

CRIMINAL CASE UPDATE

Cases covered include reported decisions from the North Carolina Appellate Courts, the Fourth Circuit Court of Appeals, and the U.S. Supreme Court decided between May 18, 2021 and October 5, 2021. To view all of the summaries, go to the **Criminal Case Compendium**. To obtain the summaries automatically by email, sign up for the **Criminal Law Listserv**.

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Appellate Issues

The Court of Appeals erred in granting defendant a new trial on the charge of conspiracy to commit murder based on an instructional error where there was overwhelming evidence of defendant's guilt

State v. Chavez, ___ N.C. ___, 2021-NCSC-86 (Aug. 13, 2021)

A few days after the defendant was evicted from her apartment, the defendant, along with one identified companion and one unidentified companion, broke into her landlord's home. The defendant was armed with a machete and both companions were armed with a hammer. When the three entered the landlord's bedroom, the defendant immediately announced to the landlord that she was there to kill him. The defendant threw the machete at the landlord, and the companions proceeded to beat him and strike him in the head with the machete and the hammer. The defendant then began to attack the landlord's girlfriend and baby with the machete. The girlfriend was able to escape with the baby and called 911. At trial, the defendant was found guilty of attempted first-degree murder, conspiracy to commit first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury.

On appeal, the Court of Appeals, in a divided opinion, concluded that the trial court plainly erred by instructing the jury on the conspiracy to commit first-degree murder charge. The majority reasoned that the indictment named only the identified companion as the defendant's co-conspirator, and the evidence presented at trial supported a finding that the defendant conspired with both an identified and an unidentified companion, but the jury instructions instructed that a conspiracy could be found if "the defendant and at least one other person entered into an agreement." Slip op. at ¶ 7. Accordingly, the majority held that the defendant's fundamental right to be informed of the accusations against her was violated.

The Supreme Court reversed the decision of the Court of Appeals, holding that the defendant failed to demonstrate prejudice because the State presented overwhelming and uncontroverted evidence of defendant's guilt at trial, and the Court of Appeals erred by failing to perform the required prejudice analysis required for plain error review. The Court concluded that given the overwhelming evidence of a conspiracy between the defendant and the identified companion to kill the landlord, there was not a reasonable probability that the jury would have returned a different verdict had the companion been identified in the jury instructions as the defendant's co-conspirator rather than a mere instruction that an agreement must be reached with at least one other person.

Certain evidentiary and jury instruction assumed errors did not rise to the level of plain error given the Supreme Court's prior opinion in this case

State v. Goins, ___ N.C. App. ___, 2021-NCCOA-499 (Sept. 21, 2021)

On remand from the Supreme Court's opinion in *State v. Goins*, 2021-NCSC-65 (2021) directing the Court of Appeals to address the defendant's remaining issues on appeal, the court

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determined that even if the trial court erred by allowing an investigator to interpret certain video footage or in failing to instruct on a lesser-included offense, those assumed errors did not rise to the level of plain error. The court noted that the Supreme Court already had interpreted under a less taxing standard certain other evidence in the case as “virtually uncontested” evidence of the defendant’s guilt and that it would create a paradox for the Court of Appeals to collaterally undermine that analysis by finding plain error with respect to the assumed errors at issue.

Counsel Issues

The defendant forfeited the right to counsel by firing various appointed attorneys and failing to hire an attorney after waiving appointed counsel

State v. Atwell, ___ N.C. App. ___, 2021-NCCOA-271 (June 15, 2021)

In this case where the defendant was convicted of violating a DVPO by attempting to purchase a firearm, the indictment was facially valid and the trial court did not err in concluding that the defendant forfeited her right to appointed counsel.

Reciting general principles regarding the facial validity of indictments, the court found the indictment in this case was valid because, among other things, it specifically referenced the defendant’s attempt to purchase a firearm and the existence of the DVPO.

As to the defendant’s forfeiture of her right to counsel, the court discussed *State v. Simpkins*, 373 N.C. 530 (2020) and *State v. Curlee*, 251 N.C. App. 249 (2016), noting that the *Simpkins* court contemplated that counsel may be forfeited in situations where a defendant obstructs proceedings by continually hiring and firing counsel or refusing to obtain counsel after multiple opportunities to do so. The court noted that the *Curlee* court contemplated that a defendant properly may be required to proceed to trial without counsel when the defendant waives appointed counsel and has a case continued several times to hire counsel while knowing that he or she likely will be unable to do so, provided that the defendant is informed of the consequences of proceeding pro se and is subjected to the inquiry required by G.S. 15A-1242. Here, the defendant appeared at a pretrial hearing without representation after her fifth attorney had withdrawn. Over a period of two years, her previous appointed attorneys had either withdrawn or been fired by the defendant, and during that time the defendant had waived counsel on several occasions, including at the setting preceding the pretrial hearing. At the pretrial hearing, the trial court denied the defendant’s request for another appointed attorney, advised her of the consequences of proceeding pro se, and conducted the inquiry required by G.S. 15A-1242. The trial court then entered an order finding that the defendant had forfeited her right to counsel, though the trial court had reiterated that the defendant was free to hire counsel between the pretrial hearing and the trial date. The majority opinion found no error.

Judge Jackson concurred in the majority’s opinion with respect to the validity of the indictment but dissented with respect to the counsel forfeiture issue, finding that the trial court’s colloquy with the defendant at the pretrial hearing was insufficient for purposes of G.S. 15A-1242 and

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that the record did not reveal that the defendant engaged in the sort of egregious misconduct that would support a finding of forfeiture.

Discovery, Subpoenas & Related Issues

Trial court did not err by denying defendant's motion for a transcript of prior trial and a continuance, where the motions were made one week before the retrial date

State v. Gaddis, ___ N.C. App. ___, 2021-NCCOA-351 (July 20, 2021)

The defendant's first trial on charges of DWI, driving while license revoked, and driving without a valid registration or properly displayed license plate ended in a hung jury and mistrial. A retrial was scheduled for approximately two months later. One week before the retrial, defense counsel made a motion for production of the transcript of the prior trial for the purpose of impeaching and cross-examining the state's witnesses, and moved for a continuance to allow time to receive the transcript. The trial court denied the defendant's motions, and the retrial was held. Over the state's objections, the defense called the defendant's prior trial counsel to testify at the retrial and impeach the state's witnesses' testimony. The jury convicted the defendant of all charges and he appealed, arguing that the trial court committed reversible error by denying his motions for a transcript and continuance.

The appellate court characterized the defendant's arguments as "a puffer fish, attempting to 'blow up' Defendant's lack of a transcript" into a constitutional error attributable to the state or the court, when it was "more accurately described as a desiccated sardine, consciously canned by his trial counsel." Noting that any error or prejudice was invited by defense counsel's delay in filing the motion for a transcript, as well as the failure to pursue other options such as issuing a subpoena to have the court reporter read back testimony at the retrial, the appellate court held that the defendant might have a basis to allege ineffective assistance of counsel, but he failed to demonstrate that the trial court committed prejudicial error by denying the pretrial motions.

Judge Murphy dissented and would have held that the trial court erred by denying defendant's motions without making the necessary findings on whether the transcript was necessary to the preparation of an effective defense or there were adequate alternatives available.

Indictment & Pleading Issues

(1) Where original indictment sufficiently alleged the essential elements of the offense and the state's amendment did not substantially alter the allegations, trial court did not err in allowing the amendment; and (2) no error in imposing consecutive sentences where jury unanimously found that each offense was supported by separate and distinct acts

State v. Scott, ___ N.C. App. ___, 2021-NCCOA-355 (July 20, 2021)

The defendant in this case was charged with sexual activity by a substitute parent under G.S. 14-27.31. The defendant lived at the home of the victim and her mother, and he was the father

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of the victim's sister. In 2016, while the victim's mother was out of the house, the defendant engaged in three different sexual acts with the victim. The victim told her mother, who notified law enforcement, and the defendant was arrested and indicted. The defendant's first trial ended in a mistrial on two counts, but he was retried and convicted on both. On appeal, the defendant raised two issues.

First, the defendant argued that the trial court erred in allowing the state to amend the indictments by including the words "[a]t the time of the offense, the defendant was residing in the home with" the victim, contending that this was a substantial alteration of the charge. The appellate court disagreed. The original language used in the indictment adequately alleged that the defendant had assumed the position of a parent in the home of the victim, who was less than 18 years old, and engaged in a sexual act with that person, thereby satisfying all the essential elements of the offense. Since the indictment was already facially valid, and it was not necessary under the statute to allege that the defendant also resided at the home, the amendment did not add an essential element and was not a substantial alteration of the charge.

The defendant also argued that it was error for him to receive two consecutive sentences because the predicate acts for both charges occurred during the same incident. The appellate court viewed this argument as "recasting a double jeopardy argument that has not been preserved for appellate review as a hybrid challenge to the unanimity of the verdict and sufficiency of the indictment," and held there was no error. The two charges were supported by separate and distinct sexual acts, and the jury instructions and verdict sheets clearly indicated the jury was unanimous as to each of those charges; therefore, the trial court did not err in imposing consecutive sentences for the two offenses.

The trial court did not err in denying the defendant's motion to dismiss because the evidence at trial conformed to the allegations in the indictment as to the essential elements of the crime

State v. Tarlton, ___ N.C. App. ___, 2021-NCCOA-458 (Sept. 7, 2021)

A confidential informant called the local police department, describing the defendant's appearance and stating that the defendant would be at a certain location with a significant amount of methamphetamine in his bookbag. When the officers arrived at the scene, they found the defendant, matching the description, and sitting down with a bag and a knife. The officers asked the defendant if he had anything on him, to which the defendant responded he had marijuana in his pocket. After the officers retrieved the marijuana, the bag, and the knife, the defendant ran and was quickly apprehended by the officers.

At trial, the defendant stipulated that his book bag contained methamphetamine and heroin. The defendant moved to dismiss at the close of the State's evidence and again at the close of all evidence, both of which were denied. The defendant was found guilty of possession with intent to sell and deliver methamphetamine, possession of heroin, misdemeanor possession of marijuana, possession of drug paraphernalia, resisting a public officer, and attaining habitual felon status.

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On appeal, the defendant argued that the trial court erred when it denied his motion to dismiss the charge for resisting a public officer because there was a fatal variance between the indictment allegation and the evidence. Specifically, the indictment alleged that at the time of the defendant's resistance, the detective was "attempting to take the defendant into custody for processing narcotics" but the evidence at trial only showed that the defendant ran from officers, including the detective, after a small amount of marijuana was seized from his person. Slip op. at ¶ 14. In rejecting the defendant's argument, the Court of Appeals held that that an essential element of the charge of resisting a public officer is the identification of the official duty an officer was discharging or attempting to discharge at the time of a defendant's resistance, rather than the specific basis for arrest. Thus, the Court concluded that the actual basis of arrest is not necessary to properly charge the offense of resisting a public officer.

A variance between the State's proof and its indictment for intimidating a witness was not fatal and the trial court did not err in its jury instruction for the charge; The trial court's restitution order was unsupported by the State's evidence

State v. Clagon, ___ N.C. App. ___, 2021-NCCOA-497 (Sept. 21, 2021)

In this intimidating a witness case, the indictment alleged that the defendant told one person, Derstine, to tell another, Ramos, that the defendant would have Ramos deported if he testified against the defendant. Evidence at trial tended to show that Ramos did not actually receive this message. The court explained that while this was a variance between the indictment and the proof at trial, the variance did not relate to "the gist" of the offense of intimidating a witness, an offense concerned with "the obstruction of justice." The court cited North Carolina case law establishing that whether a witness actually receives the threatening communication at issue is "irrelevant" to the crime of intimidating a witness, and, thus, the language of the indictment was mere surplusage. The court went on to determine that even if there was error in the trial court's jury instruction on intimidating a witness, which did not deviate from the pattern jury instruction or from the instruction agreed upon by the parties, any such error was harmless as there was no reasonable likelihood that the alleged deviation misled the jury.

The State conceded that restitution ordered by the trial court lacked an evidentiary basis and the court remanded for a rehearing on the issue.

An indictment for possession of a firearm by a felon was fatally defective where it charged that offense and other related offenses; The trial court erred by denying the defendant's motion to suppress a pistol discovered during a search of his vehicle ostensibly based on probable cause of carrying a concealed weapon without making findings of fact sufficient to resolve a material conflict in the evidence related to the accessibility of the pistol

State v. Newborn, ___ N.C. App. ___, 2021-NCCOA-426 (Aug. 17, 2021), *temp. stay allowed*, ___ N.C. ___, 861 S.E.2d 748 (Sep. 3, 2021)

In this case involving possession of a firearm by a felon and carrying a concealed weapon, (1) binding caselaw required that the defendant's conviction for felon in possession be vacated

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because the indictment was fatally defective; and (2) the trial court's ruling on the defendant's motion to suppress was based on improper findings of fact.

(1) G.S. 14-415.1(c) dictates that an indictment charging a defendant with possession of a firearm by a felon must be separate from any indictment charging other offenses related to or giving rise to the felon in possession charge. Here, a single indictment charged the defendant with felon in possession, possession of a firearm with an altered/removed serial number, and carrying a concealed weapon. Finding itself bound by *State v. Wilkins*, 225 N.C. App. 492 (2013), the court determined that the State's failure to obtain a separate indictment for the felon in possession offense rendered the indictment fatally defective and invalid as to that offense.

(2) The court determined that the trial court's order denying the defendant's Fourth Amendment motion to suppress a firearm seized from the center console of his vehicle did not contain adequate findings of fact pertaining to a material conflict in the evidence of the accessibility of the firearm and consequently the trial court plainly erred in denying the motion.

An officer initiated a valid traffic stop of the defendant and searched the vehicle for marijuana based on an emanating odor. During the search, the officer felt and saw the handgrip of a pistol around the center console, arrested the defendant for carrying a concealed weapon, and then removed a plastic panel from the console to retrieve the pistol. The defendant challenged the trial court's finding of fact that "no tools were needed" to remove the panel, a finding bearing upon the accessibility of the pistol for purposes of determining whether the officer had probable cause for the independent search of the console premised on the offense of carrying a concealed weapon. Reviewing the testimony, the court of appeals found that the finding that "no tools were needed" was not supported by the testimony at the suppression hearing and that the trial court otherwise failed to make necessary findings as to the accessibility of the pistol. Because the accessibility issue was not resolved by adequate findings, the trial court's conclusion of law regarding probable cause was not supported and it could not properly rule on the defendant's motion to suppress. The court remanded the case for the trial court to make further findings on the issue.

(1) Trial court's instruction that the jury should not be influenced by the fact that others were charged with the crime when deciding the defendant's guilt was not an improper expression of opinion; (2) Indictment for synthetic cannabinoid that failed to correctly name controlled substance was fatally flawed

State v. Hills, ___ N.C. App. ___, 2021-NCCOA-310 (July 6, 2021)

The defendant was convicted at trial of trafficking heroin, possession with intent to sell or deliver synthetic cannabinoids, and other various drug offenses in Brunswick County. (1) During its instructions to the jury, the trial court stated that the jury should determine the guilt or innocence of this defendant and should not be influenced by evidence that other people were also charged in connection with the underlying events (who would get their own days in court). The defendant argued that this was an impermissible expression of judicial opinion on the evidence. Specifically, she argued that this instruction conveyed to the jury that the crime

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had occurred; that the jury should disregard all evidence that others present in the car may have been responsible; and that the defendant's defense should be discounted. The Court of Appeals disagreed. First, the trial court expressed no opinion that the crime occurred. There was no argument denying the presence of drugs in the car, and the role of the jury in the case was to determine whether the defendant possessed them. The trial court's acknowledgement that a crime had occurred was therefore not improper opinion. The instruction also did not command the jury to disregard evidence that others present may have been responsible. "Read in context, the trial court's statement did not touch on Defendant's evidence . . . [and] did not refer to the credibility of any evidence." *Hills* Slip op. at 9. Finally, the instruction did not denigrate the defendant's defense. Unlike other cases where a trial court's statement was found to be improper, the instruction here did not disclaim the involvement of other people. Instead, the instruction specifically informed the jury that others who were charged in the case would have their own days in court. "The trial court's instruction, therefore, did not reflect an opinion on the credibility of Defendant's evidence but, instead, reminded the jury it must only consider the evidence presented during the course of the hearing." *Id.* at 11. Further, the instruction at issue came after the close of evidence, not during evidence, lessening the risk that the jury would have taken it as an expression of opinion. Finally, the jury was instructed not to assume any opinion based on the trial court's statements or expressions during trial immediately before receiving the contested instruction. Under the circumstances, the trial court's instruction did not amount to an improper expression of opinion on the case.

(2) G.S. 90-89(7) lists 18 specific synthetic cannabinoids, but the substance charged in the indictment here—"methyl(2S)-2-{{1-(5-fluoropentyl)-1H-indazol-3-yl}formamido}-3,3-dimethylbutanoate (5F-ADB)"—is not listed there or elsewhere within Chapter 90 as a Schedule I substance. Wikipedia provides that the substance named in the indictment is a synthetic cannabinoid, and the State argued on appeal that this was sufficient to establish that the identity of the substance as a Schedule I drug. The court rejected this argument, pointing out that "[a] court may not look to extrinsic evidence to supplement a missing or deficient allegation in an indictment." *Hills* Slip op. at 16. It found that the indictment failed to allege a necessary element of the offense (the controlled substance) and was therefore fatally flawed. The conviction was consequently vacated. Judges Dietz and Zachary concurred.

(1) Indictment charging defendant with trafficking opium or heroin based on her transport and possession of Fentanyl was not defective as Fentanyl is an opiate within meaning of former G.S. 90-95(h)(4); (2) Trial court did not commit plain error when it departed from the statutory instructions in G.S. 15A-1235(b) in instructing the deadlocked jury; the trial court's instructions communicated all of the core ideas of the statutory instructions

State v. Garrett, ___ N.C. App. ___, 2021-NCCOA-214 (May 18, 2021)

In this Pasquotank County case, the defendant was convicted of trafficking Fentanyl by possession and possession of Fentanyl with intent to sell or deliver, among other drug crimes.

(1) The defendant argued on appeal that the indictment for these offenses was fatally defective because Fentanyl was not covered by the version of G.S. 90-95(h)(4) that was in effect at the

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time of her offense on December 31, 2006. The Court of Appeals determined that Fentanyl was an “opiate” within the meaning of the statute, which made it unlawful to possess or transport certain quantities of “opium or opiates.” The Court reasoned that though the term “opiate” typically refers to natural drugs derived from opium, like heroin, morphine and codeine, rather than synthetic drugs like Fentanyl, that definition was not universal. It agreed with the State that the General Assembly intended for the term “opiate” to include any drug that produces an opium-like effect by binding to opium receptors in the brain, regardless of whether the drug is naturally derived from opium or is synthetic or semi-synthetic. The Court noted that the common dictionary definition of the term opiate supported this broader reading as did the statutory definition of opiate. The Court rejected the defendant’s contention that the legislature’s 2018 amendment of the statute to replace the terms “opium or opiate” with “opium, opiate, or opioid” indicated that the term opiate did not include opioids, which are partially or wholly synthetic drugs produced in a lab to mimic the effects of opium. The Court held that the amendment was intended to clarify that opium, opiates, and opioids were all prohibited substances rather than to alter the applicability of the statute.

(2) The defendant also argued on appeal that the trial court’s instructions to the jury, which reported that it was deadlocked on the second day of deliberations, were improper as they did not recite the language from G.S. 15A-1235(b) (the statute that describes how a judge should instruct a deadlocked jury). The defendant did not object to the instruction at trial, so the Court of Appeals reviewed the issue for plain error. The Court compared the instructions given by the trial court to the statutory instruction, and determined that the instructions provided contained “all of the key elements and ideas from § 15A-1235(b).” Slip op. at § 39. Thus, the Court determined that jurors was properly instructed about their duty to deliberate and the defendant did not demonstrate plain error.

Judge’s Expression of Opinion

The trial court’s comments were not improper expressions of opinion that prejudiced defendant

State v. Austin, ___ N.C. ___, 2021-NCSC-87 (Aug. 13, 2021)

The defendant was indicted for assault on a female, habitual misdemeanor assault, and attaining habitual felon status. Following the presentation of the evidence at trial, the trial court instructed the jury on the charges of assault on a female and habitual misdemeanor assault. During the initial instruction on the charge of assault on a female, the trial court stated, in part:

For you to find the defendant guilty of this offense, the State must prove three [things] beyond a reasonable doubt:

First, that the defendant intentionally assaulted the alleged victim. It has been described in this case by the prosecuting witness that the defendant hit her upon her head, that he hit her on her arms, about her body.

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You are the finders of fact. You will determine what the assault was, ladies and gentlemen. The Court is not telling you what it is, I'm just giving you a description. And there was also testimony by the witness that the defendant asked her to perform, by force, another act, which could be considered an assault. But you will determine what the assault was. I'm not telling you what it is. And if what I'm saying is the evidence and your recollection is different from what I say, you still should rely upon your recollection of the evidence, as to what the assault is that has been testified to in this case.

Slip op. at ¶ 6. The defendant did not object to any of the trial court's jury instructions at trial, and he was found guilty of assault on a female and habitual misdemeanor assault. On appeal, the defendant argued that the trial court had improperly expressed its opinion during jury instructions that an assault had occurred. The Court of Appeals found no error and upheld defendant's conviction.

Based on a dissenting opinion, the defendant appealed to the Supreme Court, arguing that the trial court's comments were improper expressions of opinion which prejudiced the defendant. In affirming the decision of the Court of Appeals, the Court concluded that even assuming the trial court violated the statutory prohibitions against the expression of opinion, the defendant cannot show a reasonable possibility of a different result. The Court reasoned that the State presented evidence at trial which satisfied the elements of the predicate assault, and the trial court's instruction made clear that the jury alone was responsible for making this determination

Justice Earls dissented, writing that the majority failed to give proper weight to the statutory mandate against expression of opinion by refusing to engage meaningfully in a prejudice analysis and instead ignoring any impact the judge's instructions had on the jury.

(1) Trial court's instruction that the jury should not be influenced by the fact that others were charged with the crime when deciding the defendant's guilt was not an improper expression of opinion; (2) Indictment for synthetic cannabinoid that failed to correctly name controlled substance was fatally flawed

State v. Hills, ___ N.C. App. ___, 2021-NCCOA-310 (July 6, 2021)

The defendant was convicted at trial of trafficking heroin, possession with intent to sell or deliver synthetic cannabinoids, and other various drug offenses in Brunswick County. (1) During its instructions to the jury, the trial court stated that the jury should determine the guilt or innocence of this defendant and should not be influenced by evidence that other people were also charged in connection with the underlying events (who would get their own days in court). The defendant argued that this was an impermissible expression of judicial opinion on the evidence. Specifically, she argued that this instruction conveyed to the jury that the crime had occurred; that the jury should disregard all evidence that others present in the car may have been responsible; and that the defendant's defense should be discounted. The Court of Appeals disagreed. First, the trial court expressed no opinion that the crime occurred. There was no argument denying the presence of drugs in the car, and the role of the jury in the case

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was to determine whether the defendant possessed them. The trial court's acknowledgement that a crime had occurred was therefore not improper opinion. The instruction also did not command the jury to disregard evidence that others present may have been responsible. "Read in context, the trial court's statement did not touch on Defendant's evidence . . . [and] did not refer to the credibility of any evidence." *Hills* Slip op. at 9. Finally, the instruction did not denigrate the defendant's defense. Unlike other cases where a trial court's statement was found to be improper, the instruction here did not disclaim the involvement of other people. Instead, the instruction specifically informed the jury that others who were charged in the case would have their own days in court. "The trial court's instruction, therefore, did not reflect an opinion on the credibility of Defendant's evidence but, instead, reminded the jury it must only consider the evidence presented during the course of the hearing." *Id.* at 11. Further, the instruction at issue came after the close of evidence, not during evidence, lessening the risk that the jury would have taken it as an expression of opinion. Finally, the jury was instructed not to assume any opinion based on the trial court's statements or expressions during trial immediately before receiving the contested instruction. Under the circumstances, the trial court's instruction did not amount to an improper expression of opinion on the case.

(2) G.S. 90-89(7) lists 18 specific synthetic cannabinoids, but the substance charged in the indictment here—"methyl(2S)-2-{{1-(5-fluoropentyl)-1H-indazol-3-yl}formamido}-3,3-dimethylbutanoate (5F-ADB)"—is not listed there or elsewhere within Chapter 90 as a Schedule I substance. Wikipedia provides that the substance named in the indictment is a synthetic cannabinoid, and the State argued on appeal that this was sufficient to establish that the identity of the substance as a Schedule I drug. The court rejected this argument, pointing out that "[a] court may not look to extrinsic evidence to supplement a missing or deficient allegation in an indictment." *Hills* Slip op. at 16. It found that the indictment failed to allege a necessary element of the offense (the controlled substance) and was therefore fatally flawed. The conviction was consequently vacated. Judges Dietz and Zachary concurred.

Jury Trial, Waiver

Defendant was not entitled to relief based on the trial court's failure to conduct the pretrial colloquy required by G.S. 15A-1201 for waiver of a jury trial as he did not show prejudice resulting from the violation

State v. Hamer, 377 N.C. 502 (June 11, 2021)

The defendant was convicted in a bench trial of speeding 94 miles per hour in a 65 mile-per-hour zone. A divided panel of the Court of Appeals determined that even though the trial court failed to follow the procedure set forth in N.C.G.S. § 15A-1201 for waiver of defendant's right to a jury trial, the defendant was not prejudiced by the trial court's noncompliance. On appeal, the defendant argued that the trial court erred in conducting a bench trial because he did not knowingly and voluntarily waive his right to a jury trial.

Counsel for the defendant requested a bench trial in superior court, and the State consented to the request. The trial court granted the request and began the trial without first addressing the

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defendant and determining whether he fully understood and appreciated the consequences of the jury trial waiver as required by G.S. 15A-1201(d). After the State rested, the trial court asked the defendant if he consented to the waiver of jury trial. In that exchange, the defendant said he consented to the waiver.

The Supreme Court determined that that the trial court's failure to conduct the inquiry required by G.S. 15A-1201(d) was a statutory rather than a constitutional violation and that the defendant was required to show prejudice resulting from the violation to be entitled to relief. The Court stated that the pretrial exchange between the trial court, defense counsel, and the State, coupled with defendant's subsequent answers to questions posed by the trial court demonstrated that he understood he was waiving his right to a trial by jury and the consequences of that decision. In addition, the Court stated there was overwhelming evidence of defendant's guilt.

Justice Ervin, joined by Justices Hudson and Earls, dissented. Justice Ervin wrote that he would hold that the defendant did not properly waive his right to trial by jury, that the absence of a proper waiver resulted in a deprivation of his right to trial by jury, that the failure to obtain a proper waiver of defendant's right to a jury trial constituted error per se, and that defendant was therefore entitled to a new trial.

Jury Argument

Prosecutor's improper comments on defendant's decision to plead not guilty during closing arguments were not prejudicial

State v. Goins, 377 N.C. 475 (June 11, 2021)

The defendant was convicted of attempted first-degree murder for shooting a law enforcement officer who was attempting to serve a warrant for the defendant's arrest for violating probation. During closing argument, the prosecutor stated:

[You m]ight ask why would [defendant] plead not guilty? I contend to you that the defendant is just continuing to do what he's done all along, refuse to take responsibility for any of his actions. That's what he does. He believes the rules do not apply to him.

...

[Defendant's] not taking responsibility today. There's nothing magical about a not guilty plea to attempted murder. He's got to admit to all the other charges. You see them all on video. The only thing that's not on video is what's in his head. He also knows that those other charges carry less time. There's the magic.

Slip op. at ¶ 8.

The defendant did not object to the State's closing argument, and he was convicted of attempted murder and other charges. On appeal, the defendant argued that the trial court's failure to intervene during the State's improper argument was reversible error. The majority of

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the Court of Appeals panel agreed, holding that the prosecutor's commentary on defendant's decision to plead not guilty was so unfair it violated defendant's due process rights and ordering a new trial. The dissenting judge would have required a showing of prejudice by defendant because he failed to object at trial. Based on the record, the dissenting judge would have held that the State's closing argument was improper, but that defendant was not prejudiced by the error. The State appealed on the basis of the dissenting opinion, conceding that the argument was improper but arguing that it was not prejudicial.

On appeal, the Supreme Court held that the Court of Appeals erred by failing to analyze prejudice. The high court undertook this review considering the entirety of the closing argument, the evidence, and the jury instructions. The Court noted that the prosecutor made the improper remarks in the context of explaining the intent required for attempted first-degree murder and after emphasizing the deliberate nature of the shooting. The Court characterized the improper argument as a "small portion" of the State's closing argument and not the "primary" or "major focus." Slip op. at ¶ 14. The Court noted that the State presented evidence that the defendant told his relatives that he would rather kill himself or be killed by law enforcement than go back to jail. Witnesses testified that the defendant's gun was loaded with bullets designed to cause more serious injuries. After the officer identified himself, the defendant turned around and fired at the officer. The shootout between the defendant and the officer was captured on hotel surveillance video, which was played for the jury at trial. The Court reasoned that between the video and testimony from eyewitnesses who corroborated the State's account of events, "virtually uncontested" evidence of the defendant's guilt was submitted to the jury. Slip op. at ¶ 15. In addition, the trial court instructed the jury that the defendant's decision to plead not guilty could not be taken as evidence of his guilt, that the defendant was presumed innocent, and that the State was required to prove the defendant's guilt beyond a reasonable doubt. Finally, the jury asked to re-watch the surveillance video of the shooting during its closing argument. The Court stated that this tended "to show that the jury based its decision on the evidence rather than on passion or prejudice resulting from the prosecutor's improper argument." Slip op. at ¶ 16. For these reasons, the Court concluded that the defendant was not prejudiced by the prosecutor's "undeniably improper" closing argument. Slip. op. at ¶ 17. The Supreme Court reversed the Court of Appeals and remanded for consideration of remaining issues.

Trial court did not abuse its discretion when it declined to intervene to correct misstatements by the prosecutor in closing argument to which the defendant did not object

State v. Parker, 377 N.C. 466 (June 11, 2021)

The defendant was convicted of possession of firearm by a felon for his involvement in a drug transaction in which one of the would-be-drug-buyers was shot and killed. Witnesses described the defendant, who they said pulled out a revolver and moved toward the car where the victim was sitting, as having a tattoo on his cheek. At trial, the State introduced a photograph of the defendant that showed a tattoo on his chest. During closing argument, the prosecutor stated that the men who saw the defendant draw his revolver identified him as having a tattoo on his

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chest. In fact, those witnesses had testified that the man had a tattoo on his cheek. The defendant did not contemporaneously object to these misstatements. The defendant appealed, and the Court of Appeals found no error, concluding that the prosecutor's statements during closing argument were not grossly improper. The Supreme Court granted discretionary review and affirmed.

