Criminal Case Update

Including significant cases decided May 24, 2016 to October 4, 2016

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Contents

Criminal Procedure

Counsel Issues

State v. Garrison, ___ N.C. App. ___, 788 S.E.2d 678 (Aug. 2, 2016). Because the trial court did not take a proper of waiver of counsel, the defendant was entitled to a new trial. The State conceded error, noting that the defendant had not been advised of the range of permissible punishments as required by G.S. 15A-1242.

Discovery & Related Issues

State v. Sandy, ___ N.C. App. ___, 788 S.E.2d 200 (June 21, 2016). Invoking Rule 2 of the NC Rules of Appellate Procedure, the court considered emails outside of the record and granted the defendants' MAR, finding both a *Brady* violation and a *Napue* (failure to correct false testimony)

violation. Specifically, the State failed to provide critical impeachment evidence regarding its star witness which would have supported the defendants' assertion that the witness was a drug dealer. Likewise, the State failed to correct testimony by the witness that he was not a drug dealer. The emails in question related to an ongoing investigation of the witness revealing that he was in fact involved with drugs.

Indictment Issues

State v. Ross, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 4, 2016). The trial court committed plain error in this safecracking case by instructing the jury that it could convict the defendant if it determined that he obtained the safe combination "by surreptitious means" when the indictment charged that he committed the offense by means of "a fraudulently acquired combination." One essential element of the crime is the means by which the defendant attempts to open a safe. Here, there was no evidence that the defendant attempted to open the safe by the means alleged in the indictment.

State v. Jones, ___ N.C. App. ___, 789 S.E.2d. 651 (July 19, 2016). In this second-degree sexual exploitation of a minor case, there was no fatal variance between the indictments and the evidence presented at trial. The indictments alleged a receipt date of December 17, 2009; the evidence established the date of receipt as October 18, 2009. A variance regarding time becomes material if it deprives the defendant of his ability to prepare a defense. Here, the defendant did not advance an alibi or other time-based defense at trial.

State v. Gates, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 2, 2016). In this second-degree sex offense case, the court vacated and remanded for entry of judgment on attempted sexual offense where the indictment charged the defendant only with an attempted, not a completed, sex offense. The indictment, labeled "Second Degree Sexual Offense," alleged that the defendant "did attempt to engage in a sex offense with the victim." Notwithstanding this, the trial court instructed the jury on the completed offense and provided no instruction on attempt.

State v. Brice, ___ N.C. App. ___, 786 S.E.2d 812 (June 7, 2016), *temporary stay allowed*, __ N.C. __, 787 S.E.2d 390 (Jun. 28, 2016). The indictment charging the defendant with habitual misdemeanor larceny failed to comply with G.S. 15A-928 with respect to alleging the required prior convictions and thus was defective. A single indictment charged the defendant with habitual misdemeanor larceny and listed the defendant's prior convictions; the prior convictions were not alleged in a separate count. The court rejected the State's argument that the error did not warrant reversal unless the defendant was prejudiced.

State v. Sellers, ___ N.C. App. ___, 789 S.E.2d 459 (July 5, 2016). An indictment alleging possession of stolen property was defective where it failed to allege that the property was stolen or that the defendant knew or had reason to believe that it was stolen.

Jurisdictional Issues

State v. Armstrong, ___ N.C. App. ___, 786 S.E.2d 830 (June 21, 2016). In a case in which the defendant was originally charged with habitual impaired driving, driving while license revoked

and speeding, the superior court did not have subject matter jurisdiction to try the misdemeanor or the infraction where the State dismissed the felony DWI charge before trial. The case came on for trial in superior court about one month after the State dismissed the felony DWI charge. Without the felony offense, the misdemeanor fell under none of the exceptions in G.S. 7A-271(a) giving jurisdiction to the superior court, and the infraction fell under none of the exceptions in subsection (d) of that provision. Under G.S. 7A-271(c), once the felony was dismissed before trial, the court should have transferred the two remaining charges to the district court.

Jury Trial Waiver

State v. Jones, ___ N.C. App. ___, 789 S.E. 2d. 651 (July 19, 2016). (1) The court rejected the defendant's argument that the trial court lacked authority to allow him to waive his right to a trial by jury because he was not arraigned before the effective date of the constitutional amendment and statute allowing such a waiver. The new provision on jury trial waivers became effective December 1, 2014 and applies to criminal cases arraigned in Superior Court on or after that date. The defendant never requested a formal arraignment pursuant to G.S. 15A-941; his arraignment occurred on the first day of trial, May 11, 2015. Because the defendant's arraignment occurred after the effective date of the constitutional amendment and accompanying session law, the trial court was constitutionally authorized to accept the defendant's waiver of jury trial. (2) The court rejected the defendant's argument that because the trial judge had ruled in favor of the defendant's pretrial motion in limine, excluding an involuntary confession, he was unable to serve as a fair and impartial factfinder and that the non-jury trial was "tainted" by the trial judge's knowledge of the inadmissible statements. Because the defendant chose to waive his right to a trial by jury and proceed with a bench trial, he could not argue on appeal that he was prejudiced as a result of his own strategic decision. Furthermore, the trial court is presumed to disregard incompetent evidence in making decisions as a finder of fact.

Jury Selection—*Batson*

State v. McQueen, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The trial court did not err by denying the defendant's *Batson* challenges in this capital case. The two victims and the eyewitness were Palestinian and the defendant was black. The State exercised a peremptory strike against Juror 2, a black male. When questioned about the death penalty, Juror 2 stated that he would not agree to the death penalty under any circumstances, elaborating that he was a pastor and that agreeing with the death penalty would make him a hypocrite; he added that he might hypothetically agree to the death penalty in one specified gruesome scenario. Reservations concerning ability to impose the death penalty constitute a racially neutral basis for exercising a peremptory challenge. The State exercised a peremptory strike against Juror 10, a black female. After the defendant raised a *Batson* challenge, the State provided reasons for the strike: Juror 10's thoughts about the death penalty; her failure to disclose her criminal charges; reservations about whether law enforcement treated her brother fairly; and her lack of eye contact when asked whether her brother's prosecution would affect her ability to be fair and impartial. These are racially neutral reasons for striking a juror. The State exercised a peremptory strike against Juror 11, a black male; it did not strike Juror 12, a white male. Jurors 11 and 12 were charged with writing worthless checks and driving while license revoked in the past and both knew a potential witness in the case. However, Juror 12 responded directly to questions about his criminal charges

while Juror 11 minimized his criminal history; Juror 11 avoided questions regarding his family members' criminal charges; Juror 12 had a business relationship with the witness whereas Juror 11 spoke with him on multiple occasions and his grandniece worked for the witness. The trial court did not commit clear error in rejecting the defendant's *Batson* challenges

