

CRIMINAL CASE UPDATE

Cases covered include reported decisions from the North Carolina Appellate Court, and the U.S. Supreme Court decided between September 21, 2021 and May 17, 2022. To view all of the summaries, go to the [Criminal Case Compendium](#). To obtain the summaries automatically by email, sign up for the [Criminal Law Listserv](#).

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Appellate Issues

Erroneously admitted testimony regarding defendant's pre-arrest silence was harmless beyond a reasonable doubt

State v. Shuler, ___ N.C. App. ___, 2022-NCCOA-96 (Feb. 15, 2022)

The facts of this Haywood County case were previously summarized here following the North Carolina Supreme Court's decision in *State v. Shuler*, 2021-NCSC-89, 378 N.C. 337, 861 S.E.2d 512 (Aug. 13, 2021) (*Shuler I*). The North Carolina Supreme Court held in *Shuler I* that the Court of Appeals erred by admitting testimony regarding the defendant's pre-arrest silence before the defendant testified at trial. *Shuler I* held that the defendant did not forfeit her Fifth Amendment right when she provided notice of her intent to invoke an affirmative defense and that the State may not preemptively impeach a defendant who has not testified. The North Carolina Supreme Court remanded the case to the Court of Appeals to determine whether the erroneously admitted testimony was harmless beyond a reasonable doubt.

On remand, the Court of Appeals held that admission of the improper evidence was harmless beyond a reasonable doubt. The evidence consisted of a detective's testimony that at the time the defendant was discovered with drugs she did not make any statements about the person she later contended had threatened her in order to convince her to hold on to the drugs. The Court of Appeals reasoned that this testimony related solely to the affirmative defense of duress, a defense that was supported only by the defendant's testimony and which the jury was "clearly likely" to have rejected. *Id.* at 14. The Court concluded there was substantial and overwhelming evidence that the defendant knowingly possessed the drugs for which she was charged. It further noted that the State made no additional references to the defendant's pre-arrest silence following the detective's testimony and did not reference the defendant's silence in closing argument. The Court thus deemed the impact of the reference to the defendant's silence to be *de minimis*.

Assuming the admission of substitute analyst testimony and 404(b) evidence was error, the defendant was not prejudiced in light of overwhelming evidence of his guilt

State v. Pabon, 380 N.C. 241, 2022-NCSC-16 (Feb. 11, 2022)

The defendant was charged with second-degree rape and first-degree kidnapping in Cabarrus County and was convicted at trial. Benzodiazepines were found in the victim's urine, and the State presented expert testimony at trial on the urinalysis results. The expert witness did not conduct the forensic testing but independently reviewed the test results. The defendant's hearsay and Confrontation Clause objections were overruled. Expert testimony from another witness established the presence of a muscle relaxant in the victim's hair sample and indicated that the two drugs in combination would cause substantial impairment. There was additional evidence of a substantial amount of the defendant's DNA on the victim, as well as evidence of

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prior similar sexual assaults by the defendant admitted under Rule 404(b) of the North Carolina Rules of Evidence. He was convicted of both charges and appealed. A divided Court of Appeals affirmed, finding no error (summarized here). Among other issues, the majority rejected the defendant's arguments that the admission of the substitute analyst testimony and the 404(b) evidence was error. The defendant appealed the Confrontation Clause ruling and the North Carolina Supreme Court later granted discretionary review on the Rule 404(b) issue.

Assuming without deciding that admission of the substitute analyst testimony was error, the error was harmless beyond a reasonable doubt. Testimony from the substitute analyst established the presence of benzodiazepines in the victim's blood based first on a preliminary test, and then a confirmatory test. While the defendant objected to all of this testimony at trial, only the testimony regarding the confirmatory test was challenged on appeal. Thus, "[e]ven in the absence of [the substitute analyst's] subsequent testimony regarding the confirmatory testing, there was still competent evidence before the jury of the presence of Clonazepam in [the victim's] urine sample." *Pabon* Slip op. at 23. The Court noted that evidence from the other analyst established a different impairing substance in the victim's hair which could have explained the victim's drugged state on its own. In light of this and other "overwhelming" evidence of guilt, any error here was harmless and did not warrant a new trial.

As to the 404(b) evidence, the Court likewise assumed without deciding that admission of evidence of the previous sexual assaults by the defendant against other women was error but determined that any error was not prejudicial under the facts. Unlike a case where the evidence amounts to a "credibility contest"—two different accounts of an encounter but lacking physical or corroborating evidence—here, there was "extensive" evidence of the defendant's guilt. This included video of the victim in an impaired state soon before the assault and while in the presence of the defendant, testimony of a waitress and the victim's mother regarding the victim's impairment on the day of the offense, the victim's account of the assault to a nurse examiner, the victim's vaginal injury, the presence of drugs in the victim's system, and the presence of the a significant amount of the defendant's DNA on the victim's chest, among other evidence. "We see this case not as simply a 'credibility contest,' but as one with overwhelming evidence of defendant's guilt." *Id.* at 34. Thus, even if the 404(b) evidence was erroneously admitted, it was unlikely that the jury would have reached a different result. The Court of Appeals decision was therefore modified and affirmed.

Chief Justice Newby concurred separately. He joined in the result but would not have discussed the defendant's arguments in light of the Court's assumption of error.

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

State v. Goins, 279 N.C. App. 448, 2021-NCCOA-499 (Sept 21, 2021).

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

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

Capacity to Proceed and Related Issues

(1) Trial court did not err by failing to sua sponte order a third competency evaluation; (2) Ineffective assistance of counsel claim dismissed without prejudice for development of the record in post-conviction

State v. Sander, 2021-NCCOA-566, 280 N.C. App. 115 (Oct. 19, 2021)

The defendant was convicted of three counts of first-degree murder at trial in Wake County. The defendant had a history of mental illness and had been involuntarily committed in the past. After he was charged with the murders, the defendant was observed by a forensic psychiatrist at a mental hospital. While the defendant initially exhibited some bizarre symptoms—some of which the treatment team believed to be evidence of malingering—his behavior improved after some time. Defense counsel arranged for a formal competency evaluation, which determined the defendant to be capable of standing trial. Once the defendant was returned to county jail from the hospital, he began accusing the lead defense attorney in his case of conspiring to have him convicted and making other fantastic allegations. A second competency evaluation was ordered. The evaluator found that, while the defendant was making “poor choices” and exhibiting “self-sabotaging” behavior, the defendant remained capable of rational thinking and was competent to stand trial.

Prior to trial, a third competency evaluation was sought, but defense attorneys conceded they had no new evidence in support of the request. The request was denied. Throughout jury selection, the defendant repeatedly interrupted the proceedings with outbursts and accusations over the course of several days and had to be shackled. He also sought to disqualify his lead defense attorney (which the trial court denied). Prior to opening statements, defense counsel notified the judge that they were not sure whether to give an opening statement, as the defendant had refused to work with them to decide on strategy. After a recess and an opportunity for the defendant to consult with defense counsel, defense counsel gave an opening statement. The defendant’s interruptions continued during the State’s case-in-chief, and he had to be removed from the courtroom. The defendant was convicted of all three murders.

During the penalty phase, defense evidence showed that the defendant could be exaggerating his mental illness or malingering, or that he was in fact doing so. The jury recommended life

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imprisonment, and the court ordered the defendant to serve consecutive life without parole terms for each count.

The record was not clear on whether the defendant gave oral notice of appeal in open court following the judgment, and a written notice of appeal filed by trial counsel failed to identify the file numbers of two of the charges, among other defects. In its discretion, the Court of Appeals granted the defendant's petition for writ of certiorari to review the matter.

(1) The trial court did not err in failing to sua sponte order a third competency evaluation based on the defendant's behavior at trial. The second competency evaluation was performed to address concerns that the defendant was unable to work with his attorneys, and it determined that the defendant had the capacity to work with his attorneys if he so desired. The beliefs and behaviors of the defendant leading to the second evaluation were the same behaviors he exhibited at trial and did not warrant sua sponte intervention by the trial court. According to the court:

“ . . . Defendant's refusal to work with his counsel at trial, his belief he was being framed by them, and his aggression in the courtroom was not new conduct. Instead, these behaviors were the subject of a previous evaluation that determined him competent. As such, these facts do not suggest a change in competency warranting a sua sponte hearing under our caselaw. *Sander Slip op.* at 17.

Further, the defendant's behaviors (however odd) indicated that he understood the allegations and evidence against him and showed that he meant to deny the charges. There was therefore no error in failing to sua sponte order a third competency evaluation.

(2) The defendant claimed that his attorneys struck certain jurors that he wanted to keep and argued that the record showed an impasse between the defendant and his attorneys on this point. The court disagreed that an impasse between counsel and the defendant was apparent on the cold record. The court dismissed this claim without prejudice, allowing the defendant to pursue this issue via a motion for appropriate relief if he desires.

Counsel Issues

The trial court did not err by denying the defendant's request for substitute counsel in the absence of an absolute impasse, denying his motion to dismiss a solicitation to commit murder charge, and declining to intervene in the State's closing argument; any error with respect to instructing the jury on solicitation to commit murder in accordance with NCPI Crim. 206.17 was harmless on the facts of the case

State v. Strickland, 2022-NCCOA-299, ___ N.C. App. ___ (May. 3, 2022)

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In this Edgecombe County solicitation to commit murder case, the trial court did not err (1) in resolving the defendant's request for substitute counsel; (2) by denying the defendant's motion to dismiss for insufficient evidence; and (3) by declining to intervene ex mero motu in the State's closing argument. Additionally, (4) any error in the jury instructions for solicitation to commit murder was harmless.

(1) The trial court did not err by denying the defendant's request for the appointment of substitute counsel where the record did not reflect an absolute impasse between the defendant and his counsel. The trial court engaged in a lengthy colloquy with the defendant and its findings and conclusions that the defendant was acting in a disruptive manner and expressing dissatisfaction with his counsel to derail the trial but was not at an absolute impasse were well-supported.

(2) The trial court properly denied the defendant's motion to dismiss a charge of solicitation to commit first-degree murder for insufficient evidence. Evidence at trial tended to show that the defendant had multiple conversations with another person, Capps, where he requested that Capps kill the defendant's ex-girlfriend, Thomas; that the defendant gave Capps a map of Thomas's house and the surrounding area; that the defendant provided detailed suggestions about how to kill Thomas; and that the defendant offered to kill Capps's girlfriend if Capps killed Thomas. In the light most favorable to the State, this evidence was sufficient for the solicitation charge to be submitted to the jury.

(3) The trial court did not err by declining to intervene ex mero motu in the State's closing argument that involved questioning the defendant's credibility, characterizing the defendant as "angry" and "dangerous" among other things, stating that the evidence rebutted the presumption of innocence, and calling the jury's attention to the specific deterrence a conviction would provide and the jury's role as representatives of the community. In the context of the evidence at trial and relevant precedent, the arguments were not grossly improper.

(4) The Court of Appeals determined on plain error review that any error in the trial court's jury instruction on solicitation to commit first-degree murder was harmless. The trial court instructed the jury using NCPI Crim. 206.17, which omits any mention of the elements of premeditation and deliberation, which distinguish first-degree from second-degree murder. The court reasoned that any error in the omission of these elements in the instruction was harmless on the facts of this case where the evidence showed that the defendant "solicited [Capps] to kill [Thomas] with malice upon [Capps's] release from prison." As the solicited killing necessarily would occur in the future and according to the defendant's suggested plans, the evidence unavoidably established the defendant solicited a premeditated and deliberated homicide with the specific intent to kill. Thus, there was no indication that the jury would have reached a different verdict absent any error in the instruction, and the defendant's ability to defend himself from the charge was not frustrated as his strategy was to deny asking Capps to kill Thomas regardless of premeditation, deliberation, or specific intent.

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Judge Murphy concurred in result only and without a separate opinion with respect to the court's conclusion that the trial court did not err by failing to intervene ex mero motu in the State's closing argument.

(1) Trial court did not err by failing to further investigate defendant's complaints about trial counsel or by denying his mid-trial request to represent himself; (2) Use of the words "victim" and "disclosure" by State's expert witness was not plain error or prejudicial; (3) Trial counsel was not ineffective for failing to object to the use of "victim" and "disclosure" by the State's expert

State v. Ward, 2022-NCCOA-40, ___ N.C. App. ___ (Jan. 18, 2022)

In this Pasquotank County case, the defendant was convicted at trial of statutory rape and abduction of a child. (1) During the first day of trial, the defendant complained about his attorney and claimed to have repeatedly fired him during the case. In response, the trial court allowed the defendant to express his concerns and attempted to address them. On the second day of trial, the defendant asked to represent himself, a request the trial court refused. On appeal, he argued that the trial court failed to inquire into an alleged impasse between trial counsel and the defendant and erred by not allowing him to represent himself. A unanimous Court of Appeals disagreed. While the defendant expressed some dissatisfaction with his attorney, his comments did not evince an absolute impasse in the case. In the court's words: Defendant's complaints . . . were deemed misunderstandings that were corrected during the colloquies by the trial court. . . Defendant may have had a personality conflict with his counsel, and asserted he did not believe defense counsel had his best interest at heart. Defendant has failed to show an 'absolute impasse as to such tactical decisions' occurred during trial. *Ward* Slip op. at 9.

Thus, the trial court did not err by failing to more fully investigate the issue. The trial court also did not err by refusing to allow the defendant to proceed pro se after trial had begun, or by failing to conduct the colloquy for self-represented individuals in G.S. 15A-1242. While waiver of the right to counsel requires a knowing, voluntary, and intelligent waiver by the defendant, the right to self-representation may be waived by inaction, as occurred here. Further, without the defendant making a timely request to represent himself, the defendant is not entitled to be informed about the right to self-representation. The trial court did not err in disallowing self-representation, or in failing to make the statutory inquiry required for self-representation, under these circumstances. According to the court:

Defendant did not clearly express a wish to represent himself until the second day of trial. The trial court gave Defendant several opportunities to address and consider whether he wanted continued representation by counsel and personally addressed and inquired into whether Defendant's decision was being freely, voluntarily, and intelligently made. Defendant's arguments are without merit and overruled. *Id.* at 10-11.

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(2) The defendant also argued that the trial court erred in allowing one of the State's witnesses to use the words "victim" and "disclosure" when referring to the child victim in the case. Because no objection was made at trial, the issue was reviewed for plain error. The court noted that overuse of terms such as "victim" and "disclosure" may, in some circumstances, prejudice a defendant. Here, in light of the evidence at trial, any error did not rise to the level of plain error and did not prejudice the defendant.

(3) Trial counsel for the defendant was not ineffective for failing to object to the use of the terms "victim" and "disclosure" for similar reasons—the defendant could not show prejudice stemming from the use of these words, given the overwhelming evidence of guilt admitted at trial.

(1) The trial court did not commit plain error by not instructing the jury on the lesser-included offense of attempted voluntary manslaughter where the evidence did not support such an instruction. (2) The trial court did not err by not conducting an inquiry into the defendant's consent to defense counsel's statements in opening and closing arguments where the content of defense counsel's arguments did not constitute *Harbison* error as implied concessions of guilt. (3) The trial court did not commit error by denying the defendant's motion to dismiss the charge of first-degree kidnapping where there was sufficient evidence of confinement to support the charge distinct from evidence of assault.

State v. Guin, ___ N.C. App ___, 2022-NCCOA-133 (Mar. 1, 2022)

The defendant was indicted for seven crimes arising from a domestic violence incident. The defendant severely beat his wife, resulting in her being hospitalized for six days where she was treated for extensive swelling and bruising to face and neck, fractures to rib bones and bones around her eyes, strangulation, contusions, and kidney failure induced by toxins released from skeletal muscle destruction. Following trial, the defendant was convicted of six of the seven charges and was sentenced to four consecutive sentences totaling 578 to 730 months. The defendant appealed.

(1) On appeal, the defendant first argued that the trial court committed plain error in failing to instruct the jury on the lesser-included offense of attempted voluntary manslaughter because the evidence showed that the defendant lacked the requisite intent for attempted first-degree murder. The defendant contended that the State failed to conclusively prove he had the requisite intent of premeditation and deliberation to commit first-degree murder because evidence at trial showed that he assaulted his wife spontaneously in response to adequate provocation. In rejecting this argument, the Court of Appeals noted that there was overwhelming evidence at trial supporting premeditation and deliberation. Although the wife admitted during trial that she stabbed the defendant in the chest with a knife, the defendant's testimony confirmed that the subsequent assault lasted multiple hours, and the defendant testified that he "knew what he was doing" and agreed that he "could have left at any time."

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Slip op. at ¶ 27. The Court thus held that this the defendant's testimony did not warrant an instruction on attempted voluntary manslaughter.

(2) The defendant next argued that the trial court did not ensure the defendant had knowingly consented before allowing defense counsel to concede the defendant's guilt to multiple charges. The defendant contended that statements made by his defense counsel during opening and closing statements constituted an implied admission of his guilt because counsel (i) told the jury that the defendant "beat" his wife and (ii) argued only against the charge of first-degree murder and did not mention the defendant's other charges in closing argument. The Court of Appeals held that defense counsel's reference to the defendant having beaten his wife did not amount to a *Harbison* error because the defendant chose to testify on his own behalf, under oath, with full awareness that he did not have to testify. The defendant then repeatedly admitted that he beat his wife. The Court concluded that defense counsel repeated the defendant's own testimony, then urged the jury to evaluate the truth in defendant's words, and that defense counsel's statements could logically be interpreted as a recitation of facts presented at trial.

(3) The defendant's final argument was that the trial court erred by denying his motion to dismiss the charge of first-degree kidnapping because the State failed to introduce sufficient evidence of confinement separate from that which was inherent in the commission of the assaults on his wife. In rejecting this argument, the Court reasoned that the State presented evidence that the defendant confined his wife to her apartment through actions apart from confinement inherent in the many instances of assault, and the evidence allowed a reasonable inference that the defendant chose to wholly confine his wife to her apartment to prevent her from seeking aid.

To the extent that defense counsel's admissions in opening statements triggered *Harbison*, the trial court's colloquy with the defendant was adequate to ascertain his consent to those admissions

State v. Bryant, ___ N.C. App. ___, 2021-NCCOA-696 (Dec. 21, 2021)

Following defense counsel's opening statements in a Possession with Intent to Sell or Deliver Heroin and Possession of Drug Paraphernalia case where the defendant was indicted as a habitual felon, the State expressed concern that defense counsel had made admissions necessitating a *Harbison* inquiry. Though defense counsel said "I don't think we admitted anything," the trial court held a colloquy where the defendant stated that the arguable admissions were made with his consent. While the transcript did not contain defense counsel's opening statements, the Court of Appeals concluded there was enough information in the transcript to determine that defense counsel, although he admitted the defendant possessed a baggie of a substance that later would be identified as heroin, had not made a *Harbison* admission to PWISD Heroin because he did not admit the element that defendant had the intent to sell or deliver the substance. Nevertheless, the Court of Appeals went on to determine that the statements could have been admissions to the lesser included offense of

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heroin possession or admissions to Possession of Drug Paraphernalia and therefore “possibly trigger[ed] *Harbison*.” Assuming a *Harbison* inquiry was required, the trial court’s colloquy with the defendant was adequate to ascertain the defendant’s consent to the admissions. The Court also noted that the colloquy was adequate with respect to any admissions defense counsel may have made regarding habitual felon status, a status to which the defendant later pleaded guilty after a voluntariness inquiry.

DWI Procedure

There was probable cause to believe that a person whose license was revoked for refusing a chemical analysis after being charged with DWI was operating a vehicle and the procedures of G.S. 20-16.2 do not violate due process

Edwards v. Jessup, ___ N.C. App. ___, 2022-NCCOA-157 (Mar. 15, 2022)

The superior court erred in reversing a DMV civil revocation of a driver’s license in a case where the appellee refused to consent to a chemical analysis after being charged with DWI. An officer responded to a call that a driver had fallen asleep in the drive-through lane of a fast food restaurant and discovered the appellee asleep in the driver’s seat of her vehicle, which was not running and was parked in the parking lot. After an investigation where the appellee admitted to falling asleep while in the drive-through lane and failed a field sobriety test, she was charged with DWI. The appellee refused to consent to a blood sample for a chemical analysis, causing the DMV to revoke her license pursuant to G.S. 20-16.2 and sustain the revocation following an administrative hearing. The superior court reversed the revocation on two grounds, finding that there was a lack of evidence that the appellee was operating a motor vehicle and also finding that the procedures of G.S. 20-16.2 deprived the appellee of due process. Leaving open the question of whether there was sufficient evidence to convict the appellee of DWI, the Court of Appeals found that the officer had probable cause to believe that the appellee was operating the vehicle, as required by the statute. As for the due process issue, the Court of Appeals found that the procedures prescribed by G.S. 20-16.2 do not violate due process merely because DMV hearing officers are DMV employees and there is no attorney at revocation hearings putting on the State’s case.

Indictment & Pleading Issues

(1) A reasonable police officer would not have understood the defendant’s statement after he was arrested to be an unambiguous request for counsel during interrogation; (2) Variance between date of vaginal intercourse stated in indictment and victim’s testimony did not require dismissal of charges

State v. Darr, 2022-NCCOA-296, ___ N.C. App. ___ (May 3, 2022)

In this Randolph County case, the defendant appealed from his conviction for statutory rape, arguing that the trial court erred in (1) denying his motion to suppress evidence from his

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interrogation because he requested and did not receive counsel, and (2) denying his motion to dismiss because the dates alleged in the indictment varied from the victim's testimony.

(1) The defendant came to the sheriff's office for questioning at a detective's request. Detectives told him about the victim's allegations that they had vaginal intercourse over a two-year period beginning in 2016, when the victim was 14 and the defendant was 33. After the detectives played a recording of the defendant speaking to the victim, the defendant admitted he had engaged in vaginal intercourse with the victim multiple times in 2017 and 2018. A detective subsequently told the defendant he was under arrest and read the defendant *Miranda* rights. The defendant said, "I'll talk to you but I want a lawyer with it and I don't have the money for one." The detectives asked additional questions about whether the defendant wanted to speak without a lawyer present. One detective told the defendant that speaking with the detectives "can't hurt." This exchange culminated in the defendant signing a waiver of his right to counsel and continuing to speak with the detectives.

The defendant moved to suppress any statements from the interrogation. The trial court denied the motion. The Court of Appeals found no error, concluding that the defendant was not in custody when he initially confessed and that a reasonable police officer would not have understood the defendant's statement after he was arrested as an unambiguous request for counsel during interrogation. The Court determined that the trial court's findings were supported by competent evidence that defendant's request for counsel was ambiguous and the detectives' statements were an attempt to clarify the defendant's statements.

(2) The date of the vaginal intercourse listed on the indictment was 2017, but the victim testified at trial that the intercourse occurred in 2016. The defendant moved to dismiss based on this variance. The trial court denied the motion and the Court of Appeals found no error. The Court reasoned that the date given in an indictment for statutory rape is not an essential element of the crime, and noted that courts are lenient concerning dates in cases involving the sexual abuse of minors. The Court concluded that the victim's testimony alleging vaginal intercourse in 2016 between her and Defendant—when she was 14 and the defendant was 19 years her elder—was sufficient to survive a motion to dismiss.

Judge Arrowood concurred in the result, but wrote separately to opine that once the defendant stated that he wanted a lawyer, the custodial interrogation should have ceased. Nevertheless, given that defendant's initial confession was made voluntarily and prior to custodial interrogation, Judge Arrowood would have found the trial court's denial of the suppression motion to be harmless error.

An attempted robbery with a dangerous weapon indictment was not fatally defective for failing to include the name of a specific victim

State v. Oldroyd, ___ N.C. ___, 2022-NCSC-27 (Mar. 11, 2022)

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In this Yadkin County case, a defendant pled guilty to second-degree murder, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon in 2013. The defendant filed a motion for appropriate relief asserting that the indictment for the attempted robbery charge was fatally defective in that it did not include the name of a victim, but rather described the victims as “employees of the Huddle House” located at a particular address. The trial court denied the motion. A divided panel of the Court of Appeals agreed with the defendant. *State v. Oldroyd*, 271 N.C. App. 544 (2020). The Supreme Court reversed the Court of Appeals, concluding that the indictment sufficiently informed the defendant of the crime he was accused of and protected him from being twice put in jeopardy for the same offense. The Court rejected the defendant’s argument, based on cases decided before the enactment of the Criminal Procedure Act of 1975, that indictments for crimes against a person must “state with exactitude” the name of a person against whom the offense was committed. The Court also distinguished prior cases finding indictments defective when they named the wrong victim or did not name any victim at all. Under the modern requirements of G.S. 15A-924(a)(5), the Court concluded that the attempted robbery with a dangerous weapon charge here was not defective. Therefore, the Court reversed the Court of Appeals and reinstated the trial court order denying the defendant’s motion for appropriate relief.

(1) There was no fatal variance in charge for injury to personal property where named victim was not the legal owner, but had a special interest in the property; (2) restitution amount was not speculative where it was based on evidence of fair market value

State v. Redmond, ___ N.C. App. ___, 2022-NCCOA-5 (Jan. 4, 2022)

Upon trial de novo in superior court, the defendant in this case was convicted of misdemeanor injury to personal property for throwing a balloon filled with black ink onto a painting during a protest at an arts event in Asheville. The defendant received a suspended 30-day sentence and was ordered to pay \$4,425 in restitution. On appeal, the defendant argued that her motion to dismiss the injury to personal property charge should have been granted due to a fatal variance, and argued that the restitution amount was improperly based on speculative value. The appellate court rejected both arguments.

The charging document alleged that the defendant had damaged the personal property of the artist, Jonas Gerard, but the evidence at trial indicated that the painting was the property of the artist’s corporation, Jonas Gerard Fine Arts, Inc., an S corporation held in revocable trust, where Jonas Gerard was listed as both an employee and the sole owner. Although this evidence established that the artist and the corporation were separate legal entities, each capable of owning property, the court held that the state’s evidence sufficiently demonstrated that the artist named in the pleading was nevertheless a person who had a “special interest” in the property and was therefore properly named in the charging instrument. The painting was not yet complete, it was still in the artist’s possession at the time it was damaged, and the artist regarded himself and the corporation as functionally “one and the same” and he “certainly held out the paintings as his own.” Finding the facts of this case analogous to *State v. Carr*, 21 N.C. App. 470 (1974), the appellate court held that the charging document was “sufficient to notify

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Defendant of the particular piece of personal property which she was alleged to have damaged,” and the trial court did not err in denying the motion to dismiss for a fatal variance.

The restitution amount was also supported by competent evidence. A witness for the state testified that a potential buyer at the show asked what the painting would cost when completed and was told \$8,850, which was the gallery’s standard price for paintings of that size by this artist. The artist also testified that the canvas was now completely destroyed, and the black ink could not be painted over. The trial court ordered the defendant to pay half that amount as restitution. The appellate court held that the fact that the painting “had not yet been purchased by a buyer does not mean that the market value assigned by the trial court for restitution was speculative.” The evidence presented at trial was sufficient to establish a fair market value for the painting prior to it being damaged, and the trial court’s restitution order would not be disturbed on appeal.

A juvenile petition for extortion was not defective despite not alleging a victim

In re J.A.D. , ____ N.C. ____, 2022-NCCOA-259 (Apr. 19, 2022)

In this Surry County juvenile case, a petition was filed alleging that the juvenile committed extortion by obtaining a digital image of a victim, without her knowledge or consent, in which she was in only her bra and underwear. The petition also alleged that the juvenile used the image to obtain food from the school cafeteria while threatening to expose the image if the victim refused to buy the food or do what the juvenile asked of her. The petition did not name the victim. The juvenile was adjudicated delinquent and the court entered a Level 1 disposition. On appeal the juvenile asserted that (1) the court lacked subject matter jurisdiction because the petition was fatally defective in that it failed to name the victim, (2) the juvenile’s motion to dismiss should have been granted because the crime of extortion requires threat of unlawful physical violence and the juvenile did not make such a threat, (3) there was a fatal variance between the threat alleged in the petition and the proof at the adjudication hearing, (4) the written findings in the adjudication order were insufficient, and (5) the disposition order was insufficient in its failure to contain findings of fact to demonstrate that the court considered all the required factors in G.S. 7B-2501(c).

(1) The Court of Appeals concluded that there was no fatal defect in the petition. Juvenile petitions are generally held to the same standards as criminal indictments in that they must aver every element of the offense with sufficient specificity to clearly apprise the juvenile of the conduct being charged. Like an indictment, a fatally deficient petition fails to evoke the jurisdiction of the court. Central to the offense of extortion is the wrongfulness of the method by which the juvenile seeks to obtain something of value. Slip op. at ¶ 23. A charging instrument charging extortion need only aver the material elements of the offense, which are 1) that a wrongful demand was made with 2) the intent to demand something of value. Slip op. at ¶ 24. The petition in this case sufficiently alleged each of these elements. It was not necessary to specifically name the victim.

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(2) The Court also assumed, without holding, that G.S. 14-118.4 is an anti-threat statute, the court holds that First Amendment jurisprudence does not limit the application of this statute to threats of unlawful physical violence. Slip op. at ¶ 31. The definition of a true threat, as provided in *State v. Taylor*, 379 N.C. 589, 2021-NCSC-164, does not require that a threat includes unlawful physical violence. There is no constitutional rule that threats are protected speech unless they threaten unlawful physical violence. Slip op. at ¶ 34. The State was not required to prove that the juvenile threatened unlawful physical violence.

(3) Next, the Court concluded that there was no fatal variance between the petition and the evidence. The essential element of extortion is that the juvenile used a wrongful threat to obtain something of value. The precise identification of what that thing of value was is not material, as long as the State proves that the juvenile obtained or attempted to obtain something of value. Slip op. at ¶ 40. The specific language in the petition alleging that the juvenile sought to obtain food from the cafeteria was unnecessarily specific and therefore surplusage. The fact that the evidence showed that the juvenile asked the victim to do his homework and the petition alleged that he asked her to obtain food from the cafeteria did not create a fatal variance.

(4) Next, the Court concluded that there were insufficient written findings in the adjudication order. G.S. 7B-2411 requires that, at a minimum, the court state in a written adjudication order that the allegations in the petition have been proved beyond a reasonable doubt. Language on the pre-printed form used, stating that “The following facts have been proven beyond a reasonable doubt: . . .,” followed by a finding that states, “[a]t the hearing before the judge, the juvenile was found to be responsible for extortion in violation of 14-118.4,” is insufficient to satisfy this statutory requirement. Only a conclusory statement that the juvenile was responsible for the offense is insufficient. The trial court must affirmatively state the burden of proof in its written findings without regard to the pre-printed language on the form. The case is remanded for the court to make the necessary written findings in the adjudication order. The dispositional order also incorporated the predisposition report and the juvenile’s risk and needs assessment by reference. There were no written findings related to the factors the court is required to consider under G.S. 7B-2501(c) when ordering a disposition. The order is therefore insufficient. Because the adjudication order is vacated, this disposition order is also vacated. However, the insufficiency of the disposition order provides an independent ground for vacating the disposition order. On remand, the trial court may hold a new dispositional hearing to hear additional evidence needed to appropriately consider the factors required by G.S. 7B-2501(c).

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

State v. Clagon, 279 N.C. App. 425, 2021-NCCOA-497 (Sept. 21, 2021).

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

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

Jurisdictional Issues

The superior court had original jurisdiction to try a misdemeanor charge that was initiated by indictment but amended by a statement of charges; Defendant’s prosecution for second-degree trespass at the General Assembly did not violate his First Amendment rights

State v. Barber, ___ N.C. App. ___, 2021-NCCOA-695 (Dec. 21, 2021)

In this case arising from a high-profile incident where William Joseph Barber was convicted of second-degree trespass for refusing to leave the office area of the General Assembly while leading a protest related to health care policy after being told to leave by security personnel for violating a building rule prohibiting causing disturbances, the Court of Appeals found that the superior court had subject matter jurisdiction to conduct the trial and that the trial was free from error.

The Court of Appeals rejected the defendant’s argument that the superior court lacked jurisdiction to try him for the misdemeanor because the charging document upon which the State proceeded in superior court was a statement of charges rather than an indictment and Defendant had not first been tried in district court. Here, the defendant was indicted by a grand jury following a presentment but the prosecutor served a misdemeanor statement of charges on him on the eve of trial and proceeded on that charging document in superior court. The Court of Appeals noted that the superior court does not have original jurisdiction to try a misdemeanor charged in a statement of charges but went on to explain that because the prosecution in this case was initiated by an indictment, the superior court had subject matter jurisdiction over the misdemeanor. The Court characterized the statement of charges as a permissible amendment to the indictment (because it did not substantially change the nature of the charged offense) rather than a new charging document.

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The Court also rejected the defendant's argument that the trial court erred by disallowing certain evidence that went to his assertion that his prosecution implicated his First Amendment rights to free speech and free assembly. The Court determined that his First Amendment rights were not implicated in the conduct for which he was charged because he was removed from the General Assembly because of the loudness of his speech rather than its content. The Court then determined that even if his First Amendment rights were implicated, they were not violated as a matter of law. The Court held that the interior of the General Assembly "is not an unlimited public forum" and therefore "the government may prohibit loud, boisterous conduct on a content-neutral basis that would affect the ability of members and staff to carry on legislative functions." It went on to conclude that "Defendant's First Amendment rights were not violated by the application of the legislative rules that support his conviction" because those "rules serve a significant interest of limiting loud disruptions and [he] has various other channels to make his concerns known and to engage in protests of legislative policies."