The Supreme Court characterized the misstatements as mistakes that were not intentional and were not extreme or grossly improper. The Court noted that the trial court explicitly instructed jurors that they were to be guided exclusively by their own recollection of the evidence any time their recollection differed from that of the attorneys. Stating that "[t]rials are not carefully scripted productions," the Court reasoned that absent gross impropriety in an argument "a judge should not be thrust into the role of an advocate based on a perceived misstatement regarding an evidentiary fact when counsel is silent." Slip op. at ¶ 26. Accepting the defendant's argument, the Court stated, would allow attorneys to "sit back in silence during closing arguments" and then claim error on appeal if the trial court failed to correct a misstatement of the evidence. Slip op. at ¶ 26. Thus, the Court concluded that the trial court did not abuse its discretion when it declined to intervene ex mero motu.

Jury Deliberations

The trial court did not plainly err with respect to an *Allen* charge and the defendant received statutory IAC during SBM proceedings

State v. Gordon, ___ N.C. App. ___, 2021-NCCOA-273 (June 15, 2021)

In this sex offense and indecent liberties case where the defendant was ordered to enroll in lifetime SBM, the trial court did not plainly err with respect to an *Allen* charge, the defendant did not preserve his argument related to SBM, and the defendant received statutory ineffective assistance of counsel during the SBM proceedings. Approximately one hour after beginning deliberations, the jury sent a question to the court asking for clarification as to whether they must have unanimous agreement to render a guilty verdict and whether a lack of unanimity would require that they return a not guilty verdict. In response and without objection from either party, the trial court responded to the jury's question with instructions derived from G.S. 15A-1235(a). The court of appeals rejected the defendant's argument that the trial court plainly erred by omitting instructions from G.S. 15A-1235(b), explaining that the jury's question asked for clarification on the issue of unanimity and did not clearly indicate that the jury was deadlocked, in disagreement, or at an impasse. As such, the trial court did not err by reciting the unanimity instructions in G.S. 15A-1235(a) without providing the additional instructions in subsection (b).

As to SBM, the court first found that the defendant failed to preserve a Fourth Amendment challenge to the lifetime SBM order by failing to make a constitutional objection during the sentencing proceeding where SBM was addressed, and further declined to invoke Rule 2 to reach the issue. The court went on to agree with the defendant's alternative argument that he received statutory ineffective assistance of counsel under G.S. 7A-451(a)(18). Likening the case

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to *State v. Spinks*, ___ N.C. App. ___, 2021-NCCOA-218 (2021), the court found that counsel was ineffective by failing to object to SBM enrollment or file a notice of appeal from the SBM order where the State offered no evidence of the reasonableness of lifetime SBM.

Jury Instructions

The trial court did not err by denying the defendant's request for an instruction on self-defense where any such error was invited

State v. Hooper, ___ N.C. App. ___, 2021-NCCOA-500 (Sept. 21, 2021)

The defendant was indicted for assault by strangulation, assault on a female, and other offenses after an incident in a hotel where evidence at trial tended to show that the defendant had an altercation with the mother of his child that left her with visible injuries and the defendant with a gunshot wound. Immediately before jury instructions were to be given, and after not requesting an instruction on self-defense or otherwise objecting to proposed instructions at a charge conference the preceding day, the defendant requested for the first time that an instruction on self-defense be given. In denying the request, the trial court noted that the defendant did not give notice of the defense and that there was no evidence of the defendant's thoughts or beliefs at the time of the altercation. After the instructions were given, both parties informed the trial court that they had no objections to the instructions as given. Based on these events, the court determined that any error in not giving a self-defense instruction was invited, and that even if an error occurred the defendant could not show prejudice because the evidence against him was overwhelming and uncontroverted.

Judge Murphy dissented, stating the view that the defendant did not waive appellate review of the alleged error merely by failing to state an objection after the instructions were given because his request for the self-defense instruction constituted an objection. Judge Murphy went on to explain that the evidence at trial was sufficient to entitle the defendant to a self-defense instruction, and that the error in not giving the instruction was prejudicial as it deprived the jury of the ability to decide the issue of whether the defendant's participation in the altercation was lawful. After determining that the trial court abused its discretion by precluding the instruction as a sanction for failing to provide notice of self-defense, presuming the trial court meant to do so, Judge Murphy stated that he would hold that the defendant was entitled to a new trial.

(1) The trial court did not err in denying the defendant's request for a special jury instruction where the trial court's instruction encompassed the substance of the law requested. (2) The trial court's failure to find mitigating factors did not amount to prejudicial error. (3) The defendant did not show that the trial court considered irrelevant and improper matters in determining the severity of the sentence.

State v. Guerrero, ___ N.C. App. ___, 2021-NCCOA-457 (Sept. 7, 2021)

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The defendant was arrested for driving while impaired. At the jail, the defendant provided a breath sample, and his alcohol concentration was reported as 0.09. The defendant pled not guilty to impaired driving in district court. Following a bench trial, the judge found the defendant guilty of impaired driving and imposed a Level Five sentence pursuant to G.S. 20-179. The defendant gave notice of appeal in open court.

At trial in superior court, the judge denied the defendant's request for a special jury instruction and instead delivered the pattern jury instruction for impaired driving. The jury found the defendant guilty of impaired driving. During sentencing, the defendant argued for three statutorily mandated mitigating factors, only one of which the judge ultimately found. The judge imposed a Level Five sentence and sentenced the defendant to 60 days in jail, suspended for 12 months of supervised probation and several special conditions of probation.

(1) On appeal, the defendant first argued that the trial court erred by denying the defendant's request for a special jury instruction. The defendant claimed that the pattern jury instruction did not allow the jury an adequate opportunity to fully weigh the breath sample evidence. In rejecting this argument, the Court of Appeals held that the trial court's instruction encompassed the substance of the law requested. The Court further found that the trial judge instructed the jurors that (1) they "are the sole judges of the weight to be given to any evidence"; (2) they "should weigh all the evidence in the case"; (3) they "should consider all the evidence"; and (4) "it is their duty to find the facts and to render a verdict reflecting the truth," which signaled to the jury that they were free to analyze and weigh the effect of the breath sample evidence along with all the evidence presented during the trial. Slip op. at ¶ 13.

(2) The defendant next argued that the trial court erred by failing to find two statutory mitigating factors and that the error was prejudicial because he received supervised probation as part of his sentence. Under G.S. 20-179, Level Five is the minimum sentencing level that a defendant can statutorily receive for impaired driving, and a defendant may be placed on probation as part of a Level Five sentence. The Court of Appeals determined that the trial judge erred by failing to find one of the mitigating factors. However, the Court concluded that the defendant was not prejudiced because even if the trial judge had found the two additional mitigating factors, the judge could not have sentenced the defendant at a lower sentencing level under the impaired driving statutes.

(3) The defendant's final argument was that the trial court erred by sentencing the defendant more harshly because the defendant exercised his right to a trial by jury. In rejecting this argument, the Court of Appeals concluded that the defendant's punishment fit within the statutory limit and the defendant did not overcome the "presumption of regularity" by showing that "the court considered irrelevant and improper matters in determining the severity of the sentence." Slip op. at ¶ 27. The defendant also argued that the trial judge relied on uncharged criminal conduct not found by the jury because the defendant was asked about his marijuana use. The Court of Appeals declined to consider this argument because the defendant did not assert his Fifth Amendment privilege or object at trial and thus waived the argument for appeal.

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The defendant was entitled to an instruction on justification as an affirmative defense to possession of a firearm by a felon

State v. Swindell, ___ N.C. App. ___, 2021-NCCOA-408 (Aug. 3, 2021), *temp. stay allowed*, ___ N.C. ___, 861 S.E.2d 339 (Aug. 20, 2021)

In this Bladen County case, the defendant was convicted of second-degree murder and possession of a firearm by a felon after shooting a man in an altercation between several people at an apartment complex. There were conflicting accounts about which of the people involved had guns, although the defendant testified that he fired his weapon when he believed that one of the men with which he was fighting had a gun, and that he was about to be killed. On appeal, the defendant argued that the trial court erred in declining his request to instruct the jury on the affirmative defense of justification to possess a firearm as a felon—a defense recently recognized by the Supreme Court in *State v. Mercer*, 373 N.C. 459 (2020). To be entitled to a jury instruction on justification, a defendant must meet a four-part test: (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *Id.* at 464. Additionally, to be entitled to the justification defense, the defendant must possess the firearm only while under threat. *Id.* Here, taking the evidence in the light most favorable to the defendant, the Court of Appeals concluded that the defendant presented evidence of all the required elements. As to the imminent threat, the victim had knocked the defendant onto his buttocks and heard others saying someone had a gun and “pop him.” As to the second element, the defendant was not the aggressor and attempted to explain to the victim that he was not there to fight. As to the availability of an alternative, evidence showed that the victim attacked the defendant, and a reasonable jury could have concluded that it was too late to call 911 and that running away would have put the defendant at risk of being shot. And as to the causal relationship between the avoidance of harm and the criminal conduct, testimony indicated that the defendant took possession of the firearm only after he heard others saying the victim had a gun, and that he abandoned it when he was able to run away. Finally, the court concluded that the defendant was prejudiced by the trial judge’s failure to give the instruction, as a reasonable jury may have acquitted the defendant on the firearm charge if it had been permitted to consider whether he was justified in possessing it. Accordingly, the majority reversed the conviction and remanded the case for a new trial.

A dissenting judge would have concluded that the required elements for the justification instruction were not met because the defendant intentionally placed himself in a dangerous situation, and because he had many reasonable alternatives to violating the law.

On the facts, the trial court did not err in jury instructions for armed robbery by failing to designate the victims

State v. McLymore, ___ N.C. App. ___, 2021-NCCOA-425 (Aug. 17, 2021)

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In this armed robbery case, the trial court did not err by failing to designate in its jury instruction the two individuals named in the indictment as the alleged victims. The defendant was indicted for armed robbery of two boys, Elijah and Shalik, who were specifically identified as victims in the indictment. The jury heard evidence that on the evening of the crime the defendant obtained the shotgun he used when robbing Elijah and Shalik by taking it without authorization from a vehicle occupied by two men, Desean and Tevin, and that he had threatened them with the shotgun after taking it. The jury also heard evidence that prior to taking the shotgun the defendant had attempted to rob a woman, Yvette, using a handgun.

The trial court instructed the jury using NCPJI CRIM 217.20, applicable to armed robberies involving a firearm, but, in a departure from the indictment, did not designate the victims Elijah and Shalik. Because the evidence before the jury did not support a conviction for robbery with a firearm of Desean, Tevin, or Yvette, the court rejected the defendant's argument that the trial court's instruction left the jury free to convict him based on the uncharged offenses involving those people. The court noted, however, that the better practice is to designate the victim in jury instructions for robbery with a firearm.

Trial court erred by failing to submit a lesser-included assault to the jury when there was evidence from which a rational juror could have found the lesser offense

State v. Huckabee, ___ N.C. App. ___, 2021-NCCOA-353 (July 20, 2021)

The defendant was charged with assault with a deadly weapon inflicting serious injury for his role in an assault that occurred inside a jail. The defendant and two other inmates assaulted the victim by punching, kicking, and hitting him with a broom. As a result of the assault, the victim suffered a bloody nose, bruises and red marks, and multiple fractures around his nose and eye. During the charge conference at the defendant's trial, the court agreed to submit the lesser-included offenses of assault inflicting serious injury and simple assault, but did not submit the lesser-included offense of assault with a deadly weapon, despite the defendant's request. The jury convicted the defendant of the charged offense, and the defendant appealed.

The appellate court agreed with the defendant that it was error not to submit the lesser-included offense of assault with a deadly weapon, and reversed his conviction and remanded for a new trial. The decision to submit a lesser-included offense is reviewed *de novo*, and the offense should be submitted to the jury if there is evidence in the record, when viewed in the light most favorable to the defendant, from which a rational juror could convict of the lesser charge. In this case, there was evidence from which a rational juror could have concluded that the victim did not suffer serious injury. The victim's medical treatment was relatively brief, and the trial testimony indicated that the victim's facial fractures were less serious and less painful than a broken arm, an injury which past cases have held warranted submitting the lesser offense to the jury.

The defendant also challenged the imposition of a civil judgment for attorney fees without providing notice and an opportunity to be heard. Since the underlying conviction was reversed and remanded, the appellate court vacated the civil judgment as well.

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Mistrial

The defendant was not prejudiced by a detective's testimony that the defendant's photograph used in a lineup was retrieved from the "jail archive" and even if the testimony was prejudicial the trial court cured it by sustaining the defendant's objection and instructing the jury to disregard the testimony

State v. McDougald, ___ N.C. App. ___, 2021-NCCOA-424 (Aug. 17, 2021)

In this armed robbery case, the trial court did not err by denying the defendant's motion for a mistrial based upon a detective testifying that he had retrieved from the "jail archive" photographs used for a lineup where the victim identified the defendant. The court noted that G.S. 15A-1061 mandates that a trial judge declare a mistrial if there occurs during trial an error resulting in substantial and irreparable prejudice to the defendant's case. Otherwise, declaring a mistrial is in the trial court's discretion. The court explained that while the detective's testimony arguably indicated to the jury indirectly that the defendant had a criminal history, the testimony was not prejudicial because the defendant himself directly informed the jury of his criminal history on direct and cross-examination. The court went on to conclude that even if the testimony was prejudicial, the trial court cured any prejudice by sustaining the defendant's objection and instructing the jury to disregard the detective's statement.

The court dismissed without prejudice the defendant's IAC claim based upon defense counsel's failure to challenge the photographic lineup's compliance with the Eyewitness Identification Reform Act because the record on direct appeal was insufficient to assess the claim.

Motions

- (1) The defendant's ineffective assistance of counsel claim was dismissed without prejudice.**
- (2) The trial court did not commit constitutional error by denying the defendant's motion to continue when the defendant's lawyer had adequate time to prepare for trial.**

State v. Surratt, ___ N.C. App. ___, 2021-NCCOA-407 (Aug. 3, 2021)

In this Cleveland County case, the defendant was charged with multiple drug crimes and with being a habitual felon. On the day of trial, the defendant made a motion to continue, telling the court that he did not have time to go over the case with his lawyer. After a discussion with the defendant's lawyer, the trial judge denied the motion to continue. The defendant was convicted of the drug crimes and then pled guilty to having attained habitual felon status. (1) On appeal, the defendant argued that he was deprived of effective assistance of counsel when his appointed attorney made him argue pro se for a continuance and failed to advocate on his behalf. Noting inconsistencies in the appellate record regarding the extent and timing of the defendant's contact with his lawyer, the Court of Appeals dismissed the claim without prejudice to allow the defendant to raise the argument in the trial court through a motion for appropriate relief.

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(2) The defendant also argued on appeal that the trial court erred by denying his motion to continue. The Court of Appeals disagreed, noting that defense counsel had over a month to prepare for a case that the court did not deem complicated—a controlled drug buy captured on video and audio recording. In the absence of any evidence of prejudice (and with no prejudice presumed due to the lack of complexity in the case), the appellate court concluded that the trial court did not err.

The trial court erred in denying the defendant’s motion to dismiss for insufficiency of the evidence

State v. Dover, ___ N.C. App. ___, 2021-NCCOA-405 (Aug. 3, 2021), *temp. stay allowed*, ___ N.C. ___, 861. S.E.2d 556 (Aug. 24, 2021)

In this Rowan County case, the defendant was convicted of felony murder based on an underlying felony of robbery with a dangerous weapon and first-degree murder based on premeditation and deliberation. The defendant was charged after one of his coworkers, Arthur Davis, was found dead in his residence due to multiple stab wounds. Investigating officers found bloody clothes at the defendant’s residence, but forensic biologists testified that those clothes had no DNA connection with the victim, and that there was no other connection between the defendant’s DNA profile and the scene of the crime. When asked about his whereabouts on the night of the crime, the defendant told investigators that he tried to call the victim that night to borrow money from him, but that Davis never answered. The defendant said he then went to his place of employment, smoked crack, did some work, and then went home. Cell site location analysis performed on the defendant’s phone records showed him to be in a sector that included both the victim’s home and his place of employment on that night. After talking with officers, the defendant was arrested and jailed on an unrelated charge. In a jailhouse phone call on a monitored line, the defendant instructed his girlfriend to bail him out using approximately \$3,000 in cash hidden in a work glove, which was in turn hidden in a McDonald’s bag in a trash can. The defendant moved to dismiss all charges for insufficiency of the evidence at the close of the State’s evidence and again at the close of all evidence. At closing, the prosecutor noted the lack of DNA evidence, but said that the jury “need[ed] a reasonable explanation for that money.” The defendant objected as the prosecutor was saying “If you don’t have a reasonable explanation for where that money came from . . . ,” which the trial judge sustained, but without giving a curative instruction.

On appeal, the defendant argued that the trial court erred by denying his motion to dismiss all the charges for failure to provide evidence as to each element of each crime. A majority of the Court of Appeals agreed. Even giving the State every reasonable inference and resolving any contradictions in its favor, the court concluded that the evidence here was insufficient to go to the jury. The State presented no evidence that the defendant entered Mr. Davis’s trailer, and no evidence connecting the \$3,000 with the victim. Evidence indicating that the defendant was in the vicinity of the victim’s home on the night of the offense, and that the victim was supposed to bring money to his daughter the next day but that no money or billfold was found in his house, showed only that the defendant had the opportunity to commit the crime and that someone may have taken money from the victim. There was no evidence beyond speculation,

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the court said, that the defendant actually went to the victim's house, had a motive to commit the crimes, or actually did it. The court thus found that the trial court erred by failing to grant the defendant's motion to dismiss and vacated the defendant's convictions. Having vacated the convictions, the majority did not reach the defendant's second argument regarding the trial court's failure to give a limiting instruction related to the State's improper closing argument, which arguably shifted the burden of proof to the defendant.

A dissenting judge would have found the evidence sufficient to give rise to a reasonable inference of guilt, and that the trial court therefore did not err by denying the defendant's motion to dismiss. The dissenting judge also would have concluded that the trial court did not err in failing to give a limiting instruction regarding the State's closing argument in light of a unobjected-to rephrasing of the argument by the prosecutor after the parties conferred with the judge.

An indictment for possession of a firearm by a felon was fatally defective where it charged that offense and other related offenses; The trial court erred by denying the defendant's motion to suppress a pistol discovered during a search of his vehicle ostensibly based on probable cause of carrying a concealed weapon without making findings of fact sufficient to resolve a material conflict in the evidence related to the accessibility of the pistol

State v. Newborn, ___ N.C. App. ___, 2021-NCCOA-426 (Aug. 17, 2021), *temp. stay allowed*, ___ N.C. ___, 861 S.E.2d 748 (Sep. 3, 2021)

In this case involving possession of a firearm by a felon and carrying a concealed weapon, (1) binding caselaw required that the defendant's conviction for felon in possession be vacated because the indictment was fatally defective; and (2) the trial court's ruling on the defendant's motion to suppress was based on improper findings of fact.

(1) G.S. 14-415.1(c) dictates that an indictment charging a defendant with possession of a firearm by a felon must be separate from any indictment charging other offenses related to or giving rise to the felon in possession charge. Here, a single indictment charged the defendant with felon in possession, possession of a firearm with an altered/removed serial number, and carrying a concealed weapon. Finding itself bound by *State v. Wilkins*, 225 N.C. App. 492 (2013), the court determined that the State's failure to obtain a separate indictment for the felon in possession offense rendered the indictment fatally defective and invalid as to that offense.

(2) The court determined that the trial court's order denying the defendant's Fourth Amendment motion to suppress a firearm seized from the center console of his vehicle did not contain adequate findings of fact pertaining to a material conflict in the evidence of the accessibility of the firearm and consequently the trial court plainly erred in denying the motion.

An officer initiated a valid traffic stop of the defendant and searched the vehicle for marijuana based on an emanating odor. During the search, the officer felt and saw the handgrip of a pistol around the center console, arrested the defendant for carrying a concealed weapon, and then removed a plastic panel from the console to retrieve the pistol. The defendant challenged

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the trial court's finding of fact that "no tools were needed" to remove the panel, a finding bearing upon the accessibility of the pistol for purposes of determining whether the officer had probable cause for the independent search of the console premised on the offense of carrying a concealed weapon. Reviewing the testimony, the court of appeals found that the finding that "no tools were needed" was not supported by the testimony at the suppression hearing and that the trial court otherwise failed to make necessary findings as to the accessibility of the pistol. Because the accessibility issue was not resolved by adequate findings, the trial court's conclusion of law regarding probable cause was not supported and it could not properly rule on the defendant's motion to suppress. The court remanded the case for the trial court to make further findings on the issue.

State failed to show that improperly admitted blood evidence was harmless beyond a reasonable doubt; new trial

State v. Scott, ___ N.C. App. ___, 2021-NCCOA-314 (July 6, 2021)

On remand from the North Carolina Supreme Court, this Alamance County case involved a medical blood draw from a defendant suspected of driving while impaired and second-degree murder. The Court of Appeals previously determined that the seizure of the defendant's medical records without a search warrant violated the defendant's Fourth Amendment rights but found that the defendant failed to prove prejudice and was not entitled to relief (here). A dissent at the Court of Appeals agreed that the warrantless seizure was a Fourth Amendment violation but disagreed that the defendant was required to show prejudice. The North Carolina Supreme Court unanimously reversed, agreeing with the dissent below. It remanded to that court for application of the correct standard, harmless error, whereby the State has the burden to demonstrate that the error did not affect the validity and fairness of the proceedings beyond a reasonable doubt.

Evidence at trial showed that the defendant was driving recklessly at a high speed and passed another car in a no passing zone, and the defendant admitted as much. The defendant also had prior convictions for impaired driving and speeding. The State argued that this was sufficient to show malice for purposes of second-degree murder even without the blood result. However, the blood result was the only evidence of impairment—there were no signs of impairment at the scene, and no witness could attest that the defendant was impaired. The jury was instructed that it could find malice based on impairment, reckless driving, or speeding. It returned a general verdict and did not specify a theory of malice supporting the murder conviction. While the evidence of speeding, recklessness, and prior convictions were sufficient to survive a motion to dismiss the murder charge, the State here did not establish that the erroneous admission of the blood evidence was harmless beyond a reasonable doubt. The conviction for second degree murder was therefore vacated and the matter remanded for a new trial. Judges Gore and Griffin concurred.

Pleas

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The trial court did not err in denying the defendant's motion to withdraw his *Alford* plea and there was a factual basis for the plea

State v. Crawford, ___ N.C. App. ___, 2021-NCCOA-272 (June 15, 2021)

The defendant entered an *Alford* plea pursuant to a plea agreement where convictions for felony larceny and felony possession of a stolen motor vehicle would be consolidated for sentencing. The defendant failed to appear at a scheduled sentencing hearing and was later arrested. When the defendant appeared over two months later at a sentencing hearing following his arrest, he moved to withdraw his plea but the trial court denied the motion. Analyzing the non-exclusive list of factors enumerated in *State v. Handy*, 326 N.C. 532 (1990) bearing on whether a defendant has carried his or her burden of showing some "fair and just reason" supporting withdrawal of the plea, the court found, focusing particularly on the defendant's failure to show the timeliness of his motion, that the trial court did not err in denying the defendant's motion to withdraw his plea.

Addressing the defendant's separate argument that there was an insufficient factual basis for his plea and recognizing precedent holding that a factual basis for an *Alford* plea cannot be supplied by a plea transcript standing alone, the court distinguished *State v. Agnew*, 361 N.C. 333 (2007) and concluded that factual information alleged in the indictments coupled with the plea transcript provided a sufficient factual basis for the plea and the trial court did not err in accepting it.

Sentencing

(1) Where defendant was resentenced to life with parole for a murder committed while he was a juvenile, trial court did not err by declining to resentence on other offenses or modify the sentences to run concurrently; (2) defendant did not receive ineffective assistance of counsel on this issue; and (3) the court withheld ruling on whether consecutive sentences that impose a *de facto* sentence of life without the possibility of parole for a juvenile violates the Eighth Amendment, pending the North Carolina Supreme Court's resolution of that question

State v. Oglesby, ___ N.C. App. ___, 2021-NCCOA-354 (July 20, 2021)

In 2004, the defendant was convicted of criminal offenses related to two convenience store robberies and a separate kidnapping and murder. All three incidents occurred in 2002, when the defendant was 16 years old. The defendant pleaded guilty to two counts of armed robbery, and was subsequently convicted at trial of first-degree murder under the felony murder rule, first degree kidnapping, and attempted robbery for the third incident. Sentencing for all the offenses occurred at a single hearing and the defendant was sentenced to a total of five consecutive active terms, including a term of life without parole for the murder. The defendant appealed his convictions, asserting errors related to the use of aggravating factors and double jeopardy. The appellate courts' resolution of those claims in *State v. Oglesby*, 174 N.C. App. 658, (2005), *aff'd in part, vacated in part*, 361 N.C. 550 (2007) and *State v. Oglesby*, 186 N.C. App. 681 (2007) (unpublished), *disc. review denied*, 362 N.C. 478 (2008), ultimately resulted in a

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remand to the trial court to arrest judgment on the attempted robbery conviction, but otherwise left the sentences undisturbed.

Following the U.S. Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), the defendant filed an MAR challenging his sentence of life without parole. The state initially requested a stay, arguing that it had not yet been decided whether *Miller* applied retroactively. Once that issue was resolved by *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the state agreed that the defendant was entitled to a resentencing hearing. The trial court granted the defendant's MAR and ordered a new sentencing hearing for the purpose of resentencing the defendant on the murder and arresting judgment on either the kidnapping or attempted robbery conviction in accordance with the prior appellate decisions.

Since the defendant's first-degree murder conviction was based on felony murder, there was no dispute that the defendant should be resentenced to life with the possibility of parole for that offense, pursuant to G.S. 15A-1340.19B(a). The contested issue at the hearing was whether that life sentence should also be ordered to run concurrently with the kidnapping sentence. After hearing arguments from the state and defense, the trial court ordered that the sentences remain consecutive. The defendant's consecutive sentences for the two armed robbery convictions were not altered by the order.

The defendant appealed, arguing that the trial court erred by ordering consecutive sentences on the murder and kidnapping convictions, and also by failing to consider the two robbery convictions at the resentencing. The appellate court rejected both arguments. After reviewing the *Miller* decision and the responsive statutory changes, the court explained that the sentencing judge retains the discretion to order either consecutive or concurrent sentences pursuant G.S. 15A-1354, and the record in this case demonstrated that the judge "duly exercised that discretion by considering all facts presented at the resentencing hearing in reaching its decision." Additionally, the appellate court held that the defendant failed to preserve the issue of whether the armed robbery sentences should have been included in the resentencing, based on defense counsel's statements at the resentencing hearing conceding that they were not, as well as the defendant's failure to include that issue in the notice of appeal. However, even if the issue had been preserved, the court held that the robbery sentences were properly excluded from the resentencing because they arose from a separate transaction. When a juvenile offender is awarded a resentencing under *Miller*, "the juvenile is only entitled to be resentenced on his murder conviction (i.e., the conviction for which he received mandatory LWOP), and is not entitled to be resentenced for unrelated convictions which arose out of a different transaction."

The defendant next argued that he received ineffective assistance of counsel, based on his attorney's acknowledgement at the hearing that the two armed robbery convictions were unrelated and not before the court for resentencing. The appellate court held that the defendant's claim failed under both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984). First, defense counsel's performance was not deficient because the argument that he purportedly should have raised (that the robbery convictions could also be included in the resentencing) "was, at best, resting on unsettled law, and at worst, meritless" as demonstrated by the appellate court's rejection of the argument above. Second, the defendant likewise failed

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to demonstrate that he was prejudiced by this alleged failure. Given that the trial court declined to consolidate the two sentences that were before it, there was only a “highly remote possibility” that the court would have consolidated the other sentences, even if that option had been presented.

Finally, the defendant argued that his multiple consecutive sentences constituted a *de facto* sentence of life without parole in violation of the Eighth Amendment. Noting that there have been conflicting decisions on that issue at the Court of Appeals, and that the North Carolina Supreme Court recently issued a stay in *State v. Kelliher*, 854 S.E.2d 586 (N.C. 2021) pending discretionary review, the appellate court declined to rule on that argument at this time; instead, the court dismissed the claim without prejudice, allowing it to be raised on a subsequent MAR after *Kelliher* is decided, if warranted.

Judge Arrowood concurred with the majority in part, but dissented as to ineffective assistance of counsel and would have held that the trial court did have the authority to resentence on the robberies because the sentences were all imposed at the same time, and therefore trial counsel was deficient in failing to advance that argument at the hearing and there was a reasonable probability that the defendant suffered prejudice as a result.

Case remanded for new sentencing hearing where it was unclear from the record which felony convictions were counted for prior record points; the defendant’s stipulation to the worksheet could not establish substantial similarity of out-of-state convictions.

State v. Bunting, __ N.C. App. __, 2021–NCCOA–532 (Oct. 5, 2021)

The defendant was convicted at a jury trial of three felony drug charges for the possession, sale, and delivery of heroin, and pleaded guilty to attaining habitual felon status. The defendant stipulated to a sentencing worksheet that indicated a total of 12 record points, giving the defendant a prior record level IV for sentencing. The trial court found mitigating factors and sentenced the defendant to a term of 80 to 108 months.

The defendant argued on appeal that there was insufficient evidence in the record to support the determination that he had a level IV prior record with 12 points, and the appellate court agreed. The sentencing worksheet included several felony convictions that were used to establish defendant’s habitual felon status, along with a number of prior convictions from out-of-state, although most of those convictions were marked out. Next to the felony convictions was a notation indicating 18 points, but the total for this section of the worksheet was listed as 14, which was then crossed out and replaced by a 10 (plus 2 points for the defendant’s misdemeanor convictions). The appellate court agreed with the defendant that it was unclear from the record which felony convictions the trial court relied on in reaching this total. Moreover, in order to reach a total of 12 points, the trial court must have either found that one or more of the out-of-state convictions was substantially similar to a North Carolina offense, or included one or more of the felonies that were used to establish the habitual felon status, neither of which was permitted. The court disagreed with the state’s argument that the defendant’s stipulation was sufficient to support the record level determination, distinguishing

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this case from *State v. Arrington*, 371 N.C. 518 (2018), where the stipulations were limited to questions of fact. A defendant may stipulate to the existence of a prior conviction and whether or not it is a felony, but he may not stipulate that an out-of-state conviction is substantially similar to a North Carolina offense; that is a legal determination which must be made by the trial court based on a preponderance of the evidence standard, and there was no such showing or finding made in this case.

