Criminal Case Update

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Covering Significant Cases decided Sept. 25, 2015─May 23, 2016

Contents

Criminal Procedure

Restraining the Defendant

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

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

Counsel Issues

State v. Blakeney, ___ N.C. App. ___, 782 S.E.2d 88 (Feb. 16, 2016). The trial court erred by requiring the defendant to proceed pro se. After the defendant was indicted but before the trial date, the defendant signed a waiver of the right to assigned counsel and hired his own lawyer. When the case came on for trial, defense counsel moved to withdraw, stating that the defendant had been rude to him and no longer desired his representation. The defendant agreed and indicated that he intended to hire a different, specifically named lawyer. The trial court allowed defense counsel to withdraw and informed the defendant that he had a right to fire his lawyer but that the trial would proceed that week, after the trial

court disposed of other matters. The defendant then unsuccessfully sought a continuance. When the defendant's case came on for trial two days later, the defendant informed the court that the lawyer he had intended to hire wouldn't take his case. When the defendant raised questions about being required to proceed pro se, the court indicated that he had previously waived his right to court-appointed counsel. The trial began, with the defendant representing himself. The court held that the trial court's actions violated the defendant's Sixth Amendment right to counsel. The defendant never asked to proceed pro se; although he waived his right to court-appointed counsel, he never indicated that he intended to proceed to trial without the assistance of any counsel. Next, the court held that the defendant had not engaged in the type of severe misconduct that would justify forfeiture of the right to counsel. Among other things, the court noted that the defendant did not fire multiple attorneys or repeatedly delay the trial. The court concluded:

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

Ineffective Assistance of Counsel

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

State v. Cook, ___ N.C. App. ___, 782 S.E.2d 569 (Mar. 15, 2016). (1) In this murder case, counsel's statement in closing argument did not exceed the scope of consent given by the defendant during a *Harbison* inquiry. In light of the *Harbison* hearing, the defendant knowingly, intelligently and voluntarily, and with full knowledge of the awareness of the possible consequences agreed to counsel's concession that he killed the victim and had culpability for some criminal conduct. The court noted that counsel's trial strategy was to argue that the defendant lacked the mental capacity necessary for premeditation and

deliberation and therefore was not guilty of first-degree murder. (2) The *Harbison* standard did not apply to counsel's comments regarding the "dreadfulness" of the crimes because these comments were not concessions of guilt. Considering these statements under the *Strickland* standard, the court noted that counsel pointed out to the jury that while the defendant's crimes were horrible, the central issue was whether the defendant had the necessary mental capacity for premeditation and deliberation. The defendant failed to rebut the strong presumption that counsel's conduct was reasonable. Additionally no prejudice was established given the overwhelming evidence of guilt.

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

State v. Warren, ___ N.C. App. ___, 780 S.E.2d 835 (Nov. 17, 2015). (1) Because the defendant had ample time to investigate, prepare, and present his defense and had failed to show that he received ineffective assistance of counsel by the trial court's denial of his motion to continue, the trial court did not err by denying defense counsel's motion to withdraw on this ground. (2) With respect to the defendant's assertion that the trial court's denial of the motion to withdraw resulted in him receiving ineffective assistance of counsel in other respects, the court found the record insufficient address the ineffectiveness issues and dismissed these grounds without prejudice to the defendant's right to assert them in a motion for appropriate relief.

State v. Nkiam, ___ N.C. App. ___, 778 S.E.2d 863 (Nov. 3, 2015), *review allowed*, ___ N.C. ___, 781 S.E.2d 475 (Jan. 28, 2016). In this appeal from a motion for appropriate relief (MAR), the court held that advice provided by the defendant's counsel in connection with his plea did not comply with *Padilla v. Kentucky*, 559 U.S. 356 (2010) (incorrect advice regarding the immigration consequences of a guilty plea may constitute ineffective assistance). The defendant was a permanent resident of the United States. After he pled guilty to aiding and abetting robbery and conspiracy to commit robbery, the federal government initiated deportation proceedings against him. The defendant then filed a MAR asserting ineffective assistance of counsel. At issue was counsel's advice regarding the immigration consequences of the defendant's guilty plea. It was undisputed that defense counsel informed the defendant that his plea carried a "risk" of deportation. The court noted that "[t]his case is the first in which our appellate courts have been called upon to interpret and apply *Padilla*'s holding." The court interpreted *Padilla* as holding: "when the consequence of deportation is unclear or uncertain, counsel need only advise the client of the risk of deportation, but when the consequence of deportation is truly clear, counsel must advise the client in more certain terms." In this case, "there was no need for counsel to do anything but read the statute," to understand that the deportation consequences for the defendant were truly clear. Thus, counsel was required, under *Padilla*, "'to give correct advice' and not just advise defendant that his 'pending criminal charges may carry a risk of adverse immigration consequences.'" The court remanded for determination of whether the defendant was prejudiced by counsel's deficient performance.

Discovery Issues

Wearry v. Cain, 577 U.S. ___, 136 S. Ct. 1002 (Mar. 7, 2016) (per curiam). In this capital case, the prosecution's failure to disclose material evidence violated the defendant's due process rights. At trial the defendant unsuccessfully raised an alibi defense and was convicted. The case was before the Court after the defendant's unsuccessful post-conviction *Brady* claim. Three pieces of evidence were at issue. First, regarding State's witness Scott, the prosecution withheld police records showing that two of Scott's fellow inmates had made statements that cast doubt on Scott's credibility. One inmate reported hearing Scott say that he wanted to make sure the defendant got "the needle cause he jacked over me." The other inmate told investigators that he had witnessed the murder. However, he recanted the next day, explaining that "Scott had told him what to say" and had suggested that lying about having witnessed the murder "would help him get out of jail." Second, regarding State's witness Brown, the prosecution failed to disclose that, contrary to its assertions at trial that Brown, who was serving a 15-year sentence, "hasn't asked for a thing," Brown had twice sought a deal to reduce his existing sentence in exchange for his testimony. And third, the prosecution failed to turn over medical records on Randy Hutchinson. According to Scott, on the night of the murder, Hutchinson had run into the street to flag down the victim, pulled the victim out of his car, shoved him into the cargo space, and crawled into the cargo space himself. But Hutchinson's medical records revealed that, nine days before the murder, Hutchinson had undergone knee surgery to repair a ruptured patellar tendon. An expert witness testified at the state collateral-review hearing that Hutchinson's surgically repaired knee could not have withstood running, bending, or lifting substantial weight. The State presented an expert witness who disagreed regarding Hutchinson's physical fitness. Concluding that the state court erred by denying the defendant's *Brady* claim, the Court stated: "Beyond doubt, the newly revealed evidence suffices to undermine confidence in [the defendant's] conviction. The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than [the defendant's] alibi." It continued: "Even if the jury—armed with all of this new evidence—could have voted to convict [the defendant], we have no confidence that it would have done so." (quotations omitted). It further found that in reaching the opposite conclusion, the state post-conviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively, emphasized reasons a juror might disregard new evidence while ignoring reasons she might not, and failed even to mention the statements of the two inmates impeaching Scott.

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

State v. Hicks, ___ N.C. App. ___, 777 S.E.2d 341 (Oct. 20, 2015). In this methamphetamine case, the trial court did not abuse its discretion by denying the defendant's motion for discovery sanctions after the State destroyed evidence seized from the defendant's home, without an order authorizing destruction, and despite a court order that the evidence be preserved. In its order denying the motion, the trial court found that the SBI destroyed the evidence under the belief that a destruction order was in place, that the defendant's preservation motion was filed some 30 days after the evidence had been destroyed, and that the item in question—an HCL generator used to manufacture meth—is not regularly preserved. The court concluded that the record contained "ample evidence" to support the trial court's conclusion that law enforcement had a good faith belief that the items were to be destroyed and did not act in bad faith when they initiated destruction.

Double Jeopardy

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

DWI Procedure

State v. Miller, ___ N.C. App. ___, ___ S.E.2d ___ (May 17, 2016). The superior court erred by denying the State a de novo hearing from the district court's preliminary determination that the defendant's motion to suppress should be granted. At issue was whether G.S. 20-38.7(a) "requires more than a general objection by the State to the district court judge's findings of fact or an assertion of new facts or evidence in order to demonstrate a 'dispute about the findings of fact.'" The court held: "Neither the plain language of N.C. Gen. Stat. § 20-38.7(a) nor § 15A-1432(b) requires the State to set forth the specific findings of fact to which it objects in its notice of appeal to superior court."

State v. Hutton, ___ N.C. App. ___, 780 S.E.2d 202 (Nov. 17, 2015). In this DWI case where the district court judge entered a preliminary determination that the results of the defendant's blood alcohol test should be suppressed but the superior court reversed the preliminary determination on the State's appeal and remanded to the district court for further proceedings, the defendant had no right of appeal to the court of appeals. Because the district court did not enter a final judgment pursuant to G.S. 20-38.6(f) denying the motion to suppress, the defendant could not seek review of the ruling on that motion. Although the court found it had authority to grant certiorari, it declined to do so.

Entry of an Order/Judgment

State v. Miller, ___ N.C. ___, 783 S.E.2d 194 (Mar. 18, 2016). On discretionary review of a unanimous, unpublished decision, the court held that the Court of Appeals improperly dismissed the State's appeal on grounds that the trial court's order had not been properly entered. The court noted that in a criminal case, a judgment or order is entered when the clerk of court records or files the judge's decision; entry of an order does not require that the trial court's decision be reduced to writing. Here, after the superior court announced its decision to affirm the district court order, the courtroom clerk noted in the minutes that "Court affirms appeal. State appeals court ruling." As a result, the order from which the State noted its appeal was properly entered.

Extending the Session

State v. Lewis, ___ N.C. App. ___, 779 S.E.2d 147 (Nov. 3, 2015). The trial court properly extended the session. After the State rested on Friday, the trial court announced that it would be in recess until the following Tuesday. The defendant did not object to the announcement. Prior to dismissing the jurors on Friday, the trial court again informed them in open court that court would be in recess until Tuesday. Again, the defendant offered no objection. Court resumed on Tuesday, without objection from the defendant, and the defendant was convicted. The court found that the trial court sufficiently complied with G.S. 15-167 and properly extended the session.

Indictment & Pleading Issues

Citation

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

Date of Offense

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

Specific Offenses

Assaults

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

Sexual Assaults

State v. Harris, ___ N.C. App. ___, 778 S.E.2d 875 (Nov. 3, 2015). Where the indictment charged the defendant with sexual offense in violation of G.S. 14-27.4(a)(1) (first-degree statutory sex offense with a child under the age of 13), the trial court erred by instructing the jury on sexual offense with a child in violation of G.S. 14-27.4A(a) (statutory sexual offense by an adult). The court noted that the charged offense was a lesser included of the offense of conviction, and that while the charged offense requires the State to prove that the defendant was at least 12 years old and at least 4 years older than the victim, the offense of conviction requires proof that the defendant is at least 18 years old. The court found itself

bound by *State v. Hicks*, ____, N.C. App. ____, 768 S.E.2d 373 (Feb. 17, 2015), vacated the conviction and remanded for resentencing on the lesser included offense.

Sex Offender Crimes

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

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

State v. McLamb, ___ N.C. App. ___, 777 S.E.2d 150 (Oct. 6, 2015). In a failure to register as a sex offender case, the indictment was not defective on grounds that did not allege that the defendant failed to provide "written notice" of his address change "within three business days." Citing prior case law, the court noted that it has already rejected this argument. The court followed this case law, refusing "to subject the indictment to hyper technical scrutiny." It further noted that the defendant did not establish that this pleading issue prejudiced his trial preparation. Finally, it noted that the better practice would be for the prosecution to allege that the defendant failed to report his change in address "in writing" and "within three business days."