Judge Inman concurred in part and concurred in the result in part by a separate opinion. Judge Inman applied *United State v. O'Brien*, 391 U.S. 367 (1968) to determine that the building rule at issue was more than an incidental burden on speech and instead was a time, place, and manner restriction subject to intermediate First Amendment scrutiny. Judge Inman also concluded, in contrast to her reading of the view in the majority opinion, that the hallway where the defendant was arrested was a designated public forum. Nevertheless, Judge Inman concurred in the ultimate conclusion that the defendant's constitutional rights were not violated as the building rule was a reasonable time, place, and manner restriction that survived intermediate scrutiny.

Jury Selection

Where the prosecutor's race-neutral explanations for use of a peremptory strike were unsupported by the record, the defendant should have prevailed on his *Batson* challenge; order denying defense *Batson* challenge reversed on the merits

State v. Clegg, 380 N.C. 127, 2022-NCSC-11 (Feb. 11, 2022)

The defendant was tried for armed robbery and possession of firearm by felon in Wake County. When the prosecution struck two Black jurors from the panel, defense counsel made a *Batson* challenge. The prosecution argued the strikes were based on the jurors' body language and failure to look at the prosecutor during questioning. The prosecution also pointed to one of the juror's answer of "I suppose" in response to a question on her ability to be fair, and to the other juror's former employment at Dorothea Dix, as additional race-neutral explanations for the strikes. The trial court initially found that these reasons were not pretextual and overruled the *Batson* challenge. After the defendant was convicted at trial, the Court of Appeals affirmed in an unpublished opinion, agreeing that the defendant failed to show purposeful discrimination. The defendant sought review at the North Carolina Supreme Court. In a special order, the Court remanded the case to the trial court and retained jurisdiction of the case.

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On remand, the defense noted that the “I suppose” answer used to justify the prosecutor’s strike was in fact a mischaracterization of the juror’s answer—the juror in question responded with that answer to a different question about her ability to pay attention (and not about whether she could be fair). The defense argued this alone was enough to establish pretext and obviated the need to refute other justifications for the strike. As to the other juror, the defense noted that while the juror was asked about her past work in the mental health field, no other juror was asked similar questions about that field. The defense argued with respect to both jurors that the prosecutor’s body language and eye contact explanations were improper, pointing out that the trial court failed to make findings on the issue despite trial counsel disputing the issue during the initial hearing. It also noted that the prosecutor referred to the two women collectively when arguing this explanation and failed to offer specific reasons for why such alleged juror behavior was concerning. This evidence, according to the defendant, met the “more likely than not” standard for showing that purposeful discrimination was a substantial motivating factor in the State’s use of the strikes.

The State argued that it struck the juror with a history in mental health as someone who may be sympathetic to the defendant but did not argue the juror’s body language or eye contact as explanations for its use of that strike at the remand hearing. As to the other juror, the State reiterated its original explanations of the juror’s body language and eye contact. It also explained that the mischaracterization of the juror’s “I suppose” answer was inadvertent and argued that this and another brief answer of “I think” from the juror during voir dire indicated a potential inability of the juror to pay attention to the trial.

The trial court ruled that the strike of the juror with previous employment in the mental health field was supported by the record, but that the prosecution’s strike of the other juror was not. It found it could not rely on the mischaracterized explanation, and that the body language and eye contact justifications were insufficient explanations on their own without findings by the trial court resolving the factual dispute on the issue. The trial court therefore determined that the prosecutor’s justifications failed as to that juror. The trial court considered the defendant’s statistical evidence of racial discrimination in the use of peremptory strikes in the case and historical evidence of racial discrimination in voir dire statewide. It also noted disparate questioning between Black and White jurors on the issue of their ability to pay attention to the trial but found this factor was not “particularly pertinent” under the facts of the case. The trial court ultimately concluded that this evidence showed the prosecutor’s explanation was improper as to the one juror, but nonetheless held that no purposeful discrimination had occurred, distinguishing the case from others finding a *Batson* violation. Thus, the objection was again overruled, and the defendant again sought review at the North Carolina Supreme Court.

A majority of the Court reversed, finding a *Batson* violation by the State. The prosecutor’s shifting and mischaracterized explanation for the strike of the juror who answered “I suppose”—initially argued as an indication the juror could not be fair, but later argued as going to her ability to pay attention—indicated the reason was pretextual, and the trial court

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correctly rejected that justification for the strike. The trial court also correctly determined that the demeanor-based explanations for the strike of this juror were insufficient without findings of fact on the point. However, the trial court erred in several critical ways. For one, when the trial court rejects all of the prosecutor's race-neutral justifications for use of a strike, the defendant's *Batson* challenge should be granted. According to the Court:

If the trial court finds that all of the prosecutor's proffered race-neutral justifications are invalid, it is functionally identical to the prosecutor offering no race-neutral justifications at all. In such circumstances, the only remaining submissions to be weighed—those made by the defendant—tend to indicate that the prosecutor's peremptory strike was 'motivated in substantial part by discriminatory intent.' *Clegg Slip op.* at 47.

Further, while the trial court correctly recited the more-likely-than-not burden of proof in its order, it failed to meaningfully apply that standard. While the present case involved less explicit evidence of racial discrimination in jury selection than previous federal cases finding a violation, it is not necessary for the defendant to show "smoking-gun evidence of racial discrimination." *Clegg Slip op.* at 41. The trial court also erred in reciting a reason for the strike not offered by the prosecution in its order denying relief. Finally, there was substantial evidence that the prosecutor questioned jurors of different races in a disparate manner, and the trial court failed to fully consider the impact of this evidence. Collectively, these errors amounted to clear error and required reversal. Because the Court determined that purposeful discrimination occurred as to the one juror, it declined to consider whether discrimination occurred with respect to the strike of the other juror.

The conviction was therefore vacated, and the matter remanded to the trial court for any further proceedings. A *Batson* violation typically results in a new trial. The defendant here had already served the entirety of his sentence and period of post-release, and the Court noted the statutory protections from greater punishment following a successful appeal in G.S. 15A-1335. In conclusion, the Court observed:

[T]he *Batson* process represents our best, if imperfect, attempt at drawing a line in the sand establishing the level of risk of racial discrimination that we deem acceptable or unacceptable. If a prosecutor provides adequate legitimate race-neutral explanations for a peremptory strike, we deem that risk acceptably low. If not, we deem it unacceptably high. . . Here, that risk was unacceptably high. *Clegg Slip op.* at 56-57.

Justice Earls wrote separately to concur. She would have considered the *Batson* challenge for both jurors and would have found clear error with respect to both. She also noted that this is the first case in which the North Carolina Supreme Court has found a *Batson* violation by the State. Her opinion argued the State has been ineffective at preventing racial discrimination in jury selection and suggested further action by the Court was necessary to correct course.

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Justice Berger dissented, joined by Chief Justice Newby and Justice Barringer. The dissenting Justices would have affirmed the trial court's finding that a *Batson* violation did not occur in the case.

(1) Defendant's challenge to the second step of the *Batson* analysis was preserved; (2) The State's proffered explanations for its use of peremptory challenges were racially neutral; (3) The trial court did not clearly err in finding that the defendant failed to show purposeful discrimination under the totality of circumstances

State v. Bennett, ___ N.C. App. ___, 2022 NCCOA 212 (Apr. 5, 2022)

The defendant was convicted at trial of trafficking and other drug offenses in Sampson County. During voir dire, defense counsel made a *Batson* objection to the prosecutor's peremptory strikes of two Black jurors. The trial court denied the motion, finding that the defendant had not made a prima facie showing of discrimination. The Court of Appeals affirmed that decision on appeal, but the North Carolina Supreme Court reversed. It found that the defendant had met the low bar for a prima facie showing and that the trial court erred in failing to conduct the remainder of the *Batson* analysis. The case was therefore remanded to the trial court for a full *Batson* hearing (Jamie Markham summarized that decision here).

On remand, the prosecution explained that one of the struck jurors was removed because the juror failed to disclose his criminal history. As to the other struck juror, the prosecution explained that some of her answers indicated confusion, and that the juror's business was involved in an ongoing drug investigation. The defense pointed out that the juror's criminal record was not in the record and argued this reason was not supported by the evidence. The trial court interrupted defense counsel and indicated that the existence of the juror's criminal record was "gospel" to the court. Defense counsel moved on to argue the stated reasons for the strikes were pretextual. The defense also offered other evidence of purposeful discrimination, including the juror strike rates, historical evidence of discriminatory jury selection practices in the county, and the susceptibility of the case to racial bias as a drug offense involving a Black defendant. The trial court ultimately found that the prosecutor's explanations for its use of the strikes were race neutral and determined that the defendant failed to show purposeful discrimination. The defendant appealed to the North Carolina Supreme Court, who remanded the matter to the Court of Appeals for review.

A unanimous panel of the Court of Appeals affirmed the trial court. (1) The defendant argued that the trial court erred at the second step of the *Batson* analysis in finding that the prosecution's stated reasons for its strikes were race-neutral. Specifically, the defendant argued that the prosecutor's reasons were unsupported by the record. The State argued that the defendant had failed to preserve his challenge to this part of the analysis. The court noted that the discussions between the parties during the *Batson* hearing were not "neatly divided," but determined that defense counsel's attempt to argue the lack of record evidence in support of the prosecutor's explanations sufficed to preserve the issue. Although the defense later argued that one of the prosecution's reasons would have supported a challenge for cause (which

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would supply a race-neutral reason), this occurred during a discussion of the third step of the analysis and after the trial court had indicated the reason had been accepted by the court. The defendant's challenge to the second step of the analysis was therefore preserved.

(2) At the second step of a *Batson* analysis, the State must supply a race-neutral explanation for its use of the challenged peremptory strikes. The State is required to do more than simply deny wrongful intent, but any explanation will suffice if it is race neutral. "[I]f not racially motivated, the prosecutor may exercise peremptory challenges on the basis of legitimate hunches and past experience. Notably, the reason does not have to be a reason that makes sense, but a reason that does not deny equal protection." *Bennett III* Slip op. at 26 (cleaned up). Although the defendant may offer surrebuttal of the prosecutor's reasons at step two, "this merely sets up" the third step of the analysis. The court noted the low bar for the prosecution at step two and observed the reason need not be supported by the record at this stage—scrutiny of the prosecutor's explanation occurs at the final step of the *Batson* analysis. Here, the reasons offered by the State for its strikes of both Black jurors were racially neutral. "Neither of those challenged explanations is inherently discriminatory because they do not rely on the jurors' race or race-based discriminatory stereotypes." *Id.* at 30.

(3) At the third and final step of the *Batson* analysis, the court must determine if the defendant has shown that the State's peremptory challenges were more likely than not motivated by race by examining the totality of the circumstances, including any relevant evidence. Here, the trial court did not clearly err by concluding that the defendant failed to show purposeful discrimination. There was no clear error in the trial court's ability to conduct a comparative juror analysis on the record before it and the trial court did not err in finding that one of the struck Black juror's answers were not substantially similar to those of a White juror passed upon by the State. The trial court likewise did not err in determining that the case was not one susceptible to racial discrimination. The case was primarily about drugs and did not involve cross racial issues. According to the court, a case susceptible to racial discrimination is one where the defendant, victim, and witnesses are of different races. Such was not the case here. In the words of the court:

Where there is no evidence of any racial motivations or discrimination in the particular case under review, our precedent does not allow us to account in some sort of general philosophical way for 'the effect of bias and racial stereotypes on jurors' as Defendant wants us to consider. *Id.* at 55.

The North Carolina Supreme Court recently approved of the relevance and use of historical and statistical data in *Batson* challenges, but trial courts remain to free to weigh such evidence against contemporary practices and policies of a district. Although the trial court's reasons here for discounting a study evidencing historical racial discrimination in jury selection in the county were improper, this did not amount to clear error under the facts of the case. According to the court:

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Side-by-side comparisons of the potential jurors are more powerful than ‘bare statistics,’ and those comparisons here support the prosecutor. Further, we have already concluded the lack of susceptibility of this case to racial discrimination favors the prosecutor’s reasoning as well. *Id.* at 65.

Finally, the trial court also did not err in assigning weight to the fact that the State passed on five Black jurors. Three Black jurors were accepted before the *Batson* challenge, and two more were seated afterwards. The trial court found this supported an inference that the challenged strikes were not racially motivated. Unlike other cases where the prosecution only passed a Black juror after a *Batson* challenge, the early sitting of multiple Black jurors could be weighed in support of the State’s explanations. Additionally, the empaneled jury was more racially diverse than the population of the county itself, which further weighed in the State’s favor. In light of the whole record, the court concluded that the trial court committed no clear error, and its judgment denying the *Batson* challenge was affirmed.

Trial court did not abuse its discretion by declining to excuse a juror for cause, despite her initial acknowledgement of bias, where juror also indicated that she could follow the law

State v. Hogan, ___ N.C. App. ___, 2022-NCCOA-4 (Jan. 4, 2022)

The defendant in this case was convicted of first-degree murder on four different theories, along with three counts each of armed robbery and kidnapping, and one count of conspiracy to commit armed robbery. The trial court sentenced the defendant for the murder and two robberies, and arrested judgment on the remaining convictions. Since the only issues raised on appeal concerned jury selection and a clerical error in one of the judgments, the appellate court declined to “recount the especially brutal and horrific factual background” leading to the defendant’s convictions. The facts are summarized in the parties’ briefs available [here](#) and [here](#).

On appeal, the defendant argued that the trial court erred by refusing to excuse a prospective juror for cause after the juror indicated that she would not be able to apply the presumption of innocence. The defendant’s motion to excuse the juror for cause was denied at trial, so she was excused by the defense with a peremptory challenge. The motion was renewed later in the jury selection process after all the defendant’s peremptory challenges were exhausted, when the defendant was unable to excuse another juror he otherwise would have.

The appellate court reviewed the trial court’s ruling under an abuse of discretion standard, and found no error. Since this case had received extensive pretrial publicity, around 200 prospective jurors were called for jury selection. After excusing a number of jurors for hardships, the remaining 146 were divided into two panels for jury selection. Many of those potential jurors were subsequently excused for cause due to their exposure to pretrial publicity, inability to be fair and impartial, and concerns over the gruesome nature of the evidence. The juror at issue in this appeal had no prior knowledge of the facts, but during voir dire she stated that her father was retired from the Highway Patrol and acknowledged that she may have difficulty being fair to the defendant since she would be inclined to trust and give greater weight to testimony from

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a law enforcement witness. However, after further questioning by the attorneys and the trial judge, the prospective juror also stated that she was capable of setting her bias aside and “applying the presumption of innocence to defendant and the burden of proving guilt beyond a reasonable doubt to the State.” Viewing the juror’s answers in their entirety under case precedent such as *State v. Cummings*, 361 N.C. 438 (2007), along with the fact that (unlike much of the venire) this juror also had no prior knowledge of the case, the appellate court concluded that the trial court did not abuse its discretion in finding that the juror could follow the law as instructed, and did not err in declining to excuse her for cause.

The case was remanded to correct a clerical error on one of the judgments, which incorrectly listed the defendant’s active sentence as 77 to 100 months, instead of 73 to 100 months.

Improper remarks to the venire regarding race and religious beliefs constituted structural error and required a new trial

State v. Campbell, 280 N.C. App. 83, 2021-NCCOA-563 (Oct. 19, 2021)

In this Guilford County case, the trial judge improperly expressed personal opinion and injected a discussion of race in remarks to the venire during jury selection. The defendant was charged with fleeing to elude and obtaining the status of habitual felon, along with other traffic offenses. During jury voir dire, a potential juror indicated that his religious beliefs as a non-denominational Baptist prevented him from judging the defendant. In response, the trial court stated:

Okay. I’m going -- we’re going to excuse him for cause, but let me just say this, and especially to African Americans: Everyday we are in the newspaper stating we don’t get fairness in the judicial system. Every single day. But none of us -- most African Americans do not want to serve on a jury. And 90 percent of the time, it’s an African American defendant. So we walk off these juries and we leave open the opportunity for -- for juries to exist with no African American sitting on them, to give an African American defendant a fair trial. So we cannot keep complaining if we’re going to be part of the problem. Now I grew up Baptist, too. And there’s nothing about a Baptist background that says we can’t listen to the evidence and decide whether this gentleman, sitting over at this table, was treated the way he was supposed to be treated and was given -- was charged the way he was supposed to be charged. But if your -- your non-denomina[tional] Baptist tells you you can’t do that, you are now excused. *Campbell* Slip op. at 3.

The defendant was convicted at trial of the most serious offenses and sentenced to a minimum term of 86 months in prison. On appeal, he argued that his right to an impartial judge was violated, resulting in structural error.

To the extent this argument was not preserved at trial or by operation of law, the defendant sought to invoke Rule 2 of the Rules of Appellate Procedure to obtain review. The State joined

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the request to suspend the normal preservation rules, and a majority of the court agreed to do so. The State further agreed that the trial judge's comments amounted to structural error, requiring a new trial without regard to any prejudice to the defendant. The majority of the panel again agreed. In its words:

Here, the trial court's interjection of race and religion could have negatively influenced the jury selection process. After observing the trial court admonish [the excused juror] in an address to the entire venire, other potential jurors—especially African American jurors—would likely be reluctant to respond openly and frankly to questions during jury selection regarding their ability to be fair and neutral, particularly if their concerns arose from their religious beliefs. *Id.* at 9.

The convictions were therefore vacated, and the matter remanded for a new trial.

Judge Dillon dissented. He would have declined to invoke Rule 2 and would have held that the trial judge's comments, while inappropriate, did not amount to structural or otherwise reversible error.

Jury Instructions

(1) The trial court did not err by declining to give the defendant's requested jury instruction on self-defense. (2) The defendant's argument regarding his request for an instruction on a presumption of reasonable fear of imminent death or serious bodily harm was not preserved for appellate review.

State v. Benner, ___ N.C. ___, 2022-NCSC-28 (Mar. 11, 2022)

In this Davidson County case, the defendant was convicted after a jury trial of first-degree murder and possession of a firearm by a felon after he shot and killed a man who was visiting his home. The trial judge rejected the defendant's request for an instruction under N.C.P.I.—Crim. 308.10, which informs the jury that a defendant who is situated in his own home and is not the initial aggressor can stand his or her ground and repel force with force regardless of the character of the assault being made upon the defendant. The State had objected to the defendant's request because it is based on a statutory right of self-defense in G.S. 14-51.2 and -51.3 that is not available to a person "attempting to commit, committing, or escaping after the commission of a felony," and the defendant here was committing the felony of possession of firearm by felon when he shot the victim. On appeal, the defendant argued that the trial judge erred by refusing his requested instruction. The Court of Appeals unanimously upheld the trial court's refusal, writing that it was bound by its prior decision in *State v. Crump*, 259 N.C. App. 144 (2018), which had held that the statutory self-defense rights at issue were not available to a defendant committing a felony even when there was no "causal connection" between that felony and the defendant's need to use force in self-defense. *State v. Benner*, 276 N.C. App.

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275, 2021-NCCOA-79 (unpublished). The Supreme Court allowed the defendant's petition for discretionary review.

The Supreme Court rejected the defendant's argument that the trial court's refusal to instruct the jury in accordance with N.C.P.I.—Crim. 308.10 deprived the defendant of a complete self-defense instruction, because the court concluded that the instruction the trial court gave adequately conveyed the substance of the defendant's request. The Court saw no material difference between the trial court's instruction that the defendant had "no duty to retreat" and the defendant's requested instruction that he could "stand [his] ground." Slip op. ¶ 27. Moreover, the Court did not view the given instruction's lack of language concerning the defendant's right to "repel force with force regardless of the character of the assault" as problematic in light of the given instruction, which (unlike instructions in prior cases which the Court distinguished) did not tell the jury that the defendant was not entitled to use a firearm to protect himself from death or great bodily injury by an unarmed assailant. The Court concluded that the trial court therefore did not err. But even if the trial court did err in rejecting the defendant's request, the Court added, the defendant failed to establish a reasonable probability that a different result would have been reached in the absence of the error in light of the instruction the trial judge gave, as well as the "more than sufficient" evidence that the defendant used excessive force.

Having decided the case on that ground, the Court did not reach the issue of the trial court's application of the commission-of-a-felony disqualification from the self-defense statutes at issue. The Court did, however, note that a refusal to instruct on that basis "may be inconsistent with [G.S.] 14-51.2(g), which upholds the continued validity of the common law with respect to the exercise of one's right to defend one's habitation, as well as [the Court's recent] decision in [*State v.*] *McLymore* [summarized here by Phil Dixon on February 15, 2022]." *Id.* ¶ 26.

Finally, the Court concluded that the defendant's argument regarding the trial court's failure to instruct the jury on the defendant's presumption of reasonable fear of imminent death or serious bodily harm was not properly preserved for appellate review under Rule of Appellate Procedure 10(a)(2).

The Court thus affirmed the decision of the Court of Appeals.

Justice Hudson, joined by Justice Earls, dissented, writing that the trial judge erred by not giving the requested instruction. She wrote that the defendant was not barred from the statutory justification for defensive force in G.S. 14-51.2 and -51.3 by virtue of his commission of the felony offense of possession of firearm by felon in light of the Court's recent ruling in *State v. McLymore, supra*, holding that there must be an immediate causal nexus between the felony and the circumstances giving rise to the defendant's perceived need to use force for the disqualification to apply. She went on to write that the given instruction's omission of language indicating that the defendant could stand his ground and repel force with force "regardless of the character assault" was a meaningful substantive difference between it and the requested

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instruction. As such, she would have held that the trial court and the Court of Appeals erred, and that the error was prejudicial.

A homicide defendant failed to show that the trial court committed prejudicial error in giving an unmodified version of the self-defense instruction from N.C.P.I. – Crim 206.10

State v. Leaks, 379 N.C. 57, 2021-NCSC-123 (Oct. 29, 2021)

Even if the trial court erred by declining to instruct the jury using the defendant’s requested modified self-defense instruction, the defendant did not demonstrate that any such error was prejudicial. Testimony at trial described alternate versions of events that ultimately culminated in the defendant fatally stabbing the victim outside the home of the victim’s girlfriend. Generally, some witnesses described the stabbing as an unprovoked attack while others, including the defendant, testified that the victim threatened the defendant with a two-by-four board. The trial court instructed the jury on self-defense using N.C.P.I. – Crim 206.10, which states as an element of self-defense that a homicide defendant must believe it necessary “to kill” the victim. The trial court refused the defendant’s request to instead instruct the jury that he must believe it necessary “to use deadly force against the victim.” Taking account of other portions of the instruction which informed the jury that the defendant’s belief regarding his use of force must have been reasonable and that he must not have used “excessive force,” the Court concluded that the defendant had not shown that there was a reasonable possibility the jury would have found he acted in self-defense had the trial court given the modified instruction. The Court noted that the defendant suffered only minor injuries in the incident but had inflicted a “highly lethal wound” upon the victim using a knife so large that it looked like a machete. The Court said that the “uncontradicted medical evidence strongly suggests that [the] defendant’s use of deadly force was not reasonable under the circumstances but rather it was excessive.” In a footnote, the Court recommended that the North Carolina Pattern Jury Instruction Committee review N.C.P.I. – Crim 206.10.

(1) Request for involuntary manslaughter instruction was preserved for appellate review; (2) Failure to instruct the jury on involuntary manslaughter was reversible error where the jury could have found that the defendant acted recklessly instead of with malice

State v. Brichikov, ___ N.C. App. ___, 2022-NCCOA-33 (Jan. 18, 2022), *temp. stay allowed*, 380 N.C. 289, 867 S.E.2d 533 (February 4, 2022)

In this Wake County murder case, the defendant admitted to having assaulted his wife and she was found with physical trauma to her face. She also had cocaine and fentanyl in her blood, had recently overdosed, and had a serious heart condition. There was conflicting evidence at trial on whether the facial injuries alone could have caused her death. The defendant requested instructions on voluntary and involuntary manslaughter. The trial court declined to give the requested instructions and the jury convicted on second-degree murder. A divided Court of Appeals reversed and remanded for a new trial.

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(1) The defendant's request for an involuntary manslaughter instruction was preserved. While an initial request for the instruction focusing on the defendant's failure to act would have been a special instruction (as it deviated from the pattern instruction) and would have needed to be in writing in order to preserve the issue, the defendant articulated multiple theories in support of an involuntary manslaughter instruction. He also objected to the lack of manslaughter instructions at the charge conference and again after the jury was instructed. This preserved the issue for review.

(2) The defendant argued that his evidence contradicted the State's evidence of malice with evidence of recklessness, and that he was entitled to an involuntary manslaughter instruction when the evidence was viewed in the light most favorable to him. The State argued that the defendant's use of a deadly weapon—his hands—"conclusively established" the element of malice, so that no lesser-included instructions were required. The court agreed with the defendant:

Viewing the evidence in the light most favorable to Defendant, the evidence was not "positive" as to the element of malice for second-degree murder. The jury could reasonably have found Defendant did not act with malice, but rather committed a reckless act without the intent to kill or seriously injure—he spent the day declaring his love for Mrs. Brichikov, they used drugs together . . . and her body was in a weakened state from a recent overdose, heart blockage, and fentanyl overdose. *Brichikov* Slip op. at 17-18.

The failure to give an involuntary manslaughter instruction prejudiced the defendant and required a new trial. The court declined to consider the propriety of the defendant's proposed special jury instruction on culpable negligence by omission, finding that issue moot in light of its ruling and expressing no opinion on the merits of the instruction.

Judge Carpenter dissented and would have found that any error in the jury instructions was not prejudicial in light of the aggravating factor found by the jury that the defendant acted especially cruelly.

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

State v. Hooper, 279 N.C. App. 451, 2021-NCCOA-500 (Sept 21, 2021).

The defendant was indicted for assault by strangulation, assault on a female, and other offenses after an incident in a hotel where evidence at trial tended to show that the defendant had an altercation with the mother of his child that left her with visible injuries and the defendant with a gunshot wound. Immediately before jury instructions were to be given, and after not requesting an instruction on self-defense or otherwise objecting to proposed instructions at a charge conference the preceding day, the defendant requested for the first time that an instruction on self-defense be given. In denying the request, the trial court noted

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that the defendant did not give notice of the defense and that there was no evidence of the defendant's thoughts or beliefs at the time of the altercation. After the instructions were given, both parties informed the trial court that they had no objections to the instructions as given. Based on these events, the court determined that any error in not giving a self-defense instruction was invited, and that even if an error occurred the defendant could not show prejudice because the evidence against him was overwhelming and uncontroverted.

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

Verdict

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

State v. Brake, 279 N.C. App. 416, 2021-NCCOA-496 (Sept. 21, 2021).

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

Motions

(1) Denial of defense motion for continuance compromised defendant's right to effective counsel in this case; (2) error was harmless in conviction for general intent offense, but

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warranted reversal on specific intent offense, where the evidence at issue related only to negating affirmative defenses to specific intent.

State v. Johnson, 379 N.C. 629, 2021-NCSC-165 (Dec. 17, 2021)

The state obtained recordings of several hundred phone calls that the defendant made while he was in jail awaiting trial on charges of murder, armed robbery, and assault on a government official. The charges arose out of a robbery at a gas station where the clerk was killed and an officer was threatened with a firearm. The defendant gave notice of the affirmative defenses of diminished capacity, mental infirmity, and voluntary intoxication (insanity was also noticed, but not pursued at trial). Copies of the jail calls were provided to the defense in discovery, but the recordings could not be played. Defense counsel emailed the prosecutor to request a new copy of the calls, and asked the state to identify any calls it intended to use at trial. The prosecutor provided defense counsel with new copies of the calls that were playable, but also indicated that the state did not intend to offer any of the calls at trial, so defense counsel did not listen to them at that time. The evening before trial, the prosecutor notified defense counsel that the state had identified 23 calls that it believed were relevant to showing the defendant's state of mind and memory at the time of the murder. At the start of trial the next morning, the defense moved for a continuance on the basis that it had not had time to review the calls or assess their impact on the defendant's experts' testimony, and argued that denial of a continuance at this point would violate the defendant's state and federal constitutional rights to due process, effective counsel, and right to confront witnesses. The trial court denied the continuance, as well as defense counsel's subsequent request to delay opening statements until Monday (after jury selection concluded mid-day Friday) in order to provide the defense an opportunity to listen to the calls and review them with the defendant's experts.

The defendant was subsequently convicted of armed robbery, assault on a government official, and felony murder based on the assault. He was sentenced to life imprisonment for the murder and 60-84 months for the robbery; judgment was arrested on the assault. The defendant appealed, and a divided Court of Appeals found that the trial court did not err in denying the continuance, and furthermore any error would not have been prejudicial because the felony murder was a general intent crime and the calls were only offered by the state as rebuttal evidence regarding defendant's diminished capacity. The dissent concluded that the majority applied the wrong standard of review, since the denial of the motion to continue was based on constitutional grounds, and would have found error and ordered a new trial. The defendant appealed to the state Supreme Court based on the dissent.

The higher court found no prejudicial error regarding the felony murder conviction, but vacated the armed robbery judgment. First, regarding the correct standard of review, a trial court's decision on a motion to continue is normally reviewed only for abuse of discretion, but if it raises a constitutional issue it is reviewed de novo; however, even for constitutional issues, denial of a motion to continue is only reversible if the error was prejudicial. In this case, the trial court erred because the time allowed to review the calls was constitutionally inadequate. Defense counsel relied on the state's representation that it would not use the calls until receiving a contrary notice the evening before trial began, and defense counsel did not have an

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opportunity to listen to the nearly four hours of recordings or consult with his expert witnesses before starting the trial. Under the circumstances of this case, the impact this had on defense counsel's ability to investigate, prepare, and present a defense demonstrated that the defendant's right to effective counsel was violated. Additionally, the defendant was demonstrably prejudiced by this violation, since defense counsel could not accurately forecast the evidence or anticipated expert testimony during the opening statements.

However, the state Supreme Court concluded that as to the felony murder conviction, the error was harmless beyond a reasonable doubt. The murder conviction was based on the underlying assault, a general intent crime "which only require[s] the doing of some act," unlike specific intent offenses "which have as an essential element a specific intent that a result be reached." The recorded calls were only offered as rebuttal evidence on this issue of intent, and therefore the error was harmless as to the assault and felony murder offenses as a matter of law, since "any evidence in this case supporting or negating that defendant was incapable of forming intent at the time of the crime is not relevant to a general-intent offense." But the defendant's conviction for armed robbery, a specific intent offense, was vacated and remanded for a new trial.

(1) The defendant did not properly preserve his challenge of a juror for cause because he did not follow the procedures established by G.S. 15A-1214. (2) The trial court did not err in denying the defendant's motion to suppress the defendant's non-custodial confession. (3) The trial court did not err in failing to instruct the jury on second-degree murder as a lesser-included offense where there was no evidence to support a conviction of second-degree murder. (4) The defendant was not entitled to another transfer hearing because he failed to appeal the transfer order and preserve the issue under G.S. 7B-2603.

State v. Wilson, ___ N.C. App. ___, 2022-NCCOA-340 (May 17, 2022)

The defendant arranged a meeting with the victim through an app for the purchase of a phone. The victim left his home to go get the phone and was later found shot and killed.

Communications found on the app led police officers to the defendant, who was 15 years old at the time.

Officers contacted the defendant's mother and arranged to meet with the defendant as a witness in a larceny case. The officers met with and questioned the defendant in the presence of his parents. During the questioning, the defendant told the officers about the meeting that had been arranged for the purchase of the phone, and eventually disclosed that one of his companions wanted to rob the victim. Although the defendant carried a gun at the time of the incident, the defendant insisted that his own plan was not to rob the victim but rather sell him the phone. The defendant was found guilty of attempted robbery with a dangerous weapon and first-degree murder. The defendant was found not guilty of conspiracy to commit robbery with a firearm.

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(1) On appeal, the defendant argued that the trial court erred by denying the defendant's challenge for cause to dismiss a juror. The Court of Appeals held that the defendant failed to preserve the issue for appeal because he did not adhere to the procedures established by G.S. 15A-1214(i). Specifically, the defendant did not (1) previously peremptorily challenge the juror; or (2) state in his motion to renew his challenge for cause that he would have challenged that juror peremptorily had his challenges not been exhausted.

(2) The defendant's next argument on appeal was that the trial court erred by denying his motion to suppress his confession. The defendant contended that detectives gained access to him, a fifteen-year-old boy, by deceiving his mother, repeatedly told the defendant that he was lying, and capitalized on the presence of his parents to extract the confessions from him. Based on the trial court's findings of fact, the Court of Appeals concluded that the defendant was in a non-custodial setting in his grandmother's home with his parents, was informed the discussion was voluntary, was not handcuffed or otherwise restrained, and was not coerced, deceived, or threatened. The defendant did not challenge any of the trial court's findings of fact. The Court of Appeals held that the trial court's findings of fact fully support its conclusions of law, and based upon the totality of the circumstances, held that the defendant's statement was voluntary. The Court affirmed the trial court's denial of the defendant's motion to suppress his non-custodial statement.

(3) The defendant argued that the trial court erred by failing to instruct the jury on second-degree murder as a lesser-included offense of first-degree murder because there was evidence that supported the instruction. In rejecting this argument, the Court of Appeals noted that there was no evidence that the victim was killed other than in the course of an attempted robbery. The Court concluded that there was no evidence in the record from which a rational juror could find the defendant guilty of second-degree murder and not guilty of felony murder.