The case was remanded for a new sentencing hearing. The court noted that the prior worksheet may serve as evidence at that hearing of the defendant's stipulation to the existence of the prior convictions, but the state must meet its burden of establishing the substantial similarity of any out-of-state convictions. Since the case was remanded for a new sentencing hearing, the court did not reach the defendant's remaining arguments as to whether he received ineffective assistance of counsel at sentencing, or whether the trial court committed prejudicial error by miscalculating his record.

(1) Sufficient evidence supported the defendant's identity as the perpetrator; (2) Defendant was not entitled to an opportunity to be heard on attorney fees where the fee was awarded as a condition of probation and not as a civil judgment

State v. Gibson, ___ N.C. App. ___, 2021-NCCOA-308 (July 6, 2021)

The defendant attempted to cash a forged check at a bank in Burke County. He submitted his driver's license and social security card along with the check through the tube system at the bank's drive-through. The bank teller handling the transaction became suspicious upon seeing the check and contacted the account owner. The account owner informed the bank employee that she had not authorized the check, did not know the defendant, and that the check had been recently taken from her mailbox. The defendant left the scene without recovering his documents and was later indicted for uttering a forged instrument. He was convicted at trial and appealed.

(1) Sufficient evidence existed for the jury to determine that the defendant was the perpetrator. The State introduced the defendant's driver's license and social security card, which had been left with the bank teller. A detective established the chain of custody of those items from the bank teller to the police. The bank teller testified that the defendant was the person who initially passed those documents to at the bank window, and that he verified at the time that the defendant was the person on the license. In the light most favorable to the State, this was sufficient evidence to show that the defendant was the person responsible for the crime.

(2) The defendant's attorney testified that he had 28 hours in the case, and the trial judge awarded attorney fees as a condition of probation in the amount of \$1,680.00. The defendant complained that he was not provided an opportunity to be heard on the award. Because the attorney fees were ordered as a condition of probation and not as a civil judgment, the defendant was not entitled to be heard. "[T]his Court has only required notice and an opportunity to be heard when the court has imposed a civil judgment against an indigent defendant for attorney fees pursuant to [G.S. 7A-]455(b)." *Gibson* Slip op. at 10 (citing *State v.*

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Jacobs, 172 N.C. App. 220 (2005) and *State v. Friend*, 257 N.C. App. 516 (2018)). G.S. 15A-1343(b)(10) authorizes payment of attorney fees as a condition of probation, and the trial court correctly calculated the rate for appointed attorney fees for the class of offense (\$60 x 28 hours) to arrive at the award. Because the award was authorized as a matter of probation and no civil judgment was involved, the award would only be reversed for an abuse of discretion. Finding none, the award of attorney fees was affirmed. Judges Dietz and Collins concurred.

The state was not required to present evidence at probation violation hearing that the defendant absconded since the defendant admitted to the willful violation; judgment remanded for correction of clerical errors.

State v. Brown, __ N.C. App. __, 2021–NCCOA–531 (Oct. 5, 2021)

The defendant in this case was on supervised probation for a conviction of possession with intent to sell or deliver methamphetamine. The defendant’s probation officer filed a violation report, alleging that the defendant had absconded from supervision and committed several other violations. The defendant waived counsel and testified at the hearing held on the violation; he admitted to absconding and committing the other violations, but also maintained that he had given his current address to his probation officer. The trial court found that the defendant had absconded and committed the other alleged violations, revoked his probation, and activated his sentence. The defendant filed a handwritten notice of appeal.

The appellate court first held that the notice of appeal was defective, but granted discretionary review and addressed the merits. The court rejected the defendant’s argument that the state presented insufficient evidence of absconding, because the defendant admitted to it in his testimony and thereby waived the requirement that the state present sufficient evidence of the violation. Citing *State v. Sellers*, 185 N.C. App. 726 (2007), the court held that “when a defendant admits to willfully violating a condition of his or her probation in court, the State does not need to present evidence to support the violations.” Defendant’s arguments that he did not understand the legal definition of absconding, had provided his probation officer with an address, and that the trial court should have conducted a more thorough examination of his admission, were unavailing given that the defendant “unequivocally and repeatedly admitted that he had absconded.” The court affirmed the revocation based on absconding, but remanded the judgment to correct three clerical errors regarding the name of the underlying offense of conviction, the total number of alleged violations, and an incorrect indication on the judgment form that the other violations besides absconding would also support revocation. The latter was deemed a clerical error because the transcript clearly indicated that the trial court’s revocation order was properly based only on the absconding violation, in accordance with G.S. 15A-1344(d2).

A Watauga County trial court lacked jurisdiction to revoke the defendant’s probation imposed in Lincoln and Catawba counties

State v. Ward, __ N.C. App. __, 2021–NCCOA–274 (June 15, 2021)

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A Watauga County trial court lacked jurisdiction to revoke the defendant's probation imposed in two separate cases in other counties, one probationary sentence imposed in Lincoln County and the other in Catawba County. As to the Lincoln County case, the State failed to meet its burden to show that the defendant was properly being supervised in Watauga County as there was no evidence that the probation was imposed in Watauga County, that the defendant violated probation imposed in the Lincoln case while she was in Watauga, or that the defendant resided in Watauga County at any relevant time. The State failed to meet its burden to show the same with respect to the Catawba County case.

(1) Probation could not be revoked for use of controlled substances, but it could be revoked for commission of a new criminal offense; and (2) the case was remanded for determination of whether good cause existed for not upholding defendant's statutory confrontation rights at the revocation hearing

State v. Hemingway, ___ N.C. App. ___, 2021-NCCOA-352 (July 20, 2021)

The defendant was on supervised probation for a conviction of possession with intent to sell or deliver marijuana, and the state alleged that he violated his probation by testing positive for cocaine and committing a new criminal offense. At a hearing held on the violation, the defendant's probation officer testified about the positive drug screen, and a police officer testified about the alleged new criminal activity. Officers used a confidential informant to conduct two controlled buys of a white powdery substance from the defendant, and then obtained a search warrant for his home where they discovered cash and additional drugs, resulting in new criminal charges against the defendant. The informant did not testify at the probation hearing. At the conclusion of the hearing, the trial court revoked the defendant's probation and the defendant appealed.

The trial court's oral pronouncement only indicated that the revocation was based on the commission of a new criminal offense, but the written findings indicated that the revocation was based on both allegations, so per case precedent the written order was deemed controlling on appeal. The appellate court agreed that pursuant to the Justice Reinvestment Act, the defendant's probation could not be revoked for using cocaine; instead, the trial court was only authorized to modify his conditions of probation or impose a 90-day CRV, so the order of revocation based on this allegation was reversed. But the state presented sufficient evidence at the hearing that the defendant also committed a new criminal offense by possessing and selling crack cocaine, which would support revoking the defendant's probation.

However, rather than affirming the trial court's order, the appellate court remanded the matter to determine whether the trial court properly exercised its discretion under G.S. 15A-1345(e), which provides that "the probationer may [...] confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." (Since this was a probation revocation hearing, only the statutory confrontation right was at issue, rather than the confrontation rights under the Sixth Amendment.) The confidential informant did not testify at the hearing, and the defense objected to the admission of her hearsay statements. The trial court overruled those objections based on "the nature of these proceedings," and the appellate

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court held that it was unclear whether that ruling reflected an exercise of discretion and finding of good cause. The court distinguished this case from *State v. Jones*, 269 N.C. App. 440 (2020), where it had previously held that a failure to find good cause was not reversible error, because in *Jones* the defendant did not challenge the testimony on this basis and did not request findings of good cause as to why confrontation should not be allowed, so no findings were required.

Judge Tyson concurred in part, finding that the defendant waived his statutory confrontation objection and failed to meet his burden of showing prejudice, and the trial court did not err in revoking the defendant's probation.

The superior court lacked jurisdiction to hear the defendant's appeal where the defendant waived his revocation hearing

State v. Flanagan, ___ N.C. App. ___, 2021-NCCOA-456 (Sept. 7, 2021)

On July 19, August 24, and October 23, 2018, the defendant plead guilty to several charges. On each of these dates, the trial court suspended the sentences for twelve months of supervised probation and other special conditions of probation.

Between December 7, 2018 and November 22, 2019, the defendant engaged in numerous acts which prompted his probation officer to file violation reports. On December 2, 2019, the defendant appeared in district court for a hearing on the January 18, 2019 and April 4, 2019 violation reports. While in district court, the defendant waived his violation hearing and admitted he violated the conditions of his probation. The district court revoked the defendant's probation and activated the sentences in his misdemeanor cases. The defendant gave notice of appeal to the superior court.

On December 23, 2019, the probation officer filed violation reports in superior court. At a February 5, 2020 hearing, the defendant admitted to willfully violating his probation. The superior court revoked the defendant's probation and activated his suspended sentences in his remaining misdemeanor and felony cases. The defendant appealed.

The Court of Appeals held that the superior court did not have jurisdiction to hear the defendant's appeal from district court. In reaching this conclusion, the Court cited G.S. 15A-1347(b), which states "If a defendant waives a revocation hearing, the finding of a violation of probation, activation of sentence, or imposition of special probation may not be appealed to the superior court." The Court vacated the judgment of the superior court and reinstated the judgment of the district court.

Over a dissent, Court of Appeals finds condition of probation mandating the defendant to have no contact with the custodian of his children proper despite child custody order authorizing visitation

State v. Medlin, ___ N.C. App. ___, 2021-NCCOA-313 (July 6, 2021), *temp. stay allowed*, ___ N.C. ___, 859 S.E.2d 630 (July 15, 2021)

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The defendant was living in a home owned by his girlfriend's mother. He and his girlfriend had three children living with the girlfriend's mother. The defendant exercised limited visitation with the children at the mother's home pursuant to a child custody order. The mother entrusted a box of jewelry and valuable coins to the defendant, requesting that he store it in a safe within the home. Much of the property from the box was later discovered to be missing or to have been replaced with fake items, with some items having been pawned by the defendant at a local store. The defendant was ultimately convicted at trial of obtaining property by false pretense.

At sentencing, the court ordered that the defendant have no contact with the girlfriend's mother as a special condition of probation. The defendant challenged that condition on appeal. He argued it conflicted with the child custody and visitation order and was an abuse of discretion. A majority of the Court of Appeals disagreed. Noting that the child custody order was not before the court and was unaffected by this decision, the majority found other avenues to exercise visitation were available to the defendant—a third party could be utilized, or the mother could contact her daughter or the defendant himself to arrange for visitation. The condition of probation only prohibited the defendant from contacting the mother. This condition was reasonably related to the "protection of the victim, the defendant's rehabilitation, and his compliance with probation." *Medlin* Slip op. at 8. The condition was therefore not an abuse of discretion. Any constitutional challenge to the probationary term was not raised at the trial level and was deemed waived on appeal.

Judge Wood dissented. She would have found that the no contact condition was not reasonably related to the defendant's crime or rehabilitation and would have vacated it as an abuse of discretion.

Sex Offenders

(1) In light of overwhelming evidence of the defendant's guilt, the trial court did not plainly err in admitting prior act testimony; (2) Convictions under prior versions of the rape and sexual offense statutes were still reportable convictions; (3) The trial court erred by ordering satellite-based monitoring without a hearing

State v. Mack, ___ N.C. App. ___, 2021-NCCOA-215 (May 18, 2021)

In this Cumberland County case, the defendant was convicted by a jury of second-degree rape and second-degree sexual offense against a victim named Tamara. The offenses were committed in 2011, but not successfully investigated until a DNA database match in 2017. During the trial, the trial judge allowed testimony by another woman, Kesha, who alleged that the defendant had previously raped her in 2009, for the purpose of proving the identity of the assailant in Tamara's case. (1) The defendant argued on appeal that the trial court erred in admitting the prior act testimony from Kesha under N.C. R. Evid. 404(b). Reviewing for plain error, the Court of Appeals concluded that the overwhelming evidence of the defendant's identity and guilt made it improbable that the jury would have reached a different result even if the evidence had been admitted in error—as it may have been given that the defendant's

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identity was not necessarily in issue in the case (he did not claim an alibi), and the circumstances of the two rapes were not particularly similar.

(2) The defendant also argued that the trial court erred by finding that his convictions under G.S. 14-27.3 and G.S. 14-27.5, the former statutes for second-degree rape and second-degree sexual offense, required sex offender registration, because those former statutes are not specifically listed in the current list of reportable offenses. Notwithstanding the State's lack of a compelling argument on appeal, the Court of Appeals on its own found the effective date provision in the 2015 recodification act, which said that prosecutions for offenses committed before December 1, 2015 remain subject to the laws that would otherwise be applicable to those offenses, including the list of reportable convictions in the former version of G.S. 14-208.6(5). The trial court therefore did not err in ordering the defendant to register.

(3) Finally, the defendant argued that the trial court erred by ordering him to enroll in satellite-based monitoring for life without conducting a full determination hearing. The Court of Appeals agreed. The State specifically elected not to proceed with the hearing during the sentencing phase, and the trial court thus erred by ordering SBM. The Court of Appeals vacated the SBM orders and remanded the issue for hearing.

Order imposing lifetime satellite-based monitoring based on a defendant's status as an aggravated offender complies with the Fourth Amendment and Article 1, Section 20 of the North Carolina Constitution

State v. Hilton, ___ N.C. ___, 2021-NCSC-115 (Sept. 24, 2021)

In this case involving the trial court's imposition of lifetime satellite-based monitoring (SBM) following the defendant's conviction for an aggravated sex offense, the North Carolina Supreme Court held that the order imposing lifetime SBM effected a reasonable search under the Fourth Amendment and did not constitute a "general warrant" in violation of Article 1, Section 20 of the North Carolina Constitution. The Supreme Court thus reinstated the trial court's order, modifying and affirming the portion of the Court of Appeals' decision that upheld the imposition of SBM during post-release supervision, and reversing the portion of the decision that held the imposition of post-release SBM to be an unreasonable search.

The defendant was convicted of first-degree statutory rape and first-degree statutory sex offense in 2007. He was released from imprisonment in 2017 and placed on post-release supervision for five years. He was prohibited from leaving Catawba County without first obtaining approval from his probation officer. He nevertheless traveled to Caldwell County on several occasions without that permission. While there, he sexually assaulted his minor niece. After the defendant was charged with indecent liberties based on that assault (but before he was convicted), the trial court held a hearing to determine whether the defendant should be required to enroll in SBM based on his 2007 convictions. The trial court ordered lifetime SBM based on its determination that the defendant had been convicted of an aggravated offense. The defendant appealed. A divided Court of Appeals upheld the imposition of SBM during the defendant's post-release supervision as reasonable and thus constitutionally permissible but

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struck down as unreasonable the trial court's imposition of SBM for any period beyond his post-release supervision. The State appealed.

The Supreme Court reinstated the trial court's order, modifying and affirming the portion of the Court of Appeals' decision that upheld the imposition of SBM during post-release supervision, and reversing the portion of the decision that held the imposition of post-release SBM to be an unreasonable search.

The Court reasoned that *State v. Grady*, 372 N.C. 509 (2019) (*Grady III*), which held that it was unconstitutional to impose mandatory lifetime SBM for individuals no longer under State supervision based solely on their status as recidivists left unanswered the question of whether lifetime SBM was permissible for aggravated offenders. To resolve this issue, the Court applied the balancing test set forth in *Grady v. North Carolina (Grady I)*, 575 U.S. 306 (2015) (*per curiam*) (holding that North Carolina's SBM program effects a Fourth Amendment search). The Court determined that the State's interest in protecting the public—especially children—from aggravated offenders is paramount. Citing authority that SBM helps apprehend offenders and studies demonstrating that SBM reduces recidivism, the court concluded that the SBM program furthers that interest by deterring recidivism and helping law enforcement agencies solve crimes. The Court stated that its recognition of SBM's efficacy eliminated the need for the State to prove efficacy on an individualized basis. The Court then considered the scope of the privacy interest involved, determining that an aggravated offender has a diminished expectation of privacy both during and after any period of post-release supervision. The Court noted that sex offenders may be subject to many lifetime restrictions, including the ability to possess firearms, participate in certain occupations, registration requirements, and limitations on where they may be present and reside. Lastly, the Court concluded that lifetime SBM causes only a limited intrusion into that diminished privacy expectation. Balancing these factors, the Court concluded that the government interest outweighs the intrusion upon an aggravated offender's diminished privacy interests. Thus, the Court held that a search effected by the imposition of lifetime SBM on the category of aggravated offenders is reasonable under the Fourth Amendment.

The Court further held that because the SBM program provides a particularized statutory procedure for imposing SBM, including a judicial hearing where the State must demonstrate that the defendant qualifies for SBM, and for effecting an SBM search, the SBM program does not violate the prohibition against general warrants in Article 1, Section 20 of the North Carolina Constitution.

Justice Earls, joined by Justice Hudson and Ervin, dissented. Justice Earls criticized the majority for its failure to account for 2021 amendments to the SBM statute “that likely obviate some of the constitutional issues” on appeal. *Id.* ¶ 43. Specifically, she reasoned that though the defendant currently is subject to lifetime SBM, he will not, as of December 1, 2021, be required to enroll in SBM for more than ten years. She also wrote to express her view that the majority's decision could not be reconciled with the Fourth Amendment or with the Court's holding in *Grady III*.

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Defendant was entitled to relief under *Grady III* where the sole basis of SBM was defendant's status as a recidivist; trial court lacked jurisdiction to consider SBM at purported "review hearing" where no statute authorized such action and the State failed to file a motion or pleading in the case

State v. Billings, ___ N.C. App. ___, 2021-NCCOA-306 (July 6, 2021)

In this Iredell County case, the defendant was convicted of multiple counts of indecent liberties with a minor. He was ordered to enroll in satellite-based monitoring ("SBM") for life as a recidivist offender. The North Carolina Supreme Court later decided *State v. Grady* ("*Grady III*"), 372 N.C. 509, 831 S.E.2d 542 (2019) (holding SBM unconstitutional as applied to recidivist offenders). A "review hearing" of defendant's SBM enrollment was conducted following that decision. No motion or other pleading was filed by the State for the hearing. The defendant appeared pro se. The State presented a Static-99 risk assessment and recounted the defendant's criminal record. The trial court ordered that the defendant remain enrolled in the SBM program for life, and the defendant appealed.

No basis for SBM existed in this case other than the defendant's status as a recidivist. *Grady III* squarely held that one's status as a recidivist alone is insufficient to justify SBM. The State argued that the defendant had been provided an opportunity to seek removal from the program at the review hearing, and that the trial court's order was supported by the evidence. According to the State, the review process rendered the defendant ineligible for relief under *Grady III*. The court disagreed:

The State did not invoke the jurisdiction of the trial court for the [review] hearing during which Defendant was ostensibly provided with the post hoc process that the State claims disqualifies him from relief under *Grady III*. The State cannot avoid *Grady III* . . . by devising a procedure that itself violates Defendant's rights. Billings Slip op. at 9.

While G.S. 14-208.40A permits the trial court to consider SBM at sentencing, and G.S. 14-208.40B permits a "bring-back" hearing where there has been no prior determination of SBM eligibility, neither of these statutes applied to the defendant's situation. Further, case law is clear that the State may not seek reconsideration of SBM once the issue has been decided. See *State v. Clayton*, 206 N.C. App. 301 (2010) (imposition of SBM at probation violation was improper when issue had already been decided against the State at SBM hearing). Without a new reportable conviction, there was no jurisdictional basis for the purported SBM review hearing. The lack of a written motion or pleading also acted to deprive the trial court of jurisdiction. The SBM order was therefore vacated without prejudice, allowing the State to properly seek a SBM order if it desires.

Judge Tyson wrote separately to concur in result only. He noted that any discussion in the majority opinion beyond its holding that the trial court lacked jurisdiction was dicta.

Criminal Procedure

The Court of Appeals abused its discretion by allowing the defendant's petition for writ of certiorari and invoking Rule 2 to review the satellite-based monitoring orders issued by the trial court

State v. Ricks, ___ N.C. ___, 2021-NCSC-116 (Sept. 24, 2021)

In this case involving the trial court's imposition of lifetime satellite-based monitoring (SBM) following the defendant's conviction for statutory rape of a child by an adult and other sex offenses, the North Carolina Supreme Court held that the Court of Appeals erred by allowing the defendant's petition for writ of certiorari and invoking Rule 2 of the Rules of Appellate Procedure to review the defendant's unpreserved challenge to the SBM orders.

The defendant was convicted of three counts of statutory rape of a child by an adult, two counts of statutory sex offense with a child, and three counts of taking indecent liberties with a child. The trial court held an SBM hearing and determined that all of the defendant's offenses were sexually violent and involved the physical, mental, or sexual abuse of a minor. The trial court also found that the statutory rape and statutory sex offense convictions were aggravated offenses. For these convictions, the trial court ordered lifetime SBM pursuant to G.S. 14-208.40A(c). The defendant did not object to the imposition of SBM or file a written notice of appeal from the SBM orders; nevertheless, he later petitioned the Court of Appeals for certiorari review. A divided Court of Appeals granted certiorari and invoked Rule 2. It then held that the trial court failed to conduct a reasonableness hearing pursuant to *State v. Grady*, 372 N.C. 509 (2019), and vacated the SBM orders.

The State appealed, and the North Carolina Supreme Court reversed, concluding that the Court of Appeals abused its discretion in granting review as the defendant's petition failed to demonstrate the merit required for certiorari review and the defendant failed to demonstrate manifest injustice sufficient to invoke Rule 2. As to the merits, the Court reasoned that the trial court appropriately followed G.S. 14-208.40A(c) by imposing lifetime SBM because of the defendant's status as an aggravated offender and that "[a]bsent an objection, the trial court was under no constitutional requirement to inquire into the reasonableness of imposing SBM." The Court further concluded that the defendant was no different from other defendants who failed to preserve constitutional arguments and that the Court of Appeals therefore should have declined to invoke Rule 2.

Justice Hudson, joined by Justices Ervin and Earls, dissented. Justice Hudson expressed her view that the Court of Appeals did not abuse its discretion in granting certiorari and invoking Rule 2, reasoning that at the time of the Court of Appeals' decision the law arguably required that the State present evidence of reasonableness and that the trial court make findings of reasonableness to order lifetime SBM for defendants classified as aggravated offenders.

SBM order entered without taking evidence or conducting a hearing was improper; divided court invokes its discretionary authority to review and reverse without prejudice

State v. Barnes, ___ N.C. App. ___, 2021-NCCOA-304 (July 6, 2021)

Criminal Procedure

The defendant was convicted of first-degree rape, kidnapping, and sex offense in Alamance County and sentenced to a minimum 420 months. The trial court ordered lifetime satellite-based monitoring (“SBM”), but no *Grady* hearing was conducted. The defendant sought certiorari review after failing to give proper notice of appeal. The court granted the petition. The defendant further sought to suspend the rules of appellate procedure to allow review of the unpreserved claim. Noting other cases where Rule 2 of the Rules of Appellate Procedure had been invoked to review claims on similar facts, the Court of Appeals allowed review.

Despite ample guidance from case law regarding the requirements for imposition of SBM, the State did not offer any evidence and the trial court did not conduct any hearing on the issue. The order was therefore vacated. Although the State is prohibited from trying again following an unsuccessful attempt to prove the appropriateness of SBM, here, it had no such opportunity given the lack of a hearing on the issue. The order was therefore vacated without prejudice, allowing the State to seek an SBM order if it desires.

Judge Tyson dissented and would not have allowed review of the unpreserved claim, calling the defendant’s appellate argument “frivolous.” *Barnes* Slip op. at 17 (Tyson, J., dissenting).

The trial court did not plainly err with respect to an *Allen* charge and the defendant received statutory IAC during SBM proceedings

State v. Gordon, ___ N.C. App. ___, 2021-NCCOA-273 (June 15, 2021)

In this sex offense and indecent liberties case where the defendant was ordered to enroll in lifetime SBM, the trial court did not plainly err with respect to an *Allen* charge, the defendant did not preserve his argument related to SBM, and the defendant received statutory ineffective assistance of counsel during the SBM proceedings. Approximately one hour after beginning deliberations, the jury sent a question to the court asking for clarification as to whether they must have unanimous agreement to render a guilty verdict and whether a lack of unanimity would require that they return a not guilty verdict. In response and without objection from either party, the trial court responded to the jury’s question with instructions derived from G.S. 15A-1235(a). The court of appeals rejected the defendant’s argument that the trial court plainly erred by omitting instructions from G.S. 15A-1235(b), explaining that the jury’s question asked for clarification on the issue of unanimity and did not clearly indicate that the jury was deadlocked, in disagreement, or at an impasse. As such, the trial court did not err by reciting the unanimity instructions in G.S. 15A-1235(a) without providing the additional instructions in subsection (b).

As to SBM, the court first found that the defendant failed to preserve a Fourth Amendment challenge to the lifetime SBM order by failing to make a constitutional objection during the sentencing proceeding where SBM was addressed, and further declined to invoke Rule 2 to reach the issue. The court went on to agree with the defendant’s alternative argument that he received statutory ineffective assistance of counsel under G.S. 7A-451(a)(18). Likening the case to *State v. Spinks*, ___ N.C. App. ___, 2021-NCCOA-218 (2021), the court found that counsel was ineffective by failing to object to SBM enrollment or file a notice of appeal from the SBM order where the State offered no evidence of the reasonableness of lifetime SBM.

Criminal Procedure

Speedy Trial & Related Issues

(1) There was no speedy trial violation despite a seven-year delay between the defendant's arrest and trial; (2) The trial court properly denied the defendant's motion for a mistrial based on juror misconduct; (3) The defendant received ineffective assistance of counsel at his satellite-based monitoring determination hearing

State v. Spinks, ___ N.C. App. ___, 2021-NCCOA-218 (May 18, 2021)

In this Guilford County case, the defendant was convicted by a jury of indecent liberties with a child in May 2019 for a 2011 incident involving his daughter's 6-year-old friend. He was sentenced to 28-43 months in prison and ordered to enroll in satellite-based monitoring for life.

(1) The defendant argued on appeal that his right to a speedy trial was violated by the seven-year delay between his arrest and trial. Applying the four-factor test from *Barker v. Wingo*, 407 U.S. 514 (1972) (the length of delay; the reason for the delay; the defendant's assertion of his right; and prejudice to the defendant), the Court of Appeals concluded that there was no speedy trial violation. The seven-year delay undoubtedly triggered the need to continue the *Barker* inquiry. As to the second factor, however, the record showed that the vast majority of the delay was attributable to the defendant's motions to remove counsel—he had four lawyers before eventually proceeding pro se—or to a good faith delay on the part of the State resulting from the serious illness of the lead investigator. As to the third factor, the defendant did repeatedly, albeit improperly, assert his right to a speedy trial, but that alone, the Court of Appeals said, did not entitle him to relief. As to the fourth factor, the defendant asserted two ways he was prejudiced by the delay in his trial: that he hadn't seen his daughter since his arrest, and that it was difficult to contact witnesses. The Court rejected the defendant's assertion regarding his daughter, because the defendant was also incarcerated on other charges during the pendency of the charges at issue in this case, and he would therefore have been unable to see his daughter regardless. The Court likewise rejected the defendant's assertion regarding witness availability, concluding that the defendant had merely asserted that the witnesses were "hard to get up with," but not shown that they were actually unavailable. Weighing all the factors, the Court found no speedy trial violation.

(2) The defendant also argued that the trial court erred by denying his motion for a mistrial based on a juror's contact with his mother during jury deliberations. The Court rejected that argument, concluding that the trial court properly determined through a thorough examination of the juror that the juror had not been improperly influenced by his conversation with his mother.

(3) Finally, the defendant argued that the trial court erred in imposing lifetime SBM because the State failed to establish that SBM was a reasonable search under the Fourth Amendment. The Court of Appeals declined to invoke Rule 2 of the Rules of Appellate Procedure to consider the merits of the argument, which was not raised in the trial court. As to the defendant's alternative argument that his lawyer provided ineffective assistance by failing to object to SBM in the trial court, the Court of Appeals concluded that a *constitutional* claim of ineffective assistance was unavailable under earlier precedent, but a *statutory* claim was available under

Criminal Procedure

G.S. 7A-451(a)(18), because the statutory right to counsel includes the right to effective counsel. Applying the requisite analytical framework, the Court held that the defendant's lawyer's performance was deficient, and that the deficiency prejudiced the defendant. The Court therefore reversed the SBM order and remanded the matter for a hearing on the reasonableness of SBM.

Verdict

The jury's verdict convicting the defendant of first-degree forcible rape and second-degree forcible sex offense was at most inconsistent rather than contradictory and there was sufficient evidence of each offense

State v. Brake, ___ N.C. App. ___, 2021-NCCOA-496 (Sept. 21, 2021)

In this first-degree rape and second-degree sexual offense case, the trial court did not err in accepting the jury's verdicts finding the defendant guilty of both offenses despite the fact that first-degree rape requires a finding of infliction of serious personal injury while second-degree rape does not. Responding to the defendant's argument that if the jury determined that he had inflicted serious injury on the victim it should have convicted him of first-degree forcible sexual offense rather than the lesser included offense of second-degree forcible sexual offense, the court explained that the verdicts were at most inconsistent rather than mutually exclusive and that there was sufficient evidence of each offense. The court went on to reason that it was possible that the jury could have determined that the defendant's infliction of serious personal injury upon the victim was done to accomplish the forcible rape but not the forcible sex offense.

Evidence

Evidence

Relevancy--Rule 401

(1) The trial court properly excluded proffered evidence that another person committed the crime. (2) An alleged error in a photographic lineup did not constitute plain error when the defendant did not also object to the witness's in-court identification. (3) The prosecutor's statement at closing about a defendant's failure to produce alibi witnesses was not impermissible. (4) The State's objection to the defendant's closing argument referencing the defendant's current appearance was properly sustained. (5) Admission of the defendant's out-of-court statements did not give rise to a reasonable possibility that the jury would have reached a different result. (6) The short-form murder indictment was sufficient to confer jurisdiction on the court.

State v. Abbitt, ___ N.C. App. ___, 2021-NCCOA-403 (Aug. 3, 2021)

In this Rowan County case, two defendants, Sindy Abbitt and Daniel Albarran, were convicted of first-degree murder on the basis of premeditation and deliberation and felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon after they entered a victim's apartment and shot her over a dispute about money. A witness to the shooting identified the defendants with certainty in photographic lineups, and cellular phone analysis conducted by the FBI showed the defendants were in locations near the victim on the night of the crime.

