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Criminal Case Law Update
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Cases covered include published criminal and related decisions from the the Fourth Circuit Court of Appeals and North Carolina appellate courts decided between November 4, 2022, and May 16, 2023. State cases were summarized by Alex Phipps and Fourth Circuit cases were summarized by Phil Dixon. To view all of the case summaries, go the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Warrantless Stops and Seizures

Reasonable suspicion that defendant was armed and dangerous justified frisk of vehicle

State v. Scott, COA22-326, ___ N.C. App. ___; 883 S.E.2d 505 (Feb. 7, 2023). In this New Hanover County case, the defendant appealed his conviction for possessing a firearm as a felon, arguing error in the denial of his motion to suppress (among other issues). The Court of Appeals found no error.

In February of 2020, a Wilmington police officer observed the defendant enter a parking lot known for drug activity and confer with a known drug dealer. When he exited the parking lot, the officer followed, and eventually pulled the defendant over for having an expired license plate. During the stop, the officer determined that the defendant was a "validated gang member," and had previously been charged with second-degree murder; the officer was also aware that a local gang war was underway at that time. Slip op. at 2. The officer frisked him and did not find a weapon, but the defendant told the officer there was a pocketknife in the driver's door compartment. When the officer went to retrieve the pocketknife, he did not find it, but while looking around the driver's area he discovered a pistol under the seat.

Reviewing the defendant's appeal, the court first noted that the initial traffic stop for an expired plate was proper. The frisk of the defendant's person and vehicle required the officer to have "a reasonable suspicion that the suspect of the traffic stop is armed and dangerous." *Id*. at 7, quoting *State v. Johnson*, 378 N.C. 236 (2021). The court found the totality of the officer's knowledge about the defendant satisfied this standard, as he had just exited a parking lot known for drug transactions, had a history of being charged with murder, was a known gang member, and was in an area experiencing a local gang war. Because the officer had a reasonable suspicion that the defendant might be armed and dangerous, the frisk of the vehicle leading to the discovery of the pistol was acceptable.

Threat to arrest the defendant for trespassing unless he consented to a frisk was a seizure unsupported by reasonable suspicion; denial of motion to suppress reversed by divided court

U.S. v. Peters, 60 F.4th 855 (Feb. 24, 2023). Two officers were patrolling housing authority property in the Eastern District of Virginia around 5:30 pm when they noticed two men walking down the sidewalk. The officers knew one of the men was not authorized to be present in the area; they also knew the

other man (the defendant) had been charged with trespassing in 2011 but could not determine the disposition of that arrest or the location involved. About a month before this interaction, one of the officers was tipped off by an informant that a man by a certain nickname was selling drugs from an address within the housing authority property. The informant provided a physical description of the alleged drug dealer. The officer showed a photo of the suspected dealer to the informant, who identified the defendant as the suspect. This caused the officer to pull the defendant's criminal history. That history included various "alerts" on the defendant—that he was a gang member in 2011; that he was a user or seller of illegal drugs in 2009; and that he was "probably armed" in 2009. The same information indicated that the defendant did not live in the neighborhood but was silent as to when the information had last been updated. Seeing the two men and armed with this information, the officers approached and activated their body cams. The officers told the men in a "stern" tone that they were not allowed on the property. The men continued walking and officers asked if either man had possessed any guns. Both men denied having a gun. The officers asked the men to raise their shirts. One man did so, but the defendant only partially lifted his shirt. The two officers stood on either side of the defendant three to five feet away. They addressed the defendant under his supposed nickname and asked for identification. The defendant denied having any. He also claimed he was not barred from being present on the property and asked police to verify that he was not on the banned persons list. One of the officers asked the defendant if he minded being patted down. The defendant refused consent. One of the officers threatened to arrest him for trespassing and continued seeking consent to frisk. The defendant reiterated that he was lawfully present in the area. At this point, one of the officers jumped towards the defendant with a "sudden forward movement," apparently in an attempt to draw a reaction from the defendant. About a minute later, the defendant lifted his shirt and officers saw the shape of a gun muzzle in his pants. He was arrested and indicted for possession of firearm by felon.

The defendant moved to suppress, arguing that officers lacked reasonable suspicion to detain him. The officers testified at the suppression hearing that the initial encounter began as a trespassing investigation and stated that they began suspecting the defendant was armed based on his "skinny jeans" and refusal to fully lift his shirt. The district court denied the motion. The defendant pled guilty, was sentenced to 120 months, and appealed. A divided Fourth Circuit reversed.

The court first examined whether the defendant was seized or, as the Government argued, the encounter was consensual. The court found that the defendant was seized within one minute of the police encounter. When the armed, uniformed officers threatened to arrest him for trespassing and indicated he would need to consent to a frisk or be arrested, this was a show of authority that a reasonable person would not feel free to disregard. The court went on to find that the seizure was unsupported by reasonable suspicion. Given the age of the defendant's criminal history and lack of accompanying detail, that information did not contribute to reasonable suspicion that the defendant was trespassing. Without more, the court rejected the notion that historical "caution data" from police databases added to reasonable suspicion. Though the defendant repeatedly asked the officers to double check their databases to confirm he was not a person prohibited from the property, they declined to do so. In fact, the defendant's 2011 arrest for trespass had not resulted in a conviction, and he correctly informed the officers that he was allowed on the property. The informant's tip about the defendant dealing drugs also failed to add to the reasonable suspicion calculus, as the officer acknowledged that he had done nothing to corroborate the tip in the month since receiving it and nothing about the behavior of the men during the encounter indicated drug activity. Neither did the tip point to evidence of trespassing. That the defendant was walking in front of the building identified by the informant as the place where drugs were being sold also failed to meaningfully contribute to the officer's suspicions here, as the men were simply walking in front of the building down the sidewalk and had not been seen

entering, exiting, or loitering by the building. That the defendant was walking with another person who was banned from the property was also not sufficient, as it was not specific to the defendant. While the officer testified at suppression that he had confidential informant information that men with skinny jeans often tuck a gun into their waistbands, this too added little to the equation. In the words of the court:

> A general tip 'that men specifically were wearing skinny jeans' to 'wedge a firearm in their waistband' does not justify the seizure here, because it is not at all particular to Peters. The argument that this rises to the level of reasonable suspicion is premised, at least in part, on the belief that individuals like Peters—present in public housing communities like Creighton Court—must lift their shirts upon request to prove they are unarmed. Such a belief cannot provide reasonable suspicion because 'a refusal to cooperate' alone does not justify a seizure. To hold otherwise would seemingly give way to the sort of general searched that we, as an en banc court, have found to violate the Fourth Amendment. *Peters* Slip op. at 21 (*citing U.S. v. Curry*, 965 F.3d 313 (4th Cir. 2020) (en banc)).

The seizure being unsupported by reasonable suspicion, the district court's denial of the suppression motion was reversed, the conviction vacated, and the matter remanded for any additional proceedings.

Judge Traxler dissented and would have affirmed the district court.

Despite the lack of canine alert, officers had probable cause to search vehicle based on totality of the circumstances

State v. Aguilar, 2022-NCCOA-903, ___ N.C. App. ___ (Dec. 29, 2022). In this Union County case, the defendant appealed his conviction for trafficking by possession and transportation of heroin, arguing error in the denial of his motion to suppress the results of a warrantless search of his vehicle. The Court of Appeals found no error.

In January of 2020, the Union County Sheriff's Office was observing several individuals involved in drug trafficking based on information from two confidential informants. Based on the observations and information received, officers ended up detaining the defendant and searching his vehicle, finding heroin in the car. Although a canine unit was present, the dog did not alert on a search around the perimeter of the car. Despite the lack of alert, the officers believed they had probable cause based on "the tips provided by two unrelated confidential informants and officers' observations that confirmed these specific tips." Slip op. at 4. The defendant subsequently pleaded guilty to charges of trafficking heroin but reserved his right to appeal the dismissal of his motion to suppress.

The court walked through each challenged finding of fact and conclusion of law, determining that none of the issues highlighted by the defendant represented error. In particular, the court explained that the lack of an alert from the canine unit did not prevent the officers from having probable cause, and noted that the"[d]efendant has cited no case, either before the trial court or on appeal, holding that officers cannot have probable cause to search a vehicle if a canine search is conducted and the canine fails to alert . . . [n]or did we find such a case." *Id*. at 29. Because the totality of the circumstances supported probable cause, the court found no error in the trial court's conclusion.

Motion to suppress was improperly granted where (1) police had reasonable suspicion for *Terry* frisk, (2) subsequent "plain view" doctrine seizure was lawful, (3) protective sweep of house was justified by circumstances, and (4) smell of marijuana was not only basis for probable cause to support search warrant for house

State v. Johnson, COA22-363, ___ N.C. App. ___ (April 18, 2023); *temp. stay allowed*, ___ N.C. ___ (April 26, 2023). In this Vance County case, the State appealed from an order granting the defendant's motion to suppress evidence seized from his person and inside a house. The Court of Appeals reversed and remanded the matter to the trial court.

While attempting to arrest the defendant for an outstanding warrant, officers of the Henderson Police Department noticed the odor of marijuana coming from inside the house where the defendant and others were located. All of the individuals were known to be members of a criminal gang. After frisking the defendant, an officer noticed baggies of heroin in his open coat pocket. The officers also performed a protective sweep of the residence, observing digital scales and other drug paraphernalia inside. After a search of the defendant due to the baggies observed in plain view during the frisk, officers found heroin and marijuana on his person, along with almost $2,000 in fives, tens and twenties. After receiving a search warrant for the house, the officers found heroin, marijuana, drug paraphernalia, and firearms inside. The defendant was indicted on drug possession, criminal enterprise, and possession of firearm by a felon charges. Before trial, the trial court granted the defendant's motion to suppress, finding that there was no probable cause to detain the defendant or to enter the residence.

The Court of Appeals first established the basis for detaining and frisking the defendant, explaining that officers had a "reasonable suspicion" for frisking the defendant under *Terry v. Ohio*, 392 U.S. 1 (1968), as they had a valid arrest warrant for the defendant for a crime involving a weapon, knew he was a member of a gang, and saw another individual leave the house wearing a ballistic vest. Slip op. at 14. Applying the "plain view" doctrine as articulated in *State v. Tripp*, 381 N.C. 617 (2022), and *State v. Grice*, 367 N.C. 753 (2015), the court found that the search was constitutional and the arresting officer's eventual seizure of the "plastic baggies he inadvertently and 'plainly viewed'" was lawful. Slip op. at 16.

The court then turned to the trial court's ruling that the warrantless entry of officers into the house to conduct a protective sweep was unlawful. Noting applicable precedent, the court explained "[t]he Supreme Court of the United States, the Supreme Court of North Carolina, and this Court have all recognized and affirmed a law enforcement officer's ability to conduct a protective sweep both as an exigent circumstance and for officer's safety when incident to arrest." *Id*. at 16-17. The court found that the officers had both justifications here, as the defendant was a member of a gang and known for violence involving weapons, and the officers were unsure whether any other people remained inside the house.

