, who had just woken up. (2) The trial court did not err by failing to instruct on the lesser-included offense of assault with a deadly weapon to the charge on assault with a deadly weapon inflicting serious injury. After a beating by the defendant, the victim received hospital treatment, had contusions and bruises on her knee, could not walk for about a week and a half, and her knee still hurt at the time of trial. (3) The evidence was insufficient to establish that a secret assault occurred. In the middle of the night, the victim heard a noise and looked up to see someone standing in the bedroom doorway. The victim jumped on the person and hit him with a chair. The victim was aware of the defendant's presence and purpose before the assault began. In fact, he started defending himself before the defendant's assault was initiated.

State v. McLean, __ N.C. App.__, __ S.E.2d __ (April 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02MDEtMS5wZGY=). (1) There was sufficient

evidence that the victim suffered serious injury. The defendant shot the victim with a shotgun, causing injuries to the victim's calf and 18-20 pellets to lodge in his leg, which did not fully work themselves out for six months. One witness testified that the victim had holes in his leg from the ankle up and another observed blood on his leg and noted that the wounds looked like little holes from birdshot from a shotgun. (2) When the trial judge used N.C.P.J.I.—Crim. 208.15 to instruct the jury on the offense of assault with a deadly weapon with intent to kill inflicting serious injury, it did not err by failing to also give instruction 120.12, defining serious injury. (3) Discharging a barreled weapon is a general intent crime; it does not require the State to prove any specific intent to shoot into the vehicle but only that the defendant intentionally fire a weapon under such circumstances where he or she had reason to believe the conveyance that ended up being shot was occupied. (4) N.C.P.J.I.—Crim. 208.90D, which was used in this case, properly charged the jury as to the required mental state.

State v. Smith, __ N.C. App. __ (Mar. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MDQtMS5wZGY). The trial court did not commit plain error by peremptorily instructing the jury that multiple gunshot wounds to the upper body would constitute serious injury. The victim required emergency surgery, was left with scars on his chest, shoulder, back and neck, and a bullet remained in his neck, causing him continuing pain.

Sexual Assaults and Related Offenses

State v. Hunt, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NjYtMS5wZGY=). (1) Reversing the defendant's conviction for crime against nature (based on private conduct with a 17-year-old female, not for money), the court concluded that there was insufficient evidence of lack of consent. (2) The court reversed the defendant's second-degree sexual offense conviction where there was insufficient evidence as to the victim's mental disability. Even if the State presented sufficient evidence of mental retardation, it did not present sufficient evidence that the condition rendered her incapable of resistance. The victim was in the top range of achievement in high school, she babysat, she planned to get her driver's license and attend community college, at the time of trial she was living with her boyfriend and his mother, and there was some indication that she was pregnant but there had been no DSS intervention or charges filed against the boyfriend. On the other hand, the victim was described as "childlike", she attended classes for children with learning disabilities and was classified as intellectually disabled in the mild category, with an I.Q. of 61, DSS paid her bills, and it would be difficult for her to get a community college associate's degree. The court held: "where the victim's IQ falls within the range considered to be 'mental retardation[,]' but who is highly functional in her daily activities and communication, the State must present expert testimony as to the extent of the victim's mental disability as defined by [G.S.] 14-27.5."

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). The evidence was sufficient to establish indecent liberties. The child reported being touched in her genital and rectal area by a male. The victim's mother testified that she found the victim alone with the defendant on several occasions, and the victim's testimony was corroborated by her consistent statements to others.

In Re A.W., __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MTMtMS5wZGY). (1) The court rejected the juvenile's argument that the evidence was insufficient to establish indecent liberties in that it failed to show that he acted with a purpose to arouse or gratify his sexual desires. The facts showed that: the juvenile was thirteen and the victim was ten years younger; the juvenile told the victim that the juvenile's private parts "taste like candy," and had the victim lick his penis; approximately eleven months prior, the juvenile admitted to having performed fellatio on a four-year-old male relative. The court concluded that the juvenile's age and maturity, the age disparity between him and the victim, coupled with the inducement he employed to convince the victim to perform the act and the suggestion of his prior sexual activity before this event, was sufficient evidence of maturity and intent to show the required element of "for the purpose of arousing or gratifying sexual desire." (2) The evidence was insufficient to sustain an adjudication of delinquency based on a violation of G.S. 14-27.5 (second-degree sexual offense). On appeal, the State conceded that there was no evidence that the victim was mentally disabled, mentally incapacitated, or physically helpless.

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). The trial court did not commit plain error by instructing the jury that it could consider whether or not the use of a bottle constituted a deadly weapon during the commission of a sexual offense. The defendant and his accomplice, after tying the victim's hands and feet, shoved a rag into his mouth, pulled his pants down, and inserted a bottle into his rectum. The victim thought that he was going to die and an emergency room nurse found a tear in the victim's anal wall accompanied by "serious drainage."