Larceny & Related Offenses

State v. Hill, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). Exercising discretion to consider a fatal variance argument with respect to a theft of money and an iPod from a frozen yogurt shop, the court held that a fatal variance existed. The State alleged that the property belonged to Tutti Frutti, LLC, but it actually belonged to Jason Wei, the son of the sole member of that company, and the State failed to show that Tutti Frutti was in lawful custody and possession of Wei's property when it was stolen. It clarified: "there is no fatal variance between an indictment and the proof at trial if the State establishes that the alleged owner of stolen property had lawful possession and custody of the property, even if it did not actually own the property."

State v. Campbell, ___ N.C. App. ___, 777 S.E.2d 525 (Oct. 20, 2015), *temporary stay allowed*, ___ N.C. ___, 778 S.E.2d 97 ___ (Nov. 10, 2015). The trial court erred by failing to dismiss a larceny charge due to a fatal variance with respect to ownership of the stolen property. The indictment alleged that the property was owned by Pastor Stevens and Manna Baptist Church. The court held that when an indictment alleges multiple owners, the State must prove multiple owners. Here, there was no evidence that the property was owned by Pastor Stevens; it showed only that it was owned by the church. The fact that Stevens was an employee of the church, the true owner of the property, did not cure the fatal variance. The State was required to demonstrate that both alleged owners had at least some sort of property interest in the stolen items; here it failed to do that.

Frauds & Related Offenses

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

Trespass & Injury to Property Offenses

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

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

The court further held that to the extent *State v. Lilly*, 195 N.C. App. 697 (2009), is inconsistent with its opinion, it is overruled. Finally, the court noted that although "[i]deally, an indictment for injury to real property should include the street address or other clear designation, when possible, of the real property alleged to have been injured," if the defendant had been confused as to the property in question, he could have requested a bill of particulars.

State v. Hill, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). The court rejected the defendant's fatal variance argument regarding injury to real property charges, noting that the North Carolina Supreme Court recently held that an indictment charging this crime need only identify the real property, not its owner.

State v. Jefferies, ___ N.C. App. ___, 776 S.E.2d 872 (Oct. 6, 2015). In this burning of personal property case where the indictment charged that the defendant set fire to the victim's bed, jewelry, and clothing and the evidence showed only that he set fire to her bedding, no fatal variance occurred. The State was not required to show that the defendant also set fire to her jewelry and clothing. The court rejected the defendant's argument that there was a fatal variance between the indictment's allegation that he set fire to her bed and the evidence, which showed he set fire to her bedding. Any variance in this regard was not material, given that there was no evidence that the "bedding" was found anywhere other than on the bed. It concluded: "we are unable to discern how Defendant was unfairly surprised, misled, or otherwise

prejudiced in the preparation of his defense by the indictment's failure to identify the 'bedding' rather than the 'bed.'"

Disorderly Conduct

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

Discharging Weapon Into Property

State v. Bryant, ___ N.C. App. ___, 779 S.E.2d 508 (Nov. 17, 2015). An indictment charging discharging a firearm into an occupied dwelling was not defective. The indictment alleged that the defendant "discharge[d] a firearm to wit: a pistol into an apartment 1727 Clemson Court, Kannapolis, NC at the time the apartment was occupied by Michael Fezza" and that the defendant violated G.S. 14-34. The defendant was convicted of discharging a weapon into an occupied dwelling in violation of G.S. 14-34.1. The court rejected the defendant's argument that the term "apartment," as used in the indictment, was not synonymous with the term "dwelling," the term used in the statute. On this issue the court stated: "We refuse to subject defendant's … indictment to hyper technical scrutiny with respect to form." Next, the court held that although the indictment incorrectly referenced G.S. 14-34 instead of G.S. 14-34.1(b), the error was not a fatal defect.

Drug Offenses

State v. Stith, ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). (1) In this drug case, the court held, over a dissent, that an indictment charging the defendant with possessing hydrocodone, a Schedule II controlled substance, was sufficient to allow the jury to convict the defendant of possessing hydrocodone under Schedule III, based on its determination that the hydrocodone pills were under a certain weight and combined with acetaminophen within a certain ratio to bring them within Schedule III. The original indictment alleged that the defendant possessed "acetaminophen and hydrocodone bitartrate," a substance included in Schedule II. Hydrocodone is listed in Schedule II. However, by the start of the trial, the State realized that its evidence would show that the hydrocodone possessed was combined with a non-narcotic such that the hydrocodone is considered to be a Schedule III substance. Accordingly, the trial court allowed the State to amend the indictment, striking through the phrase "Schedule II." At trial the evidence showed that the defendant possessed pills containing hydrocodone bitartrate combined with acetaminophen, but that the pills were of such weight and combination to bring the hydrocodone within Schedule III. The court concluded that the jury did not convict the defendant of possessing an entirely different controlled substance than what was charged in the original indictment, stating: "the original indictment identified the controlled substance … as hydrocodone, and the jury ultimately convicted Defendant of possessing hydrocodone." It also held that the trial court did not commit reversible error when it allowed the State to amend the indictment. The court distinguished prior cases, noting that here the indictment was not changed "such that the identity of the controlled substance was changed. Rather, it was changed to reflect that the controlled substance was below a certain weight and mixed with a non-narcotic (the identity of which was also contained in the indictment) to lower the punishment from a Class H to a Class I felony." Moreover, the court concluded, the indictment adequately apprised the defendant of the controlled substance at issue. (2) The court applied the same holding with respect to an indictment charging the defendant with trafficking in an opium derivative, for selling the hydrocodone pills.

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

Habitual Felon

State v. Jefferies, ___ N.C. App. ___, 776 S.E.2d 872 (Oct. 6, 2015). The trial court erred by instructing the jury that it could find that the defendant attained habitual felon status based on a prior conviction for selling cocaine where the indictment did not allege that conviction. The indictment alleged three predicate felonies to establish habitual felon status. However, the trial court instructed the jury on four felonies, the three identified in the indictment as well as sale of cocaine, which was not alleged in the indictment. Because it was impossible for the court to determine whether the jurors relied on the fourth felony not alleged in the indictment, a new hearing on habitual felon was required.

Jurisdictional Issues

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

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

Jury Selection

Foster v. Chatman, 578 U.S. ___ (May 23, 2016). The Court reversed this capital murder case, finding that the State's "[t]wo peremptory strikes on the basis of race are two more than the Constitution allows." The defendant was convicted of capital murder and sentenced to death in a Georgia court. Jury selection proceeded in two phases: removals for cause and peremptory strikes. The first phase whittled the list of potential jurors down to 42 "qualified" prospective jurors. Five were black. Before the second phase began, one of the black jurors—Powell--informed the court that she had just learned that one of her close friends was related to the defendant; she was removed, leaving four black prospective jurors: Eddie Hood, Evelyn Hardge, Mary Turner, and Marilyn Garrett. The State exercised nine of its ten allotted peremptory strikes, removing all four of the remaining black prospective jurors. The defendant immediately lodged a

Batson challenge. The trial court rejected the objection and empaneled the jury. The jury convicted the defendant and sentenced him to death. After the defendant unsuccessfully pursued his *Batson* claim in the Georgia courts, the U.S. Supreme Court granted certiorari. Before the Court, both parties agreed that the defendant demonstrated a prima facie case and that the prosecutor had offered race-neutral reasons for the strikes. The Court therefore addressed only *Batson*'s third step, whether purposeful discrimination was shown. The defendant focused his claim on the strikes of two black prospective jurors, Marilyn Garrett and Eddie Hood. With respect Garrett, the prosecutor had told the trial court that Garrett was "listed" by the prosecution as "questionable" and its strike of her was a last-minute race-neutral decision. However, evidence uncovered after the trial showed this statement to be false; the evidence showed that the State had specifically identified Garret in advance as a juror to strike. In fact, she was on a "definite NO's" list in the prosecution's file. The Court rejected attempts by the State "to explain away the contradiction between the 'definite NO's' list and [the prosecutor's] statements to the trial court as an example of a prosecutor merely 'misspeak[ing].'" Regarding Hood, the Court noted that "[a]s an initial matter the prosecution's principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual." It further found that the State's asserted justifications for striking Hood "cannot be credited." In the end, the Court found that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury."

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

State v. Gettys, ___ N.C. App. ___, 777 S.E.2d 351 (Oct. 20, 2015). The trial court did not err by denying the defendant's motion to strike the jury venire. The defendant alleged that his venire was racially disproportionate to the demographics of Mecklenburg County, where he was tried, and therefore deprived him of his constitutional right to a jury of his peers. The court began by noting that the fact that a single venire that fails to proportionately represent a cross-section of the community does not constitute systematic exclusion. Rather, systematic exclusion occurs when a procedure in the venire selection process consistently yields non-representative venires. Here, the defendant argued that Mecklenburg County's computer program, Jury Manager, generated a racially disproportionate venire and thus deprived him of a jury of his peers. Although the defendant asserted that there was a disparity in the venire, he conceded the absence of systematic exclusion and thus his claim must fail.

Jury Argument

State v. Huey, ___ N.C. App. ___, 777 S.E.2d 303 (Oct. 6, 2015), *temporary stay allowed*, ___ N.C. ___, 777 S.E.2d 761 (Oct. 26, 2015). (1) In this homicide case, a new trial was required where the trial court failed to intervene on its own motion to the State's improper statements made during closing argument. The State argued to the jury not only that the defendant was a liar but that he had lied on the stand in

cooperation with defense counsel and the defendant's mental health expert. The prosecutor's argument suggested that the defendant's expert would say whatever the defense wanted him to say because he was being paid to do so. Further, the State implied that the expert was committing perjury because "he [was] just a $6,000 excuse man[,]" and would do "exactly what he was paid to do." The State also indicated that the jury should not trust defense counsel because he was "paid to defend the defendant."

State v. McNeill, ___ N.C. App. ___, 778 S.E.2d 457 (Nov. 3, 2015). The trial court did not err by failing to intervene sua sponte during the prosecutor's closing argument. Here, the prosecutor argued facts in evidence regarding a prior assault by the defendant and the trial court gave an appropriate limiting instruction regarding the defendant's prior conviction. Thus, the prosecutor's reference to this incident and his comment suggesting that the defendant was a "cold person" were not so grossly improper that the trial court was required to intervene on its own motion.

State v. Jefferies, ___ N.C. App. ___, 776 S.E.2d 872 (Oct. 6, 2015). The court held, in this burning of personal property case, that although some of the prosecutor's comments regarding the credibility of certain witness testimony during closing arguments may have been objectionable, they did not rise to the level of requiring the trial court to intervene ex mero motu. The court noted as objectionable the prosecutor's statement that the victim's testimony was "extraordinarily credible."

State v. Carvalho, ___ N.C. App. ___, 777 S.E.2d 78 (Oct. 6, 2015). The State's closing arguments did not require the trial court to intervene ex mero moto. With respect to comments regarding 404(b) evidence, the State did not ask the jury to use the evidence for an improper purpose. To the extent that the State referred to any improper evidence, the references were not so grossly improper that the trial court should have intervened on its own motion.