Jury Argument

State v. Lindsey, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The trial court did not err by denying the defendant final closing arguments in this DWI case. Rule 10 of the General Rules of Practice for the Superior and District Courts provides that "if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." Here, the defendant did not call any witnesses or put on evidence but did cross-examine the State's only witness and sought to play a video of the entire traffic stop recorded by the officer's in-car camera during cross-examination. At issue on appeal was whether admitting the video of the stop during cross-examination constituted introducing evidence. Although the officer provided testimony describing the stop shown in the video, the video went beyond the officer's testimony and "is different in nature from evidence presented in other cases that was determined not to be substantive." Playing the video allowed the jury to hear exculpatory statements by the defendant to the police beyond those testified to by the officer and introduced evidence of flashing police lights that was not otherwise in evidence to attack the reliability of the HGN test. The video was not merely illustrative. It allowed the jury to make its own determinations concerning the defendant's impairment apart from the officer's testimony and therefore was substantive evidence.

State v. Gordon, ___ N.C. App. ___, 789 S.E.2d. 659 (July 19, 2016). (1) The prosecutor's statement, which was clarified after objection, was not in violation of the law or calculated to mislead or prejudice the jury. After the trial court sustained defense counsel's objection to the prosecutor's statement about the victim, "I think she is telling the truth," the prosecutor clarified: "I'm just arguing they should think she's telling the truth. I'm sorry, Judge, I misstated. You should be able to say, after watching her testify, that you think she is telling the truth." (2) The court rejected the defendant's argument that the trial court erred by failing to give a curative instruction to the jury after sustaining defense counsel's objection, where the defendant had not asked for such an instruction. Additionally, the trial court had instructed the jury at the outset of the trial that when the court sustains an objection to a question, the jury must disregard the question and the answer. (3) The trial court did not err by failing to intervene ex mero motu when the prosecutor made his clarifying statement.

Jury Instructions

State v. Campos, ___ N.C. App. ___, 789 S.E.2d. 492 (July 19, 2016). In this child abuse case, the trial court committed prejudicial error by giving a flight instruction where there was no evidence upon which a reasonable theory of flight could be based. The court explained: "what the trial court deemed a 'close call' in terms of defendant's alleged flight amounted to mere conjecture." It rejected the State's argument that the defendant's refusal to speak with law enforcement on a voluntary, pre-arrest basis was evidence of flight. It also rejected the State's

argument that there was evidence that the defendant deviated from his normal pattern of behavior, showing efforts to avoid apprehension.

State v. Frazier, ___ N.C. App. ___, ___ S.E.2d ___ (July 5, 2016). (1) In this case in which the defendant was convicted of felony murder with the underlying felony being child abuse, the trial court did not err by denying the defendant's request to instruct the jury on premeditated and deliberate murder and all lesser included offenses. There was no evidence that the defendant possessed a specific intent to kill formed after premeditation and deliberation where the evidence showed that the defendant "snapped" and "lost control." (2) Second-degree murder is not a lesser included offense of first-degree felony murder.

State v. Campos, ___ N.C. App. ___, 789 S.E.2d. 492 (July 19, 2016). In this child abuse case, the trial court did not err by using the term "handling" to describe the element of intentional assault that was part of the child abuse charge. The trial court's instruction was sufficient to explain the term assault as it related to the case.

Jury Deliberations

State v. Lee, ___ N.C. App. ___, 789 S.E.2d 679 (Aug. 2, 2016). The court rejected the defendant's argument that the trial court committed plain error by requiring a jury to deliberate for an unreasonable length of time. Jury deliberations began at 2:15 pm. At 8:43 pm the jury sent a note indicating that it was deadlocked. Several minutes later, and with defense counsel's consent, the trial court gave an *Allen* instruction. At 10:50 pm the trial court returned the jury to the courtroom and requested an update on deliberations. The foreperson indicated that the jury was a lot closer "than the first time." Both parties agreed to let deliberations resume. The jury returned a verdict at 11:34 pm. The court rejected the defendant's argument that by allowing the jury to continue deliberations until nearly midnight it violated G.S. 15A-1235(c). When the trial court allowed the jury to continue deliberating at 10:50 pm the statute was not implicated because it no longer appeared that the jury was unable to agree.

Motions to Suppress

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 2, 2016). The trial court did not err by denying the defendant's motion to suppress as untimely under G.S. 15A-976 where the defendant failed to file the motion within the requisite time following receipt of the State's notice.

Pleas

State v. Pless, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 4, 2016). (1) A drug trafficking defendant who pled guilty and was sentenced pursuant to a plea agreement had no right to appeal the sentence, which was greater than that allowed by the applicable statute at the time. G.S. 15A-1444 allows for appeal after a guilty plea for terms that are unauthorized under provisions of Chapter 15A; the drug trafficking defendant here was sentenced under Chapter 90. However, the court went on to find that the defendant's plea was invalid. (2) A drug trafficking defendant who pled guilty and was sentenced pursuant to a plea agreement allowing for a sentence greater than

that provided for in the applicable drug trafficking statute was entitled to have the plea agreement set aside on this basis.

State v. Jester, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 16, 2016). The trial court erred by sentencing the defendant as a habitual felon where the defendant stipulated to his habitual felon status but did not enter a plea to that effect. The trial court's colloquy with the defendant failed to comply with G.S. 15A-1022.

Sentencing

***Blakely* Issues**

State v. Williams, ___ N.C. App. ___, 786 S.E.2d 419 (June 21, 2016). Where the trial court enhanced a DWI sentence based solely on the defendant's prior convictions, the defendant's Sixth Amendment rights were not violated. At sentencing, the trial court found the existence of two grossly aggravating factors, i.e., that defendant had two or more convictions involving impaired driving within seven years before the date of the offense. (1) The court rejected the defendant's argument that the State violated the notice provision for aggravating factors in G.S. 20-179(a1)(1), holding that provision only applied to cases appealed to superior court (the case in question was initiated in superior court by indictment). (2) The court also rejected the defendant's argument that the State's failure to comply with the statutory notice provision violated his constitutional rights under *Blakely* (any factor other than prior conviction that elevates the sentence beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt). The court reasoned that because the defendant's sentence was aggravated only because of prior convictions, *Blakely* did not apply.