(1) The defendants argued on appeal that the trial court erred by excluding their proffered evidence that another person committed the crime. To be relevant, evidence that another person committed a crime must not only implicate another person, but also exculpate the defendant. The Court of Appeals agreed with the trial court's conclusion that the defendants' evidence did support an inference that another person (Ashley Phillips) may have been involved in some way, but it was not inconsistent with the direct evidence of either defendant's involvement in the actual shooting, and was therefore properly excluded.

(2) Defendant Albarran argued on appeal that the photographic array lineup used to identify him was unconstitutionally suggestive because the photograph of him was closer to his face than the other photos in the lineup, drawing attention to him. Albarran had filed a pretrial motion to suppress the lineup, but did not object to the witness's in-court identification during trial. Reviewing the issue for plain error, the Court of Appeals concluded that in light of the unobjected-to in-court identification, any alleged error in the photo lineup would not have impacted the jury's verdict. The defendant's argument was therefore overruled.

(3) Albarran argued that the trial court erred by overruling his objection to the prosecutor's statements during closing asking why the defendant Abbitt—who had filed a pretrial notice to assert an alibi defense—did not call certain witnesses to corroborate her whereabouts on the night of the crime. Albarran, who did not give notice of an alibi defense, claimed that the comment was an improper comment on his failure to present evidence. The Court of Appeals disagreed, concluding that the prosecutor's comment on Abbitt's failure to produce exculpatory evidence was not impermissible as applied to her and therefore were not improper.

Evidence

(4) Albarran argued that the trial court erred by sustaining the State's objections to defense counsel's statements during closing about Albarran's tattoos. Defense counsel reminded the jury during closing that the witness's description at the time of the offense made no mention of tattoos, and asked them to note the many tattoos they could see on him now. The Court of Appeals concluded that the trial court did not err in sustaining the objection where the defendant's appearance at the time of trial—more than two years after the crime—had no bearing on the witness's identification and description of the defendant on the night of the murder.

(5) Defendant Abbitt argued that her out-of-court statements to an officer that she had not been at the scene of the crime, that she had not seen the victim in years, and that she did not know Albarran were hearsay that was improperly placed into evidence as admissions. The Court of Appeals concluded that the statements were relevant and admissible under Rule 401, and that in any event admission of the statements did not give rise to a reasonable possibility that the jury would have reached a different result without the asserted error.

(6) Finally, the Court of Appeals rejected defendant Abbitt's argument that the short form murder indictment was insufficient to confer jurisdiction on the court, noting the Supreme Court of North Carolina's longstanding and consistent jurisprudence on that issue.

Crawford Issues & Confrontation Clause

Defendant failed to properly make or preserve statutory confrontation objection at probation violation hearing; state presented sufficient evidence of absconding.

State v. Thorne, __ N.C. App. __, 2021–NCCOA–534 (Oct. 5, 2021)

The defendant was placed on 36 months of supervised probation after pleading guilty to one count of conspiracy to obtain property by false pretenses. The defendant's probation officer subsequently filed a violation report alleging that the defendant had violated his probation by using illegal drugs, and an addendum alleging that the defendant had absconded from probation. At the violation hearing, the defendant admitted to using illegal drugs, but denied that he absconded. The state presented testimony at the violation hearing from a probation officer who was not involved in supervising the defendant, but read from another officer's notes regarding the defendant's alleged violations. The trial court found the defendant in violation, revoked his probation for absconding, and activated his suspended 10 to 21 month sentence. The defendant filed a *pro se* notice of appeal, which was defective, but the court granted his petition for *writ of certiorari* and addressed the merits.

On appeal, the defendant argued that his confrontation rights under G.S. 15A-1345(e) were violated when the trial court allowed another probation officer to testify from the supervising officer's notes, over the defendant's objection. However, at the hearing the defendant did not state that the objection was based on his statutory confrontation right, nor did he request that the supervising officer be present in court or subjected to cross-examination. The court held that, at most, it could be inferred that the defendant's objection was based on hearsay grounds or lack of personal knowledge. The court rejected the defendant's argument that the issue was

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preserved despite the absence of an objection because the trial court acted contrary to a statutory mandate, per *State v. Lawrence*, 352 N.C. 1 (2000). In this case, the trial court did not act contrary to the statute because the objection made at the hearing was insufficient to trigger the trial court's obligation to either permit cross-examination of the supervising officer or find good cause for disallowing confrontation. Therefore, the officer's testimony based on the notes in the file was permissible, and it established that the defendant left the probation office without authorization on the day he was to be tested for drugs, failed to report to his probation officer, did not respond to messages, was not found at his residence on more than one occasion, and could not be located for 22 days. Contrasting these facts with *State v. Williams*, 243 N.C. App. 198 (2015), in which the evidence only established that the probationer had committed the lesser violation of failing to allow his probation officer to visit him at reasonable times, the evidence here adequately showed that the defendant had absconded. The court therefore affirmed the revocation, but remanded the case for correction of a clerical error because the order erroneously indicated that both violations justified revocation, rather than only the absconding per G.S. 15A-1344(d2).

(1) Probation could not be revoked for use of controlled substances, but it could be revoked for commission of a new criminal offense; and (2) the case was remanded for determination of whether good cause existed for not upholding defendant's statutory confrontation rights at the revocation hearing

State v. Hemingway, ___ N.C. App. ___, 2021-NCCOA-352 (July 20, 2021)

The defendant was on supervised probation for a conviction of possession with intent to sell or deliver marijuana, and the state alleged that he violated his probation by testing positive for cocaine and committing a new criminal offense. At a hearing held on the violation, the defendant's probation officer testified about the positive drug screen, and a police officer testified about the alleged new criminal activity. Officers used a confidential informant to conduct two controlled buys of a white powdery substance from the defendant, and then obtained a search warrant for his home where they discovered cash and additional drugs, resulting in new criminal charges against the defendant. The informant did not testify at the probation hearing. At the conclusion of the hearing, the trial court revoked the defendant's probation and the defendant appealed.

The trial court's oral pronouncement only indicated that the revocation was based on the commission of a new criminal offense, but the written findings indicated that the revocation was based on both allegations, so per case precedent the written order was deemed controlling on appeal. The appellate court agreed that pursuant to the Justice Reinvestment Act, the defendant's probation could not be revoked for using cocaine; instead, the trial court was only authorized to modify his conditions of probation or impose a 90-day CRV, so the order of revocation based on this allegation was reversed. But the state presented sufficient evidence at the hearing that the defendant also committed a new criminal offense by possessing and selling crack cocaine, which would support revoking the defendant's probation.

Evidence

However, rather than affirming the trial court's order, the appellate court remanded the matter to determine whether the trial court properly exercised its discretion under G.S. 15A-1345(e), which provides that "the probationer may [...] confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." (Since this was a probation revocation hearing, only the statutory confrontation right was at issue, rather than the confrontation rights under the Sixth Amendment.) The confidential informant did not testify at the hearing, and the defense objected to the admission of her hearsay statements. The trial court overruled those objections based on "the nature of these proceedings," and the appellate court held that it was unclear whether that ruling reflected an exercise of discretion and finding of good cause. The court distinguished this case from *State v. Jones*, 269 N.C. App. 440 (2020), where it had previously held that a failure to find good cause was not reversible error, because in *Jones* the defendant did not challenge the testimony on this basis and did not request findings of good cause as to why confrontation should not be allowed, so no findings were required.

Judge Tyson concurred in part, finding that the defendant waived his statutory confrontation objection and failed to meet his burden of showing prejudice, and the trial court did not err in revoking the defendant's probation.

Prior Acts--404(b) Evidence

(1) Trial court did not commit plain error by admitting in defendant's first-degree murder trial evidence of a break-in the day before the murder in which the murder weapon was stolen; (2) Defendant failed to show that the jury instruction on recent possession, even if erroneous, had a probable impact on the jury's verdict

State v. Washington, ___ N.C. App. ___, 2021-NCCOA-219 (May 18, 2021)

In this Mecklenburg County case, the defendant was convicted of first-degree murder and possession of a firearm by a felon for shooting and killing Oren Reed. Reed's aunt found his body in a pool of blood inside the backdoor of his home around 5 p.m. on November 21, 2013. The doorframe for the backdoor was splintered, and glass and bullet shells were on the ground. The State introduced evidence at trial that the previous day someone had kicked in the side door to Chris Townsend's house, breaking the door frame, and had stolen a revolver and bullets. Other evidence showed that the stolen gun, found in defendant's possession when he was arrested, was used to fire 22 of the 23 spent cartridges at Reed's residence. An expert testified that two of the bullets recovered from Reed's body shared similar class and characteristics as bullets fired from this gun.

(1) On appeal, the defendant argued that the trial court committed plain error by admitting evidence of the break-in at the Townsend residence. The Court of Appeals rejected that argument, reasoning that the evidence was relevant because it tended to show how the defendant gained possession of the murder weapon. The evidence also was admissible under N.C. R. Evid. 404(b) as it showed the natural development of the facts and completed the story of the murder and because there were substantial similarities between the two incidents.

Evidence

(2) The defendant also argued on appeal that the trial court committed plain error by instructing the jury on the doctrine of recent possession, which allows a jury to infer that the possessor of recently stolen property stole the property. The defendant argued that this inference was not relevant to whether he broke into Reed's house and killed him and that it likely caused the jury to convict the defendant of felony-murder based on the break-in to Townsend's home. The Court of Appeals determined that, even presuming the trial court erred in instructing the jury that it could consider the doctrine of recent possession in deciding whether the defendant was guilty of first-degree murder, the defendant failed to show the instruction had a probable impact on the verdict. The Court reasoned that even if the recent possession instruction could have caused the jury to improperly convict the defendant of felony-murder, the instruction did not have a probable impact on first-degree murder verdict because the jury also found the defendant guilty based on malice, premeditation and deliberation.

(1) the trial court did not err by admitting Rule 404(b) evidence of the disappearance of a person the defendant had been previously convicted of murdering, (2) the defendant was not prejudiced by alleged improper remarks by the prosecution during closing argument, and (3) the trial court did not err by denying the defendant's motion to dismiss a first-degree murder charge for insufficient evidence of premeditation and deliberation

State v. Bradley, ___ N.C. App. ___, 2021-NCCOA-495 (Sept. 21, 2021)

In this first-degree murder case, (1) the trial court did not err by admitting under Rule 404(b) evidence of the disappearance of a person the defendant had been previously convicted of murdering, (2) the defendant was not prejudiced by alleged improper remarks by the prosecution during closing argument, and (3) the trial court did not err by denying the defendant's motion to dismiss the murder charge for insufficient evidence of premeditation and deliberation.

(1) At the defendant's murder trial for killing victim Tucker, the state introduced evidence concerning law enforcement investigation into the disappearance of victim Rippy, a woman the defendant had been previously convicted of murdering but whose body had never been found. Tucker's body was discovered during a search of property associated with the defendant by investigators who were looking for Rippy. The trial court admitted evidence concerning the investigation of Rippy's disappearance under Rule 404(b) to show the course of the investigation of Tucker's death, identity, motive, and modus operandi. On appeal, the defendant argued under the standard of plain error that the evidence concerning Rippy was not sufficiently similar and was so voluminous as to be more prejudicial than probative under Rule 403. The court first explained various ways in which the challenged evidence of Rippy's disappearance was introduced for a proper purpose under Rule 404(b), including that it helped provide a full picture of the course of the investigation of Tucker's death, related to the credibility of witnesses, and cast certain physical evidence in a probative light. The evidence concerning Rippy also was sufficiently similar to that concerning Tucker as both victims lived around Wilmington; were of the same sex; disappeared within nine months of each other; had

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legal, financial, and substance abuse problems; relied on the defendant for transportation; had relationships with the defendant; and were subjects of his sexual attention. Distinguishing *State v. Hembree*, 368 N.C. 2 (2015), the court further found that the trial court did not abuse its discretion in admitting the evidence under Rule 403, pointing to the trial court's deliberate weighing of its probative and prejudicial qualities and appropriate limiting instructions to the jury.

(2) The defendant made several arguments pertaining to alleged trial court errors during the prosecution's closing arguments. (a) Certain statements about the presence of Tucker's blood in the defendant's car were a reasonable inference from evidence introduced at trial, though no DNA samples were recoverable from sections of carpeting that had been shown through testing to contain human blood. (b) Statements that Rippy was deceased did not violate the trial court's limitation on the state's use of the defendant's conviction for her murder and were not made for an improper purpose. (c) The trial court cured improper statements suggesting that defendant bore the burden of proving his own innocence and was responsible for the inclusion of second-degree murder as a lesser-included offense on the verdict sheet, and did not err by denying the defendant's motion for a mistrial based upon those statements. (d) The trial court did not err by failing to intervene ex mero motu when the prosecution referred to "evil" during closing while displaying a poster that showed the Black defendant alongside the white victims. (e) The alleged improper remarks did not amount to cumulative prejudice.

(3) Viewing the evidence in the light most favorable to the State, there was substantial evidence of premeditation and deliberation to support the conviction of first-degree murder. The nature of Tucker's injuries from blunt force trauma suggested that the manner of her killing was brutal and thus indicative of premeditation and deliberation. Premeditation and deliberation also was suggested by evidence of postmortem concealment and undignified treatment of Tucker's body, as well as the defendant's efforts to destroy evidence of the murder.

Fifth Amendment (Self-Incrimination) Issues

A defendant does not forfeit their Fifth Amendment right to silence if they give notice of intent to offer an affirmative defense. The State may not preemptively impeach a defendant who has not testified.

State v. Shuler, ___ N.C. ___, 2021-NCSC-89 (Aug. 13, 2021)

The defendant was charged with felony trafficking in methamphetamine and misdemeanor simple possession of marijuana. Prior to trial, the defendant filed a notice of her intent to rely upon the affirmative defense of duress. At trial, the detective who was present at the scene testified for the State during its case-in-chief. Over defense counsel's objection, the State asked the detective if the defendant made "any statements" about another person when she handed over the substances in her possession, to which the detective responded in the negative.

The defense counsel asked for the court to excuse the jury and moved for a mistrial arguing that the State's questions had "solicited an answer highlighting [the defendant's] silence at the

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scene.” Slip op. at ¶ 6. After conducting a voir dire to determine the admissibility of the detective’s testimony, the trial court ultimately allowed the State to ask the question again when the jury returned. After the State’s case-in chief, the defendant took the witness stand to testify in her own defense. At the close of all the evidence, the trial court instructed the jury on the defense of duress, and the jury ultimately found the defendant guilty of both charges.

On appeal, the Court of Appeals unanimously found no error in the jury’s verdicts or in the judgment, concluding that because defendant gave notice of her intent to assert the affirmative defense of duress before she testified, the trial court did not err in admitting the detective’s testimony of the defendant’s silence during the State’s case-in-chief.

The Supreme Court granted review to determine whether the Court of Appeals erred by holding that a defendant who exercises their Fifth Amendment right to silence forfeits that right if they give notice of intent to offer an affirmative defense. The Court held that when the defendant gave pre-trial notice of her intent to invoke an affirmative defense under statute, she did not give up her Fifth Amendment right to remain silent or her Fifth Amendment right to not testify, and the State was not permitted to offer evidence to impeach her credibility when she had not testified. Here, at the time the State elicited the impeachment testimony from the detective, the defendant had not testified and retained her Fifth Amendment right not to do so. Thus, the Court held it was error to admit the detective’s testimony into evidence.

(1) Admission of improper lay-witness testimony did not prejudice the defendant. (2) The defendant’s right against self-incrimination was not violated by testimony that did not actually refer to the defendant’s post-arrest silence

State v. Malone-Bullock, ___ N.C. App. ___, 2021-NCCOA-406 (Aug. 3, 2021)

In this Wilson County case, the defendant was convicted after a jury trial of first-degree murder related to a dispute arising out of a card game. Though the defendant told the victim he was going to kill him, and though multiple witnesses saw the defendant shoot the victim, the defendant claimed for the first time at trial that another man, William Saxton, actually shot the victim. During the trial, a witness testified over the defendant’s objection that the defendant had driven to Mr. Saxton’s house after the card game because he knew Mr. Saxton had guns. Another witness testified over the defendant’s objection that he thought the defendant had tried to have him killed. (1) The defendant argued on appeal that both witnesses gave impermissible lay-witness opinions and that the trial court erred by admitting them. The Court of Appeals agreed. A lay witness may not speculate about another person’s intentions on a particular occasion, and each of the witnesses here did (that the defendant drove to Mr. Sexton’s house to get a gun, and that the defendant had set up another witness to be killed, respectively). In both instances, the court concluded, the witness was in no better position than the jurors to deduce the defendant’s intentions based on the evidence. Nevertheless, the court concluded that neither witness’s testimony prejudiced the defendant in light of the ample evidence against him.

(2) The defendant also argued on appeal that his right to not incriminate himself was violated when the trial court allowed the State to elicit testimony from a detective that the defendant

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did not give the same explanation of events at trial (that another man shot the victim) at any time before trial. The defendant argued that asking the officer why the defendant did not mention the other man earlier impermissibly referenced his post-arrest silence. The Court of Appeals disagreed, noting that the right to remain silent did not apply when the defendant did not actually remain silent; instead, he spoke to the detective, claimed that he did not kill the victim, and that he did not know who did. The State's questioning focused on the differences between the defendant's statement during the investigation (that he did not know who killed the victim) and his explanation at trial (that Mr. Saxton killed the victim) and was therefore permissible.

Hearsay

(1) Victim's statements regarding identity of attacker were admissible as excited utterances despite possible passage of time between attack and statements; (2) Sixth Amendment confrontation argument not raised during trial was waived on appeal notwithstanding pretrial motion; (3) No abuse of discretion or prejudicial error in admission of testimony identifying defendant on a jail phone call and interpreting the contents of the call

State v. Lowery, ___ N.C. App. ___, 2021-NCCOA-312 (July 6, 2021)

The victim in this Davie County murder case was a "neighborhood runner," running errands for people in general, and allegedly running drugs for the defendant. One afternoon, a friend of the victim was walking home and discovered the victim laying near railroad tracks. The victim told his friend, "Red beat me up." The defendant was known as "Red." Around an hour and a half passed before law enforcement was alerted. The first responding officer asked the victim what happened, and the defendant named "Carlos Lowery" and "Red" as the person responsible. The victim again repeated this information to a detective. An additional officer and an EMT on the scene overheard the victim name the defendant as the perpetrator, and the victim named the defendant once more to a detective in the ambulance. The victim did not survive, and the defendant was charged with first-degree murder and common law robbery.

The defendant filed a motion in limine to exclude the victim's statements to law enforcement and overheard by the EMT as hearsay and in violation of the defendant's confrontation and due process rights. The trial court denied the motion. It found that the statements fell within the excited utterance exception or were offered in corroboration and did not address the motion's constitutional grounds. At trial, the defendant made only general objections to the testimony regarding the victim's statements. The State also presented evidence of a recorded jail call between the defendant and a woman through a detective. The detective testified to her familiarity with the defendant's voice, as well as the jail phone system, and identified the voice on the call as the defendant's. The phone call was played for the jury, but the audio was of low quality. The detective was permitted to testify that the defendant stated on the call that he "got the cigarettes and the change, but not the phone." *Lowery* Slip op. at 6. Those specific items were among those listed as missing from the victim. The defendant was convicted of second-degree murder and appealed, arguing evidentiary and confrontation errors at trial.

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(1) The defendant argued evidence of the victim's statements to police and EMT identifying the defendant as his attacker was improperly admitted under the excited utterance exception. The exception provides that "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," are admissible. G.S. 8C-1, Rule 803(2) (2019). The defendant maintained that, because the time of the attack was unknown, it was error to conclude the defendant was still under the influence of the event at the time. Rejecting this argument, the court noted that the unknown time frame cut against the defendant's argument. In its words:

Defendant's argument, however, rests on a speculative assessment of the facts precisely because the Record does not disclose how much time elapsed from the assault until the statements were made. Put another way, the assault may have occurred just minutes before [the friend] found [the victim] but no more than approximately 75-90 minutes before. Lowery Slip op. at 9.

Further, there is not a firm rule regarding how soon after the startling event a statement may be made to be considered an excited utterance; the question turns on whether the declarant was still under the stress of the event at the time. The defendant pointed to evidence that the defendant's friend initially perceived the victim to be "calm" but "in pain" when the victim was first discovered. This too was rejected. Given the severity of the victim's injuries—internal injuries causing breathing difficulty and eventually death—the court declined to conclude that the victim's statements were not made while under the stress of the event. The trial court therefore did not err in admitting the statements as excited utterances.

(2) The defendant argued that admission of the victim's statements identifying him to police and the EMT violated his Confrontation Clause and Due Process rights under Sixth Amendment. This constitutional argument was raised in the defendant's pretrial motion, but the court did not rule on that issue when admitting the statements. The defendant made no constitutional objections at trial, and the issue was consequently unpreserved for appellate review. See N.C.R. App. P. 10(a)(1) (2021). The defendant did not seek plain error review or suspension of the Rules of Appellate Procedure to allow review of the unpreserved claim, and the court declined to review it.

(3) The defendant argued that admission of the jail phone call testimony violated Rule 701 of the North Carolina Rules of Evidence as improper lay opinion. He pointed out that the call was played for the jury and argued that the detective's testimony was not helpful to the jury. As a preliminary matter, the court observed that the defendant again only made a general objection at trial and possibly failed to preserve the issue for appellate review. Assuming the issue was preserved, the admission of this testimony was not an abuse of discretion. Under *State v. Belk*, 201 N.C. App. 412 (2009), a lay witness may identify a defendant when the testimony is helpful to the jury and does not improperly invade the jury's role as finder of fact. Distinguishing the video identification at issue in *Belk*, as well as the strength of the evidence in the respective cases, the court rejected this argument:

Given [the detective's] familiarity with both the telephone system and with Defendant . . . , we cannot say then that there was 'no basis for the trial court to

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conclude that the officer was more likely than the jury to correctly identify' the contents of the recording of the telephone call . . . Lowery Slip op. at 18.

Finally, the court concluded that even if this testimony was admitted in error, the defendant could not demonstrate prejudice on the facts. The trial court was therefore affirmed in all respects. Judge Dietz and Zachary concurred.

Opinions

(1) The trial court did not err in admitting one witness' identification of the defendant and did not plainly err in admitting identifications by the other witnesses. (2) Because there was substantial evidence of each element of felony larceny and the defendant's identity as the perpetrator, the trial court did not err in denying the defendant's motion to dismiss. (3) The trial court did not fail to consider the defendant's ability to pay prior to ordering restitution, and therefore did not abuse its discretion.

State v. McKoy, ___ N.C. App. ___, 2021-NCCOA-237 (June 1, 2021)

A man owned a trailer containing various catering equipment used for his business and stored the trailer on the business's property adjacent to Sheetz. In the last week of August 2016, he drove past the property and saw that the trailer was gone. He contacted the police department, and a detective met him at the property. After reviewing footage recorded by Sheetz's cameras, the detective sent a still image to a DMV agent who was able to identify the defendant as the person in the image. At trial, the man, the detective, the manager at Sheetz, and the DMV agent each identified the defendant as the person in the footage towing the trailer away. The defendant was found guilty of larceny of the trailer.

(1) On appeal, the defendant argued that the trial court plainly erred by permitting the State's witnesses to give lay opinion testimony identifying the defendant as the individual pictured in the Sheetz footage. The Court of Appeals held that because the DMV agent testified that he was familiar with and had previous dealings with the defendant, the agent was qualified to give lay opinion testimony identifying the person in the Sheetz footage as the defendant and that the admission of the agent's testimony was not error. The Court also held that because the other witnesses each had no familiarity with the defendant prior to seeing him in the Sheetz footage, admission of their testimony was error. However, the Court concluded that those admissions did not amount to plain error because the admission of the DMV agent's identification was not erroneous, the Sheetz footage illustrated the agent's identification and permitted the jury to assess its accuracy, and the jury had the opportunity to draw its own conclusions based on still images admitted into evidence.

(2) The defendant next argued that the trial court erred by denying his motion to dismiss because the evidence was insufficient to support his conviction for felony larceny. The defendant argued that the evidence admitted at trial established only that the defendant was in the Sheetz store and that there was insufficient evidence to support an inference that the person depicted in the Sheetz surveillance video is the person who stole the trailer. In rejecting this argument, the Court of Appeals determined that crediting the in-court identifications and

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giving the State the benefit of every reasonable inference, a rational juror could conclude that the defendant was the sole occupant and driver of the truck and, without consent, hitched the man's trailer to the truck and drove away with the trailer in tow, intending to deprive the man of it permanently.

(3) The defendant argued that the trial court erred in ordering restitution because it failed to consider the defendant's ability to pay. Prior to ordering restitution, the trial court was informed that the defendant was near the end of an active sentence and therefore unable to currently earn, the defendant has two children to support upon his release, and the defendant plans to go back to school and get a trade once he leaves from custody. The defendant also filed an affidavit of indigency reflecting that he was in custody and had zero assets and zero liabilities as of the date of the trial. The Court of Appeals held that the trial court did not fail to consider the defendant's resources and thus did not abuse its discretion in ordering restitution.

(1) Admission of improper lay-witness testimony did not prejudice the defendant. (2) The defendant's right against self-incrimination was not violated by testimony that did not actually refer to the defendant's post-arrest silence.

State v. Malone-Bullock, ___ N.C. App. ___, 2021-NCCOA-406 (Aug. 3, 2021)

In this Wilson County case, the defendant was convicted after a jury trial of first-degree murder related to a dispute arising out of a card game. Though the defendant told the victim he was going to kill him, and though multiple witnesses saw the defendant shoot the victim, the defendant claimed for the first time at trial that another man, William Saxton, actually shot the victim. During the trial, a witness testified over the defendant's objection that the defendant had driven to Mr. Saxton's house after the card game because he knew Mr. Saxton had guns. Another witness testified over the defendant's objection that he thought the defendant had tried to have him killed. (1) The defendant argued on appeal that both witnesses gave impermissible lay-witness opinions and that the trial court erred by admitting them. The Court of Appeals agreed. A lay witness may not speculate about another person's intentions on a particular occasion, and each of the witnesses here did (that the defendant drove to Mr. Sexton's house to get a gun, and that the defendant had set up another witness to be killed, respectively). In both instances, the court concluded, the witness was in no better position than the jurors to deduce the defendant's intentions based on the evidence. Nevertheless, the court concluded that neither witness's testimony prejudiced the defendant in light of the ample evidence against him.

(2) The defendant also argued on appeal that his right to not incriminate himself was violated when the trial court allowed the State to elicit testimony from a detective that the defendant did not give the same explanation of events at trial (that another man shot the victim) at any time before trial. The defendant argued that asking the officer why the defendant did not mention the other man earlier impermissibly referenced his post-arrest silence. The Court of Appeals disagreed, noting that the right to remain silent did not apply when the defendant did not actually remain silent; instead, he spoke to the detective, claimed that he did not kill the victim, and that he did not know who did. The State's questioning focused on the differences

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between the defendant's statement during the investigation (that he did not know who killed the victim) and his explanation at trial (that Mr. Saxton killed the victim) and was therefore permissible.

(1) A clinical social worker who diagnosed the victim with post-traumatic stress disorder (PTSD) did not impermissibly vouch for the victim's credibility by addressing what types of trauma could lead to a PTSD diagnosis; (2) Expert witnesses' use of the word "disclose" did not constitute impermissible vouching; and (3) The trial court did not plainly err by admitting evidence of the defendant's past domestic violence incidents with the victim's mother as they were relevant to explain why the victim delayed reporting the defendant's crimes and aided the jury's understanding of the victim's PTSD diagnosis.

State v. Betts, 377 N.C. 519 (June 11, 2021)

Defendant was convicted of three counts of indecent liberties with a child for sexually abusing M.C., the seven-year-old daughter of his then-romantic-partner. The abuse was discovered after M.C.'s sister was born with illegal drugs in her system, prompting the involvement of the Forsyth County Department of Social Services (DSS). When a DSS worker interviewed M.C., M.C. reported that the defendant had touched her inappropriately. Other interviews followed in which M.C. described incidents of domestic violence between the defendant and her mother. A clinical social worker for DSS ultimately diagnosed M.C. with post-traumatic stress disorder (PTSD).

The defendant appealed to the Court of Appeals, which in a divided opinion held that the defendant's trial was free from prejudicial error. On appeal, the Supreme Court considered whether (1) the clinical social worker impermissibly vouched for the victim's credibility, (2) the use of the word "disclose" by witnesses for the State constituted impermissible vouching, and (3) the trial court plainly erred by allowing evidence of his past domestic violence incidents with the victim's mother.

(1) The defendant argued that the clinical social worker's affirmative answers to the following questions from the State impermissibly vouched for the victim's credibility: (A) "when you make a diagnosis of post-traumatic stress disorder, are there several types of traumatic events that could lead to that diagnosis?," (B) "would violence in the home be one of those?," (C) "what about domestic violence or witnessing domestic violence?," (D) "what about sexual abuse?," (E) "[w]ould it be fair to say that [M.C.] had experienced a number of traumas?," and (6) "And that was the basis of your therapy?"

Because the defendant did not object to this testimony at trial, the Court reviewed for plain error.

The Court determined that the witness's testimony was admissible as she addressed what types of trauma could lead to a PTSD diagnosis rather than indicating which if any of these traumas M.C. experienced. She did not vouch for M.C.'s credibility by testifying that M.C. was in fact sexually abused. Instead, she stated the considerations that led to her expert diagnosis. Moreover, the Court concluded that even if the testimony was admitted in error, it was not

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prejudicial. The trial court instructed the jury that the testimony could only be used to corroborate M.C.'s testimony or to explain M.C.'s delay in reporting defendant's crimes.

(2) The defendant argued that witness's use of the word "disclose" impermissibly vouched for the victim's credibility. Reviewing for plain error, the Court rejected the defendant's argument. First, the Court stated that "[a]n expert witness's use of the word 'disclose,' standing alone, does not constitute impermissible vouching as to the credibility of a victim of child sex abuse, regardless of how frequently used, and indicates nothing more than that a particular statement was made.'" Slip op. at 20. Second, the court concluded that even if it was error to admit the testimony, the defendant did not show that the use of the word "disclose" had a probable impact on the jury's finding that he was guilty given the substantial evidence of abuse.