Kidnapping

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). (1) The evidence was sufficient to establish that the defendant confined and restrained Victims Alvarez and Cortes for the purpose of terrorizing them and doing them serious bodily harm. The evidence was sufficient to establish a purpose of terrorizing Alvarez when the defendant beat and kicked Alvarez repeatedly while wrestling him to the floor; the defendant bound Alvarez's hands and feet and placed a rag in his mouth; the defendant and an accomplice threatened to kill Alvarez; the defendant pulled Alvarez's pants down, and the accomplice forced a bottle into his rectum; and Alvarez testified that he thought he was going to die. There was sufficient evidence as to the purpose of doing serious bodily harm to Alvarez given the sexual assault. As to Cortes, the defendant and the accomplice knocked him to the floor, and kicked him in the stomach repeatedly; Cortes was hog-tied so severely that his spine was fractured; he had lacerations to the lips and abrasions on his face, neck, chest, and abdomen; tissue paper was in his mouth; the spine fracture would have paralyzed the lower part of his body; and cause of death was a combination of suffocation and strangulation, with a contributing factor being the fracture of the thoracic spine. (2) The trial court's instruction clearly and appropriately defined "terrorizing" and "serious bodily harm" as required for kidnapping. The trial court instructed that: "Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension, or doing serious bodily injury to that person. Serious bodily injury may be defined as such physical injury as causes great pain or suffering." (3) A person who is killed in the course of a kidnapping is not left in a safe place. Alternatively, if the victim still was alive when left by the defendant and his accomplice, he was not left in a safe place given that he was bound so tightly that he suffered a fracture to his spine and ultimately suffocated.

State v. Boozer, __ N.C. App. __ (Mar. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDE4LTEucGRm). (1) The evidence was sufficient to establish an intent to cause bodily harm or terrorize where the facts showed that after severely beating the victim, the defendants first attempted to stuff him into a garbage can and then threw him into a 10 or 12-foot-deep ditch filled with rocks and water; one defendant had been to the location several times and could have seen the ditch; and the victim could not recall anything after the assault began and was not struggling or moving during this process. This evidence supports a reasonable inference that the defendants intended to cause the victim serious bodily injury if they believed he was unconscious and unable to protect himself as he was thrown into the ditch, landing on rocks and possibly drowning. Alternatively, it supports a reasonable inference that the defendants intended to terrorize the victim if they believed him to be conscious and aware of being stuffed into a garbage can and then flung into a deep, rocky, water-filled ditch. (2) The trial court erred by instructing the jury that it need only find that the restraint or removal aspect of the kidnapping "was a separate, complete act independent of and apart from the injury or terror to the victim." As such, it did not distinguish between the restraint as a part of the kidnapping and any restraint or removal that was part of the assault or robbery of the victim. However, because the evidence indicates that the assault stopped before the victim's removal, the court determined that this error was not prejudicial.

Larceny & Unauthorized Use

State v. Szucs, __ N.C. App. __, 701 S.E.2d 362 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100305-1.pdf). A defendant may not be convicted of both felony larceny and felonious possession of the same goods.

State v. Nickerson, __ N.C. App. __, 701 S.E.2d 685 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091511-1.pdf). Unauthorized use of a motor

propelled conveyance is a lesser included offense of possession of stolen goods and on the facts presented, the trial court erred by failing to instruct the jury on the lesser included offense.

Possession of Stolen Goods

State v. Szucs, __ N.C. App. __, 701 S.E.2d 362 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100305-1.pdf). (1) In a case involving felonious breaking or entering, larceny, and possession of stolen goods, there was sufficient evidence of possession. The defendant's truck was parked at the residence with its engine running; items found in the truck included electronic equipment from the residence; a man fitting the defendant's description was seen holding items later identified as stolen; items reported as missing included electronic equipment and a large quantity of loose change; the police dog's handler observed evidence that someone recently had been in a muddy area behind the residence; the side door of the residence showed pry marks; the defendant was found wearing muddy clothing and shoes and in possession of a Leatherman tool and a large quantity of loose change. A reasonable juror could conclude that the defendant possessed goods stolen from the residence, either as the person standing in the yard holding electronic equipment, through constructive possession of the items in his truck, or through actual possession of the loose change. (2) A defendant may not be convicted of both felony larceny and felonious possession of the same goods.

State v. Nickerson, __ N.C. App. __, 701 S.E.2d 685 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091511-1.pdf). Unauthorized use of a motor propelled conveyance is a lesser included offense of possession of stolen goods and on the facts presented, the trial court erred by failing to instruct the jury on the lesser included offense.