Jury Deliberations

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

State v. Hazel, ___ N.C. App. ___, 779 S.E.2d 171 (Nov. 3, 2015). In this felony murder case, the trial court acted within its discretion by declining to answer a question from the deliberating jury. Robbery was the underlying felony for the felony murder charge. During deliberations, the jury sent a note with the following question: "Can this defendant be found guilty of the robbery charge and then found not guilty of the murder charge?" After hearing from the parties, the trial court declined to answer the question yes or no, instead telling the jury to read the written jury instructions that it had previously provided. The court noted that whether to give additional instructions to the jury is within the trial court's discretion. Here, it was undisputed that the trial court correctly instructed the jury on all offenses and heard from the parties when the question was raised.

Jury Instructions

Unanimous Verdict Issues

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

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

"Overinstructing"—Charging Element Not Required By Law

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

Specific Instructions

Breath Tests

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

Flight

State v. Huey, ___ N.C. App. ___, 777 S.E.2d 303 (Oct. 6, 2015), *temporary stay allowed*, ___ N.C. ___, 777 S.E.2d 761 (Oct. 26, 2015). In this homicide case, the trial court properly instructed the jury on flight where evidence showed that the defendant shot the victim, got into his vehicle, drove off for a short period of time, and returned; the firearm used to shoot the victim was never recovered. Noting that mere evidence that the defendant left a crime scene is not enough to support an instruction on flight, the court found that here there was evidence that the defendant took steps to avoid apprehension. Specifically the evidence supported the theory that the defendant drove away briefly to dispose of the firearm used in the homicide.

Intent

State v. Marshall, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 1, 2016). (1) In this case in which the defendant was convicted of several felonies, including attempted murder, assault with intent to kill, burglary, and numerous attempted sex offenses, the trial court did not err in responding to the deliberating jury's request that it explain the "legal definition of intent." The State proposed that the court read to the jury the pattern instruction on intent, N.C.P.I. -Crim. 120. 10. This instruction includes a footnote setting out additional, optional instructions related to specific intent and general intent. The defendant was

charged with multiple offenses, including both specific intent and general intent crimes. The defendant asked the trial court to read a special instruction pertaining only to specific intent and referencing only the charged crimes that required specific intent, omitting the charged general intent crimes. The State objected to the defendant's proposed instruction on grounds that it was too specific and did not answer the question that the jury asked. The trial court gave State's instruction, adding an additional sentence. The trial court' decision to give the State's instruction was well within its broad discretion. (2) The defendant failed to preserve for review language in the trial court's instruction on intent that deviated from the pattern instruction. Specifically, the defendant failed to object to the additional sentence when proposed by the trial court. The court noted that the defendant failed to argue plain error on appeal.

Interested Witness

State v. Singletary, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). The trial court did not err by denying the defendant's request for a jury instruction on the testimony of an interested witness (N.C.P.I.-Crim. 104.20), where it gave a different instruction leaving "no doubt that it was the jury's duty to determine whether the witness was interested or biased."

Sequestration

State v. Gettys, ___ N.C. App. ___, 777 S.E.2d 351 (Oct. 20, 2015). The trial court did not err by denying the defendant's request for a special instruction on sequestration. In closing argument, the prosecutor argued, in part: "[Defendant is] cherry-picking the best parts of everybody's story after … he's had the entire trial to listen to what everybody else would say. You'll notice that our witnesses didn't sit in here while everybody else was testifying." After the jury was instructed and left the courtroom to begin deliberations, the defendant asked the trial court to instruct the jury as follows: "In this case, all witnesses allowed by law were sequestered at the request of the State. These witnesses could not be present in court except to testify until they were released from their subpoenas, or to discuss the matter with other witnesses or observers in court. By law, the defendant and lead investigator for the State cannot be sequestered." Given the trial court's conclusion that the requested instruction did not relate to a dispositive issue in the case, it did not abuse its discretion in denying the defendant's request.

Homicide

State v. Juarez, ___ N.C. App. ___, 777 S.E.2d 325 (Oct. 6, 2015), *review allowed*, ___ N.C. ___, 781 S.E.2d 473 (Jan. 28, 2016). (1) Where the defendant was charged with first-degree murder, the trial court erred by denying his request to instruct the jury on the lesser offenses of second-degree murder and voluntary manslaughter. The trial court denied the defendant's request and instructed the jury only on first-degree murder pursuant to the felony murder theory, with discharging a barreled weapon serving as the underlying felony. This was error where the defendant presented evidence that he committed the offense of discharging a barreled weapon in self-defense. (2) The trial court committed plain error by instructing the jury that the defendant could not benefit from self-defense if he was found to be the aggressor. The court noted that cases consistently hold that it is reversible error to instruct the jury on the aggressor doctrine where there is no evidence that the defendant was the initial aggressor. It continued: "Although our courts have not explicitly defined an 'initial aggressor,' we have held that withdrawing from conflict is a means by which a person can avoid that status." Considering the evidence in the case, the court concluded that the defendant's withdrawal "remove[d] him from the realm of the initial aggressor."

State v. Chaves, ___ N.C. App. ___, 782 S.E.2d 540 (Mar. 1, 2016). The trial court did not err by declining to instruct the jury on voluntary manslaughter. The trial judge instructed the jury on first- and second-degree murder but declined the defendant's request for an instruction on voluntary manslaughter.

The jury found the defendant guilty of second-degree murder. The defendant argued that the trial court should have given the requested instruction because the evidence supported a finding that he acted in the heat of passion based on adequate provocation. The defendant and the victim had been involved in a romantic relationship. The defendant argued that he acted in the heat of passion as a result of the victim's verbal taunts and her insistence, shortly after they had sex, that he allow his cell phone to be used to text another man stating that the victim and the defendant were no longer in a relationship. The court rejected this argument, concluding that the victim's words, conduct, or a combination of the two could not serve as legally adequate provocation. Citing a North Carolina Supreme Court case, the court noted that mere words, even if abusive or insulting, are insufficient provocation to negate malice and reduce a homicide to manslaughter. The court rejected the notion that adequate provocation existed as a result of the victim's actions in allowing the defendant to have sex with her in order to manipulate him into helping facilitate her relationship with the other man. The court also noted that that there was a lapse in time between the sexual intercourse, the victim's request for the defendant's cell phone and her taunting of him and the homicide. Finally the court noted that the defendant stabbed the victim 29 times, suggesting premeditation.

Motions

Motion to Continue

State v. Hicks, ___ N.C. App. ___, 777 S.E.2d 341 (Oct. 20, 2015). The trial court did not err by denying the defendant's motion to continue after rejecting his *Alford* plea, where the defendant did not move for a continuance until the second week of trial. The defendant argued that he had an absolute right to a continuance under G.S. 15A-1023(b) (providing in part that "[u]pon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court"). Here, where the defendant failed to move for a continuance until the second week of trial, his statutory right to a continuance was waived.

Motion to Dismiss

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

State v. Ballard, ___ N.C. App. ___, 781 S.E.2d 75 (Dec. 15, 2015). (1) In a case involving two perpetrators, the trial court properly denied the defendant's motion to dismiss a robbery charge, predicated on the corpus delicti rule. Although the defendant's own statements constituted the only evidence that he participated in the crime, "there [wa]s no dispute that the robbery happened." Evidence

to that effect included "security footage, numerous eyewitnesses, and bullet holes and shell casings throughout the store." The court concluded: "corpus delicti rule applies where the confession is the only evidence that the crime was committed; it does not apply where the confession is the only evidence that the defendant committed it." The court continued, citing *State v. Parker*, 315 N.C. 222 (1985) for the rule that " 'the perpetrator of the crime' is not an element of corpus delicti." (2) The trial court properly denied the defendant's motion to dismiss a conspiracy charge, also predicated on the corpus delicti rule. The court found that there was sufficient evidence corroborating the defendant's confession. It noted that "the fact that two masked men entered the store at the same time, began shooting at employees at the same time, and then fled together in the same car, strongly indicates that the men had previously agreed to work together to commit a crime." Also, "as part of his explanation for how he helped plan the robbery, [the defendant] provided details about the crime that had not been released to the public, further corroborating his involvement." Finally, as noted by the *Parker* Court, "conspiracy is among a category of crimes for which a 'strict application' of the corpus delicti rule is disfavored because, by its nature, there will never be any tangible proof of the crime."

Sentencing

Constitutional Issues

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

State v. James, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). (1) In this murder case where the defendant, who was a juvenile at the time of the offense, was resentenced to life in prison without parole under the State's *Miller*-compliant sentencing scheme (G.S. 15A-1340.19A et seq.), the court rejected the defendant's argument that his resentencing under this scheme violated the prohibition on ex post facto laws. Although the relevant statute was enacted after the defendant committed his offense, he was not disadvantaged by its application; under the new statute the harshest penalty remains life without parole, but the trial court has the option of imposing a lesser sentence of life imprisonment with parole. (2) The court rejected the defendant's argument that G.S. 15A-1340.19A et seq. violates the constitutional guarantees against cruel and unusual punishment because it presumptively favors a sentence of life without parole for juveniles convicted of first-degree murder and therefore the risk of disproportionate punishment is as great as it was under the old statute, which mandated a sentence of life without parole for juveniles convicted of such a crime. It concluded: "we hold it is not inappropriate, much less unconstitutional, for the sentencing analysis in N.C. Gen. Stat. § 15A-1340.19A et seq. to begin with a sentence of life without parole and require the sentencing court to consider mitigating factors to determine

whether the circumstances are such that a juvenile offender should be sentenced to life with parole instead of life without parole. Life without parole as the starting point in the analysis does not guarantee it will be the norm." (3) The court rejected the defendant's argument that G.S. 15A-1340.19A et seq. deprived him of due process because the law is unconstitutionally vague and will lead to arbitrary sentencing decisions for juvenile offenders. (4) The trial court failed to make adequate findings of fact to support its decision to impose a sentence of life without parole. Specifically, it failed to "include findings on the absence or presence of any mitigating factors" as mandated by the statute. The court remanded for further sentencing proceedings.

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

Prior Record Level

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

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

Probation Violations & Revocation

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

State v. Jakeco Johnson, ___ N.C. App. ___, 783 S.E.2d 21 (Mar. 1, 2016). (1) The trial court erred by revoking the defendant's probation where the State failed to prove violations of the absconding provision in G.S. 15A-1343(b)(3a). The trial court found that the defendant "absconded" when he told the probation officer he would not report to the probation office and then failed to report as scheduled on the following day. This conduct does not rise to the level of absconding supervision; the defendant's whereabouts were never unknown to the probation officer. (2) The other alleged violations could not support a probation

revocation, where those violations were "unapproved leaves" from the defendant's house arrest and "are all violations of electronic house arrest." This conduct was neither a new crime nor absconding. The court noted that the defendant did not make his whereabouts unknown to the probation officer, who was able to monitor the defendant's whereabouts via the defendant's electronic monitoring device.

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

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

Right to be Present

State v. Collins, ___ N.C. App. ___, 782 S.E.2d 350 (Feb. 2, 2016). The trial court improperly sentenced the defendant in his absence. The trial court orally sentenced the defendant to 35 to 42 months in prison, a sentence which improperly correlated the minimum and maximum terms. The trial court's written judgment sentenced the defendant to 35 to 51 months, a statutorily proper sentence. Because the defendant was not present when the trial court corrected the sentence, the court determined that a resentencing is required and remanded accordingly.

Sex Offenders

Satellite-Based Monitoring (SBM)

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

State v. Barnett, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 19, 2016), *review allowed*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 13, 2016). The trial court erroneously concluded that attempted second-degree rape is an aggravated offense for purposes of lifetime SBM and lifetime sex offender registration. Pursuant to the statute, an aggravated offense requires a sexual act involving an element of penetration. Here, the defendant was convicted of attempted rape, an offense that does not require penetration and thus does not fall within the statutory definition of an aggravated offense.