Finally, the court examined the probable cause supporting the search warrant for the house. The defendant argued that the smell of marijuana could not support probable cause due to it being indistinguishable from industrial hemp. Looking to applicable precedent such as *State v. Teague*, 2022-NCCOA-600 (2022), the court noted that the Industrial Hemp Act did not modify the State's burden of proof, but also noted that like in *Teague*, the smell of marijuana was not the only basis for probable cause in this case. Slip op. at 25. Here, the court found the drugs in the defendant's pocket and the drug paraphernalia observed during the protective sweep also supported probable cause.

Searches

Probable cause supported search of defendant's cellphone found in vehicle linked to home invasion

State v. Byrd, 2022-NCCOA-905, ___ N.C. App. ___ (Dec. 29, 2022). In this Johnson County Case, the defendant appealed the denial of his motion to suppress evidence obtained from his cellphone. The Court of Appeals affirmed the trial court's denial of the motion.

The defendant was convicted of burglary, robbery, kidnapping, conspiracy, and habitual felony status for a home invasion in September of 2018. The evidence supporting the defendant's conviction came from a search of his cellphone found in a vehicle tied to the home invasion. He argued at trial that the search warrant for his cellphone was not supported by probable cause, but the trial court denied the motion to suppress.

The Court of Appeals explained that probable cause to support the warrant came from the totality of the circumstances around the cellphone. Here, the cellphone was found in a car identified by an eyewitness as leaving the scene and the car was owned by the defendant's cousin. This same cousin told law enforcement that the defendant was the owner of a white LG cellphone, matching the phone found in the car after a search. The car also contained a distinctive Tourister case stolen from the home in question. The court found that "[u]nder the totality of the circumstances, these facts show a nexus between [d]efendant's white LG cellphone and the home invasion." Slip op. at 8.

Miranda

Brief questioning of defendant in a public park after hours did not rise to the level of custody for purposes of *Miranda;* denial of motion to suppress affirmed

U.S. v. Leggette, 57 F.4th 406 (Jan. 10, 2023). In this case from the Middle District of North Carolina, Winston-Salem police officers noticed a car parked in the lot of a public park around 11:30 pm. The park closed at 10:30 pm, and officers decided to investigate the potential trespass. The defendant and a companion were present in the park and approached the officer. A backup officer arrived and found a gun inside of a nearby trash can. The first officer performed a frisk of the defendant and asked him three times about ownership of the gun. This occurred over the course of around 90 seconds. The defendant denied knowing anything about the weapon in response to the first two questions, but admitted to being a felon. The officer stated that honesty would "go a long way" and asked a third time, at which point the defendant admitted ownership of the gun. At the detention center, officers read the defendant a *Miranda* warning and the defendant again confessed. He was charged with being a felon in possession and moved to suppress his statements, arguing a *Miranda* violation based on the officer's questions in the park. The district court denied the motion, finding that the defendant was not in custody at the time of his inculpatory statements. The defendant pled guilty, reserving his right to appeal the suppression issue. He was sentenced to 180 months and appealed. A unanimous panel of the Fourth Circuit affirmed.

The court noted that a person may not be free to leave an encounter with police but still may not be considered "in custody" for purposes of *Miranda*. According to the court:

> …[A] *Terry* stop does not constitute Miranda custody. Just like the subject of a traffic stop, the person cannot leave. But, like traffic stops, Terry stops lack the necessary coercion, and so do not curtail a person's freedom of action to a degree associated with formal arrest. *Leggette* Slip op. at 7 (cleaned up).

The court noted that only one officer questioned the defendant and the officer asked "only a handful of questions," aimed at discovering information about the gun. The officer spoke politely and did not draw his firearm. Other than the initial frisk, the officer did not touch or restrain the defendant during the questioning. The questioning occurred in a public place, with the defendant's companion beside him, and within a short window of time. These circumstances did not rise to the functional equivalent of an arrest and therefore did not amount to custody for purposes of *Miranda*. The district court was therefore affirmed. Concluding, the court observed:

> *Miranda* warnings are not required every time an individual has their freedom of movement restrained by a police officer. Nor are they necessarily required every time questioning imposes some sort of pressure on suspects to confess. Instead, they are only required when a suspect's freedom of movement is restrained to the point where they do not feel free to terminate the encounter and the circumstances reveal the same inherently coercive pressures as the type of stationhouse questioning at issue in *Miranda*. *Id*. at 12-13 (cleaned up).

Eyewitness Identification

(1) Showing eyewitness a single picture of defendant during trial preparation conference was impermissibly suggestive but did not create substantial likelihood of irreparable misidentification; (2) showing witness the single picture of defendant was not a lineup or show-up for EIRA purposes

State v. Morris, COA22-3, ___ N.C. App. ___ (March 7, 2023). In this Duplin County case, the defendant appealed his convictions for sale and delivery of cocaine, arguing error (1) in denying his motion to suppress certain eyewitness testimony for due process violations, (2) denying the same motion to suppress for Eyewitness Identification Reform Act ("EIRA") violations, (3) in permitting the jury to examine evidence admitted for illustrative purposes only, and (4) in entering judgment for both selling and delivering cocaine. The Court of Appeals affirmed the denial of defendant's motion and found no plain error with the jury examining illustrative evidence but remanded for resentencing due to the error of sentencing the defendant for both the sale and delivery of cocaine.

In December of 2017, the Duplin County Sheriff's Office had confidential informants performing drug buys from the defendant in a trailer park. The informants purchased crack cocaine on two different days from the defendant, coming within three to five feet of him on clear days. At a trial preparation meeting in October of 2020, the prosecutor and a detective met with the lead informant; at the meeting, the informant saw a DMV picture of the defendant with his name written on it, and responded "yes" when asked if that was the person from whom the informant purchased cocaine. No other pictures were shown to the informant at this meeting. Defense counsel subsequently filed a motion to suppress the testimony of the informant based on this meeting, as well as motions *in limine*, all of which the trial court denied.

The Court of Appeals first considered (1) the denial of the defendant's motion to suppress, where defendant argued that the identification procedure violated his due process rights. The due process inquiry consists of two parts: whether the identification procedure was "impermissibly suggestive," and if the answer is yes, "whether the procedures create a substantial likelihood of irreparable misidentification" after a five-factor analysis. Slip Op. at 9-10, quoting *State v. Rouse*, 284 N.C. App. 473, 480-81 (2022). Applying the *Rouse* framework and similar circumstances in *State v. Malone*, 373 N.C. 134 (2019) and *State v. Jones*, 98 N.C. App. 342 (1990), the court determined that "[the informant] seeing the photo of Defendant in the file during the trial preparation meeting was impermissibly suggestive," satisfying the first part. *Id*. at 18. However, when the court turned to the five-factor analysis, it determined that only the third factor (accuracy of the prior description of the accused) and the fifth factor (the time between the crime and the confrontation of the accused) supported finding of a due process violation. The court concluded that "[b]ecause there was not a substantial likelihood of irreparable misidentification, the identification did not violate due process." *Id*. at 24.

The court also considered (2) the defendant's argument that the EIRA applied and supported his motion to suppress. After reviewing the scope of the EIRA, the court applied *State v. Macon*, 236 N.C. App. 182 (2014), for the conclusion that a single-photo identification could not be a lineup for EIRA purposes. Slip Op. at 28. The court then considered whether the procedure was a show-up:

> In contrast to our longstanding description of show-ups, the procedure here was not conducted in close proximity to the crime and, critically, it was not conducted to try to determine if a suspect was the perpetrator. The identification here took place during a meeting to prepare for [trial]. As a result, the State, both the police and the prosecution, had already concluded Defendant was the perpetrator. The identification acted to bolster their evidence in support of that conclusion since they would need to convince a jury of the same. Since the identification here did not seek the same purpose as a show-up, it was not a show-up under the EIRA.*Id*. at 30.

The court emphasized the limited nature of its holding regarding the scope of the EIRA, and that this opinion "[did] not address a situation where the police present a single photograph to a witness shortly after the crime and ask if that was the person who committed the crime or any other scenario." *Id*. at 32.

Pleadings

Indictment's statement of specific facts showed malice aforethought

State v. Davis, 2023-NCCOA-4, ___ N.C. App. ___ (Jan. 17, 2023). In this New Hanover County case, the defendant appealed after being found guilty of two counts of first-degree murder and three counts of attempted first-degree murder, arguing (1) the indictment for attempted first-degree murder failed to include an essential element of the offense, (2) error in denying his motion to dismiss one of the attempted murder charges, and (3) error in admitting evidence of past acts of violence and abuse against two former romantic partners. The Court of Appeals found no error.

In August of 2014, after the defendant assaulted his girlfriend, a protective order was granted against him. On December 22, 2014, the defendant tried to reconcile with his girlfriend, but she refused; the girlfriend went to the house of a friend and stayed with her for protection. Early the next morning, the

defendant tried to obtain a gun from an acquaintance, and when that failed, he purchased a gas can and filled it with gas. Using the gas can, the defendant set fires at the front entrance and back door of the home where his girlfriend was staying. Five people were inside when the defendant set the fires, and two were killed by the effects of the flames. The defendant was indicted for first-degree arson, two counts of first-degree murder, and three counts of attempted first-degree murder, and was convicted on all counts (the trial court arrested judgment on the arson charge).

The Court of Appeals explained that "with malice aforethought" was represented in the indictment by "the specific facts from which malice is shown, by 'unlawfully, willfully, and feloniously . . . setting the residence occupied by the victim(s) on fire.'" Slip op. at 10. Because the ultimate facts constituting each element of attempted first-degree murder were present in the indictment, the lack of "with malice" language did not render the indictment flawed.

City ordinance was not properly pleaded where charging documents did not include the caption of the ordinance

State v. Miller, COA22-561, ___ N.C. App. ___ (Feb. 21, 2023). In this Union County case, the defendant appealed his convictions for attempted first degree murder, going armed to the terror of the people, possession of a handgun by a minor, and discharge of a firearm within city limits, arguing (in part) error by denial of his motion to dismiss the discharge of a firearm charge. The Court of Appeals agreed, remanding the case and vacating the discharge of a firearm conviction.

The court found that the arrest warrant and indictment were both defective as they did not contain the caption of the relevant ordinance. Under G.S. 160A-79(a), "a city ordinance . . . must be pleaded by both section number and caption." *Id*. at 8. Here, the charging documents only reference the Monroe city ordinance by number and failed to include the caption "Firearms and other weapons." The court found the State failed to prove the ordinance at trial, and vacated the defendant's conviction for the discharge of a firearm within city limits charge.