(4) The defendant's final argument was that the trial court erred by failing to order a discretionary transfer hearing as a matter of due process. The defendant argued that the juvenile petition did not contain facts indicating that he committed first-degree murder, so a discretionary transfer hearing should have occurred as required under G.S. 7B-2203. The Court of Appeals rejected this argument, noting that the defendant already had a transfer hearing in district court, and the defendant did not appeal the district court's order to superior court as required by G.S. 7B-2603.

The defendant also contended that the trial court violated his right to due process by allowing the State to prosecute him under felony murder because felony murder is based on deterrence, which is not effective for and should not apply to juveniles. However, the Court of Appeals considered the argument abandoned because the defendant failed to cite any law indicating a juvenile may not be convicted of felony murder.

Chief Judge Stroud dissented in part to say that because there was a conflict in the evidence regarding an element of felony murder, specifically whether or not the defendant planned to

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rob the victim, the evidence supported an instruction for the lesser included offense of second-degree murder.

Findings of fact failed to resolve material conflicts in the evidence from suppression hearing; denial of motion to suppress vacated and remanded for new findings

State v. Heath, ___ N.C. App. ___, 2022-NCCOA-37 (Jan. 18, 2022)

The defendant was stopped in Cleveland County for driving left of center and driving without an active license. The officer recognized the defendant and knew her to be involved in drugs. While running license and warrants checks, the officer asked to search the car. The defendant refused. According to the officer, a drug dog was called, but before it could arrive, the defendant admitted to possessing drugs. According to the defendant, the officer searched her car without consent, found drugs, removed them from the car, and then put them back inside the car for canine training purposes. When the canine arrived, it alerted on the car, leading to the discovery of methamphetamine, marijuana, and paraphernalia, and the defendant was charged accordingly. She moved to suppress, and the trial court denied the motion.

The findings of fact in the denial order reflected that the defendant did not consent, but the conclusions of law upholding the search were based on the defendant's consent. The order also failed to resolve the factual dispute regarding when the drugs were actually seized in relation to when the canine sniff occurred. These issues required that the order be vacated, and the matter remanded for new findings. In the court's words:

Because the findings of fact are not sufficient to allow proper appellate review, we must remand for further findings of fact, particularly regarding whether and when defendant consented to a search and the timing of the search and seizure in relation to the consent and the call for, arrival, and sniff of the canine officer." *Heath* Slip op. at 8-9.

Sentencing

Aggravating factors dependent on the same evidence used to support the elements of the offense were improper; plea bargain vacated

State v. Heggs, 280 N.C. App. 95, 2021-NCCOA-564 (Oct. 19, 2021)

The defendant pled guilty to felony death by motor vehicle and impaired driving in Wake County pursuant to a plea bargain. He stipulated in the plea transcript to the existence of three factors in aggravation and was sentenced to an aggravated term of imprisonment. On appeal, the defendant argued that the aggravating facts were based on the same evidence supporting the elements of the offenses of conviction. Under G.S. 15A-1340(16)(d), "evidence necessary to support an element of the offense shall not be used to prove any factor in aggravation." One of the aggravating factors alleged that the defendant was armed with a deadly weapon—the

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vehicle he was driving—at the time of the offenses. The evidence to support this factor was the same evidence to support the “driving” element of felony death by motor vehicle. Similarly, the aggravating factor that the defendant caused serious and permanent injury to the victim was based only on the victim’s death, another essential element of felony death by motor vehicle. These two aggravating factors therefore violated G.S. 15A-1340(16)(d). A third aggravating factor—that the defendant knowingly created a great risk of death to more than one person by his driving—did not implicate the elements of the offenses and was properly found based on the defendant’s reckless driving and high rate of speed before the collision.

Because the defendant stipulated to the aggravating factors as a part of the plea bargain, the entire plea bargain was vacated, and the matter remanded for new proceedings. According to the unanimous court:

Defendant seeks to repudiate the portion of his agreement with the State in which he stipulated to the existence of aggravating factors while retaining the portions which are more favorable; namely, his plea of guilty to felony death by motor vehicle in exchange for the State’s agreement to not seek an indictment on the charge of second-degree murder. ‘Defendant cannot repudiate in part without repudiating the whole.’ *Heggs* Slip op. at 10 (*quoting State v. Rico*, 218 N.C. App. 109, *rev’d per curiam for reasons stated in the dissent*, 366 N.C. 327 (2012)).

Charging a 16-year-old defendant as an adult under the law that existed at the time of his offenses did not violate his constitutional rights to equal protection, due process, or to be free from cruel and unusual punishment, and the trial court thus erred by granting his motion to dismiss

State v. Garrett, 280 N.C. App. 220, 2021-NCCOA-591 (Nov. 2, 2021)

In this Mecklenburg County case, the defendant was charged with two class H felonies (felonious breaking or entering and larceny after breaking or entering) in October of 2016, when he was 16 years of age and before “raise the age” was implemented through the Juvenile Justice Reinvestment Act. The charges were under the exclusive jurisdiction of the criminal law under the law in place at the time of the offense. Raise the age was passed in 2017 and applied prospectively, beginning with offenses committed on December 1, 2019. This case was set for trial in late 2017 and the defendant failed to appear. The defendant was arrested in 2019 and his case proceeded. The trial court granted a pretrial motion to dismiss, finding that the defendant’s constitutional rights to equal protection, protection from cruel and unusual punishment, and due process were violated by prosecution as an adult. The trial court went on to conclude that the loss of the benefit of Juvenile Court irreparably prejudiced the preparation of his case such that dismissal was the only remedy. The State appealed.

The Court of Appeals concluded that the defendant’s constitutional rights were not violated by trying him as an adult. As to the defendant’s equal protection argument, the Court concluded

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that under *State v. Howren*, 312 N.C. 454 (1984), there is no equal protection violation when the same group of people (here, 16-year-olds alleged to have committed a Class H felony) are treated differently at different times (here, before and after the effective date of the Juvenile Justice Reinvestment Act).

As to the defendant's Eighth Amendment argument, the Court of Appeals concluded that trying a young defendant as an adult does not implicate the substantive limits on what can be made criminal without violating the constitutional prohibition on cruel and unusual punishment. Those limits have been invoked only in relation to the status of addiction to drugs or alcohol. *Robinson v. California*, 370 U.S. 660 (1962). In addition, the prosecution of juveniles as adults involves the procedure taken regarding a criminal offense alleged against a juvenile, not the substance of what is made criminal. Trying the defendant as an adult does not, the Court reasoned, criminalize a status like addiction. Rather, it punishes criminal behavior—here, breaking or entering and larceny, “offenses that are undoubtedly within the police powers of North Carolina.” ¶ 21. The Court thus rejected the defendant's Eighth Amendment claim.

As to the defendant's due process argument, the Court concluded that there is no fundamental right to be tried as a juvenile in criminal cases, and therefore no particular process due in relation to being tried in that way. The Court distinguished *Kent v. United States*, 383 U.S. 541 (1966), noting that the District of Columbia statutory structure at issue in *Kent*, which did mandate certain procedures before a case was transferred from juvenile to adult court, was distinct from North Carolina's, in which a defendant's case began in superior court by default. Turning to substantive due process, because no fundamental right was at issue, the Court applied rational basis review and concluded that the State had a legitimate interest in prosecuting and sentencing juveniles under the statutory scheme in place at the time they commit their offense.

In the absence of any constitutional violation, the Court of Appeals concluded that the trial court erred in granting the defendant's motion to dismiss under G.S. 15A-954(a)(4). The Court thus reversed the trial court and remanded the case.

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

State v. Bunting, 279 N.C. App. 636, 2021–NCCOA–532 (Oct. 5, 2021)

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

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The defendant argued on appeal that there was insufficient evidence in the record to support the determination that he had a level IV prior record with 12 points, and the appellate court agreed. The sentencing worksheet included several felony convictions that were used to establish defendant's habitual felon status, along with a number of prior convictions from out-of-state, although most of those convictions were marked out. Next to the felony convictions was a notation indicating 18 points, but the total for this section of the worksheet was listed as 14, which was then crossed out and replaced by a 10 (plus 2 points for the defendant's misdemeanor convictions). The appellate court agreed with the defendant that it was unclear from the record which felony convictions the trial court relied on in reaching this total. Moreover, in order to reach a total of 12 points, the trial court must have either found that one or more of the out-of-state convictions was substantially similar to a North Carolina offense, or included one or more of the felonies that were used to establish the habitual felon status, neither of which was permitted. The court disagreed with the state's argument that the defendant's stipulation was sufficient to support the record level determination, distinguishing this case from *State v. Arrington*, 371 N.C. 518 (2018), where the stipulations were limited to questions of fact. A defendant may stipulate to the existence of a prior conviction and whether or not it is a felony, but he may not stipulate that an out-of-state conviction is substantially similar to a North Carolina offense; that is a legal determination which must be made by the trial court based on a preponderance of the evidence standard, and there was no such showing or finding made in this case.

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

A Georgia conviction for statutory rape was substantially similar to a North Carolina Class B1 felony for purposes of calculating the defendant's PRL for sentencing

State v. Graham, 379 N.C. 75, 2021-NCSC-125 (Oct. 29, 2021)

The Court of Appeals properly applied the comparative elements test of *State v. Sanders*, 367 N.C. 716 (2014) in affirming the trial court's consideration of the defendant's Georgia conviction for statutory rape as equivalent to a North Carolina Class B1 felony for purposes of calculating the defendant's PRL for sentencing. Comparing the elements of the Georgia statutory rape offense with the elements of G.S. 14-27.25, the Court found the offenses substantially similar despite variations in the states' punishment schemes based on the ages of the offender and the victim.

Justice Earls, joined by Justice Ervin, dissented, expressing the view that the majority misapplied *Sanders* and that the offenses were not substantially similar because the Georgia

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statute “indisputably encompasses conduct which is not a Class B1 felony in North Carolina.” Justice Earls explained that, at the time of the defendant’s Georgia offense, a person who was 18 years old who had sexual intercourse with a 14-year-old would have violated the Georgia statute at issue but would not have violated any North Carolina statute creating a Class B1 felony.

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

State v. Brown, 279 N.C. App. 630, 2021–NCCOA–531 (Oct. 5, 2021)

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

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

(1) Challenge to earlier order extending probation following later revocation was not an impermissible collateral attack on the underlying judgment; (2) Violation of defendant’s right to counsel at probation extension hearing voided extension order, which deprived the trial court of jurisdiction to later revoke probation

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State v. Guinn, ___ N.C. App. ___, 2022-NCCOA-36 (Jan. 18, 2022)

The defendant was on supervised probation in Gaston County after pleading guilty to two counts of uttering a forged instrument. 24 months into a 30-month period of probation, a probation violation was filed, accusing the defendant of willful failure to pay. The defendant was not represented by counsel at the hearing, and the trial court ultimately extended probation by 12 months. A year later, probation filed a violation report accusing the defendant of numerous violations. An absconding violation was filed soon after. A hearing was held where the defendant's probation was revoked, and his sentence activated.

On appeal, the defendant argued that the initial extension of his probation was invalid based on a violation of his right to counsel. (1) The State argued that the defendant was not permitted to collaterally attack the underlying judgment. The court disagreed, finding that the defendant sought to challenge the order extending his probation, not the underlying criminal judgment placing him on probation. Because the defendant had no right of appeal from that order, he retained the right to challenge it in the present case.

(2) The trial court failed to conduct a colloquy pursuant to G.S. 15A-1242 to ensure the defendant knowingly, intelligently, and voluntarily waived his right to counsel at the first probation hearing. While the defendant and judge had signed a waiver of counsel form indicating that the defendant waived all counsel, the judge failed to check either box (indicating partial or total waiver of counsel) on the certification section of the form. The certification attests that the G.S. 15A-1242 colloquy with the defendant was completed. This was a substantive error and not a clerical mistake—the trial court only had jurisdiction to revoke probation in the current case if the initial extension was valid, and the initial extension was only valid if the defendant's right to counsel was honored, so a mistake here spoke directly to the length of the defendant's probation. While a knowing, voluntary, and intelligent waiver of counsel may be presumed from the defendant's signature on the waiver form, that presumption will not be indulged where other record evidence contradicts that conclusion. According to the court:

[A]lthough a signed written waiver is generally 'presumptive evidence that a defendant wishes to act as his or her own attorney,' we conclude that the written waiver in the instant case is insufficient—notwithstanding the presence of both parties' signatures—to pass constitutional and statutory muster. *Guinn* Slip op. at 18 (cleaned up).

Further, the transcript revealed that no waiver of counsel colloquy occurred. Even assuming the signed waiver of counsel form was valid, the trial court still has a duty to conduct the colloquy of G.S. 15A-1242 and its failure to do so was prejudicial error. The trial court's original order extending probation by 12 months was therefore invalid, as those proceedings violated the defendant's right to counsel. Accordingly, the trial court lacked jurisdiction at the later probation violation hearing, and the order of revocation was vacated.

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Judge Tyson dissented. He would have found that the signed form conclusively established the defendant's valid waiver of counsel and would have affirmed the trial court's revocation order.

Probation violation properly alleged absconding and provided sufficient notice to the defendant of the charges

State v. Crompton, 380 N.C. 220, 2022-NCSC-14 (Feb. 11, 2022)

In this probation revocation case from Buncombe County, the defendant failed to contact his probation officer for nearly three months until his arrest. After more than month of not being able to contact the defendant, the probation officer filed a violation report accusing him of absconding and other violations. The absconding violation alleged that the defendant failed to report to the probation office, failed to return his probation officer's calls, failed to provide his current address, failed to make himself available for supervision, and noted that the last in-person contact with the defendant was more than a month ago. The defendant represented himself at hearing, admitted the violations, and was revoked. At the Court of Appeals, a divided panel affirmed the revocation (summarized here). A dissenting judge there would have held that the violation report did not sufficiently plead absconding and that the State's evidence was insufficient to establish willful absconding. The defendant appealed based on the dissent, and the North Carolina Supreme Court affirmed.

The Court found that the defendant had adequate notice that he was accused of absconding probation. The allegation of violation need only describe the defendant's conduct in violating probation and need not state the condition of probation violated by the conduct. The allegations here described the defendant's conduct with appropriate specificity. That the conduct described in the absconding violation also violated regular, non-revocable conditions of probation did not render the allegation improper—an argument the Court called “meritless.” *Crompton* Slip op. at 12. The defendant's admission to absconding at the hearing and argument to the trial judge to run his suspended sentences concurrent further demonstrated that the defendant had effective notice of the allegations. In the words of the Court:

[The] defendant here was sufficiently and properly informed by the probation violation reports of his alleged violations and his alleged conduct which constituted the alleged violations, including the alleged absconding behavior which defendant admitted. *Id.* at 13.

The trial court therefore did not abuse its discretion in revoking the defendant's probation.

Justice Earls dissented. She would have found that the violation report only alleged violations of regular, non-revocable conditions of probation and that the defendant only admitted to as much.

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The trial court abused its discretion in concluding a crime was committed and revoking defendant's probation where there was no evidence beyond the fact that the defendant was arrested that tended to establish he committed a crime

State v. Graham, ___ N.C. App ___, 2022-NCCOA-132 (Mar. 1, 2022)

The defendant pled guilty to second-degree murder and possession of a firearm by a convicted felon. The defendant was sentenced to active terms of 176-221 months imprisonment for the second-degree murder charge and 16-20 months imprisonment for the possession of a firearm by a convicted felon charge. The active sentence for possession of a firearm by a convicted felon was suspended for 36 months of supervised probation, which commenced in August 2019 after the defendant was released from prison following his active sentence for second-degree murder.

In February 2021, the State filed a violation report alleging that the defendant violated his probation by failing to pay the full monetary judgment entered against him and because he was arrested and charged with possession of a firearm by a felon. Following a hearing, the trial court found that the defendant committed a crime and revoked the defendant's probation. The Court of Appeals granted the defendant's petition for writ of certiorari.

On appeal, the defendant argued that the trial court erred in revoking his probation. The Court of Appeals agreed, reasoning that in order to revoke a defendant's probation for committing a criminal offense, there must be some form of evidence that a crime was committed. The only evidence presented at the probation revocation hearing was the probation officer's violation report and testimony from the probation officer. The Court concluded that this evidence only established that defendant was arrested for possession of a firearm by a felon and that there was no evidence beyond the fact that defendant was arrested that tended to establish he committed a crime. The Court thus held that the trial court abused its discretion in concluding a crime was committed and revoking defendant's probation.

The State presented sufficient evidence that the defendant violated the terms of his probation. The trial court did not abuse its discretion by revoking the defendant's probation.

State v. Pettiford, ___ N.C. App. ___, 2022-NCCOA-136 (Mar. 1, 2022)

The defendant was sentenced to 25 to 42 months in prison, suspended for 30 months of supervised probation. The defendant's probation officer subsequently filed a violation report alleging that the defendant committed the crime of misdemeanor breaking or entering. At the probation violation hearing, the trial court found that the defendant violated his probation by committing a new offense of misdemeanor breaking or entering and activated the defendant's suspended sentence. The defendant filed a motion for appropriate relief the following month, which the trial court denied.

On appeal, the defendant argued that insufficient evidence existed to show he violated his probation, or, in the alternative, that the trial court abused its discretion by revoking his

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probation. The Court of Appeals rejected the defendant's first argument, noting that a probation proceeding is more informal than a criminal prosecution and, accordingly, "the court is not bound by strict rules of evidence, and the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." Slip op. at ¶ 9. The evidence presented at the hearing showed that the defendant was known to associate with the victim "on a routine basis"; the officer recovered several prints from the point of entry of the victim's apartment, one of which was identified as belonging to the defendant; the defendant did not have permission to be inside the apartment; and the defendant lived next door to the apartment. The Court of Appeals thus concluded that competent evidence existed that the defendant willfully violated his probation by committing a new offense of misdemeanor breaking or entering.

The Court also held that because competent evidence existed to support the trial court's finding, the trial court had authority to revoke the defendant's probation and thus did not constitute an abuse of discretion.

Discrepancies between the record and the trial court's judgments left the basis for revoking the defendant's probation unclear and required that the judgments be vacated and the case be remanded for further determinations and findings

State v. Whatley, ___ N.C. App. ___, 2021-NCCOA-702 (Dec. 21, 2021)

The Court of Appeals vacated the trial court's judgments revoking the defendant's probation and activating his suspended sentences imposed in connection with felonies charged in two CRS case numbers – 17 CRS 86913 and 18 CRS 338 – because discrepancies between the record and the judgments left the basis for revocation in both case numbers unclear. The Court likened this case to *State v. Sitosky*, 238 N.C. App. 558 (2014) because in both cases the trial court marked the boxes on the judgments indicating that the defendants had admitted to all violations alleged in the violation reports when in fact the defendants had not done so. Here, among other inconsistencies, the trial court indicated in its judgments that the defendant had waived his revocation hearing and admitted all alleged violations despite the fact that the record indicated that the defendant did not waive the hearing and expressly denied the alleged violations. The Court discussed other discrepancies in the judgments and the record, including that the trial court appeared to have revoked the defendant's probation in 17 CRS 86913 on the basis of violating an SRG Agreement that was a valid condition of probation in 18 CRS 338 but was not a valid condition of 17 CRS 86913 as it had not been included in a written order in that case. The Court of Appeals remanded the case to the trial court for further determinations and findings.

The trial court erred by sentencing the defendant to a period of period of supervised probation exceeding the time specified in G.S. 15A-1343.2(d) without making a specific finding that a longer period was necessary, as required by the statute

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State v. Porter, ___ N.C. App. ___, 2022-NCCOA-166 (Mar. 15, 2022)

In an assault on a female case, the State conceded that the trial court erred by sentencing the defendant to 24 months of supervised probation without making a specific finding, as required by G.S. 15A-1343.2(d), that a probationary period longer than 18 months was necessary. The court remanded the case for resentencing.

The trial court did not abuse its discretion in imposing a special condition of probation

State v. Medlin, ___ N.C. ___, 2022-NCSC-25 (Mar. 11, 2022)

In this Cabarrus County case involving a defendant convicted of obtaining property by false pretenses, the Supreme Court affirmed the decision of the Court of Appeals, 2021-NCCOA-313, which had concluded that the trial court did not abuse its discretion in imposing a special condition of probation under G.S. 15A-1343. Though not discussed in the Supreme Court’s opinion, the special condition at issue was that the defendant not have any contact with the victim—his mother-in-law, who also had legal custody of his three children. The defendant had argued that a probation condition forbidding all contact with his mother-in-law would conflict with the terms of his child custody order, which allowed limited visitation with his children each week. Highlighting the Court of Appeals’ observation that trial judges have substantial discretion in devising probation conditions, the Supreme Court affirmed the lower court’s conclusion that the condition was reasonably related to protection of the victim and the defendant’s rehabilitation.

The trial court erred in subjecting the defendant to the maximum sentence enhancement provided in G.S. 15A-1340.17(f) where the defendant was not sentenced for a reportable conviction of a Class D felony but instead was sentenced as a Class D felon for his convictions of Class H felonies due to his status as a habitual felon

State v. Essick, ___ N.C. App ___, 2022-NCCOA-131 (Mar. 1, 2022)

The defendant was charged with two counts of third-degree sexual exploitation of a minor, a Class H felony offense, and attaining the status of a habitual felon. The defendant entered an *Alford* plea to the sexual-exploitation charges and stipulated to having attained habitual-felon status. The plea arrangement provided that the charges would be consolidated into one Class H felony judgment, and that the defendant, as a habitual felon and a prior record level III offender, would receive an enhanced, Class D-level sentence of 67 to 93 months’ imprisonment, pursuant to G.S. 14-7.6.

However, before accepting the plea and entering judgment, the trial court determined that the maximum sentence should be increased from 93 months to 141 months pursuant to the sentencing enhancement provided in G.S. 15A-1340.17(f) for certain “reportable convictions” that require enrollment in the sex-offender registry. The Court of Appeals allowed the defendant’s petition for writ of certiorari.

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On appeal, the defendant argued that the trial court erred by increasing his maximum sentence from 93 months to 141 months pursuant to G.S. 15A-1340.17(f)'s sentencing-enhancement provision, which he argued does not apply to Class F through I felony reportable convictions enhanced with habitual-felon status. The Court of Appeals agreed, concluding that the defendant's contemporaneous conviction of being a habitual felon did not reclassify his Class H felony convictions to a Class D felony conviction. Slip op. at ¶ 20. The Court rationalized that the plain language of G.S. 15A-1340.17(f) suggests that the sentencing enhancement only applies to those convicted of certain Class B1 through E felonies, rather than those convicted of lower-level felonies but *punished* at the higher level of Class B1 through E due to the application of some other sentencing enhancement. The Court thus held that the trial court erred by applying the 15A-1340.17(f) sentencing enhancement in the defendant's case.

Selective Prosecution

There was no error in the defendant's conviction for violating G.S. 14-4. Where the maximum punishment for the conviction is a \$50.00 fine, the trial court erred by sentencing the defendant to suspended confinement and probation and imposing a \$100.00 fine.

State v. Hales, ___ N.C. App ___, 2022-NCCOA-134 (Mar. 1, 2022)

The defendant was charged with violating G.S. 14-4 for violation of a city ordinance. The defendant was issued a criminal summons stating that his property was in violation of City of Fayetteville Code of Ordinances Section 22-16(a) for failure to remove all metal items from his yard after due notice. The defendant was convicted and appealed to superior court. At a hearing, the defendant waived his right to counsel, elected to proceed *pro se*, and waived his right to a jury trial. The trial court denied the defendant's motions to dismiss for selective prosecution and to suppress all evidence.

The trial court found the defendant guilty of violating a local ordinance under G.S. 14-4. The trial court found that the defendant had one prior conviction, giving him a prior record level II, and sentenced him to 15 days' confinement. The trial court suspended the sentence, placed him on supervised probation for 18 months, and ordered him to comply with the regular conditions of probation and several special conditions of probation. The trial court also imposed a \$100.00 fine plus \$372.50 in costs. The probation and payment of the fine and costs was stayed pending appeal, and the court imposed the following conditions of pretrial release: post a \$500.00 bond; not violate any criminal law; not violate any city code, ordinance, rule, or regulation; and allow the city inspectors to inspect the defendant's property upon 48 hours' written notice either delivered to the defendant or posted on his door. The defendant appealed.

(1) On appeal, the defendant argued that the trial court erred by denying his motion to dismiss for selective prosecution. The defendant alleged that a neighbor "solicited" the code enforcer to target the defendant, who is white, because of the defendant's interracial marriage to his wife, who is black, but offered no evidence to support his allegations. The Court of Appeals

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rejected this argument, concluding that the defendant offered no evidence to show the State targeted or discriminated against the defendant in prosecuting him.

(2) The defendant next argued that the trial court erred by denying his motion to suppress all evidence on the ground that the evidence was obtained in violation of his Fourth Amendment rights. The Court of Appeals rejected this argument, reasoning that the inspector testified that he viewed and took photos of the defendant's property from a public roadway and from a neighboring property where he had secured permission from the neighbor to be on their property.

(3) The defendant argued the trial court erred by not holding separate hearings on his motion to dismiss for selective prosecution and motion to suppress all evidence, but instead heard arguments on both motions at trial. The Court rejected this argument, noting that the record reflects the trial court heard arguments from the parties on both motions immediately preceding the trial. The trial court denied the defendant's motion to dismiss prior to trial and held in abeyance its ruling on the motion to suppress until the trial court had heard all the evidence. The Court thus held that the defendant failed to show any legal error or abuse of discretion.

(4) The defendant also argued that the summons delivered to him was defective because it referenced the incorrect statutory subsection. In rejecting this argument, the Court noted that the summons listed G.S. 14-4 as the statutory basis for the charge against the defendant, correctly identifying the crime with which he was charged. The summons also indicated that the charge was based on the defendant's failure to remove all metal items from the yard, indicating to the defendant the proper city ordinance subsection of which he was in violation. The Court thus concluded that the summons was not defective in that the defendant had sufficient notice of the charge against him.

(5) The defendant argued, and the State conceded, that the trial court erred in applying the sentencing requirements for a Class 3 misdemeanor with one prior conviction. Pursuant to G.S. 15A-1340.23, unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine. An individual convicted of violating a city ordinance pursuant to G.S. 14-4 is guilty of a Class 3 misdemeanor and shall be fined not more than five hundred dollars, and no fine shall exceed fifty dollars unless the ordinance expressly states that the maximum fine is greater than fifty dollars. G.S. 14-4(a). The Court thus held that the trial court erred by sentencing the defendant to a 15-day term of incarceration and 18 months' probation and by imposing a \$100.00 fine. The Court vacated the defendant's sentence and remanded to the trial court for resentencing. However, the Court also held that the trial court did not err by imposing conditions of pretrial release upon the defendant.

(6) Because the defendant waived his right to counsel at trial and chose to proceed *pro se*, the Court rejected the defendant's ineffective assistance of counsel claim.

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(7) The defendant argued that the trial court gave him contradictory rules regarding his right to self-incrimination, contending that the trial court told him both that he cannot be made to testify against himself and that by choosing to take the stand, he loses his right against self-incrimination. The Court rejected this argument, concluding that the rule was a correct statement of law.

Sex Offenders

The defendant was ineligible for termination from the sex-offender registry because he did not satisfy the requisite period of registration. North Carolina's ten-year registry requirement under G.S. 14-208.12A(a) does not violate the Equal Protection Clauses of the United States and North Carolina Constitutions

State v. Fritsche, ___ N.C. App. ___, 2022-NCCOA-339 (May. 17, 2022)

In 2000, the defendant pleaded guilty to sexual exploitation of a child in violation of Colorado's laws. The defendant served eight years in prison and registered with the Colorado Sex Offender Registry in 2008, as required by Colorado law. In February 2020, the defendant moved from Colorado to Florida and registered with the Florida Sex Offender Registry, as required by Florida law. The defendant moved to North Carolina in October 2020 and filed a petition requesting a judicial determination of his requirement to register in North Carolina as a sex offender. The trial court entered an order in 2021 requiring that the defendant register as a sex offender on the North Carolina Sex Offender Registry, and the defendant did so on the following business day.

The defendant then filed a petition pursuant to G.S. 14-208.12A for termination of his requirement to register as a sex offender. The trial court denied the defendant's petition on the ground that the defendant did not satisfy all of the conditions for early termination of his requirement to register as a sex offender, in that he had not been registered as a sex offender for ten years in North Carolina.

On appeal, the defendant argued that the trial court erred in denying his petition to terminate his requirement to register as a sex offender because the Court's holding in *In re Borden*, 216 N.C. App. 579 (2011), was incorrectly decided and should be overturned. In *Borden*, the Court of Appeals interpreted the statutory phrase "ten years from the date of initial county registration" as limiting eligibility for removal from the North Carolina sex-offender registry to offenders who have been registered for at least ten years from their initial date of registration *in a North Carolina county*, rather than ten years from the offender's initial date of registration in *any* jurisdiction. Slip op. at ¶ 12. Here, the Court determined that although the defendant initially registered as a sex offender in Colorado in 2008, he initially registered as a sex offender in North Carolina in 2021. The Court thus held that because the defendant did not satisfy the statute's requisite period of registration, he was ineligible for termination from the sex-offender registry.

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The defendant argued, in the alternative, that the trial court erred in denying his petition to terminate his requirement to register as a sex offender because the termination statute's ten-year North Carolina registry requirement violates the Equal Protection Clause. The Court of Appeals determined that an individual's residency at the time of his initial registration as a sex offender is not inherently suspect, and thus applied a rational basis review to determine whether the statute violated the Equal Protection Clause. The Court concluded that the requirement that a defendant be registered in North Carolina as a sex offender for at least ten years in order to be eligible for early termination of sex offender registration is rationally related to the State's legitimate interests in maintaining public safety and protection. The Court also concluded that the defendant was treated the same as all other registered sex offenders who initially enrolled in another jurisdiction's sex-offender registry based upon an out-of-state conviction. The Court thus held that the ten-year North Carolina registry requirement under G.S. 14-208.12A(a) does not violate the Equal Protection Clauses of the United States and North Carolina Constitutions.

North Carolina's SBM program is not facially unconstitutional and the trial court did not err by ordering the defendant to submit to lifetime SBM

State v. Strudwick, 379 N.C. 94, 2021-NCSC-127 (Oct. 29, 2021)

The trial court did not err by ordering the defendant to submit to lifetime SBM after he pleaded guilty to first-degree forcible rape and other offenses. In *State v. Strudwick*, 273 N.C. App. 676 (2020), the Court of Appeals reversed the trial court's lifetime SBM order, relying on *State v. Gordon*, 270 N.C. App. 468 (2020) on its way to determining that the State did not demonstrate the reasonableness of the SBM search which would occur decades in the future. In its opinion, the Court of Appeals indicated that "further guidance" about SBM procedure from the Supreme Court would be helpful. The Court provided that guidance in this opinion, though it noted that S.L. 2021-138 made major revisions to the SBM program which are effective December 1, 2021.

The Court first concluded that the SBM scheme, which requires a trial court to determine the reasonableness of an SBM search at the time of sentencing rather than at the time of the actual effectuation of the search, is not facially unconstitutional. The Court noted that under G.S. 14-208.43 a defendant may petition for release from the SBM program, and further noted that a defendant potentially may be able to have a SBM order set aside through Rule 60 of the North Carolina Rules of Civil Procedure.

The Court then turned to the reasonableness of the lifetime SBM order in this case, finding that the SBM program's promotion of the "legitimate and compelling governmental interest" in preventing and prosecuting future crimes committed by the defendant outweighed the program's "narrow, tailored intrusion into [the] defendant's expectation of privacy in his person, home, vehicle, and location." The court explained, among other things, that the trial court found that the ET-1 SBM device is "relatively small" and "unobtrusive," and that the SBM scheme only provides the State with the physical location of the defendant, who had a

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diminished expectation of privacy because of his status as a convicted felon sex offender, for use in the prevention and prosecution of future crimes he potentially could commit. The Court noted that unlike *Grady III*, a State's witness had testified in the defendant's case "concerning situations in which lifetime SBM would be obviously effective in assisting law enforcement with . . . preventing and solving future crimes by sex offenders." Thus, the Court reversed the opinion of the Court of Appeals and kept the trial court's lifetime SBM order in full effect.

Justice Earls, joined by Justices Hudson and Ervin, dissented. Justice Earls described the majority's view that "a court today can assess the reasonableness of a search [of lifetime duration] that will be initiated when (and if) [the defendant] is released from prison decades in the future" as a "remarkable conclusion" and "cavalier disregard" of constitutional protections. Justice Earls went on to criticize the majority's application and interpretation of *Grady III* as well as the majority's analysis of whether the State had shown that the SBM search was reasonable.

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

State v. Hilton, 378 N.C. 692, 2021-NCSC-115 (Sept. 24, 2021)

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

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

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

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

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

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

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(1) Lifetime SBM was not unreasonable as applied to a recidivist defendant also convicted of sexual offense with a child by an adult. (2) The trial court erred by ordering a second SBM determination hearing upon the defendant's release from prison.

State v. Carter, ___ N.C. App. ___, 2022-NCCOA-262 (Apr. 19, 2022)

In this Forsyth County case, the defendant was convicted of multiple sex crimes in 2020. Based on a prior conviction from 2002, he was deemed to be a recidivist and ordered to enroll in satellite-based monitoring (SBM). Though the SBM statute in effect at the time would have required lifetime SBM, the trial court orally ordered SBM for five years as a condition of the defendant's post-release supervision (PRS). In its written order, though, the trial court ordered SBM for life based on the defendant's status as a recidivist. (The trial court did not note that the defendant was also statutorily eligible for lifetime SBM based on his conviction for statutory sexual offense with a child by an adult.) The trial court made findings as to the reasonableness of SBM in light of *State v. Grady*, 372 N.C. 509 (2019), but ultimately ordered that the defendant be brought back before the court at the conclusion of his lengthy active sentence for a determination of the reasonableness the search under then-existing circumstances and technology.