Robbery

State v. Johnson, __ N.C. App. __, 702 S.E.2d 547 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC01MTktMS5wZGY). The trial court erred by denying the defendant's motion to dismiss a charge of attempted armed robbery when there was no evidence that the defendant attempted to take the victim's personal property. Because the defendant's conviction for felony breaking or entering was based on an intent to commit armed robbery, the trial court also erred by failing to dismiss that charge.

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). The evidence was sufficient to establish that the defendant took money from a store clerk by means of violence or fear. The defendant hid his arm underneath his jacket in a manner suggesting that he had a gun; the clerk knew the defendant was "serious" because his eyes were "evil looking"; and the clerk was afraid and therefore gave the defendant the money. The court distinguished *State v. Parker*, 322 N.C. 559 (1988), on grounds that in that case, there was no weapon in sight and the victim was not afraid. Instead, the court found the case analogous to *State v. White*, 142 N.C. App. 201 (2001), which concluded that there was sufficient evidence of violence or fear when the defendant handed a threatening note to the store clerks implying the he had a gun, even though none of them saw a firearm in his possession.

Frauds

State v. Twitty, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzIwLTEucGRm). There was sufficient evidence to support a false pretenses conviction when the defendant falsely told a church congregation that his wife had died and that he was broke to elicit sympathy and obtain property.

State v. Moore, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjQtMS5wZGY). There was sufficient evidence of obtaining property by false pretenses when the defendant received money for rental of a house that the defendant did not own or have the right to rent.

Burglary, Breaking or Entering, and Related Offenses

State v. Chillo, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC02MjItMS5wZGY). The evidence was insufficient to establish that the defendant intended to commit a larceny in the vehicle. The evidence suggested that the defendant's only intent was to show another how to break glass using a spark plug and that the two left without taking anything once the vehicle's glass was broken.

State v. Clark, __ N.C. App. __, 702 S.E.2d 324 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yMzUtMS5wZGY). An indictment properly alleges the fifth element of breaking and entering a motor vehicle—with intent to commit a felony or larceny therein—by alleging that the defendant intended to steal the same motor vehicle.

Disorderly Conduct

Snyder v. Phelps, 562 U.S. __ (Mar. 2, 2011). The First Amendment shields members of a church from tort liability for picketing near a soldier's funeral. A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The picketing occurred in Maryland. Although that state now has a criminal statute in effect restricting picketing at funerals, the statute was not in effect at the time the conduct at issue arose. Noting that statute and that other jurisdictions have enacted similar provisions, the Court stated: "To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional." Slip Op. at 11. [Author's note: In North Carolina, G.S. 14-288.4(a)(8), criminalizes disorderly conduct at funerals, including military funerals. In a prosecution for conduct prohibited by that statute, the issue that the U.S. Supreme Court did not have occasion to address may be presented for decision].

Obstruction of Justice

State v. Taylor, __ N.C. App. __, __ S.E.2d __ (June 7, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NTEtMS5wZGY=). (1) By enacting G.S. 14-223 (resist, delay, obstruct an officer), the General Assembly did not deprive the State of the ability to prosecute a defendant for common law obstruction of justice, even when the defendant's conduct could have been charged under G.S. 14-223. (2) In a case in which the defendant, a sheriff's chief deputy, was alleged to have obstructed justice by interfering with police processing duties in connection with a DWI charge against a third-person, the trial judge did not err by failing to instruct the jury on the lack of legal authority to require the processing with which the defendant allegedly interfered.

Weapons Offenses

State v. Whitaker, 364 N.C. 404 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/21A10-1.pdf). Affirming, *State v. Whitaker*, __ N.C. App. __, 689 S.E.2d 395 (Dec. 8, 2009), the court held that G.S. 14-415.1, the felon in possession statute, was not an impermissible ex post facto law or bill of attainder.

State v. Wiggins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTAtMS5wZGY). The felon in possession statute does not authorize multiple convictions and sentences for possession of a firearm by a convicted felon predicated on evidence that the defendant simultaneously obtained and possessed one or more firearms, which he or she used during the commission of multiple substantive criminal offenses during the course of the same transaction or series of transactions. The court clarified that the extent to which a defendant is guilty of single or multiple offenses hinges upon the extent to which the weapons in question were acquired and possessed at different times. In the case at hand, the weapons came into the defendant's possession simultaneously and were used over a two-hour period within a relatively limited part of town in connection with the commission of a series of similar offenses. Based on these facts, only one felon in possession conviction could stand.