State v. Springle, ___ N.C. App. ___, 781 S.E.2d 518 (Jan. 5, 2016). (1) The trial court's conclusion that the defendant was a recidivist was not supported by competent evidence and therefore could not support

the conclusion that the defendant must submit to lifetime sex offender registration and SBM. The trial court's order determining that the defendant was a recidivist was never reduced to writing and made part of the record. Although there was evidence from which the trial court could have possibly determined that the defendant was a recidivist, it failed to make the relevant findings, either orally or in writing. The defendant's stipulation to his prior record level worksheet cannot constitute a legal conclusion that a particular out-of-state conviction is "substantially similar" to a particular North Carolina offense. (2) Ineffective assistance of counsel claims cannot be asserted in SBM appeals; such claims can only be asserted in criminal matters.

No Contact Order

State v. Barnett, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 19, 2016), *review allowed*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 13, 2016). Deciding an issue of 1st impression, the court held that the trial court erred when it entered a permanent no contact order, under G.S. 15A-1340.50, preventing the defendant from contacting the victim as well as her three children. "[T]he plain language of the statute limits the trial court's authority to enter a no contact order protecting anyone other than the victim."

Speedy Trial & Related Issues

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

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

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

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

State v. Carvalho, ___ N.C. App. ___, 777 S.E.2d 78 (Oct. 6, 2015). Applying the four-factor speedy trial test of *Barker v. Wingo*, the court concluded that no speedy trial violation occurred. The nine year gap

between the time of indictment and the hearing on the speedy trial motion is presumptively prejudicial. However while extraordinary, this delay is not per se determinative and an examination of the remaining *Barker* factors is required. As to the second factor, reason for delay, the defendant failed to show that that the delay stemmed from the State's negligence or willfulness. The "more significant elements" that contributed to delay included: changing the proceedings from capital to noncapital; plea discussions; forensic issues regarding an audiotape; securing the testimony of the state's key witness; and the interconnectedness of the two murders. Regarding the third factor, assertion of the speedy trial right, the court noted that the defendant first asserted his right some eight years after he was indicted. Regarding the final factor, prejudice from delay, the court found that the defendant failed to show any affirmative proof of prejudice.

Evidence

Arrest Warrant, Admission of

State v. Bryant, ___ N.C. App. ___, 779 S.E.2d 508 (Nov. 17, 2015). Although the trial court violated G.S. 15A-1221(b) by admitting an arrest warrant into evidence, the error did not constitute plain error.

Authentication

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

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

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

State v. Ford, ___ N.C. App. ___, 782 S.E.2d 98 (Feb. 16, 2016). In this voluntary manslaughter case, where the defendant's pit bull attacked and killed the victim, the trial court did not err by admitting as evidence screenshots from the defendant's webpage over the defendant's claim that the evidence was not properly authenticated. The State presented substantial evidence that the website was actually maintained by the defendant. Specifically, a detective found the MySpace page in question with the name "Flexugod/7." The page contained photos of the defendant and of the dog allegedly involved in the incident. Additionally, the detective found a certificate awarded to the defendant on which the defendant is referred to as "Flex." He also found a link to a YouTube video depicting the defendant's dog. This evidence was sufficient to support a prima facie showing that the MySpace page was the defendant's webpage. It noted: "While tracking the webpage directly to defendant through an appropriate electronic footprint or link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique content belong to defendant."

Demonstrations & Experiments

State v. Chapman, ___ N.C. App. ___, 781 S.E.2d 320 (Jan. 5, 2016). In this armed robbery case, the trial court did not err by admitting a videotape showing a detective test firing the air pistol in question. The State was required to establish that the air pistol was a dangerous weapon for purposes of the armed robbery charge. The videotape showed a detective performing an experiment to test the air pistol's shooting capabilities. Specifically, it showed him firing the air pistol four times into a plywood sheet from various distances. While experimental evidence requires substantial similarity, it does not require precise reproduction of the circumstances in question. Here, the detective use the weapon employed during the robbery and fired it at a target from several close-range positions comparable to the various distances from which the pistol had been pointed at the victim. The detective noted the possible dissimilarity between the amount of gas present in the air cartridge at the time of the robbery and the amount of gas contained within the new cartridge used for the experiment, acknowledging the effect the greater air pressure would have on the force of a projectile and its impact on a target.

Judicial Notice

State v. Harwood, ___ N.C. App. ___, 777 S.E.2d 116 (Oct. 6, 2015). In this probation revocation case, the Court of Appeals took judicial notice of the date of the defendant's release from incarceration. This fact was obtained from an offender search on the Department of Public Safety website.

Rule 401, Rule 403 & Rape Shield

State v. Ford, ___ N.C. App. ___, 782 S.E.2d 98 (Feb. 16, 2016). In this voluntary manslaughter case, where the defendant's pit bull attacked and killed the victim, the trial court did not err by admitting a rap song recording into evidence. The defendant argued that the song was irrelevant and inadmissible under Rule 403, in that it contained profanity and racial epithets which offended and inflamed the jury's passions. The song lyrics claimed that the victim was not killed by a dog and that the defendant and the dog were scapegoats for the victim's death. The song was posted on social media and a witness identified the defendant as the singer. The State offered the song to prove that the webpage in question was the defendant's page and that the defendant knew his dog was vicious and was proud of that characteristic (other items posted on that page declared the dog a "killa"). The trial court did not err by determining that the evidence was relevant for the purposes offered. Nor did it err in determining that probative value was not substantially outweighed by prejudice.

State v. Goins, ___ N.C. App. ___, 781 S.E.2d 45 (Dec. 15, 2015). (1) In this sexual assault case involving allegations that the defendant, a high school wrestling coach, sexually assaulted wrestlers, the trial court abused its discretion by excluding, under Rule 403, evidence that one of the victims was biased. The evidence in question had a direct relationship to the incident at issue. Here, the defendant did not seek to introduce evidence of completely unrelated sexual conduct at trial. Instead, the defendant sought to introduce evidence that the victim told "police and his wife that he was addicted to porn . . . [and had] an extramarital affair[,] . . . [in part] because of what [Defendant] did to him." The defendant sought to use this evidence to show that the victim "had a reason to fabricate his allegations against Defendant – to mitigate things with his wife and protect his military career." Thus, there was a direct link between the proffered evidence and the incident in question. The court went on to hold, however, that because of the strong evidence of guilt, no prejudice resulted from the trial court's error. (2) The trial court also erred by excluding, under the Rape Shield Rule, evidence showing that the victim had a motive to falsely accuse the defendant. The trial court found the evidence irrelevant because it did not fit within one of the exceptions of the Rape Shield Statute. The court concluded that this was error, noting that the case was "indistinguishable" "in any meaningful way" from *State v. Martin*, __ N.C. App. __, 774 S.E.2d 330 (2015) (trial court erred by concluding that evidence was per se it admissible because it did not fall within

one of the Rape Shield Statute's exceptions). The court went on to hold, however, that because of the strong evidence of guilt, no prejudice resulted from the trial court's errors.

Rule 611

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

***Crawford* & the Confrontation Clause**

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

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

> wearing and the fact that someone saw the man drop the gun. Because these statements described past events rather than what was happening at the time and were not made under circumstances objectively indicating an ongoing emergency, we conclude that they were testimonial and therefore inadmissible. (quotation and citation omitted).

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

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

Corroboration

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

Cross-Examination

State v. Singletary, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). The trial court erred by preventing the defendant from making any inquiry into the compensation paid to the State's expert witness. "The source and amount of a fee paid to an expert witness is a permissible topic for cross-examination, as it allows the opposing party to probe the witnesses' partiality, if any, towards the party by whom the expert was called." However, the defendant failed to show "harmful prejudice."

404(b) Evidence

State v. Watts, ___ N.C. App. ___, 783 S.E.2d 266 (April 5, 2016), *temporary stay allowed*, ___ N.C. ___, 783 S.E.2d 747 (Apr. 13, 2016). In this child sexual assault case, the court held, over a dissent, that

the trial court committed reversible error by admitting 404(b) evidence. The evidence involved allegations by another person—Buffkin--that resulted in the defendant being charged with rape and breaking or entering, charges which were later dismissed. The court held that the trial court erred by determining that the evidence was relevant to show opportunity, explaining: "there is no reasonable possibility that Buffkin's testimony concerning an alleged sexual assault eight years prior was relevant to show defendant's opportunity to commit the crimes now charged." The court further found that the evidence was not sufficiently similar to show common plan or scheme. The similarities noted by the trial court--that both instances involved sexual assaults of minors who were alone at the time, the defendant was an acquaintance of both victims, the defendant's use of force, and that the defendant threatened to kill each minor and the minor's family--were not "unusual to the crimes charged." Moreover, "the trial court's broad labeling of the similarities disguises significant differences in the sexual assaults," including the ages of the victims, the circumstances of the offenses, the defendant's relationships with the victims, and that a razor blade was used in the Buffkin incident but that no weapon was used in the incident in question.

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

State v. Campbell, ___ N.C. App. ___, 777 S.E.2d 525 (Oct. 20, 2015), *temporary stay allowed*, ___ N.C. ___, 778 S.E.2d 97 ___ (Nov. 10, 2015). In a case involving a breaking or entering of a church, counsel was not ineffective by failing to challenge the admissibility of evidence that the defendant broke into a home on the night in question. The court noted that because the issue pertains to the admission of evidence no further factual development was required and it could be addressed on appeal. It went on to hold that the evidence was admissible under Rule 404(b) to show that the defendant's intent in entering the church was to commit a larceny therein and to contradict his testimony that he entered the church for sanctuary. The evidence also was admissible under Rule 403. As to the defendant's argument that counsel should have requested a limiting instruction that the jury could not consider the evidence to show his character and propensity, the court agreed that a limiting instruction would have mitigated any potential unfair prejudice. But it held: "any resulting unfair prejudice did not substantially outweigh the evidence's

probative value, given the temporal proximity of the breaking or entering offenses and the evidence's tendency to show that defendant's intent in entering the church was to commit a larceny therein." Because the defendant failed to show that admission of the evidence was error he could not prevail on his ineffective assistance claim.

State v. Carvalho, ___ N.C. App. ___, 777 S.E.2d 78 (Oct. 6, 2015). In this murder case, the court held, over a dissent, that the trial court did not err by admitting under Rule 404(b) portions of an audiotape and a corresponding transcript, which included a conversation between the defendant and an individual, Anderson, with whom the defendant was incarcerated. Anderson was a key witness for the State and his credibility was crucial. The 404(b) evidence was not admitted for propensity but rather to show: that the defendant trusted and confided in Anderson; the nature of their relationship, in that the defendant was willing to discuss commission of the crimes at issue with Anderson; and relevant factual information to the murder charge for which the defendant was on trial. These were proper purposes. Additionally, the trial court did not abuse its discretion in admitting this evidence under the Rule 403 balancing test.

Rule 609: Impeachment with Conviction of Crime

State v. Joyner, ___ N.C. App. ___, 777 S.E.2d 332 (Oct. 20, 2015). In this larceny trial, the trial court did err not by allowing the State to cross-examine the defendant on his previous convictions for uttering a forged instrument, forgery, and obtaining property by false pretenses, all of which occurred more than 10 years ago. The court noted that it has held that under Rule 609 trial court must make findings as to the specific facts and circumstances demonstrating that the probative value of an older conviction outweighs its prejudicial effect and that a conclusory finding that the evidence would attack the defendant's credibility without prejudicial effect does not satisfy this requirement. It continued, however, stating that a trial court's failure to follow this requirement "does not [necessarily constitute] reversible error." (quotation omitted). It explained: "Where there is no material conflict in the evidence, findings and conclusions are not necessary." (quotation omitted). Here, other than making a general objection, the defendant offered no evidence and made no attempt to rebut the State's argument for admitting the prior convictions. Furthermore, a trial court's failure to make the necessary findings is not error when the record demonstrates the probative value of prior conviction evidence to be obvious, and that principle applied in the case at hand. The court held: "although the trial court's findings were conclusory and would normally be inadequate under Rule 609(b), the record contains facts and circumstances showing the probative value of the evidence." Among other things, it noted that the defendant's credibility was central to the case and that all of the prior crimes involved dishonesty.