(1) On appeal, the defendant argued that the trial court erred by ordering lifetime SBM when the State failed to present evidence about reasonableness and the trial court did not conduct a formal hearing on the issue. The Court of Appeals disagreed. As to SBM ordered during the defendant's term of PRS, the Court concluded that it was reasonable in light of a supervised offender's diminished expectation of privacy. As to the SBM extending beyond the period of PRS, the Court concluded under the totality of the circumstances that it too was reasonable in light of the 10-year cap on monitoring under 2021 statutory amendments; the fact that the defendant here was not just a recidivist, but was also convicted of statutory sexual offense by an adult with a victim under the age of thirteen; and the fact that SBM was deemed effective without the need for an individualized determination in *State v. Hilton*, 378 N.C. 692 (2021). The Court thus affirmed the trial court order requiring lifetime SBM.

(2) The defendant also argued that the trial court was without authority to order a second SBM determination hearing upon the defendant's release from prison. The Court of Appeals agreed that there was no statutory authority for the procedure, but noted that SBM, as a civil matter, could be modified under authority of Rule 60 of the Rules of Civil Procedure. The Court thus vacated the trial court's order for a second SBM hearing upon the defendant's release.

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

State v. Ricks, 378 N.C. 737, 2021-NCSC-116 (Sept. 24, 2021)

In this case involving the trial court's imposition of lifetime satellite-based monitoring (SBM) following the defendant's conviction for statutory rape of a child by an adult and other sex

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offenses, the North Carolina Supreme Court held that the Court of Appeals erred by allowing the defendant's petition for writ of certiorari and invoking Rule 2 of the Rules of Appellate Procedure to review the defendant's unpreserved challenge to the SBM orders.

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

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

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

Speedy Trial & Related Issues

The trial court plainly erred by admitting and relying upon testimony that violated the defendant's attorney-client privilege while assessing an alleged speedy trial violation under the balancing framework of *Barker v. Wingo*

State v. Farook, 2022-NCSC-59, ___ N.C. ___ (May. 6, 2022)

On discretionary review of a unanimous opinion of the Court of Appeals, 274 N.C. App. 65 (2020), the Supreme Court held in this Rowan County case that the trial court plainly erred by admitting testimony that violated the defendant's attorney-client privilege and consequently

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reversed the trial court's order relying on that testimony in denying the defendant's motion to dismiss on speedy trial grounds.

The defendant was represented by four different attorneys over the six-year period from his arrest in June 2012 to his trial in October 2018 on various charges, including second-degree murder and attaining violent habitual felon status, arising from his involvement in a fatal motor vehicle crash in 2012. At a September 2018 hearing on the defendant's speedy trial motion to dismiss, the trial court admitted testimony without objection from one of the defendant's former attorneys, Davis, concerning his representation of the defendant and their communications about Davis's strategic decision to delay the defendant's trial. The Supreme Court determined that it was plain error to admit this testimony as it violated attorney-client privilege and served as the sole basis for the trial court's conclusion in a *Barker* inquiry that the presumption of prejudice from the six-year delay between arrest and trial was rebutted. The Court rejected the State's argument that the defendant waived the privilege by filing a pro se IAC motion, explaining that the motion was a "legal nullity" given that the defendant was represented by counsel at the time and thus "was not allowed to file pro se motions." The Court went on to explain that the trial court had misapplied the proper standard for evaluating prejudice to a defendant resulting from a delayed trial by (1) assessing the prejudice of the delay to the State's case and (2) concluding that the defendant was not prejudiced because he did not prove actual prejudice. The Court remanded the case for the trial court to consider any competent non-privileged evidence while applying the balancing framework and proper prejudice standard from *Barker v. Wingo*.

Justice Berger, joined by Chief Justice Newby and Justice Barringer, dissented, expressing the view that the majority improperly shifted the burden of proof from the defendant to the State and eliminated the *Barker* requirement that a defendant demonstrate prejudice caused by the delay. The dissent also expressed the view that the defendant had waived his attorney-client privilege.

(1) No plain error in constructive possession or firearm by felon jury instructions; (2) No plain error in attempted first-degree murder instructions; (3) Year-long delay of defendant's appeal did not violate due process right to speedy appeal

State v. Neal, 280 N.C. App. 101, 2021-NCCOA-565 (Oct. 19, 2021)

The defendant appealed from his Alamance County convictions for attempted murder, discharging a weapon into an occupied vehicle, possession of firearm by felon, and assault with a deadly weapon with intent to kill. The offenses arose from an incident where the defendant and his romantic partner shot at a Child Protective Services worker while the worker was in her car. The partner later pled guilty to various offenses and agreed to testify against the defendant. (1) The defendant argued at trial that possession of firearm by felon requires actual possession and that a constructive possession instruction was improper. The trial court overruled the objection and gave the constructive possession instruction. On appeal, the defendant contended that the evidence did not support an instruction on constructive

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possession. Reviewing for plain error, the court determined the instructions on constructive possession and possession of firearm by felon were supported by the evidence and properly given. Any potential error from the constructive possession instruction did not impact the verdict, and this argument was rejected.

(2) The defendant also challenged the attempted first-degree murder instruction. Because no objection was made during the charge conference, the issue was again reviewed only for plain error. The instruction told jurors that if they found that the defendant intentionally inflicted harm upon the victim with a deadly weapon, the jurors could infer both an unlawful act and malice by the defendant. Here, the victim was not actually wounded during the shooting, and the defendant argued the instruction was therefore improper. The court again disagreed. The instructions as a whole properly placed the burden of proof on the State, and it was unlikely that any error here had an impact on the verdict. “As the State could not meet its burden of proving that the Defendant intentionally inflicted a wound on [the victim], the jury was not permitted to infer that Defendant acted unlawfully and with malice. We assume the jury followed the court’s instructions.” *Neal* Slip op. at 17. There was therefore no plain error in the attempted murder instructions.

(3) The defendant’s appeal was delayed for a year due to ten extensions of time for the court reporter to complete the trial transcript. Undue delay of a criminal appeal can create a due process violation. To determine whether a speedy appeal violation has occurred, the court examines the same factors it would in a speedy trial case. *See Barker v. Wingo*, 407 U.S. 514 (1972). Here, the delay of more than a year was sufficient to trigger the *Barker* inquiry. However, the court approved each request for extension of time to complete the transcript. The reason for the delay was therefore not attributable to the defendant or the State. The defendant did not assert a speedy appeal claim before filing his brief, and his alleged statements to appellate counsel to expedite the appeal did not count as a formal assertion of the right. Finally, the defendant claimed unique stresses from incarceration during COVID-19 and faded memory as prejudice. The court rejected this argument. The defendant failed to show that any significant and helpful evidence was lost due to his faded memory. Further, the defendant ultimately received the full transcript. This precluded a finding of prejudice. “Acknowledging Defendant’s allegation of stress caused by incarceration during the pandemic, Defendant has failed to show prejudice resulting from the delay.” *Neal* Slip op. at 21. There was therefore no due process violation, and the convictions were unanimously affirmed in full.

Vindictive Prosecution

(1) Court of Appeals erred in finding that the trial court should have granted defendant’s motions to dismiss for vindictive prosecution and failure to join; (2) remanded for reconsideration of defendant’s double jeopardy argument.

State v. Schalow, 379 N.C. 639, 2021-NCSC-166 (Dec. 17, 2021)

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The facts of this case were previously summarized following the Court of Appeals decision in *State v. Schalow*, 269 N.C. App. 369 (2020) ("*Schalow II*"), available here. The defendant was initially charged with attempted murder and several counts of assault against his wife, but the state only proceeded to trial on attempted murder and dismissed the assault charges. After discovering the indictment for attempted murder failed to allege malice, the court granted the state a mistrial over the defendant's objection. The defendant was subsequently tried for that charge on a new indictment and convicted. On appeal, the defendant argued in *State v. Schalow*, 251 N.C. App. 354 (2018) ("*Schalow I*") that the mistrial was granted in error because it sufficiently alleged manslaughter as written, and therefore the second prosecution violated double jeopardy. The appellate court agreed and vacated the conviction. In addition to seeking discretionary review of the decision in *Schalow I* (which was ultimately denied), the state obtained several new indictments against the defendant for felony child abuse and the related assaults against his wife. The defendant's pretrial motion to dismiss the new charges on the basis of vindictive prosecution, double jeopardy, and failure to join charges under G.S. 15A-926 was denied, and the defendant sought discretionary appellate review, which was granted. The Court of Appeals held that the trial court erred by denying the defendant's motion to dismiss in *Schalow II*, finding that the defendant was entitled to a presumption of prosecutorial vindictiveness and also met his burden of showing that the state withheld the prior indictments to circumvent the joinder requirements of G.S. 15A-926, which required dismissal of the charges. Based on those holdings, the appellate court did not reach the double jeopardy issue.

The state sought discretionary review of the appellate court's rulings in *Schalow II*, which was granted and resulted in the current decision. On review, the state Supreme Court court reversed the Court of Appeals on the two issues it decided, and remanded the case to the lower court to reconsider the remaining double jeopardy argument.

First, regarding vindictive prosecution, the higher court explained that *North Carolina v. Pearce*, 395 U.S. 711 (1969) and *Blackledge v. Perry*, 417 U.S. 21 (1974) establish a presumption of vindictiveness when a defendant receives a more serious sentence or faces more serious charges with significantly more severe penalties after a successful appeal, but noted that subsequent cases have declined to extend that presumption to other contexts. The filing of new or additional charges after an appeal, without more, "does not necessarily warrant a presumption of prosecutorial vindictiveness," even when there is "evidence that repeated prosecution is motivated by the desire to punish the defendant for his offenses." The Court of Appeals erred in concluding that the defendant faced a more severe sentence for substantially the same conduct under the new set of charges, since G.S. 15A-1335 independently prohibits imposing a more severe sentence in these circumstances, making that outcome a "legal impossibility" in this case. The court also rejected the defendant's argument that under *U.S. v. Goodwin*, 457 U.S. 368 (1982), the presumption of vindictiveness applies whenever there has been a change in the charging decision after an initial trial is completed. The language in *Goodwin* regarding the lower likelihood of vindictiveness in pretrial charging decisions did not establish "that such a presumption was warranted for all post-trial charging decision changes," and given the harshness of imposing such a presumption, the court was unwilling to find that it applied here. Additionally, although the prosecutor in this case made public

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statements about his intent to pursue other charges against the defendant if the ruling in *Schalow I* were upheld, those statements indicated an intent to punish the defendant for his underlying criminal conduct, not for exercising his right to appeal. Concluding that the presumption of vindictiveness did not apply and actual vindictiveness was not established, the state Supreme Court reversed the appellate court on this issue.

Second, the state Supreme Court also disagreed with the Court of Appeals' conclusion that the defendant's motion to dismiss should have been granted for failure to join offenses under G.S. 15A-926. The statute provides that after a defendant has been tried for one offense, his pretrial motion to dismiss another offense that could have been joined for trial with the first offense must be granted unless one of the enumerated exceptions applies. Pursuant to *State v. Furr*, 292 N.C. 711 (1977), this statute does not apply to charges that were not pending at the time of the earlier trial. However, under *State v. Warren*, 313 N.C. 254 (1985), the later-filed charges must nevertheless be dismissed if the prosecutor withheld those charges in order to circumvent the statutory requirement. If either or both of two circumstances are present — (i) during the first trial the prosecutor was aware of evidence that would support the later charges, or (ii) the state's evidence at the second trial would be the same as the first trial — those factors will “support but not compel” a finding that the state did withhold the other charges to circumvent the statute. At the trial level, the defendant in this case only argued that dismissal was required by the statute, but did not argue that dismissal was required under *Warren* even though the charges were not pending at the time of the prior trial; therefore, the argument presented by the defendant on appeal was not properly preserved for review, and the appellate court erred by deciding the issue on those grounds. Additionally, the Court of Appeals erred by holding that the trial court was required to dismiss the charges upon finding that both *Warren* factors were present. Even if one or both *Warren* factors were found, that will “support” a dismissal by the trial court, but it does not “compel” it. The appellate court incorrectly converted “a showing of both *Warren* circumstances into a mandate requiring dismissal,” contrary to case precedent.

The case was remanded for reconsideration of the defendant's remaining argument that prosecution for the assault charges would also violate double jeopardy, which the Court of Appeals declined to address.

Evidence

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Relevancy--Rule 401

The trial court did not commit plain error by admitting certain testimony about how the death of a murder victim affected the victim's brother

State v. McCutcheon, ___ N.C. App. ___, 2021-NCCOA-699 (Dec. 21, 2021)

In this first-degree murder case, the trial court did not commit plain error under Rules 401 and 402 by admitting testimony from the victim's brother and the brother's wife concerning how the victim's death affected the brother. With regard to the brother's testimony, the Court of Appeals determined that the testimony satisfied the "low bar of logical relevance" because it rebutted evidence the defendant had elicited from another witness suggesting that the brother had spoken to that witness shortly after the murder and explained why that was unlikely. The testimony also had bearing on the brother's credibility and allowed the jury to better understand his motives or biases. The testimony of the brother's wife explaining how the victim's death had affected him also was relevant because it explained the timeline of the brother's communication with the other witness and corroborated the brother's testimony. The Court went on to determine that the defendant failed to preserve certain victim-impact evidence arguments and had failed to show that she was prejudiced by the admission of any of the challenged evidence.

Character Evidence

The defendant was not prejudiced by any error related to the exclusion of evidence from the victim's cell phone when there was not, in light of the other evidence, a reasonable possibility that the jury would have reached a different result had the evidence been admitted

State v. McKoy, 2022-NCCOA-60, ___ N.C. App. ___ (Feb. 1, 2022)

In this Durham County case, the defendant was found guilty by a jury of voluntary manslaughter. The charge arose out of the defendant's shooting of Augustus Brandon, a long-time acquaintance that the defendant generally tried to avoid because of his perceived criminal and gang activity. In December 2016, the defendant was driving when he saw Brandon drive past him. Brandon turned his car around, followed the defendant, pulled in front of him, and then stopped his car in front of the defendant's. When Brandon began approaching the defendant's car, which had become stuck in a ditch, the defendant "just panicked" and fired his semi-automatic rifle three times, hitting Brandon once in the back and once in the back of the head, killing him. Mr. Brandon was unarmed. At trial, the jury was instructed on first-degree murder, second-degree murder, and voluntary manslaughter. The jury returned a verdict of voluntary manslaughter.

On appeal, the defendant argued that the trial court erred by granting the State's motion in limine regarding text messages and photographs on the victim's cell phone. The State had

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asserted that the evidence—which pertained to the victim’s past violent acts and ownership and use of guns—would be more prejudicial than probative because specific acts of conduct are impermissible to prove a victim’s propensity for violence. The defendant argued that the State had opened the door to admission of the cell-phone evidence by introducing testimony about Brandon’s personality through his parents’ testimony, and that the evidence was admissible to impeach the victim’s father’s testimony that he did not previously know his son had possessed a gun.

The Court of Appeals concluded over a dissent that even if the cell-phone evidence was excluded in error, any error would not be sufficiently prejudicial to warrant a new trial, because the defendant did not show a reasonable possibility that a different result would have been reached had the error not occurred. Other admissible evidence supported the defendant’s theory of self-defense, including the defendant’s own testimony about Brandon’s reputation for “gang bang[ing] and tot[ing] guns,” a previous incident in which Brandon showed the defendant a video of himself shooting a gun, and the fact that he was “terrified” at the time of the shooting. ¶ 23. Additionally, the evidence showed that even if the defendant was honestly in fear for his life, the degree of force he used was more than reasonably necessary—Brandon was unarmed and running away from the defendant when he was shot, and the defendant testified that he never saw Brandon holding a gun that day. In the absence of prejudicial error, the defendant’s conviction stood.

Judge Tyson dissented to say that he would have concluded that the State opened the door to the admission of the photos and texts from the victim’s phone when it introduced testimony from Brandon’s parents about his lack of guns and reputation for peacefulness and being a “happy guy.” The exclusion of that evidence, he argued, prejudiced the defendant’s right to present his defense by easing the State’s burden of proving that the defendant used unreasonable force.

Crawford Issues & Confrontation Clause

The defendant’s Confrontation Clause rights were violated by the introduction of an unavailable witness’s plea allocution in a related case and the defendant did not open the door to the confrontation violation by eliciting evidence suggesting the unavailable witness’s culpability for the crime for which the defendant had been charged

Hemphill v. New York, 595 U.S. ___, 142 S. Ct. 681 (Jan. 20, 2022)

In this murder case, the Supreme Court determined that the defendant’s Sixth Amendment right to confront witnesses against him was violated when the trial court admitted into evidence a transcript of another person’s plea allocution. In 2006, a child in the Bronx was killed by a stray 9-millimeter bullet. Following an investigation that included officers discovering a 9-millimeter cartridge in his bedroom, Nicholas Morris was charged with the murder but resolved the case by accepting a deal where he pleaded guilty to criminal possession of a .357-magnum revolver in exchange for dismissal of the murder charge. Years

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later, the defendant Hemphill was charged with the murder. At trial, for which Morris was unavailable as a witness, Hemphill pursued a third-party culpability defense and elicited undisputed testimony from the State's law enforcement officer witness indicating that a 9-millimeter cartridge was discovered in Morris's bedroom. Over Hemphill's Confrontation Clause objection, the trial court permitted the State to introduce Morris's plea allocution for purposes of proving, as the State put it in closing argument, that possession of a .357 revolver, not murder, was "the crime [Morris] actually committed." Relying on state case law, the trial court reasoned that Hemphill had opened the door to admission of the plea allocution by raising the issue of Morris's apparent possession of the 9-millimeter cartridge.

After finding that Hemphill had preserved his argument by presenting it in state court and accepting without deciding that the plea allocution was testimonial, the Supreme Court determined that admission of Morris's plea allocution violated Hemphill's confrontation rights and rejected various arguments from the State advocating for an "opening the door" rule along the lines of that adopted by the trial court. Describing the "door-opening principle" as a "substantive principle of evidence that dictates what material is relevant and admissible in a case" the Court distinguished it from procedural rules, such as those described in *Melendez-Diaz*, that the Court has said properly may govern the exercise of the right to confrontation. The Court explained that it "has not held that defendants can 'open the door' to violations of constitutional requirements merely by making evidence relevant to contradict their defense." Thus, the Court reversed the judgment of the New York Court of Appeals which had affirmed the trial court.

Justice Alito, joined by Justice Kavanaugh, concurred but wrote separately to address the conditions under which a defendant can be deemed to have validly waived the right to confront adverse witnesses. Justice Alito wrote that while it did not occur in this case, there are circumstances "under which a defendant's introduction of evidence may be regarded as an implicit waiver of the right to object to the prosecution's use of evidence that might otherwise be barred by the Confrontation Clause." He identified such a situation as that where a defendant introduces a statement from an unavailable witness, saying that the rule of completeness dictates that a defendant should not be permitted to then lodge a confrontation objection to the introduction of additional related statements by the witness.

Justice Thomas dissented based on his view that the Court lacked jurisdiction to review the decision of the New York Court of Appeals because Hemphill did not adequately raise his Sixth Amendment claim there.

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

State v. Thorne, 279 N.C. App. 655, 2021–NCCOA–534 (Oct. 5, 2021)

The defendant was placed on 36 months of supervised probation after pleading guilty to one count of conspiracy to obtain property by false pretenses. The defendant's probation officer

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

On appeal, the defendant argued that his confrontation rights under G.S. 15A-1345(e) were violated when the trial court allowed another probation officer to testify from the supervising officer's notes, over the defendant's objection. However, at the hearing the defendant did not state that the objection was based on his statutory confrontation right, nor did he request that the supervising officer be present in court or subjected to cross-examination. The court held that, at most, it could be inferred that the defendant's objection was based on hearsay grounds or lack of personal knowledge. The court rejected the defendant's argument that the issue was preserved despite the absence of an objection because the trial court acted contrary to a statutory mandate, per *State v. Lawrence*, 352 N.C. 1 (2000). In this case, the trial court did not act contrary to the statute because the objection made at the hearing was insufficient to trigger the trial court's obligation to either permit cross-examination of the supervising officer or find good cause for disallowing confrontation. Therefore, the officer's testimony based on the notes in the file was permissible, and it established that the defendant left the probation office without authorization on the day he was to be tested for drugs, failed to report to his probation officer, did not respond to messages, was not found at his residence on more than one occasion, and could not be located for 22 days. Contrasting these facts with *State v. Williams*, 243 N.C. App. 198 (2015), in which the evidence only established that the probationer had committed the lesser violation of failing to allow his probation officer to visit him at reasonable times, the evidence here adequately showed that the defendant had absconded. The court therefore affirmed the revocation, but remanded the case for correction of a clerical error because the order erroneously indicated that both violations justified revocation, rather than only the absconding per G.S. 15A-1344(d2).

Prior Acts--404(b) Evidence

(1) The trial court did not err by concluding that evidence of prior alleged forcible sexual assaults was relevant to a present rape allegedly committed against a physically helpless victim. (2) The trial court did not abuse its discretion in concluding that testimony about the prior alleged offense was more probative than prejudicial

State v. Rodriguez, 280 N.C. App. 272, 2021-NCCOA-594 (Nov. 2, 2021)

In this Wake County case, the defendant was charged with incest and second-degree forcible rape for an offense committed against his niece. The defendant pled guilty to incest, but had a

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jury trial on the rape charge. At trial, the State offered testimony from a witness, Brittany Mack, who alleged that she had previously been forcibly raped by the defendant numerous times, including five days prior to the acts giving rise to the defendant's current charge. The defendant filed a motion in limine seeking to exclude that testimony under Rule 404(b). The trial court heard arguments on that motion but reserved ruling on it until after the victim in the present case testified at trial. After the present victim testified that the defendant had intercourse with her while she was blacked out after drinking alcohol, the trial court ruled that the 404(b) evidence of the defendant's sexual assault on Brittany Mack would be admissible for the limited purposes of showing the absence of mistake, lack of consent and intent. The trial court also conducted a Rule 403 balancing test and concluded that the proffered evidence was sufficiently similar and close in time to be more probative than prejudicial. After Mack testified, the trial court instructed the jury that her testimony could be considered solely for the purpose of showing an absence of mistake or that the defendant had the intent to commit the crime charged in this case. The defendant was convicted. On appeal, he argued that the trial court erred in allowing testimony regarding the prior alleged rapes because they were not relevant to any material element of the present charge of second-degree forcible rape, and that the trial court abused its discretion in weighing the testimony's prejudicial effect.

(1) The Court of Appeals concluded that the trial court did not err when it deemed Mack's testimony relevant under Rule 401. Though the type of force allegedly applied in the prior incident (Mack testified that the defendant "threw her on his bed" and forced her to have sex against her will) was different from the evidence of physical helplessness at issue in the present case, the Court of Appeals noted that physical helplessness still implies force and a lack of consent. Because force and consent are relevant issues in any second-degree forcible rape case, the Court held that the testimony about the prior alleged offense was relevant to prove that the defendant did not mistake the present victim's actions and inactions as consent.

(2) The Court also concluded that the trial court did not abuse its discretion when weighing the probative value of Mack's testimony against the danger of unfair prejudice. The trial judge heard testimony on voir dire, instructed the jury on the limited purpose of the testimony, and acknowledged that the prior alleged acts most recently occurred five days prior to the present offense. The Court of Appeals thus found no error and affirmed the defendant's conviction.

(1) Photos of condoms were properly admitted but photos of sex toys were irrelevant and improper, although the error did not rise to the level of plain error; (2) Improper lifetime SBM order vacated without prejudice to the State's ability to refile a new petition; (3) Portions of undisclosed protected records, while favorable to the defendant, were not material and did not justify relief

State v. Sheffield, ___ N.C. App. ___, 2022 NCCOA 216 (Apr. 5, 2022)

In this Caldwell County case, the defendant was charged with first-degree sex offense with a child. The victim was the minor child of a family friend. While the child was watching television at the defendant's house, the defendant brought the child to his computer, which had

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pornography playing. The defendant then exposed himself and masturbated, performed oral sex on the child, and attempted to have anal sex with the child. The child escaped and reported the incident to his mother at once. During forensic examination, the defendant's DNA was found on the child's underwear. The child stated that the defendant had shown him a glass duck with square packets inside he did not recognize, similar to candy or gum packaging, in a previous encounter. At trial, the State presented photos of the defendant's bedroom. One photo showed sex toys and condoms, and the other photos showed a bag of condoms with a sex toy in the background. The sex toys were not alleged to have been involved in the sexual assault, and the State did not mention them in argument. It did argue that the items in the glass duck mentioned by the victim during his interview were condoms, and that the photos of the condoms in the defendant's room corroborated the child's account. The defendant was convicted at trial and appealed.

(1) The admission of the photograph showing condoms in the defendant's room was properly admitted. That image was relevant to corroborate the victim's story and to show potential grooming behavior by the defendant. The condoms were also admissible to show the defendant's plan and preparation to commit the offense. Thus, the trial court did not err under N.C. Evid. R. 401 or 404 in admitting the condom photo. The admission of the photos showing the sex toy, however, was erroneous under both rules. The sex toy was in no way related to the assault allegation and amounted to improper character evidence. However, the sex toy was only referenced at trial in passing by defense counsel (and not elsewhere), and there was overwhelming evidence of the defendant's guilt. Under these circumstances, the erroneous admission of the photos did not rise the level of plain error.

(2) The defendant was ordered to enroll in satellite-based monitoring ("SBM") for life without a hearing and without defense objection. On appeal, the parties conceded that this was error but disagreed as to the remedy, with the defendant asking for reversal and the State seeking remand of the issue. The court found the issue was preserved under G.S. 15A-1446(d)(18) as an unauthorized sentence. The defendant was convicted under now-G.S. 14-27.29 (formerly G.S. 14-27.4). At trial, the parties mistakenly agreed that the defendant had been convicted under G.S. 14-27.28 (formerly G.S. 14-27.4A). Under the SBM laws in place at the time, a person convicted of an offense under G.S. 14-27.28 was required to enroll in SBM for life, whereas the defendant's conviction was not eligible for automatic lifetime enrollment. His conviction did require that he undergo a risk assessment and potentially enroll in SBM for a time period to be determined by the trial court. While other cases have prohibited the State from re-litigating the issue on remand, this case was distinguishable given the lack of a motion to dismiss the SBM proceeding, the lack of defense objection, and the mistake of law of the parties. The SBM order was therefore vacated without prejudice, allowing the State to seek an additional hearing on the issue if it desires. A claim of ineffective assistance of counsel based on trial counsel's performance at the SBM hearing was rendered moot in light of this holding.

(3) The defendant sought to access an officer's personnel file, as well as Division of Social Services ("DSS") and school records on the victim and his family. The trial court reviewed and released to the defendant certain documents from each category but ordered other portions of

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the records withheld as irrelevant, cumulative, or otherwise not discoverable. The Court of Appeals reviewed the unreleased records and determined that some of the unreleased records contained evidence favorable to the defendant. However, that information was not material, in that it did not establish a reasonable likelihood of a different result at trial had it been disclosed. Further discussion of the specifics of the undisclosed records was placed in an order under seal in the court file to preserve the confidentiality of the records for any potential further review. The case was therefore remanded for any new SBM proceeding, and the trial was otherwise without error.

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

State v. Bradley, 279 N.C. App. 389, 2021-NCCOA-495 (Sept. 21, 2021).

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

(1) At the defendant's murder trial for killing victim Tucker, the state introduced evidence concerning law enforcement investigation into the disappearance of victim Rippy, a woman the defendant had been previously convicted of murdering but whose body had never been found. Tucker's body was discovered during a search of property associated with the defendant by investigators who were looking for Rippy. The trial court admitted evidence concerning the investigation of Rippy's disappearance under Rule 404(b) to show the course of the investigation of Tucker's death, identity, motive, and modus operandi. On appeal, the defendant argued under the standard of plain error that the evidence concerning Rippy was not sufficiently similar and was so voluminous as to be more prejudicial than probative under Rule 403. The court first explained various ways in which the challenged evidence of Rippy's disappearance was introduced for a proper purpose under Rule 404(b), including that it helped provide a full picture of the course of the investigation of Tucker's death, related to the credibility of witnesses, and cast certain physical evidence in a probative light. The evidence concerning Rippy also was sufficiently similar to that concerning Tucker as both victims lived around Wilmington; were of the same sex; disappeared within nine months of each other; had legal, financial, and substance abuse problems; relied on the defendant for transportation; had relationships with the defendant; and were subjects of his sexual attention. Distinguishing *State v. Hembree*, 368 N.C. 2 (2015), the court further found that the trial court did not abuse its discretion in admitting the evidence under Rule 403, pointing to the trial court's deliberate

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weighing of its probative and prejudicial qualities and appropriate limiting instructions to the jury.

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

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

Opinions

Absent physical evidence of abuse, it was plain error to admit expert testimony that sexual abuse had occurred and that identified the defendant as the perpetrator; new trial

State v. Clark, 380 N.C. 204, 2022-NCSC-13 (Feb. 11, 2022)

The defendant was convicted at trial of indecent liberties with a minor in Pitt County. The trial court allowed an expert witness for the State to testify the minor child had been sexually abused, despite a lack of physical evidence. The defendant did not object at the time. The same expert testified about her treatment recommendations for the minor victim, which included that the child have no contact with the defendant, again without objection. The defendant argued that the admission of this evidence was plain error, or alternatively that the record showed ineffective assistance of counsel based on trial counsel's failure to object to the challenged testimony. A divided Court of Appeals affirmed in an unpublished decision. The majority found that admission of this testimony, though error, did not amount to plain error. The dissent at the Court of Appeals would have found ineffective assistance of counsel based

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on trial counsel's failure to object to the expert testimony. A majority of the North Carolina Supreme Court reversed and granted a new trial.

An expert may not testify that a child has been sexually abused without physical evidence of sexual abuse, and admission of such testimony is plain error where the case turns on the victim's credibility. *See State v. Towe*, 366 N.C. 56 (2012). While evidence was presented concerning the victim's behavioral and social changes following the alleged crime (and such evidence may properly be circumstantial evidence of abuse), this did not amount to physical evidence of sexual abuse. The expert testimony here that the child was sexually abused despite a lack of physical evidence was therefore improper vouching for the victim's credibility. Given the lack of physical evidence in the case, this was plain error and required a new trial.

The expert's testimony that she recommended the victim to stay away from the defendant improperly identified the defendant as the perpetrator and similarly constituted plain error. While an expert in a child sex case may testify that physical symptoms of a victim are consistent with the victim's report, an expert cannot explicitly or implicitly identify the defendant as the perpetrator. *See State v. Aguallo*, 322 N.C. 818 (1988). "[S]ince this case turns on the credibility of the victim, even an implicit statement that the defendant is the one who committed the crime is plain error necessitating a new trial." *Clark Slip op.* at 18.

Given its ruling on these points, the Court declined to address the defendant's ineffective assistance argument, which it dismissed without prejudice. The Court of Appeals was therefore reversed in part and the matter remanded for a new trial.

Chief Justice Newby dissented, joined by Justice Barringer. The dissenting Justices would have found no plain error and would have affirmed the Court of Appeals.

Assuming without deciding that officer expressed improper lay opinion that the defendant was the operator of the moped that crashed, the error was not prejudicial because other admitted evidence included substantially similar information

State v. Delau, 2022-NCSC-61, ___ N.C. ___ (May. 6, 2022)

In this Buncombe County case, the Supreme Court reversed the decision of the Court of Appeals that the trial court committed prejudicial error in admitting an officer's testimony that the defendant was driving his moped when it crashed. The Supreme Court noted that a warrant application for the defendant's blood that was signed by the testifying officer was admitted without objection at the defendant's trial on impaired driving charges. That application stated the officer's conclusion, based on the circumstances he observed following the crash, that the defendant was operating the moped. In addition, the defendant's cross-examination of the officer brought out much of the same information. Thus, the Supreme Court held that the defendant did not meet his burden to establish that a different result would have been reached had the objected-to testimony been excluded.

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In a first-degree murder and discharging a firearm into an occupied vehicle in operation case, the trial court did not commit reversible error on evidentiary issues and that there was no cumulative error

State v. Thomas, ___ N.C. App. ___, 2021-NCCOA-700 (Dec. 21, 2021)

Evidence > Opinions > Expert Opinions > Issues Re: of Amendments to R. 702

In this first-degree murder and discharging a firearm into an occupied vehicle in operation case, the Court of Appeals determined that the trial court did not commit reversible error on evidentiary issues and that there was no cumulative error. Defendant was jealous of Demesha Warren's relationship with the victim, Kenneth Covington, and fatally shot Covington while Covington was driving Warren's car after visiting the store on an evening when he and Warren were watching TV together at her apartment.

(1) Because certain prior statements made by Warren to an investigator correctly reflected her knowledge at the time she made them, the trial court did not err by admitting the statements as past recorded recollections under Rule 803(5). One statement was recorded by the investigator on the night of the murder and the other was an email Warren later provided to the investigator. At trial, Warren remembered speaking with the investigator on the night of the murder and giving him the email but could not remember the content of either communication because of trauma-induced memory loss. While Warren did not testify that the content of the recording correctly reflected her knowledge at the time, she did not disavow it and characterized the content as "what [she] had been through" and "just laying it all out." This was sufficient for the Court to conclude that Warren was relaying information that reflected her knowledge correctly. As for the email, evidence suggesting that Warren dictated the email and signed and dated it when providing it to the investigator was sufficient to show that it correctly reflected her knowledge at the time.