Drug Offenses

State v. Slaughter, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NDQtMS5wZGY=). (1) Over a dissent, the court held that there was sufficient evidence of constructive possession of marijuana. The defendant did not have exclusive control over the place where the contraband was found and there was no evidence that he owned any items found in proximity to the contraband, was the only person who could have placed the contraband where it was found, acted nervously, resided in or regularly visited the premises where the contraband was found, or possessed a large amount of cash. The primary evidence was his proximity to the contraband. Specifically, he was in a 150-square-foot room surrounded by bags of marijuana, marijuana residue, stacks of cash, bags of cash, handguns, blunts, rolling papers, a grinder, and packaging paraphernalia. Many of these items were in plain view of officers when they entered the room, including several baggies of marijuana, marijuana residue, several stacks of cash, at least one handgun, and plastic baggies. In addition, almost all of the officers testified that a strong smell of marijuana pervaded the premises. (2) Over a dissent, the court held that for the same reasons, there was sufficient evidence that the defendant constructively possessed drug paraphernalia (officers recovered scales, Ziploc-style baggies, cigars, cigar wrappers, and a grinder in close proximity to a substantial amount of marijuana and to each other).

State v. McCain, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (No. COA10-534) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MzQtMS5wZGY=). The trial court erred by submitting to the jury the charge of possession with intent to manufacture cocaine because it is not a lesser-included offense of the charged crime of trafficking by possession of cocaine. However, possession of cocaine is a lesser of the charged offense; because the jury convicted on possession with intent to manufacture, the court remanded for entry of judgment on possession of cocaine.

State v. Wilkins, __ N.C. App. __, 703 S.E.2d 807 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC02MzQtMS5wZGY). The trial court erred by denying the defendant's motion to dismiss a charge of possession with intent to sell or deliver. Evidence that an officer found 1.89 grams of marijuana on the defendant separated into three smaller packages, worth about $30, and that the defendant was carrying $1,264.00 in cash was insufficient to establish the requisite intent.

State v. Jones, __ N.C. App. __, 703 S.E.2d 772 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00NzUtMS5wZGY). An officer's testimony that a substance's packaging was indicative of it being held for sale was sufficient evidence of an intent to sell to survive a motion to dismiss.

State v. Parlee, __ N.C. App. __, 703 S.E.2d 866 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00OTctMS5wZGY). For purposes of double jeopardy, a second-degree murder conviction based on unlawful distribution of and ingestion of a controlled substance was not the same offense as sale or delivery of a controlled substance to a juvenile or possession with intent to sell or deliver a controlled substance.

Motor Vehicle Offenses

State v. Davis, __ N.C. App. __, 702 S.E.2d 507 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091537-1.pdf). In a case in which there was no admissible evidence as to the defendant's blood alcohol level, the court found that the evidence was insufficient to show that the defendant drove while impaired, even though it showed that she had been drinking before driving. The accident at issue occurred when the defendant collided with someone or something extending over the double yellow line and into her lane of traffic. Under these circumstances, the fact of the collision itself did not establish faulty or irregular driving indicating impairment.

State v. Jackson, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTgyLTEucGRm). In a felony speeding to elude case there was sufficient evidence that the defendant drove recklessly. An officer testified that the defendant drove 82 mph in a 55 mph zone and that he was weaving around traffic; also a jury could infer from his testimony

that the defendant crossed the solid double yellow line.

State v. Dewalt, __ N.C. App. __, 703 S.E.2d 872 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NTktMS5wZGY). The trial court did not err by instructing the jury that in order to constitute an aggravating factor elevating speeding to elude arrest to a felony, driving while license revoked could occur in a public vehicular area. Although the offense of driving while license revoked under G.S. 20-28 requires that the defendant drive on a highway, driving while license revoked can aggravate speeding to elude even if it occurs on a public vehicular area. While the felony speeding to elude arrest statute lists several other aggravating factors with express reference to the motor vehicle statutes proscribing those crimes (e.g., passing a stopped school bus as proscribed by G.S. 20-217), the aggravating factor of driving while license revoked does not reference G.S. 20-28.

Defenses

Self-Defense

State v. Cruz, 364 N.C. 417 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/193A10-1.pdf). The court affirmed per curiam *State v. Cruz*, __ N.C. App. __, 691 S.E.2d 47 (April 6, 2010) (holding, in a murder case, and over a dissenting opinion, that an instruction on self-defense was not required where there was no evidence that the defendant believed it was necessary to kill the victim in order to save himself from death or great bodily harm).

Statute of Limitations

State v. Taylor, __ N.C. App. __, __ S.E.2d __ (June 7, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NTEtMS5wZGY=). The statute of limitations applicable to misdemeanor offenses does not apply when the issue of a defendant's guilt of a misdemeanor offense is submitted to the jury as a lesser included offense of a properly charged felony. Applying this rule, the court held that the two-year misdemeanor statute of limitations does not bar conviction for misdemeanor common law obstruction of justice when the misdemeanor was submitted to the jury as a lesser-included offense of felonious obstruction of justice, the crime charged in the indictment.