Fifth Amendment (Self-Incrimination) Issues

State v. Taylor, ___ N.C. App. ___, 780 S.E.2d 222 (Dec. 1, 2015). In this larceny and obtaining property by false pretenses case, the court held: "[t]estimony that the investigating detective was unable to reach defendant to question him during her investigation was admissible to describe the course of her investigation, and was not improper testimony of defendant's pre-arrest silence." The testimony at issue involved the State's questioning of the detective about her repeated unsuccessful efforts to contact the defendant and his lack of participation in the investigation. Noting that pre-arrest silence may not be used as substantive evidence of guilt, the court noted that none of the relevant cases involve a situation where "there has been no direct contact between the defendant and a law enforcement officer." It continued: "Pre-arrest silence has no significance if there is no indication that a defendant was questioned by a law enforcement officer and refused to answer." Here, the detective never made contact with the defendant, never confronted him in person, and never requested that he submit to questioning. Additionally, the court noted there was no indication that the defendant knew the detective was trying to talk to him and that he refused to speak to her. Thus, the court concluded "it cannot be inferred that defendant's lack of response to indirect attempts to speak to him about an ongoing investigation was evidence of pre-arrest silence."

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

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

Hearsay

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

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

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

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

Opinions

Expert Opinions

Dog Bite

State v. Ford, ___ N.C. App. ___, 782 S.E.2d 98 (Feb. 16, 2016). In this voluntary manslaughter case, where the defendant's pit bull attacked and killed the victim, the trial court did not commit plain error by allowing a pathologist to opine that the victim's death was due to dog bites. The court rejected the defendant's argument that the expert was in no better position than the jurors to speculate as to the source of the victim's puncture wounds.

Sexual Assault Cases

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

State v. Walston, ___ N.C. App. ___, 780 S.E.2d 846 (Dec. 1, 2015), *temporary stay allowed*, ___ N.C. ___, 781 S.E.2d 463 (Dec. 18, 2015). In this sexual assault case involving adult victims and assaults that allegedly occurred when they were young children, the trial court improperly excluded the defendant's expert witness based on the erroneous belief that the testimony was not admissible as a matter of law. The defendant's expert, Dr. Artigues, would have given testimony concerning the suggestibility of children. Although the trial court did not make findings of fact and conclusions of law in rending its decision, the court reviewed the record and determined that the trial court excluded the testimony for two reasons. First, the trial court determined that the case did not involve repressed memory and therefore the testimony was not relevant. Second, the trial court agreed with the State that it could not allow an expert witness to testify about the general susceptibility of children to suggestion if the expert had not interviewed the alleged victims. The court rejected the notion that its decision in *State v. Robertson*, 115 N.C. App. 249, (1994), created a per se rule to that effect. Rather, *Robertson* simply held that the trial court had not abused its discretion by excluding the expert testimony under Rule 403. It continued: "Neither *Robertson* nor any other North Carolina appellate opinion we have reviewed recognizes any such *per se* rule. We hold that expert opinion regarding the general reliability of children's statements may be admissible so long as the requirements of Rules 702 and 403 … are met." The court went on to reject the notion that such expert testimony only can be allowed when the witness has interviewed the victims, noting that the defendant's expert here had no right to access the victims absent their consent. It continued: "The ability of a defendant to present expert witness testimony on his behalf cannot be subject

to the agreement of the prosecuting witness, for that agreement will rarely materialize." The court continued:

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

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

State v. Harris, ___ N.C. App. ___, 778 S.E.2d 875 (Nov. 3, 2015). (1) In this child sexual assault case the trial court did not err by admitting testimony from the victim's therapist. The court rejected the defendant's argument that the therapist's testimony constituted impermissible vouching for the victim's credibility. The therapist specialized in working with children who have been sexually abused; she performed an assessment and used trauma-focused cognitive behavioral therapy (TFCBT) to help treat the victim. During treatment the victim talked about the sexual misconduct, how she felt, and wrote a "trauma narrative" describing what had happened. The court noted that the defendant was unable to point to any portion of the therapist's testimony where she opined that the victim was in fact sexually abused by the defendant or stated that sexual abuse did in fact occur. Rather, the therapist explained how TFCBT is used to help treat sexual abuse victims and described therapeutic techniques that she employs in her treatment. She testified that the victim had symptoms consistent with trauma, and explained the process and purpose of writing a trauma narrative. The court found that her explanation laid the foundation for the State to introduce the victim's trauma narrative, which included her written statement about what happened to her. It noted that the narrative was introduced solely for the purpose of corroborating the victim's testimony. It added, "[t]he mere fact that [the therapist's] testimony supports [the victim's] credibility does not render it inadmissible." (2) The trial court did not err by allowing a nurse practitioner to testify that she recommended the victim for therapy despite finding no physical evidence of abuse, and that she referred to the victim's mother as the "non-offending" caregiver. The defendant argued that this testimony impermissibly bolstered the victim's credibility and constituted opinion evidence as to guilt. The court noted that the nurse never asserted that the victim had been sexually abused or explicitly commented on her credibility. Rather, her testimony simply recounted what she did at the conclusion of her examination of the victim and was within the permissible range of expert testimony in child sexual abuse cases. As to her use of the term non-offending caregiver, the witness explained that her organization uses that term to refer to the person with whom the child will be going home and that any parent or caregiver suspected of being an offender is not allowed in the center. The court noted that the witness never testified that the defendant was an offending caregiver.

Drug Cases

State v. Lewis, ___ N.C. App. ___, 779 S.E.2d 147 (Nov. 3, 2015). In this conspiracy to traffic in opiates case, the evidence was sufficient to support the conviction where the State's expert analyzed only one of the pills in question and then confirmed that the remainder were visually consistent with the one that was tested. The police seized 20 pills weighing 17.63 grams. The State's expert analyzed one of the pills and determined that it contained oxycodone, an opium derivative with a net weight of 0.88 grams. The expert visually examined the remaining 19 pills and found them to have "the same similar size, shape and form

as well as the same imprint on each of them." The defendant argued that the visual examination was insufficient to precisely establish how much opium derivative was present in the seized pills. The court rejected this argument, citing prior precedent establishing that a chemical analysis of each individual pill is not necessary; the scope of the analysis may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the entire quantity of pills under consideration.

State v. Hooks, ___ N.C. App. ___, 777 S.E.2d 133 (Oct. 6, 2015). The evidence was sufficient with respect to 35 counts of possession of the precursor chemical pseudoephedrine with intent to manufacture methamphetamine. The court rejected the defendant's argument that the evidence was insufficient because the substance was not chemically identified as pseudoephedrine. The court concluded that the holding of *State v. Ward* regarding the need to identify substances through chemical analysis was limited to identifying controlled substances, and pseudoephedrine is not listed as a controlled substance in the North Carolina General Statutes.

Fire Investigation

State v. Jefferies, ___ N.C. App. ___, 776 S.E.2d 872 (Oct. 6, 2015). In this burning of personal property case, the trial court did not err by allowing the State's expert in fire investigation, a fire marshal, to testify that the fire had been intentionally set. The court noted that in *State v. Hales*, 344 N.C. 419, 424-25 (1996), the North Carolina Supreme Court held that with the proper foundation, a fire marshal may offer an expert opinion regarding whether a fire was intentionally set.

Impaired Driving

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

State v. Torrence, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). Following its opinion in *Godwin*, above, the court held, in this DWI case, that the trial court erred by admitting lay opinion testimony on the results of an HGN test and that a new trial was required.

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

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

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

Lay Opinions

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

Privileges

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

State v. Crisco, ___ N.C. App. ___, 777 S.E.2d 168 (Oct. 20, 2015). In this murder case, the court rejected the defendant's argument that the clergy-communicated privilege prohibited admission of evidence regarding the defendant's confession to his pastor. The court noted that there are two requirements for this privilege to apply: the defendant must be seeking the counsel and advice of his or her minister; and the information must be entrusted to the minister as a confidential communication. Here, the evidence in question was not the defendant's confession to the pastor; it was evidence that the defendant told a third-party who was not a member of the clergy that he had confessed to the pastor about the murder. Because no recognized privilege existed between the defendant and that third-party, the defendant's statement to the third-party that he had confessed to a preacher was not privileged. The court continued, concluding that even if error had occurred the defendant failed to show prejudice.

Arrest, Search, and Investigation

Stops

Reasonable Suspicion

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

State v. Travis, ___ N.C. App. ___, 781 S.E.2d 674 (Jan. 19, 2016). In this drug case, the officer had reasonable suspicion for the stop. The officer, who was in an unmarked patrol vehicle in the parking lot of a local post office, saw the defendant pull into the lot. The officer knew the defendant because he previously worked for the officer as an informant and had executed controlled buys. When the defendant pulled up to the passenger side of another vehicle, the passenger of the other vehicle rolled down his window. The officer saw the defendant and the passenger extend their arms to one another and touch

hands. The vehicles then left the premises. The entire episode lasted less than a minute, with no one from either vehicle entering the post office. The area in question was not known to be a crime area. Based on his training and experience, the officer believed he had witnessed hand-to-hand drug transaction and the defendant's vehicle was stopped. Based on items found during the search of the vehicle, the defendant was charged with drug crimes. The trial court denied the defendant's motion to suppress. Although it found the case to be a "close" one, the court found that reasonable suspicion supported the stop. Noting that it had previously held that reasonable suspicion supported a stop where officers witnessed acts that they believed to be drug transactions, the court acknowledged that the present facts differed from those earlier cases, specifically that the transaction in question occurred in daylight in an area that was not known for drug activity. Also, because there was no indication that the defendant was aware of the officer's presence, there was no evidence that he displayed signs of nervousness or took evasive action to avoid the officer. However, the court concluded that reasonable suspicion existed. It noted that the actions of the defendant and the occupant of the other car "may or may not have appeared suspicious to a layperson," but they were sufficient to permit a reasonable inference by a trained officer that a drug transaction had occurred. The court thought it significant that the officer recognized the defendant and had past experience with him as an informant in connection with controlled drug transactions. Finally, the court noted that a determination that reasonable suspicion exists need not rule out the possibility of innocent conduct.