Mitigating Factors/Sentence

State v. Wagner, ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). (1) In this child sexual assault case, the trial court did not err by failing to find the mitigating factor that the defendant successfully completed a substance abuse program. Because the defendant completed the program prior to his arrest, his participation in it did not meet the requirements of G.S. 15A-1340.16(e)(16). (2) The court rejected the defendant's argument that the trial court abused its discretion by failing to treat his completion of the program as a non-statutory mitigating factor. (3) The trial court did not err by failing to find the mitigating factor that the defendant had a positive employment history. Even if the defendant's evidence established that he had a professional bull riding career, he retired from that profession in 2007 and did not present evidence that he was gainfully employed between that date and his arrest in 2014.

State v. Lee, ___ N.C. App. ___, 789 S.E.2d 679 (Aug. 2, 2016). Because the trial court did not depart from the presumptive range in sentencing the defendant, it was not required to make any findings regarding mitigation. The court rejected the defendant's argument that the trial court erroneously failed to "consider" evidence of mitigating factors proved by the State's own evidence.

Prior Record Level

Notice

State v. Crook, ___ N.C. App. ___, 785 S.E.2d 771 (June 7, 2016). The trial court erred by including a prior record level point under G.S. 15A-1340.14(b)(7) where the State did not provide the defendant with notice of intent to prove the existence of the point as required by the statute.

Proof, Stipulations & Admissions

State v. Robinson, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The trial court did not err by sentencing the defendant as a PRL IV offender. The State used the defendant's prior Michigan conviction at the default level as a Class I felony. On appeal the defendant argued that since the prior record level worksheet did not clearly show that the Michigan conviction was classified as a felony in Michigan and the State did not present any evidence regarding the conviction or its classification there, it was improperly treated as a felony. The worksheet clearly indicated that the offense would be classified as a Class I felony and the defendant stipulated to this classification.

State v. Briggs, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 16, 2016). The evidence supported sentencing the defendant as a PRL II offender where defense counsel's lack of objection to the PRL worksheet, despite the opportunity to do so, constituted a stipulation to the defendant's prior felony conviction.

State v. Jester, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 16, 2016). There was sufficient evidence to sentence the defendant as a PRL IV offender. Defense counsel stipulated to the defendant's prior record level as stated on the prior record level worksheet where counsel did not dispute the prosecutor's description of the defendant's prior record or raise any objection to the contents of the proffered worksheet. Additionally, counsel referred to the defendant's record during his sentencing argument.

Substantially Similar Offense

State v. Jester, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 16, 2016). The trial court did not err by assigning points for two out-of-state felony convictions. "[B]ecause defendant stipulated to his prior record and the prosecutor did not seek to assign a classification more serious than Class I to his out-of-state convictions for second-degree burglary and breaking and entering, the State was not required to offer proof that these offenses were considered felonies in South Carolina or that they were substantially similar to specific North Carolina felonies."

Probation

State v. Hancock, ___ N.C. App. ___, 789 S.E.2d 522 (Aug. 2, 2016). The trial court properly revoked the defendant's probation, where the defendant committed new crimes (drug possession and possession of drug paraphernalia) while on probation. Though the defendant had not yet been convicted of the new crimes, a probation officer's allegation that cocaine, marijuana, and

drug paraphernalia were found during a warrantless search was sufficient evidence that the defendant had committed them.

Resentencing

State v. Spence, ___ N.C. App. ___, 787 S.E.2d 455 (June 21, 2016). On remand, the trial court properly conducted a de novo sentencing hearing.

Right to be Present

State v. Briggs, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 16, 2016). Because the trial court resentenced the defendant to a longer prison sentence without him being present, the court vacated and remanded for resentencing. After the defendant was sentenced, the Division of Adult Correction notified the court that the maximum prison term imposed did not correspond to the minimum prison term under Structured Sentencing. The trial court issued an amended judgment in response to this notice, resentencing the defendant, without being present, to a correct term that included a longer maximum sentence.

Evidence

Authentication

State v. Ross, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 4, 2016). The trial court did not commit plain error by admitting store surveillance video in a safecracking case. Citing *State v. Snead*, ___ N.C. ___, 783 S.E.2d 733 (2016), the court held that the surveillance video was properly authenticated. The store manager testified that the surveillance system included 16 night vision cameras; he knew the cameras were working properly on the date in question because the time and date stamps were accurate; and a security company managed the system and routinely checked the network to make sure the cameras remained online. The store manager also testified that the video being offered into evidence at trial was the same video he viewed immediately following the incident and that it had not been edited or altered in any way.

State v. Fleming, ___ N.C. App. ___, 786 S.E.2d 760 (June 7, 2016). (1) The trial court properly admitted a videotape of a detective's interview with the defendant for illustrative purposes. The detective testified that the video was a fair and accurate description of the interview. This met the requirements for authentication of a video used for illustrative purposes. (2) Citing the North Carolina Supreme Court's recent decision in *State v. Snead*, the court held that a store surveillance video of a theft was properly authenticated. The State's witness testified that the surveillance video system was functioning properly at the time and that the video introduced at trial was unedited.

Relevancy

State v. Clevinger, ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). Although statements made by a law enforcement officer during a videotaped interrogation of the defendant were not relevant, the defendant failed to show prejudice warranting a new trial. The court distinguished

cases holding that statements by a law enforcement officer during a videotaped interrogation of the defendant are relevant to provide context for the defendant's answers, noting, among other things, that in this case the defendant never made any concessions or admissions during the interrogation; instead, he repeatedly denied involvement in the crime. For the same reason, the officer's statements were not relevant to show his interrogation techniques. Finally, because the defendant never wavered from his denials, the officer's statements were not relevant to show that the defendant conceded the truth or changed his story.

State v. Young, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 2, 2016). The court rejected the defendant's argument that two photos from a photo line-up were irrelevant. The victims had identified the photographs during a photo lineup as depicting the perpetrator. The photographs were admitted as substantive evidence and published to the jury at trial without objection. The court rejected the defendant's argument that the photos were irrelevant where no witness testified that the defendant was in fact the person depicted in them. The court found that the photographs were properly authenticated by testifying witnesses and the jury "was well able" to look at them and to look at the defendant in the courtroom and draw their own conclusions about whether he was the person depicted.