Voluntary Intoxication

State v. Merrell, __ N.C. App. __, __ S.E.2d __ (June 7, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzA0LTEucGRm). Because the defendant failed to present evidence of intoxication to the degree required to show that he was incapable of forming the requisite intent to commit attempted statutory rape and indecent liberties, the trial court did not commit plain error by failing to instruct the jury on voluntary intoxication. The State's evidence showed that the defendant made careful plans to be alone with the child, and in at least one instance, tricked her into coming out of her room after she had locked herself away from him. The defendant offered evidence that he has abused alcohol and drugs for so long that his memory has deteriorated so that he cannot remember the relevant events. However, the court concluded, the defendant's failure to remember later when accused is not proof of his mental condition at the time of the crime.

Withdrawal

State v. Wright, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03OTQtMS5wZGY=). The trial court did not err by denying the defendant's request to instruct the jury on the defense of withdrawal where the evidence showed that the defendant completed his assigned task in the home invasion (kicking in the door) and failed to renounce the common purpose or indicate that he did not intend to participate in the crime any further.

Capital

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) The trial court did not err by allowing the State's challenge for cause of a prospective juror when the juror's beliefs about the death penalty could

not be pinned down. (2) The trial court did not err in denying the defendant's motion to dismiss asserting that disproportionate numbers of prospective jurors who were African-American, opposed the death penalty, or both, were excluded from the jury in violation of *Wainwright v. Witt*, 469 U.S. 412 (1985). The court declined to reconsider its previous holding that death qualifying a jury in a capital case does not violate the United States or North Carolina Constitutions. (3) The trial court did not err by prohibiting defense counsel from suggesting during voir dire that there is a presumption that life without parole is the appropriate sentence when North Carolina law does not establish such a presumption. (4) The court rejected the defendant's argument that the State injected error when it stated to prospective jurors that the jury had to be unanimous as to a sentence of death or life without parole. According to the defendant, these comments erroneously indicated that the jury had to recommend a life sentence unanimously, placing a burden on the defendant, when in fact life sentence is imposed if the jury cannot agree during a capital sentencing proceeding. While the defendant was correct that an inability to reach unanimity in a capital sentencing proceeding will result in a life sentence, the jury is not to be instructed as to the result of being unable to reach a unanimous sentencing recommendation. (5) The State did not reduce its burden when it asked prospective jurors to presuppose that the defendant had been found guilty. Such a supposition was a necessary prelude to voir dire questions relating to the sentencing proceeding, should one be needed.

Bobby v. Mitts, 563 U.S. ___ (May 2, 2011). In a per curiam opinion, the Court reversed a Sixth Circuit decision granting relief to a defendant on grounds that the jury instructions used in his capital trial ran afoul of *Beck v. Alabama*, 447 U.S. 625 (1980) (holding that the death penalty may not be imposed when the jury was not permitted to consider a verdict of guilt of a lesser-included non-capital offense, and when the evidence would have supported such a verdict). The Court concluded that the penalty phase instruction at issue was not invalid under *Beck*, which dealt with guilt-innocence phase instructions.

State v. Lane, __ N.C. __ (Mar. 11. 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS82MDZBMDUtMS5wZGY). The trial court did not err by failing to submit the G.S. 15A-2000(f)(1) (no significant history of prior criminal activity) mitigating circumstance. A forecast of evidence suggested that the defendant had violently abducted his former wife and forced her to engage in sexual activity.

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). The trial court did not err by instructing the jury to consider, over the defendant's objection, the (f)(1) mitigating circumstance (no significant history of prior criminal activity). The defendant's priors consisted of breaking and entering a motor vehicle (Class I felony) and several misdemeanors (larceny, public disturbance, defrauding an innkeeper, trespassing, carrying a concealed weapon, and possession of marijuana). There was also evidence of unspecified thefts, mostly at school. Because the evidence pertained to minor offenses, a rational jury could conclude that the defendant had no significant history of criminal activity.

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) The trial court did not err by failing to give a peremptory instruction on statutory mitigating circumstances when the evidence as to each was contested. (2) Although the trial court erred by failing to give a peremptory instruction on the non-statutory mitigating circumstance that the defendant's mother did not accept his deficits, the error was harmless beyond a reasonable doubt. (3) The trial court did not err by failing to give peremptory instructions on non-statutory mitigating circumstances when it was not clear how one was mitigating or that the evidence was credible; as to others, the evidence was not uncontroverted.

Post-Conviction

G.S. 15A-1335

State v. Goode, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjU4LTEucGRm). Citing, *State v. Oliver*, 155 N.C. App 209 (2002), the court held that no violation of G.S. 15A-1335 occurred when, after the defendant's two death sentences for murder were vacated, the trial judge imposed two consecutive life sentences. [Author's note: for a detailed discussion of G.S. 15A-1335, see the publication posted here: http://www.sog.unc.edu/programs/crimlaw/aoj200303.pdf].