Nature of location is an essential element for G.S. 14-277.2 possession of a dangerous weapon at a demonstration charge

State v. Reavis, 2022-NCCOA-909, ___ N.C. App. ___ (Dec. 29, 2022). In this Chatham County case, the Court of Appeals overturned the defendant's conviction for possession of a firearm at a demonstration, finding that the indictment failed to specify the type of land where the violation took place.

The defendant attended a protest in Hillsborough over the removal of a confederate monument in 2019. During the protest, an officer observed the defendant carrying a concealed firearm. The defendant was indicted for violating G.S. 14-277.2, and at trial moved to dismiss the charges, arguing that the misdemeanor statement of charges was fatally defective for not specifying the type of location for the offense, specifically the required location of a private health care facility or a public place under control of the state or local government. The defendant's motion was denied, and she was convicted of the misdemeanor.

Reviewing the appeal, the court agreed with the defendant's argument that her indictment was defective. Although the State moved to amend the location in the statement of charges, and the superior court granted that motion, the Court of Appeals explained that this did not remedy the defect.

The court explained that "if a criminal pleading is originally defective with respect to an essential element . . . amendment of the pleading to include the missing element is impermissible, as doing so would change the nature of the offense." Slip op. at 8-9. The court looked to analogous statutes and determined that the specific type of location for the offense was an essential element of G.S. 14-277.2, and that the State had failed to specify the location in either the statement of charges or the police report provided with the statement. Instead, the statement and police report simply listed the street address and described the location as "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk[,]" failing to specify the essential element related to the type of location. *Id*. at 16-17.

Judge Inman concurred only in the result.

Indictment did not specifically identify facilitating flight following commission of felony as purpose of kidnapping; underlying felony of rape was completed before the actions of kidnapping occurred, justifying dismissal

State v. Elder, 383 N.C. 578 (Dec. 16, 2022). In this Warren County case, the Supreme Court affirmed the Court of Appeals decision finding that the second of the defendant's two kidnapping charges lacked support in the record and should have been dismissed because the rape supporting the kidnapping charge had already concluded before the events of the second kidnapping.

The two kidnapping charges against the defendant arose from the rape of an 80-year-old woman in 2007. The defendant, posing as a salesman, forced his way into the victim's home, robbed her of her cash, forced her from the kitchen into a bedroom, raped her, then tied her up and put her in a closet located in a second bedroom. The basis for the kidnapping charge at issue on appeal was tying up the victim and moving her from the bedroom where the rape occurred to the second bedroom closet. The defendant moved at trial to dismiss the charges for insufficiency of the evidence and argued that there was no evidence in the record showing the second kidnapping occurred to facilitate the rape.

The Supreme Court agreed with the Court of Appeal majority that the record did not support the second kidnapping conviction. The court explored G.S. 14-39 and the relevant precedent regarding kidnapping, explaining that kidnapping is a specific intent crime, and the State must allege one of the ten purposes listed in the statute and prove at least one of them at trial to support the conviction. Here, the State alleged "that defendant had moved the victim to the closet in the second bedroom *for the purpose of facilitating the commission of rape*." Slip Op. at 30. At trial, the evidence showed that the defendant moved the victim to the second bedroom "after he had raped her, with nothing that defendant did during that process having made it any easier to have committed the actual rape." *Id*. Because the State only alleged that the defendant moved the victim for purposes of facilitating the rape, the court found that the second conviction was not supported by the evidence in the record. The court also rejected the State's arguments that *State v. Hall*, 305 N.C. 77 (1982) supported interpreting the crime as ongoing, overruling the portions of that opinion that would support interpreting the crime as ongoing. Slip Op. at 42.

Chief Justice Newby, joined by Justice Berger, dissented and would have allowed the second kidnapping conviction to stand. *Id*. at 45.

Capacity and Commitment

Defendant did not assert a constitutional right to competency hearing; defendant waived statutory right to competency hearing by failing to assert right at trial

State v. Wilkins, 2022-NCCOA-911, ___ N.C. App. ___ (Dec. 29, 2022). In this Caswell County case, the defendant appealed his conviction for drug possession charges, arguing error by the trial court for the lack of a competency evaluation and admission of testimony regarding his silence at a traffic stop. The Court of Appeals found no error.

The defendant was in the front seat of an SUV stopped in 2018 under suspicion of throwing contraband into a prison yard. A search of the vehicle found two footballs cut open and filled with drugs; the defendant was silent during the stop and search of the vehicle. While awaiting trial, defense counsel moved for a competency hearing; the trial court entered an order finding the defendant's competency in question, and ordering an evaluation. However, the defendant was never evaluated, and no finding was ever entered as to his competency, as he was instead released on bail. By the time the defendant reached trial in 2021, he had new counsel, who did not assert the right to a competency evaluation. The defendant was convicted of drug possession offenses at trial.

Reviewing the defendant's appeal, the court noted that the defendant never objected to the lack of a hearing or evaluation on his competency at trial, and this represented waiver of the statutory right to a competency evaluation and hearing. The defendant failed to assert a due process clause claim for the competency hearing, preventing consideration of the constitutional issue. The court explained that the statutory right to a competency hearing comes from G.S. 15A-1002, and under *State v. Young*, 291 N.C. 562 (1977), "our Supreme Court repeatedly has held that 'the statutory right to a competency hearing is waived by the failure to assert that right at trial.'" Slip op. at 4, quoting *State v. Badgett*, 361 N.C. 234 (2007). Reviewing the defendant's objection to the admission of testimony about his silence, the court found no plain error, and noted it was unclear if the issue was even reviewable on appeal. *Id*. at 9-10.

Judge Inman dissented by separate opinion and would have granted the defendant's right to competency hearing. *Id*. at 11.

Trial court did not err by allowing trial to proceed after defendant jumped from a balcony in the jail, severely injuring himself; hearing under G.S. 15A-1002 was statutorily sufficient even though trial court did not consider whether defendant's jump represented a suicidal gesture; trial court was not presented with sufficient evidence of incompetence to trigger hearing under Due Process Clause

State v. Flow, 202PA21, ___ N.C. ___ (Apr. 28, 2023). In this Gaston County case, the Supreme Court affirmed the Court of Appeals decision finding no error when the trial court declined to conduct further inquiry into the defendant's capacity after determining that he voluntarily absented himself by jumping from a balcony on the sixth day of trial.

In May of 2018, the defendant forced his way into the home of his ex-girlfriend and held her at gunpoint for several hours, raping her twice. Police eventually forced their way into the home and successfully rescued the ex-girlfriend from the defendant. Defendant came for trial on charges of rape, burglary, kidnapping, sexual offense, possession of a firearm by a felon, and violation of a protective order beginning on December 9, 2019. After the defendant decided not to testify or present evidence on his

own behalf, the trial court conducted two colloquies with him to determine if he was making the choices freely and intelligently. The court conducted these colloquies on Friday, December 13, and again on Monday, December 16, 2019. After the second colloquy, the jury was brought back and heard closing arguments from both sides, and trial proceedings concluded for the day. On the morning of December 17, 2019, the defendant leaped off a mezzanine in the jail, breaking his leg and ribs. Defense counsel then moved under G.S. 15A-1002 to challenge the defendant's competency. After hearing from defense counsel and the state, the trial court determined that the defendant voluntarily absented himself from the trial, and the trial moved forward, ultimately resulting in the defendant's convictions. A unanimous panel at the Court of Appeals found no error by the trial court, distinguishing the circumstances from *State v. Sides*, 376 N.C. 449 (2020).

On appeal, the defendant argued that the trial court erred by failing to conduct an inquiry into his capacity to proceed, basing his arguments on G.S. §§ 15A-1001 & -1002, and the Due Process Clause of the Fourteenth Amendment. The Supreme Court reviewed these interrelated arguments de novo, first looking at the statutory claim. Here, defense counsel's initial motion was sufficient to trigger G.S. 15A-1002's hearing procedures, but the court explained the section only provides "sparse guidance regarding the procedural and substantive requirements of the competency hearing." Slip Op. at 29. The court concluded that the inquiry here, where the trial court heard from both parties and accepted testimony on the events, was "statutorily sufficient because defendant was provided an opportunity to present any and all evidence relating to his competency that he was prepared to present." *Id*. at 30. Even though the trial court did not consider whether the defendant had attempted suicide by his jump, this did not show a failure to consider the defendant's capacity, as "[s]uicidality does not automatically render one incompetent," and the defendant could be suicidal without being incompetent, or vice versa. *Id*. at 31.

The court next moved to the Due Process Clause argument, explaining that the requirements for a constitutional competency hearing are more involved, but are only triggered when the trial court is presented with substantive evidence of the defendant's incompetence. Here, "the determinative issue [was] whether the trial court in the instant case had substantial evidence that defendant may have lacked capacity at the time of his apparent suicide attempt." *Id*. at 36. The court first noted that, as explained in the statutory inquiry, the defendant's suicide attempt on its own did not represent substantial evidence of incompetence. The defendant pointed to three categories of evidence showing incompetence: (1) his actions before the arrest, including erratic behavior, the use of a racial slur, and the nature of his crimes, (2) his suicide attempt, and (3) testimony that he was heavily medicated and had trouble communicating in the hospital after his attempt at suicide. The court rejected number (3) immediately as it related to after the attempt, and again noted that number (2) by itself did not support incompetence. That left the evidence of number (1), which the court found was inadequate to show substantial evidence of incompetence. Additionally, the trial court was able to observe and interact with the defendant over the course of the trial, and received evidence provided by defense counsel at the hearing, none of which indicated a history of mental illness or inability to participate or understand the legal proceedings prior to his suicide attempt. The court concluded that no substantial evidence existed to justify further inquiry.

Justice Earls dissented and would have held that the trial court held an insufficient hearing under G.S. 15A-1002 and had sufficient evidence to require a competency hearing under the Due Process Clause. *Id*. at 45.