State v. Mbaya, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). (1) In this sexual assault case, the trial court did not err by excluding the defendant's evidence that the victim had previously been sexually active and that her parents punished her for this activity. The defendant did not argue that the victim's past sexual activity was admissible under one of the four exceptions to the Rape Shield statute. Rather, he argued that her past sexual activity and parental punishment for it was relevant to show that she had a motive to fabricate accusations against him. Here, the evidence showed that the victim had not engaged in sexual activity for several months prior to the incident at issue. The victim's parents knew that she had been sexually active for several years prior to the incident and the victim testified that she was not worried about being punished for engaging in sexual conduct. No evidence tied her past sexual activity or parental punishment to the incident in question. Additionally, unlike other cases where evidence of sexual activity was deemed admissible, this case did not turn primarily on the victim's testimony. Here, there was other "compelling physical evidence submitted by the State" including, among other things, DNA evidence and GPS records. (2) The trial court did not violate the defendant's constitutional right to present a defense by excluding irrelevant evidence.

Opening the Door

State v. Portillo, ___ N.C. App. ___, 787 S.E.2d 822 (June 7, 2016). Because the defendant's self-serving, exculpatory statement was separate and apart from inculpatory statements he made on other days and that were admitted at trial, the State did not open the door for its admission.

404(b) Evidence

State v. Reed, ___ N.C. App. ___, 789 S.E.2d 703 (Aug. 16, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 6, 2016). In case where the defendant was convicted of misdemeanor child abuse and contributing to the delinquency of a minor, the court held, over a dissent, that although the trial court did not abuse its discretion in admitting 404(b) evidence,

reference to the 404(b) evidence at trial created error. The evidence showed that when the defendant went to use the bathroom in her home for a few minutes, her toddler fell into their outdoor pool and drown. The 404(b) evidence showed that some time earlier while the defendant was babysitting another child, Sadie Gates, the child got out of the house and drowned just outside of her home. Although the evidence was properly admitted under Rule 404(b), the State used the evidence of Sadie's death "far beyond the bounds allowed by the trial court's order." The prosecutor mentioned Sadie 12 times in its opening statement, while the actual victim was mentioned 15 times; during the State's direct examination Sadie was mentioned 28 times, while the actual victim was mentioned 33 times; and during closing Sadie was mentioned 12 times while the actual victim was mentioned 15 times. The court concluded: "The State's use of the evidence regarding Sadie went far beyond showing that defendant was aware of the dangers of water to small children or any other proper purpose as found by the trial court."

Fifth Amendment (Self-Incrimination) Issues

Herndon v. Herndon, ___ N.C. ___, 785 S.E.2d 922 (June 10, 2016). Reversing the Court of Appeals, the court held that the trial court did not violate the defendant's Fifth Amendment rights in connection with a civil domestic violence protective order hearing. During the defendant's case-in-chief, but before the defendant took the stand, the trial court asked defense counsel whether the defendant intended to invoke the Fifth Amendment, to which counsel twice responded in the negative. While the defendant was on the stand, the trial court posed questions to her. The court noted that at no point during direct examination or the trial court's questioning did the defendant, a voluntary witness, give any indication that answering any question posed to her would tend to incriminate her. "Put simply," the court held, the "defendant never attempted to invoke the privilege against self-incrimination." The court continued: "We are not aware of, and the parties do not cite to, any case holding that a trial court infringes upon a witness's Fifth Amendment rights when the witness does not invoke the privilege." The court further noted that in questioning the defendant, the trial court inquired into matters within the scope of issues that were put into dispute on direct examination by the defendant. Therefore, even if the defendant had attempted to invoke the Fifth Amendment, the privilege was not available during the trial court's inquiry.

State v. Wagner, ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). In this child sexual assault case, the court rejected the defendant's argument that the defendant's wife improperly testified as to the defendant's exercise of his constitutional right to remain silent after arrest. The defendant pointed to the witness's answer to a question about whether she ever talked to him about the allegations at issue. She responded: "I want to say that I did ask him what had happened, and he said that he couldn't talk over the phone because it was being recorded." Because the testimony at issue was from the defendant's wife, not a law enforcement officer, and was given by her to explain whether she had ever discussed the allegations with the defendant, her statement that he had declined to discuss them over the phone due to a concern that the call was being recorded "cannot properly be characterized as a violation of his privilege against self-incrimination."

Opinions

Expert Opinions

State v. McGrady, ___ N.C. ___, 787 S.E.2d 1 (June 10, 2016). Affirming the decision below, the court held that the trial court did not abuse its discretion by ruling that the defendant's proffered expert testimony did not meet the standard for admissibility under Rule 702(a). The defendant offered its expert to testify on three principal topics: that, based on the "pre-attack cues" and "use of force variables" present in the interaction between the defendant and the victim, the defendant's use of force was a reasonable response to an imminent, deadly assault that the defendant perceived; that the defendant's actions and testimony are consistent with those of someone experiencing the sympathetic nervous system's "fight or flight" response; and that reaction times can explain why some of the defendant's defensive shots hit the victim in the back. Holding (for reasons discussed in detail in the court's opinion) that the trial court did not abuse its discretion by excluding this testimony, the court determined that the 2011 amendment to Rule 702(a) adopts the federal standard for the admission of expert witness articulated in the *Daubert* line of cases. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

State v. Abrams, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 2, 2016). In this drug case, the trial court did not abuse its discretion by admitting expert testimony identifying the substance at issue as marijuana. At trial, Agent Baxter, a forensic scientist with the N.C. State Crime Lab, testified that she examined the substance, conducted relevant tests, and that the substance was marijuana. The *Daubert* test requires the court to evaluate qualifications, relevance and reliability. In the instant case, the defendant did not dispute Baxter's credentials or the relevancy of her testimony; he challenged only its reliability. The court noted that *Daubert* articulated five factors from a nonexhaustive list that can bear on reliability. Those factors however are part of a flexible inquiry and do not form a definitive checklist or test; the trial court is free to consider other factors that may help assess reliability. Additionally, Rule 702 does not mandate any particular procedural requirements for the trial court when exercising its gatekeeping function over expert testimony. Here, Baxter's testimony established that she analyzed the substance in accordance with State Lab procedures, providing detailed testimony regarding each step in her process. The court concluded: "Based on her detailed explanation of the systematic procedure she employed to identify the substance …, a procedure adopted by the N.C. Lab specifically to analyze and identify marijuana, her testimony was clearly the 'product of reliable principles and methods' sufficient to satisfy … Rule 702(a)." The court went on to reject the defendant's argument that Baxter's testimony did not establish that she applied the principles and methods reliably to the facts of the case.