Correcting Errors

State v. Petty, __ N.C. App. __, __ S.E.2d __ (June 7, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NDYtMS5wZGY=). Having erroneously arrested judgment on a DWI charge to which the defendant had pleaded guilty, the trial court had authority to correct the invalid judgment and sentence the defendant even after the session ended. Citing *State v. Branch*, 134 N.C. App. 637 (1999), the court noted in dicta that the trial court's authority to correct invalid sentences includes sentences that exceed the statutory maximum. For a more detailed discussion of *Branch* and the trial court's authority to sua sponte correct errors, see *Jessica Smith, Trial Judge's Authority to Sua Sponte Correct Errors after Entry of Judgment in a Criminal Case*, ADMIN. OF JUSTICE. BULL. May 2003 (UNC School of Government) (online: http://www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200302.pdf).

State v. Eaton, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNTg2LTEucGRm). In a case in which the defendant was sentenced as a Class C habitual felon, the court remanded for correction of a clerical error regarding the felony class of the underlying felony.

State v. Moore, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjQtMS5wZGY). Trial judge's failure to mark the appropriate box in the judgment indicating that the sentence was in the presumptive range was a clerical error.

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTItMS5wZGY). Listing the victim on the restitution worksheet as an "aggrieved party" was a clerical error.

State v. Kerrin, __ N.C. App. __, 703 S.E.2d 816 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUzLTEucGRm). The trial court committed a clerical error when, in a written order revoking probation, it found that the conditions violated and the facts of each violation were set forth in a violation report dated October 20, 2008, which was the date of a probation violation hearing, not a violation report.

State v. Dobbs, __ N.C. App. __, 702 S.E.2d 349 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0zODgtMS5wZGY). The court treated as a clerical error the trial court's mistake on the judgment designating an offense as Class G felony when it in fact was a Class H felony. The court remanded for correction of the clerical error.

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yODctMS5wZGY). On the judicial findings and order for sex offender form, the trial court erroneously indicated that the defendant had been convicted of an offense against a minor under G.S. 14-208.6(1i) when in fact he was convicted of a sexually violent offense under G.S. 14-208.6(5). The court remanded for correction of the clerical error.

DNA Testing

Skinner v. Switzer, 562 U.S. __ (Mar. 7, 2011). In a 6-to-3 decision, the Court held that a convicted state prisoner seeking DNA testing of crime-scene evidence may assert a claim under 42 U.S.C. § 1983. However, the Court noted that *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. __ (2009), severely limits the federal action a state prisoner may bring for DNA testing. It stated: "*Osborne* rejected the extension of substantive due process to this area, and left slim room for the prisoner to show that the governing state law denies him procedural due process." Slip Op. at 2 (citation omitted).

Ineffective Assistance of Counsel

State v. Clark, __ N.C. App.__, __ S.E.2d __ (April 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MDMtMS5wZGY=). Because a SBM hearing is not a criminal proceeding to which the right to counsel applies, the defendant cannot assert an ineffective

assistance of counsel claim as to counsel's performance at such a hearing.

State v. Miller, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTEtMS5wZGY=). The court noted in dicta that ineffective assistance of counsel claims are not available in civil appeals, such as that from an SBM eligibility hearing.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjY2LTEucGRm). (1) The defendant's claim that trial counsel was ineffective by failing to object to a videotape of the defendant's interrogation was properly considered on appeal. Although the defendant asked the court to dismiss his claim without prejudice to raise it in a motion for appropriate relief, he failed to identify how the record on appeal was insufficient to resolve the claim. (2) The defendant's claim that trial counsel was ineffective by failing to object to a videotape of the defendant's interrogation fails because even if counsel had objected, the objection would have been overruled when the defendant opened the door to the evidence through his own trial testimony. (3) The defendant failed to demonstrate that counsel's performance was deficient. As noted, the defendant's own testimony opened the door to admission of the videotape. Trial counsel made a strategic decision to have the defendant testify to offer an alibi. On appeal, the defendant did not challenge this strategy, which the jury rejected, and thus did not overcome the presumption that counsel's trial strategy was reasonable.