Duration of Stop; Frisk

State v. Warren, ___ N.C. ___, 782 S.E.2d 509 (Mar. 18, 2016). On appeal pursuant from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 775 S.E.2d 362 (2015), the court per curiam affirmed. In this post-*Rodriguez* case, the court of appeals had held that the officer had reasonable suspicion to extend the scope and duration of a routine traffic stop to allow a police dog to perform a drug sniff outside the defendant's vehicle. The court of appeals noted that under *Rodriguez v. United States*, ___ U.S. ___, 191 L.Ed. 2d 492 (2015), an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop. It further noted that earlier N.C. case law applying the de minimus rule to traffic stop extensions had been overruled by *Rodriguez*. The court of appeals continued, concluding that in this case the trial court's findings support the conclusion that the officer developed reasonable suspicion of illegal drug activity during the course of his investigation of the traffic offense and was therefore justified to prolong the traffic stop to execute the dog sniff. Specifically:

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

State v. Leak, ___ N.C. ___, 780 S.E.2d 553 (Dec. 18, 2015). The supreme court vacated the decision below, *State v. Leak*, ___ N.C. App. ___, 773 S.E.2d 340 (2015), and ordered that the court of appeals remand to the trial court for reconsideration of the defendant's motion to suppress in light of *Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609 (2015). The court of appeals had held that the defendant's Fourth Amendment rights were violated when an officer, who had approached the defendant's legally parked car without reasonable suspicion, took the defendant's driver's license to his patrol vehicle. The court of appeals concluded that until the officer took the license, the encounter was consensual and no reasonable suspicion was required: "[the officer] required no particular justification to approach defendant

and ask whether he required assistance, or to ask defendant to voluntarily consent to allowing [the officer] to examine his driver's license and registration." However, the court of appeals concluded that the officer's conduct of taking the defendant's license to his patrol car to investigate its status constituted a seizure that was not justified by reasonable suspicion. Citing *Rodriguez* (police may not extend a completed vehicle stop for a dog sniff, absent reasonable suspicion), the court of appeals rejected the suggestion that no violation occurred because any seizure was "de minimus" in nature.

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

> Even assuming [the officer] had a right to ask defendant to exit the vehicle while he ran defendant's license, his actions that followed certainly extended the stop beyond what was necessary to complete the mission. The issue is not whether [the officer] could lawfully request defendant to exit the vehicle, but rather whether he unlawfully extended and prolonged the traffic stop by frisking defendant and then requiring defendant to sit in the patrol car while he was questioned. To resolve that issue, we follow *Rodriguez* and focus again on the overall mission of the stop. We hold, based on the trial court's findings of fact, that [the officer] unlawfully prolonged the detention by causing defendant to be subjected to a frisk, sit in the officer's patrol car, and answer questions while the officer searched law enforcement databases for reasons unrelated to the mission of the stop and for reasons exceeding the routine checks authorized by *Rodriguez*.

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

State v. Bedient, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). (1) In this post-*Rodriguez* case, the court held that because no reasonable suspicion existed to prolong the defendant's detention once the purpose of a traffic stop had concluded, the trial court erred by denying the defendant's motion to suppress evidence obtained as a result of a consent search of her vehicle during the unlawful detention. The court found that the evidence showed only two circumstances that could possibly provide reasonable suspicion for extending the duration of the stop: the defendant was engaging in nervous behavior and she had associated with a known drug dealer. It found the circumstances insufficient to provide the necessary reasonable suspicion. Here, the officer had a legitimate basis for the initial traffic stop: addressing the defendant's failure to dim her high beam lights. Addressing this infraction was the original mission of the traffic stop. Once the officer provided the defendant with a warning on the use of high beams, the original mission of the stop was concluded. Although some of his subsequent follow-up questions about the

address on her license were supported by reasonable suspicion (regarding whether she was in violation of state law requiring a change of address on a drivers license), this "new mission for the stop" concluded when the officer decided not to issue her a ticket in connection with her license. At this point, additional reasonable suspicion was required to prolong the detention. The court agreed with the defendant that her nervousness and association with a drug dealer did not support a finding of reasonable suspicion to prolong the stop. Among other things, the court noted that nervousness, although a relevant factor, is insufficient by itself to establish reasonable suspicion. It also concluded that "a person's mere association with or proximity to a suspected criminal does not support a conclusion of particularized reasonable suspicion that the person is involved in criminal activity without more competent evidence." These two circumstances, the court held, "simply give rise to a hunch rather than reasonable, particularized suspicion." (2) The defendant's consent to search the vehicle was not obtained during a consensual encounter where the officer had not returned the defendant's drivers license at the time she gave her consent.

State v. Castillo, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). (1) In this post-*Rodriguez* case, the court held that reasonable suspicion supported the officer's extension of the duration of the stop, including: the officer smelled marijuana on the defendant's person, the officer learned from the defendant him that he had an impaired driving conviction based on marijuana usage, the defendant provided a "bizarre" story regarding the nature of his travel, the defendant was extremely nervous, and the officer detected "masking odors." (2) The defendant's consent to search his car, given during a lawful extension of the stop, was clear and unequivocal.

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

Blood Draws

State v. McCrary, ___ N.C. ___, 780 S.E.2d 554 (Dec. 18, 2015). In a per curiam opinion, the supreme court affirmed the decision below, *State v. McCrary*, __ N.C. App. __, 764 S.E.2d 477 (2014), to the extent it affirmed the trial court's denial of the defendant's motion to dismiss. In this DWI case, the court

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

State v. Romano, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). In this DWI case, the court held that the trial court did not err by suppressing blood draw evidence that an officer collected from a nurse who was treating the defendant. The trial court had found that no exigency existed justifying the warrantless search and that G.S. 20-16.2, as applied in this case, violated *Missouri v. McNeely*. The court noted that in *McNeely*, the US Supreme Court held "the natural metabolization of alcohol in the bloodstream" does not present a "per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." Rather, it held that exigency must be determined based on the totality of the circumstances. Here, the officer never advised the defendant of his rights according to G.S. 20-16.2 and did not obtain his written or oral consent to the blood test. Rather, she waited until an excess of blood was drawn, beyond the amount needed for medical treatment, and procured it from the attending nurse. The officer testified that she believed her actions were reasonable under G.S. 20-16.2(b), which allows the testing of an unconscious person, in certain circumstances. Noting that it had affirmed the use of the statute to justify warrantless blood draws of unconscious DWI defendants, the court further noted that all of those decisions were decided before *McNeely*. Here, under the totality of the circumstances and considering the alleged exigencies, the warrantless blood draw was not objectively reasonable. The court rejected the State's argument that the blood should be admitted under the independent source doctrine, noting that the evidence was never obtained independently from lawful activities untainted by the initial illegality. It likewise rejected the State's argument that the blood should be admitted under the good faith exception. That exception allows officers to objectively and reasonably rely on a warrant later found to be invalid. Here, however, the officers never obtained a search warrant.

Pretrial Line-Up

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

Confessions & Interrogations

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

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

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

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

State v. Knight, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). Over a dissent, the majority held that although the trial court erred in concluding that the defendant voluntarily waived his *Miranda* rights, the defendant was not prejudiced by the error. The court found that "there is no persuasive evidence that the defendant actually understood his *Miranda* rights" before waiving them. Although the defendant had experience in the criminal justice system, there was no evidence that he had ever been *Mirandized* before or that if he had, he understood his rights on those previous occasions. Additionally, the court concluded, "[j]ust because defendant appeared to have no mental disabilities does not mean he understood the warnings expressly mandated by *Miranda*." The court found "no indication that defendant understood he did not have to speak with [the Detective], and that he could request counsel." Finally, the court noted that when asked if he understood his rights, the defendant never affirmatively acknowledged that he did.

In this respect, the court held: "As a constitutional minimum, the State had to show that defendant intelligently relinquished a known and understood right." Thus, while the State presented sufficient evidence of an implied waiver, it did not show that the defendant had a meaningful awareness of his *Miranda* rights and the consequences of waiving them. The dissenting judge believed that the State failed to demonstrate that the error was harmless beyond a doubt.

State v. Hammonds, ___ N.C. App. ___, 777 S.E.2d 359 (Oct. 20, 2015), *review allowed*, ___ N.C. ___, 781 S.E.2d 472 (2016). (1) In this armed robbery case, and over a dissent, the court rejected the defendant's argument that when police interrogated him in the hospital for approximately 1 ½ hours and procured a confession, he was in custody, triggering his right to *Miranda* warnings. The defendant argued that because he had been involuntarily committed, he was automatically "in custody" for purposes of *Miranda*. Agreeing that involuntary commitment is different from a voluntary hospitalization, the court found instructive cases holding that the fact that a person is incarcerated does not automatically mean that he or she is in custody for purposes of *Miranda*. In continued: "Since involuntary commitment is arguably less restrictive than incarceration, and certainly not more restrictive, we do not adopt a more restrictive rule for involuntary commitment than for incarceration." It went on to consider the circumstances of the interrogation as it would for an incarcerated defendant, specifically: whether the person was free to refuse to go to the place of the interrogation; whether the person was told that participation in the interrogation was voluntary and that he was free to leave at any time; whether the person was physically restrained from leaving the place of interrogation; and whether the person was free to refuse to answer questions. Here, the court noted, the officers told the defendant he was not under arrest, they never told him that he could not stop the conversation or could not request that they leave, the officers never raised their voices, and the defendant was not isolated from others such as nurses. The court went on to "hold that a reasonable person in defendant's position would understand that the restriction on his movement was due to his involuntary commitment to receive medical treatment, not police interrogation." (2) Based on the trial court's findings, the court concluded, over a dissent, that the defendant's confession was not involuntary. Among other things, the trial court found that the officers never threatened the defendant and that their exhortations that he tell the truth did not make his confession involuntary.

Search Warrants

State v. Allman, ___ N.C. App. ___, 781 S.E.2d 311 (Jan. 5, 2016). Over a dissent the court held in this drug case that the application in the search warrant failed to establish probable cause to search the defendant's residence. The court found the case indistinguishable from *State v. Campbell*, 282 N.C. 125 (1972), where the affidavit stated that the defendant and two other residents of the premises had been involved with drug sales and possession but insufficiently identified facts indicating that controlled substances would be found in the dwelling to be searched. Here, the affidavit alleged that two individuals residing at the residence were engaged in drug trafficking. However, nothing in the application indicated that the officer had observed or received information that drugs were possessed or sold at the premises in question. The court rejected the State's argument that such an inference arose naturally and reasonably from circumstances indicating that the two individuals were engaged in drug transactions, including the fact that both previously had been convicted of drug crimes and that an officer found marijuana, cash, and a cell phone with messages consistent with marijuana sales in one man's possession during a traffic stop. These facts were relevant to whether those individuals were engaged in drug dealing, but as in *Campbell*, information that a person is an active drug dealer is "not sufficient, without more, to support a search of the dealer's residence." The fact that the men lied about living in the house "while perhaps suggestive that drugs might be present" there, "does not make the drug's presence probable." The court distinguished all cases offered by the State on grounds that in those cases, the relevant affidavits contained "some specific and material connection between drug activity and the place to be searched."

Searches

Of Premises

State v. Smith, ___ N.C. App. ___, 783 S.E.2d 504 (Mar. 1, 2016). No fourth amendment violation occurred when officers entered the defendant's driveway to investigate a shooting. When detectives arrived at the defendant's property they found the gate to his driveway open. The officers did not recall observing a "no trespassing" sign that had been reported the previous day. After a backup deputy arrived, the officers drove both of their vehicles through the open gate and up the defendant's driveway. Once the officers parked, the defendant came out of the house and spoke with the detectives. The defendant denied any knowledge of a shooting and denied owning a rifle. However, the defendant's wife told the officers that there was a rifle inside the residence. The defendant gave verbal consent to search the home. In the course of getting consent, the defendant made incriminating statements. A search of the home found a rifle and shotgun. The rifle was seized but the defendant was not arrested. After leaving and learning that the defendant had a prior felony conviction from Texas, the officers obtained a search warrant to retrieve the other gun seen in his home and a warrant for the defendant's arrest. When officers returned to the defendant's residence, the driveway gate was closed and a sign on the gate warned "Trespassers will be shot exclamation!!! Survivors will be shot again!!!" The team entered and found multiple weapons on the premises. At trial the defendant unsuccessfully moved to suppress all of the evidence obtained during the detectives' first visit to the property and procured by the search warrant the following day. He pled guilty and appealed. The court rejected the defendant's argument that a "no trespassing" sign on his gate expressly removed an implied license to approach his home. While the trial court found that a no trespassing sign was posted on the day of the shooting, there was no evidence that the sign was present on the day the officers first visited the property. Also, there was no evidence that the defendant took consistent steps to physically prevent visitors from entering the property; the open gate suggested otherwise. Finally, the defendant's conduct upon the detectives' arrival belied any notion that their approach was unwelcome. Specifically, when they arrived, he came out and greeted them. For these reasons, the defendant's actions did not reflect a clear demonstration of an intent to revoke the implied license to approach. The court went on to hold that the officers' actions did not exceed the scope of a lawful knock and talk. Finally, it rejected the defendant's argument his fourth amendment rights were violated because the encounter occurred within the curtilage of his home. The court noted that no search of the curtilage occurs when an officer is in a place where the public is allowed to be for purposes of a general inquiry. Here, they entered the property by through an open driveway and did not deviate from the area where their presence was lawful.