(2) The trial court did not abuse its discretion in admitting testimony of the State's expert on gunshot residue (GSR) because the expert followed the State Crime Lab's procedures as required to meet the reliability requirement of Rule 702(a). The defendant argued that the expert did not follow Lab protocol because the expert analyzed a GSR sample taken from the defendant more than four hours after the shooting. The trial court found, and the Court of Appeals agreed, that the expert actually did follow Lab protocol which permits a sample to be tested beyond the four-hour time limit when the associated GSR information form indicates that collection was delayed because the person from whom the sample was collected was sleeping during the four-hour time window, as was the case here. The Court determined that the defendant failed to preserve another Rule 702(a) argument related to threshold amounts of GSR elements.

(3) The trial court did not abuse its discretion by allowing an investigator to provide lay opinion testimony identifying a car in a surveillance video as the defendant's car based on its color and sunroof. The Court of Appeals explained that it was unnecessary for the investigator to have firsthand knowledge of the events depicted in the videos to provide the lay opinion

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identification. Rather, in order to offer an interpretation of the similarities between the depicted car and the defendant's car, the investigator needed to have firsthand knowledge of the defendant's car, which he did because he had viewed and examined the car following the shooting.

(4) The trial court erred by admitting testimony from a witness concerning statements Warren had made to the witness describing the defendant confronting Warren about her relationship with the victim and Warren's belief that the defendant had killed the victim. The trial court admitted the testimony of those statements as non-hearsay corroboration of Warren's testimony, but this was error because the statements were inconsistent with and contradicted Warren's testimony. While error, admission of the statements was not prejudicial because the jury heard other admissible evidence that was consistent with the erroneously admitted statements.

(5) The trial court did not err by admitting a witness's testimony recounting the victim's statement to the witness that the victim was afraid of the defendant because the defendant had threatened to kill him as a statement of the victim's then-existing state of mind under Rule 803(3). The fact of the threat explained the victim's fear and, thus, the statement was "precisely the type of statement by a murder victim expressing fear of the defendant that our Supreme Court has long held admissible under Rule 803(3)."

(6) The trial court erred by admitting evidence that an investigator recovered a .45 caliber bullet from the defendant's car because the bullet had no connection to the murder, which involved .40 caliber bullets, and therefore was irrelevant under Rules 401 and 402. However, this error did not amount to prejudicial plain error because it "did not draw any connection between Defendant and guns that had not already been drawn."

(7) Finally, the Court rejected the defendant's contention that the cumulative effect of the individual errors required a new trial, explaining that "the errors individually had, at most, a miniscule impact on the trial" because the facts underlying the erroneously admitted evidence came in through other means and there was extensive other evidence implicating the defendant in the murder.

Privileges

In a first-degree murder case, the trial court did not err in jury instructions regarding an inference of the defendant's intent to injure the child victim but did err in permitting the State to cross-examine the defendant about privileged attorney-client communications

State v. Graham, 2022-NCCOA-297, ___ N.C. App. ___ (May. 3, 2022)

In this Gaston County first-degree murder case, the trial court (1) did not err in instructing the jury that there was sufficient evidence to infer that the defendant intentionally injured the victim; (2) erred by allowing the State to examine the defendant about privileged

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communications he had with defense counsel; (3) and did not err by denying the defendant's motion to compel the State to disclose the theory on which it sought to convict him of first-degree murder.

(1) The court rejected the defendant's argument that the trial court's instruction to the jury that "[w]hen an adult has exclusive custody of a child for a period of time during which that child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries" impermissibly "created a 'mandatory presumption'" that the defendant intentionally injured the victim. Viewing the challenged language "in light of the entire charge" and in the greater context of the law regarding intent and direct and circumstantial evidence, the Court of Appeals found no error in the instruction, explaining in part that the phrase "sufficient to create an inference" cannot reasonably be interpreted as meaning that the basic facts, if proven, "*necessarily* create an inference" of intent.

(2) The trial court erred by permitting the State to question the defendant on cross-examination about the substance of communications between him and defense counsel as those communications were subject to attorney-client privilege. Over an objection and in an effort to impeach the defendant's credibility, the State was permitted to question the defendant about whether he discussed his law enforcement interrogation with his attorney. The Court of Appeals determined that the error was not prejudicial in light of the fact that the defendant's credibility was already at issue at the time of the objectionable cross-examination and the defendant already had testified to being untruthful with police in the past.

(3) Given the well-established principle that "when first-degree murder is charged, the State is not required to elect between theories of prosecution prior to trial," the court rejected the defendant's argument that the trial court erred by denying his pretrial motion to compel the State to disclose the theory upon which it sought his conviction.

Refreshed Recollection

(1) The trial court did not err by allowing a witness to presently refresh his recollection by reference to an earlier writing. (2) A prior writing was properly admitted as a prior consistent statement. (3) The trial court did not plainly err in instructing the jury on attempted first-degree murder when the defendant could not demonstrate prejudice resulting from any alleged error. (4) Referencing attempted first-degree murder as a Class B1 felony was a clerical error

State v. Jones, 280 N.C. App. 241, 2021-NCCOA-592 (Nov. 2, 2021)

In this Wake County case, the defendant was charged with two counts each of attempted first-degree murder and several related assault and conspiracy charges stemming from an altercation between two groups of people. At trial, a man named Ronald Cameron, who had shared a cell block with the defendant during his pretrial confinement, and who wrote a letter

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to the district attorney detailing conversations he had with the defendant about his charges, testified for the State. After Cameron initially gave limited testimony and said he did not remember anything else, the trial court allowed the State to use his letter to refresh his recollection. Cameron then gave additional testimony, eventually without reference to the letter, including some details of his conversations with the defendant that were not included in the letter. The trial court found that the letter was properly used to refresh the witness's recollection, and also admitted the letter itself as a prior consistent statement that could be used to corroborate his testimony. When instructing the jury, the trial judge explained to the parties that he intended to give the instructions, including the defendant's requested alibi instruction, only once even though there were two counts of each charge (one for each victim)—a plan to which the defendant did not object. The jury found the defendant guilty of all charges. One page of the attempted first-degree murder judgment listed the crime as a Class B1 felony.

(1) On appeal, the defendant argued that the trial court erred by allowing Cameron to reference his letter to the district attorney during his testimony, claiming that the letter was used as a "testimonial crutch" rather than merely as a means to presently refresh his recollection. The Court of Appeals disagreed, concluding that this was not a case where Cameron's testimony was "clearly a mere recitation of the refreshing memorandum." Slip op. ¶ 21 (citing *State v. Black*, 197 N.C. App. 731 (2009)). To the contrary, Cameron testified to part of his jail conversation with the defendant before looking at the letter to refresh his recollection and included some details in his testimony that were not contained in the letter at all, such as the specific location where the gun used to commit the crimes could be found. Because it was not clear that Cameron was merely reciting the letter at trial or using it as a testimonial crutch, the Court of Appeals concluded that the trial court did not abuse its discretion by allowing the refreshed testimony.

(2) The defendant also argued that the trial court erred by admitting the letter into evidence as a prior consistent statement. The Court of Appeals disagreed, concluding that the letter qualified as a prior consistent statement in that it corroborated Cameron's testimony both as to how he came to have the information about the defendant's crime as well as the information about the crime itself. The Court noted that one inconsistency between the letter and Cameron's trial testimony did not undermine its status as a prior consistent statement because it did not directly contradict that testimony.

(3) The defendant argued that the trial court plainly erred when instructing on attempted first-degree murder when it fashioned its own instruction combining the pattern instructions on general attempt (N.C.P.I. – Criminal 201.10) and first-degree murder (206.10) rather than using the specific pattern instruction for attempted first-degree murder (206.17A). The Court acknowledge minor differences between 206.17A and the trial court's combined instruction—most notably in the definition of malice based on intentional infliction of a "wound" instead of "serious bodily harm." However, the Court of Appeals ultimately concluded that the difference did not amount to plain error because the defendant was unable to show prejudice resulting from it. Regardless of the instruction used in the attempted murder charge, the jury found the

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element of intent to kill when it found the defendant guilty of ADWIKISI based on the same action (shooting at the victims). Moreover, the crux of the defendant's defense was an alibi—the defendant did not argue that he lacked malice, but rather that he was not involved at all. As a result, any alleged error in the instruction would not have had a probable impact on the jury's finding of guilt, and was thus not plain error.

(4) Finally, the Court of Appeals agreed that the attempted first-degree murder judgment included a clerical error when it referenced the crime in one place as a class B1 felony. It is a class B2 felony under G.S. 14-2.5, and the Court remanded the matter to the trial court for correction of that error.

Arrest, Search, and Investigation

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Arrests & Investigatory Stops

(1) Stop based on alleged misplacement of the defendant’s registration plate renewal sticker was supported by reasonable suspicion; (2) If officer was mistaken in believing that law required sticker to be placed on right side of plate, the mistake was reasonable

State v. Amator, 2022-NCCOA-293, ___ N.C. App. ___ (May. 3, 2022)

In this McDowell County case, the defendant appealed from a judgment finding her guilty of trafficking in methamphetamine. She was convicted based on the discovery of drugs found in her car during a traffic stop. On appeal, she argued that the trial court erred in denying her motion to suppress the evidence discovered during the traffic stop, contending that the officer did not have reasonable suspicion to initiate the stop based on an alleged misplacement of her registration plate renewal sticker.

The Court of Appeals concluded that the trial court did not err in denying the defendant’s motion to suppress. Defendant was stopped for a violation of G.S. 20-66(c), which requires that the registration renewal sticker be displayed in the place prescribed by DMV. At the time the defendant was stopped, DMV had begun issuing single month/year renewal stickers, but had not updated administrative code provisions that required that separate “month and year stickers . . . be displayed on the plate in the correct position.” 19A N.C.A.C. 3C.0237 (2018). The registration card accompanying the single sticker instructed that the sticker be placed on the upper right corner of the plate; nevertheless, the defendant placed the sticker on the upper left corner of the plate. The Court held that the relevant law was ambiguous, that the officer relied on a quick reference guide and the instructions on the registration card in concluding there was a violation, and that this provided reasonable suspicion for the stop. If the officer was mistaken, the Court held, his mistake was reasonable.

(1) In the absence of a plea arrangement, a defendant is not required to give notice of his intent to appeal to pursue right to appeal denial of motion to suppress; (2) Officer did not have reasonable suspicion to stop the car in which the defendant was traveling based on its transporter license plate, and officer’s mistake of law regarding license plate was not objectively reasonable

State v. Jonas, ___ N.C. App. ___, 2021-NCCOA-660 (Dec. 7, 2021), *temp. stay allowed*, ___ N.C. ___, 865 S.E.2d 886 (December 22, 2021)

In this Cabarrus County case, the defendant was convicted of possession of a Schedule II controlled substance based on 0.1 grams of methamphetamine found in a backpack in the trunk of a vehicle in which the defendant was a passenger. The defendant moved to suppress the evidence on the basis that it was seized in connection with a traffic stop that was not supported by reasonable suspicion. The trial court denied the motion. Defendant pled guilty, without a plea arrangement with the State, and appealed.

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(1) G.S. 15-979(b) provides that an order finally denying a motion to suppress may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty. The North Carolina Supreme Court held in *State v. Reynolds*, 298 N.C. 380 (1979), that when a defendant intends to appeal from the denial of a motion to suppress pursuant to G.S. 15A-979(b), the defendant must give notice of that intention to the prosecutor and the court before plea negotiations are finalized. Absent such notice, the right to appeal is waived. The Court of Appeals held that the *Reynolds* notice requirement did not apply in the instant case because the defendant did not plead guilty as part of a plea arrangement. Thus, the defendant had a statutory right to appeal without having provided notice to the State and the trial court before entering his guilty plea.

(2) The officer who stopped the car in which the defendant was traveling testified that he stopped the car because it emerged from the empty parking lot of a closed business, a trailer had recently been stolen in that area, and the car was equipped with transporter plate, which the officer had never seen placed on a vehicle other than a truck. The Court of Appeals noted that, despite the officer's belief to the contrary, G.S. 20-79.2 "clear[ly] and unambiguous[ly]" permits transporter plates to be used on motor vehicles generally, not just trucks. Though the Fourth Amendment tolerates objectively reasonable mistakes, the Court concluded that the officer's mistake about the transporter plates was not objectively reasonable because the statute was not ambiguous. Thus, the officer's belief regarding the transporter plates could not support reasonable suspicion. The Court determined that the additional facts that the business was closed and there was a recent trailer theft in the area were insufficient to support reasonable suspicion. Accordingly, the Court held that the trial court erred in denying the defendant's motion to suppress. It reversed the trial court's order and remanded the case to the trial court for entry of an order vacating the defendant's guilty plea.

Though none of the circumstances alone would satisfy constitutional requirements, when considered in their totality, they provided officers with reasonable articulable suspicion to stop the defendant

State v. Royster, 280 N.C. App. 281, 2021-NCCOA-595 (Nov. 2, 2021)

In this Forsyth County case, the defendant was charged with possession of a firearm by a felon, several drug crimes including trafficking opium or heroin by possession, possession of a weapon on school property, and attaining the status of habitual felon after an investigatory stop on school grounds stemming from an anonymous tip. The police received a detailed anonymous report saying that a black male named Joseph Royster who went by the nickname "Gooney" had heroin and a gun in the armrest of his black Chevrolet Impala with a specific license plate number, that he was wearing a white t-shirt and blue jeans, had gold teeth and a gold necklace, and that he was parked near South Fork Elementary School. An experienced officer who received the tip searched a police database that showed a person by that name as a black male with gold teeth and a history of drug and weapon charges. Officers went to the named elementary school, saw a vehicle with the specified license plate number matching the

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description in the tip in the parking lot, and eventually saw a person matching the description in the tip return to the vehicle. When that person quickly exited the vehicle, reached back into it and turned it off, began to walk away from officers and reached for his waistband, officers frisked him for weapons and detained him for a narcotics investigation. The defendant moved to suppress, arguing that officers did not have reasonable articulable suspicion for the stop. The trial court denied the motion and the defendant pled guilty.

On appeal of the denial of the motion to suppress, the defendant argued that the anonymous call did not demonstrate sufficient reliability. The Court of Appeals noted that the anonymous call itself merely provided identifying information, and there was nothing inherent in the tip itself that would give officers reasonable suspicion to make the stop. The Court rejected the State's argument, based on *Navarette v. California*, 572 U.S. 393 (2014), that the caller's use of a phone to make the tip sufficiently bolstered its reliability, because there was no evidence as to whether the caller used 911 or a non-emergency number or otherwise preserved her anonymity. The Court was likewise unpersuaded that the caller's use of the defendant's nickname showed a level of familiarity with the defendant that made the call sufficiently reliable in its assertion of illegality. Thus, the anonymous call itself was insufficient to provide officers with reasonable articulable suspicion.

Looking at the totality of the circumstances, however, the Court concluded that officers did have reasonable articulable suspicion. The defendant's actions in exiting the vehicle, reaching back into it, walking away from officers, and reaching for his waistband demonstrated evasive behavior that went beyond merely walking away from officers and supported a finding of reasonable suspicion for the stop. Additionally, the caller's allegation that the defendant was in possession of a firearm, coupled with his presence on school grounds and his prior criminal record obtained through the police database gave officers reasonable suspicion that he was in possession of a firearm, and that he was thus violating the criminal statute prohibiting the possession of a firearm on school property. As a result, the stop was deemed proper, and the Court concluded that the trial court did not err in denying the defendant's motion to suppress.

Checking station to detect motor vehicle violations and impaired driving was reasonable and constitutional as the relevant factors weighed in favor of the public interest

State v. Cobb, 2022-NCSC-57, ___ N.C. ___ (May. 6, 2022)

In this Harnett County case, the defendant pled guilty to impaired driving after the trial court denied her motion to suppress evidence obtained at a checking station set up to ensure compliance with Chapter 20 and to detect impaired driving. The Court of Appeals vacated the trial court's order denying the motion to suppress, determining that the trial court did not adequately weigh the factors necessary to determine whether the public interest in the checking station outweighed its infringement on the defendant's Fourth Amendment privacy interests. The State appealed. The Supreme Court reversed and reinstated the order of the trial court, finding that the unchallenged findings of fact supported the conclusion that the checking station was reasonable and constitutional as the relevant factors (gravity of public concern,

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degree to which seizure advances public interest, and severity of the interference with individual liberty) weighed in favor of the public interest. The Supreme Court cited the trial court's findings that the checkpoint was carried out on a heavily traveled road pursuant to a plan that required the stopping of all vehicles during a time frame conducive to apprehending impaired drivers. The Court further relied upon the trial court's findings that the checking station was operated under a supervising officer and that most drivers were stopped for less than one minute.

(1) Stop was not unreasonably extended where officer had not yet determined whether to charge the defendant and; (2) Consent was freely and voluntarily given

State v. Jordan, ___ N.C. App. ___, 2022-NCCOA-214 (Apr. 5, 2022), *temp. stay allowed*, ___ N.C. ___, 871 S.E.2d 808 (May 11, 2022)

Law enforcement in Guilford County received information that the defendant was selling drugs from his girlfriend's apartment. They conducted a controlled buy at the location with the help of an informant, who identified the defendant as the seller. Police were later surveilling the home and saw the defendant leave with his girlfriend in her car. The car was stopped for speeding 12 mph over the limit. The stopping officer saw the defendant reach for the center console and smelled a strong odor of marijuana upon approach. The officer removed the occupants from the car and searched it, leading to the discovery of marijuana. During the search, an officer contacted the drug investigators about the possibility of notifying the defendant of the wider drug investigation. This took approximately five to seven minutes. The on-scene officers then informed the pair of the ongoing drug investigation of the defendant and sought consent to search the apartment, which the girlfriend gave. A gun and cocaine were discovered there, and the defendant was charged with firearm by felon and possession of cocaine. He moved to suppress, arguing that the traffic stop was unreasonably extended and that any consent was invalid. The trial court denied the motion, and the defendant entered a guilty plea, preserving his right to appeal the denial of the motion. On appeal, the Court of Appeal unanimously affirmed.

(1) The defendant argued since the police never acted on the speeding or marijuana offenses discovered during the traffic stop, the mission of the stop was complete, and the officer deviated from the mission of the stop by delving into an unrelated drug investigation and seeking consent to search the apartment. The court disagreed:

[A]t the time Officer Fisher asked for consent to search the Apartment, there is no evidence to suggest Officer Fisher had already made a determination to refrain from charging Defendant for the traffic violation or marijuana possession. Instead, the Record seems to indicate that at the time of Officer Fisher's request for consent to search the Apartment, the stop had not been 'otherwise-completed' as he had not yet made a decision on whether to charge Defendant for the marijuana possession." *Jordan Slip op.* at 9-10.

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The act of asking for consent to search the apartment therefore occurred during the lawful course of the stop. Further, officers had reasonable suspicion that the defendant was selling drugs, justifying extension of the stop even if the original mission of the stop was complete at the time of the request for consent. Given the tip, the controlled purchase, law enforcement surveillance of the residence (which included observing a high volume of guests visiting the home), law enforcement likely had probable cause to arrest the defendant or obtain a warrant to search the apartment. “Consequently, the officer was justified in extending the seizure to question Defendant about the sale of heroin and crack-cocaine even though it was unrelated to the traffic violation.” *Id.* at 12.

(2) Officers had informed the pair that police would seek a search warrant, or that they could consent to a search of the apartment. The defendant argued that this was improper coercion and that any consent was therefore involuntary and invalid. The court disagreed. The defendant and his girlfriend were informed of the right to refuse consent, the girlfriend signed a written consent form, and neither person objected or attempted to revoke consent during the search. Further, the officers did not use any threats or other “inherently coercive tactics” in obtaining consent. Thus, the trial court properly determined that consent was freely and voluntarily given. The trial court’s judgment was consequently affirmed.

The trial court’s findings supporting its denial of the defendant’s motion to suppress were not supported by competent evidence and a deputy may have unlawfully extended a seizure of the defendant that was initiated based upon the deputy’s mistaken belief that the defendant was the subject of outstanding arrest warrants

State v. Mullinax, ___ N.C. App. ___, 2022-NCCOA-165 (Mar. 15, 2022)

In a drug possession case, some of the trial court’s findings in denying the defendant’s motion to suppress were not supported by competent evidence. A uniformed deputy approached the defendant while she sat in her car in a parking lot based on the deputy’s mistaken belief that the defendant was a different person, a Ms. McConnell, who was the subject of outstanding arrest warrants. Five minutes after obtaining the defendant’s driver’s license and a total of eight minutes into the encounter, the deputy returned to the defendant’s car having determined that she was not Ms. McConnell and was not subject to any outstanding warrants. At that time, the deputy did not return the defendant’s license and asked for consent to search the car. Fifty seconds later a backup deputy arrived and noticed what he suspected were drugs in the defendant’s pocket. The backup deputy asked to search the defendant’s pockets, retrieved a bag of methamphetamine, and placed her under arrest. Ruling on the defendant’s motion to suppress, the trial court found that the defendant was not seized at the time the first deputy returned to her car while still in possession of her license and “essentially found” that no gap in time occurred between the return to the car and the discovery of drugs in the defendant’s pocket. Contrary to the trial court, the Court of Appeals determined based on its review of bodycam footage of the incident that the defendant was seized at some point prior to the deputy’s return to the defendant’s car, though it did not resolve the legality of the seizure. Saying that the case was similar to *State v. Parker*, 256 N.C. App. 319 (2017), where it

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held that a stop was illegally extended without reasonable articulable suspicion, the Court of Appeals remanded the case for additional findings as to whether any such suspicion justified the defendant's continued seizure during the delay between the deputy's return to the defendant's vehicle and the detection of the drugs in her pocket by the backup deputy 50 seconds later.

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

State v. Johnson, 279 N.C. App. 475, 2021-NCCOA-501 (Sept. 21, 2021).

In this felony possession of cocaine case, the trial court erred by denying the defendant's motion to suppress evidence that was discovered pursuant to a consent search where the request for consent and the search measurably extended a traffic stop without reasonable suspicion in violation of *Rodriguez*. An officer made a traffic stop of the defendant after observing him driving without wearing a seatbelt. "Almost immediately," the officer asked the defendant to exit the vehicle and accompany him to his patrol car. As they walked, the officer asked if the defendant possessed anything illegal and whether he could search the defendant. The defendant raised his hands above his waist and the officer reached into the defendant's sweatshirt pocket, discovering a plastic wrapper containing soft material he believed to be powder cocaine.

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

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

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

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

State v. France, 279 N.C. App. 436, 2021-NCCOA-498 (Sept. 21, 2021).

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

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

Interrogation and Confession

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The defendant was not in custody for *Miranda* purposes while barricading himself in his bedroom while officers served an arrest warrant

State v. Conner, 2022-NCCOA-295, ___ N.C App. ___ (May 3, 2022)

In this McDowell County case of first impression, the Court of Appeals determined that law enforcement officers were not required to provide the defendant with *Miranda* warnings while he barricaded himself in a bedroom for many hours and threatened to commit suicide while officers served an arrest warrant for him at his aunt's home. Because the defendant was not in custody for *Miranda* purposes while barricaded in the bedroom, the court rejected his argument that un-warned incriminating statements he made indicating that there were drugs in the bedroom should be suppressed. The court explained that the defendant's own actions prevented officers from placing him in *Miranda* custody and noted that negotiations between the defendant and officers while he was barricaded were "limited to the purpose of having defendant safely leave the bedroom." The court vacated and remanded one judgment in the case for correction of a clerical error related to sentencing.

The trial court appropriately considered evidence regarding the interrogation of a juvenile without the need for further expert testimony

State v. Benitez, ___ N.C. App. ___, 2022-NCCOA-261 (Apr. 19, 2022)

This Lee county case has a lengthy procedural history, summarized in *State v. Benitez*, 258 N.C. App. 491, 813 S.E.2d 268 (2018) (*Benitez I*). Most recently, the case was remanded to the trial court to conduct a review of the totality of the circumstances of the juvenile defendant's statements to law enforcement to determine if he knowingly and voluntarily waived his *Miranda* rights. The defendant made the statements at age 13 during two and a half hours of questioning that occurred at the Sheriff's office. The statements were made through an interpreter and in the presence of the juvenile's uncle. The juvenile's initial motion to suppress was denied, and he subsequently pled guilty to first-degree murder. On remand, the trial court again denied the motion to suppress.

The Court of Appeals rejected the defendant's argument that the trial court was not in a position to make certain findings without the benefit of expert testimony. Whether a juvenile understood *Miranda* warnings does not require testimony of an expert. It is, the Court concluded, a question of law to be answered by the court based on the evidence presented by both sides. The trial court appropriately considered evidence regarding the circumstances surrounding the interrogation, as well as the juvenile's age, experience, education, background, intelligence, and capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. The trial court did not need further expert testimony on these topics to make its determination. The trial court was also clear that evidence from the capacity hearing, held well after the interrogation occurred, was not used in determining that the defendant understood the *Miranda* warnings at the time of interrogation. The binding findings of fact, considered as directed by *Benitez I*, support the trial

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court's denial of the motion to suppress. The Court of Appeals therefore affirmed the trial court.

Search Warrants

In a first-degree murder case, the Court of Appeals rejected the defendant's challenges to (1) the validity of a search warrant for his home; (2) the trial court's refusal to suppress electronic monitoring data from a GPS unit the defendant was wearing at the time of the offense; (3) the trial court's refusal to allow him to cross examine a witness; (4) the admission of expert testimony concerning firearms identification and examination; (5) the trial court's denial of his motion to dismiss the murder charge

State v. Gallion, ___ N.C. App. ___, 2022-NCCOA-164 (Mar. 15, 2022)

In this first-degree murder case, the defendant challenged (1) the validity of a search warrant for his home; (2) the trial court's refusal to suppress electronic monitoring data from a GPS unit the defendant was wearing at the time of the offense; (3) the trial court's refusal to allow him to cross examine a witness on a particular issue; (4) the admission of expert testimony concerning firearms identification and examination; (5) the trial court's denial of his motion to dismiss the murder charge. The Court of Appeals rejected each of the defendant's arguments and upheld his conviction.

(1) The court rejected the defendant's argument that a search warrant for his home address was defective because of an insufficient nexus between the murder, the evidence sought, and the defendant's address. The court noted, among other things, that the search warrant affidavit explained that officers looking through a window had seen bullets on a shelf inside a building at the defendant's address, that firearms were found in the defendant's truck when he was arrested, and that there were blood smears on the defendant's truck and his hands when he was arrested. The allegations in the warrant affidavit were sufficient for a magistrate to reasonably infer that the items sought under the warrant, such as weapons, ammunition, bloodstains, and DNA evidence, likely could be found at the defendant's residence. The court also determined that the trial court's findings of fact related to the defendant's motion to suppress supported the trial court's conclusion that there was probable cause to support the issuance of the warrant.

(2) The Court of Appeals determined that no plain error occurred in connection with the trial court refusing to suppress electronic monitoring data from a GPS device the defendant was wearing at the time of the offense because he was on post-release supervision. Among other things, the court noted that the defendant moved to suppress the data under G.S. 15A-974(a)(2) as a substantial violation of Chapter 15A while alleging that the evidence was obtained in violation of G.S. 15-207. The court explained that G.S. 15A-974(a)(2) "does not provide a mechanism by which [the defendant] could allege evidence was obtained as a result of a substantial violation of *Chapter 15*."

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(3) The Court of Appeals rejected the defendant's argument that he should have been allowed to cross-examine a witness a witness concerning a Facebook message that the victim sent his mother on the day of the murder suggesting that the victim, who was killed in his home, planned to go somewhere else to fight an unknown person. The trial court properly excluded the testimony on hearsay grounds, and, given that the message did not point directly towards the guilt of another party, the Court of Appeals concluded that it was "too remote and speculative to be relevant."

(4) The court next rejected the defendant's challenge to expert firearm identification evidence, which it examined for plain error because of the defendant's failure to object to the admission of the testimony at trial. Conducting a detailed Rule 702 analysis and recounting significant portions of the expert's testimony, which generally opined that casings and bullets collected from the crime scene were fired from a pistol seized from the defendant, the court determined that the testimony was based on sufficient facts or data and was the product of reliable principles and methods which the expert applied reliably to the facts of the case, as required under Rule 702.

(5) Finally, the court rejected the defendant's argument that the trial court erred by denying his motion to dismiss the first-degree murder charge on the basis of insufficient evidence of malice, premeditation, and deliberation or that the defendant was the perpetrator. The court found that the defendant had both the opportunity and the capability to commit the murder, as evidenced by GPS data placing him at the crime scene and witness testimony that on the day in question the defendant brandished a firearm matching the murder weapon. Evidence tending to show that the defendant fired three shots into the victim's head, two of which were from close range, was sufficient on the issues of malice and premeditation and deliberation.

The trial court properly found the affidavit supported the magistrate's finding of probable cause and the trial court applied the proper standard in its order

State v Kochetkov, 280 N.C. App. 351, 2021-NCCOA-617 (Nov. 16, 2021)

An acquaintance of the defendant contacted the local police department about several posts made on a Facebook account with the defendant's name. The department used screenshots of the Facebook posts to obtain an arrest warrant for communicating threats and later obtained a search warrant of the defendant's home to seize items related to the crime. The search warrant application included screenshots of the Facebook posts and outlined the defendant's prior encounters with the police department.

One of the items seized in the search was the defendant's cell phone, on which images of alleged child pornography were found. These images led to a subsequent search warrant and search of the defendant's home, ultimately leading to the defendant being charged and indicted with five counts of second-degree sexual exploitation of a child. The trial court denied the defendant's motion to suppress, and the defendant ultimately pled guilty to all five counts

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of second-degree sexual exploitation of a child, having given proper notice of his intention to appeal.

On appeal, the defendant first argued that the trial court erred in denying his motion to suppress evidence because the affidavit to the warrant application did not establish probable cause he committed the designated offense. In rejecting this argument, the Court of Appeals noted that the affidavit included screenshots of Facebook posts allegedly made by the defendant which contained content relating to threats, violence, and referencing schools, as well as information of defendant's prior encounters with the police, including an arrest for trespassing at a nearby elementary school. The Court thus concluded that the information was sufficient to support a magistrate's finding, under the totality of the circumstances test, that evidence of a crime may be found at the place to be searched and in the items to be seized.

The defendant next argued that the information listed in the affidavit was stale because it failed to establish when the Facebook posts were made or discovered. More specifically, the defendant contended that the screenshots of the Facebook posts did not include dates and times, nor did the affidavit provide information as to when the acquaintance provided the information to the police. The search warrant provided the items to be seized were electronic devices to include cell phones, computers, tablets, hard drive devices, USB drives, CDs, and disks; written documentation to include any handwritten notes, printed notes, photographs, or other documents; and weapons to include handguns, long guns, weapons of mass destruction, or explosives. The Court of Appeals concluded that because the items to be seized included items with enduring utility, the information was not stale, despite the lack of date and time information.

The defendant's final argument was that the trial court erred because its order did not find that the affidavit supplied probable cause to believe that the designated crimes had occurred or were about to occur. However, the trial court explicitly found that the affidavit established probable cause in its findings of fact and conclusions of law.

The trial court erred in denying the defendant's motion to suppress when the search warrant affidavit did not provide a sufficient basis for a finding of probable cause

State v. Eddings, 280 N.C. App. 204, 2021-NCCOA-590 (Nov. 2, 2021)

In this Buncombe County case, the defendant was convicted by a jury of possession with intent to sell or deliver fentanyl, possession of fentanyl, possession of firearm by a felon, and maintaining a building for keeping or selling controlled substances. Officers conducted a search of the defendant's home when they believed it to be the place where another man, Robert Jones, obtained drugs that were sold to a confidential informant. That suspicion was based on officers' multiple observations of Jones visiting the defendant's address for short periods before engaging in controlled purchases, including an incident in which officers conducted a traffic stop on Jones immediately after he visited the defendant's address, which prompted Jones to ingest narcotics while officers were pursuing him. The defendant moved to suppress the

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evidence obtained pursuant to the search, arguing that the warrant affidavit lacked sufficient probable cause. The trial court denied the motion.

Over a dissent, the Court of Appeals reversed the trial court. The majority concluded that the affidavit lacked sufficient facts to establish probable cause in that it did not describe how much time passed between Jones leaving the defendant's house and being pulled over, how Jones obtained drugs, or why law enforcement believed the defendant's address was the source of supply. The Court thus concluded that the trial court erred in denying the defendant's motion to suppress, and that the defendant was entitled to a new trial.

A dissenting judge would have concluded that the affidavit provided a sufficient basis for probable cause to search the defendant's residence. The judge noted that the affidavit's references to drug purchases by Jones in "recent days" was a specific enough reference to the passage of time, and the trial court's reference to officers' stop of Jones after leaving the defendant's residence as "immediate" was accurate under a commonsense reading of the warrant.