Order for involuntary medication affirmed; extended commitment of defendant in an attempt to restore capacity was reasonable

U.S. v. Tucker, 60 F.4th 879 (Feb. 24, 2023). Under *Sell v. U.S.*, 539 U.S. 166, 179 (2003), forced medication to restore competency to stand trial for a serious crime may be permitted. Due process requires that forced medication is only available when the Government shows by clear and convincing evidence that important governmental interests are at stake, that forced medication will advance those interests, that the medication is needed in light of those interests, and that the involuntary treatment is "medically appropriate." *Id.* Under *Jackson v. Indiana,* 406 U.S. 715, 738 (1972), civil commitment to restore competency is allowed, but a defendant may not be held for more time than is reasonably necessary to determine whether the defendant is likely to become competent. The defendant was charged with various child pornography offenses in the Middle District of North Carolina in 2017. He was quickly found to lack competency to proceed and civilly committed in hopes of restoration. The commitment was extended without defense objection. In 2018, the court was informed that the defendant remained incompetent but would likely regain competency with continued treatment and medication. The commitment was again extended without defense objection. In 2019, the treating psychologist reported that the defendant had responded well to treatment and was close to competency, but the defendant refused to consistently comply with medication. The doctor sought an order permitting forced medication as needed to restore his competency. The district court ultimately found that involuntary medication was appropriate and entered that order along with an extension of commitment. That order was appealed, and the Fourth Circuit stayed the order pending resolution of the appeal. Around two years later, the Government sought a remand to the district court, which was granted. The district court again concluded that involuntary treatment was appropriate, and the defendant again appealed, leading to the present matter. Analyzing the *Sell* factors, the court affirmed. While the defendant has been in custody for over five years, the Government's interest in prosecuting him for child pornography offenses was significant. The offenses were more serious than mere possession of child pornography—the defendant was charged with two counts of soliciting people he believed to be minors to create child pornography, offenses the court categorized as "grave by any measure." *Tucker* Slip op. at 13. Consequently, it was unlikely that the defendant would have completed any sentence imposed as a result of the charges at this point in time—two of his charges carry 15-year minimum sentences in the event of conviction. The overall length of time of commitment was considerable, but the defendant forfeited or waived his challenge to much of that time by failing to object to earlier extensions, by seeking continuances, and by seeking multiple stays pending appeals. The court therefore authorized the involuntary medication order and extended the period of commitment once more to attempt restoration while cautioning the Government against further extensions. In the court's words:

Given the deferential standards of review, we conclude the district court committed no reversible error in deciding an involuntary medication order was warranted and finding it appropriate to grant one final four-month period of confinement to attempt to restore Tucker's competency. We emphasize, however, that '[a]t some point [the government] can't keep trying and failing and trying and failing, hoping to get it right,' and we trust no further extensions will be sought once the current appeal is finally resolved. *Id*. at 17-18.

Dismissal with Leave and Reinstatement

District Attorney holds exclusive discretionary power to reinstate criminal charges dismissed with leave; trial court does not have authority to compel district attorney to reinstate charges dismissed with leave

State v. Diaz-Tomas, ___ N.C. ___; 2022-NCSC-115 (Nov. 4, 2022). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision denying the defendant's petition for writ of certiorari and dismissed as improvidently allowed issues related to the defendant's petition for discretionary review and the denial of his petition for writ of mandamus.

This matter has a complicated procedural history as detailed on pages 4-10 of the slip opinion. The defendant was originally charged with driving while impaired and driving without an operator's license in April of 2015. The defendant failed to appear at his February 2016 hearing date; an order for arrest was issued and the State dismissed the defendant's charges with leave under G.S. § 15A-932(a)(2). This meant that the defendant could not apply for or receive a driver's license from the DMV. The defendant was arrested in July of 2018, and given a new hearing date in November of 2018, but he again failed to appear. In December of 2018, the defendant was arrested a second time, and given another new hearing date that same month. However, at the December 2018 hearing, the assistant DA declined reinstate the 2015 charges, leading to the defendant filing several motions and petitions to force the district attorney's office to reinstate his charges and bring them to a hearing. After the defendant's motions were denied by the district court, and his writ for certiorari was denied by the superior court and the Court of Appeals, the matter reached the Supreme Court.

The court first established the broad discretion of district attorneys, as "[s]ettled principles of statutory construction constrain this Court to hold that the use of the word 'may' in N.C.G.S. § 15A-932(d) grants exclusive and discretionary power to the State's district attorneys to reinstate criminal charges once those charges have been dismissed with leave . . . ." Slip op. at 13. Due to this broad authority, the court held that district attorneys could not be compelled to reinstate charges. The court next turned to the authority of the trial court, explaining that "despite a trial court's wide and entrenched authority to govern proceedings before it as the trial court manages various and sundry matters," no precedent supported permitting the trial court to direct the district attorney in this discretionary area. *Id*. at 16. Because the district attorney held discretionary authority to reinstate the charges, and the trial court could not interfere with the constitutional and statutory authority of the district attorney, the court affirmed the denial of the defendant's motions for reinstatement and petition for writ of certiorari. [Shea Denning blogged about this case here.] [A petition for writ of certiorari has been filed in the U.S. Supreme Court in this matter, available here.]

Right to Counsel

Defendant did not "effectively waive" her right to counsel; forfeiture of counsel requires "egregious misconduct" by defendant

State v. Atwell, 2022-NCSC-135, ___ N.C. ___ (Dec. 16, 2022). In this Union County case, the Supreme Court reversed the Court of Appeals decision that the defendant effectively waived her right to counsel and remanded the case for a new trial.

The defendant was subject to a Domestic Violence Prevention Order (DVPO) entered against her in 2013; the terms of the order required her to surrender all firearms and ammunition in her position and forbid her from possessing a firearm in the future, with a possible Class H felony for violation. In 2017, the defendant attempted to buy a firearm in Tennessee while still subject to the DVPO and was indicted for this violation. Initially the defendant was represented by counsel, but over the course of 2018 and 2019, the defendant repeatedly filed pro se motions to remove counsel and motions to dismiss. The trial

court appointed five different attorneys; three withdrew from the representation, and the defendant filed motions to remove counsel against the other two. The matter finally reached trial in September of 2019, where the defendant was not represented by counsel. Before trial, the court inquired whether she was going to hire private counsel. She explained that she could not afford an attorney and wished for appointed counsel. The trial court refused this request and determined that the defendant had waived her right to counsel. The matter went to trial and she was convicted, having been mostly absent from the trial proceedings.

Examining the Court of Appeals opinion, the Supreme Court noted that the panel was inconsistent when discussing the issue of waiver of counsel verses forfeiture of counsel, an issue that was also present in the trial court's decision. The court explained that "waiver of counsel is a voluntary decision by a defendant and that where a defendant seeks but is denied appointed counsel, a waiver analysis upon appeal is both unnecessary and inappropriate." Slip op. at 16. Here the trial court, despite saying defendant "waived" counsel, interpreted this as forfeiture of counsel, as the defendant clearly expressed a desire for counsel at the pre-trial hearing and did not sign a waiver of counsel form at that time (although she had signed several waivers prior to her request for a new attorney).

Having established that the proper analysis was forfeiture, not waiver, the court explained the "egregious misconduct" standard a trial court must find before imposing forfeiture of counsel from *State v. Harvin*, 2022-NCSC-111, and *State v. Simpkins*, 373 N.C. 530 (2020). Slip op. at 18. The court did not find such egregious misconduct in this case, explaining that the defendant was not abusive or disruptive, and that the many delays and substitutions of counsel were not clearly attributable to her. Instead, the record showed legitimate disputes on defense strategy with one attorney and was silent as to the reasons for withdrawal for the others. Additionally, the State did not move to set the matter for hearing until many months after the indictment, meaning that defense counsel issues did not cause significant delay to the proceedings. [Brittany Williams blogged about this case, here.]

Chief Justice Newby, joined by Justices Berger and Barringer, dissented and would have found that the defendant forfeited her right to counsel by delaying the trial proceedings. *Id*. at 28.

Defense counsel's statements during closing argument represented admissions of guilt requiring consent from defendant

State v. Hester, 2022-NCCOA-906, ___ N.C. App. ___ (Dec. 29, 2022). In this Duplin County case, the Court of Appeals remanded the case to the trial court for an evidentiary hearing on whether the defendant consented to defense counsel's admissions of guilt.

The defendant was charged with breaking or entering, larceny, and possession of stolen goods after a series of break-ins in 2017 at a power plant that was not operational. At trial, defense counsel exhibited issues with hearing loss. The defendant also noted the issue of hearing loss before testifying in his own defense, although the trial court did not take any action on the information. During closing arguments, defense counsel said "Let me level with you. I agree it's not good to be caught in the act while being in somebody else's building without consent," and mentioned "caught" and "in the act" several times, referring to the defendant being on the power plant property. Slip op. at 5.

Reviewing the defendant's arguments on appeal, the court agreed that defense counsel's statements that the defendant possessed stolen keys from the plant and entered the plant's warehouse without

permission amounted to admissions of guilt for lesser included misdemeanors of breaking or entering and possession of stolen goods. The court noted that under *State v. Harbison*, 315 N.C. 175 (1985), and subsequent precedent, a violation of the defendant's constitutional right to counsel occurs whenever defense counsel expressly or impliedly admits guilt without the defendant's consent, and this violation does not require a showing a prejudice to justify a new trial. *Id*. at 8-9. Here, defense counsel made admissions of guilt, but the record did not reflect any consent from the defendant. As a result, the Court of Appeals remanded to the trial court for an evidentiary hearing on whether the defendant consented in advance to these concessions of guilt.

Right to a Public Trial

Trial court failed to utilize *Waller* test or make sufficient findings of fact to support closure of courtroom; city ordinance was not properly pleaded where charging documents did not include the caption of the ordinance

State v. Miller, COA22-561, ___ N.C. App. ___ (Feb. 21, 2023). In this Union County case, the defendant appealed his convictions for attempted first degree murder, going armed to the terror of the people, possession of a handgun by a minor, and discharge of a firearm within city limits, arguing error by insufficient findings to justify closure of the courtroom and by denial of his motion to dismiss the discharge of a firearm charge. The Court of Appeals agreed, remanding the case and vacating the discharge of a firearm conviction.

In August of 2018, the defendant was armed and riding in a car with other armed occupants near a neighborhood basketball court. Defendant was seated in the front passenger seat, and when the vehicle passed a group of pedestrians walking to the basketball court, defendant leaned out the window and began shooting. One bullet hit a pedestrian but did not kill him. During the trial, the prosecution moved to close the courtroom during the testimony of two witnesses, the victim and another witness who was present during the shooting, arguing this was necessary to prevent intimidation. The trial court granted this motion over defendant's objection, but allowed direct relatives of defendant and the lead investigator to be present during the testimony.

The Court of Appeals found that the trial court failed to utilize the four-part test from *Waller v. Georgia*, 467 U.S. 39 (1984), and failed to make findings sufficient for review to support closing the courtroom. The *Waller* test required the trial court to determine whether "'the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to support the closure.'" Slip op. at 4, quoting *State v. Jenkins*, 115 N.C. App. 520, 525 (1994). In the current case, the trial court did not use this test and made no written findings of fact at all. As a result, the Court of Appeals remanded for a hearing on the propriety of the closure using the *Waller* test. [Shea Denning blogged out this issue in the case, here.]

Turning to defendant's motion to dismiss, the court found that the arrest warrant and indictment were both defective as they did not contain the caption of the relevant ordinance. Under G.S. 160A-79(a), "a city ordinance . . . must be pleaded by both section number and caption." *Id*. at 8. Here, the charging documents only reference the Monroe city ordinance by number, and failed to include the caption "Firearms and other weapons." The court found the State failed to prove the ordinance at trial, and vacated defendant's conviction for the discharge of a firearm within city limits charge.