(3) The defendant argued that the trial court plainly erred by introducing evidence of domestic violence which he said had little to do with the charged offenses. The Supreme Court disagreed, reasoning that the domestic violence evidence explained why M.C. was fearful of and delayed in reporting defendant's sexual abuse and was probative of M.C.'s PTSD diagnosis. The Court further explained that the domestic violence evidence was not more prejudicial than probative because it went directly to the issue of the victim's credibility. Because the Court concluded that the trial court did not err by admitting the evidence it held there could not be plain error.

Arrest, Search, and Investigation

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Arrests & Investigatory Stops

The duration of a traffic stop was not impermissibly prolonged under *Rodriguez v. United States*

State v. France, ___ N.C. App. ___, 2021-NCCOA-498 (Sept. 21, 2021)

In this case involving drug offenses, the trial court did not err by denying the defendant's motion to suppress evidence arising from a traffic stop because the duration of the stop was not impermissibly prolonged under *Rodriguez v. United States*, 575 U.S. 348 (2015). Two officers with the Winston-Salem Police Department conducted a traffic stop of a vehicle based upon observing its broken taillight. One officer requested identification from the occupants of the car, informed them of the reason for the stop, and returned to the patrol car to conduct warrant checks. During this time the other officer requested that a canine unit respond to the stop. The officer conducting warrant checks learned that a passenger had outstanding arrest warrants and placed him under arrest, at which time the officer discovered that the passenger was carrying a pistol and disarmed him. The other officer immediately returned to the patrol car to begin the process of issuing a citation for the taillight and finish warrant checks on the remaining occupants. While drafting the citation, the canine unit arrived and indicated a positive alert after walking around the vehicle. The officers then searched the vehicle and found drug evidence. The court determined that at all times prior to the canine alert the officers were diligently pursuing the purpose of the stop, conducting ordinary inquiries incident to the stop, or taking necessary safety precautions. The court further determined that the request for the canine unit did not measurably extend the stop. Assuming for argument that any of the officers' actions unrelated to the initial purpose of the stop did extend its duration, they were justified by reasonable suspicion because a stopping officer encountered the defendant's vehicle earlier in the evening and witnessed a hand-to-hand drug transaction, the stop occurred in a high crime area late at night, and a passenger with outstanding arrest warrants was armed with a loaded gun.

The court vacated a civil judgment for attorney's fees because the trial court erred by not providing the defendant notice and an opportunity to be heard before entering the judgment.

The trial court erred by denying the defendant's motion to suppress drug evidence that was discovered pursuant to a consent search where the request for consent and the search measurably extended a traffic stop without reasonable suspicion in violation of *Rodriguez v. United States*

State v. Johnson, ___ N.C. App. ___, 2021-NCCOA-501 (Sept. 21, 2021)

In this felony possession of cocaine case, the trial court erred by denying the defendant's motion to suppress evidence that was discovered pursuant to a consent search where the request for consent and the search measurably extended a traffic stop without reasonable suspicion in violation of *Rodriguez*. An officer made a traffic stop of the defendant after observing him driving without wearing a seatbelt. "Almost immediately," the officer asked the

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defendant to exit the vehicle and accompany him to his patrol car. As they walked, the officer asked if the defendant possessed anything illegal and whether he could search the defendant. The defendant raised his hands above his waist and the officer reached into the defendant's sweatshirt pocket, discovering a plastic wrapper containing soft material he believed to be powder cocaine.

The court first determined that the defendant had preserved his undue delay argument for appellate review by generally arguing to the trial court that the stop was unsupported by reasonable suspicion and the search was unreasonable under the Fourth Amendment, regardless of the fact that the defendant's precise Fourth Amendment argument on appeal differed slightly from his argument to the trial court. The court went on to say that it would exercise Rule 2 discretion to address the merits in any event.

Addressing the merits, the court determined that while it may have been permissible on the grounds of officer safety to conduct an external frisk if the officer had reasonable suspicion that the defendant was armed and dangerous, the search in this case went beyond such a frisk, lasting almost thirty seconds and appearing to miss areas that would be searched in a safety frisk. The State also made no argument that reasonable suspicion of being armed and dangerousness justified the search. The court proceeded to distinguish case law the State argued supported the position that officers need no additional reasonable suspicion to request consent to search during a traffic stop as a universal matter, explaining that in the case at hand the request for consent and the full search were not related to the mission of the stop and were not supported by additional reasonable suspicion beyond the observed seatbelt violation. The court concluded that any consent the defendant gave for the search was involuntary as a matter of law, reversed the trial court's denial of the defendant's motion to suppress, and vacated the judgement entered against the defendant based on his guilty pleas.

Judges Carpenter and Griffin concurred with separate opinions, each agreeing with the Fourth Amendment analysis. Judge Griffin wrote to address an argument in the defendant's brief "raising a question of impartiality in traffic stops, and our justice system generally, based on the color of a person's skin and their gender." Judge Griffin rejected that argument, characterizing it as "inflammatory and unnecessary." Judge Carpenter wrote that "[c]hoosing to inject arguments of disparate treatment due to race into matters before the Court where such treatment is not at issue . . . does not further the goal of the equal application of the law to everyone."

The trial court did not commit error in denying the defendant's request to suppress the controlled substances which were discovered as a result of the *Terry* search of the defendant's vehicle

State v. Johnson, ___ N.C. ___, 2021-NCSC-85 (Aug. 13, 2021)

An officer on patrol ran the license plate of the car the defendant was driving and discovered that the license plate was registered to another car. The officer initiated a traffic stop. As the officer approached the driver's side of the car, he noticed that the defendant had raised his hands in the air. On inquiry, the defendant denied the presence of any weapons in the car.

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When the officer explained that the mismatched license plate served as the reason for the traffic stop, the defendant responded that he had just purchased the car in a private sale that day. The defendant produced his driver's license, the car's registration, and bill of sale. The officer sensed that the defendant seemed nervous and was "blading his body" as he searched for the requested documentation. Slip op. at ¶ 3.

When the officer ran the defendant's information through the police database, he found that the defendant had been charged with multiple violent crimes and offenses related to weapons over the span of several years. When the officer returned, he asked the defendant to step out of the car with the intent of conducting a frisk of defendant's person and a search of the vehicle. The defendant consented to be frisked for weapons, and a pat down of the defendant's clothing revealed no weapons or other indicia of contraband. The defendant refused to grant consent to search the car, but the officer explained that he was going to conduct a limited search of car nonetheless based on the defendant's "criminal history . . . and some other things." Slip op. at ¶ 5. The officer found a baggie of powder cocaine and arrested the defendant.

The defendant was indicted for possession of cocaine. At trial, the defendant file a motion to suppress, which the trial court ultimately denied. The defendant agreed to plead guilty to felony possession of cocaine and misdemeanor possession of drug paraphernalia. The defendant appealed, and the Court of Appeals, in a divided opinion, affirmed the trial court's denial of the defendant's motion to suppress. The defendant appealed to the Supreme Court based on the dissenting opinion from the Court of Appeals.

The defendant's first argument was that the officer did not have a reasonable suspicion that defendant was armed. In rejecting this argument, the Court noted that the officer rendered uncontroverted testimony that he conducted a late-night traffic stop of the defendant's vehicle in a high-crime area and encountered the defendant who acted very nervous, appeared to purposely hamper the officer's open view of the defendant's entry into the vehicle's center console, and possessed a criminal history which depicted a "trend in violent crime." Slip op. at ¶ 18. The Court thus concluded that the officer's suspicion of the defendant's potentially armed and dangerous status was reasonable.

The defendant next argued that the *Terry* search of defendant's vehicle represented an unconstitutional extension of the traffic stop. The Court rejected this argument, noting that the testimony rendered by the officer as to the actual chain of events and the observations by the officer which culminated in the *Terry* search did not equate to a conclusion that the officer unreasonably prolonged the traffic stop.

The defendant finally argued that the Court's correction of the trial court's supposed error should result in an outcome which vacates the trial court's order and overturns defendant's conviction. The Court concluded that the unconflicted evidence introduced by the State at the suppression hearing was sufficient for the trial court to make findings of fact and conclusions of law that the investigating officer had reasonable suspicion to conduct a *Terry* search of the defendant's person and car. The Court thus left the lower court's ruling undisturbed.

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Justice Earls, joined by Justice Hudson, dissented. She wrote that the result reached by the majority is a decision inconsistent with the Fourth Amendment and fails to consider the racial dynamics underlying reasonable suspicion determinations.

Exigent Circumstances

Flight of a person suspected of a misdemeanor offense does not categorically justify an officer's warrantless entry into a home

Lange v. California, 594 U.S. ___, 141 S. Ct. 2011 (June 23, 2021)

In this case, the Court held, in an opinion by Justice Kagan, that the flight of a person suspected of a misdemeanor offense does not categorically justify an officer's warrantless entry into a home. Instead, an officer must consider all the circumstances in a case involving the pursuit of a suspected misdemeanant to determine whether there is an exigency that would excuse the warrant requirement.

A California highway patrol officer attempted to stop the petitioner Lange's car after observing him driving while playing loud music through his open windows and repeatedly honking his horn. Lange, who was within 100 feet of his home, did not stop. Instead, he drove into his attached garage. The officer followed Lange into the garage, where he questioned Lange and saw that Lange was impaired. Lange was subsequently charged with the misdemeanor of driving under the influence of alcohol and a noise infraction.

Lange moved to suppress the evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. The trial court denied Lange's motion, and the appellate division affirmed. The California Court of Appeal also affirmed, concluding that an officer's hot pursuit of a fleeing misdemeanor suspect is always permissible under the exigent circumstances to the warrant requirement. The United States Supreme Court rejected the categorical rule applied by the California Court of Appeal and vacated the lower court's judgment.

In rejecting a categorical exception for hot pursuit in misdemeanor cases, the Court noted that the exceptions allowing warrantless entry into a home are "'jealously and carefully drawn,' in keeping with the 'centuries-old principle' that the 'home is entitled to special protection.'" Slip op. at 6. Assuming without deciding that *United States v. Santana*, 427 U.S. 38 (1976), created a categorical exception that allows officers to pursue fleeing suspected felons into a home, the Court reasoned that applying such a rule to misdemeanors, which "run the gamut of seriousness" from littering to assault would be overbroad and would result in treating a "dangerous offender" and "scared teenager" the same. Slip op. at 11. Instead, the Court explained that the Fourth Amendment required that the exigencies arising from a misdemeanant's flight be assessed on a case-by-case basis – an approach that "will in many, if not most, cases allow a warrantless home entry." *Id.* The Court explained that "[w]hen the totality of the circumstances shows an emergency — such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home" law enforcement officers may lawfully enter the home without a warrant. *Id.* The Court also cited as support the

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lack of a categorical rule in common law that would have permitted a warrantless home entry in every misdemeanor pursuit.

Justice Kavanaugh concurred, observing that “there is almost no daylight in practice” between the majority opinion and the concurrence of Chief Justice Roberts, in which the Chief Justice concluded that pursuit of a fleeing misdemeanant constitutes an exigent circumstance. The difference between the two approaches will, Justice Kavanaugh wrote, be academic in most cases as those cases will involve a recognized exigent circumstance such as risk of escape, destruction of evidence, or harm to others in addition to flight.

Justice Thomas concurred on the understanding that the majority’s articulation of the general case-by-case rule for evaluating exceptions to the warrant requirement did not foreclose historical categorical exceptions. He also wrote to opine that even if the state courts on remand concluded the officer’s entry was unlawful, the federal exclusionary rule did not require suppression. Justice Kavanaugh joined this portion of Justice Thomas’s concurrence.

The Chief Justice, joined by Justice Alito, concurred in the judgment. The Chief Justice criticized the majority for departing from the well-established rule that law enforcement officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect – regardless of what offense the suspect was suspected of doing before he fled. He characterized the rule adopted by the Court as “famously difficult to apply.” Roberts, C.J., concurrence, slip op. at 14. The Chief Justice concurred rather than dissenting because the California Court of Appeals assumed that hot pursuit categorically permits warrantless entry. The Chief Justice would have vacated the lower court’s decision to allow consideration of whether the circumstances in this case fell within an exception to the general rule, such as a case in which a reasonable officer would not believe that the suspect fled into the home to thwart an otherwise proper arrest.

Jurisdiction of Officers

Tribal officer was authorized to detain and search non-Indian suspect on public highway on reservation based on the tribe’s inherent sovereign authority to address conduct that threatens or affects tribe’s health or welfare

United States v. Cooley, 593 U.S. ___, 141 S. Ct. 1638 (June 1, 2021)

The respondent in this case, a non-Indian, was detained and searched by a tribal police officer on a public highway that traversed the Crow Reservation in Montana. The officer discovered the respondent in his truck on the roadside, noticed that he had watery, bloodshot eyes and saw two semiautomatic rifles in his front seat. The officer detained the defendant and seized the guns and the drugs that he later discovered in the respondent’s truck. The respondent was federally indicted for drug and gun offenses. The trial court suppressed the drug evidence on the basis that the tribal officer lacked the authority to investigate nonapparent violations of law by a non-Indian on a public right of way on the reservation. The Ninth Circuit affirmed.

A unanimous Supreme Court vacated the Ninth Circuit’s judgment.

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The Court, in an opinion authored by Justice Breyer, held that the officer was authorized to detain and search the respondent based on the tribe's inherent sovereign authority to address conduct that threatens or has some direct effect on the health or welfare of the tribe. This authority is an exception to the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers. The Court explained that to deny a tribal police officer the authority to detain and search a person the officer believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats. Earlier cases denying tribal jurisdiction over the activities of non-Indians on a reservation relied in part on the fact that applying full tribal jurisdiction would subject non-Indians to tribal law they had no role in creating. The tribal officer's detention and search of the respondent, in contrast, did not subject him to tribal law, but instead to state and federal laws that apply whether the person is outside the reservation or on a state or federal highway within it. Finally, the Court rejected the argument that existing federal statutes granting tribes limited authority to enforce federal law divested tribes of this sovereign authority.

Justice Alito concurred, stating that he joined the opinion of the Court with the understanding that it only held the following: On a public right-of-way that traverses an Indian reservation and is primarily patrolled by tribal police, a tribal officer may (a) stop a non-Indian motorist based on reasonable suspicion of a violation of state or federal law; (b) search to the extent necessary to protect the officer and others; and (c) if the officer has probable cause, detain the motorist for the period of time reasonably necessary for a non-tribal officer to arrive.

Search Warrants

Trial court did not err in denying defendant's motion to suppress evidence obtained pursuant to a search warrant where executing officers turned off their body cameras before the search was completed; there was no evidence of bad faith or loss of materially exculpatory evidence.

State v. Robinson, __ N.C. App. __, 2021–NCCOA–533 (Oct. 5, 2021)

The defendant was indicted for trafficking opium and possession of a firearm by a felon, and he filed a motion to suppress evidence obtained during a search of his residence on the grounds that the officers executing the search turned off their body cameras after conducting the initial walk-through of the residence. The trial court denied the motion to suppress, finding that there was no evidence of bad faith and no showing that any materially exculpatory evidence was lost – only potentially useful evidence was lost. The defendant pleaded guilty, and the trial court declined the defendant's request to make a substantial assistance deviation at sentencing, but did make note of his assistance and imposed one consolidated sentence of 90 to 120 months. The defendant filed a notice of appeal and a petition for *writ of certiorari*.

The appellate court first found that the defendant failed to preserve his right to appeal because he did not give notice of his intent to appeal when the plea was entered. However, the court granted the petition for *writ of certiorari* and reached the merits on the grounds that the defendant's trial counsel was responsible for this deficiency, rather than the defendant. Defendant's appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967),

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stating that he could not find any meritorious issues to argue and asking the court to conduct its own review. The appellate court reviewed the record and the majority likewise concluded that there were no meritorious issues regarding the sufficiency of the indictments, denial of the motion to suppress, factual basis for the guilty plea, or sentencing. On the motion to suppress, the majority agreed with the trial court that there was no evidence of bad faith on the part of the officers in turning off their body cameras, since they were instructed to do so by a supervisor on scene after the walk-through was completed, and they were acting in accordance with their department's policy. Additionally, the defendant was present during the execution of the search warrant, and there was no showing that any materially exculpatory evidence was lost. The majority therefore found no error.

Judge Murphy dissented, and would have remanded the case for appointment of new appellate counsel to brief issues of potential merit, including whether the officers' execution of the search warrant may have violated the notice and entry requirements in G.S. 15A-249, and whether the trial court may have erred in its application of the substantial assistance provisions in G.S. 90-95(h)(5).

Search warrant affidavit that failed to identify dates or time frame of events did not establish probable cause; trial court erred by considering information outside of the four corners of the warrant

State v. Logan, ___ N.C. App. ___, 2021-NCCOA-311 (July 6, 2021)

In this Cleveland County case, police were dispatched to a commercial business around 3 a.m. in response to a noise complaint. Upon arrival, they noticed a strong odor of burning marijuana and loud noises from a party within the building. The property owner-defendant approached police on scene and refused to consent to a search of the property. Officers applied for a search warrant. The defendant was ultimately charged with possession of firearm by felon based on the discovery of firearms inside, along with having obtained the status of habitual felon. He moved to suppress all evidence derived from the search, arguing that the warrant did not establish probable cause, was based on stale information, and was overbroad. Following the denial of his motion, the defendant was convicted of both offenses at trial. The Court of Appeals unanimously reversed.

The affidavit in support of the warrant alleged an investigation at the location and the odor of marijuana but failed to recount any specific time or date of the officer's observation. This was fatal to a finding of probable cause. In the words of the court:

[W]e agree with Defendant that the affidavit in support of the search warrant application did not provide sufficient facts from which the magistrate could conclude there was probable cause because it did not specify when the purported events occurred nor did it indicate sufficient facts from which the magistrate could reasonably infer the timing of such events . . . Logan Slip op. at 12.

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The trial court erred in considering information (the timing of the officer's observations) not found within the four corners of the warrant. The denial of the motion to suppress was therefore reversed, the convictions vacated, and the matter remanded for a new trial. Because the court determined that the warrant application failed to establish probable cause, it did not consider the defendant's other arguments regarding the validity of the warrant. Judge Gore and Judge Dillon concurred.

Searches

(1) Trial court properly denied motion to suppress evidence because officer had probable cause to search car based on the odor of burnt marijuana, the passenger's admission that he had smoked marijuana, and the passenger's producing of a partially smoked marijuana cigarette from his sock; (2) The trial court did not err in instructing the jury that Cyclopropylfentanyl and N-ethylpentylone were controlled substances; (3) The trial court did not err by refusing to provide a special jury instruction on knowing possession of a controlled substance as the defendant denied knowing that the vehicle he was driving contained drugs

State v. Parker, ___ N.C. App. ___, 2021-NCCOA-217 (May 18, 2021)

In this Cabarrus County case, the defendant was convicted of two counts of felony possession of Schedule I controlled substance and having attained habitual felon status. The charges arose from substances recovered from the vehicle defendant was driving when he was stopped for failing to wear his seatbelt. The officer who approached the car smelled the odor of burnt marijuana emanating from the car. The officer told the defendant and his passenger that if they handed over everything they had, he would simply cite them for possession of marijuana. The passenger in the car then admitted that he had smoked a marijuana joint earlier and retrieved a partially smoked marijuana cigarette from his sock. The officer then searched the car and discovered gray rock-like substances that when tested proved to be Cyclopropylfentanyl (a fentanyl derivative compound) and a pill that was N-ethylpentylone (a chemical compound similar to bath salts).

(1) At trial, the defendant moved to suppress evidence of the drugs recovered from his car. The trial court denied the motion. The defendant appealed, arguing that the trial court erred by failing to issue a written order and in finding that the search was supported by probable cause. The Court of Appeals determined that the trial court did not err by failing to enter a written order denying the defendant's motion to suppress as there was no material conflict in the evidence and the trial court's oral ruling explained its rationale. The Court further held that regardless of whether the scent of marijuana emanating from a vehicle continues to be sufficient to establish probable cause (now that hemp is legal and the smell of the two is indistinguishable), the officer in this case had probable cause based on additional factors, which included the passenger's admission that he had just smoked marijuana and the partially smoked marijuana cigarette he produced from his sock. The Court also considered the officer's subjective belief that the substance he smelled was marijuana to be additional evidence supporting probable cause, even if the officer's belief might have been mistaken. The Court

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rejected the defendant's contention that the probable cause had to be particularized to him, citing precedent establishing that if probable cause justifies the search of a vehicle, an officer may search every part of the vehicle and its contents that may conceal the object of the search.

(2) The defendant argued on appeal that the trial court erred by instructing the jury that Cyclopropylfentanyl and N-ethylpentylone were controlled substances since those substances are not specifically listed as named controlled substances under Schedule I in G.S. 90-89. The Court rejected the defendant's argument on the basis that the classification of these substances was a legal issue within the province of the trial court. Furthermore, the Court determined that even if the classification was a factual issue, the defendant was not prejudiced because the undisputed evidence demonstrated that the substances were controlled substances fitting within the catch-all provision of Schedule I.

(3) The defendant argued on appeal that because he denied knowing the identity of the substances found in his vehicle the trial court erred in denying his request to instruct the jury that he must have known that what he possessed was a controlled substance. The Court of Appeals found no error. The Court characterized the defendant's statements to the arresting officer as "amount[ing] to a denial of any knowledge whatsoever that the vehicle he was driving contained drugs" and noted that the defendant never specifically denied knowledge of the contents of the cloth in which the Cyclopropylfentanyl was wrapped, nor did he admit that the substances belonged to him while claiming not to know what they were. The Court concluded that these facts failed to establish the prerequisite circumstance for giving the instruction requested, namely that the defendant did not know the true identity of what he possessed. The Court further noted that defense counsel was allowed to explain to the jury during closing argument that knowing possession was a required element of the offense and the jury instructions required the State to prove that the defendant knowingly possessed the controlled substance and was aware of its presence.

Criminal Offenses

Criminal Offenses

General Crimes

(1) Where evidence supported one conspiracy, trial court erred by entering separate conspiracy judgments; only the first substantive crime of the conspiracy supported judgment, but the error did not require resentencing; (2) No abuse of discretion to deny jury's request for transcript of witness testimony

State v. Beck, ___ N.C. App. ___, 2021-NCCOA-305 (July 6, 2021), *temp. stay allowed*, ___ N.C. ___, 859 S.E.2d 927 (July 26, 2021)

The defendant was convicted of armed robbery, conspiracy to commit armed robbery, felony breaking or entering, and conspiracy to commit breaking or entering in Watauga County. The offenses related to the attempted robbery of a drug dealer in an apartment in Boone. The jury convicted on all counts, and each conspiracy count was consolidated with the related substantive count for judgment.

(1) The defendant argued that the trial court erred in failing to dismiss one of the conspiracy counts. The Court of Appeals agreed. To convict on separate conspiracies, the State has the burden to show separate agreements. A single agreement to commit multiple offenses constitutes only one conspiracy. Factors relevant in determining the existence of multiple conspiracies include “the “nature of the agreement or agreements, the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings . . .” *Beck* Slip op. at 11 (citation omitted). Here, the evidence showed only one agreement to rob drug dealers and thus only supported one conspiracy.

Where multiple conspiracy convictions are vacated, the court must identify the first substantive crime in determining which conviction to vacate. Here, the felony breaking or entering was the first substantive offense committed by the conspirators. The conviction for conspiracy to commit armed robbery was therefore vacated. According to the court:

As the felony breaking and entering was the first substantive crime committed by defendant (i.e., the ‘operative’ crime), because the conspiracy to commit felony breaking and entering was the ‘earlier of the conspiracy convictions’ insofar as defendant is concerned, and because the State failed to prove that defendant conspired with [the co-conspirators] in the weeks leading up to the crimes, we vacate defendant’s conviction for conspiracy to commit armed robbery . . . *Id.* at 14.

No resentencing was required, however, since the conspiracy to commit armed robbery was consolidated with the substantive robbery offense and the defendant was sentenced within the presumptive range for that crime.

(2) The trial court did not abuse its discretion in failing to provide the jury with a transcript of a witness’s testimony. No party objected to the trial court’s refusal in response to the jury’s request. Under G.S. 15A-1233(a), it is within the trial court’s discretion to allow reexamination of the evidence. Prejudice from the denial of a jury request to reexamine evidence will only be

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considered where the trial court fails to acknowledge its discretion in responding to the request. The trial court here recognized the matter as within its discretion. Consequently, the denial of the request for a transcript was neither an abuse of discretion nor prejudicial error.

Judge Inman concurred without separate opinion. Judge Tyson concurred in part and dissented in part. He would have found no error with the conviction for conspiracy to commit armed robbery.

Homicide

(1) Trial court did not err by denying defendant's motion to dismiss first-degree murder charge where State's evidence provided ample expert support to establish that the child victim died of starvation; (2) Trial court did not commit plain error by failing in bench trial to instruct itself to make a separate finding of malice or err by failing to make a separate determination that defendant acted maliciously as the act of starving another person to death suffices to show malice; (3) Starvation for purposes of G.S. 14-17(a) does not require proof that the defendant subjected the alleged victim to a complete deprivation of food and hydration; (4) Trial court's determinations that the defendant allowed the child victim to remain in soiled diapers resulting in open sores and ulcers and kept the child in a playpen for so long that bed sores formed on the child's legs and knees were consistent with the indictment's allegations that the defendant deprived the child of medical treatment, resulting in the infliction of serious bodily injury.

State v. Cheeks, 377 N.C. 528 (June 11, 2021)

The defendant was convicted in a bench trial of first-degree murder and negligent child abuse inflicting serious injury for starving and failing to provide medical treatment to his four-year-old disabled stepson, Malachi. The defendant appealed, and the Court of Appeals affirmed. The Supreme Court granted discretionary review. The defendant argued on appeal that: (1) the trial court erred by failing to dismiss the first-degree murder charge because the record failed to contain sufficient evidence to support a finding that Malachi's death was proximately caused by starvation; (2) the State was required to make a separate showing of malice in order to prove defendant's guilt of murder on the basis of starvation; (3) if malice is implied, then starving must be defined as the complete deprivation of food and water; and (4) his conviction for negligent child abuse inflicting serious bodily injury rested upon findings that Malachi suffered from bedsores, ulcers, and diaper rash, which differed from the indictment's allegations that he failed to provide the child with medical treatment and proper nutrition. The Supreme Court rejected each of the defendant's arguments and affirmed his convictions.

(1) The Supreme Court determined that the trial court had ample justification for concluding that Malachi died as a proximate result of starvation, despite findings in an amended autopsy report attributing Malachi's death to asphyxia caused by strangulation. Witnesses who were responsible for providing treatment to Malachi and his sibling during the last two years of his life testified that Malachi was not fed even though he was ravenously hungry and looked considerably thinner in the months leading up to his death. Emergency medical technicians who

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responded to the 911 call for Malachi's death noticed the malnourished state of Malachi's body, which some of them initially mistook for a doll. The physical evidence in the autopsy report demonstrated that Malachi was severely malnourished and dehydrated. A pediatric neurologist who had treated Malachi testified that the only thing that "would cause Malachi or any child to look like" the child described by the emergency medical technicians and depicted in the autopsy report and related photographs was "starvation." Slip op. at ¶ 44. Although the autopsy was amended to attribute Malachi's death to asphyxia secondary to strangulation, the record demonstrates that the forensic pathologist made those amendments based on the defendant's statements to a detective that he had strangled Malachi, statements that the trial court found not credible.

(2) The Supreme Court concluded that the trial court did not commit plain error or err by failing to (a) instruct itself concerning the issue of malice or (b) make a separate finding that defendant acted with malice in connection with killing Malachi. The Court reasoned that the intentional withholding of the nourishment and hydration needed for survival resulting in death when the victim is unable to provide these things for himself or herself shows a reckless disregard for human life and a heart devoid of social duty. Thus, the malice necessary for guilt of murder is inherent in the intentional withholding of hydration or nutrition sufficient to cause death. As a result, the Court held that the act of starving another person to death for purposes of G.S. 14-17(a), without more, suffices to show malice, so that the trial court did not commit plain error by failing to instruct itself to make a separate finding of malice or err by failing to make a separate determination that defendant acted maliciously in its findings of fact and conclusions of law.

The Court further held that the record and the trial court's findings demonstrated that the defendant proximately caused Malachi's death by intentionally depriving him of needed hydration and nutrition, a showing that supported the conviction of murder by starvation. Witnesses testified that there was food in the house and that Malachi's siblings received sufficient nutrition and hydration to survive. The evidence depicted Malachi as hungry and dehydrated during the months leading to his death; yet the defendant, who was Malachi's primary caregiver, did not seek medical attention for Malachi and fed Malachi, at the most, no more than once each day.

(3) The Supreme Court rejected the defendant's argument that starvation for purposes of G.S. 14-17(a) required proof that the defendant subjected the victim to a complete deprivation of food and hydration. The Court explained that the discussion in *State v. Evangelista*, 319 N.C. 152 (1987) did not suggest otherwise; instead, *Evangelista* simply indicated that murder by starvation occurs in the event that the defendant completely deprives the victim of food and drink. The Court reasoned that the adoption of the defendant's definition of starvation for purposes of G.S. 14-17(a) would produce the absurd result that a person who kills another by withholding virtually all, but not all, food and drink would not be guilty of murder by starvation.

(4) The Supreme Court held there was no fatal discrepancy between the allegations of the indictment charging defendant with negligent child abuse inflicting serious injury and the trial court's factual justification for convicting defendant of that offense. The indictment charged the defendant with negligent child abuse inflicting serious injury for failing to provide Malachi

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“with medical treatment” for over one year, “despite the child having a disability,” and with failing to “provid[e] the child with proper nutrition and medicine, resulting in weight loss and failure to thrive.” Slip op. at ¶ 50. The Court deemed the trial court’s determinations that defendant “allow[ed] the child to remain in soiled diapers until acute diaper rash formed on the [child’s] groin and bottom,” resulting in “open sores and ulcers,” and that defendant kept “the child in a playpen for so long a period of time that bed sores formed on [his] legs and knees” to be fully consistent with the allegations in the indictment. Slip op. at ¶ 50.

Assaults

There was sufficient evidence of discharging a firearm into an occupied vehicle in operation where the defendant fired a bullet that struck a toolbox fastened into the truck’s bed

State v. Staton, ___ N.C. App. ___, 2021-NCCOA-427 (Aug. 17, 2021)

In this discharging a firearm into an occupied vehicle while in operation case, the trial court did not err by denying the defendant’s motion to dismiss for insufficient evidence. Evidence at trial tended to show that the defendant fired a pistol at the victim’s truck and struck a toolbox fastened into the truck’s bed. The court rejected the defendant’s argument that G.S. 14-34.1(b) requires at a minimum that the bullet strike the exterior wall of the vehicle. Analogizing to *State v. Miles*, 223 N.C. App. 160 (2012), where it had determined that there was sufficient evidence of the version of the offense involving an occupied dwelling where a bullet struck a porch attached to a house, the court determined that striking the toolbox of the vehicle was sufficient to meet the firing “into [property]” element of the offense.