State v. Hunt, ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). (1) In this drug case, testimony from the State's expert sufficiently established a trafficking amount of opium (over 4 grams). Following lab protocol, the forensic analyst grouped the pharmaceutically manufactured pills seized into four categories based on their unique physical characteristics. He then chemically analyzed one pill from three categories and determined that they tested positive for oxycodone. He did not test the pill in the final category because the quantity was already over the trafficking amount. Following prior case law, the court held that the analyst was not required to chemically analyze each individual tablet; his testimony provided sufficient evidence for a trafficking amount of opium such that an instruction on lesser included drug offenses was not

required. The court also noted that any deviation that the analyst might have taken from the established methodology for analyzing controlled substances went to the weight of his testimony not its admissibility. (2) The analyst's testimony was properly admitted under Rule 702. The court began by holding that the analyst's testimony was the product of reliable principles and methods. Next, the court rejected the defendant's central argument that the analyst should not have been permitted to testify regarding pills that were not chemically analyzed and therefore that his testimony was not based on sufficient facts or data and that he did not apply the principles and methods reliably to the facts of the case. Rejecting this argument, the court noted the testing and visual inspection procedure employed by the analyst, as described above.

State v. Daughtridge, ___ N.C. App. ___, 789 S.E.2d 667 (Aug. 2, 2016). Applying the *Daubert* standard, the court held that the trial court improperly allowed a medical examiner to testify that the victim's death was a homicide, when that opinion was based not on medical evidence but rather on non-medical information provided to the expert by law enforcement officers. However, the error did not rise to the level of plain error.

Lay Opinions

State v. Daughtridge, ___ N.C. App. ___, 789 S.E.2d 667 (Aug. 2, 2016). In this murder and possession of a firearm by a felon case, the trial court did not commit plain error by allowing the admission of an investigator's testimony concerning the defendant's demeanor. At trial, the investigator, who had interviewed the defendant, was asked to clarify why he thought that the defendant's earlier statement didn't "add up." The investigator noted the defendant's demeanor testifying, among other things, that the defendant did not express emotion when talking about his wife's alleged suicide. The court rejected the defendant's argument that the statements constituted impermissible lay opinions under Rule 701. Rather, it concluded that in context, the investigator was simply explaining the steps he took in his ongoing investigation; his statements expressing skepticism over the defendant's account served merely to provide context explaining his rationale for subjecting the defendant to further scrutiny. The court further rejected the defendant's argument that the investigator's testimony regarding certain text messages sent from the victim's phone also constituted improper lay opinion testimony. The investigator examined these messages to determine whether the victim's death was a suicide. Like the investigator's other testimony, this testimony provided context for his decision-making regarding the investigation; his testimony explained why he conducted a homicide investigation rather than concluding that the victim's death was a suicide. Regarding the investigator's testimony that the defendant "was deceptive," the court concluded that because the statements were elicited by the defense on cross examination the invited error doctrine applied.

On Credibility

State v. Crabtree, ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). In this child sexual assault case, neither a child interviewer from the Child Abuse Medical Evaluation Clinic nor a DSS social worker improperly vouched for the victim's credibility; however, the court held, over a dissent, that although a pediatrician from the clinic improperly vouched for the victim's credibility, no prejudice occurred. In the challenged portion of the social worker's testimony, the social worker, while explaining the process of investigating a report of child sexual abuse, noted

that the pediatrician and her team "give their conclusions or decision about those children that have been evaluated if they were abused or neglected in any way." This statement merely described what the pediatrician's team was expected to do before sending a case to DSS; the social worker did not comment on the victim's case, let alone her credibility. In the challenged portion of the interviewer's testimony, he characterized the victim's description of performing fellatio on the defendant as "more of an experiential statement, in other words something may have actually happened to her as opposed to something [seen] on a screen or something having been heard about." This testimony left the credibility determination to the jury and did not improperly vouch for credibility. However, statements made by the pediatrician constituted improper vouching. Although the pediatrician properly described the five-tier rating system that the clinic used to evaluate potential child abuse victims, she ventured into improper testimony when she testified that "[w]e have sort of five categories all the way from, you know, we're really sure [sexual abuse] didn't happen to yes, we're really sure that [sexual abuse] happened" and referred to the latter category as "clear disclosure" or "clear indication" of abuse in conjunction with her identification of that category as the one assigned to the victim's interview. Also, her testimony that her team's final conclusion that the victim "had given a very clear disclosure of what had happened to her and who had done this to her" was an inadmissible comment on the victim's credibility. However, the defendant was not prejudiced by these remarks.

Privileges

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 2, 2016). The court rejected the defendant's argument that the trial court erred by admitting his medical records into evidence. The court began by rejecting the defendant's argument that under the plain language of the physician-patient privilege statute, G.S. 8-53, disclosure of a patient's medical records may be compelled only by judicial order after determination that such disclosure is necessary to a proper administration of justice. No authority suggests that this statute provides the exclusive means of obtaining patient medical records. G.S. 90-21.20B allows law enforcement to obtain such records through a search warrant and permits disclosure of protected health information notwithstanding G.S. 8-53. Next the court rejected the defendant's argument that G.S. 90-21.20B did not permit the disclosure to law enforcement and use at trial of the medical records.

Victim Impact Evidence

State v. Charleston, ___ N.C. App. ___, 789 S.E.2d 513 (Aug. 2, 2016). Although the trial court erred by admitting victim impact evidence during the guilt-innocence phase of the trial, in light of the extensive evidence of the defendant's guilt, the error did not constitute plain error.

Arrest, Search & Investigation

Arrests & Investigatory Stops

Whether a Seizure Occurred; Exigent Circumstances

State v. Marrero, ___ N.C. App. ___, 789 S.E.2d 560 (Aug. 2, 2016). In this drug case, the trial court properly denied a motion to suppress where no illegal seizure of the defendant occurred

during a knock and talk and where exigent circumstances justified the officers' warrantless entry into the defendant's home. (1) The court rejected the defendant's argument that he was illegally seized during a knock and talk because he was coerced into opening the front door. The officers knocked on the front door a few times and stated that they were with the police only once during the 2-3 minutes it took the defendant to answer the door. There was no evidence that the defendant was aware of the officer's presence before he opened the door. Blue lights from nearby police cars were not visible to the defendant and no takedown lights were used. The officers did not try to open the door themselves or demand that it be opened. The court concluded: "the officers did not act in a physically or verbally threatening manner" and no seizure of defendant occurred during the knock and talk. (2) Exigent circumstances supported the officers' warrantless entry into the defendant's home (the defendant did not challenge the existence of probable cause). Officers arrived at the defendant's residence because of an informant's tip that armed suspects were going to rob a marijuana plantation located inside the house. When the officers arrived for the knock and talk, they did not know whether the robbery had occurred, was in progress, or was imminent. As soon as the defendant open his door, an officer smelled a strong odor of marijuana. Based on that odor and the defendant's inability to understand English, the officer entered the defendant's home and secured it in preparation for obtaining a search warrant. On these facts, the trial court did not err in concluding that exigent circumstances warranted a protective sweep for officer safety and to ensure the defendant or others would not destroy evidence.