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

State v. Robinson, 279 N.C. App. 643, 2021–NCCOA–533 (Oct. 5, 2021)

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

The appellate court first found that the defendant failed to preserve his right to appeal because he did not give notice of his intent to appeal when the plea was entered. However, the court granted the petition for *writ of certiorari* and reached the merits on the grounds that the defendant's trial counsel was responsible for this deficiency, rather than the defendant. Defendant's appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that he could not find any meritorious issues to argue and asking the court to conduct its own review. The appellate court reviewed the record and the majority likewise concluded that there were no meritorious issues regarding the sufficiency of the indictments, denial of the motion to suppress, factual basis for the guilty plea, or sentencing. On the motion to suppress, the majority agreed with the trial court that there was no evidence of bad faith on the part of the officers in turning off their body cameras, since they were instructed to do so by a

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supervisor on scene after the walk-through was completed, and they were acting in accordance with their department's policy. Additionally, the defendant was present during the execution of the search warrant, and there was no showing that any materially exculpatory evidence was lost. The majority therefore found no error.

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

Searches

(1) The trial court properly denied the defendant's motion to suppress where officers had reasonable suspicion to search the vehicle involved in an accident to find the identification of the purported driver and developed probable cause to search the defendant's person and backpack. (2) The trial court's instructions to the jury adequately explained the knowledge element and requirement of the possession of methamphetamines charge.

State v. Julius, ___ N.C. App. ___, 2022-NCCOA-135 (Mar. 1, 2022)

Officers responded to a single-car accident in May 2018. At the time of the crash, the defendant was the passenger, and her acquaintance, Kyle, was driving the vehicle with the defendant's permission. Witnesses at the site told the officers the driver fled the scene and walked into nearby woods because he had outstanding warrants. The defendant told the officers that she knew the driver as "Kyle" but that she did not know his full or last name. One officer searched the SUV to look for Kyle's driver's license or ID. The officer found a bag in which he discovered a black box that contained two cell phones, a scale, and two large bags of a clear crystal-like substance, which was later determined to be of methamphetamine.

The officers arrested the defendant then searched the bag she had with her outside of the car. Inside of the defendant's bag, the officers found a glass smoking pipe, five cell phones, a handgun, a notebook, \$1,785 in cash, and a clear container holding several bags of a white crystal-like substance, one of which contained one tenth of an ounce of methamphetamine.

Defense counsel filed a pretrial motion to suppress the evidence found in both bags, alleging the search of the vehicle violated the defendant's Fourth Amendment protection from unreasonable searches and seizures. During a hearing, the officer testified that he had searched the vehicle to locate the driver's identification in order to investigate the motor vehicle collision and a potential hit-and-run. The trial court concluded the warrantless search was constitutional because the officer had probable cause to search the SUV and denied the defendant's motion. The defendant pled guilty of possession of methamphetamine and was convicted of trafficking in methamphetamine by possession by a jury's verdict. The defendant appealed.

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(1) On appeal, the defendant argued that the trial court erred in denying her motion to suppress evidence found in a warrantless search of her parents' vehicle without sufficient probable cause. The Court of Appeals concluded that the officers had reasonable suspicion to search the vehicle to verify the claims of another occupant and custodian of the vehicle to determine that alleged driver's identity. The Court reasoned that Kyle's identification may not have been inside the vehicle, but there was no other way for the officers to try to find information to identify the driver if the passenger and other witnesses did not know or would not provide his full name, and the identification of the purported driver may have reasonably been determined from looking inside the wrecked vehicle. The Court thus held that the trial court properly denied the defendant's motion to suppress.

(2) The defendant also argued that the trial court plainly erred by failing to provide an additional instruction about her actual knowledge of the drugs found inside the vehicle. The Court determined that the trial court adequately advised the jury of the knowledge requirement by stating, "a person possesses methamphetamine if the person is aware of its presence . . . and intent to control the disposition or use of that substance." Slip op. at ¶ 23. The Court thus concluded the jury was sufficiently instructed that the State had to prove beyond a reasonable doubt that the defendant knowingly possessed methamphetamine, and the defendant could not be convicted if she lacked knowledge of the methamphetamine found inside of her parent's vehicle.

Judge Inman dissented in part to say that while there may have been probable cause to justify the issuance of a warrant by a magistrate, no exception to the warrant requirement authorized the warrantless search of the vehicle on the scene of the single-car accident in this case. Judge Inman concurred in part to say she would hold that the trial court erred in failing to further instruct the jury about the defendant's knowledge as prescribed by our pattern jury instructions but did not conclude that the error had a probable impact on the jury's verdict.

The defendant did not have standing to challenge the placement of a GPS tracking device on a vehicle he did not own or possess

State v. Lane, 280 N.C. App. 264, 2021-NCCOA-593 (Nov. 2, 2021)

In this Wake County case, evidence of the defendant's crimes was obtained using a GPS tracking device installed, pursuant to a court order, on a car owned by Sherry Harris and driven by Ronald Lee Evans. Evans was the target of the investigation. When officers intercepted the vehicle as it returned from a trip to New York, the defendant was driving and Evans was a passenger. After an initial mistrial, the defendant ultimately pled guilty to attempted trafficking heroin by possession and trafficking heroin by transportation, but preserved his right to appeal the trial court's denial of his motion to suppress evidence obtained as a result of the GPS device.

The Court of Appeals concluded that the defendant did not have standing to challenge use of the GPS device. Under the common law trespass theory of a search, a search happens when

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government agents intrude into a constitutionally protected area to obtain information. Here, the defendant offered no evidence that he possessed the car to which the GPS device was attached such that any trespass by the government violated his rights as opposed to the rights of the owner (Harris) or usual driver (Evans). Likewise under a reasonable expectation of privacy theory, the defendant could not show that he had a reasonable expectation of privacy in his movements in someone else's car on a public thoroughfare. To the contrary, the Court said, "[f]or the Defendant, the [car] was a vehicle for a trip to conduct a heroin transaction. Defendant did not have a reasonable expectation of privacy to confer standing to challenge the court order issue on probable cause." Slip op. ¶ 30.

Standing

1) The defendant had standing to contest the search of a building where he was a late-night occupant and exercised apparent control of the door and a safe within; (2) Potential loss of car keys tied to stolen car was not exigent circumstance justifying warrantless entry and drugs discovered inside the building likewise could not support warrantless entry; (3) Purported consent was invalid as the product of an illegal warrantless entry and was not sufficiently attenuated from the illegal police actions; (4) Search warrant for safe based on sight of drugs inside the home did not establish probable cause

State v. Jordan, ___ N.C. App. ___, 2022 NCCOA 215 (Apr. 5, 2022), *temp. stay allowed*, ___ N.C. ___, 871 S.E.2d 101 (April 21, 2022)

Charlotte-Mecklenburg police received a report of a stolen car and information about its possible location. Officers went to the location, which was part residence and part commercial establishment. A car matching the description of the stolen vehicle was in the back parking lot. As police watched, a man came out of the building and approached the car as if to enter it. He noticed the unmarked police car and immediately returned to the building, alerting the occupants to the presence of police. Police pulled into the driveway intending to detain the man. The defendant opened the door of the building from inside and the man who had approached the stolen car went inside, although the door was left open. An officer approached and asked the man to come out and speak with police before immediately stepping into the building through the open door. That officer noticed a safe next to the defendant and saw the defendant close the safe, lock it, and place the key in his pocket. More officers arrived on scene and noticed drug paraphernalia in plain view. Officers swept the house and discovered a gun in a bedroom. At this point, officers established that a man inside either owned or leased the building and requested his consent to search. The man initially refused but assented when officers threatened to place everyone in handcuffs and to obtain a search warrant. The defendant informed officers that anything they found in the home was not his and that he did not live there. He denied owning the safe, but a woman who was present at the time later informed officers that the safe belonged to the defendant. Officers obtained a search warrant for the safe and discovered money, drugs, paraphernalia, and a gun inside. The defendant was subsequently charged with trafficking, firearm by felon, habitual felon, and other offenses. He moved to suppress. The trial court denied the motion, apparently on the basis that the

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defendant lacked standing (although because no written order was entered, the findings and conclusions of the trial court were not easily determined). The defendant was convicted at trial of the underlying offenses and pled guilty to having obtained habitual felon status. The trial court imposed a minimum term of 225 months in consecutive judgments. On appeal, a unanimous panel of the Court of Appeals reversed.

(1) The defendant had a reasonable expectation of privacy in the building. He opened the door when it was knocked and was one of only four people inside the home at a late hour. The defendant further had apparent permission to keep the safe inside and clearly had an interest in it as the person with its key and the ability to exclude others. While the defendant did not own or lease the property, this was not enough to defeat his expectation of privacy. The defendant also disclaimed ownership of the safe to police, and the State argued that this amounted to abandonment, defeating any privacy interest in the safe. The court disagreed, noting that the defendant only made that remark after the police illegally entered the home and that abandonment does not apply in such a situation. In its words: “[W]hen an individual ‘discards property as the product of some illegal police activity, he will not be held to have voluntarily abandoned the property or to have necessarily lost his reasonable expectation of privacy with respect to it[.]’” *Jordan* Slip op. at 14 (citation omitted). Thus, the defendant had standing to challenge the police entry and search.

(2) The trial court determined that officers had reasonable suspicion to speak with the man who was seen approaching the stolen car. However, this did not justify warrantless entry into the home. The State argued that the entry was supported by exigent circumstances, in that the keys to the stolen car and the drug paraphernalia seen inside the building could have been easily destroyed. However, there was no evidence that the first officer who approached the home saw any drug paraphernalia at the time and the officer therefore could not have had a legitimate concern about its destruction. There was likewise no explanation from the State regarding the need for immediate warrantless entry to preserve the car keys evidence. Because officers had already seen the man approach the car with the keys and because possession of a stolen car may be established by constructive possession, there was no immediate need to obtain the car keys. Further, there was no immediate risk of destruction of evidence where the occupants of the home left the door open, and an officer entered the home within “moments” of arrival. Exigent circumstances therefore did not support the warrantless entry.

(3) The State also argued that the person with a property interest in the building gave valid consent, and that this consent removed any taint of the initial illegal entry. Illegally obtained evidence may be admissible where the link between the illegal police activity and the discovery of evidence is sufficiently attenuated. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). Here, the taint of the illegal entry had not dissipated. Officers obtained consent soon after entering the home, no intervening circumstances arose between the entry and the obtaining of consent, and officers purposefully and flagrantly entered the building without a warrant or probable cause. Any consent was therefore tainted by the initial police illegality and could not justify the search.

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(4) Although police did ultimately obtain a search warrant for the safe, the information contained in the search warrant application was based on information obtained by police after they were inside the building. There was no evidence that officers saw any drugs prior to entry, so any evidence obtained as a result was the fruit of the poisonous tree. Without the drugs evidence, the stolen car in the parking lot, the man walking up to the stolen car, and his abrupt return from the car to the building did not supply probable cause to search the building or safe. According to the court:

Because the affidavit supporting the issuance of the search warrant, stripped of the facts obtained by the officers' unlawful entry into the residence, does not give rise to probable cause to search the residence for the evidence of drugs and drug paraphernalia described in the warrant, 'the warrant and the search conducted under it were illegal and the evidence obtained from them was fruit of the poisonous tree.' *Id.* at 24.

The denial of the motion to suppress was therefore reversed and the case was remanded for any further proceedings.

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Human Trafficking and Related Offenses

In this human trafficking case involving multiple victims, (1) the trial court did not abuse its discretion by allowing the defendant to represent himself; (2) the indictments were sufficient to convey subject matter jurisdiction; (3) the trial court did not err by entering judgments for multiple counts of human trafficking for each victim; and (4) the trial court did not err in determining the defendant’s prior record level

State v. Applewhite, ___ N.C. App. ___, 2021-NCCOA-694 (Dec. 21, 2021), *review allowed*, ___ N.C. ___, 871 S.E.2d 511 (May 4, 2022)

In this human trafficking case involving multiple victims, (1) the trial court did not abuse its discretion by allowing the defendant to represent himself; (2) the indictments were sufficient to convey subject matter jurisdiction; (3) the trial court did not err by entering judgments for multiple counts of human trafficking for each victim; and (4) the trial court did not err in determining the defendant’s prior record level.

(1) The Court of Appeals rejected the defendant’s argument that the trial court’s statements concluding that he had an “absolute right” to represent himself coupled with the trial court’s failure to consider whether he fell into the “gray area” of being competent to stand trial but incapable of representing himself was a mistake of law requiring a new trial. While the defendant suffered from an unspecified personality disorder and drug use disorders, the record showed that the trial court “undertook a thorough and realistic account of Defendant’s mental capacities and competence before concluding Defendant was competent to waive counsel and proceed *pro se*.” The Court of Appeals noted that after interacting with him, considering his medical conditions, and receiving testimony concerning his forensic psychiatric evaluation, two judges had ruled that Defendant was competent to proceed and represent himself. The Court of Appeals said that even if the trial court erred in allowing the defendant to represent himself, he invited the error by disagreeing with the manner of representation of appointed counsel and any such error was harmless beyond a reasonable doubt.

(2) The Court of Appeals rejected the defendant’s arguments concerning the sufficiency of the seventeen indictments charging him with human trafficking of six different victims. The Court noted that the indictments alleged every element of the offense within a specific time frame for each victim and tracked the language of the relevant statute word for word.

(3) The Court then turned to and rejected the defendant’s argument that human trafficking is a continuous offense and may only be charged as one crime for each victim. The Court explained that the defendant’s interpretation of G.S. 14-43.11, which explicitly provides that each violation of the statute “constitutes a separate offense,” would “result in perpetrators exploiting victims for multiple acts, in multiple times and places, regardless of the length of the timeframe over which the crimes occurred as long as the Defendant’s illegal actions and control

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over the victim were ‘continuous.’” The Court characterized human trafficking as “statutorily defined as a separate offense for each instance.”

(4) Finally, the Court determined that the defendant failed to show any error in the trial court’s calculation of his prior record level for sentencing purposes. With regard to a prior federal felon in possession of a firearm charge, the defendant conceded its classification as a Class G felony on the basis of substantial similarity by not objecting at trial when given the opportunity. Likewise with regard to a misdemeanor drug paraphernalia charge, the defendant conceded its classification as a Class 1 misdemeanor by not objecting when given the opportunity.

Judge Arrowood concurred in part and dissented in part by separate opinion, expressing his view that it was improper to convict the defendant of multiple counts per victim of human trafficking. Judge Arrowood explained that North Carolina precedent, specifically involving issues of first impression addressing statutory construction, “clearly instructs that, where a criminal statute does not define a unit of prosecution, a violation thereof should be treated as a continuing offense.” Judge Arrowood then proceeded with a lengthy and detailed analysis of the appropriate unit of prosecution for human trafficking in North Carolina.

Animal Fighting

(1) Sufficient evidence supported dogfighting convictions; (2) Leading question during State’s direct examination was not error; (3) The trial court did not err by ordering restitution for all the seized animals or by failing to explicitly consider the defendant’s ability to pay, but erred in converting the restitution award to a civil judgment absent statutory authorization

State v. Crew, ___ N.C. App ___, 2022-NCCOA-35 (Jan. 18, 2022)

The defendant was charged with and convicted of dogfighting and related offenses in Orange County. (1) He argued the evidence was insufficient to establish his specific intent to keep the dogs for purposes of fighting. The court disagreed. When the county Animal Services officials visited the property, they found equipment used in the strength training of dogs, at-home medications used to treat animal wounds, and an apparent dogfighting pit, as well as notes on preparing dogs for fights and dogfighting magazines. There was also evidence that many of the dogs had medical conditions commonly associated with dogfighting. This was sufficient evidence of the defendant’s specific intent, and the trial court properly denied the motion to dismiss for insufficient evidence.

(2) During direct examination of its expert witness, the State asked a leading question about the defendant’s intent. The defendant did not object at trial but complained on appeal that the question amounted to plain error. The court disagreed, noting that trial courts have the discretion to allow leading questions concerning evidence previously admitted without objection, as was the case here. The court further observed that plain error review is not available for discretionary decisions of the trial court, and the case “did not remotely approach”

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the circumstances where invocation of Rule 2 of the Rules of Appellate Procedure was warranted to obtain review. Even assuming plain error review was available, the court found there was no error—plain or otherwise—and rejected this argument.

(3) The trial court ordered the defendant to pay Animal Services restitution in the amount of \$70,000 for its care and keep of the animals and immediately converted the award to a civil judgment (presumably based on the 60-month minimum active portion of the sentence imposed in the case). Thirty dogs were seized from the defendant's property, but he was only convicted of offenses relating to 17 of the animals. According to the defendant, the restitution award should have therefore been proportionally reduced. The court disagreed, observing that "[t]he trial court may impose restitution for 'any injuries or damages arising directly and proximately out of the offense committed by the defendant,'" pointing to G.S. 15A-1340.34(c). *Crew Slip op.* at 9. Because the defendant's crimes resulted in the removal of all the animals, he could properly be held responsible for the cost of caring for the animals.

The defendant also argued that the trial court erred in failing to consider his ability to pay before ordering restitution. While the trial court need not make express findings on the issue, G.S. 15A-1340.36(a) requires the judge to consider the defendant's ability to pay among several other factors when deciding restitution. Here, there was evidence in the record concerning the defendant's income, the price of a "good puppy," and of the defendant's living arrangements. "Based on this evidence, the trial court's determination that the defendant had the ability to pay was within the court's sound discretion and certainly not manifestly arbitrary or outside the realm of reason." *Crew Slip op.* at 10-11.

Finally, the defendant argued the trial court improperly converted the restitution award to a civil judgment. The court agreed. The restitution statutes distinguish between offenses subject to the Crime Victim's Rights Act ("VRA") and offenses exempt from that law. G.S. 15A-1340.38 expressly authorizes a trial court to convert an award of restitution to a civil judgment in VRA cases. No similar statutory authorization exists for non-VRA cases. While some other offenses have separate statutory provisions permitting conversion of a restitution award to a civil judgment (*see, e.g.*, G.S. 15-8 for larceny offenses), no such statute applied to the crimes of conviction here. The court noted that G.S. 19A-70 authorizes animal services agencies to seek reimbursement from a defendant for the expenses of seized animals and observed that the agency failed to pursue that form of relief. The court rejected the State's argument that the trial court's action fell within its inherent authority. The civil judgments were therefore vacated. The convictions and sentence were otherwise undisturbed.

General Crimes

(1) A general objection with no request for a voir dire does not preserve the defendant's right to appellate review of a motion to suppress. (2) The trial court did not err by denying codefendants' motions to dismiss when, viewed in the light most favorable to the State, there was substantial evidence of each element of the charges. (3) A defendant's motion for judgment notwithstanding

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the verdict was not preserved for appellate review when trial counsel did not state the specific grounds for the motion.

State v. Draughon, 2022-NCCOA-58, ___ N.C. App. ___ (Feb. 1, 2022)

In this Hoke County case, defendant Stanley Draughon was found guilty by a jury of assault with a deadly weapon with the intent to kill inflicting serious injury (AWDWIKISI) and conspiracy to commit AWDWIKISI, and defendant Phyllis Mull was found guilty of conspiracy to commit AWDWIKISI. The charges arose from an incident in which Draughon and an unidentified man beat a victim, McBryde, with an object and tased him, breaking several bones in his arms and legs, among other injuries. At trial, Draughon's lawyer objected to the State's questioning related to Draughon's cell phone, which had been seized from the vehicle of the person who drove Draughon to the sheriff's office to turn himself in. Evidence from the phone indicated that Draughon and Mull had exchanged many text messages and calls. Additional testimony indicated that Mull wound up in possession of a box cutter that McBryde typically carried and had used in self-defense when he was assaulted.

(1) On appeal, Draughon argued that the evidence related to his cell phone should have been suppressed. The Court of Appeals disagreed, concluding that Draughon's lawyer made only a general objection to the evidence at trial without specifying that he was making a motion to suppress or requesting a voir dire, as required by G.S. 15A-977. As a result, the defendant waived appellate review of the issue.

(2) Defendant Draughon also challenged the trial court's denial of his motion to dismiss the conspiracy to commit AWDWIKISI charge at the close of the State's evidence and at the close of all evidence. The Court of Appeals disagreed, concluding that, viewed in the light most favorable to the State, there was sufficient evidence of each element of the conspiracy charge. The numerous calls and texts between Draughon and Mull reflected that they had a relationship, and the facts that Mull was standing behind Draughon when he assaulted McBryde and that Mull wound up with McBryde's box cutter constituted substantial evidence that Draughon had conspired to assault McBryde. Defendant Mull likewise argued that the trial court erred by denying her motion to dismiss. Again, the Court of Appeals disagreed, citing evidence indicating that Mull had agreed to invite Draughon and the other assailant into her house so they could wait for McBryde to assault him.

(3) Finally, the Court of Appeals concluded that Defendant Mull's argument regarding the trial court's denial of her motion for judgment notwithstanding the verdict was not preserved for appeal, because her trial lawyer did not state the basis for the motion. The Court went on to decline Mull's request to invoke Rule 2 of the Rules of Appellate Procedure to consider the issue, reasoning that Mull's not guilty verdict on her AWDWIKISI charge was neither contradictory to nor mutually exclusive with her conviction for conspiracy to commit AWDWIKISI, as the conspiracy was complete when there was a meeting of minds between the conspirators, without any requirement for an overt act.

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Homicide

(1) The trial court did not err in denying a motion to strike the jury venire where it was apparent from the record that the jury participated in reasoned decision-making based on the merits of the case. (2) There was substantial evidence in the record that the defendant's culpably negligent acts and omissions proximately caused the victim's unintentional death and that the evidence was sufficient to send the case to the jury. (3) The indictment was not fatally defective where the constitutionality of the statutory short-form indictment has been upheld by the appellate courts.

State v. Metcalf, 280 N.C. App. 357, 2021-NCCOA-618 (Nov. 16, 2021)

The defendant lived in a trailer home with her boyfriend. In January 2015, the boyfriend's three-year-old nephew came to stay with the couple for several days. The defendant would care for the child while the boyfriend and other nearby family members were at work. On a particular day, the defendant took four tablets of Xanax, in excess of the recommend three tablets a day. The boyfriend left for work, and the defendant checked on the child. The defendant turned on a space heater in the living room and went to the bathroom to smoke a cigarette. When she returned to the living room, she noticed that there were sparks coming from either the heater or the electric outlet and that the sparks were already causing the couch to smoke.

In a failed attempt to stop the burning, the defendant smothered the fire with a blanket. The defendant testified that she did not immediately get the child out of the trailer because she thought she could put out the fire. The mobile home did not have any running water, and the defendant tried unsuccessfully to use the fire extinguisher. After yelling for help, a neighbor arrived and escorted the defendant out of the trailer home. As the events progressed, the defendant was asked several times if there was anyone else inside the home, and each time, the defendant responded that there wasn't.

When the fire department arrived, the defendant again answered that there was no one in the home, which a firefighter in turn relayed to dispatch. By the time a family member arrived and insisted that the child was still in the home, the firefighter informed him that there was no longer any way to safely enter the home. Once the crews gained access to the home, they found the deceased child on the bedroom floor.

During the initial trial proceedings, the trial judge inadvertently mentioned that the defense attorneys were from the public defender's office. The court then denied a motion to strike the entire jury venire. The court also denied the defendant's motions to dismiss the charges for insufficient evidence. The defendant was convicted of involuntary manslaughter and orally provided notice of appeal.

(1) The defendant's first argument on appeal was that the trial court erred in denying her motion to strike the jury venire, because it denied her right to a fair trial before an impartial jury. The Court of Appeals held that the single passing reference made under these facts did not

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warrant a new trial because the jury could not reasonably infer the trial court's introduction of the parties to be an opinion on a factual issue in the case, the defendant's guilt, nor the weight of the evidence or a witness's credibility.

(2) The defendant next argued that her involuntary manslaughter conviction must be vacated because the State did not meet its burden of proving that the defendant's criminally negligent actions proximately caused the child's death. Noting (i) the defendant's admission that she could have removed the child from the burning home when she exited, (ii) the defendant's omissions to her neighbors and the firefighters regarding the child's presence in the burning home, and (iii) the deceased child's airway being coated with soot, the Court of Appeals held that there was substantial evidence in the record that the defendant's culpably negligent acts and omissions proximately caused the child's unintentional death and that the evidence was sufficient to send the case to the jury.

(3) The defendant's final argument was that the short-form indictment charging her with involuntary manslaughter was fatally defective for lack of sufficient notice of involuntary manslaughter's essential elements. In rejecting this assertion, the Court of Appeals noted that the constitutionality of the statutory short-form indictment at issue has previously been upheld by both the Court of Appeals and the state Supreme Court.

(1) There was sufficient evidence of premeditation and deliberation. (2) The trial court did not err by failing to instruct the jury on automatism. (3) The trial court did not err by failing to intervene in the State's questioning of prospective jurors when the State's questions did not inappropriately stake jurors out. (4) The trial court did not err by failing to intervene during closing arguments when the State's comments were not improper.

State v. King, 2022-NCCOA-59, ___ N.C. App. ___ (Feb. 1, 2022)

In this Burke County case, the defendant appealed after he was found guilty by a jury of first-degree murder. The case arose out of an altercation between the defendant and his apartment neighbor, Hubert Hunter, Jr. After Hunter was found dead in his own apartment, a maintenance worker found a plastic bag containing bloodstained clothing and a kitchen knife in a dumpster behind the apartment building. DNA on the knife matched the victim and DNA on the clothing matched the defendant. A medical examination of the victim showed that he had three stabbing and slashing wounds to his neck, one of which was deep enough to fracture his spine, as well as hemorrhaging of blood vessels indicating that the ultimate cause of death was strangulation. Law enforcement interviewed the defendant multiple times. He first denied fighting with Hunter, but later said that he had gone to Hunter's apartment to collect \$3 Hunter owed him, which led to a fight in which the victim "pulled a knife." The defendant admitted to choking the victim as they wrestled in an attempt to make him pass out and stop fighting, but said that he was struggling in self-defense after the victim grabbed the knife and that any stabbing was incidental. The defendant also claimed that he himself passed out during the struggle. The defendant was convicted of first-degree murder and appealed.

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(1) The defendant first argued that the trial court erred by denying his motion to dismiss based on insufficient evidence of premeditation and deliberation. Viewing the evidence in the light most favorable to the State, the Court of Appeals concluded that the trial court did not err in dismissing the motion. The evidence showed the defendant threatened the victim, beat him severely, did not seek medical assistance after the fight, and attempted to cover up the killing by disposing of his bloodied clothes and the knife. The Court rejected the defendant's contention that his own black out undermined the State's theory of premeditation and deliberation and instead showed he acted in a state of passion; other evidence sufficed to submit the issue to the jury, and it was for them to weigh the evidence presented.

(2) The defendant next argued that the trial court committed plain error by failing to instruct the jury on the defense of automatism in light of the defendant's statement that he blacked out during the altercation with the victim. The Court of Appeals disagreed, noting that the only evidence of the defendant blacking out came from his own self-serving statements, which, moreover, were contradicted by his other statements and general ability to recall the details of the fight. Because the defendant's statements about blacking out were insufficient to satisfy a reasonable jury that he lacked consciousness, the trial court did not plainly err by failing to give the instruction.

(3) Next, the defendant argued that the trial court erred by failing to intervene ex mero motu in the State's questioning of prospective jurors. The State's questions included hypothetical questions like "If you were in fear for your life and had a weapon, would you defend yourself or would you run away?" The Court of Appeals concluded that the trial court did not abuse its discretion in failing to intervene because the State's questions did not stake jurors out by asking them to consider specific circumstances and forecast their ultimate verdict.

(4) Finally, the defendant argued that the trial court erred by not intervening ex mero motu during closing arguments when the State claimed that the defendant, not the victim, handled the knife, thereby misleading the jury on the central issue of self-defense. The Court of Appeals disagreed, concluding that trial court did not err when the State's arguments drew reasonable inferences from the evidence and did not rely on evidence outside the trial record.

Having rejected each of the defendant's arguments, the Court concluded that the defendant's trial was free from error.

(1) There was sufficient evidence of malice in a second-degree murder prosecution stemming from the defendant's impaired driving. (2) The trial court properly denied the defendant's motion for appropriate relief.

State v. Williamson, ___ N.C. App. ___, 2022-NCCOA-265 (Apr. 19, 2022)

In this Robeson County case, the defendant was found guilty after a jury trial of second-degree murder, aggravated felony death by vehicle, and other offenses based on a motor vehicle crash that resulted in the death of a passenger. On appeal, the defendant argued that the trial court

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erred by failing to dismiss the charge of second-degree murder based on insufficiency of the evidence on malice. The Court of Appeals disagreed, noting evidence that showed the defendant, who had a history of impaired driving convictions, drove after consuming alcohol, continued to consume alcohol while driving over several hours, had a BAC that may have been as high as 0.20, and drove recklessly by engaging the emergency break and falling asleep while driving. Viewing that evidence in the light most favorable to the State, the Court concluded that there was sufficient evidence to submit the charge of second-degree murder to the jury.

The defendant also argued that the trial court erred by denying his motion for appropriate relief (MAR) alleging that a witness had recanted his trial testimony indicating that the defendant was the driver of the vehicle. That witness testified at an evidentiary hearing on the MAR that his trial testimony was false, but later asserted his Fifth Amendment privilege against self-incrimination on cross-examination, and then eventually failed to show up at all for a final hearing on the motion. The trial court found that the witness waived his privilege by testifying at the first hearing, but then substantially prejudiced the State's ability to present its argument by failing to reappear and undergo cross-examination. The Court of Appeals concluded that the trial court properly applied the rule from *State v. Ray*, 336 N.C. 463 (1994), by striking the witness's direct evidence in its entirety. Without that testimony, the defendant failed to meet his burden of proof, and the trial court thus properly denied the motion.

Assaults

Trial court lacked a sufficient factual basis to accept defendant's guilty plea to several assault charges arising from one assaultive episode as the facts established at the plea hearing did not establish a distinct interruption between assaults

State v. Robinson, 2022-NCSC-60, ___ N.C. ___ (May. 6, 2022)

In this Buncombe County case, the North Carolina Supreme Court affirmed the Court of Appeals' determination that the trial court lacked a factual basis to accept the defendant's guilty plea, but modified the holding of the Court of Appeals by vacating the plea arrangement and remanding for further proceedings.

Defendant pled guilty to four charges resulting from his assault and strangulation of his then-girlfriend over the course of a single evening after reportedly holding the victim captive in her home for three days. As provided by the plea agreement between the defendant and the State, the trial judge sentenced the defendant to four consecutive sentences for the four offenses charged: assault on a female, violation of a domestic violence protective order, assault inflicting serious bodily injury, and assault by strangulation. The defendant subsequently petitioned for a writ of certiorari, which was granted by the Court of Appeals. The Court of Appeals filed a divided opinion reversing the trial court's judgment and sentence, and the State appealed.

Applying its ruling in *State v. Dew*, 379 N.C. 64 (2021), that a single assaultive episode will support multiple assault charges only when there is a clear break delineating the end of one

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assault and the beginning of another, such as an intervening event, significant lapse of time, or change in location, the Supreme Court concluded that the facts presented at the defendant's plea hearing did not establish such a distinct interruption. Instead, the factual statements provided at that hearing described a confined and continuous attack in which the defendant choked and punched the victim in rapid succession and without interruption. Thus, the Supreme Court affirmed the Court of Appeals' ruling that the trial court erred when it accepted the plea and entered judgment on the three different assault charges (assault on a female, assault inflicting serious bodily injury, and assault by strangulation).

The Supreme Court disagreed, however, with the Court of Appeals' prescribed remedy of arresting judgment on the lesser assault charges (assault on a female and assault by strangulation) and remanding for resentencing on assault inflicting serious bodily injury and violation of a DVPO. Noting that it is not the role of an appellate court to accept certain portions of a plea arrangement while rejecting others, the Supreme Court modified the holding of the Court of Appeals by vacating the entire plea arrangement.

Chief Justice Newby, joined by Justice Barringer, dissented on the basis that the prosecutor's factual summary and testimony from the victim tended to show there was a distinct interruption between each assault.

There was sufficient evidence that the defendant committed multiple assaults against his girlfriend where a "distinct interruption" occurred between the assaults

State v. Dew, 379 N.C. 64, 2021-NCSC-124 (Oct. 29, 2021)

There was sufficient evidence that the defendant committed multiple assaults against his girlfriend and the Court was equally divided as to whether there was sufficient evidence to establish that the defendant used his hands, feet, or teeth as deadly weapons. The Court characterized "the question of how to delineate between assaults—to know where one assault ends and another begins—in order to determine whether the State may charge a defendant with multiple assaults" as an issue of first impression. Reviewing case law, the Court explained that a single assault "might refer to a single harmful contact or several harmful contacts within a single incident," depending on the facts. The Court declined to extend the three-factor analysis of *State v. Rambert*, 341 N.C. 173 (1995), applicable to discharging a firearm into occupied property, to assault cases generally, saying that the *Rambert* factors were "not the ideal analogy" because of differences in the nature of the acts of discharging a firearm and throwing a punch or kick. The Court determined that a defendant may be charged with more than one assault only when there is substantial evidence that a "distinct interruption" occurred between assaults. Building on Court of Appeals jurisprudence, the Court said:

[W]e now take the opportunity to provide examples but not an exclusive list to further explain what can qualify as a distinct interruption: a distinct interruption may take the form of an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a

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change in location, or some other clear break delineating the end of one assault and the beginning of another.

The Court went on to explain that neither evidence of a victim's multiple, distinct injuries nor evidence of different methods of attack alone are sufficient to show a "distinct interruption" between assaults.