Abuse Offenses

Defendant was a person providing “care and supervision” under the felony child abuse statute, G.S. 14-318.4, supporting his felony murder conviction for abuse that caused the child’s death

State v. Chambers, ___ N.C. App. ___, 2021-NCCOA-348 (July 20, 2021)

The child victim in this case, “David,” died primarily as a result of blunt force abdominal injuries, with a number of other external and internal injuries as contributing factors. The state’s evidence indicated that the defendant abused David on several occasions during a two-month period, ultimately leading to the child’s death. The defendant was charged with first-degree murder based on causing the victim’s death in the course of committing felonious child abuse under G.S. 14-318.4(a), and was convicted at trial.

On appeal, the defendant argued that there was insufficient evidence he was a “person providing care to or supervision of” the minor victim, as required for a conviction under G.S. 14-318.4(a), and therefore he could not be guilty of the underlying offense that supported the felony murder conviction. After reviewing the state’s evidence, the appellate court disagreed. The defendant was romantically involved with “R.W.,” the victim’s mother, and he

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had recently moved in with R.W. and her children and slept at their house every weeknight. The defendant also helped potty train the children, played with them, put them to bed, cooked meals, and did yardwork around the home. The court acknowledged that the child abuse statute does not define what constitutes “care and supervision,” but prior cases such as *State v. Carilo*, 149 N.C. App. 543 (2002) have “found guidance in our State’s juvenile code under N.C. Gen. Stat. § 7B-101(3) defining a ‘caretaker.’” To determine whether an adult qualifies under the abuse statute, the court looks at the totality of the circumstances including the duration and frequency of care provided by the adult, the location where it occurs, and the amount of decision-making authority held by the adult. Finding that the state’s evidence in this case “mirrors the evidence we found sufficient in *Carrilo*,” the defendant’s conviction was unanimously affirmed.

Threats & Related Offenses

The trial court erred by failing to make findings of fact in its order denying motions for domestic violence protective orders

Milligan v. Crews, ___ N.C. App. ___, 2021-NCCOA-493 (Sept. 21, 2021)

The trial court failed to make adequate findings of fact to support its orders denying the plaintiffs’ motions for domestic violation protective orders against the defendant, their biological father’s wife. The court noted that state supreme court precedent had interpreted N.C. Rule Civ. P. 52(a)(1) to require a trial court to make specific findings of fact and separate conclusions of law when sitting without a jury. The trial court’s failure to make any findings of fact on form AOC-CV-306, other than who was present at the hearing, precluded the Court of Appeals from conducting a meaningful review of its order denying the motions.

Sexual Assaults & Related Offenses

The State presented sufficient evidence of penetration for convictions for sexual offense

State v. Burns, ___ N.C. App. ___, 2021-NCCOA-404 (Aug. 3, 2021)

In this Forsyth County case, the defendant was convicted of four counts of statutory sexual offense with a child by an adult and sixteen charges of indecent liberties with a child based on incidents involving an 8-year-old victim. The victim testified that the defendant rubbed his fingers in circles on her vagina, which she described as “where I wipe at” and “the place where I pee.” She also said that nothing had ever gone “inside” her vagina. On appeal, the defendant argued that there was insufficient evidence to support the sexual offense conviction because there was no evidence of penetration. The Court of Appeals disagreed. A “sexual act” for the purposes of a sexual offense includes the penetration, however slight, by any object into the genital or anal opening of another person’s body, G.S. 14-27.20(4), and case law indicates that penetration of the labia is sufficient penetration within the meaning of that definition. Here, the victim’s testimony indicated that the defendant touched her on her urethral opening, which

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is located within the labia. The Court of Appeals concluded that the State therefore presented sufficient evidence to support the element of penetration.

Kidnapping & Related Offenses

(1) Motion to dismiss for insufficient evidence should have been granted on a kidnapping charge based on facilitating commission of a felony where the felony had already been completed; (2) where state failed to give notice of expert testimony, trial court did not err in finding that witness was qualified and allowing limited testimony; (3) medical records were authenticated and admissible as business records; (4) admission of purported hearsay testimony was not plain error; (5) trial court erred by sentencing defendant for both first-degree rape and first-degree kidnapping where rape was element used to elevate kidnapping offense; and (6) trial court erred by imposing civil judgment for attorney fees without giving defendant notice and opportunity to be heard

State v. Elder, ___ N.C. App. ___, 2021-NCCOA-350 (July 20, 2021), *temp. stay allowed*, ___ N.C. ___, 860 S.E.2d 656 (Aug. 5, 2021)

In April of 2007, the defendant came to the victim's front door under the pretense of demonstrating a vacuum cleaner, but when she opened the door he forced his way inside, tied her up, robbed her, raped her, and left her bound in a closet. After the defendant left, the victim was able to free herself and call her family, who came to her home. The police arrived soon after and the victim was transported to a hospital, where a rape kit was collected and submitted to the SBI for analysis. A male DNA profile was recovered, but at the time there was no match. The victim, who was 80 years old at the time of the assault, died in 2015. A few months later, based on information from forensic investigators in New York, officers obtained a search warrant for the defendant's DNA and determined it was a match to the sample recovered from the victim's rape kit. The defendant was indicted for one count each of breaking and entering, common law robbery, assault with a deadly weapon inflicting serious injury, forcible sex offense, and first-degree rape, and two counts of first-degree kidnapping (one count for moving the victim to the back bedroom before the rape, and one count for moving her into a closet in another bedroom after the rape). The defendant was convicted at trial of all charges, and on appeal he asserted error in six areas.

First, the defendant argued that his motions to dismiss for insufficiency of the evidence should have been granted on the rape, kidnapping, and common law robbery charges. The appellate court concluded there was sufficient evidence to submit the rape charge to the jury, based on the victim's statements, forensic evidence, and the injuries suffered by the victim. Similarly, based on evidence that the defendant stole jewelry off the victim's person, along with cash and other property from her home, and did so by using force to restrain the victim, there was sufficient evidence to submit the common law robbery charge to the jury. However, the court agreed that there was insufficient evidence to submit the second kidnapping charge to the jury. Both kidnapping indictments alleged that the offenses were in the first-degree because they were done for the purpose of facilitating the commission of another felony – the rape. Finding *State v. Morris*, 147 N.C. App. 247 (2001) controlling, the court held that the second

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alleged kidnapping offense, in which the victim was placed in a closet, could not be for the purpose of facilitating the rape crime because it had already been completed. Although facilitating flight after the completion of a felony could also serve as a basis for first-degree kidnapping, that theory was not alleged in the indictment and the state was bound by the particular allegation made. Therefore, the court reversed as to the latter kidnapping conviction, and remanded for resentencing.

Second, the defendant challenged the trial court's admission of expert testimony from a state's witness about the sexual assault kit collection process. The defendant argued that the state failed to give notice of its proposed expert or her opinion, and further challenged the witness's qualifications. Based on the witness's experience and training in nursing, the appellate court held that the trial court properly exercised its discretion in allowing her testimony. To the extent that the state's failure to give advance notice was a discovery violation, the trial court appropriately exercised its discretion by limiting the scope of the witness's testimony. The defendant also contested the witness's ability to authenticate the victim's medical records or lay a foundation for their admission as business records. The appellate court disagreed, noting that the witness was a staff nurse at the hospital when the victim was treated, she was familiar with the records at issue, they were made contemporaneously with the victim's care, and any otherwise inadmissible statements within the records were appropriately redacted.

Third, the defendant challenged the admission of testimony from several witnesses about statements made by the victim after the attack. Since this issue was not raised at trial, the appellate court reviewed only for plain error and found no merit to the argument. The court concluded that the disputed statements were not hearsay because they were either the testifying witness's own observations or were not offered for the truth of the matter asserted, and the remaining challenged testimony was only corroborative of other evidence already admitted.

Fourth, the defendant argued that the trial court erred by sentencing him for both first-degree rape and first-degree kidnapping, since the rape was used to elevate the kidnapping charge to first-degree. The state contended that this was merely a clerical error, since both charges were consolidated for sentencing. Citing precedent and legislative intent, the appellate court agreed with the defendant and remanded the case to the trial court to arrest judgment on one of the two offenses and only enter judgment on the other.

Finally, granting the defendant's petition for writ of certiorari on this issue and reaching the merits, the court held that the civil judgment entered against the defendant for attorney's fees was improperly imposed without giving the defendant notice and an opportunity to be heard. The fee application was submitted four days after the sentencing, and there was no indication in the record that the defendant had a meaningful opportunity to be heard as to the amount. The court vacated the civil judgment and remanded for a new hearing.

Judge Tyson concurred in part, but dissented on the issues of sufficiency of the evidence for the second kidnapping charge, sentencing the defendant for both the rape and kidnapping offenses, and the defendant's challenge to the civil judgment for attorney's fees.

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Robbery

(1) Sufficient evidence showed that a taser was a dangerous or deadly weapon, and the trial court properly instructed the jury on this issue; (2) trial court was not required to instruct the jury on serious bodily injury in connection with deadly weapon used to commit armed robbery; (3) no *Harbison* error where counsel's admission of guilt to a lesser offense was made with defendant's knowledge and consent; and (4) trial court erred in contempt proceeding by failing to indicate that findings were made under reasonable doubt standard

State v. Chavis, ___ N.C. App. ___, 2021-NCCOA-349 (July 20, 2021)

The defendant and her boyfriend robbed the victim at his home. During the robbery the two pinned the victim down, hit him with a stick, and stunned him several times with a taser. The victim's wallet was stolen, and he was left with blood coming out of his ears, a knot on his head, and a taser burn. The defendant was charged with robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. After being convicted at trial, the defendant raised several claims on appeal. The appellate court found no error as to the criminal convictions, but did reverse a related judgment of contempt.

First, the defendant argued that her motion to dismiss at trial should have been granted, because there was insufficient evidence that a taser was a deadly weapon. The appellate court disagreed, citing precedent including *State v. Gay*, 151 N.C. App. 530 (2002) in which a stun gun previously has been deemed a dangerous or deadly weapon. Moreover, noting that any implement can be a deadly weapon based on the manner in which it is used, in this case the taser was used to stun the victim in the course of beating him and causing injury, providing a sufficient factual basis from which the jury could find that the taser was a deadly weapon.

Second, the defendant argued that the trial judge improperly expressed an opinion during the jury instructions that the taser was a deadly weapon. This issue was not raised at trial level, but as an alleged statutory violation it was nevertheless reviewable *de novo* on appeal. However, the appellate court held there was no error. During one portion of the instructions, the trial judge identified the taser as the alleged deadly weapon, but the remainder of the instructions made it clear that it was left up to the jury to decide whether the taser was a deadly weapon in this case or not.

Third, the defendant sought plain error review on an unpreserved argument that the trial court erred by failing to instruct the jury on serious bodily injury. This argument was likewise rejected, since serious bodily injury is not an element of armed robbery. The trial court's instructions on the deadly weapon element of armed robbery correctly explained that it means a weapon "capable of" causing death or serious bodily injury, and as noted above there was a sufficient showing of that capability here since it was used to incapacitate the victim. But the state was not required to prove, nor was the jury required to find, that the victim actually suffered serious bodily injury in this case.

Fourth, the appellate court denied the defendant's claim of ineffective assistance of counsel, alleging that her attorney conceded her guilt to common law robbery without her knowledge or consent in violation of *State v. Harbison*, 315 N.C. 175 (1985). The court found that "[t]his

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assertion is simply not true,” as shown by the transcript. The trial judge engaged in a *Harbison* inquiry with the defendant immediately after her attorney’s closing arguments, and the defendant stated that she had discussed the admissions with her attorney beforehand and they were made with her consent.

Finally, the defendant appealed the trial court’s order holding her in direct criminal contempt for failing to put on the clothes provided for her. Based on a “plain reading” of G.S. 5A-14(b) and citing to more recent precedent, the appellate court held that the contempt order failed to clearly indicate that the trial judge had applied a reasonable doubt standard when making the factual findings, so the contempt order and judgment were reversed.

Frauds

(1) State presented substantial evidence of forgery of an endorsement and uttering a forged check; (2) Photocopy of check was properly admitted to illustrate the testimony of a witness

State v. McSwain, ___ N.C. App. ___, 2021-NCCOA-216 (May 18, 2021)

In this Cleveland County case, the defendant was convicted of forgery of an endorsement pursuant to G.S. 14-120, uttering a forged check pursuant to G.S. 14-120 and attaining habitual felon status pursuant to G.S. 14-7.1. (1) The defendant argued on appeal that the State failed to prove the falsity of the instrument. The Court of Appeals determined that the State presented substantial evidence to show that the defendant wrote and signed a check on the account of John McGinnis without McGinnis’s authority. The State’s evidence tended to show that the defendant wrote a check on McGinnis’s account weeks after his house and car were broken into. A driver’s license and phone number handwritten on the check were similar to defendant’s. The defendant falsely told the person to whom she wrote the check that McGinnis was her father and had given her permission to use the check. McGinnis was hospitalized when the check was written and had no children. Malcom Parker was the sole power of attorney for McGinnis and handled all of his financial matters.

(2) The trial court properly admitted a photocopy of the forged check pursuant to G.S. 8-97 to illustrate the testimony of the witness to whom the check had been provided. The Court found no indication that the photocopy was used as substantive evidence, and further concluded that the State put forth substantial evidence that the defendant had forged and uttered an instrument as defined by G.S. 14-119.

There was sufficient evidence that the victim was a “person within this State” as the phrase is used in G.S. 14-100 as well as sufficient evidence of the value of the property at issue in a false pretenses case

State v. Pierce, ___ N.C. App. ___, 2021-NCCOA-502 (Sept. 21, 2021)

In this obtaining property by false pretenses case, there was sufficient evidence that the victim was a “person within this State” as the term is used in G.S. 14-100(a) as well as sufficient

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evidence of the value of the property at issue. Addressing what it characterized as an issue of first impression, the court determined that even if it is an essential element of a violation of G.S. 14-100 that the victim of the offense be by “a person within this State” as that phrase is used in the statute, an issue that the court did not decide, the element was satisfied in this case involving AT&T. The defendant’s fraud scheme involved the resale of iPhones falsely obtained from AT&T, and the court reasoned that because the phones came from a store operated by AT&T located in North Carolina, AT&T was operating as “a person within this state” for purposes of the offense and the trial court properly denied the defendant’s motion to dismiss.

The court went on to conclude that the State met its burden of proving that the value of the iPhones falsely obtained by the defendant was at least \$100,000. The court noted that North Carolina case law has defined the term “value” for purposes of obtaining property by false pretenses to be synonymous with “fair market value” and explained that evidence presented at trial showed that the actual retail value of the iPhones as calculated by the price AT&T paid to its supplier for the phones met or exceeded \$100,000. The court discussed *State v. Kornegay* and *State v. Hines* in the process of rejecting the defendant’s argument that the value issue should take into account net value and setoffs to calculate the particular economic damage to the victim. The court explained: “*Hines* establishes that we are only concerned with the gross fair market valuation of the property obtained, not the net gain in value to the criminal.”

(1) Sufficient evidence supported convictions for obtaining property by false pretense; credits to defendant’s NCDOR account were things of value for purposes of the offense, and NCDOR was actually deceived; (2) Assuming without deciding that a motion to dismiss for insufficient evidence preserves a variance argument, the failure to specify the NCDOR credits as a thing of value in the jury instructions was not a fatal variance from the allegations of the indictment on the facts; (3) Restitution award was unsupported by evidence and required reversal

State v. Brantley-Phillips, ___ N.C. App. ___, 2021-NCCOA-307 (July 6, 2021)

The defendant engaged in a scheme whereby she would submit electronic payments towards delinquent taxes to the North Carolina Department of Revenue (“NCDOR”) from invalid accounts (or, in one case out of 48, an account with insufficient funds). The payments to NCDOR were all made towards matters connected to the defendant. The electronic payments (from a total of ten different banks) had valid bank routing numbers and were all initially processed by NCDOR—resulting in immediate credits on the defendant’s NCDOR accounts. Only days after the electronic payment would the bank receive notice that payment had not been received due to an invalid account or insufficient funds. NCDOR immediately applied the payments to defendant’s various tax liabilities, and occasionally stopped garnishing the defendant’s wages based on the fraudulent payments. The defendant made several overpayments to NCDOR, and refund checks were issued to her. The defendant was able to cash three of four refund checks before NCDOR realized the electronic payments never materialized. When interviewed by law enforcement, the defendant confessed. She was subsequently charged with ten counts of obtaining property by false pretenses in Wake County. The jury convicted on all counts and the defendant appealed.

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(1) The defendant argued that there was insufficient evidence that she obtained a “thing of value” for purposes of obtaining property by false pretense. Any thing of value will suffice for this purpose, and the determination of whether something is a thing of value is a factual question for the jury. Ample evidence showed that the defendant received a thing of value:

[T]he benefit Defendant incurred from her purported ‘payments’ was the elimination or diminution of liabilities owed to NCDOR . . . in addition to the tangible benefit of cash by way of the refund checks. Moreover, Defendant herself admitted she committed these offenses to ‘stop the wage garnishments from occurring,’ and deliberately ‘continue[d] the cycle’ to redeem additional refund checks. Brantley-Phillips Slip op. at 10.

There was also sufficient evidence that NCDOR was actually deceived by the defendant for related reasons—the agency issued refund checks, credited the defendant’s accounts with the agency (and others), and stopped garnishing the defendant’s wages at times. The convictions were therefore supported by sufficient evidence.

(2) The indictments alleged that the defendant made false representations to obtain credits on her NCDOR account. The trial court instructed the jury that the defendant could be found guilty if it found that the defendant fraudulently obtained property or a thing of value. The instruction did not specifically name the NCDOR tax credits as the item of value at issue. The defendant argued that the jury instructions impermissibly varied from the language of the indictment. The State argued this issue should only be reviewed for plain error since the defendant did not object at trial. The defendant argued that her properly timed motion to dismiss for insufficient evidence preserved all issues relating to sufficiency, including variance issues, and should be reviewed de novo. Assuming without deciding that the motion preserved the variance argument, the court applied de novo review.

Jury instructions should generally match the allegations of the indictment, and a fatal variance may result where they do not. However, an exception to this rule exists: “[A] jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds ‘no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury.’” *Id.* at 14 (citation omitted). The jury instructions here were consistent with the allegations of the indictment and the proof at trial, and it was unlikely the jury was confused as to the thing of value at issue. There was therefore no fatal variance between the jury instructions and the indictment.

(3) The State conceded on appeal that the restitution award in the case was unsupported by sufficient evidence, and the matter was remanded for resentencing on that issue alone. The judgment of the trial court was otherwise affirmed. Judges Wood and Tyson concurred.

Burglary, Breaking or Entering, and Related Offenses

The State presented insufficient evidence that the truck contained “goods, wares, freight, or other thing of value,” an essential element of felony breaking or entering a motor vehicle

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State v. Gibson, ___ N.C. App. ___, 2021-NCCOA-235 (June 1, 2021)

The defendant was charged with felony breaking or entering a pickup truck that was parked overnight at a business. The trial record did not include any evidence that the truck contained an item of even trivial value, and there was no evidence that anything had been taken from inside. In responding to the defendant's motion to dismiss at trial, the State did not address the element of "goods, wares, freight, or other thing of value," nor did the State argue that the evidence presented was sufficient to support that element. The Court of Appeals held there was insufficient evidence that the motor vehicle contained "goods, wares, freight, or other thing of value" and reversed the defendant's conviction for felony breaking or entering a motor vehicle.

Trespass Offenses

The "exceeds authorized access" clause under the CFAA applies only to those who obtain information to which their computer access does not extend, not to those who misuse access that they otherwise have

Van Buren v. United States, 593 U.S. ___, 141 S. Ct. 1648 (June 3, 2021)

The defendant, during his time as a police sergeant in Georgia, used his patrol car computer to run a license plate search in the law enforcement database in exchange for money. The defendant's conduct was in violation of his department's policy, which authorized access to database information only for law enforcement purposes. The federal government charged the defendant with a felony violation of the Computer Fraud and Abuse Act (CFAA) for "exceeding authorized access." The defendant was convicted in district court, and the Eleventh Circuit affirmed.

The CFAA subjects to criminal liability anyone who "intentionally accesses a computer without authorization or exceeds authorized access." 18 U. S. C. § 1030(a)(2). The term "exceeds authorized access" is defined to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." § 1030(e)(6).

The Supreme Court, in an opinion authored by Justice Barrett, did not dispute that the phrase "exceeds authorized access" readily encompasses the defendant's conduct, but concluded that the defendant did not exceed his authorized access as the CFAA defines that phrase. The Court resolved that the phrase "is not entitled so to obtain" plainly refers to information that a person is not entitled to obtain, specifically by using a computer that he is authorized to access. The Court also noted that a broad interpretation of the statute would criminalize a wide array of commonplace computer activity.

The Court held that the "exceeds authorized access" clause covers those who obtain information from particular areas in the computer to which their computer access does not extend, but does not cover those who have improper motives for obtaining information that is otherwise available to them. Because the defendant had authorization to use the system to

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retrieve license plate information, he did not exceed authorized access within the meaning of the CFAA, even though he obtained the information for an improper purpose.

Justice Thomas, joined by Chief Justice Roberts and Justice Alito, dissented, declining to give the statute any limiting function and choosing to rely on the plain meaning of the phrase.

Arson & Burning Offenses

(1) There was sufficient evidence that the home was the dwelling “of another” despite the co-conspirator being the only other inhabitant of the house. (2) The trial court properly considered the appropriate reliability factors before admitting the expert testimony. (3) The trial court did not commit plain error in its jury instructions because there was no variance between the allegations in the indictment and the State’s evidence at trial. (4) The State failed to present sufficient evidence to support the requested restitution amount.

State v. Lance, ___ N.C. App. ___, 2021-NCCOA-236 (June 1, 2021), *temp. stay allowed*, 377 N.C. 563 (June 7, 2021)

The house leased by the defendant and her mother was destroyed by a fire. The police sergeant who was sent to investigate the fire observed that there was an unusually low number of personal belongings in the home and “not what you would expect in a home that was just lost to a fire.” Slip op. at ¶ 8. The sergeant learned that the defendant had obtained a renter’s insurance policy on her personal property about four months prior to the fire and had filed a claim for items lost in the fire. Several months later, the sergeant learned that the defendant’s mother had rented a nearby storage unit the day before the fire. Upon search of the unit, the sergeant found several personal items belonging to the defendant, many of which matched items listed on the loss inventory form the defendant submitted to her insurance company. Video footage from the storage facility showed the defendant and her mother accessing the storage unit the day before the fire, moving items into the unit, and later moving items out of the unit after the fire. The defendant was charged with and convicted of second degree arson, conspiracy to commit second degree arson, and insurance fraud and was ordered to pay \$40,000 in restitution to the homeowner.

(1) On appeal, the defendant argued that the trial court erred in denying her motion to dismiss the arson and conspiracy charges because the State failed to present sufficient evidence that the house in question was inhabited by “another person,” an essential element of those arson charges. The defendant asserted that the only other inhabitant of the house, her mother, was her alleged co-conspirator and thus the house was not the dwelling of “another.” In rejecting this argument, the Court of Appeals noted that the elements of the offense and existing precedent do not provide any exception for co-conspirators and require only that “someone other than the defendant lives there.” Slip op. at ¶ 21.

(2) The defendant argued that the trial court erred in admitting expert witness testimony because the court failed to conduct a proper reliability analysis under Rule 702 of the Rules of Evidence and because the expert’s testimony was based on an unreliable method. The trial court heard extensive *voir dire* testimony from the expert, including information on his

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background and methods. The trial court allowed the expert's testimony that he "did not conclude that the fire had an incendiary or human cause, only that he could not rule out the hypothesis of an incendiary cause based on the information gathered in his investigation." Slip op. at ¶ 31. The Court of Appeals held that in light of the trial record, the trial court's stated reasoning, and the court's express pronouncement that it considered the three reliability factors in Rule 702, the trial court's ruling was within the court's sound discretion.

(3) The defendant contended that the trial court failed to specify the particular false statement or misrepresentation alleged in the indictment while delivering instructions to the jury. In rejecting this argument, the Court of Appeals concluded that there was no variance between the allegations in the indictment and the State's evidence at trial and that the defendant's statements on record all fell within the scope of the specific misrepresentation alleged in the indictment that her property was destroyed by an accidental fire.

(4) The defendant's final argument was that the trial court erred in ordering her to pay \$40,000 in restitution without a sufficient evidentiary basis of testimony or documentary evidence to support the amount of restitution ordered. The State did not present any testimony or documents to support the requested \$40,000 amount except for the restitution worksheet. The State conceded error, and the Court of Appeals vacated and remanded that portion of the defendant's sentence.

Weapons Offenses

The defendant was entitled to an instruction on justification as an affirmative defense to possession of a firearm by a felon

State v. Swindell, ___ N.C. App. ___, 2021-NCCOA-408 (Aug. 3, 2021), *temp. stay allowed*, ___ N.C. ___, 861 S.E.2d 339 (Aug. 20, 2021)

In this Bladen County case, the defendant was convicted of second-degree murder and possession of a firearm by a felon after shooting a man in an altercation between several people at an apartment complex. There were conflicting accounts about which of the people involved had guns, although the defendant testified that he fired his weapon when he believed that one of the men with which he was fighting had a gun, and that he was about to be killed. On appeal, the defendant argued that the trial court erred in declining his request to instruct the jury on the affirmative defense of justification to possess a firearm as a felon—a defense recently recognized by the Supreme Court in *State v. Mercer*, 373 N.C. 459 (2020). To be entitled to a jury instruction on justification, a defendant must meet a four-part test: (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *Id.* at 464. Additionally, to be entitled to the justification defense, the defendant must possess the firearm

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only while under threat. *Id.* Here, taking the evidence in the light most favorable to the defendant, the Court of Appeals concluded that the defendant presented evidence of all the required elements. As to the imminent threat, the victim had knocked the defendant onto his buttocks and heard others saying someone had a gun and “pop him.” As to the second element, the defendant was not the aggressor and attempted to explain to the victim that he was not there to fight. As to the availability of an alternative, evidence showed that the victim attacked the defendant, and a reasonable jury could have concluded that it was too late to call 911 and that running away would have put the defendant at risk of being shot. And as to the causal relationship between the avoidance of harm and the criminal conduct, testimony indicated that the defendant took possession of the firearm only after he heard others saying the victim had a gun, and that he abandoned it when he was able to run away. Finally, the court concluded that the defendant was prejudiced by the trial judge’s failure to give the instruction, as a reasonable jury may have acquitted the defendant on the firearm charge if it had been permitted to consider whether he was justified in possessing it. Accordingly, the majority reversed the conviction and remanded the case for a new trial.

A dissenting judge would have concluded that the required elements for the justification instruction were not met because the defendant intentionally placed himself in a dangerous situation, and because he had many reasonable alternatives to violating the law.

Gambling

Trial court did not err by determining that gaming enterprise was an unlawful sweepstakes in violation of G.S. 14-306.4

Crazie Overstock Promotions v. State of North Carolina, 377 N.C. 391 (June 11, 2021)

The plaintiff filed a complaint seeking a determination, among other things, that its video gaming enterprise did not constitute an unlawful sweepstakes in violation of G.S. 14-306.4. The trial court granted summary judgment for the defendants. The plaintiff appealed, and the Court of Appeals affirmed the granting of summary judgment with respect to the issue of whether the gaming enterprise violated G.S. 14-306.4 while reversing the trial court’s decision to grant summary judgment in defendants’ favor with respect to the issue of whether the gaming enterprise violated G.S. 14-306.1A. The Supreme Court granted discretionary review.

The plaintiff’s video gaming enterprise consists of two electronic games. The first is the Reward Game, which is a game of chance. Customers use Reward Points from that game to play the Dexterity Test, which involves some skill, as it rewards Dexterity Points based on how closely the customer stops a stopwatch to the designated number. Dexterity Points may be redeemed for cash.

The Supreme Court stated that the relevant test for determining whether the operation of an electronic gaming device violates G.S. 14-306.4(a) is whether the results produced by that equipment in terms of whether the player wins or loses and the relative amount of the player’s winnings or losses varies primarily with the vagaries of chance or the extent of the player’s skill and dexterity. Applying that test, the Supreme Court agreed with the Court of Appeals that the

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plaintiff's gaming enterprise violated G.S. 14-306.4. First, given that the number of Reward Points increases the dollar value of the prizes that a player is entitled to win in the course of the Dexterity Test, Reward Points are a "[]thing . . . of value" pursuant to G.S. 14-306.4(a)(4). Slip op. at ¶ 24. For that reason, the Court concluded that the Reward Game violates G.S. 14-306.4.

The Court reached the same conclusion when considering the Reward Game and the Dexterity Test in conjunction. Even though the Dexterity Test, viewed in isolation, involves skill or dexterity, a customer's ability to win more than a minimal amount of money is controlled by the outcome of the Reward Game. A person who is wholly unsuccessful in playing the Reward Game cannot win more than \$1.00 regardless of how well he or she performs while playing the Dexterity Test. The Court reasoned that this fact established that the amount of a player's winnings is primarily dependent upon chance rather than skill or dexterity as required by G.S. 14-306.4. Because chance predominates over the exercise of skill or dexterity in plaintiff's games, the Court concluded that they are properly classified as a game of chance rather than a game of dexterity or skill.

Thus, the Court held that the plaintiff's gaming enterprise is an unlawful sweepstakes in violation of G.S. 14-306.4. The court concluded that this determination obviated the need to decide other issues on remand, and accordingly modified and affirmed the decision of the Court of Appeals.

Drug Offenses

State's evidence was sufficient to allow jury to infer that the defendant intended to sell or deliver methamphetamine

State v. Blagg, 377 N.C. 482 (June 11, 2021)

The defendant was stopped for a traffic violation after leaving a Buncombe County house that officers were surveilling due to complaints of illegal drug activity. Officers recovered from the defendant's car one large bag and several smaller bags of a white crystalline substance, a bag of a leafy green substance believed to be marijuana, a baggie of cotton balls, several syringes, rolling papers, and a lockbox containing several smoked marijuana blunts and a number of plastic baggies. When he was arrested, the defendant offered to provide information about a woman he was supposed to meet who was involved in heroin trafficking.