SBM

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

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

of the circumstances, whether the search was reasonable. The court noted that on remand the State bears the burden of proving that the SBM search is reasonable.

Strip Searches

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

Computerized Devices

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

Criminal Offenses

States of Mind

State v. Miller, ___ N.C. App. ___, 783 S.E.2d 512 (Mar. 15, 2016), *temporary stay allowed*, ___ N.C. ___, 783 S.E.2d 502 (Mar. 31, 2016). The defendant's due process rights were violated when he was convicted under G.S. 90-95(d1)(1)(c) (possession of pseudoephedrine by person previously convicted of

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

State v. Bryant, ___ N.C. App. ___, 779 S.E.2d 508 (Nov. 17, 2015). In a discharging a barreled weapon into occupied property case, the trial court did not err by instructing the jury that because the crime was a general intent crime, the State need not prove that the defendant intentionally discharged the firearm into occupied property, and that it needed only prove that he intentionally discharged the firearm.

Acting in Concert

State v. Hardison, ___ N.C. App. ___, 779 S.E.2d 505 (Nov. 3, 2015). Reversing the defendant's convictions for contaminating a public water system, the court held that because the defendant was not constructively present, the evidence was insufficient to support criminal liability under the doctrine of acting in concert. The evidence showed that the defendant offered to pay another person to intentionally break county water lines so that the defendant's company, which was under contract with the county to repair the lines, would be paid by the county for the necessary repairs. The defendant was never present when the accomplice broke the water lines. The court held that the defendant "was not physically close enough to aid or encourage the commission of the crimes and therefore was not actually or constructively present—a necessary element of acting-in-concert liability." The court rejected the State's argument that the defendant was constructively present because she planned the crimes, was accessible if needed by telephone, and later was at the crime scene to repair the broken water lines. In this respect, the court held, in part, that "one cannot be actually or constructively present for purposes of proving acting in concert simply by being available by telephone." The court noted that the evidence would have supported a conviction based on a theory of accessory before the fact, but the jury was not instructed on that theory of criminal liability, nor was the defendant charged with other offenses, such as conspiracy, that apply to those who help plan a criminal act.

Attempt

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

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

Conspiracy

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

State v. Garrett, ___ N.C. App. ___, 783 S.E.2d 780 (April 5, 2016). The trial court did not err by denying the defendant's motion to dismiss a charge of conspiracy to sell methamphetamine, given the substantial evidence of an implied understanding among the defendant, Fisher, and Adams to sell methamphetamine to the informants. The informants went to Fisher to buy the drugs. The group then drove to the defendant's house where Fisher asked the defendant for methamphetamine. The defendant said that he didn't have any but could get some. The defendant led Fisher and Adams to the trailer where the drugs were purchased.

State v. Warren, ___ N.C. App. ___, 780 S.E.2d 835 (Nov. 17, 2015). The trial court properly determined that a charge of conspiracy to manufacture methamphetamine was a Class C felony. The court rejected the defendant's argument that G.S. 14-2.4(a) required punishment as a Class D felony ("Unless a different classification is expressly stated, a person who is convicted of a conspiracy to commit a felony is guilty of a felony that is one class lower than the felony he or she conspired to commit[.]"). Here, G.S. 90-98 requires that conviction for conspiracy to manufacture methamphetamine is punished at the same level as manufacture of methamphetamine.

Homicide

State v. McNeill, ___ N.C. App. ___, 778 S.E.2d 457 (Nov. 3, 2015). (1) The evidence was sufficient to submit felony murder to the jury on the basis of felony larceny with a deadly weapon being the underlying felony. The court rejected the defendant's argument that the State failed to show that a beer bottle found at the crime scene was used as a "deadly weapon" within the meaning of the homicide statute, G.S. 14-17. The State's evidence showed, among other things that the murder victim's injuries could have been caused by the bottle. Thus, the State presented sufficient evidence that the broken beer bottle constituted a deadly weapon. The court also rejected the defendant's argument that the State failed to prove that the defendant used the broken bottle during the commission of the felonious larceny, noting that the evidence showed that after incapacitating the victim with the broken bottle the defendant stole the victim's vehicle. Finally, the court rejected the defendant's argument that the State failed to prove that the

killing was committed in the perpetration of the larceny, finding sufficient evidence of a continuous transaction. (2) Where the defendant was convicted of felony murder with the underlying felony being felony larceny, the trial court erred by failing to arrest judgment on the underlying felony.

State v. Juarez, ___ N.C. App. ___, 777 S.E.2d 325 (Oct. 6, 2015), *review allowed*, ___ N.C. ___, 781 S.E.2d 473 (Jan. 28, 2016). Felony discharging of a firearm into an occupied vehicle can serve as an underlying felony supporting a charge of felony murder.

Abuse Offenses

State v. Watkins, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). The evidence was sufficient to survive the defendant's motion to dismiss a misdemeanor child abuse charge under G.S. 14-318.2(a). The case arose from an incident in which the defendant left her young child unattended in a vehicle on a cold day. The State proceeded on the theory that she had created or allowed to be created a substantial risk of physical injury to the child. The court found the evidence sufficient, noting that she left the child, who was under 2 years old, alone and helpless and outside of her line of sight for over 6 minutes inside a vehicle with one of its windows rolled more than halfway down in 18° weather with accompanying sleet, snow and wind. It concluded: "Given the harsh weather conditions, [the child's] young age, and the danger of him will being abducted (or of physical harm being inflicted upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that Defendant 'created a substantial risk of physical injury' to him by other than accidental means."

DVPO Offenses

State v. Williams, ___ N.C. App. ___, 784 S.E.2d 232 (April 19, 2016). The evidence was sufficient to support the defendant's conviction of unlawfully entering property operated as a domestic violence safe house by one subject to a protective order in violation of G.S. 50B-4.1(g1). The evidence showed that the defendant drove his vehicle to shelter, parked his car in the lot and walked to the front door of the building. He attempted to open the door by pulling on the door handle, only to discover that it was locked. The court rejected the defendant's argument that the State was required to prove that he actually entered the shelter building. The statute in question uses the term "property," an undefined statutory term. However by its plain meaning, this term is not limited to buildings or other structures but also encompasses the land itself.

Indecent Liberties

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

Rape

State v. Matsoake, ___ N.C. App. ___, 777 S.E.2d 810 (Oct. 20, 2015). In this rape case, because the evidence was clear and positive and not conflicting with respect to penetration, the trial court did not err

by failing to instruct on attempted rape. Here, among other things, a sexual assault nurse testified that the victim told her she was penetrated, the victim told the examining doctor at the hospital immediately after the attack that the defendant had penetrated her, the defendant's semen was recovered from inside the victim's vagina.

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

Indecent Exposure

State v. Pugh, ___ N.C. App. ___, 780 S.E.2d 226 (Dec. 1, 2015). (1) The trial court properly denied the defendant's motion to dismiss in this felony indecent exposure case. The evidence showed that a neighbor and her 4-year-old daughter saw the defendant masturbating in front of his garage. The court rejected the defendant's argument that because he was on his own property he was not in a "public place" within the meaning of the statute. The court noted that prior case law has held that a public place includes one that is open to the view of the public at large. Here, the defendant's garage was directly off a public road and was in full view from the street and from the front of his neighbor's house. (2) Where the neighbor and her daughter saw the defendant as they exited their car, the trial court did not commit plain error by failing to instruct the jury that the defendant must have been in view of the public with the naked eye and without resort to technological aids. Even if such an instruction may be appropriate in some cases here it was wholly unsupported by the evidence.

Sex Offender Crimes
Being At Place Where Minors Gather

State v. Fryou, ___ N.C. App. ___, 780 S.E.2d 152 (Nov. 17, 2015). (1) In a case involving charges under G.S. 14-208.18(a) (sex offender being present at a location used by minors, here a church preschool), where the State was required to prove (in part) that the defendant was required to register as a sex offender and was so required because of a conviction for an offense where the victim was less than 16 years old, the age of the victim was a factual question to which the defendant could stipulate. (2) The trial court did not err by denying the defendant's motion to dismiss, which had asserted that the State failed to produce substantial evidence that the defendant knew that a preschool existed on the church premises. The evidence showed that the church advertised the preschool with flyers throughout the community, on its website, and with signs around the church. Additionally, the entrance to the church office, where defendant met with the pastor, was also the entrance to the nursery and had a sign explicitly stating the word "nursery." The court rejected the defendant's argument that the State was required to show that he should have known children were actually on the premises at the exact time when he was there. It reasoned: "[T]he actual presence of children on the premises is not an element of the crime, and the State needed only to demonstrate that defendant was 'knowingly' '[w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors' whether the minors were or were not actually present at the time." (3) The court rejected the defendant's facial overbreadth challenge to the statute reasoning that because his argument was not based on First Amendment rights, he lacked standing to assert the challenge. (4) The court rejected the defendant's argument that G.S. 14-208.18(a) was

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

Accessing Social Networking Site

State v. Packingham, 368 N.C. 380 (Nov. 6, 2015). Reversing the court of appeals, 229 N.C. App. 293 (2013), the court held that G.S. 14-202.5 (unlawful for registered sex offender to access certain social networking websites) is constitutional. The court of appeals had held that the statute was unconstitutional on its face and as applied to the defendant, as it violated the defendant's first amendment free speech rights. The court began by finding that the statute is a regulation on conduct, not speech, stating:

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

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

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

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

Failure to Register & Related Offenses

State v. Crockett, ___ N.C. ___, 782 S.E.2d 878 (Mar. 18, 2016). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 767 S.E.2d 78 (2014), the court affirmed the defendant's convictions, finding the evidence sufficient to prove that he failed to register as a sex

offender. The defendant was charged with failing to register as a sex offender in two indictments covering separate offense dates. The court held that G.S. 14-208.9, the "change of address" statute, and not G.S. 14-208.7, the "registration" statute, governs the situation when, as here, a sex offender who has already complied with the initial registration requirements is later incarcerated and then released. The court continued, noting that "the facility in which a registered sex offender is confined after conviction functionally serves as that offender's address." Turning to the sufficiency the evidence, the court found that as to the first indictment, the evidence was sufficient for the jury to conclude that defendant had willfully failed to provide written notice that he had changed his address from the Mecklenburg County Jail to the Urban Ministry Center. As to the second indictment, the evidence was sufficient for the jury to find that the defendant had willfully changed his address from Urban Ministries to Rock Hill, South Carolina without providing written notice to the Sheriff's Department. As to this second charge, the court rejected the defendant's argument that G.S. 14-208.9(a) applies only to in-state address changes. The court also noted that when a registered offender plans to move out of state, appearing in person at the Sheriff's Department and providing written notification three days before he intends to leave, as required by G.S. 14-208.9(b) would appear to satisfy the requirement in G.S. 14-208.9(a) that he appear in person and provide written notice not later than three business days after the address change. Having affirmed on these grounds, the court declined to address the Court of Appeals' alternate basis for affirming the convictions: that the Urban Ministry is not a valid address at which the defendant could register because the defendant could not live there.