Jury Selection

Trial court properly concluded that defendant did not prove purposeful discrimination under the third step of *Batson* inquiry

State v. Hobbs, 263PA18-2, ___ N.C. ___ (Apr. 6, 2023). In this Cumberland County case, the Supreme Court affirmed the trial court's determination that under the inquiry established by *Batson v. Kentucky*, 476 U.S. 79 (1986), no purposeful discrimination in jury selection occurred when the State used peremptory challenges to strike three black jurors.

This matter was originally considered in *State v. Hobbs (Hobbs I)*, 374 N.C. 345 (2020), where the Supreme Court remanded to the trial court with specific directions to conduct a hearing under the third step of the three-step *Batson* inquiry to determine whether defendant had proven purposeful discrimination. After the hearing, the trial court concluded defendant had not proven purposeful discrimination. In the current opinion, the Supreme Court considered whether the trial court's conclusions were "clearly erroneous."

The Supreme Court first noted that under both the U.S. and North Carolina constitutions the striking of potential jurors for race through peremptory challenges is forbidden, and that it has expressly adopted the *Batson* three-prong test for review of peremptory challenges. Here only the third prong was at issue, where the trial court "determines whether the defendant, who has the burden of proof, established that the prosecutor acted with purposeful discrimination." Slip op. at 4. The court then explained the basis of its review and detailed the instructions from *Hobbs I* for the trial court to consider when performing its analysis. Walking through the evidence for each stricken juror, the court found that the trial court considered the relevant factors and "conducted side-by-side juror comparisons of the three excused prospective jurors at issue with similarly situated prospective white jurors whom the State did not strike," creating an analysis for each juror. *Id*. at 9.

In addition to the evidence regarding specific jurors, the court pointed out that "the State's acceptance rate of black jurors was 50% after the State excused [the last juror under consideration] which did not support a finding of purposeful discrimination." *Id*. at 20. Reviewing additional evidence, the court noted that "the trial court found that the relevant history of the State's peremptory strikes in the jurisdiction was flawed and therefore misleading." *Id*. This referred to a study by Michigan State University regarding the use of peremptory strikes in North Carolina. The trial court found that all of the *Batson* challenges in cases referenced in the study were rejected by North Carolina appellate courts, and the study had three potential flaws:

> (1) the study identified juror characteristics without input from prosecutors, thus failing to reflect how prosecutors evaluate various characteristics; (2) recent law school graduates with little to no experience in jury selection evaluated the juror characteristics; and (3) the recent law school graduates conducted their study solely based on trial transcripts rather than assessing juror demeanor and credibility in person. *Id*. at 8-9.

Based on the court's review of the entire evidence, it affirmed the trial court's conclusion of no *Batson* violation.

Justice Earls, joined by Justice Morgan, dissented, and would have found a *Batson* violation. *Id*. at 22.

Lay and Expert Opinion

Testimony by an expert that sexual assault victim "did not appear to be coached" was admissible; evidence from school records was properly excluded under Rule 403; video showing equipment related to a polygraph examination was admissible

State v. Collins, COA22-488, ___ N.C. App. ___ (April 4, 2023). In this Rockingham County case, defendant appealed his convictions for statutory rape, indecent liberties with a child, and sex act by a substitute parent or guardian, arguing error in admitting expert testimony that the victim's testimony was not coached, in granting a motion *in limine* preventing defendant from cross-examining the victim about her elementary school records, and in admitting a video of defendant's interrogation showing equipment related to a polygraph examination. The Court of Appeals found no error.

In 2021, defendant was brought to trial for the statutory rape of his granddaughter in 2017, when she was 11 years old. At trial, a forensic interviewer testified, over defendant's objection, that he saw no indication that the victim was coached. The trial court also granted a motion *in limine* to prevent defendant from cross-examining the victim regarding school records from when she was in kindergarten through second grade showing conduct allegedly reflecting her propensity for untruthfulness. The conduct was behavior such as cheating on a test and stealing a pen.

The Court of Appeals noted "[o]ur Supreme Court has held that 'an expert may not testify that a prosecuting child-witness in a sexual abuse trial is believable [or] is not lying about the alleged sexual assault.'" Slip Op. at 2, quoting *State v. Baymon*, 336 N.C. 748, 754 (1994). However, the court could not point to a published case regarding a statement about coaching like the one in question here. Because there was no controlling opinion on the matter, the court engaged in a predictive exercise and held, "[b]ased upon our Supreme Court's statement in *Baymon*, we conclude that it was not error for the trial court to allow expert testimony that [the victim] was not coached." *Id*. at 3.

The court also found no error with the trial court's conclusions regarding the admissibility of the victim's childhood records under Rule of Evidence 403. The court explained that the evidence showed behavior that was too remote in time and only marginally probative regarding truthfulness. Finally, the court found no error with the interrogation video, explaining that while it is well established that polygraph evidence is not admissible, the video in question did not show a polygraph examination. Instead, the video merely showed "miscellaneous items on the table and not the actual polygraph evidence," and all references to a polygraph examination were redacted before being shown to the jury. *Id*. at 5-6.

Expert fingerprint testimony was admitted without proper foundation but was not represent prejudicial error

State v. Graham, 2023-NCCOA-6, ___ N.C. App. ___ (Jan. 17, 2023). In this Mecklenburg County case, defendant appealed his convictions for breaking and entering, larceny, and attaining habitual breaking and entering offender status, arguing error in admission of expert fingerprint testimony without the necessary foundation, among other issues. The Court of Appeals found no prejudicial error.

The court noted that the defendant did not object at trial to the expert testimony, meaning the review was under plain error. The court examined the testimony of two experts under Rule of Evidence 702, finding that the fingerprint expert testimony "[did] not clearly indicate that [state's expert] used the

comparison process he described in his earlier testimony when he compared [d]efendant's ink print card to the latent fingerprints recovered at the crime scene." *Id*. at 28. However, the court found no prejudicial error in admitting the testimony, as properly admitted DNA evidence also tied defendant to the crime.

Crimes

Disorderly Conduct

Disorderly conduct at school and disturbing schools laws failed to give fair notice of prohibited conduct and were unconstitutionally vague; South Carolina enjoined from further enforcement and ordered to expunge relevant records

Carolina Youth Action Project v. Wilson, 60 F.4th 770 (Feb. 22, 2023). Plaintiffs in the District of South Carolina obtained class certification to challenge two state criminal laws aimed at school misbehavior. The class consisted of all middle and high school-age children in the state, as well as any among that group who had a record of referral to the Department of Juvenile Justice ("DJJ") for alleged violations of the laws. One law prohibited "disorderly" or "boisterous" conduct and "profane" or "obscene" language within hearing of a school. The other law prohibited the willful or unnecessary "interference with" or "disturbance of" teachers or students in any way or place, along with prohibiting "obnoxious" acts at schools. Between 2014 and 2020, more than 3,700 students aged between 8 and 18 were referred to DJJ for consideration of charges under the first law. Between 2010 and 2016, over 9,500 students aged between 7 and 18 were referred to DJJ for consideration of charges under the second law. While the State did not prosecute each referral, both DJJ and the local prosecutor kept a record of each referral, which could be used in the future for various purposes. The case was initially dismissed for lack of standing. The Fourth Circuit reversed. *Kenny v. Wilson*, 885 F.3d 280, 291 (4th Cir. 2018). On remand, the district court certified the class of plaintiffs and ultimately granted summary judgment to them. It found that the challenged laws were unconstitutionally vague and entered a permanent injunction prohibiting the State from enforcing them against members of the class. It also ordered that the records of the referrals to DJJ of class members be destroyed except as otherwise permitted under state expunction rules. The State appealed, and a divided Fourth Circuit affirmed.

A law is void for vagueness as a matter of the Due Process Clause if it fails to give an ordinary person sufficient notice of the prohibited conduct at issue, or if the law is so vague as to allow for arbitrary or discriminatory enforcement. *Manning v. Caldwell for* City of Roanoke, 930 F.3d 264, 272 (4th Cir. 2019) (en banc). Criminal laws are subject to a heightened standard of review for vagueness challenges. *Carolina Youth* Slip op. at 14 (citation omitted). The majority agreed that both laws failed to provide sufficient notice of prohibited conduct. As to the disorderly conduct at schools law, the court observed that a person of ordinary intelligence would not be able to determine whether certain "disorderly" or "boisterous" conduct in a school was merely a disciplinary matter versus a criminal one. In the court's words:

> Based solely on the dictionary definitions of the statutory terms—particularly disorderly and boisterous—it is hard to escape the conclusion that any person passing a schoolyard during recess is likely witnessing a large-scale crime scene. *Id*. at 18.

The record before the district court showed officers could not meaningfully articulate objective standards under which the law was enforced on the ground—using instead a "glorified smell test." *Id*. at 20. The evidence also showed a significant racial disparity in enforcement, with Black children being referred for violations of the law at around seven times the rate of referrals for White children. "The Constitution forbids this type of inequitable, freewheeling approach." *Id*. at 21.

The disturbing schools law was likewise unconstitutional. "It is hard to know where to begin with the vagueness problems with this statute." *Id*. at 24. The court found that the law lacked meaningful standards from which criminal "unnecessary disturbances" and "obnoxious acts" at a school could be distinguished from non-criminal acts. According to the court:

> The Supreme Court has struck down statutes that tied criminal culpability to whether the defendant's conduct was annoying or indecent—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings. We do the same here. *Id*. at 26 (cleaned up).

The court agreed with the trial court as to the remedy, noting that the U.S Supreme Court and others have acknowledged the right to class-wide expungement at times. The district court was therefore affirmed in all respects. [Phil Dixon blogged about this case, here.]

Judge Neimeyer dissented. He would have found that no plaintiff had standing to seek expungement, and, on the merits, that the challenged laws were not unconstitutionally vague.

Drugs

Officer's testimony that "everyone" assumed substance was cocaine did not create a question regarding defendant's guilty knowledge that he possessed fentanyl, and did not justify providing a guilty knowledge instruction to the jury

State v. Hammond, COA22-715, ___ N.C. App. ___ (March 7, 2023). In this Henderson County case, defendant appealed his conviction for trafficking opium or heroin by possession, arguing error in the denial of his requested instruction that the jury must find he knew what he possessed was fentanyl. The Court of Appeals found no error.

In March of 2018 the Henderson County Sheriff's Office executed a warrant for defendant's arrest at a home in Fletcher. During the arrest, an officer smelled marijuana and heard a toilet running in the house, leading the police to obtain a search warrant for the entire home. During this search, officers found a plastic bag with white powder inside, as well as some white powder caked around the rim of a toilet. Officers performed a field test on the substance which came back positive for cocaine, but when lab tested, the substance turned out to be fentanyl. At trial, one of the officers testified that "everyone" at the scene believed the substance they found was cocaine on the day of the search. Defendant chose not to testify during the trial and had previously refused to give a statement when arrested.