The defendant was indicted for several drug charges including possession of methamphetamine and possession with intent to sell or deliver methamphetamine and for attaining habitual felon status. At trial, a forensic analyst from the State Crime Lab testified that that the white crystalline substance in the large plastic baggie was 6.51 grams of methamphetamine. The arresting officer testified that a typical methamphetamine sale for personal drug use was usually between one-half of a gram to a gram, and that two of the smaller baggies containing white crystalline substances (which were not analyzed) weighed 0.6 and 0.9 grams. The officer also testified that the baggies found in the car were consistent with those used in drug sales.

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The defendant moved at the close of the State's evidence to dismiss the charge of possession with intent to sell or deliver methamphetamine on the basis that the search of his person and vehicle yielded no cash, guns, financial records or other evidence to show that the defendant was a drug dealer as opposed to a drug user in possession of drugs. The trial court denied the motion, and the defendant was convicted of this charge and others and of being a habitual felon. The defendant appealed. Over a dissent, the Court of Appeals concluded that the trial court did not err in denying the defendant's motion to dismiss the possession with intent to sell or deliver charge. The majority opined that "[w]hile it is possible that [d]efendant had 13 hits of methamphetamine solely for personal use, it is also possible that [d]efendant possessed that quantity of methamphetamine with the intent to sell or deliver the same" and that the issue was thus "properly resolved by the jury." Slip op. at ¶ 8.

On appeal, the Supreme Court considered whether the State presented sufficient evidence that the defendant intended to sell or deliver methamphetamine. The Court applied the following factors from *State v. Nettles*, 170 N.C. App. 100 (2005), to evaluate whether the defendant's intent to sell or deliver could be inferred from the evidence: (1) the packaging, labeling and storage of the controlled substance, (2) the defendant's activities, (3) the quantity of the drugs found, and (4) the presence of cash or drug paraphernalia including plastic baggies. The Court determined that the State's evidence satisfied every factor and that the trial court properly denied the defendant's motion to dismiss. Specifically, the court pointed to the following evidence: (1) the packaging of the confirmed methamphetamine and the untested white crystalline substances and the presence of clear plastic baggies in the car; (2) the storage of the methamphetamine in the center console after leaving a house where drug activity was suspected and while having a pending meeting with a drug trafficker; (3) the driving to a suspected drug house, entering and remaining inside for ten minutes, planning to meet with a drug trafficker, and driving a car with a large bag of methamphetamine inside and other items that appeared to be drug-related; and (4) the more than 8 grams of white crystalline substances in the defendant's car, with 6.51 grams confirmed as methamphetamine (23.3 percent of the threshold amount to establish trafficking in methamphetamine), combined with evidence that the typical packaging of such a substance is one-half of a gram to a gram; and (5) the loaded syringe, bag of new syringes and baggie of cotton balls in the defendant's car along with a lock box with plastic baggies in the back floorboard of the car. Focusing on the presence of evidence that could reasonably support an inference that the defendant possessed methamphetamine with intent to sell or deliver, the Court concluded that the State presented sufficient evidence of the defendant's intent to sell or deliver methamphetamine.

Justice Earls, joined by Justice Hudson, dissented. Justice Earls wrote that the majority had jettisoned the requirement that the State present substantial evidence of the defendant's specific intent to sell or deliver the controlled substance by relying on evidence that was common to any individual who possesses a controlled substance.

Motor Vehicle Offenses

Criminal Offenses

(1) There was sufficient evidence of the defendant’s impairment. (2) Any error in the admission of a toxicology expert’s testimony was not prejudicial in light of the defendant’s admission to taking Hydrocodone.

State v. Teesateskie, ___ N.C. App. ___, 2021-NCCOA-409 (Aug. 3, 2021)

In this Graham County case, the defendant was convicted of felony death by vehicle and driving while impaired after she drove off the road and killed her passenger. Though first responders did not initially think the defendant had ingested any impairing substance, the Highway Patrol suspected impairment. A blood sample revealed the presence of Xanax, Citalopram, and Lamotrigine, but was inconclusive as to Hydrocodone, which the blood analyst testified could have been masked by the Lamotrigine, metabolized, or present in too small a quantity to be measured. (1) On appeal, the defendant argued that the trial court erred by denying her motion to dismiss based on insufficient evidence of impairment to support her charge of DWI, and, in turn, her charge of felony death by motor vehicle. The Court of Appeals disagreed. Viewing the evidence in the light most favorable to the State, and allowing the State every reasonable inference arising from the evidence, the court concluded that there was sufficient evidence of impairment, including the results from standardized field sobriety tests, the defendant’s statement that she had consumed alcohol and Hydrocodone, and the opinion of the Highway Patrol’s drug recognition expert. The defendant’s conflicting evidence—including that the accident occurred at night on a curvy mountain road and that her weight and diabetes affected the results of her sobriety tests—did not allow the trial court to grant a motion to dismiss, because conflicting evidence is for the jury to resolve.

(2) The defendant also argued on appeal that the trial court should not have allowed the State’s expert to testify as to possible reasons why Hydrocodone did not show up in the defendant’s blood test, because that testimony violated Rule 702 in that it was not based on scientific or technical knowledge, was impermissibly based on unreliable principles and methods, and was prejudicial due to the stigma associated with Hydrocodone on account of the opioid crisis. The Court of Appeals concluded that even if the issue was properly preserved for appeal, and even if the admission of the expert’s statement was an abuse of discretion in violation of Rule 702, it was not prejudicial given the defendant’s admission that she took 20 mg of Hydrocodone approximately one hour and fifteen minutes before the accident.

Defenses

Defenses

Self-Defense

The trial court properly declined to resolve the defendant's castle doctrine defense before trial, properly denied the defendant's motion to dismiss, and properly instructed the jury on the elements of the castle doctrine

State v. Austin, ___ N.C. App. ___, 2021-NCCOA-494 (Sept. 21, 2021)

In this first-degree murder case, the trial court properly declined to resolve the defendant's castle doctrine defense before trial, properly denied the defendant's motion to dismiss, and properly instructed the jury on the elements of the castle doctrine.

The defendant argued that the trial court erred by refusing to resolve her castle doctrine defense prior to trial because the language of G.S. 14-51.2(e) providing that a person is "immune from civil or criminal liability" when he or she satisfies the castle doctrine criteria suggests that the issue of whether a person qualifies for the defense must be resolved by judge rather than a jury. Engaging in statutory construction, the court explained through various examples that in the context of the criminal law, the General Statutes use the phrase "immunity from prosecution" when describing the traditional form of immunity equating to a right not to be forced into court to defend oneself. In contrast, the court explained that the immunity provided by the castle doctrine is "immunity from a conviction and judgment, not the prosecution itself." The court bolstered this conclusion by noting that traditional immunities from prosecution typically involve little or no fact determination while the castle doctrine "can involve deeply fact-intensive questions."

The court went on to conclude that there was sufficient evidence from which the jury could determine that the State had rebutted the castle doctrine's presumption of reasonable fear and also sufficient evidence of premeditation and deliberation. The State's evidence showed that a bystander saw the defendant in her driveway with a gun standing over the unarmed victim as he pleaded "Please, please, just let me go. Let me go." The bystander then saw the defendant take several steps back and shoot the victim in the head from three to six feet away. In the light most favorable to the State, this was sufficient evidence to overcome the defendant's motions to dismiss based on both the castle doctrine and a lack of premeditation and deliberation.

Finally, the court determined that the trial court did not err in its instruction to the jury concerning the castle doctrine. The jury instruction used language mirroring that of G.S. 14-51.2 and was crafted with significant input from the parties. While the instruction specifically identified only the criteria of G.S. 14-51.2(c)(5) as an avenue for rebutting the defendant's presumption of fear, it did not, consistent with state law on the issue, instruct that the criteria of subsection (c)(5) was the only means of rebuttal and instead left the issue for the jury's determination based on the facts of the case.

Post-Conviction Proceedings

Post-Conviction Proceedings

Motions for Appropriate Relief

(1) The MAR court erred in summarily dismissing the defendant's guilt-innocence phase IAC claims without an evidentiary hearing. (2) The MAR court erred in dismissing the defendant's shackling claim as procedurally barred without conducting an evidentiary hearing.

State v. Allen, ___ N.C. ___, 2021-NCSC-88 (Aug. 13, 2021)

The defendant was found guilty of first-degree murder and sentenced to death in 2003. The defendant challenged his conviction and sentence on direct appeal, but the Supreme Court unanimously found no error. The Supreme Court of the United States denied certiorari. Subsequently, the defendant filed a motion for appropriate relief (MAR) in Superior Court in July 2007. Six years later, and before the MAR court ruled on his MAR, the defendant filed a supplemental motion for appropriate relief (SMAR) amending some of his previous claims and adding two additional claims. The MAR court dismissed each of the defendant's claims, and the defendant appealed to the state Supreme Court.

(1) Of the twelve total claims raised in the defendant's MAR and SMAR, five of them directly related to his allegation that his trial attorneys rendered unconstitutionally ineffective assistance of counsel (IAC) during the guilt-innocence phase of his trial by failing to investigate, develop, and utilize various sources of exculpatory evidence. The Supreme Court held that the MAR court erred in summarily dismissing the defendant's guilt-innocence phase IAC claims without an evidentiary hearing because "some of his asserted grounds for relief required the [MAR] court to resolve questions of fact." Slip op. at ¶ 3. The Court concluded that because the defendant presented evidence which, if proven true would entitle him to relief, he is entitled to an evidentiary hearing in accordance with statutory mandate.

(2) The Supreme Court held that the trial court erred in summarily ruling that the defendant's claim alleging he was impermissibly shackled in view of the jury was procedurally barred because the record did not contain facts necessary to a fair resolution of the claim. The Court vacated the relevant portion of the MAR court's order and remanded for an evidentiary hearing to obtain the facts necessary to determine whether his claim is procedurally barred and, if not, whether it has merit.

The Court affirmed the MAR court's disposition of all other claims raised in the defendant's MAR and SMAR.

Judicial Administration

Judicial Administration

Contempt

(1) Defendant was properly served subpoenas to appear by telephone; (2) Show cause order based on defendant's disregard of the subpoena was sufficient to confer jurisdiction for contempt hearing; (3) Trial court's oral pronouncement of the correct standard of proof was sufficient despite failure to check box on form finding the defendant in criminal contempt

State v. Gonzalez, ___ N.C. App. ___, 2021-NCCOA-309 (July 6, 2021), *temp. stay allowed*, ___ N.C. ___, 859 S.E.2d 634 (July 21, 2021)

The defendant was served with subpoenas for her and her children to testify in a murder trial. She was first served by telephone by the Watauga County Sheriff's deputy and later served personally. The defendant and her children did not appear as commanded. (This led to an improperly declared mistrial and ultimately resulted in a double jeopardy violation. *See State v. Resendiz-Merlos*, 268 N.C. App. 109 (Oct. 15, 2019)). The day before failing to appear as required by the subpoena, the defendant met with the prosecutor and acknowledged her obligation to appear and testify. After the trial, the defendant acknowledged to law enforcement that she had purposefully failed to comply with the subpoena. A show cause order was issued, and the defendant was found in criminal contempt. She was sentenced to an active term of 30 days and appealed.

(1) The subpoena personally served on the defendant only had one page of the AOC subpoena form (AOC-G-100). Page two of that document lists the rights and protections for a person under subpoena, and the defendant argued this rendered the process invalid. The Court of Appeals agreed that the subpoena personally served on the defendant did not comply with the requirements for service of a subpoena, but found the subpoena served by telephone was proper.

(2) The defendant also argued that the trial court lacked jurisdiction to find her in contempt based on the invalid subpoena. Because the telephone subpoena was properly served, the trial court had jurisdiction to enforce it. Contempt under these circumstances was permissible as a matter of Rule 45 of the North Carolina Rules of Civil Procedure or under G.S. 5A-11 (Criminal contempt). A show cause order alleging failure to comply with a court order and referencing the prior order gives a trial court jurisdiction for the trial court to act, and the show cause order here did so. In the court's words:

[B]ecause the trial court entered a show cause order requiring defendant to appear in court and explain why she failed to appear in accordance with the subpoena served upon her, it was fully authorized to find her in criminal contempt of court. *Gonzalez Slip op.* at 9.

(3) An additional argument that the trial court failed to apply the beyond-a-reasonable-doubt standard to her contempt conviction was likewise rejected. The trial court announced in open court its use of that standard but failed to check the appropriate box on the form order. The oral pronouncement was sufficient to indicate the trial court's application of the correct

Judicial Administration

standard of proof, and the district court's judgment was therefore affirmed in all respects. Judges Carpenter and Arrowood concurred.

Fourth Circuit Cases

May Fourth Circuit Cases

***Gant* limitations on search incident to arrest exception apply outside of the vehicle context; searches of backpack and vehicle after defendant was secured were improper**

U.S. v. Davis, 997 F.3d 191 (May 7, 2021). Officer Derek Richardson with the Holly Springs Police Department stopped a car driven by Howard Davis for a window tinting violation. While Davis was on the side of the road, two other officers arrived in a separate patrol car, with the lights activated. While the three officers conferred behind his car, Davis put his hand outside of his window and made a pointing gesture indicating he was leaving. He drove off, leaving his driver's license and insurance card with Richardson. The officers chased Davis's car through a residential neighborhood. Davis drove into someone's backyard, got out of his vehicle carrying a backpack, ran on foot into a swamp, and got stuck in knee-high water. Richardson, who was pursuing Davis on foot at this point, drew his gun and ordered Davis to come out of the swamp. Davis returned to dry land, dropped his backpack, and lay down on his stomach. Richardson patted Davis down and discovered a large amount of cash. He then handcuffed Davis's hands behind his back and arrested him for traffic offenses, including speeding to elude. Richardson then unzipped the backpack and found cash and cocaine inside. Officers also searched Davis's car, finding a digital scale and cash. A witness reported seeing Davis throw a gun from the car while fleeing, and officers found a gun on the path Davis drove through the neighborhood. Davis was indicted for federal drug and gun charges. He moved to suppress the evidence seized from his backpack and vehicle, arguing that both searches violated the Fourth Amendment. The trial court denied his motion. Davis was convicted at trial and was sentenced to thirty-five years of imprisonment. He appealed.

The Fourth Circuit began by reviewing the United States Supreme Court case law identifying and defining the parameters of the exception to the warrant requirement that permits searches incident to a lawful arrest. The court noted that the authority to search a vehicle incident to a suspect's arrest had been curtailed in *Gant*. There, the Supreme Court held that officers may search a vehicle incident to a recent occupant's arrest in two circumstances: (1) when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; and (2) when it is reasonable to believe that evidence related to the crime of arrest might be found in the vehicle.

Davis urged the Fourth Circuit to apply the first *Gant* holding to the search of his backpack. The court obliged, reasoning that this holding was not limited to the vehicle context and that it applied to searches of containers more generally. The Fourth Circuit pointed to the *Gant* Court's reliance on a non-vehicle case, *Chimel v. California*, 395 U.S. 752 (1969) (determining that it was reasonable for arresting officers to search an arrestee and the area within the arrestee's reach, from which the suspect might access a weapon or destroy evidence), as a basis for the standard it articulated. The *Davis* Court noted that the Third, Ninth, and Tenth Circuits had likewise concluded that *Gant* was not limited to automobile searches. (Ever-prescient Professor Jeff Welty predicted this outcome more than a decade ago.)

Fourth Circuit Cases

Applying *Gant*, the court determined that the search of the backpack was unlawful. Davis was face-down on the ground with his hands handcuffed behind his back when Richardson unzipped the bag and searched it. There were three officers and no other suspects or distracting bystanders on the scene. Thus, the court reasoned, Davis was secured. Moreover, the court concluded that even though the bag was next to Davis, the fact that Davis was face-down and handcuffed meant that the bag was not within his reach.

The court distinguished *United States v. Ferebee*, 957 F.3d 406 (4th Cir. 2020), a case in which the Fourth Circuit reasoned that officers could properly search a backpack located inside the house where defendant Ferebee was handcuffed and arrested even after Ferebee was taken out of the house. There, the court concluded that Ferebee, though supervised by an officer, “still could walk around somewhat freely and could easily have made a break for the backpack inside the house.” *Id.* at 419. In addition, Ferebee had, while handcuffed and before being escorted from the house, surreptitiously discarded a marijuana joint without officers noticing. Davis, though handcuffed like Ferebee, was prone with his hands handcuffed behind his back, facts that the court said rendered him secure and the bag out of reach.

The *Davis* Court also distinguished the Third Circuit’s decision in *United States v. Shakir*, 616 F.3d 315 (3d Cir. 2010), a case it relied upon in *Ferebee*. In *Shakir*, the defendant was arrested and dropped a duffel bag at his feet. Officers handcuffed the defendant and then searched the duffel bag. The Third Circuit held that the search was permissible because, even though the defendant was handcuffed and guarded by two officers, there was a “sufficient possibility” that he could access a weapon in the bag. *Id.* at 321. The court noted that Shakir was subject to an arrest warrant for armed bank robbery and that he was arrested in public “near some 20 innocent bystanders, as well as at least one suspected confederate who was guarded only by unarmed hotel security officers.” *Id.* Davis’s circumstances were different in key ways. Again, Davis was positioned on his stomach with his hands cuffed behind his back. A gun was pointed at him. There were three officers on the scene, a lone defendant, and no one else. Davis, unlike Shakir, could not have accessed his bag by dropping to the floor.

The court next considered the lawfulness of the warrantless search of Davis’s car, which occurred before officers learned of the gun. Davis argued that the search was not permissible under the automobile exception, which requires probable cause that the car contains evidence of a crime, or under *Gant*, since he was secured, the car was out of reach, and it was not reasonable to believe that evidence of his crime of arrest would be discovered in the vehicle. Again, the Fourth Circuit agreed with Davis.

Without the evidence from the backpack, probable cause to search the car rested on Davis’s flight, his arrest, and the cash discovered on his person. The court concluded that while these facts may have given the officers an articulable suspicion that evidence of a crime was in the vehicle, it did not provide probable cause. Thus, the search was not authorized under the automobile exception. As for the first prong of *Gant*, Davis was secured and the car was out of reach. As for the second *Gant* prong, Davis was arrested for speeding to elude, resisting an

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officer, and other traffic offenses. The court said it was not reasonable to believe that Davis's car would contain evidence of those crimes.

The Fourth Circuit reversed Davis's convictions and remanded for entry of an order granting the motion to suppress. [This summary is reproduced from Shea Denning's blog on the case, [here](#).]

Suppression remedy not available for violation of administrative warrant requirement

U.S. v. Santos-Portillo, 997 F.3d 159 (May 7, 2021). In this case from the Eastern District of North Carolina, the defendant was in the country without authorization. He was convicted of a felony in 2011 and deported to Honduras. In 2018, a Homeland Security agent recognized the defendant, leading to his arrest for illegal reentry. Following his arrest, he made inculpatory statements. Under 8 U.S.C. § 1357(a), immigration officers may arrest without a warrant only where evidence exists to show that the arrestee will escape if not immediately arrested. Here, no warrant was obtained and there was no evidence that the defendant was a flight risk. The defendant moved to suppress the evidence obtained after his arrest based on the statutory violation. The district court agreed the arrest was unlawful but found that suppression was not a proper remedy in this context.

A divided Fourth Circuit agreed. In the majority's words:

There is absolutely no statutory basis for Santos-Portillo's argument that we should suppress the evidence against him. 8 U.S.C. § 1357(a) makes no mention of suppression or any other remedy for those arrested without an administrative warrant. This absence is notable, considering that Congress has authorized a suppression remedy in other contexts. *Santos-Portillo* Slip op. at 6 (citations omitted).

The arrest was reasonable under the Fourth Amendment, and that precluded suppression as a remedy absent statutory authorization.

The defendant also argued that the court had the inherent authority to fashion a suppression remedy despite the absence of clear authority in support. This too was rejected by the majority: "[T]he once freewheeling power of the federal courts to create remedies where Congress did not has met only disfavor from the Court itself [in recent times]." *Id.* at 9. The court's position here is consistent with other circuits that have considered the question. Other arguments in favor of a suppression remedy were similarly rejected, and the district court was affirmed in full.

Judge Floyd dissented. He would have found that a suppression remedy was available as a matter of the court's supervisory authority and that remedy should have been considered as an option by the district court.

Fourth Circuit Cases

Conviction for abusive language based on racial slur reversed on First Amendment grounds

U.S. v. Bartow, 997 F.3d 203 (May 11, 2021). The defendant was a white retired Lieutenant Colonel with the U.S. Air Force. While in a store on a military base in the Eastern District of Virginia, he became verbally abusive towards several people within. He loudly used the slur “n****r” towards at least one African American man and other people. He was charged with abusive language under a Virginia law prohibiting language likely to cause a breach of peace (akin to one version of North Carolina’s disorderly conduct offense, G.S. 14-288.4(a)(2)). He was prosecuted in federal court under a federal statute incorporating state law. He was convicted at trial and appealed. The Fourth Circuit unanimously reversed.

So-called “fighting words” are unprotected under the First Amendment pursuant to *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). However, the U.S. Supreme Court has not recognized any speech since *Chaplinsky* as falling within the fighting words exception and has significantly limited the reach of the exception. No longer are words that “by their very utterance inflict injury” recognized as fighting words. *Bartow* Slip op. at 6 (citations omitted). Fighting words must be directed at an individual personally. “Without evidence of a direct personal insult, the Court has determined that the Government may not obtain a conviction for ‘fighting words.’” *Id.* at 7 (citation omitted). To qualify as fighting words, the speech at issue must also be likely to provoke immediate violence from the listener towards the speaker. Finally, fighting words must be evaluated in light of all of the circumstances and in the context under which the speech was made.

The court recognized that the defendant’s use of the racial slur was grossly offensive. “It is hard to think of an English term that is more abhorrent.” *Id.* at 9. The word itself does not, however, rise to the level of fighting words. Here, there was no evidence presented that the people who heard the defendant’s slur reacted violently to it, nor any evidence that a reasonable person would violently react to it under the circumstances. This was fatal to the conviction. According to the court:

The record contains no evidence that Bartow employed other profanity, repeated the vile slur, or issued any kind of threat, let alone one dripping with racism [as in another case where a similar offense withstood a First Amendment challenge]. . . He did not take any aggressive actions that might have provoked violence. Indeed, Bartow’s mode of speech—a series of rhetorical questions while trying on shoes — did not provoke anyone. *Id.* at 13 (cleaned up).

The unanimous court acknowledged its ruling permitted the defendant to avoid criminal liability for his “shameful speech,” but concluded the First Amendment required that the conviction be reversed.

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June Fourth Circuit Cases

Question about the existence of contraband in the car during a traffic stop was not an improper extension or deviation from the mission of the stop

U.S. v. Buzzard, 1 F.4th 198 (June 11, 2021). In this case from the Southern District of West Virginia, an officer stopped the defendants for a brake light violation around 1:30am. This occurred in a high crime area with a known drug house nearby. The officer recognized the passenger as a person he had dealt with before and knew him to be a felon with multiple prior drug arrests. He also knew the passenger had recently been released from prison. During the initial encounter, the passenger exhibited nervous behavior, interrupting the officer, refusing to make eye contact, and fidgeting in a way that led the officer to believe he may be inclined to flee. The driver could not produce a license or registration. Given the late hour and multiple occupants of the car, the officer called for backup before checking the men's information. Before the backup officer arrived, the officer asked if there was anything illegal in the car. The driver admitted to having marijuana paraphernalia and turned a pipe over to the officer. The passenger leaned down and was seen "fiddling" with something under the seat. The backup officer arrived within 3 to 5 minutes of being called and took control of the driver outside of the car. The passenger then admitted to the stopping officer that he too possessed drug paraphernalia and turned over a hypodermic needle. The driver then admitted to the backup officer that there were guns in the car. A search found a firearm under the driver seat and another under the passenger seat, and both men were charged with felon in possession. They moved to suppress, arguing that the officer's question about having anything illegal was an improper extension of the traffic stop and an improper deviation from the mission of the stop. At suppression, both men testified and contradicted the officer's version of events, but the officer's version was ultimately credited. The district court denied the motions to suppress, and a unanimous panel of the Fourth Circuit affirmed.

Under *U.S. v. Rodriguez*, 575 U.S. 348 (2018), the reasonableness of a traffic stop's duration depends on the purpose of the stop—normally to address the traffic violation causing the stop, and to address any related officer safety concerns (absent any additional reasonable suspicion). In that case, an officer extended an already-completed traffic stop by running a drug dog around the car, which was found to violate the Fourth Amendment. Here, the district court determined that the officer's question about any contraband in the car was related to officer safety concerns. The Fourth Circuit agreed:

[The officer] was outnumbered, and he asked the question because of 'the time of night and the high drug area, [the passenger's] history and [the passenger's] behavior.' Given the totality of the circumstances, it makes sense that he needed to know more about what [the driver and passenger] had in the car. Buzzard Slip op. at 10.

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Further, the question was asked during the middle of the traffic stop before the officer had completed routine checks and before the backup officer arrived (who, again, was called to ensure officer safety). To the extent the question deviated from the mission of the stop, it was permissible because it did not extend the stop's duration, which was ongoing. The motion was therefore properly denied.

Other challenges were likewise rejected, and the district court was affirmed in all respects.

No error in allowing the defendant to represent himself or in failing to order a competency evaluation

U.S. v. Ziegler, 1 F.4th 219 (June 14, 2021). The defendant sped by an officer and ultimately crashed in the Southern District of West Virginia. The officer noticed empty beer cans in the car and that the defendant was “disheveled and erratic.” The defendant refused to submit to breath testing and exclaimed that any charges would be dropped because he was an Assistant United States Attorney (“AUSA”). He was charged with impaired driving and other traffic offenses. Before the magistrate, the defendant again claimed to be an AUSA and stated he would represent himself. After posting bond, he attempted to recover his vehicle from the tow truck company and again claimed to be an AUSA (as well as a sovereign citizen). The defendant later met with the state prosecutor in his impaired driving case and stated once more that he was representing himself as an AUSA. This prompted the prosecutor to check with the United States Attorney’s office. That office confirmed that the defendant was not and had never been an AUSA. He was subsequently indicted in federal court for two counts impersonating an AUSA—one for his statements to law enforcement and the prosecutor, and one for his statements to the tow company.

After being appointed a federal public defender, the defendant moved to represent himself. In support of the request, he argued that he had previously represented himself effectively and, although he was convicted in the matter, the conviction was overturned on appeal. Upon investigation of this claim, it was determined that the previous conviction was overturned for failure of the trial court to follow proper procedure before permitting the defendant to represent himself. The trial court specifically asked the defendant if his intention was to do the same thing in the present matter—that is, to proceed pro se and then complain of errors in allowing the pro se representation on appeal. The defendant denied any such intent.

The defendant also professed knowledge of federal criminal procedure, evidence, constitutional law, and criminal law generally. He agreed that his waiver of counsel was knowing and voluntary. After recommending that the defendant keep his appointed attorney, the defendant stated that he “absolutely” wanted to represent himself. The public defender agreed that the defendant was competent to waive counsel. The trial court allowed the federal defender to withdraw and permitted the defendant to proceed pro se (although the defender was kept on as stand-by counsel).

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Several pretrial motions were heard and argued, including a motion to suppress. The defendant made some “odd” and “rambling” statements, and some of his motions were not relevant or out of the ordinary (including an attempt to remove his impaired driving case to federal court). The trial court again advised the defendant to allow a licensed attorney to represent him in the case and even offered to appoint a different attorney. The trial judge stated: “I read your submissions carefully, and it’s obvious to me that you’re not a sophisticated person as far as your knowledge of the law. There are a lot of things that it’s apparent to me that you don’t understand that you think you understand.” *Ziegler* Slip op. at 7. The trial court again considered the defendant’s competency to waive counsel and found that while the defendant’s decision was ill-advised, the defendant was competent to make it.

During trial, the defendant’s behaved strangely at times, asking irrelevant questions and arguing with witnesses and the court. He also introduced evidence, made objections that were sustained, “made good points on cross,” and otherwise performed many of the necessary incidents of representation. After the jury convicted on both counts, the defendant claimed he needed an evaluation of his mental health for the first time. The district court denied the motion and sentenced the defendant to time served. The defendant appealed, and a unanimous Fourth Circuit affirmed.

The defendant argued that the trial judge failed to properly consider his competency to waive counsel before allowing him to proceed pro se, and that his conduct during trial should have triggered a reexamination of the issue. A defendant is competent to waive counsel if he “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,” and (2) “he has a rational as well as factual understanding of the proceedings against him.” *Id.* at 11 (citation omitted). Competence to waive counsel is distinct from competence to provide effective representation for oneself, and only the former is required. The trial court observed the defendant and engaged in repeated and extensive pretrial colloquies with him regarding self-representation. This was a sufficient examination of the defendant’s competency to waive counsel. The fact that the defendant had argued he had a prior conviction overturned due to his legal skill, when in fact the conviction was overturned for errors relating to the defendant’s waiver of counsel, was not enough to change the analysis and was not itself reason for the trial court to order a mental health evaluation. According to the court:

[N]othing about that case, nor about the way Ziegler presented it to the district court, created cause to believe Ziegler was mentally incompetent. Not every misleading claim or lack of knowledge suggests mental illness, and ‘not every manifestation of mental illness demonstrates incompetence to stand trial’ or to waive the right to counsel. Id. at 18 (citation omitted).

The defendant’s behavior during trial likewise did not create reasonable grounds to believe he was incompetent. He performed “quite well” as his own attorney, notwithstanding some “bizarre statements and mistakes.” *Id.* at 19. Although he represented to the court that he was skilled in the law and acted strangely with some witnesses and arguments, this was not enough to seriously question his competency:

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Many great trial lawyers are combative and a bit full of themselves, if not outright narcissists. And 'persons of unquestioned competence have espoused ludicrous legal positions.' Id. at 20 (citation omitted).

Such behavior alone is not enough to trigger a competency evaluation, and the district court did not abuse its discretion in allowing the defendant to represent himself or in failing to sua sponte order a competency evaluation during trial.

A challenge to the sufficiency of evidence was also rejected, and the district court was affirmed in full.

No constitutional violations for denial of in-person visitation with minor daughter where plaintiff was convicted of sexual offenses with a minor

Desper v. Clarke, 1 F.4th 236 (June 15, 2021). In this case from the Western District of Virginia, the plaintiff was a prison inmate and sex offender. He previously exercised in-person visitation with his minor daughter for years during his incarceration. In 2015, the prison changed its policy to disallow in-person visits between minors and sex offenders convicted of an offense involving a minor unless the prison issued an exemption, which affected the plaintiff. After unsuccessfully seeking an exemption several times, he sued, claiming various constitutional violations. The district court dismissed the case and the Fourth Circuit unanimously affirmed.