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

Kidnapping

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

State v. Knight, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). (1) Where a kidnapping indictment alleged that the defendant confined and restrained the victim for purposes of facilitating a forcible rape, the State was not required to prove both confinement and restraint. (2) In a case where the defendant was charged with sexual assault and kidnapping, there was sufficient evidence of restraint for purposes of

kidnapping beyond that inherent in the assault charge. Specifically, the commission of the underlying sexual assault did not require the defendant to seize and restrain the victim and to carry her from her living room couch to her bedroom.

Larceny & Unauthorized Use

State v. Robinson, 368 N.C. 402 (Nov. 6, 2015). The court modified and affirmed the decision below, ___ N.C. App. ___, 763 S.E.2d 178 (2014), holding that unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle. The court noted that it has adopted a definitional test (as distinct from a factual test) for determining whether one offense is a lesser-included offense of another. Applying that rule, it reasoned that unauthorized use contains an essential element that is not an essential element of possession of a stolen vehicle (that the defendant took or operated a motor-propelled conveyance). The court overruled *State v. Oliver*, 217 N.C. App. 369 (2011) (holding that unauthorized use is not a lesser-included offense of possession of a stolen vehicle but, according to the *Robinson* court, mistakenly reasoning that *Nickerson* mandated that result), to the extent that it is inconsistent with its opinion.

State v. Jones, ___ N.C. App. ___, 781 S.E.2d 333 (Jan. 5, 2016). There was insufficient evidence to sustain the defendant's larceny conviction. The defendant worked as a trucker. After a client notified the defendant's office manager that it had erroneously made a large deposit into the defendant's account, the office manager contacted the defendant, notified him of the erroneous deposit and indicated that the client was having it reversed. However, the defendant withdrew the amount in question and was charged with larceny. The court held that because the client willingly made the deposit into the bank account, there was insufficient evidence of a trespass. The defendant did not take the funds from the client by an act of actual trespass. Rather, the money was put into his account without any action on his part. Thus, no actual trespass occurred. Although a trespass can occur constructively, when possession is fraudulently obtained by trick or artifice, here no such act allowed the defendant to obtain the money. The defendant did not trick anyone into depositing the money; rather it was deposited by mistake by the client. The court rejected the State's argument that the taking occurred when the defendant withdrew the funds after being made aware of the erroneous transfer, noting that at this point the funds were in the defendant's possession not the client's.

Intimidating a Witness

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

instruction for each of the two separate charges of deterring a witness and instead informing the jury that the law was the same for both counts.

Obtaining Property by False Pretenses

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

Disorderly Conduct

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

Weapons Offenses

Caetano v. Massachusetts, 577 U.S. ___, 136 S. Ct. 1027 (Mar. 21, 2016) (per curiam). The Court vacated and remanded the decision of the Supreme Judicial Court of Massachusetts, finding that court erred in interpreting *District of Columbia v. Heller,* 554 U. S. 570 (2008), to hold that the Second Amendment does not extend to stun guns. The Court began by noting that *Heller* held "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."

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

State v. Bonetsky, ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 13, 2016). The court rejected the defendant's contention that the possession of a firearm by a felon statute was unconstitutional as applied to him. Although rejecting the defendant's challenge, the court agreed that the trial court erred when it found that the defendant's 1995 Texas drug trafficking conviction "involve[d] a threat of violence." The trial court also erred by concluding that the remoteness of the 1995 Texas conviction should be assessed from the point that the defendant was

released from prison--13 years ago--instead of the date of the conviction-- 18 years ago. The court went on to find that because the defendant's right to possess a firearm in North Carolina was never restored, he had no history of responsible, lawful firearm possession. And it found that the trial court did not err by concluding that the defendant failed to assiduously and proactively comply with the 2004 amendment to the firearm statute. The court rejected the defendant's argument that this finding was erroneous because there was no reason to believe that the defendant was on notice of the 2004 amendment, noting that it has never held that a defendant's ignorance of the statute's requirement should weigh in the defendant's favor when reviewing an as applied challenge. Finally, the court held that even though the trial court erred with respect to some of its analysis, the defendant's as applied challenge failed as a matter of law, concluding:

> Defendant had three prior felony convictions, one of which was for armed robbery and the other two occurred within the past two decades; there is no relevant time period in which he could have *lawfully* possessed a firearm in North Carolina; and, as a convicted felon, he did not take proactive steps to make sure he was complying with the laws of this state, specifically with the 2004 amendment to [the statute]. (footnote omitted).

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

Drug Offenses

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

State v. Miller, ___ N.C. App. ___, 783 S.E.2d 512 (Mar. 15, 2016), *temporary stay allowed*, ___ N.C. ___, 783 S.E.2d 502 (Mar. 31, 2016). The defendant's due process rights were violated when he was convicted under G.S. 90-95(d1)(1)(c) (possession of pseudoephedrine by person previously convicted of possessing methamphetamine is a Class H felony). The defendant's due process rights "were violated by his conviction of a strict liability offense criminalizing otherwise innocuous and lawful behavior without providing him notice that a previously lawful act had been transformed into a felony for the subset of

convicted felons to which he belonged." The court found that "the absence of any notice to [the defendant] that he was subject to serious criminal penalties for an act that is legal for most people, most convicted felons, and indeed, for [the defendant] himself only a few weeks previously [before the new law went into effect], renders the new subsection unconstitutional as applied to him." The court distinguished the statute at issue from those that prohibit selling illegal drugs, possessing hand grenades or dangerous assets, or shipping unadulterated prescription drugs, noting that the statute at issue criminalized possessing allergy medications containing pseudoephedrine, an act that citizens would reasonably assume to be legal. The court noted that its decision was consistent with *Wolf v. State of Oklahoma*, 292 P.3d 512 (2012). It also rejected the State's effort to analogize the issue to cases upholding the constitutionality of the statute prescribing possession of a firearm by a felon.

State v. Hooks, ___ N.C. App. ___, 777 S.E.2d 133 (Oct. 6, 2015). The evidence was sufficient with respect to 35 counts of possession of the precursor chemical pseudoephedrine with intent to manufacture methamphetamine. As to possession, the State introduced evidence that the defendant purchased pseudoephedrine, was seen "cooking meth," and that others had purchased pseudoephedrine for him. The court rejected the defendant's argument that the evidence was insufficient because the substance was not chemically identified as pseudoephedrine. The court concluded that the holding of *State v. Ward* regarding the need to identify substances through chemical analysis was limited to identifying controlled substances, and pseudoephedrine is not listed as a controlled substance in the North Carolina General Statutes.

Defenses

Self-Defense

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

State v. Juarez, ___ N.C. App. ___, 777 S.E.2d 325 (Oct. 6, 2015), *review allowed*, ___ N.C. ___, 781 S.E.2d 473 (Jan. 28, 2016). The trial court committed plain error by instructing the jury that the defendant could not benefit from self-defense if he was found to be the aggressor. The court noted that cases consistently hold that it is reversible error to instruct the jury on the aggressor doctrine where there is no evidence that the defendant was the initial aggressor. It continued: "Although our courts have not explicitly defined an 'initial aggressor,' we have held that withdrawing from conflict is a means by which a person can avoid that status." Considering the evidence in the case, the court concluded that the defendant's withdrawal "remove[d] him from the realm of the initial aggressor."

Capital Law

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

Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (Jan. 12, 2016). The Court held Florida's capital sentencing scheme unconstitutional. In this case, after a jury convicted the defendant of murder, a

penalty-phase jury recommended that the judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced the defendant to death. After the defendant's conviction and sentence was affirmed by the Florida Supreme Court, the defendant sought review by the US Supreme Court. That Court granted certiorari to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*. Holding that it does, the Court stated: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."

Racial Justice Act

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

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

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

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

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

Post-Conviction Proceedings

DNA Testing & Related Matters

State v. Cox, ___ N.C. App. ___, 781 S.E.2d 865 (Feb. 2, 2016). In this child sexual assault case, the trial court did not err by refusing to appoint counsel to litigate the defendant's pro se motion for post-conviction DNA testing. Under G.S. 15A-269(c), to be entitled to counsel, the defendant must establish that the DNA testing may be material to his wrongful conviction claim. The defendant's burden to show materiality requires more than a conclusory statement. Here, the defendant's conclusory contention that testing was material was insufficient to carry his burden. Additionally, the defendant failed to include the

lab report that he claims shows that certain biological evidence was never analyzed. The court noted that the record does not indicate whether this evidence still exists and that after entering a guilty plea, evidence need only be preserved until the earlier of 3 years from the date of conviction or until the defendant is released.

Motions for Appropriate Relief

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

State v. Martin, ___ N.C. App. ___, 781 S.E.2d 339 (Jan. 5, 2016). (1) Because the defendant's motion for appropriate relief (MAR) alleging ineffective assistance of counsel in this sexual assault case raised disputed issues of fact, the trial court erred by failing to conduct an evidentiary hearing before denying relief. The defendant claimed that counsel was ineffective by failing to, among other things, obtain a qualified medical expert to rebut testimony by a sexual abuse nurse examiner and failing to properly cross-examine the State's witnesses. The defendant's motion was supported by an affidavit from counsel admitting the alleged errors and stating that none were strategic decisions. The court concluded that these failures "could have had a substantial impact on the jury's verdict" and thus the defendant was entitled to an evidentiary hearing. The case was one of "he said, she said," with no physical evidence of rape. The absence of any signs of violence provided defense counsel an opportunity to contradict the victim's allegations with a medical expert, an opportunity he failed to take. Additionally, trial counsel failed to expose, through cross-examination, the fact that investigators failed to collect key evidence. For example, they did not test, collect, or even ask the victim about a used condom and condom wrapper found in the bedroom. Given counsel's admission that his conduct was not the product of a strategic decision, an evidentiary hearing was required. (2) With respect to the defendant's claim that the trial court erred by denying his motion before providing him with post-conviction discovery pursuant to G.S. 15A-1415(f), the court remanded for the trial court to address whether the State had complied with its post-conviction discovery obligations.

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

Retroactivity

Welch v. United States, 578 U.S. __, 136 S. Ct. 1257 (April 18, 2016). *Johnson v. United States*, 576 U. S. ___ (2015), holding that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. §924(e)(2)(B)(ii), was void for vagueness was a substantive decision that is retroactive in cases on collateral review.

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

> [W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. This holding is limited to *Teague*'s first exception for substantive rules; the constitutional status of Teague's exception for watershed rules of procedure need not be addressed here.

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

> Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'" Because *Miller* determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it "'necessarily carr[ies] a significant risk that a defendant'"—here, the vast majority of juvenile offenders—"'faces a punishment that the law cannot impose upon him.'" (citations omitted).

The Court went on to reject the State's argument that *Miller* is procedural because it did not place any punishment beyond the State's power to impose, instead requiring sentencing courts to take children's age into account before sentencing them to life in prison. The Court noted: "*Miller* did bar life without parole,

however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." It explained: "Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence." Noting that *Miller* "has a procedural component," the Court explained that "a procedural requirement necessary to implement a substantive guarantee" cannot transform a substantive rule into a procedural one. It continued, noting that the hearing where "youth and its attendant characteristics" are considered as sentencing factors "does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."

Judicial Administration

One Trial Judge Overruling Another

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