Turning to defendant's arguments, the court found that no evidence in the record supported defendant's contention that he lacked guilty knowledge the substance was fentanyl. Defendant pointed to the officer's testimony that "everyone" believed the substance was cocaine, but "[r]ead in context, it is apparent that [the officer] was referring to the knowledge of the officers who initially arrested

[defendant and another suspect] for possession of cocaine, as the excerpted testimony immediately follows a lengthy discussion of their rationale for doing so." Slip op. at 8. Because defendant did not testify and no other evidence supported his contention that he lacked knowledge, his circumstances differed from other cases where a defendant was entitled to a guilty knowledge instruction. The court explained that evidence of a crime lacking specific intent, like trafficking by possession, creates a presumption that defendant has the required guilty knowledge; unless other evidence in the record calls this presumption into question, a jury does not have to be instructed regarding guilty knowledge. *Id*. at 9. [Jeff Welty blogged about the knowledge element of drug offenses, here.]

Although defendant was in a separate car from the contraband, he was liable under the acting-in-concert theory for purposes of trafficking by possession and trafficking by transportation charges

State v. Christian, COA22-299, ___ N.C. App. ___ (March 7, 2023). In this Cleveland County case, defendant appealed his convictions for trafficking methamphetamine, arguing that his motion to dismiss should have been granted as he was not physically present when his travel companion was found in possession of the contraband. The Court of Appeals affirmed the denial of defendant's motion to dismiss.

In February of 2020, an associate of defendant was arrested for possession of drugs and chose to assist police with their investigation of defendant in return for leniency. Defendant had asked the associate for assistance in bringing drugs from Georgia to North Carolina, and the police assisted the associate in developing a plan where they would drive together to pick up drugs for sale in North Carolina. The plan would conclude with the pair being pulled over as they re-entered the state. However, as the pair returned from Atlanta with the drugs, they became tired, and defendant called a female friend to assist them with driving from South Carolina to their destination in North Carolina. The female friend arrived with another woman, and the pair split up, leaving defendant's associate in the car with the contraband and one woman, and defendant in a different car with the other woman. They were both pulled over when they passed into North Carolina, traveling three to five miles apart. At trial, defense counsel moved to dismiss the charges at the close of State's evidence and again at the close of all evidence, but both motions were denied.

The Court of Appeals first explained that a person may be charged with a crime in North Carolina even if part of the crime occurred elsewhere, as long as at least one of the essential acts forming the crime occurred in North Carolina, and the person "has not been placed in jeopardy for the identical offense in another state." Slip op. at 5, quoting G.S. 15A-134. The court then moved to defendant's arguments that he did not possess or transport the drugs while in North Carolina so he could not be charged with trafficking by possession or trafficking by transportation.

Although defendant did not have actual possession of the drugs in North Carolina, the court noted that the "knowing possession" element of trafficking by possession could also be shown by proving that "the defendant acted in concert with another to commit the crime." Slip op. at 6, quoting *State v. Reid*, 151 N.C. App. 420, 428 (2002). Along with the evidence in the current case showing the defendant acted in concert with his associate, the trafficking charge required showing that defendant was present when the offense occurred. Here, after exploring the applicable case law, the court found that defendant was "constructively present" because, although "parties in the present case were a few miles away from each other, they were not so far away that defendant could not render aid or encouragement [to his associate]." *Id*. at 11.

Moving to the trafficking by transportation charge, the court noted that "[a]s with trafficking by possession, 'trafficking by transport can be proved by an acting in concert theory.'" *Id*. at 13, quoting *State v. Ambriz*, 880 S.E.2d 449, 459 (N.C. App. 2022). The court explained that "[f]or the same reasons we hold that defendant's motion to dismiss the trafficking by possession charge was properly denied, we also hold that the motion to dismiss the trafficking by transportation charge was properly denied." *Id*.

Failure to Register

Defendant's actions when reporting his change of address and homeless status to the sex offender registry did not show an intent to deceive, justifying dismissal of the charge

State v. Lamp, 2022-NCSC-141, ___ N.C. ___ (Dec. 16, 2022). In this Iredell County case, the Supreme Court reversed the Court of Appeals majority decision affirming defendant's conviction for failure to comply with the sex offender registry.

Defendant is a registered sex offender, and in June 2019 he registered as a homeless in Iredell County. Because of the county's requirements for homeless offenders, he had to appear every Monday, Wednesday, and Friday to sign a check-in log at the sheriff's office. On June 21, 2019, defendant moved into a friend's apartment, but the apartment was under eviction notice and defendant vacated this apartment sometime on the morning of June 26, 2019. Defendant reported all of this information at the sheriff's office and signed a form showing his change of address on June 21; however, due to the way the form was set up, there was no way to indicate defendant planned to vacate on June 26. Instead, defendant signed the homeless check-in log. A sheriff's deputy went through and attempted to verify this address, unaware that defendant had since vacated; compounding the confusion, the deputy went to the incorrect address, but did not attempt to contact defendant by phone. As a result, the deputy requested a warrant for defendant's arrest, defendant was indicted, and went to trial for failure to comply with the registry requirements. At trial defendant moved to dismiss the charge, arguing that there was no evidence of intent to deceive, but the trial court denied the motion.

Examining the appeal, the Supreme Court agreed with defendant that the record did not contain sufficient evidence of defendant's intent to deceive. The court examined each piece of evidence identified by the Court of Appeals majority, and explained that none of the evidence, even in the light most favorable to the State, supported denial of defendant's motion to dismiss. Instead, the court noted the record did not show any clear intent, and that the State's theory of why defendant would be attempting to deceive the sheriff's office (because he couldn't say he was homeless) made no sense, as defendant willfully provided his old address and signed the homeless check-in log at the sheriff's office. Slip op. at 16.

Justice Barringer, joined by Chief Justice Newby and Justice Berger, dissented and would have held that sufficient evidence in the record supported the denial of defendant's motion to dismiss. *Id*. at 18.

Fleeing to Elude

Specific description of lawful duty being performed by officer not necessary for charge of speeding to elude arrest

State v. McVay, 2022-NCCOA-907, ___ N.C. App. ___ (Dec. 29, 2022). In this Mecklenburg County case, the Court of Appeals found no error by the trial court when denying defendant's motion to dismiss for insufficient evidence.

In November of 2016, a Charlotte-Mecklenburg police officer received a call from dispatch to look out for a white sedan that had been involved in a shooting. Shortly thereafter, the officer observed defendant speed through a stop sign, and the officer followed. Defendant continued to run stop signs, and after the officer attempted to pull him over, defendant led officers on a high-speed pursuit through residential areas until he was cut off by a stopped train at a railroad crossing. Defendant was indicted and eventually convicted for felonious speeding to elude arrest.

On appeal, defendant argued that the trial court erred by failing to dismiss the charge, because the State did not admit sufficient evidence showing the officer was lawfully performing his duties when attempting to arrest defendant. The crux of defendant's argument relied on the language of the indictment, specifically that the officer was attempting to arrest defendant for discharging a firearm into an occupied vehicle. Although defendant argued that evidence had to show this was the actual duty being performed by the officer, the court explained that the description of the officer's duty in the indictment was surplusage. Although the State needed to prove (1) probable cause to arrest defendant, and (2) that the officer was in the lawful discharge of his duties, it did not need to specifically describe the duties as that was not an essential element of the crime, and here the court found ample evidence of (1) and (2) to sustain the conviction. Slip op. at 9-10. The court also found that defendant failed to preserve his jury instruction request on the officer's specific duty because the request was not submitted in writing.

Homicide

Failure to provide jury instruction on involuntary manslaughter represented error justifying new trial; jury finding defendant's offense as "especially heinous, atrocious, or cruel" did not conclusively represent a finding of malice for the offense

State v. Brichikov, 2022-NCSC-140, ___ N.C. ___ (Dec. 16, 2022). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision granting defendant a new trial because the trial court declined to provide his requested jury instruction on involuntary manslaughter.

In 2018, defendant met his wife at a motel in Raleigh known for drug use and illegal activity; both defendant and his wife were known to be heavy drug users, and defendant's wife had just been released from the hospital after an overdose that resulted in an injury to the back of her head. After a night of apparent drug use, defendant fled the motel for Wilmington, and defendant's wife was found dead in the room they occupied. An autopsy found blunt force trauma to her face, head, neck, and extremities, missing and broken teeth, atherosclerosis of her heart, and cocaine metabolites and fentanyl in her system. Defendant conceded that he assaulted his wife during closing arguments. Defense counsel requested jury instructions on voluntary and involuntary manslaughter, including involuntary manslaughter under a theory of negligent omission, arguing that the victim may have died from defendant's failure to render or obtain aid for her after an overdose. The trial court did not provide instructions on either voluntary or involuntary manslaughter, over defense counsel's objections.

On appeal, the Supreme Court considered the issues raised by the Court of Appeals dissent, (1) whether the trial court committed error by failing to provide an instruction on involuntary manslaughter, and (2) did any error represent prejudice "in light of the jury's finding that defendant's offense was 'especially heinous, atrocious, or cruel.'" Slip op. at 15. The court found that (1) the trial court erred because a juror could conclude "defendant had acted with culpable negligence in assaulting his wife and leaving her behind while she suffered a drug overdose or heart attack that was at least partially exacerbated by his actions, but that it was done without malice." *Id*. at 21. Exploring (2), the court explained "where a jury convicts a criminal defendant of second-degree murder in the absence of an instruction on a lesser included offense, appellate courts are not permitted to infer that there is no reasonable possibility that the jury would have convicted the defendant of the lesser included offense on the basis of that conviction." *Id*. at 22, citing *State v. Thacker*, 281 N.C. 447 (1972). The court did not find the "especially heinous, atrocious, or cruel" aggravating factor dispositive, as it noted "finding that a criminal defendant committed a homicide offense in an especially heinous, atrocious, or cruel way does not require a finding that he acted with malice in bringing about his victim's death." *Id*. at 24. Instead, the court found prejudicial error in the lack of involuntary manslaughter instruction.

Justice Berger, joined by Chief Justice Newby and Justice Barringer, dissented and would have upheld the defendant's conviction for second-degree murder. *Id*. at 27.

Sentencing defendant as Class B1 felon was appropriate where the jury found all three types of malice supporting the second-degree murder conviction; presence of depraved-heart malice did not create ambiguity justifying Class B2 felony sentencing

State v. Borum, 505PA20, ___ N.C. ___ (Apr. 6, 2023). In this Mecklenburg County case, the Supreme Court reversed an unpublished Court of Appeals decision and affirmed the trial court's sentencing of defendant at the Class B1 felony level for second-degree murder.