Harrington v. Richter, 131 S. Ct. 770 (Jan. 19, 2011) (http://www.supremecourt.gov/opinions/10pdf/09-587.pdf). The Court reversed the Ninth Circuit, which had held that the state court unreasonably applied existing law when rejecting the defendant's claim that his counsel was deficient by failing to present expert testimony on serology, pathology, and blood spatter patterns; the defendant had asserted that this testimony would have confirmed his version of how the events in question occurred. The Court concluded that it was at least arguable that a reasonable attorney could decide to forgo inquiry into the blood evidence under the circumstances, which included, among other things, the fact that counsel had reason to question the truth of the defendant's version of the events. The Court also rejected the Ninth Circuit's conclusion that counsel was deficient because he had not expected the prosecution to offer expert testimony and therefore was unable to offer expert testimony of his own in response. The Court concluded that although counsel was mistaken in thinking the prosecution would not present forensic testimony, the prosecution itself did not expect to make that presentation and had made no preparations for doing so on the eve of trial. For this reason alone, the Court concluded, it is at least debatable whether counsel's error was so fundamental as to call the fairness of the trial into doubt. Finally, the Court concluded that it would not have been unreasonable for the state court to conclude that the defendant failed to establish prejudice. Justice Kagan did not participate in the consideration or decision of the case.

Premo v. Moore, 131 S. Ct. 733 (Jan. 19, 2011) (http://www.supremecourt.gov/opinions/10pdf/09-658.pdf). The Court reversed the Ninth Circuit, which had held that the state court unreasonably applied existing law when rejecting the defendant's claim that counsel was ineffective by failing to file a motion to suppress the defendant's confession to police before advising him to accept a plea offer. Counsel had explained that he discussed the plea bargain with the defendant without first challenging the confession to the police because suppression would serve little purpose given that the defendant had made full and admissible confessions to two other private individuals, both of whom could testify. The state court would not have been unreasonable to accept this explanation. Furthermore, the Court held, the state court reasonably could have determined that the defendant would have accepted the plea agreement even if his confession had been ruled inadmissible. Justice Kagan did not participate in the consideration or decision of the case.

Cullen v. Pinholster, 563 U.S. __ (April 4, 2011) (http://www.supremecourt.gov/opinions/10pdf/09-1088.pdf). In a capital case, the Ninth Circuit Court of Appeals improperly granted the defendant habeas relief on his claim of penalty-phase ineffective assistance of counsel. The defendant and two accomplices broke into a house at night, killing two men who interrupted the burglary. A jury convicted the defendant of first-degree murder, and he was sentenced to death. After the California Supreme Court twice denied the defendant habeas relief, a federal district court held an evidentiary hearing and granted the defendant relief under 28 U.S.C. § 2254 on grounds of "inadequacy of counsel by failure to investigate and present mitigation evidence at the penalty hearing." Sitting en banc, the Ninth Circuit affirmed, holding that the California Supreme Court unreasonably applied *Strickland* v. *Washington*, 466 U. S. 668 (1984), in denying the defendant's claim of penalty-phase ineffective assistance of

counsel. The U.S. Supreme Court reversed, concluding that the defendant failed to show that the state court unreasonably concluded that defense counsel's penalty phase "family sympathy" strategy (that consisted principally of the testimony of the defendant's mother) was appropriate. Likewise, the defendant failed to show that the state court unreasonably concluded and that even if counsel's conduct was deficient, no prejudice occurred, given that the new evidence largely duplicated the mitigation evidence presented at trial and the extensive aggravating evidence.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). In a child sexual assault case, defense counsel's failure to move to strike testimony of a forensic interviewer that the fact that a young child had extensive sexual knowledge suggested that "something happened," did not constitute deficient performance.

State v. Womak, __ N.C. App.__, __ S.E.2d __ (April 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTg0LTEucGRm). (1) Defense counsel did not commit a *Harbison* error during the habitual felon proceeding by admitting that the defendant had pled guilty to three felonies. Although defense counsel admitted the defendant's prior convictions, he never argued that the jury should find that the defendant had attained habitual felon status and in fact suggested that the jury take certain mitigating factors into account. (2) Even if such an admission occurred, the defendant would not be entitled to relief because *Harbison* does not apply to a habitual felon proceeding.

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). The trial court's denial of a motion to continue in a murder case did not violate the defendant's right to effective assistance of counsel. The defendant asserted that he did not realize that certain items of physical evidence were shell casings found in defendant's room until the eve of trial and thus was unable to procure independent testing of the casings and the murder weapon. Even though the relevant forensic report was delivered to the defendant in 2008, the defendant did not file additional discovery requests until February 3, 2009, followed by *Brady* and *Kyles* motions on February 11, 2009. The trial court afforded the defendant an opportunity to have a forensic examination done during trial but the defendant declined to do so. The defendant was not entitled to a presumption of prejudice on grounds that denial of the motion created made it so that no lawyer could provide effective assistance. The defendant's argument that had he been given additional time, an independent examination *might* have shown that the casings were not fired by the murder weapon was insufficient to establish the requisite prejudice.