Vehicle Stops

State v. Reed, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). Applying *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), in this drug case, the court held, over a dissent, that trial court erred by denying the defendant's motion to suppress. After stopping the defendant's vehicle for speeding, the officer told the defendant to come with him to the patrol car. The officer frisked the defendant and found a pocketknife. The defendant sat in the front passenger seat of the patrol car with the door open and one leg outside of the car. The officer's canine was in the backseat. The officer told the defendant to close the door; when the defendant hesitated the officer ordered him to do so and the defendant complied. The officer ran the defendant's New York license through record checks on his mobile computer asking the defendant about New York and where he was headed. The officer also asked the defendant about his criminal history, his living arrangements with his fiancée, a passenger in his car, and other questions. When the officer noticed that the rental agreement he had been given was for a different vehicle, he told the defendant to remain seated while he returned to the vehicle to get the correct rental agreement. The officer then approached the defendant's fiancé and asked for the rental agreement and about her travel plans and the nature of her trip. After the defendant's fiancé failed to locate the correct rental agreement, the trooper told her that he was would issue the defendant a speeding ticket and the two could be on their way. The officer then returned to the patrol car, explained that the defendant's fiancé couldn't find the correct rental agreement and continued to question the defendant about his trip. He then called the rental company and confirmed that everything was in order with the rental. The officer issued the defendant a warning ticket. The officer told the defendant he was "completely done with the traffic stop" but wanted to ask the defendant additional questions. The officer asked the defendant if he was carrying controlled substances, firearms, or illegal cigarettes. When the officer asked the defendant for consent to search the car,

the defendant told him to ask his fiancée. The officer also asked the defendant's fiancé the same questions and for permission to search the car. The fiancé eventually gave consent to search. The officer's authority to seize the defendant for the speeding infraction ended when he issued the warning ticket. No reasonable suspicion supported extending the traffic stop beyond this point.

State v. Eldridge, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The trial court erred by denying the defendant's motion to suppress where a stop was based on an officer's mistake of law that was not objectively reasonable. An officer stopped a vehicle registered in Tennessee for driving without an exterior mirror on the driver's side of the vehicle. The officer was not aware that the relevant statute—G.S. 20-126(b)—does not apply to vehicles registered out-of-state. A subsequent consent search led to the discovery of controlled substances and drug charges. On appeal, the State conceded, and the court concluded, following *Heien v. North Carolina*, 135 S. Ct. 530 (2014), that the officer's mistake of law was not reasonable. Looking for guidance in other jurisdictions that have interpreted *Heien*, the court noted that cases from other jurisdictions "establish that in order for an officer's mistake of law while enforcing a statute to be objectively reasonable, the statute at issue must be ambiguous." "Moreover," the court noted, "some courts applying *Heien* have further required that there be an absence of settled case law interpreting the statute at issue in order for the officer's mistake of law to be deemed objectively reasonable." The concluded that the statue at issue was clear and unambiguous; as a result "a reasonable officer reading this statute would understand the requirement that a vehicle be equipped with a driver's side exterior mirror does not apply to vehicles that—like Defendant's vehicle—are registered in another state."

State v. Goins, ___ N.C. App. ___, 789 S.E.2d 466 (July 5, 2016), *temporary stay allowed*, ___ N.C. ___, 787 S.E.2d 398 (July 22, 2016). Over a dissent, the court held that a stop of the defendant's vehicle was not supported by reasonable suspicion. The stop occurred in an area of high crime and drug activity. The defendant's mere presence in such an area cannot, standing alone, provide the necessary reasonable suspicion for the stop. Although headlong flight can support a finding of reasonable suspicion, here the evidence was insufficient to show headlong flight. Among other things, there was no evidence that the defendant saw the police car before leaving the premises and he did not break any traffic laws while leaving. Although officers suspected that the defendant might be approaching a man at the premises to conduct a drug transaction, they did not see the two engage in suspicious activity. The officers' suspicion that the defendant was fleeing from the scene, without more, did not justify the stop.

State v. Crandell, ___ N.C. App. ___, 786 S.E.2d 789 (June 7, 2016). Reasonable suspicion supported the stop of the defendant's vehicle. The vehicle was stopped after the defendant left premises known as "Blazing Saddles." Based on his experience making almost two dozen arrests in connection with drug activity at Blazing Saddles and other officers' experiences at that location, the officer in question was aware of a steady pattern the people involved in drug transactions visit Blazing Saddles when the gate was down and staying for approximately two minutes. The defendant followed this exact pattern: he visited Blazing Saddles when the gate was down and stayed approximately two minutes. The court distinguished these facts from those where the defendant was simply observed in a high drug area, noting that Blazing Saddles was a "notorious" location for selling drugs and dealing in stolen property. It was an abandoned, partially burned building with no electricity, and there was no apparent legal reason for anyone

to go there at all, unlike neighborhoods in high drug or crime areas where people live and naturally would be present.

State v. Sawyers, ___ N.C. App. ___, 786 S.E.2d 753 (June 7, 2016). (1) A stop of the defendant's vehicle was justified by reasonable suspicion. While on patrol in the early morning, the officer saw the defendant walking down the street. Directly behind him was another male, who appeared to be dragging a drugged or intoxicated female. The defendant and the other male placed the female in the defendant's vehicle. The two then entered the vehicle and left the scene. The officer was unsure whether the female was being kidnapped or was in danger. Given these circumstances, the officer had reasonable suspicion that the defendant was involved in criminal activity. (2) Additionally, and for reasons discussed in the opinion, the court held that the stop was justified under the community caretaking exception.