In February of 2019, defendant went on trial for first-degree murder for shooting a man during a protest. During the jury charge conference, the trial court explained the three theories of malice applicable to the case: actual malice, condition of mind malice, and depraved-heart malice. The verdict form required the jury to identify which type of malice supported the verdict. When the jury returned a verdict of guilty for second-degree murder, all three types of malice were checked on the verdict form. At sentencing, defendant's attorney argued that he should receive a Class B2 sentence, as depraved-heart malice was one of the three types of malice identified by the jury. The trial court disagreed, and sentenced defendant as Class B1. The Court of Appeals reversed this holding, determining the verdict was ambiguous and construing the ambiguity in favor of the defendant.

Reviewing defendant's appeal, the Supreme Court found no ambiguity in the jury's verdict. Explaining the applicable law under G.S. 14-17(b), the court noted that depraved-heart malice justified sentencing as Class B2, while the other two types of malice justified Class B1. Defendant argued that he should not be sentenced as Class B1 if there were facts supporting a Class B2 sentence. The court clarified the appropriate interpretation of the statute, holding that where "the jury's verdict unambiguously supports a second-degree murder conviction based on actual malice or condition of mind malice, a Class B1 sentence is required, even when depraved-heart malice is also found." *Id*. at 7. The language of the statute supported this conclusion, as "the statute plainly expresses that a person convicted of second-degree murder is only sentenced as a Class B2 felon where the malice necessary to prove the murder conviction is depraved-heart malice . . . this means that a Class B2 sentence is only appropriate where a second-degree murder conviction hinges on the jury's finding of depraved-heart malice." *Id*. at 11. The

court explained that "[h]ere . . . depraved-heart malice is not necessary—or essential—to prove [defendant's] conviction because the jury also found that [defendant] acted with the two other forms of malice." *Id*. at 11-12.

Impaired Driving

Exigent circumstances justified warrantless blood draw; evidence of impairing substances in defendant's blood represented sufficient evidence to dismiss motion

State v. Cannon, COA22-572, ___ N.C. App. ___ (May 2, 2023). In this Edgecombe County case, defendant appealed his convictions for second-degree murder and aggravated serious injury by vehicle, arguing error in the denial of his motion to suppress a warrantless blood draw and motion to dismiss for insufficient evidence. The Court of Appeals found no error and affirmed.

In June of 2015, defendant crossed the centerline of a highway and hit another vehicle head on, causing the death of one passenger. Officers responding to the scene interviewed defendant, and noted his responses seemed impaired and the presence of beer cans in his vehicle. A blood draw was performed at the hospital, although the officer ordering the draw did not read defendant his Chapter 20 implied consent rights or obtain a search warrant before the draw. The results of defendant's blood draw showed a benzodiazepine, a cocaine metabolite, two anti-depressants, an aerosol propellant, and a blood-alcohol level of 0.02.

Reviewing defendant's argument that no exigent circumstances supported the warrantless draw of his blood, the Court of Appeals first noted that defense counsel failed to object to the admission of the drug analysis performed on defendant's blood, meaning his arguments regarding that exhibit were overruled. The court then turned to the exigent circumstances exception to justify the warrantless search, noting that the investigation of the scene took significant time and defendant was not taken to the hospital until an hour and forty-five minutes afterwards. Acknowledging Supreme Court precedent "that the natural dissipation of alcohol in the bloodstream cannot, standing alone, create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant," the court looked for additional justification in the current case. Slip Op. at 11. Here the court found such justification in the shift change occurring that would prevent the officer from having assistance, and the delay in going to obtain a warrant from the magistrate's office that would add an additional hour to the process. These circumstances supported the trial court's finding of exigent circumstances.

The court then turned to defendant's argument that insufficient evidence was admitted to establish he was impaired at the time of the accident. The record contained evidence that defendant had beer cans in his truck along with an aerosol can of Ultra Duster, and several witnesses testified as to defendant's demeanor and speech after the accident. The record also contained a blood analysis showing defendant had five separate impairing substances in his system at the time of the accident, "alcohol, benzyl ethylene (a cocaine metabolite), Diazepam (a benzodiazepine such as Valium), Citalopram (an anti-depressant) and Sertraline (another anti-depressant called "Zoloft")." *Id*. at 16. The court found that based on this evidence there was sufficient support for denying defendant's motion.

Incest

Niece-in-law is not a niece for purposes of criminal incest under North Carolina law

State v. Palacio, COA22-231, ___ N.C. App. ___ (Feb. 21, 2023). In this Onslow County case, defendant appealed his convictions for statutory rape, incest, and indecent liberties with a child. Defendant argued error in denying his motion to dismiss the incest charge (among other issues on appeal). The Court of Appeals did not find justification for a new trial or error with denial of the motion to suppress but did vacate defendant's incest conviction and remanded the case for correction of the clerical error on the judgment and resentencing.

In 2018, the 15-year-old victim of defendant's sexual advances moved in with defendant and his wife in Jacksonville. The victim is the daughter of defendant's wife's sister, making her defendant's niece by affinity, not consanguinity. During several encounters, the defendant made sexual advances and eventually engaged in sexual contact with the victim, and she reported this conduct to her father, who called the police. Prior to his trial, the defendant moved to suppress statements made to law enforcement after his arrest, but the trial court denied the motion.

The court agreed with defendant that "the term 'niece' in [G.S.] 14-178 does not include a niece-in-law for the purposes of incest." *Id*. The opinion explored the history of the incest statute and common law in North Carolina in extensive detail, concluding that a niece-in-law does not represent a niece for purposes of criminal incest. As an illustration of the "absurd results" under North Carolina law if a niece by affinity were included, "an individual could marry their niece-in-law . . . [but] that individual would be guilty of incest if the marriage were consummated." *Id*. at 20. As a result, the court vacated the defendant's incest conviction.

Kidnapping

Indictment did not specifically identify facilitating flight following commission of felony as purpose of kidnapping; underlying felony of rape was completed before the actions of kidnapping occurred, justifying dismissal

State v. Elder, 2022-NCSC-142, ___ N.C. ___ (Dec. 16, 2022). In this Warren County case, the Supreme Court affirmed the Court of Appeals decision finding that the second of defendant's two kidnapping charges lacked support in the record and should have been dismissed because the rape supporting the kidnapping charge had already concluded before the events of the second kidnapping.

The two kidnapping charges against defendant arose from the rape of an 80-year-old woman in 2007. Defendant, posing as a salesman, forced his way into the victim's home, robbed her of her cash, forced her from the kitchen into a bedroom, raped her, then tied her up and put her in a closet located in a second bedroom. The basis for the kidnapping charge at issue on appeal was tying up the victim and moving her from the bedroom where the rape occurred to the second bedroom closet. Defendant moved at trial to dismiss the charges for insufficiency of the evidence and argued that there was no evidence in the record showing the second kidnapping occurred to facilitate the rape.

The Supreme Court agreed with the Court of Appeal majority that the record did not support the second kidnapping conviction. The court explored G.S. 14-39 and the relevant precedent regarding kidnapping, explaining that kidnapping is a specific intent crime and the State must allege one of the ten purposes listed in the statute and prove at least one of them at trial to support the conviction. Here, the State alleged "that defendant had moved the victim to the closet in the second bedroom *for the purpose of facilitating the commission of rape*." Slip op. at 30. At trial, the evidence showed that defendant moved

the victim to the second bedroom "after he had raped her, with nothing that defendant did during that process having made it any easier to have committed the actual rape." *Id*. Because the State only alleged that defendant moved the victim for purposes of facilitating the rape, the court found that the second conviction was not supported by the evidence in the record. The court also rejected the State's arguments that *State v. Hall*, 305 N.C. 77 (1982) supported interpreting the crime as ongoing, overruling the portions of that opinion that would support interpreting the crime as ongoing. Slip op. at 42.

Chief Justice Newby, joined by Justice Berger, dissented and would have allowed the second kidnapping conviction to stand. *Id*. at 45.

Maintaining a Vehicle or Dwelling

Conviction for maintaining a dwelling resorted to by persons using methamphetamine required evidence that someone other than defendant resorted to his home to use methamphetamine

State v. Massey, 2023-NCCOA-7, ___ N.C. App. ___ (Jan. 17, 2023). In this Johnston County case, defendant appealed his controlled substance related convictions arguing error in (1) the admission of prior bad act evidence, and (2) denying his motion to dismiss some of the controlled substances charges. The Court of Appeals vacated and arrested the judgment for maintaining a dwelling resorted to by persons using methamphetamine, but otherwise found no error.

In March of 2019, Johnston County Sheriff's Office executed a search warrant on defendant's home, discovering methamphetamine in small baggies, marijuana, and paraphernalia consistent with selling drugs. Defendant was also noncompliant during the search and arrest, struggling with officers and attempting to flee.

The court found error with one of defendant's convictions, maintaining a dwelling resorted to by persons using methamphetamine under G.S. 90-108(a)(7), as the State did not offer sufficient evidence to show any other person actually used defendant's residence for consuming methamphetamine. The court noted that "the State failed to establish that anyone outside of defendant, used defendant's home to consume controlled substances . . . [d]efendant cannot 'resort' to his own residence." *Id*. at 18. The court rejected defendant's arguments with respect to his other controlled substance convictions, and arrested judgment instead of remanding the matter as defendant's convictions were consolidated and he received the lowest possible sentence in the mitigated range.

Solicitation

Defendant's intent to meet with fifteen-year-old before her sixteenth birthday could be inferred from the content of messages and prior conduct, justifying denial of his motion to dismiss

State v. Wilkinson, COA22-563, ___ N.C. App. ___ (March 7, 2023). In this New Hanover County case, defendant appealed his conviction for soliciting a child by computer, arguing error in denying his motion to dismiss for insufficient evidence. The Court of Appeals found no error.

In 2019, the defendant began communicating with a fifteen-year-old girl online. The defendant was aware of her age, but still messaged her regarding sexual activity, and on at least four occasions the girl went to defendant's house. During these visits, defendant groped and kissed the girl. The FBI received a

tip regarding the defendant's behavior and observed a conversation in August of 2019 where defendant messaged the girl on snapchat. The defendant was indicted on several charges related to his contact with the fifteen-year-old, but during the trial moved to dismiss only the charge of soliciting a child by computer. After being convicted of indecent liberties with a child and several over related offenses, defendant appealed the sufficiency of the evidence regarding the soliciting a child by computer charge alone.

The defendant argued that the evidence for soliciting a child by computer was insufficient because the snapchat messages from August of 2019 did not arrange a plan or show a request to meet in person before the fifteen-year-old's sixteenth birthday. Defendant argued that this evidence failed to prove he intended to "commit an unlawful sex act" as required by G.S. 14-202.3(a). Slip op. at 4-5. The Court of Appeals disagreed, explaining that although there was no explicit plan to meet in the snapchat messages, defendant's intent could be inferred from the content of the messages and his previous conduct with the girl when she came to his house. Because defendant's intent could be inferred regarding the necessary sex act, the court found no error when dismissing defendant's motion.