Turning to the facts at hand, the Court concluded that evidence showing that the defendant beat the victim for hours inside a trailer and subsequently beat the victim in a car while driving home was sufficient to support multiple charges of assault. The assaults were separated by an intervening event interrupting the momentum of the attack – cleaning the trailer and packing the car. The assaults also were distinct in time and location. Though the defendant was charged with at least two assaults for conduct occurring inside the trailer, the Court concluded that the evidence indicated that there was only a single assault inside the trailer as the attack was continuous and ongoing.

Threats & Related Offenses

Sufficient evidence existed for the jury to find that the defendant was aware of a DVPO; Court of Appeals erred in failing to view the evidence in the light most favorable to the State

State v. Tucker, 380 N.C. 234, 2022-NCSC-15 (Feb. 11, 2022)

In this case from Mecklenburg County, the defendant was convicted of violating a domestic violence protective order ("DVPO") while in possession of a deadly weapon, as well as felony breaking or entering in violation of the DVPO, assault with a deadly weapon, and assault on a female. The defendant was served with an ex parte DVPO and a notice of hearing on the question of a permanent DVPO. He failed to attend the hearing, and a year-long DVPO was entered in his absence. On appeal, a unanimous Court of Appeals vacated the breaking or entering and DVPO violation convictions, finding that the defendant lacked notice of the permanent DVPO and therefore could not have willfully violated that order (summarized here). On discretionary review, the North Carolina Supreme Court reversed.

The ex parte DVPO was served on the defendant and indicated that a hearing would be held to determine whether a longer order would be entered. Though the defendant was not present at the hearing, he acknowledged his awareness of the DVPO during his arrest in the victim's apartment the day after the hearing on the permanent order by stating he knew the plaintiff had obtained a DVPO—a remark captured on an officer's bodycam. While this remark could have referred to the ex parte DVPO, it was sufficient evidence of the defendant's knowledge of the permanent order when viewed in context in the light most favorable to the State. The Court of Appeals erred by failing to apply that standard. According to the unanimous Court:

Defendant's statement, 'I know,' in addition to his other statements, conduct, and the timing of such conduct, supports this holding. The existence of evidence

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that could support different inferences is not determinative of a motion to dismiss for insufficient evidence. The evidence need only be sufficient to support a reasonable inference. *Tucker Slip op.* at 10 (citations omitted).

The Court of Appeals was therefore reversed, and the defendant's convictions reinstated.

(1) Conviction for making a threat under G.S. 14-16.7(a) requires proof that it was a “true threat,” meaning that the statement was both objectively threatening to a reasonable recipient and subjectively intended as a threat by the speaker; (2) the state presented sufficient evidence of such a threat to withstand defendant’s motion to dismiss, but conviction was vacated and remanded for new trial where the jury was not properly instructed on this issue consistent with the First Amendment.

State v. Taylor, 379 N.C. 589, 2021-NCSC-164 (Dec. 17, 2021)

The facts of this case were previously summarized following the Court of Appeals decision in *State v. Taylor*, 270 N.C. App. 514 (2020), available here. Briefly, the defendant in this case wrote several social media posts allegedly threatening an elected district attorney over her decision not to seek criminal charges in connection with the death of a child. The defendant was convicted of threatening a court officer under G.S. 14-16.7(a), and appealed. The Court of Appeals held that the defendant's convictions were in violation of the First Amendment and vacated the conviction. The state sought and obtained discretionary review at the state Supreme Court. The higher court concluded that the defendant's conviction was properly vacated, but remanded the case for a new trial rather than entry of a judgment of acquittal.

The Supreme Court began its analysis by reviewing the events that prompted the defendant's Facebook posts, the contents of those posts, and the state's evidence purportedly supporting the charges, such as evidence that the prosecutor was placed in fear by the threats. Next, the higher court summarized the opinion of the Court of Appeals, which held that the offense required proof of both general and specific intent on the part of the defendant. The appellate court held that the defendant could only be constitutionally convicted under this statute if he made a “true threat,” meaning that the defendant not only made a statement that was objectively threatening (i.e., one which would be understood by those who heard or read it as a serious expression of intent to do harm), but also that he made that statement with the subjective intent that it be understood as a threat by the recipient. Finding that the state failed to make a sufficient showing of those requirements, the Court of Appeals held the statements were protected speech under the First Amendment and vacated the conviction.

Undertaking its own review, the state Supreme Court noted that the First Amendment broadly protects the fundamental right of free speech, and only certain limited categories of speech involving obscenity, defamation, incitement, fighting words, and “true threats” can be constitutionally restricted. The court reviewed *Watts v. United States*, 394 U.S. 705 (1969), which distinguished true threats from other types of protected speech. The court identified three factors from *Watts* that were relevant to evaluating the case at hand, although no single

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factor is dispositive: (i) the statute at issue must be interpreted with the First Amendment in mind; (ii) the public's right to free speech is even more substantial than the state's interest in protecting public officials; and (iii) the court must consider the context, nature and language of the statement, and the reaction of the listener. Next, the court reviewed the fractured opinions from another true threats case, *Virginia v. Black*, 538 U.S. 343 (2003). After considering the contrasting interpretations offered by the state and the defendant in the present case as to how *Black's* holdings should be construed, the court ultimately concluded that "a speaker's subjective intent to threaten is the pivotal feature separating constitutionally protected speech from constitutionally proscribable true threats." Based on the precedent above and reiterating the importance of the free speech interest at stake, the court held that a true threat is defined as "an objectively threatening statement communicated by a party which possesses the subjective intent to threaten a listener or identifiable group," and "the State is required to prove both an objective and a subjective element in order to convict defendant under N.C.G.S. § 14-16.7(a)."

Applying that definition and framework, the state Supreme Court then considered whether the trial court erred by denying the defendant's motion to dismiss. On a motion to dismiss, the question for the trial court is whether there is substantial evidence, when viewed in the light most favorable to the state, to support each element of the offense and find that the defendant was the perpetrator. In this case there was no dispute that the defendant wrote the posts at issue, and they contained ostensibly threatening language that was not clearly "political hyperbole" or other protected speech. The state Supreme Court acknowledged that cases raising First Amendment issues are subject to an independent "whole record review," but explained that this supplements rather than supplants traditional appellate review, and it is not inconsistent with the traditional manner of review on a motion to dismiss. Under this standard of review, the trial court did not err by ruling that the state had presented sufficient evidence to withstand a motion to dismiss and submit the case to the jury.

However, because the trial court did not properly instruct the jury on the charged offense consistent with the subjective intent requirement under the First Amendment, the conviction was vacated and the case was remanded to the trial court for a new trial and submission of the case to a properly instructed jury.

Justice Earls concurred with the majority's conclusion that the First Amendment requires the state to prove both the objective and subjective aspects of the threat, but dissented on the issue of whether the state's evidence was sufficient to withstand a motion to dismiss in this case, and disagreed with the majority's interpretation and application of whole record review. In Justice Earls' view, the defendant's Facebook posts could not have been viewed as a serious intent to inflict harm when considered in context by a reasonable observer, and even if they could, the state offered insufficient evidence to show that this was the defendant's subjective intent.

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(1) State failed to establish that an objectively reasonable hearer would have construed juvenile's statement about bombing the school as a true threat; (2) State presented sufficient evidence that the juvenile communicated a threat to harm a fellow student

In the Matter of Z.P., ___ N.C. App. ___, 2021-NCCOA-655 (Dec. 7, 2021)

In this Iredell County case, the juvenile, “Sophie,” was adjudicated delinquent for communicating a threat of mass violence on educational property in violation of G.S. 14-277.6 after making a statement, in the presence of four classmates, that she was going to blow up the school. She was also adjudicated delinquent for communicating a threat to harm a fellow student in violation of G.S. 14-277.1 after stating that she was going to kill him with a crowbar and bury him in a shallow grave. Sophie argued that the State failed to present sufficient evidence to support the allegations of the charged offenses.

(1) Proof of a “true threat” is required for an anti-threat statute. The true threat analysis involves both how a reasonable hearer would objectively construe the statement and how the perpetrator subjectively intended the statement to be construed. While there is a split in cases regarding what the State must prove regarding the perpetrator’s subjective intent, this case is resolved because the State did not meet its burden of showing that a reasonable hearer would have construed Sophie’s statement as a true threat. The three classmates who heard the threat and testified at the adjudication hearing did not think she was serious when she made the threat. Sophie had made outlandish threats before and never carried them out. Most of the classmates believed that Sophie was joking when she made the statement. There is not enough evidence to support an inference that it would be objectively reasonable for the hearers to think Sophie was serious in this threat. The adjudication is reversed with respect to the offense of communicating a threat of mass violence on educational property.

(2) The evidence provided regarding the threat to the classmate was sufficient. That evidence, when analyzed in the light most favorable to the State, established that the statement was made so that the classmate could hear it, the classmate took the threat seriously, and it would be reasonable for a person in the classmate’s position to take the threat seriously because the classmate was smaller than Sophie and had previously been physically threatened by her. The Court of Appeals affirmed the adjudication of communicating a threat to harm a fellow student and remanded the case to allow the trial court to reconsider the disposition in light of the reversal of the adjudication of communicating a threat of mass violence on educational property.

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

Milligan v. Crews, 279 N.C. App. 371, 2021-NCCOA-493 (Sept. 21, 2021).

The trial court failed to make adequate findings of fact to support its orders denying the plaintiffs’ motions for domestic violation protective orders against the defendant, their biological father’s wife. The court noted that state supreme court precedent had interpreted

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N.C. Rule Civ. P. 52(a)(1) to require a trial court to make specific findings of fact and separate conclusions of law when sitting without a jury. The trial court's failure to make any findings of fact on form AOC-CV-306, other than who was present at the hearing, precluded the Court of Appeals from conducting a meaningful review of its order denying the motions.

Sexual Assaults & Related Offenses

There was sufficient evidence that the defendant submitted false sex offender registration information to the local sheriff's office

State v. Lamp, ___ N.C. App. ___, 2021-NCCOA-698 (Dec. 21, 2021)

There was sufficient evidence that the defendant submitted false sex offender registration information to the local sheriff's office where he submitted his address as "1010 Foxcroft Lane, Building 604, Apartment A6" when at the relevant time of 25 June 2019 he was either homeless or possibly living at 1010 Foxcroft Lane, Building 602, Apartment A6. The Court of Appeals explained that evidence before the trial court indicated (1) that on 25 June 2019 the defendant submitted information to the sheriff's office asserting both that he resided at Building 604 Apartment A6 and was homeless; (2) the same day he was seen at Building 602 Apartment A6; (3) the following day an occupant of Building 604 Apartment A6 told a sheriff's deputy that the defendant did not live there. The Court held that given these inconsistencies a reasonable juror could have inferred that the defendant willfully misrepresented his address to the sheriff's office and noted case law establishing that providing an incorrect address on sex offender registration forms constitutes circumstantial evidence of deceptive intent and the mental state of willfulness. In the light most favorable to the State, the evidence was sufficient to go to the jury and the trial court did not err by denying the defendant's motion to dismiss.

Frauds

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

State v. Pierce, 279 N.C. App. 494, 2021-NCCOA-502 (Sept. 21, 2021).

In this obtaining property by false pretenses case, there was sufficient evidence that the victim was a "person within this State" as the term is used in G.S. 14-100(a) as well as sufficient evidence of the value of the property at issue. Addressing what it characterized as an issue of first impression, the court determined that even if it is an essential element of a violation of G.S. 14-100 that the victim of the offense by "a person within this State" as that phrase is used in the statute, an issue that the court did not decide, the element was satisfied in this case involving AT&T. The defendant's fraud scheme involved the resale of iPhones falsely obtained from AT&T, and the court reasoned that because the phones came from a store operated by

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AT&T located in North Carolina, AT&T was operating as “a person within this state” for purposes of the offense and the trial court properly denied the defendant’s motion to dismiss.

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

Larceny, Embezzlement & Related Offenses

There was sufficient evidence of the value of a stolen propane tank for purposes of felonious larceny and felonious possession of stolen goods

State v. Wright, 379 N.C. 93, 2021-NCSC-126 (Oct. 29, 2021)

The Supreme Court affirmed per curiam *State v. Wright*, 273 N.C. App. 188 (2020), a case where the Court of Appeals majority determined there was sufficient evidence of the value of a stolen propane tank for purposes of felonious larceny and felonious possession of stolen goods.

(1) Sufficient evidence supported the defendant’s convictions for embezzlement in excess of \$100,000; (2) The trial court did not err in declining to give a special jury instruction on joint ownership

State v. Steele, ___ N.C. App. ___, 2022-NCCOA-39 (Jan. 18, 2022)

The defendant was close friends with older couple in Pamlico County. They considered each other family. When the husband of the couple unexpectedly died, the defendant offered to assist the surviving widow. She ultimately turned over complete control of her finances to the defendant. Two months later, she signed a power of attorney making the defendant her attorney in fact and named the defendant as the primary beneficiary of her will. Money was withdrawn from the widow’s accounts and deposited into new bank accounts opened jointly in the names of the widow and the defendant. The defendant then used the widow’s funds to make personal purchases and pay individual debts. Additionally, some of the widow’s funds were automatically withdrawn by the bank from the joint accounts to cover overdrafts owed by the defendant on his individual bank accounts. After the discovery that more than \$100,000.00 had been withdrawn from the widow’s accounts, the defendant was charged with embezzlement and multiple counts of exploitation of an older adult. At trial, the defense requested a special jury instruction regarding the rights of joint account holders based on

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provisions in Chapter 54C (“Savings Banks”) of the North Carolina General Statutes. The trial court declined to give the proposed instruction, the jury convicted on all counts, and the defendant was sentenced to a minimum 73-months imprisonment.

On appeal, a unanimous Court of Appeals found no error. (1) The defendant’s motion to dismiss for insufficient evidence was properly denied. The evidence showed a fiduciary relationship existed between the defendant and the widow, even before the execution of the power of attorney. “[T]he evidence sufficiently established that a fiduciary relationship existed between Defendant and Mrs. Monk prior to that point, when he ‘came into possession of the funds in Mrs. Monk’s bank accounts.’” *Steele* Slip op. at 10. The defendant also argued that, as a joint account holder with the widow, the money in the accounts was properly considered his property. The court disagreed. While joint account holders may be presumed to be the owners of the money in a joint account, that presumption can be overcome when ownership is disputed. Then, ownership of the funds is determined by examining the history of the account, the source of the money, and whether one party intended to gift money to the other joint account holder (among other factors). It was clear here that the widow was the source of the funds in the joint accounts and that she did not intend to make any gift to the defendant. “[T]here was sufficient evidence that the funds taken were the property of Mrs. Monk, and that she did not have the requisite ‘donative intent’ to grant Defendant the money to withdraw and use for his personal benefit.” *Id.* at 14 (citation omitted). There was also sufficient evidence that the defendant intended to embezzle an amount exceeding \$100,000. While more than \$20,000 of the missing funds had been automatically withdrawn by a bank to cover the defendant’s preexisting overdraft fees and the defendant denied being aware of this, the overdraft repayments occurred over a 9-month period of time. The defendant received bank statements recounting the repayments each month during that time frame. The total amount deducted as overdraft repayments exceeded \$20,000, more than one-fourth of the defendant’s yearly salary. There was also evidence of the defendant’s financial problems. This was sufficient circumstantial evidence of the defendant’s fraudulent intent to embezzle over \$100,000. The defendant’s various sufficiency arguments were therefore all properly rejected.

(2) The trial court did not err in failing to give the jury a special instruction on joint accounts and joint tenancy. The proposed instruction was based on the language of G.S. 54C-165 and related laws regarding banking regulations. These laws are intended to protect banks, and allows them to disburse joint funds to either party listed on the account. The laws do not allow a joint account holder to wrongfully convert the funds to their own use simply by virtue of being a joint account holder. The proposed instruction therefore would have been confusing and misleading to the jury. In the words of the court:

Because the requested special instruction could have misled the jury and was likely to create an inference unsupported by the law and the record—that Defendant’s lawful access to the funds in the joint accounts entitled him to freely spend the money therein—the trial court properly declined to deliver Defendant’s requested special jury instruction. *Steele* Slip op. at 19.

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Extortion

(1) Defendant’s motion to dismiss for insufficient evidence sufficed to preserve a constitutional challenge, despite not having been raised at trial; (2) Extortion is unprotected speech as speech integral to criminal conduct and the “true threats” analysis does not apply to the offense

State v. Bowen, ___ N.C. App. ___, 2022 NCCOA 213 (Apr. 5, 2022), *temp. stay allowed*, ___ N.C. ___, 871 S.E.2d 102 (April 22, 2022)

The defendant and victim met on a website arranging “sugar daddy” and “sugar baby” relationships, and the two engaged in a brief, paid, sexual relationship. The victim was a married man with children at the time. Years later, the defendant contacted the man, stating that she planned to write a book about her experiences on the website and that she intended to include information about their relationship within. The woman repeatedly contacted the man and threatened to include information that the man had shared with her about his ex-wife and their marriage. She also threatened to contact the man’s ex-wife, as well as his current wife. Eventually, she offered the man a confidentiality agreement, whereby she would keep the details of their relationship private in exchange for a large sum of money. The man went to the police, and the woman was charged with extortion. She was convicted at trial and appealed.

(1) Although the defendant did not raise a constitutional challenge in her motions to dismiss at trial, her motion to dismiss for insufficient evidence preserved all sufficiency issues for review, including her constitutional argument. According to the court:

Defendant was not required to state a specific ground for her motion to dismiss as a properly made motion to dismiss preserves all arguments based on insufficiency of the evidence. Moreover, Defendant does not raise an entirely new issue on appeal, but rather argues the insufficiency of the evidence to support a conviction for extortion under her proposed Constitutional interpretation of N.C. Gen. Stat. § 14-118.4. *Bowen* Slip op. at 7 (citation omitted).

(2) Under the First Amendment to the U.S. Constitution, threat crimes must be interpreted to require a “true” threat. “A ‘true threat’ is an ‘objectively threatening statement communicated by a party which possess the subjective intent to threaten a listener or identifiable group.’” *Bowen* Slip op. at 10 (citing *State v. Taylor*, 379 N.C. 589 (2021)). The defendant argued that extortion under G.S. 14-118.4 must be interpreted to require proof of a true threat. The court disagreed. It found that extortion falls within another category of unprotected speech—speech integral to criminal conduct, or speech that is itself criminal (such as solicitation to commit a crime). This approach to extortion is consistent with treatment of the offense by federal courts. Although an extortion statute may sweep too broadly in violation of the First Amendment, North Carolina’s extortion statute requires that the defendant possess the intent to wrongfully obtain a benefit via the defendant’s threatened course of action. The statute therefore only applies to “extortionate” conduct and does not reach other types of protected

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speech, such as hyperbole or political and social commentary. According to the unanimous court:

Following the U.S. Supreme Court and federal appellate opinions, we hold extortionate speech is criminal conduct in and of itself and, as such, is not constitutionally protected speech. Therefore, the First Amendment does not require that the ‘true threat’ analysis be applied to N.C. Gen. Stat. § 14-118.4. *Bowen Slip op.* at 16.

Here, the evidence clearly established the defendant’s wrongful intent and threats, and she was properly convicted of extortion.

Gambling

Video sweepstakes games as modified remain games of chance under the predominant factor test and violate the sweepstakes ban statute

Gift Surplus, LLC v. State of North Carolina, 38 N.C. 1, 2022-NCSC-1 (Feb. 11, 2022)

The plaintiffs sought a declaratory judgment that their sweepstakes video games were lawful and did not violate G.S. 14-306.4 (banning certain video sweepstakes games). For the third time, the North Carolina Supreme Court held that the video games at issue are primarily games of chance in violation of the statute. While the games were modified to award more nominal money prizes and to allow players to “double nudge” game symbols into place to win, these changes did not alter the chance-based character of the games. The question of whether a game falls within the prohibition on games of chance in G.S. 14-306.4 is a mixed question of law and fact and is subject to de novo review where there is no dispute about how the game is played. Applying that standard, the Court unanimously held the modified games remained games of chance. In its words:

After considering plaintiffs’ game when viewed in its entirety, we hold that the results produced by plaintiffs’ equipment in terms of whether the player wins or loses and the relative amount of the player’s winnings or losses varies primarily with the vagaries of chance and not the extent of the player’s skill and dexterity. *Gift Surplus Slip op.* at 22 (cleaned up).

Because the Court determined the games at issue violated G.S. 14-306.4, it declined to consider whether the games also constituted illegal gambling.

The Court of Appeals majority opinion below held that the games violated the statute regardless of whether or not they were games of chance because the games constituted an “entertaining display” under the statute. This was error, as entertaining displays are not banned under the statute unless the game is one of chance. “Any doubt about whether the statute is only concerned with games of chance is resolved by subsection (i), the statute’s ‘catch-all

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provision,' which prohibits sweepstakes through '[a]ny other video game not dependent on skill or dexterity.'" *Id.* at 12. The Court of Appeals was consequently affirmed as modified.

Drug Offenses

The trial court did not err by revoking the defendant's probation where there was substantial evidence that he had constructive possession of controlled substances

State v. Bradley, ___ N.C. App. ___, 2022-NCCOA-163 (Mar. 15, 2022)

The trial court did not err by revoking the defendant's probation where there was substantial evidence that he committed the criminal offense of possessing controlled substances but insufficient evidence of maintaining a vehicle for sale of controlled substances. There was competent evidence to support the trial court's finding that the defendant committed simple possession of schedule II and IV controlled substances where officers conducting a traffic stop for reckless driving discovered Oxycodone, Xanax, and Clonazepam in a pill bottle in the glove compartment in front of the passenger seat where the defendant was sitting. Analyzing the issue of whether the defendant had constructive possession of the drugs and finding that he did, a majority of the court emphasized the defendant's close proximity to the glove compartment and pill bottle, his behavior suggesting his fear that the drugs would be discovered, and his exhibition of obvious signs of impairment that caused officers to call for EMS to check whether he should be taken to the hospital. The majority went on to find that there was insufficient evidence that the defendant committed the offense of maintaining a vehicle for the sale of controlled substances, but that the trial court's error in revoking defendant's probation on the basis of this offense was not prejudicial given the proper revocation based upon the possession offense.

Judge Hampson dissented and expressed the view that there was insufficient evidence of the defendant's constructive possession of the drugs in the glovebox. Judge Hampson explained that the defendant's behavior arguably evincing fear did not clearly indicate he was aware of the drugs, and further explained that it was not clear that his impairment was specifically related to the drugs.

Motor Vehicle Offenses

Admission of defendant's medical records, if error, was harmless in light of the overwhelming evidence of defendant's guilt of driving while impaired

State v. Kitchen, 2022-NCCOA-298, ___ N.C. App. ___ (May 3, 2022)

In this Carteret County case, the defendant appealed from his conviction for habitual impaired driving and habitual felon status. The defendant was treated at the hospital following his arrest and the State obtained his medical records pursuant to a court order. Those records, which were introduced at trial, included a toxicology lab report of the defendant's alcohol

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concentration. The defendant argued on appeal that the trial court erred by denying his motion to suppress the medical records because disclosure of the records violated his Fourth Amendment rights. The Court of Appeals found no prejudicial error. Even assuming for the sake of argument that the trial court erred, the Court held that any error was harmless in light of the overwhelming evidence of the defendant's guilt. That evidence included a strong odor of alcohol on the defendant, defendant's slurred speech, defendant's inability to stand up straight, his poor performance on standardized field sobriety tests, his urinating on the police station floor, and opinion testimony from two law enforcement officers that the defendant was appreciably impaired.

There was sufficient circumstantial evidence that the defendant was the driver of a moped

State v. Ingram, ___ N.C. App. ___, 2022-NCCOA-264 (Apr. 19, 2022)

In this Rowan County case, the defendant appealed after being convicted of impaired driving after a jury trial. The conviction stemmed from a 2017 incident in which the defendant was found unresponsive on a fallen moped in the middle of the road. Field sobriety tests and a toxicology test indicated that the defendant was impaired. The trial court denied the defendant's motion to dismiss and the defendant was convicted. On appeal, the defendant contended that the trial court erred by denying his motion to dismiss because there was insufficient evidence that he drove the moped. Though no witness testified to seeing the defendant driving the moped, the Court of Appeals concluded that there was sufficient circumstantial evidence that he did. He was found alone, wearing a helmet, lying on the double yellow line in the middle of the road and mounted on the seat of the fallen moped. The Court thus found no error.

(1) Probable cause existed that defendant committed the offense of DWI, and exigent circumstances existed to justify warrantless blood draw; (2) Trial court did not abuse its discretion by not taking judicial notice of a weather report; (3) Analyst's testimony and laboratory report were properly admitted as analyst testified to his independent opinion based on his analysis and review of data collected by other analysts and wrote the report based on that analysis; (4) Chain of custody report was admissible because State established adequate chain of custody; (5) Substantial evidence supported convictions for driving while impaired, assault with a deadly weapon inflicting serious injury, and felony serious injury by vehicle.

State v. Bucklew, ___ N.C. App. ___, 2021-NCCOA-659 (Dec. 7, 2021), *temp. stay allowed*, 380 N.C. 288, 866 S.E.2d 900 (January 12, 2022)

In this Martin County case, the defendant was convicted of assault with a deadly weapon inflicting serious injury, felony serious injury by vehicle and driving while impaired for his driving of a vehicle after consuming prescription medications, crossing into oncoming traffic, hitting two other vehicles, and seriously injuring another driver.

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(1) The defendant, who was seriously injured in the crash and was taken to the hospital, had a “few coherent moments” in which he agreed to allow his blood to be withdrawn and analyzed for evidence of impairment. The defendant subsequently moved to suppress evidence of the blood analysis on the basis that there was not probable cause to believe he was driving while impaired, the blood was withdrawn without a warrant, and there were no exigent circumstances. The trial court denied the motion, and the Court of Appeals found no error. The Court first determined that the following evidence established probable cause: (a) a witness called 911 to report erratic driving by the defendant before the defendant crashed his vehicle into two other vehicles; (b) there were no skid marks at the scene to indicate that the defendant attempted to stop his vehicle; (c) the defendant admitted to taking oxycodone, valium, and morphine earlier in the day; and (d) after the crash, the defendant was lethargic, had slurred speech, droopy eyelids, and a blank stare. The Court then concluded that exigent circumstances existed as the officer did not have time to obtain a search warrant given the extent of the defendant’s injuries; indeed, the hospital postponed administering necessary pain medication to the defendant until after the State withdrew his blood. After the blood draw, the defendant was air-lifted to another hospital for a higher level of care.

(2) The defendant argued that the trial court erred by failing to take judicial notice of the National Weather Station’s weather conditions (the “Weather Report”) on the date of the collision. The Court of Appeals disagreed, reasoning that the Weather Report was not a document of indisputable accuracy for purposes of Rule 201(b) of the North Carolina Rules of Evidence because it did not state the level of rain that was occurring at the time of the crash. Thus, the Court of Appeals reasoned, the trial court was not required to take judicial notice of the report under Rule 201(d), but was free to use its discretion pursuant to Rule 201(c). And, the Court of Appeals concluded, the trial court did not abuse its discretion by declining to take judicial notice of the Weather Report.

(3), (4) The defendant argued on appeal that the trial court erred in admitting testimony from an analyst regarding the analysis of defendant’s blood, the analyst’s report, and the accompanying chain of custody report. The Court of Appeals found no error. The Court determined that the analyst’s testimony and his report were admissible because, even though the analyst relied on data collected by and tests performed by others, the analyst himself analyzed and reviewed the data, forming his own independent expert opinion and writing his own report. The Court further held that the trial court did not err by admitting the chain of custody report because the State established an adequate chain of custody through testimony of the law enforcement officer who submitted the blood and the analyst who prepared the report.

(5) The Court of Appeals determined that the trial court did not err in denying defendant’s motion to dismiss for insufficient evidence. Defendant’s erratic driving, the severity of the crash, his admission to taking medications, his impaired behavior, and the results of the analysis of defendant’s blood provided substantial evidence of impaired driving. Defendant’s driving in an erratic and reckless manner while impaired and crashing into another vehicle without appearing to have braked, seriously injuring the other driver provided substantial evidence of

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assault with a deadly weapon inflicting serious injury. Finally, the serious injury to the other driver caused by defendant's impaired driving provided substantial evidence of felony serious injury by vehicle.

Judge Dietz concurred in the judgment, writing separately to state that he would have resolved the suppression issue solely based on the evidence of impairment establishing probable cause and the exigency resulting from the need to draw blood before medical professionals administered additional medications.

Trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence on a charge of fleeing to elude; there was sufficient evidence that officers were engaged in lawful performance of their duties where they had reasonable suspicion to detain defendant and probable cause to arrest him, and they complied with statutory arrest requirements

State v. Thompson, ___ N.C. App. ___, 2022-NCCOA-6 (Jan. 4, 2022)

The defendant in this case "yelled, cursed, and argued with school staff" in the front office about the school's tardy slip policy after bringing his child to school late, and the school called the police after the defendant initially refused to go outside. When officers arrived, the defendant was outside getting back into his truck with his child, and bystanders were staring at the defendant. Concluding that the disturbance call likely involved the defendant, the first officer approached the truck and told the defendant he was being detained. After the officer talked to the principal, who asked to have the defendant banned from the property, a second officer approached the vehicle and asked for the defendant's identification. The defendant refused to provide any identification other than his name. When the defendant raised his voice and demanded to know what laws he was violating and the basis for his detention, the officer told him he would be arrested for obstructing their investigation if he did not comply. When the defendant moved to put the vehicle in gear, the officer reached in and attempted to remove the keys from the ignition. The defendant pulled forward, briefly pinning the officer's arm in the car, before reversing and then driving away. Officers initially pursued the car, but broke off the chase due to the presence of a child in the vehicle. The defendant crashed his vehicle a short time later and was arrested. The defendant was charged with felony fleeing to elude an officer engaged in the lawful performance of his duties under G.S. 20-141.5. The defendant filed a pretrial motion to suppress all evidence on the grounds that his arrest was unlawful, which was denied, and later made a motion to dismiss at trial for insufficiency of the evidence, which was also denied. The defendant was convicted, received a suspended 6-17 month sentence, and appealed.

On appeal, the defendant argued that his motion to dismiss should have been granted because there was insufficient evidence that the officers were acting in the lawful performance of their duties. Specifically, the defendant argued on appeal that the officers had no reasonable suspicion to detain him and no probable cause to arrest him, and the attempted arrest also failed to comply with statutory requirements. The appellate court rejected all three arguments. First, although the officers had only briefly spoken with the principal and were still investigating

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the matter, under the totality of the circumstances (including the initial phone call, the defendant's behavior upon seeing the officers, and the fact that bystanders and others inside the school were staring at the defendant) the officers had reasonable and articulable suspicion that the defendant may have been interrupting or disturbing the operation of the school in violation of G.S. 14-288.4(a)(6) ("Disorderly conduct"). Second, since the defendant was operating a motor vehicle but refused to provide his identification to the officers, there was probable cause to arrest him for a misdemeanor under G.S. 20-29 ("Surrender of license"). Finally, the appellate court rejected the defendant's argument that the officers failed to comply with G.S. 15A-401 during the attempted arrest. The defendant argued that the officers did not provide the defendant with "notice of their authority and purpose for arresting him" as required by the statute, and unlawfully used force to enter his vehicle. The officer testified at trial that he told the defendant he would be arrested for obstructing an investigation, and was only prevented from further citing to G.S. 20-29 because the defendant was arguing with and talking over the officer. Similarly, the officer's forcible entry only occurred because the defendant locked the doors and refused to exit the vehicle, and the officer reasonably believed that attempting to take the keys was necessary to prevent his escape. Viewed in the light most favorable to the state, this was sufficient evidence for a jury to find that the officers were acting in lawful performance of their duties, and the motion to dismiss was properly denied.

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Accident

In a second-degree murder case, the trial court did not err by omitting a jury instruction on the defense of accident or by sentencing the defendant as a Class B1 felon

State v. Crisp, ___ N.C. App. ___, 2021-NCCOA-697 (Dec. 21, 2021)

In this second-degree murder case where the defendant's girlfriend was fatally shot in the eye with a pistol, the trial court did not err by omitting a jury instruction on the defense of accident or by sentencing the defendant as a Class B1 felon. The trial court did not err by omitting an instruction on the defense of accident because the defendant testified that he did not commit the shooting or witness it and that he was unsure how it happened. The defendant's testimony "flatly contradicted" the evidence suggesting he was involved in an arguably accidental shooting. The Court explained that the defendant could not "simultaneously deny that he committed the shooting and claim that he accidentally committed the shooting."

As to the sentencing issue, while a general verdict of guilty for second-degree murder is ambiguous for sentencing purposes where there is evidence supporting either a Class B2 offense based on depraved-heart malice or a Class B1 offense based on another malice theory, the court concluded that there was no evidence in support of depraved-heart malice in this case. Neither the defendant's testimony, which asserted that he left the unloaded pistol unattended, or other testimony suggesting that the victim grabbed the pistol as the defendant held it while arguing with her, was sufficient to show that the defendant committed an inherently dangerous act in a manner indicating a depraved heart. The trial court therefore did not err by sentencing the defendant as a Class B1 felon and also did not err by omitting an instruction to the jury on the definition of depraved-heart malice.