Motions for Appropriate Relief

State v. Shropshire, __ N.C. App. __ (Mar. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEzLTEucGRm). The trial court did not err by denying the defendant's post-sentencing motion to withdraw a plea without an evidentiary hearing. The defendant's motion was a motion for appropriate relief. Evidentiary hearings are required on such motions only to resolve issues of fact. In this case, no issue of fact was presented. The defendant's statement that he did not understand the trial court's decision to run the sentences consecutively did not raise any factual issue given that he had already stated that he accepted and understood the plea agreement and its term that "the court will determine whether the sentences will be served concurrently or consecutively." Furthermore, nothing in the record indicates that the defendant's plea was not the product of free and intelligent choice. Rather, it appears that his only reason for moving to withdraw was his dissatisfaction with his sentence.

State v. Long, __ N.C. __, __ S.E.2d __ (Feb. 4. 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS8yNjVQQTA5LTEucGRm). With one justice taking no part in consideration of the case and with the other members of the court equally divided, the court affirmed, without opinion, a ruling by the trial court on the defendant's motion for appropriate relief. The case was before the court on writ of certiorari to review the trial court's order. The question presented, as stated in the defendant's appellate brief, was: "Whether the trial court erred in finding in a capitally-charged case that failing to disclose exculpatory SBI reports, testifying falsely as to what evidence was brought to the SBI and failing to preserve irreplaceable biological evidence did not violate due process?"

State v. Taylor, __ N.C. App. __, __ S.E.2d __ (June 7, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NTEtMS5wZGY=). The court suggested in

dicta that on a motion for appropriate relief (as on appellate review) a defendant may be deemed to have waived errors in jury instructions by failing to raise the issue at trial. However, the court did not decide the issue since it concluded that even when considered on the merits, the defendant's alleged instructional error lacked merit.

§ 1983 Liability

Brady Violations

Connick v. Thompson, 563 U.S. __ (Mar. 29, 2011) (http://www.supremecourt.gov/opinions/10pdf/09-571.pdf). A district attorney's office may not be held liable under 42 U.S.C. § 1983 for failure to train based on a single *Brady* violation. The Orleans Parish District Attorney's Office conceded that, in prosecuting the defendant for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over under *Brady*. The defendant was convicted. Because of that conviction, the defendant chose not to testify in his own defense in his later murder trial. He was again convicted and spent 18 years in prison. Shortly before his scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory and both convictions were vacated. The defendant then sued the district attorney's office for damages under § 1983, alleging that the district attorney failed to train prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure at issue. The jury awarded the defendant $14 million, and Fifth Circuit affirmed. Reversing, the Court, in an opinion authored by Justice Thomas, clarified that the failure-to-train claim required the defendant to prove both that (1) the district attorney, the policymaker for the district attorney's office, was deliberately indifferent to the need to train prosecutors about their *Brady* disclosure obligation with respect to the type of evidence at issue and (2) the lack of training actually caused the *Brady* violation at issue. The Court determined that the defendant failed to prove that the district attorney was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training. The Court noted that a pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. Here, however, no such pattern existed; the Court declined to adopt a theory of "single-incident liability." Justice Scalia concurred, joined by Justice Alito, writing separately only to address several issues raised by the dissent. Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. For another discussion of this opinion, see the blog post here: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=2087

Jails and Corrections

Brown v. Plata, 563 U.S. __ (May 23, 2011) (http://www.law.cornell.edu/supct/html/09-1233.ZS.html). In a 5-to-4 decision, the Court affirmed a remedial order issued by a three-judge court directing California to remedy ongoing constitutional violations involving prisoners with serious mental disorders and medical conditions primarily caused by prison overcrowding. The order below leaves the choice of means to reduce overcrowding to the discretion of state officials. But absent compliance through new construction, out-of-state transfers, or other means—or modification of the order upon a further showing by the State—California will be required to release some number of prisoners before their full sentences have been served. The Court held that the Prison Litigation Reform Act of 1995 authorizes the relief afforded and that the court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights.

Judicial Administration

State v. Oakes, __ N.C. App. __, 703 S.E.2d 476 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMjgwLTEucGRm). The defendant failed to demonstrate grounds for recusal. The defendant argued that recusal was warranted based on the trial judge's comments at various hearings and on the fact that "the trial court was often dismissive of defense counsel's efforts and made a number of rulings unfavorable to the Defendant." The court cautioned the trial court with respect to the following statement made at trial: "The other thing I want to do is put on the record that I leave to the appellate courts whether or not any recommendation as to discipline should be made to any of the responses or conduct of the attorneys based upon the record in this case as to whether any of the Rules of Practice or Rules of Conduct have been violated." The court concluded that although it was unclear what issue the trial court meant to address with this statement, "it is the trial court's responsibility initially to pass on these concerns if the court has them, especially in view of the fact that the trial court is in a better position than a Court of the Appellate Division both to observe and control the trial proceedings. . . . It is not for the trial court to abdicate its role in managing the conduct of trial to an appellate court whose task is to review the cold record" (citation omitted).