Verbal altercation did not negate first-degree murder charge when sufficient evidence showed premeditation and deliberation; trial court's refusal of defendant's "stand your ground" instruction was appropriate

State v. Walker, ___ N.C. App. ___; 2022-NCCOA-745 (Nov. 15, 2022). In this Guilford County case, the defendant appealed his convictions for first-degree murder and possession of a firearm by a felon, arguing the trial court erred by (1) denying his motions to dismiss, (2) giving an improper jury instruction on deliberation, and (3) failing to give the defendant's requested "stand your ground" instruction. The Court of Appeals found no error.

In 2017, the defendant was at a house drinking alcohol with two other men when an argument broke out between the defendant and the eventual victim. The victim yelled in the defendant's face and spit on him, threatening to kill the defendant the next time he saw him. Notably, the victim's threat was to kill the defendant at a later time, and the victim stated he would not do so in the house where they were drinking. After the victim yelled in the defendant's face, the defendant drew a pistol and shot the victim six times. The defendant then fled the scene and did not turn himself in until 18 days later.

Reviewing the trial court's denial of the defendant's motions to dismiss, the court noted that "evidence of a verbal altercation does not serve to negate a charge of first-degree murder when 'there was other evidence sufficient to support the jury's finding of both deliberation and premeditation.'" Slip op. at 8, quoting *State v. Watson*, 338 N.C. 168, 178 (1994). The court found such evidence in the instant case, with the defendant's prior history of quarrels with the victim, the number of gunshots, the defendant's fleeing the scene and remaining on the run for 18 days, and with the defendant's statements to his girlfriend regarding his intention to deny the charges.

The court then turned to the disputed jury instructions, first explaining that the defendant's request for an additional explanation on deliberation beyond that contained in Pattern Jury Instruction 206.1 was based on a dissenting opinion in *State v. Patterson*, 288 N.C. 553 (1975) which carried no force of law, and the instruction given contained adequate explanation of the meaning of "deliberation" for first-degree murder. Slip op. at 11. The court next considered the "stand your ground" instruction, comparing the trial court's instruction on self-defense to the version offered by the defendant. Looking to *State v. Benner*, 380 N.C. 621 (2022), the court found that "the use of deadly force cannot be excessive and must

still be proportional even when the defendant has no duty to retreat and is entitled to stand his ground." Slip op. at 14. The court also noted that the "stand your ground" statute requires proportionality in the defendant's situation, explaining "[d]efendant could use deadly force against the victim under [N.C.G.S. §] 14-51.3(a) only if it was necessary to prevent imminent death or great bodily harm, i.e., if it was proportional." *Id*. at 16-17. Finally, the court determined that even if the trial court erred in failing to give the instruction, it was not prejudicial, as overwhelming evidence in the record showed that the defendant was not under threat of imminent harm, noting "[l]ethal force is not a proportional response to being spit on." *Id*. at 17.

Sentencing and Probation

No abuse of discretion by trial court when declining to adjust defendant's mandatory minimum sentence downward for defendant's substantial assistance to law enforcement

State v. Robinson, 2022-NCSC-138, ___ N.C. ___ (Dec. 16, 2022). In this Guilford County case, the Supreme Court affirmed the Court of Appeals majority that found no abuse of discretion by the trial court when declining to adjust the defendant's sentence downward for substantial assistance to law enforcement.

Defendant was first arrested in 2016 after a search of his home, leading to charges of trafficking a controlled substance and possession of a firearm by a felon. In 2018, after the defendant was released but before the charges reached trial, defendant was arrested and indicted with a second trafficking charge. The defendant ultimately pleaded guilty to two trafficking a controlled substance charges and a firearm possession charge. During sentencing, defense counsel argued that the defendant had provided substantial assistance to law enforcement and deserved a downward deviation in the required minimum sentences. The trial court acknowledged that the defendant had provided substantial assistance but declined to lower the sentences, instead choosing to consolidate the three offenses to one sentence of 90 to 120 months.

The Supreme Court agreed with the opinion of the Court of Appeals majority that the actions of the trial court did not represent abuse of discretion, explaining that G.S. 90-95(h)(5) granted complete discretion to the trial court. The court noted two decision points, (1) whether the defendant provided substantial assistance, and (2) whether this assistance justified a downward adjustment in the mandatory minimum sentencing. Further, the court noted that this assistance could come from any case, not just the case for which the defendant was being charged; this was the basis of the dissent in the Court of Appeals opinion, but the Supreme Court did not find any evidence that the trial court misinterpreted this discretion. Slip op. at 15. Instead, the court found that the trial court appropriately exercised the discretion granted by the statute, as well as G.S. 15A-1340.15(b), to consolidate the defendant's offenses.

Justice Earls dissented and would have remanded for resentencing. *Id*. at 20.

Vacating judgment without remand was appropriate remedy for failure to find good cause when revoking defendant's probation after expiration

State v. Lytle, COA22-675, ___ N.C. App. ___ (Feb. 21, 2023). In this Buncombe County case, the defendant appealed an order revoking his probation, arguing the trial court failed to make a finding of

good cause to revoke his probation along with other errors. The Court of Appeals agreed with the defendant and vacated the trial court's judgment without remand.

The defendant's probation was revoked at a hearing held 700 days after the expiration of his probation term. The court noted that "the trial court failed to find good cause to revoke probation after the expiration of the probation period as required by [G.S.] 15A-1344(f)(3)." Slip op. at 2. Subsection (f)(3) requires a finding of good cause to support the trial court's jurisdiction to revoke probation; here, the record did not show any findings supporting good cause. Considering the appropriate remedy, the court applied *State v. Sasek*, 271 N.C. App. 568 (2020), holding that where no evidence in the record supports a finding of "reasonable efforts" by the state to hold a revocation hearing sooner, the appropriate remedy for failure to make findings of good cause under G.S. 15A-1344(f)(3) is vacating the judgment without remand. Slip op. at 4.

Defendant waived right to 30-day notice of intent to prove prior record level point for offense while on parole/probation/post-release supervision

State v. Scott, COA22-326, ___ N.C. App. ___ (Feb. 7, 2023). In this New Hanover County case, the defendant appealed his conviction for possessing a firearm as a felon, arguing improper sentencing (among other issues).

During sentencing, the defendant's prior record level was calculated with nine points for prior crimes and one additional point for committing a crime while on probation/parole/post-release supervision, leading to a level IV offender sentence. The defendant complained on appeal that the State failed to give the statutorily required written notice of intent to use the extra sentencing point. Rejecting this argument, the court agreed that under G.S. 15A-1340.14(b)(7), the State was obligated to provide the defendant with notice of its intent to add a prior record level point by proving his offense was committed while on probation, parole, or post-release supervision. While the record here did not contain evidence that the defendant received the required notice 30 days before trial, the court found that the exchange between defense counsel and the trial court represented waiver for purposes of the requirement. While the trial court did not confirm the receipt of notice through the colloquy required by G.S. 15A-1022.1, defense counsel acknowledged on the record having notice of the State's intent to use the point and agreed that the prior record level worksheet submitted by the State was accurate. This exchange between the trial court and defense counsel amounted to waiver of the issue, falling into the exception outlined in *State v. Marlow*, 229 N.C. App 593 (2013). Under these circumstances, "the trial court was not required to follow the precise procedures . . . as defendant acknowledged his status and violation by arrest in open court." Slip op. at 18.

Defendant's appeal was timely filed within 14 days of order from trial court; probation revocation hearing evidence not subject to Fourth and Fourteenth Amendment analysis

State v. Boyette, 2022-NCCOA-904, ___ N.C. App. ___ (Dec. 29, 2022). In this Caldwell County case, the Court of Appeals denied the state's motion to dismiss defendant's appeal as untimely but found no error with the trial court's decision to revoke the defendant's probation for violations related to a search of his truck.

In May of 2020, the defendant was pulled over after sheriff's deputies observed him cross the center line while driving 55 mph in a 35 mph zone. During the traffic stop, the deputies determined that the

defendant was on probation for manufacturing methamphetamine and possessing stolen goods, and was subject to warrantless searches. The deputies searched the defendant and his truck, finding a shotgun, smoking pipes and a baggie containing methamphetamine. The defendant's probation officer filed violation reports with the trial court; the trial court subsequently revoked probation and activated the defendant's sentences, which he appealed.

The Court of Appeals first reviewed the state's motion to dismiss the defendant's appeal as untimely, applying *State v. Oates*, 366 N.C. 264 (2012), as controlling precedent for criminal appeals. Slip op. at 7-8. The court explained that Rule of Appellate Procedure 4 requires an appeal to be filed either (1) orally at the time of trial, or (2) in writing within 14 days of the entry of the judgment or order. In the present case, the trial court announced its decision to revoke the defendant's probation on April 30, 2021, but did not enter an order until May 24, 2021, a delayed entry similar to the circumstances in *Oates*. The defendant filed a written notice of appeal on May 25, 2021, easily satisfying the 14-day requirement.

Turning to the substance of the appeal, the court noted that the Fourth and Fourteenth Amendment protections and formal rules of evidence do not apply in a probation revocation hearing. *Id*. at 9. As a result, the defendant's arguments that the evidence obtained by searching his truck should have been suppressed were invalid, and the trial court did not err by using this evidence as the basis for revocation of his probation.

Judge Jackson concurred in part A, the denial of state's motion to dismiss, but concurred only in the result as to part B, the evidence found in the defendant's truck. *Id*. at 10.

Order of restitution was not abuse of discretion where defendant presented no evidence of her inability to repay; G.S. 15A-1340.36(a) does not specify procedure for hearing from defendant regarding ability to pay restitution

State v. Black, COA22-426, ___ N.C. App. ___ (Feb. 21, 2023). In this Buncombe County case, the defendant argued error by the trial court when ordering that she pay restitution of $11,000. The Court of Appeals found no error and affirmed the judgment.

The current opinion represents the second time this matter came before the Court of Appeals; previously the defendant appealed her convictions of possession of a stolen motor vehicle and attempted identify theft after pleading guilty, arguing mistakes in calculating her prior record level and error in ordering a civil judgment for attorney's fees without permitting the defendant to be heard. In *State v. Black*, 276 N.C. App. 15 (2021), the court found error by the trial court on both issues and remanded for resentencing while vacating the attorney's fees. After the trial court's hearing on remand, the defendant brought the current appeal, arguing that the trial court erred because it did not hear from her or consider her ability to pay before ordering the $11,000 restitution.

The Court of Appeals disagreed, noting that the defendant did not present evidence of her inability to pay the restitution, and the burden of proof was on her to demonstrate an inability to pay. The applicable statute, G.S. 15A-1340.36(a), requires the trial court to consider the defendant's ability to pay restitution, but does not require any specific testimony or disclosures from the defendant. Looking at the record, the court found no abuse of discretion by the trial court, explaining that the defendant even conceded "she previously stipulated to the $11,000 restitution amount set out in the May 2019 Restitution Worksheet." Slip op. at 6.