Self-Defense

(1) Statutory self-defense provisions of G.S. 14-51.3 and 14-51.4 abolished the common law right of perfect self-defense; (2) Defendant's argument that the felony disqualification required a causal nexus was preserved; (3) Felony disqualification provisions of G.S. 14-51.4 require a causal nexus between the felony and the need for defensive force (4) Based on the jury's guilty verdict for armed robbery, the trial court's failure to instruct on a causal nexus did not prejudice the defendant

State v. McLymore, 380 N.C. 185, 2022-NCSC-12 (Feb. 11, 2022)

Under G.S. 14-51.4, a person may not claim self-defense if the person was attempting a felony, committing a felony, or escaping from the commission of a felony at the time of the use of force. The defendant was charged with first-degree murder, armed robbery, and fleeing to elude in Cumberland County. He claimed self-defense and testified on his behalf. Evidence showed that the defendant had multiple prior felony convictions and that he possessed a

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weapon at the time of the murder. The trial court gave a general instruction on statutory self-defense and instructed the jury that the defendant could not claim self-defense if he was committing the felony of possession of firearm by a felon at the time of his use of force. The jury convicted on all counts and the defendant was sentenced to life without parole. On appeal, the Court of Appeals affirmed, finding that the defendant was disqualified from claiming statutory self-defense under *State v. Crump*, 259 N.C. App. 144 (2018) (strictly interpreting the felony disqualification) and determining that G.S. 14-51.4 supplanted the common law right in the situations covered by the statute. On discretionary review, the Supreme Court modified and affirmed.

(1) The trial court and Court of Appeals correctly rejected the defendant’s argument that the statutory self-defense disqualification did not apply because the defendant was claiming common law, rather than statutory, self-defense. The Court agreed with the lower courts that G.S. 14-51.3 and 14-51.4 were intended to abolish the common law right to perfect self-defense in the circumstances identified by the statute, noting that the language of G.S. 14-51.3 closely followed the common law definition of self-defense and that the legislature had failed to express an intent to retain the common law (unlike other parts of the statutory self-defense laws, where such an intention was expressly stated). In the words of the Court:

[A]fter the General Assembly’s enactment of G.S. 14-51.3, there is only one way a criminal defendant can claim perfect self-defense: by invoking the statutory right to perfect self-defense. Section 14-51.3 supplants the common law on all aspects of the law of self-defense addressed by its provisions. Section 14-51.4 applies to the justification described in G.S. 14-51.3. Therefore, when a defendant in a criminal case claims perfect self-defense, the applicable provisions of G.S. 14-51.3—and, by extension, the disqualifications provided under G.S. 14-51.4—govern. *McLymore* Slip op. at 8-9 (cleaned up).

The trial court therefore did not err by instructing the jury on statutory self-defense, including on the felony disqualifier.

(2) The defendant’s objections to the jury instructions were sufficient to preserve his arguments relating to a “causal nexus” requirement for the felony disqualification provisions of G.S. 14-51.4, and his arguments were also apparent from the record. Among other reasons, the State argued, and the trial court relied on, the *Crump* decision (finding no causal nexus requirement for the felony disqualifier) in rejecting the defendant’s proposed jury instruction.

(3) The Court agreed that G.S.14-51.4 must be read to require a nexus between the defendant’s use of force and felony conduct used to disqualify the defendant from use of defensive force. A strict interpretation of this statute would lead to absurd and unjust results and would also contract the common law right to self-defense. “[A]bsent a causal nexus requirement, each individual [committing a felony not related to the need for defensive force] would be required to choose between submitting to an attacker and submitting to a subsequent criminal conviction.” *McLymore* Slip op. at 18. The Court also noted that a broad interpretation of the

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felony disqualifier may violate the North Carolina Constitution's protections for life and liberty. N.C. Const. art. I, sec. 1. The Court therefore held that the State has the burden to demonstrate a connection between the disqualifying felony conduct and the need for the use of force, and the jury must be instructed on that requirement. *Crump* and other decisions to the contrary were expressly overruled. In the Court's words:

[W]e hold that in order to disqualify a defendant from justifying the use of force as self-defense pursuant to N.C.G.S. § 14-51.4(1), the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force. The State must introduce evidence that 'but for the defendant' attempting to commit, committing, or escaping after the commission of a felony, 'the confrontation resulting in injury to the victim would not have occurred.' *McLymore* Slip op. at 20.

(4) Though the trial court's instructions on the felony disqualification were erroneous, this error did not prejudice the defendant under the facts of the case. The jury convicted the defendant of armed robbery based on his theft of the victim's car immediately after the murder. This necessarily showed that the jury found the defendant was committing or escaping from the commission of a felony related to his need to use force. According to the court:

Based upon the outcome of *McLymore's* trial, it is indisputable that there existed an immediate causal nexus between his felonious conduct and the confrontation during which he used assertedly defensive force, and the felony disqualifier applies to bar his claim of self-defense. *Id.* at 23.

However, the Court rejected the State's argument that the defendant would be categorically barred from self-defense with a firearm due to this status as a convicted felon. The defendant was not charged with possession of firearm by felon in the case and had no opportunity to defend against that charge. Additionally, the jury was not instructed on a causal connection between the defendant's mere possession of the firearm and his need for use of force. According to the Court:

To accept the State's argument on this ground would be to effectively hold that all individuals with a prior felony conviction are forever barred from using a firearm in self-defense under any circumstances. This would be absurd. *Id.* at 22.

The Court of Appeals was therefore modified and affirmed. Chief Justice Newby wrote separately to concur in result only, joined by Justice Barringer. They would have found that the causal nexus argument was not preserved and should have not been considered. Alternatively, they would have ruled that the felony disqualification does not require a causal nexus.

The trial court erred by instructing the jury on the aggressor doctrine

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State v. Hicks, ___ N.C. App. ___, 2022-NCCOA-263 (Apr. 19, 2022), *temp. stay allowed*, ___ N.C. ___, 871 S.E.2d 538 (May 9, 2022)

In this Randolph County case, the defendant was convicted of second-degree murder for an incident in which she killed Caleb Adams, a romantic partner. On the day of the incident, Caleb stormed into her residence while under the influence of methamphetamine and began pushing, punching, kicking, and shoving her before the defendant shot him twice in the back. At trial, the judge instructed the jury on the aggressor doctrine over the defendant's objection. The defendant argued on appeal that the trial court erred in instructing the jury on the aggressor doctrine because the evidence presented did not support any inference that she was the aggressor within the meaning of G.S. 14-51.4(2) (stating that self-defense under 14-51.2 and - 51.3 is not available to a person who initially provokes the use of force against himself or herself unless an exception applies). Applying the relevant factors (the circumstances that precipitated the altercation, the presence or use of weapons, the degree and proportionality of the parties' use of defensive force, the nature and severity of the parties' injuries, and whether there is evidence that one party attempted to abandon the fight), the Court of Appeals concluded that the trial court erred in instructing the jury on the aggressor doctrine. The victim burst into the defendant's residence even though the defendant told him not to come, he yelled at her and told her he was going to kill her, and he initiated a physical confrontation. Though the victim entered the home unarmed, he briefly took possession of the victim's firearm before relinquishing it to her; she armed herself with it only after the victim continued to scream at her, and used it only after he physically assaulted her. The Court rejected the State's argument that the defendant's threat to send sexually explicit photographs to his wife on the night before the shooting made her the aggressor. The threat happened seven hours before the shooting, and therefore was not made *at the time* the self-defense occurred. Additionally, the Court declined to hold that a threat to expose one's extramarital affair is conduct demonstrating an aggressive willfulness to engage in a physical altercation. The Court also rejected the State's argument that the act of shooting the victim in the back necessarily made the defendant the aggressor. The Court distinguished *State v. Cannon*, 341 N.C. 79 (1995), in which the aggressor doctrine properly applied when the victim was actively retreating from the affray. In the absence of evidence that the defendant was the aggressor, the trial court erred in giving the aggressor instruction. The Court therefore ordered a new trial.

Having ordered a new trial, the Court did not reach the defendant's argument that the trial court admitted certain evidence in error.

(1) Challenge to jury instructions was not preserved despite written request where counsel twice acknowledged agreement with the final instructions; (2) The trial court did not err by refusing to instruct the jury on manslaughter and perfect self-defense; (3) Trial court's comments regarding the defendant's theory of self-defense during charge conference were not improper; (4) The defendant could not show prejudice from the trial court's failure to instruct on imperfect self-defense

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State v. Acker, ___ N.C. App. ___, 2022 NCCOA 211 (Apr. 5, 2022)

The defendant lived with his parents in a mobile home trailer in Craven County. The owner of the trailer, Ms. Patterson, lived on the property in a different mobile home and was lifelong friends with the defendant and his parents. Ms. Patterson lived with one of the defendant's nephews pursuant to an informal arrangement with child's father, although the Division of Social Services ("DSS") was investigating the child's safety there. Ms. Patterson and the child's biological mother were involved in an altercation at the child's school during an orientation session. According to the defendant, once Ms. Patterson returned from the school, she called out for the defendant to come to her trailer. The defendant claimed to have seen a black object in her hand shortly beforehand, which he believed to be a gun. When the defendant arrived in the trailer, Ms. Patterson expressed concern that DSS would remove the child from her home and became upset, using obscenities and "throwing her hands around." The defendant thought he saw the same black object in the woman's hands, and immediately hit her in the head with a baseball bat. He initially claimed to have hit her once and then to have blacked out. The next day, the defendant made several statements to various people that he had killed a woman with a bat. He did not mention being in fear or that the woman had a gun, and no gun was found in Ms. Patterson's trailer. The defendant had blood on his clothes and appeared drunk when making these remarks. Later that evening, the defendant called 911 and reported that he had killed the woman but did not recall why he had killed her. During interrogation by the police, the defendant admitted to hitting the woman "a couple of times" and then "three or four times" with the bat and stated that he killed her because she threatened to evict his family. Blood splatter in the trailer indicated multiple blows, and the victim had no defensive injuries.

At trial, the defendant requested a jury instruction for perfect self-defense. The trial court declined to instruct on self-defense or manslaughter but agreed to instruct on second-degree murder and voluntary intoxication. The jury convicted on second-degree murder and the other offenses, and the defendant appealed. (1) Although the instructions requested by the defense were submitted in writing and argued at the charge conference, defense counsel twice acknowledged his agreement with the ultimate instructions. This was insufficient to preserve the issue for appellate review, and the court therefore reviewed the jury instructions for plain error only. (2) The trial court did not err, plainly or otherwise, in failing to instruct on manslaughter or perfect self-defense. The only evidence in support of the defendant's reasonable fear of imminent death or serious bodily harm was his testimony that the victim was cursing, throwing her hands about, and that he thought he saw a gun in her hands. He did not testify that the woman threatened him, and in his numerous statements to laypeople and law enforcement he never mentioned being in fear or that the woman had a gun. "Even taking this testimony in the light most favorable to defendant, defendant has failed to establish that he believed it was reasonably necessary to kill Patterson to save himself from death or great bodily harm." *Acker* Slip op. at 15. (3) The trial court stated during the charge conference that the defendant's testimony on his need for self-defense amounted to "fantasy." The defendant argued that this comment was an impermissible assessment of the defendant's credibility. The court disagreed, noting that the comment was made during the charge conference, outside the presence of the jury, and "was simply . . . the trial court's reasoning in denying defendant's request." *Id.* at 16. (4) Even if the trial court erred in refusing to instruct on imperfect self-

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defense and manslaughter, the defendant was not prejudiced as a result. In the words of the court: “The evidence of defendant’s guilt, most of it from statements he freely and voluntarily made, was overwhelming. Accordingly, we hold that the trial court did not plainly err in declining to instruct the jury on self-defense and manslaughter.” *Id.* at 17. There was therefore no error in the case.

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

State v. Austin, 279 N.C. App. 377, 2021-NCCOA-494 (Sept. 21, 2021).

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

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

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

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

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of subsection (c)(5) was the only means of rebuttal and instead left the issue for the jury's determination based on the facts of the case.

Voluntary Intoxication

1) The trial court did not err in refusing to instruct the jury on voluntary intoxication where there was not substantial evidence the defendant was so intoxicated that he could not form a premeditated and deliberate intent to kill; (2) The trial court did not err by admitting a handgun into evidence before its relevance was established or commit prejudicial error by admitting the handgun without the State establishing a chain of custody

State v. Green, ___ N.C. App. ___, 2022-NCCOA-95 (Feb. 15, 2022)

In this Richmond County case, the defendant was found guilty by a jury of first-degree murder, attempted first-degree murder, and assault with a deadly weapon with intent to kill for shooting an acquaintance during an argument, and, during the same incident, shooting another acquaintance who was standing nearby in the leg. The defendant had been drinking for more than six hours before he shot the victims. After he began drinking and several hours before the shooting, he displayed a gun in front of a child. After the shooting, he drove to another acquaintance's house and honked his car horn for thirty minutes. At trial, he requested that the judge instruct the jury on voluntary intoxication. The judge refused this request.

(1) On appeal, the defendant argued that the trial court erred by refusing to instruct the jury on voluntary intoxication. The defendant contended there was substantial evidence that, because of his intoxication, he could not form a deliberate and premeditated intent to kill the victim. The Court of Appeals concluded that although there was evidence that the defendant was very intoxicated and acted recklessly some hours before the shooting, there was not substantial evidence that he was intoxicated to the point he could not control himself and could not form the intent to kill the victim. The Court noted that the defendant shot and killed the victim following an argument and then drove away from the scene, arriving at an acquaintance's house without getting into an accident. Hours after the shooting, he told officers that he shot the deceased victim in self-defense. Thus, the Court concluded that the trial court did not err in not instructing the jury on voluntary intoxication.

(2) The defendant also argued on appeal that the trial court erred in admitting the handgun used in the shootings during testimony from the pawnbroker who transferred the gun to the defendant. This took place early in the trial and before the State presented evidence that the handgun was used to shoot the victims. The Court of Appeals determined that the trial court did not err in admitting the handgun before its relevance had been established as the State later presented evidence connecting the handgun to the shootings. The defendant also argued that the trial court erred by admitting the handgun because the State did not establish a chain of custody. Even assuming the defendant preserved this issue for appeal and that the trial court erred in this regard, the Court found that the error did not prejudice the defendant in light of other overwhelming evidence of the defendant's guilt.

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(1) Trial court properly denied defendant's request for an instruction on voluntary intoxication as defendant failed to show that his mind and reason were so completely intoxicated and overthrown from methamphetamine use so as to render him incapable of forming a deliberate and premeditated purpose to kill; (2) Trial court did not err in denying the defendant's motion to dismiss the first-degree murder by torture charge

State v. Bowman, ___ N.C. App. ___, 2021-NCCOA-658 (Dec. 7, 2021)

In this Mitchell County case, the defendant was convicted of first-degree murder (based on the theories of (a) malice, premeditation and deliberation; (b) felony murder; and (c) torture), possession of a firearm by a convicted felon, conspiracy to commit first-degree murder, and first-degree kidnapping for his role in the death of the victim after several days of subjecting the victim to physical abuse and death threats, interspersed with the defendant's (and the victim's) use of methamphetamine.

Apparently believing that the victim, an addict to whom the defendant supplied methamphetamine, had informed law enforcement officers about the defendant's drug trafficking, the defendant began to threaten and assault the victim, firing pistol rounds near his feet, striking him, putting him in a chokehold, threatening to kill him, and asking others, in the victim's presence, if the victim should live or die. After smoking methamphetamine with the victim and others, the defendant told the victim that people from Georgia had arrived "to take care of" him, took him outside of a house where a laser beam was focused on him, and asked him if he was ready to die. When the victim attempted to run away, the defendant tackled him and dragged him back toward the house. The defendant then used his cell phone to record the victim pleading for his life. Over the next two days, the group used more methamphetamine and the defendant continued to threaten to kill the victim, to physically abuse him, to prevent him from leaving – at one point binding the victim's hands with duct tape -- and to film him confessing to various acts. On the third day, the defendant shot the victim in the left shin and obtained a telephone cord to "make [the victim] hang himself." The victim's face was turning blue when the cord broke and he fell to the ground. The defendant eventually threw the victim into the yard, telling others on the scene that they could either "get involved or [they] could be next." The defendant ordered others to hit the victim with a large rock. The defendant then ordered his girlfriend to shoot the victim or he was "gonna hurt [them] all." The woman shot the victim once in the side of the head, killing him. The defendant then told others to help him dispose of the victim's body.

(1) The defendant argued on appeal that the trial court erred by denying his request for a jury instruction on voluntary intoxication, asserting that his consumption of methamphetamine defeated his ability to form the specific intent necessary to support first-degree murder based on malice, premeditation and deliberation and the felony-murder rule and first-degree kidnapping. Noting that to be entitled to such an instruction, the defendant must produce substantial evidence that he was so intoxicated he could not form a deliberate and premeditated intent to kill, the Court of Appeals held that the defendant did not satisfy this

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requirement. Testimony regarding defendant's consumption of methamphetamine and his girlfriend's testimony that he was "wiggling" -- meaning that he believed things that were not present were in fact present -- were not enough.

The court reasoned that the defendant's actions showed that he intended to kill the victim. He brandished a gun, saying he "smelled death." He wondered out loud about what he would do with the witnesses if he killed the victim, ordered others to hit the seriously-injured victim with a large rock, told his girlfriend to shoot the victim, orchestrated the disposal of the victim's body, kept a bullet he used to shoot the victim in the leg as a trophy, fled to Georgia after the killing, told his family what he did, and showed videos he recorded of the victim.

The Court also found ample evidence of defendant's specific intent to kill to support his conviction for felony murder based on first-degree kidnapping. His actions showed his specific intent to unlawfully restrain or confine the victim over successive days, stating he was doing this in retribution for the victim's alleged snitching. The defendant bound the victim's hands behind his back, stopped the victim when he tried to run away, told the victim he would be freed if the victim killed his own mother, threatened to kill the victim by making him inject methamphetamine combined with poison, and arranged an attempted hanging of the victim.

(2) The Court of Appeals rejected the defendant's argument that the trial court erred by failing to dismiss the charge of first-degree murder based on torture. The defendant argued that because the victim died from the gunshot delivered by defendant's girlfriend, torture was not a proximate cause of his death. The Court of Appeals reasoned that the torture of the victim included defendant's conduct over the days when the victim was detained, humiliated, beaten, and tortured. The torture included all of the abuse the defendant delivered during that time, including the defendant ordering his girlfriend, under threats to her and her families' lives, to shoot and kill the victim.

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DNA Testing & Related Matters

(1) A defendant who pled guilty is eligible to seek postconviction DNA testing under G.S. 15A-269. (2) The defendant did not establish the materiality of the evidence he sought through postconviction DNA testing.

State v. Alexander, ___ N.C. ___, 2022-NCSC-26 (Mar. 11, 2022)

In this Warren County case, the defendant moved for postconviction DNA testing under G.S. 15A-269 more than two decades after pleading guilty to second-degree murder. The trial court determined that the defendant had failed to show that the requested testing would be material to his defense. The Court of Appeals majority concluded that the General Assembly’s use of the word “verdict” in G.S. 15A-269 did not limit the statute’s application to cases decided by a jury, but ultimately affirmed the trial court’s decision that the defendant here failed to make the necessary showing of materiality to grant his request for postconviction DNA testing. *State v. Alexander*, 271 N.C. App. 77 (2020). The Supreme Court allowed the defendant’s petition for discretionary review and affirmed the Court of Appeals.

The Supreme Court began by considering as a question of first impression whether defendants who pled guilty are eligible to seek postconviction DNA testing. Like the Court of Appeals, the Court concluded that the statute’s use of the term “verdict” was not intended to limit the law’s application to defendants convicted after a jury trial. Likewise, the law’s reference to “defense” did not exclude defendants who pled guilty. Slip op. ¶ 38 (“[A] defendant’s ‘defense’ may evolve in light of newly available DNA evidence. As a result, the statutory reference to the defendant’s ‘defense’ does not, without more, satisfy us that the General Assembly intended to limit the availability of postconviction DNA testing to defendants who were convicted at the conclusion of a contested trial on the issue of guilt or innocence.”). In light of the statute’s title and purpose and the fact that some innocent people plead guilty for understandable reasons (like avoiding the death penalty), the Court held that the Court of Appeals did not err in determining that a defendant who pleads guilty can nonetheless seek postconviction DNA testing under G.S. 15A-269.

Nevertheless, on the merits of the defendant’s request for postconviction DNA testing, the Supreme Court affirmed the Court of Appeals’ conclusion that the defendant failed to make a sufficient showing of the materiality of any evidence that would be obtained through the testing. The Court concluded that the Court of Appeals applied the correct legal standard in analyzing materiality—that is, whether, in response to the test results, there was a “reasonable probability” that the defendant would have refrained from pleading guilty and obtained a more favorable verdict at any ensuing trial. The Supreme Court reasoned that the discovery of any third-party DNA on the shell casings and projectile found at the crime scene would not likely have changed the outcome because it would not contradict other evidence in the case; rather, it would merely indicate that someone else touched the shell casing and projectile at some point in time, for some reason not necessarily related to the crime.

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Chief Justice Newby concurred in the result, writing that in light of the statute’s use of the words “defense” and “verdict,” a defendant who pleads guilty should not be able to make a postconviction motion to test DNA under G.S. 15A-269.

Justice Earls concurred in part and dissented in part, writing that she agreed with the majority’s conclusion that defendants who plead guilty are eligible to seek postconviction DNA testing, but that the majority’s materiality analysis placed too high a burden on the defendant. The evidence Alexander sought might not have conclusively established his innocence, but it might have demonstrated a reasonable probability that he would not have pled guilty to second-degree murder and would not have been convicted had he proceeded to trial—which is, she wrote, all the burden he must carry at this stage.

Motions for Appropriate Relief

The trial court properly applied the multi-factor test for evaluating an MAR based on newly discovered evidence

State v. Reid, ___ N.C. ___, 2022-NCSC-29 (Mar. 11, 2022)

In this Lee County case, the trial judge granted a motion for appropriate relief and awarded a new trial for a defendant who was convicted of first-degree murder committed when he was fourteen years old, largely on the basis of a confession made during a police interrogation conducted outside the presence of a parent or guardian. Years later, postconviction counsel located a new witness who claimed a different person had confessed to the crime, exculpating the defendant. The trial court found the new witness’s testimony credible and granted the MAR based on the newly discovered evidence and ordered a new trial. The Court of Appeals reversed, saying the trial court abused its discretion and erred in granting a new trial, in that the defendant’s affidavit failed multiple prongs of the seven-factor test for evaluating newly discovered evidence set forth in *State v. Beaver*, 291 N.C. 137 (1976). *State v. Reid*, 274 N.C. App. 100 (2020).

After allowing the defendant’s petition for discretionary review, the Supreme Court reversed the Court of Appeals, concluding that the trial court properly applied the *Beaver* test. First, the trial court did not err in concluding that the newly discovered evidence was “probably true,” despite the inconsistencies in the new witness’s testimony. It was the factfinder’s role—not the role of the Court of Appeals—to evaluate the credibility of the witness and make findings of fact, which are binding on appeal if supported by the evidence. The Court of Appeals thus erred by reweighing the evidence and making its own findings as to whether the new evidence was “probably true.”

Second, the trial court did not err in finding that the defendant’s trial counsel had exercised due diligence in attempting to procure the newly discovered evidence. The trial court’s findings that an investigator had earlier attempted to find the new witness and that those efforts were

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unsuccessful due in part to interference by the witness's mother were supported by the evidence and binding on appeal. The Court noted that the "due diligence" prong of the *Beaver* test requires "reasonable diligence," not that the defendant have done "everything imaginable" to procure the purportedly new evidence at trial. Where, as here, neither the defendant nor his lawyer knew whether the sought-after witness actually had any information about the victim's killing, hiring an investigator was deemed reasonable diligence without the need to take additional steps such as issuing an subpoena or asking for a continuance.

Third, the Court concluded that the trial judge did not err in concluding that the new witness's testimony was "competent" even though it was hearsay. The evidence was admitted without objection by the State, and was therefore competent. And in any event, the test for competence within the meaning of the *Beaver* test is not admissibility at the MAR hearing, but rather whether it would be material, competent, and relevant in a future trial if the MAR were granted. Here, the trial court properly concluded that the new witness's testimony would have been admissible at trial under the residual hearsay exception of Rule 803(24).

Finally, the trial court did not err in concluding that the addition of the newly discovered evidence would probably result in a different outcome in another trial. Though the defendant's confession was admissible, it was nonetheless the confession of a fourteen-year-old and might therefore receive less probative weight in a case like this where the other evidence of the defendant's guilt was not overwhelming.

The Supreme Court reversed the Court of Appeals and remanded the case for a new trial.

Chief Justice Newby, joined by Justice Barringer, dissented. He wrote that the defendant failed to meet the "due diligence" prong of the *Beaver* test in that he did not take reasonable action at trial to procure the evidence he later argued was newly discovered. The Chief Justice disagreed with the majority's conclusion that hiring an investigator was enough. Rather, he wrote, the defense lawyer should have gone to the trial court for assistance in obtaining testimony from the witness (such as through a material witness order), or spoken to other witnesses who likely had the same information (such as the sought-after witness's brother).

Trial court improperly limited scope of post-conviction discovery in MAR proceedings

State v. Cataldo ("Cataldo III"), ___ N.C. App. ___, 2022-NCCOA-34 (Jan. 18, 2022)

The defendant was convicted of statutory rape and sex offense in Rockingham County. That verdict was affirmed on appeal in an unpublished decision, and the defendant sought post-conviction relief. He filed a motion for appropriate relief ("MAR") and a request for post-conviction discovery, arguing that his trial counsel was ineffective in failing to obtain Department of Social Services ("DSS") records on the victim from Rockingham and Guilford counties. Specifically, the MAR stated that the DSS records would establish multiple prior false accusations by the victim. The trial court denied the request for discovery and denied the MAR. The Court of Appeals granted certiorari and reversed, ordering the trial court to obtain the DSS

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records and to conduct an in camera review. The State provided what it alleged to be the complete DSS files relating to the case to the trial court. Reviewing those records, the trial court found that the files did not contain information relevant to the defendant's case. It also found that the records were incomplete and that the court was unable to complete its review without additional files. The trial court ordered Rockingham DSS (and later Guilford County DSS) to produce records on the victim from three specific time frames. The defendant complained to the trial court that limiting the order to these specific ranges of time was too narrow and would miss relevant records (including the records of the accusation against the defendant himself), but the trial court did not alter its order. When the trial judge ultimately obtained the ordered records and reviewed them, it found the information was not likely to have impacted the verdict and was therefore not material. The motion for post-conviction discovery of the DSS records was consequently denied for a second time. The Court of Appeals granted certiorari again and again reversed and remanded.

The court agreed with the defendant that the trial court improperly limited the scope of the request for DSS records. The defendant's original request was for DSS records of prior accusations by the victim. While the Court of Appeals order remanding the case for an in camera review of the records mentioned specific time frames as examples, its order was not limited to those time frames and encompassed any and all relevant records. On remand a second time, the trial court was ordered to conduct an in camera review of any DSS records pertaining to prior accusations of abuse by the victim. The court declined to review the DSS records sealed in the file before the trial court has had an opportunity to complete a full review of the relevant records. It noted that the defendant would be entitled to a new trial if the records are deemed material.

Judge Arrowood sat on the panel initially remanding the case and dissented. He believed that the trial court had complied with the original remand order and would have affirmed the trial court's order denying post-conviction discovery.

Requiring a person to serve an otherwise lawfully imposed sentence during a pandemic does not give rise to a claim of cruel and unusual punishment that can be successfully asserted in a MAR

State v. Thorpe, ___ N.C. App. ___, 2021-NCCOA-701 (Dec. 21, 2021)

The defendant, who had underlying health conditions, was not entitled to relief on a MAR under G.S. 15A-1415(b)(8) on the basis of his prison sentence being invalid as a matter of law as a form of cruel and unusual punishment due to the coronavirus pandemic. The Court of Appeals explained that the defendant's 77 to 105 month term of imprisonment was lawful at the time it was imposed before the pandemic began and that the defendant had identified no precedent indicating that requiring a person to serve an otherwise lawful sentence during pandemic times makes the sentence cruel and unusual. The defendant was not entitled to state habeas relief because of procedural deficiencies in his MAR.

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Trial court erred by failing to conduct a hearing on the ineffective assistance of counsel (IAC) claims raised by the defendant in his motion for appropriate relief (MAR). The trial court further erred by barring the defendant from filing a future MAR

State v. Ballard, 2022-NCCOA-294, ___ N.C. App. ___ (May. 3, 2022)

In this Brunswick County case, the defendant appealed from an order denying his motion for appropriate relief (“MAR”) filed after his conviction for robbery with a firearm and related offenses. The defendant argued on appeal that the trial court erred by (1) denying his MAR because law enforcement’s loss of an eyewitness statement was a *Brady* violation; (2) denying his MAR because the State presented false testimony, (3) failing to hold an evidentiary hearing on his claims, and (4) barring the defendant from filing future MARs.

(1) The Court of Appeals affirmed the trial court’s ruling deny the defendant’s due process claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that the State suppressed favorable evidence. Noting that to establish a *Brady* violation, the defendant must show that the suppressed evidence was material, the Court of Appeals concluded that the lost statement from an eyewitness did not meet this standard. Central to the Court’s conclusion was trial counsel’s ability to cross-examine the witness about inconsistencies in his statements and to impeach him with other testimony.

(2) The Court of Appeals affirmed the trial court’s ruling denying the defendant’s due process claim under *Napue v. Illinois*, 360 U.S. 264 (1959), that the State knowingly presented false evidence. The Court concluded that the record did not support the defendant’s contention that the State knew testimony from one of the eyewitness victims was false as opposed to simply inconsistent with other testimony.

(3) The Court of Appeals determined that the trial court erred by failing to grant an evidentiary hearing on the defendant’s IAC claims as the defendant stated facts that, if true, would entitle him to relief. Focusing its analysis on defendant’s claim that trial counsel failed to investigate a known alibi witness – defendant’s son, who claimed to have been with him the morning of the crime – the Court noted that the record did not reveal whether defendant’s trial counsel made a strategic decision not to investigate this alibi witness. The Court reasoned that this factual issue could only be appropriately resolved at an evidentiary hearing.

(4) The Court of Appeals vacated the trial court’s ruling that the defendant’s failure to assert other grounds in his MAR “shall be treated in the future as a **BAR** to any other motions for appropriate relief [in this case].” The Court relied upon its holding in *State v. Blake*, 275 N.C. App. 699 (2020), that G.S. 15A-1419 does not authorize a trial court to bar MAR claims in advance and that gatekeeper orders normally are entered only when a defendant has previously asserted numerous frivolous claims. The Court noted that the current case was not one in which the defendant had filed many frivolous MARs asserting the same claims.

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Judge Murphy concurred, with the exception of a sole paragraph discussing precedent from other jurisdictions related to whether an attorney's representation is deficient for failing to contact and interview prospective alibi witnesses. Judge Griffin concurred by separate opinion, expressing his disagreement with North Carolina Supreme Court precedent requiring an evidentiary hearing on the defendant's IAC claim, which he said was not supported by statute and allowed a petitioning party to take away the gatekeeping function of the trial judge.

Judicial Administration

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Contempt

The trial court's findings of fact in a contempt proceeding were not supported by the evidence

State v. Robinson, 2022-NCCOA-61, ___ N.C. App. ___ (Feb. 1, 2022)

In this Gaston County case, the defendant was summarily found in direct criminal contempt by a magistrate. The contempt order arose out of a situation where the defendant came to the magistrate's office to report a death threat she had received on her cell phone. The magistrate declined to look at the phone because cell phones were not permitted in the courtroom. The magistrate then told the defendant "that she needed to leave and take the cell phone out or [he] would hold her in contempt." ¶ 5. The magistrate sat in silence for two or three minutes while the defendant repeated her claim, and then shut the blinds to the magistrate's window, saying "we're finished." *Id.* The defendant left and made it to her car, but by that point the magistrate had informed the sheriff's office that he was holding the defendant in contempt. Officers returned the defendant to the courtroom where the magistrate, without any additional proceedings, passed the contempt order through the window and gave it to the defendant. On appeal, the superior court found, among other things, that the magistrate told the defendant "that she was going to have to leave the courtroom and stop arguing with him, or he would hold her in contempt of court." ¶ 8. The superior court concluded that the magistrate twice gave the defendant summary notice of the contempt charge and the conduct on which it was based, and then gave the defendant an opportunity to respond. The superior court entered an order holding the defendant in contempt and sentenced her to 48 hours of time already served.

On appeal to the Court of Appeals, the defendant argued that some of the trial judge's findings of fact were not supported by the evidence. The Court of Appeals agreed, concluding that the evidence did not support the finding that the magistrate told the defendant to stop arguing with him. Rather, the magistrate told the defendant to leave the courtroom on account of the phone, and did not say anything further before ultimately closing the window blinds. Additionally, the Court concluded that there was insufficient evidence to support the trial court's finding that the defendant continued to argue with the magistrate in response to being given notice that she would be held in contempt. To the contrary, the magistrate's own testimony indicated that the defendant was repeating her claim about the underlying death threat, not arguing with the magistrate's contempt warning.

The Court went on to note that the superior court appeared to be reviewing validity of the proceedings leading up to the magistrate's order rather than conducting a *de novo* review. Moreover, the Court noted that summary contempt proceedings by the magistrate were not appropriate in any event where the contempt was not imposed substantially contemporaneously with the offending acts. Here, the magistrate effectively closed court by closing the window blinds and did not actually hold the defendant in summary contempt until

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she had left the courtroom for her car. Once court was closed, there was no proceeding to be delayed or disrupted, and summary contempt proceedings were therefore inappropriate.

The Court reversed the trial court's order.