Whether grounded in the First Amendment right of free association or in Fourteenth Amendment due process rights, the parent-child relationship enjoys constitutional protection. However, any right to prison visitation is not clearly established under either authority. The court here was unwilling to find that a person convicted of a sexual offense against a minor was constitutionally entitled to in-person visitation with a minor. Under *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 461 (1989), “[t]he denial of prison access to a particular visitor ‘is well within the terms of confinement ordinarily contemplated by a prison sentence,’ and therefore is not independently protected by the Due Process Clause.” (citation omitted). The court “doubt[ed]” that the plaintiff had a liberty interest in in-person visitation and the prison visitation policies did not separately confer one here. Fair process was provided for the plaintiff to seek an exemption, and the plaintiff suffered no permanent deprivation, given his ability under the prison policy to seek an exemption each year. The prison’s denial of in-person visitation also did not rise to level of shocking misconduct necessary to state a substantive due process claim. Finally, the plaintiff failed to state a claim for an Equal Protection violation based on alleged differential treatment as compared to other prisoners. The district court was therefore affirmed in all respects.

First Amendment protects the dissemination of truthful, publicly available court records; ban on distributing recordings of criminal court proceedings was subject to strict scrutiny

Soderberg v. Carrion, 999 F.3d 962 (June 15, 2021). Under Maryland law, broadcasting criminal court proceedings is criminally prohibited. The ban applies to both live and previously recorded

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proceedings and applies only to criminal cases—civil matters are not covered by the ban. Thus, the press or public is free to broadcast or distribute any recorded civil court proceeding but is barred from doing the same for criminal cases. Other state laws require court proceedings to be recorded and provide for a right of public to access the audio or video recordings (subject to exceptions for closed proceedings and the like). The plaintiffs sued, challenging the ban’s application to previously-recorded matters as a First Amendment violation. The State argued that the law was a “content-neutral regulation of the time, place, and manner of speech” subject only to intermediate scrutiny. The district court agreed with the State and dismissed the case for failure to state a claim. A unanimous Fourth Circuit reversed.

The First and Fourteenth Amendments protect the dissemination of publicly available court records. Under relevant U.S. Supreme Court precedent, “...States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.” *Soderberg Slip op.* at 10 (citation omitted). That general rule applied to the information at issue here, and the district court erred in failing to review the law under strict scrutiny. The district court’s judgment was therefore vacated, and the matter remanded for further proceedings under the correct standard of review.

Abortion providers had standing to challenge North Carolina’s criminal abortion laws

Bryant v. Woodall, 1 F.4th 280 (June 16, 2021). Abortion providers sued in the Middle District of North Carolina, seeking to enjoin the State from enforcing its criminal prohibitions on abortion. See G.S. [14-44](#), [14-45](#), and [14-45.1](#). The plaintiffs argued that the statutes violated the due process rights of their patients. The district court found that the plaintiffs had standing and ultimately granted summary judgment on their behalf. On appeal, the State renewed its argument that the plaintiffs lacked standing, pointing out that it had not prosecuted under these laws for almost fifty years. North Carolina amended its abortion rules in 2015 and this indicated “a renewed interest in regulating abortion.” *Bryant Slip op.* at 11. A unanimous Fourth Circuit agreed that the plaintiffs had established a credible threat of prosecution for purposes of standing, and the district court’s judgment was consequently affirmed.

Majority of the full court reverses denial of preliminary injunction enjoining Baltimore’s use of aerial surveillance program and associated data

Leaders of a Beautiful Struggle v. Baltimore Police Department, 2 F.4th 330 (June 24, 2021) (en banc). The plaintiffs in this District of Maryland case were a group of community advocates who regularly travelled in and around crime scenes in the city. They sought a preliminary injunction to prohibit the defendant from operating a novel aerial surveillance system known as Aerial Investigation Research (“AIR”) and to prohibit the police from accessing any information obtained via operation of the system, alleging First and Fourth Amendment violations. “[A]ny single AIR image—captured once per second—includes around 32 square miles of Baltimore and can be magnified to a point where people and cars are individually visible, but only as blurred dots or blobs.” *Leaders of a Beautiful Struggle Slip op.* at 5. The district court denied

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relief, and a three-judge panel of the Fourth Circuit affirmed, finding no constitutional violations (summarized [here](#)). During the litigation, the defendants ceased the program and city officials pledged to not renew the practice. They also deleted all but around 14% of the data collected. On rehearing en banc, the majority reversed.

Because of the possibility that the plaintiffs may be included within the remaining data, the matter remained a live controversy:

14.2 percent of all the data collected—millions of photographs documenting thousands of hours of public movements over six months—is a significant quantity of information. Indeed, the preserved 14.2 percent is the needle in the proverbial haystack that the AIR program was designed to discover. Id. at 12.

The matter was therefore not moot, as the defendant retained access to some amount of data collected by the AIR program. The majority determined that the case was controlled by *U.S. v. Carpenter*, 138 S. Ct. 2206 (2018) (holding that long term tracking by use of historical cell site location data constituted a Fourth Amendment search). Like the cell site location data there, the AIR program here provides police with a “‘detailed, encyclopedic,’ record of where everyone came and went within the city during daylight hours over the prior month-and-a-half.” *Leaders of a Beautiful Struggle* Slip op. at 19. While the program only operated during daylight hours (weather-permitting), the technology here was more accurate than the cell site data in *Carpenter* and amounted to long term tracking of every person in the city when the system was operative—thus violating the reasonable expectation of privacy of each person recorded. In the court’s words:

The AIR program records the movements of a city. With analysis, it can reveal where individuals come and go over an extended period. Because the AIR program enables police to deduce from the whole of individuals’ movements, we hold that accessing its data is a search, and its warrantless operation violates the Fourth Amendment. Id. at 28.

The plaintiffs therefore established a likely constitutional violation and a risk of irreparable harm supporting an injunction against the policy. Other factors in support of the injunction were similarly met, and the district court erred by failing to preliminarily enjoin the defendant from restarting the AIR policy or accessing its data.

Chief Judge Gregory concurred in a separate opinion, joined by Judges Wynn, Thacker, and Harris. His opinion criticized the dissent for its emphasis on policing as the sole answer to the crime problems of Baltimore and took issue with the dissent’s argument that disenfranchised communities in the city would be “hopeless” without the AIR program.

Judge Wynn also penned a concurrence, joined by Judges Motz, Thacker, and Harris, to express disagreement with dissent’s “dire rhetoric” and its “insinuat[ion] that the dissent alone has Baltimore’s best interests at heart.” *Id.* at 39 (Wynn, J., concurring).

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Judge Wilkinson dissented, joined in full by Judges Neimeyer, Agee, Quattlebaum and joined in part (in various combinations) by Judges Diaz, Richardson, and Rushing. He would have affirmed the district court and panel decision below as moot. He also criticized the majority opinion for failing to properly apply the requirements for the issuance of a preliminary injunction, contravening Fourth Amendment precedent on aerial surveillance, trampling principles of federalism, and for imposing a “straitjacket” on Baltimore’s ability to experiment and attempt new solutions to its epidemic of violent crime. “Today’s precipitous and gratuitous ruling will contribute to the continuation of a great human tragedy.” *Id.* at 74 (Wilkinson, J., dissenting). Judge Neimeyer also dissented separately, faulting the majority for its “stunning judicial overreach,” and recommending review by the U.S. Supreme Court. *Id.* at 75 (Neimeyer, J., dissenting).

Judge Diaz also penned a dissent and would have found the matter moot.

First Amendment right of access to public court documents includes right to reasonably contemporaneous access

Courthouse News Service v. Schaefer, 2 F.4th 318 (June 24, 2021). The plaintiff was a news organization reporting on civil litigation. It sends reporters to courthouses to review new complaints each business day in its course of business. Certain clerks of court in the Eastern District of Virginia did not make complaints promptly available for review, with the reporters often waiting days to obtain copies of the documents. The plaintiff sued, alleging First Amendment right of access violations. After the complaints were filed, the clerks began providing copies of complaints filed at a significantly faster pace. The district court agreed with the plaintiff and issued a declaratory judgment, finding the clerks actions in delaying release of the complaints violated the First Amendment. The clerks appealed, and the Fourth Circuit unanimously affirmed.

The First Amendment protects access to judicial records where the information sought “‘ha[s] historically been open to the press and general public’; and (2) where ‘public access plays a significant positive role in the functioning of the particular process in question.’” *Courthouse News Slip op.* at 12 (citation omitted). The complaints sought here easily satisfied both parts of that test. The defendants largely agreed but argued there was no right to contemporaneous access of the documents. The court disagreed: “The press and public thus have an important interest in reasonably contemporaneous access to civil complaints.” *Id.* at 16. While some minor deviation or occasional delay to court documents will not violate the right of access, court documents should be made available “as expeditiously as possible” to avoid a First Amendment violation. *Id.* at 19. The district court correctly determined that the defendants had failed to do prior to the filing of the current action, and its declaratory judgment was unanimously affirmed.

52-year sentence for offense committed as a juvenile did not violate the Eighth Amendment

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U.S. v. Friend, 2 F.4th 369 (June 28, 2021). In this case from the Eastern District of Virginia, the defendant was originally sentenced to life without parole for carjacking resulting in death and other offenses committed when he was 15 years old. Following a resentencing under *Miller v. Alabama*, 567 U.S. 460 (2012), he was sentenced to a 65-year term of imprisonment. On appeal, the Fourth Circuit reversed, finding that the district court failed to properly weigh the defendant's age and immaturity at the time of his offenses. On remand, the district court took additional evidence and ultimately sentenced the defendant to a 52-year term of years. The defendant again appealed, alleging an Eighth Amendment violation. The Fourth Circuit denied relief.

Under *Jones v. Mississippi*, 141 S. Ct. 1307, 1313 (2021), a “discretionary sentencing system is both constitutionally necessary and constitutionally sufficient” for purposes of the Eighth Amendment in the context of juvenile murder sentences. Here, the district court recognized its discretion and exercised it to impose a sentence less than life (and 20% shorter than its previous sentence). Further, the defendant was not sentenced to life without parole—he will be released at age 60. The court rejected the idea that the term amounted to a de facto life sentence. While recognizing the possibility that a term of years sentence could transform into a de facto life term, such was not the case here. The district court carefully considered the defendant's individual situation, and its sentence did not violate the Eighth Amendment. Other challenges to the reasonableness of the sentence were also rejected, and a majority of the court affirmed.

Judge Floyd dissented and would have found that the sentence was procedurally and substantively unreasonable.

No due process or ex post facto violation for upward variance at *Johnson* resentencing

U.S. v. Abed, 3 F.4th 104 (June 29, 2021). In this case from the Western District of Virginia, the defendant was sentenced to a total of 570 months for his involvement in a violent racketeering scheme, including the use of a destructive device during a crime of violence. Following changes in the law regarding the definition and reach of a “crime of violence” under federal law, the defendant successfully sought a resentencing. See *Johnson v. United States*, 576 U.S. 591 (2015). He argued that the district court was bound by sentencing guidelines in place at the time of his offense, which would have required a sentence of no more than 235 months. The district court disagreed and varied upward to impose a 360-month sentence, noting that the sentencing guidelines are now discretionary as a matter of Sixth Amendment law. See *U.S. v. Booker*, 543 U.S. 220 (2005). On appeal, the defendant argued ex post facto and due process violations.

The ex post facto clauses in the Constitution prohibit legislatures at the state or federal level from passing ex post facto laws, but these clauses do not apply to the judiciary. While due process can limit ex post facto actions by the judicial branch, the application of *Booker* here—treating the sentencing guidelines as discretionary at a resentencing—did not implicate a

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judicial ex post facto action. The court likewise rejected the due process arguments. The sentence was not improper or driven by retaliation for the defendant's successful exercise of his rights. The total term of the defendant's imprisonment decreased from 570 months to 360 months. This was not vindictive and did not otherwise violate due process. Other challenges to the sentence were similarly rejected, and the district court affirmed in full by a unanimous court.

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July Fourth Circuit Cases

Reasonable suspicion existed to detain armed man despite open-carry laws; type of weapon is relevant to reasonable suspicion analysis; summary judgment to officer on Fourth Amendment wrongful seizure claim affirmed

Walker v. Donahoe, 3 F.4th 676 (July 7, 2021). One week after the Parkland, Florida high school shootings in 2018, the plaintiff was walking through a suburban area near a school in the Southern District of West Virginia while armed with an AR-15 assault rifle and dressed in military-style garb. In response to a 911 call about the armed man, police briefly detained the plaintiff. Open carry of weapons is permitted in the state, although state law restricts open carry to persons 18 years of age and older. The plaintiff was 24 years old at the time, but the officers believed he could have been under the legal age to carry based on his appearance. The plaintiff was polite but largely uncooperative during the encounter, refusing to answer questions about the gun or his business and disputing the justification for his detention. After a background check revealed that the defendant was eligible to possess and carry the weapon, he was released. The interaction took less than nine minutes. The plaintiff sued, alleging a Fourth Amendment illegal seizure.

The trial court granted summary judgment to the officer, finding the seizure was brief, reasonable, and supported by reasonable suspicion. It held that the officer reasonably believed that the plaintiff could have been violating the age restrictions for open carry. The trial court further found that the totality of circumstances—the recent mass shooting, the 911 report, the plaintiff’s proximity to a school, his military-style dress, and young appearance—created reasonable suspicion to believe the plaintiff may have posed a threat to the nearby school. The trial court alternatively held that the officer did not violate any clearly established rights and was therefore protected from liability by qualified immunity. A majority of the Fourth Circuit affirmed the reasonable suspicion ruling.

Under circuit precedent, “where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention.” *Walker* Slip op. at 13 (citation omitted). The district court correctly noted this rule and correctly found that the officer here had more than the mere fact of the plaintiff’s open carrying of a rifle. A suspect’s open possession of a weapon in open-carry states, while not enough on its own, may contribute to reasonable suspicion. Further, the type of firearm is a relevant consideration in the analysis. In *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008), the U.S. Supreme Court noted that the right to possess and carry weapons “extends only to certain types of weapons,” observing that weapons like handguns, commonly used for self- and home-defense, were protected by the Second Amendment, while military-style weapons may be regulated without offending the constitutional right. Following *Heller*, the Fourth Circuit held that Maryland’s ban on AR-15 rifles and similar high-capacity rifles was constitutional. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir.) (en banc), cert. denied, 138 S. Ct. 469 (2017). While both *Heller* and *Kolbe* dealt with Second Amendment rights rather than Fourth Amendment reasonable suspicion, the court found them “instructive” and agreed with the district court that circumstances here supported reasonable

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suspicion: “Simply put, the circumstances of Walker’s firearm possession were unusual and alarming enough to engender reasonable suspicion,” for all the reasons identified by the district court. *Walker* Slip op. at 18. The district court’s ruling on reasonable suspicion was therefore affirmed.

Judge Richardson concurred in judgment but would have affirmed the district court on the basis of qualified immunity.

Tip by known informant, corroborated by law enforcement, supplied probable cause to search defendant’s vehicle for evidence of drug trafficking

U.S. v. Gondres-Medrano, 3 F.4th 708 (July 8, 2021). A longtime confidential informant with a track record of reliability provided a tip to the FBI that the defendant was involved in drug trafficking. Law enforcement obtained a warrant to track the defendant’s cell phone and located him in Baltimore, Maryland. The informant provided additional information that the defendant would be moving heroin on a specific day and meeting the informant. On the day predicted by the informant, police watched as the defendant entered the informant’s car with a shoebox. The car was stopped, and the shoebox searched, revealing fentanyl and heroin. The defendant was ultimately convicted at trial and sentenced to 121 months. He appealed, arguing in part that the trial court erred in denying his motion to suppress the heroin.

The trial court found the information from the reliable and known informant, corroborated by police investigation, provided probable cause to search the car for evidence of drug trafficking under the automobile exception. The Fourth Circuit agreed. Even an anonymous tipster may be sufficiently corroborated by police to provide probable cause. Here, the proven informant had “enhanced” reliability, much of his information to police was independently corroborated by them (including that the defendant would have heroin on the day of his arrest), and the informant met with police face to face (thereby subjecting himself to penalties for false information). Under the totality of circumstances, probable cause existed to search the car for drugs, and the motion to suppress was properly denied.

Other challenges were rejected, and the district court was unanimously affirmed in full.

Divided court finds no reasonable expectation of privacy in mail addressed to another person absent some other showing of interest in the property

U.S. v. Rose, 3 F.4th 722 (July 9, 2021). In this Eastern District of North Carolina case, the defendant recruited a friend to receive packages of drugs at the friend’s house. The packages were addressed to the friend’s deceased brother. When the packages would arrive, the friend would leave them on the porch and the defendant would collect them. A Drug Enforcement Agency agent noticed a suspicious package addressed to the friend’s home in the dead brother’s name at a FedEx facility. The agent confirmed that the addressee did not match

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anyone connected with the address. A FedEx manager opened the package, finding two kilograms of cocaine. Agents soon noticed an additional, similar package. Following a canine alert, a search warrant for the second package was obtained. It too was searched, revealing another two kilos of cocaine. Police arranged a controlled delivery of the packages, and the defendant eventually collected them from the friend's porch. When law enforcement tried to stop the defendant as he drove away, he fled and ultimately crashed into a parked police car. He sought to suppress the cocaine. The trial court denied the motion, finding the defendant had no reasonable expectation of privacy in the packages. A majority of the Fourth Circuit agreed.

To establish a reasonable expectation of privacy in property, the defendant must show some interest in the property at the time of the search. Normally, mail is protected by a reasonable expectation of privacy. Where the defendant is not the named recipient of the mail, though, the defendant will typically lack a reasonable expectation of privacy in the property. A defendant may show some other interest in or connection to the property despite not being the named recipient of a package, such as when the named recipient of the item is an "established alias" of the defendant, but there was no such showing here. *Rose Slip op.* at 10 (citation omitted). At the time the packages were searched, the defendant had no apparent interest in the property and could not have exercised control over it, had he attempted to do so. In the words of the court:

Rose did not have a reasonable expectation of privacy in the packages addressed to Ronald West because, at the time of the searches, there were no objective indicia that Rose owned, possessed, or exercised control over the packages. Id. at 13 (citation omitted).

That the defendant intended to pick up the packages, or had picked up packages this way before, was not enough to demonstrate an objectively reasonable expectation of privacy in the property. The court distinguished this situation from *Byrd v. U.S.*, 138 S. Ct. 1518 (2018). There, the defendant was found to have an expectation of privacy in a rental car despite not being authorized to drive the car under the rental contract, based on his possession and control of the vehicle. Unlike the defendant in *Byrd*, the defendant here did not have possession or control of the packages at the time of the search, and no other evidence supported an interest in the property. Thus, the district court did not err in denying the motion to suppress. Challenges to the 420-month sentence were also rejected and the district court was affirmed in all respects.

Judge Gregory dissented. According to him, the defendant had "at least informal ownership, control, and possession" of the packages, which was sufficient under relevant precedent to show a reasonable expectation of privacy. The dissent faulted the majority for "effectively [requiring] formal property rights" to assert an expectation of privacy, as well as for misapplying precedent and "muddling the doctrine." *Rose Slip op.* at 22, 23 (Gregory, J., dissenting).

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(1) Restrictions on social media use affirmed; (2) Probation officer sitting with prosecutor at revocation hearing was not plain error, but court cautions against practice

U.S. v. Comer, 5 F.4th 535 (July 21, 2021). The defendant was convicted of sex trafficking in the Western District of North Carolina. Her crimes involved recruiting woman on social media to join a prostitution ring, and, in at least one instance, using social media to attempt to coerce a woman into returning to prostitution. While on supervised release, she also used social media to set up a drug sale. The district court required that the defendant have no social media accounts without the consent of her probation officer as a special condition of supervised release. The defendant challenged this condition on appeal. She also complained that her probation officer sat with the government attorney during her supervised release revocation hearing, alleging a due process violation and separation of powers issues.

(1) The district court did not err in imposing the social media restriction. The condition was not unduly vague and the probation officer's testimony at the revocation hearing gave the defendant fair notice of what conduct would be prohibited. The restriction would not bar the defendant from pursuing professional opportunities or staying informed of current events but would preclude the defendant from pursuing purely social activities through social media absent the consent of her probation officer. Should the restriction become unwieldy or be applied in an unpredictable way, the defendant could challenge that application at that time. The restriction was also not a greater deprivation than was needed to ensure the goals of supervision. Given that her underlying crime involved the use of social media, her continued use of social media to facilitate criminal activity even during her period of supervision, and her past efforts to circumvent internet restrictions, the condition was not overbroad and did not impermissibly restrict the defendant's liberty. Finally, the condition was not an improper delegation of authority to the probation officer. This was consistent with circuit precedent and that of other circuits. According to the court: "[A]s long as the court orders the broad principle guiding the condition of release and retains the ultimate authority over revoking release, the court may allow the probation officer to fill in many of the details necessary for applying the condition." *Comer* Slip op. at 19.

(2) The defendant did not object to the probation officer sitting with and whispering with the government attorney during her revocation hearing. A Seventh Circuit case suggests that the practice of a probation officer sitting at the government's table during court proceedings is improper. *U.S. v. Turner*, 203 F.3d 1010 (7th Cir. 2000), and the defendant pointed to that case, arguing plain error. The defendant was not entitled to relief under *Turner*. Because it was an out-of-circuit case and merely advised against the challenged practice, the defendant could not establish plain error. However, the court agreed that the best practice would be to avoid having probation officers sit with the government during court hearings. In its words:

With that said, we understand Comer's frustration with this arrangement and, like the Seventh Circuit, believe that the perception of fairness in federal courts will be strongly advanced by sitting probation officers apart from either defendants or the Government. After all, 'the probation officer is an agent of the

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court.’ ‘As an arm of the court, [they are] not supposed to take an adversarial role in a sentencing or revocation hearing.’ Defendants will better understand this crucial role if probation officers are not literally sitting with the prosecution. As a result, they may come to better trust the officers tasked with helping them transition to law-abiding lives. At the end of the day, by sitting at a separate table, the probation officer, as an arm of court, avoids the appearance of impropriety and so promotes the public’s confidence in the evenhanded administration of justice. Comer Slip op. at 23 (internal citations omitted).

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(1) Automobile exception justified initial search of car and search of car trunk two weeks later; (2) No abuse of discretion to allow codefendant's testimony despite an imputed conflict of interest between the codefendant's attorney and defendant's prior state counsel; (3) Any error in disclosure of juvenile delinquency history worksheets in lieu of the complete juvenile delinquency files was harmless

U.S. v. Caldwell, 7 F.4th 191 (Aug. 3, 2021). (1) In this case from the Western District of North Carolina, the defendant was convicted of bank robbery and a firearm offense. The defendant was apprehended hiding in bushes with a bag of money, including a GPS tracker, from the bank. Officers then located a car nearby, finding a gun in plain view, another GPS tracker, a ski mask, currency bands, and other items connected with the robbery. Officer obtained a warrant and searched the interior of the car but could not open the trunk due a dead car battery. The vehicle was impounded, and the trunk searched two weeks later, leading to the discovery of another gun and other evidence. The defendant moved to suppress, arguing that the search warrant was invalid and that the inventory search of the trunk was not supported by the warrant. The district court denied the motion. It found both searches were justified by the automobile exception, and that the trunk search was alternatively justified as an inventory search.

On appeal, the Fourth Circuit agreed that the searches were justified under the automobile exception. Officers were led to the scene by the bank's GPS trackers, and the items in plain view gave police probable cause to search the vehicle without a search warrant. The two-week delay before the car's trunk was searched did not undermine probable cause: "[W]hen a warrantless search of a vehicle could have been conducted on the scene pursuant to the automobile exception, a warrantless search is also justified after the vehicle has been impounded and immobilized as long as probable cause still exists." *Caldwell* Slip op. at 8 (citations omitted). While the passage of time is a factor in the probable cause analysis, here, probable cause still existed to search the trunk (even without a warrant) because officers were previously unable to open the trunk and had not yet located the second firearm involved in the robberies. The district court's suppression ruling was therefore affirmed.

(2) Both codefendants testified against the defendant at trial. One of the codefendants was represented at the defendant's trial by an attorney who worked in the same public defender office as another attorney who had initially represented the defendant on state charges relating to the case. The defendant argued that the codefendant should not be allowed to testify based on this alleged conflict of interest. The trial court conducted on a full hearing on the issue and determined no actual conflict of interest existed. The North Carolina State Bar was also contacted to assist in resolving any ethical concerns. It advised that this situation amounted to an imputed conflict of interest, but, under the circumstances, the court could use its discretion to allow the testimony. The testimony was allowed, and the codefendant's attorney withdrew shortly thereafter. The Fourth Circuit found no error. When the trial court became aware of the

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potential conflict, it investigated and properly used its discretion to handle the matter without prejudicing the defendant.

(3) The defendant sought juvenile delinquency records for two government witnesses. In response, juvenile delinquency history worksheets for each witness were provided to the defense (but not the actual delinquency records). The trial court refused to order the complete files disclosed, finding that the worksheets were sufficient for defense counsel to impeach the witnesses and allowing the defense to do so at trial. Any error here was harmless.

Other challenges were similarly rejected, and the district court's judgment was unanimously affirmed in full.

Ban on female toplessness does not violate Equal Protection under circuit precedent

Eline v. Town of Ocean City, Maryland, 7 F.4th 214 (Aug. 4, 2021). The Town of Ocean City bans public nudity. Under the ordinance, women, but not men, are prohibited from appearing topless in public. The plaintiffs filed suit, alleging equal protection violations for gender discrimination and seeking to enjoin enforcement of the rule. The district court granted summary judgment to the town. The Fourth Circuit unanimously affirmed, noting circuit precedent dictated that result. *See U.S. v. Biocic*, 928 F.2d 112 (4th Cir. 1991) (holding that the protection of the public from seeing nude female breasts served a significant governmental interest and satisfied equal protection concerns). A majority of other courts to consider the question have likewise found that the Equal Protection Clause permits bans of public toplessness by women. The grant of summary judgment to defendant was therefore affirmed. Chief Judge Gregory wrote separately in concurrence. He agreed that circuit precedent controlled on the issue but questioned that precedent's continuing rationale. "[L]aws that discriminate between male and female toplessness embody problematic stereotypes through the control imposed upon the bodies of women and not men." *Chelsea* Slip op. at 24 (Gregory, C.J., concurring). He encouraged the full court to reconsider the issue.

Conflict of interest at plea withdrawal hearing constituted ineffective assistance of counsel

U.S. v. Glover, 8 F.4th 239 (Aug. 9, 2021). The defendant in this South Carolina case pled guilty to federal drugs and conspiracy offenses. After entering a guilty plea but before sentencing, the defendant moved pro se to withdraw his plea, accusing his attorney of misleading him, pressuring him to take the plea, and failing to pursue suppression. At hearing on the motion to withdraw the plea, the defendant argued that his counsel had a conflict of interest and should not be permitted to represent him at the hearing. The district court disagreed, giving the defendant the option to continue with his counsel, or to represent himself pro se. The defense attorney then defended the guilty plea and explained why the motion to withdraw the plea was

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not justified. The district court denied the motion to withdraw the plea, leading to the current appeal. A unanimous Fourth Circuit reversed.

An actual conflict of interest by defense counsel constitutes ineffective assistance of counsel under *Cuyler v. Sullivan*, 446 U.S. 335 (1980). “[W]here an attorney has an actual conflict of interest, prejudice is presumed if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer’s performance.” *Glover* Slip op. at 10 (cleaned up) (citation omitted). The court observed that conflict of interest claims are generally brought in post-conviction and not on direct appeal, but that in this case, the conflict was “conclusively” established by the record. The defendant’s claims of malfeasance by his attorney directly implicated the attorney’s performance and reputation, creating an actual conflict. Further, the defense attorney affirmatively argued against the withdrawal motion, praising the benefit of the plea bargain and “effectively ‘testifying against his client.’” *Id.* at 13 (citation omitted). The case was therefore remanded with instructions for the defendant to receive a conflict-free attorney and a new hearing on the motion to withdraw his guilty plea.

Judge Quattlebaum wrote separately to concur. He would have decided the issue in the defendant’s favor based on the functional denial of counsel at a critical stage of the proceedings, rather than under ineffective assistance of counsel standards. He further noted that not any conflict between defense counsel and client will result in an actual conflict of interest.

Death sentence vacated for failure to pursue and present mitigation evidence; new sentencing trial

Stokes v. Stirling, 10 F.4th 236 (Aug. 19, 2021). The defendant was convicted of capital murder in state court in South Carolina and sentenced to death. Trial counsel possessed mitigation evidence about the defendant’s “extraordinarily traumatic childhood” during the penalty phase but failed to present any of it to the jury, calling only a single “counterproductive” witness. Post-conviction counsel discovered additional mitigation evidence but failed to assert a claim that trial counsel was ineffective by failing to present a stronger mitigation case. After exhausting state post-conviction avenues, the defendant sought habeas relief in federal district court, raising the mitigation-based ineffective assistance of counsel claims for the first time. The district court denied relief, finding the claim procedurally defaulted and without merit. A majority of the Fourth Circuit reversed.

State post-conviction counsel was ineffective for failing to challenge trial counsel’s effectiveness during the penalty phase, and this was sufficient to excuse the procedural default. Turning to the merits of the claim, the court found that trial counsel was objectively unreasonable in failing to more fully investigate the defendant’s personal history and in failing to present personal mitigation evidence about the defendant during the penalty phase. These errors were prejudicial. According to the court: “[W]hen a jury heard virtually no mitigation evidence at

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trial, and nothing about the defendant as an individual, the unheard personal evidence is especially impactful on the prejudice calculus.” *Stokes Slip op.* at 32. The habeas petition was therefore granted, the death sentence vacated, and the matter remanded for a new sentencing.

Judge Quattlebaum dissented and would have found that the trial attorneys were not ineffective.

Death sentence for mass shooter affirmed

U.S. v. Roof, 10 F.4th 314 (Aug. 25, 2021). In 2015, the defendant committed a mass shooting at a historic church in Charleston, South Carolina, in apparent hopes of sparking a race war. He was convicted at trial of numerous hate crime offenses resulting in death and other offenses and was sentenced to death. He appealed, arguing various errors relating to his competency, self-representation during the penalty phase, and challenges to the statutes of conviction, among others. The entire Fourth Circuit recused itself from the case, and an out-of-circuit panel sat by special designation. In a 149-page opinion, the panel unanimously rejected all claims advanced by the defendant. The convictions and death sentence were consequently affirmed in full.