Checkpoints

State v. Ashworth, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 2, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Aug. 22, 2016). In this impaired driving case, the trial court erred by denying the defendant's motion to suppress, which had asserted that a checkpoint stop violated his constitutional rights. When considering a constitutional challenge to a checkpoint, a two-part inquiry applies: the court must first determine the primary programmatic purpose of the checkpoint; if a legitimate primary programmatic purpose is found the court must judge its reasonableness. The defendant did not raise an issue about whether the checkpoint had a proper purpose. The court noted when determining reasonableness, it must weigh the public's interest in the checkpoint against the individual's fourth amendment privacy interest. Applying the *Brown v. Texas* three-part test (gravity of the public concerns served by the seizure; the degree to which the seizure advances the public interest; and the severity of the interference with individual liberty) to this balancing inquiry, the court held that the trial court's findings of fact did not permit the judge to meaningfully weigh the considerations required under the second and third prongs of the test. This constituted plain error.

Arrests

State v. Lindsey, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). An officer had probable cause to arrest the defendant for DWI. After the officer stopped the defendant's vehicle, he smelled a moderate odor of alcohol coming from the defendant and noticed that the defendant's eyes were red and glassy. Upon administration of an HGN test the officer observed five of six indicators of impairment. The defendant was unable to provide a breath sample for an alco-sensor, which the officer viewed as willful refusal. The defendant admitted that he had consumed three beers, though he said his last consumption was nine hours prior. The officer arrested at the defendant for DWI. The court held: "Without even considering defendant's multiple failed attempts to provide an adequate breath sample on an alco-sensor device, we hold the trial court's findings support its conclusion that there was probable cause to arrest defendant for DWI."

State v. Williams, ___ N.C. App. ___, 786 S.E.2d 419 (June 21, 2016). An officer had probable cause to arrest the defendant for DWI. The officer responded to a call involving operation of a golf cart and serious injury to an individual. The defendant admitted to the officer that he was the

driver of the golf cart. The defendant had "very red and glassy" eyes and "a strong odor of alcohol coming from his breath." The defendant's clothes were bloody, and he was very talkative, repeating himself several times. The defendant's mannerisms were "fairly slow" and the defendant placed a hand on the deputy's patrol car to maintain his balance. The defendant stated that he had "6 beers since noon" and he submitted to an Alco-Sensor test, which was positive for alcohol.

Exclusionary Rule & Related Issues

Utah v. Strieff, 579 U.S. ___, 136 S. Ct. 2056 (June 20, 2016). The attenuation doctrine applies when an officer makes an unconstitutional investigatory stop, learns that the suspect is subject to a valid arrest warrant, and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. An officer stopped the defendant without reasonable suspicion. An anonymous tip to the police department reported "narcotics activity" at a particular residence. An officer investigated and saw visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs. One visitor was the defendant. After observing the defendant leave the house and walk toward a nearby store, the officer detained the defendant and asked for his identification. The defendant complied and the officer relayed the defendant's information to a police dispatcher, who reported that the defendant had an outstanding arrest warrant for a traffic violation. The officer then arrested the defendant pursuant to the warrant. When a search incident to arrest revealed methamphetamine and drug paraphernalia, the defendant was charged. The defendant unsuccessfully moved to suppress, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. He was convicted and appealed. The Utah Supreme Court held that the evidence was inadmissible. The Court reversed. The Court began by noting that it has recognized several exceptions to the exclusionary rule, three of which involve the causal relationship between the unconstitutional act and the discovery of evidence: the independent source doctrine; the inevitable discovery doctrine; and—at issue here—the attenuation doctrine. Under the latter doctrine, "Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." (quotation omitted). Turning to the application of the attenuation doctrine, the Court first held that the doctrine applies where—as here—the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant. It then concluded that the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on the defendant's s person. In this respect it applied the three factors articulated in *Brown v. Illinois*, 422 U. S. 590 (1975): the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct. It concluded:

> Applying these factors, we hold that the evidence discovered … was admissible because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant. Although the illegal stop was close in time to [the] arrest, that consideration is outweighed by two factors supporting the State. The outstanding

> arrest warrant for … arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling [the] Officer … to arrest [the defendant]. And, it is especially significant that there is no evidence that [the] Officer[']s] … illegal stop reflected flagrantly unlawful police misconduct.

Interrogation & Confession: *Miranda* Issues

State v. Hammonds, ___ N.C. ___, 789 S.E.2d 1 (June 10, 2016). Vacating the opinion of the Court of Appeals and the trial court's order denying the defendant's motion to suppress, the court ordered the case certified to the trial court for a new hearing on the defendant's motion to suppress for the trial court to apply the totality of the circumstances test as set out in *Howes v. Fields*, 132 S. Ct. 1181, 1194 (2012). At issue was whether the defendant was in custody when he made statements to law enforcement officers while under an involuntary commitment order. The court further stated that the trial court "shall consider all factors, including the important factor of whether the involuntarily committed defendant was told that he was free to end the questioning." (quotation omitted).

State v. Barnes, ___ N.C. App. ___, 789 S.E. 2d. 488 (July 19, 2016). Although the defendant was in handcuffs at the time of the questioning, he was not, based on the totality of the circumstances, "in custody" for purposes of *Miranda*. While the defendant was visiting his cousin's house, a parole officer arrived to search of the cousin's home. The parole officer recognized the defendant as a probationer and the officer advised him that he was also subject to a warrantless search because of his probation status. The officer put the defendant in handcuffs "for officer safety" and seated the two men on the front porch while officers conducted a search. During the search, the parole officer found a jacket with what appeared to be crack cocaine inside a pocket. The officer asked the defendant and his cousin to identify the owner of the jacket. The defendant claimed the jacket and was charged with a drug offense. The court held: "Based on the totality of circumstances, we conclude that a reasonable person in Defendant's situation, though in handcuffs would *not* believe his restraint rose to the level of the restraint associated with a formal arrest." The court noted that the regular conditions of probation include the requirement that a probation submit to warrantless searches. Also, the defendant was informed that he would be placed in handcuffs for officer safety and he was never told that his detention was anything other than temporary. Further, the court reasoned, "as a probationer subject to random searches as a condition of probation, Defendant would objectively understand the purpose of the restraints and the fact that the period of restraint was for a temporary duration."

State v. Portillo, ___ N.C. App. ___, 787 S.E.2d 822 (June 7, 2016). (1) The defendant was not in custody when he gave statements to officers at the hospital. The victim was killed in a robbery perpetrated by the defendant and his accomplice. The defendant was shot during the incident and brought to the hospital. He sought to suppress statements made to police officers at the hospital, arguing that they were elicited during a custodial interrogation for which he had not been given his *Miranda* warnings. There was no evidence that the defendant knew a guard was present when the interview was conducted; the defendant was interrogated in an open area of the ICU where

other patients, nurses, and doctors were situated and he had no legitimate reason to believe that he was in police custody; none of the officers who were guarding him spoke with him about the case prior to the interview; the detectives who did so wore plain clothes; and there was no evidence that the defendant's movements were restricted by anything other than the injuries he had sustained and the medical equipment connected to him. Additionally, based on the evidence, the court rejected the defendant's argument that the interrogation was custodial because he was under the influence of pain and other medication that could have affected his comprehension. It also rejected the defendant's argument that he was in custody because the detectives arrived at the hospital with the intention of arresting him. Although they may have had this intention, it was not made known to the defendant and thus has no bearing on whether the interview was custodial. (2) Where there was no evidence that the defendant's first statement, given in the hospital, was coerced, there was no support for his contention that his second statement was tainted by the first. (3) The court rejected the defendant's argument that his inculpatory statements resulted from substantial violations of Chapter 15A requiring suppression.

State v. Crook, ___ N.C. App. ___, 785 S.E.2d 771 (June 7, 2016). (1) Because the defendant was handcuffed and placed under arrest, the trial court erred by concluding that the defendant was not in custody when he made a statement to the officer. (2) The defendant was subject to an interrogation when, after handcuffing the defendant, placing him under arrest, and conducting a pat down, the officer asked, "Do you have anything else on you?" The defendant, who was in front of a doorway to a motel room, stated, "I have weed in the room." (3) The court rejected the State's argument that the public safety exception established in *New York v. Quarles*, 467 U.S. 649 (1984) applied. The court found the facts of the case at hand "noticeably distinguishable" from those in *Quarles*, noting that the defendant was not suspected of carrying a gun or other weapon; rather, he was sitting on the ground in handcuffs and already had been patted down.

Search Warrants

State v. Jackson, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 4, 2016). Over a dissent, the court held that the search warrant was supported by sufficient probable cause in this drug use. At issue was the reliability of information provided by a confidential informant. Applying the totality of the circumstances test, and although the informant did not have a "track record" of providing reliable information, the court found that the informant was sufficiently reliable. The court noted that the information provided by the informant was against her penal interest (she admitted purchasing and possessing marijuana); the informant had a face-to-face communication with the officer, during which he could assess her demeanor; the face-to-face conversation significantly increase the likelihood that the informant would be held accountable for a tip that later proved to be false; the informant had first-hand knowledge of the information she conveyed; the police independently corroborated certain information she provided; and the information was not stale (the informant reported information obtained two days prior).

State v. Brown, ___ N.C. App. ___, 787 S.E.2d 81 (June 21, 2016). Because an affidavit failed to specify when an informant witnessed the defendant's allegedly criminal activities, there was insufficient evidence establishing probable cause to support issuance of the search warrant. In the affidavit, the officer stated that he received a counterfeit $100 bill from an informant who claimed it had been obtained from the defendant's home. At the suppression hearing, the officer

testified that what he meant to state in the affidavit was that the informant had obtained the bill within the last 48 hours. It was error for the trial court to consider this additional testimony from the officer that was outside of the facts recited in the affidavit. Considering the content of the affidavit, the court held that without any indication of when the informant received the bill, the affidavit failed on grounds of staleness.

State v. Gerard, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). In this sexual exploitation of a minor case, the information contained in an officer's affidavit was sufficient to provide probable cause for issuance of a search warrant for child pornography. In this case, an officer and certified computer forensic examiner identified child pornography through the use of a SHA1 algorithm; the officer downloaded and reviewed some of the images and compared SHA1 values to confirm that the files were child pornography. Although less detailed than the officer's testimony at the hearing, the affidavit went into technical detail regarding law enforcement methods and software used to identify and track transmissions of child pornography over the Internet. The court rejected the defendant's argument that the affidavit's identification of alleged pornographic images as known child pornography based upon computer information was insufficient and that the pictures themselves must be provided with the affidavit.

State v. Downey, ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). In this drug case, the court rejected the defendant's argument that the trial court erred by denying his motion to suppress evidence collected from his residence on the grounds that the inventory list prepared by the detective was unlawfully vague and inaccurate in describing the items seized. The defendant argued that the evidence gathered from his residence was obtained in substantial violation of G.S. 15A-254, which requires an officer executing a search warrant to write and sign a receipt itemizing the items taken. Specifically, he asserted that the inventory receipt was vague and inaccurate and thus failed to satisfy the statute's requirements. In order for suppression to be warranted for a substantial violation of the statute, G.S. 15A-974 requires that the evidence be obtained as a result of officer's unlawful conduct and that it would not have been obtained but for the unlawful conduct. Here, citing prior case law, the court held, in part, that because the evidence was seized before the inventory required by the statute had to be prepared, the defendant failed to show that the evidence would not have been obtained but for the alleged violations of G.S. 15A-254. The court held that G.S. 15A-254 "applies only after evidence has been obtained and does not implicate the right to be free from unreasonable search and seizure. In turn, because evidence cannot be obtained 'as a result of' a violation of [G.S.] 15A-254, [G.S.] 15A-974(a)(2) is inapplicable to either alleged or actual [G.S.] 15A-254 violations."

Searches

Warrantless Searches

Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160 (June 23, 2016). In three consolidated cases the Court held that while a warrantless breath test of a motorist lawfully arrested for drunk driving is permissible as a search incident to arrest, a warrantless blood draw is not. It concluded: "Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation." Having found

that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, the Court turned to the argument that blood tests are justified based on the driver's legally implied consent to submit to them. In this respect it concluded: "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."

State v. Pigford, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 2, 2016). In this drug case, the court held, deciding an issue of first impression, that an odor of marijuana emanating from inside a vehicle stopped at a checkpoint did not provide an officer with probable cause to conduct an immediate warrantless search of the driver. The defendant was driving the stopped vehicle; a passenger sat in the front seat. The officer was unable to establish the exact location of the odor but determined that it was coming from inside the vehicle. Upon smelling the odor, the officer ordered the defendant out of the vehicle and searched him, finding cocaine and other items. On appeal the defendant argued that although the officer smelled marijuana emanating from the vehicle, there was no evidence that the odor was attributable to the defendant personally. It was not contested that the officer had probable cause to search the vehicle. Probable cause to search a vehicle however does not justify search of a passenger. The State offered no evidence that the marijuana odor was attributable to the defendant. The court held: the officer "may have had probable cause to search the vehicle, but he did not have probable cause to search defendant."

Consent Searches

State v. Cobb, ___ N.C. App. ___, 789 S.E.2d 532 (Aug. 2, 2016). In this drug case, the court held that the defendant's consent to search his room in a rooming house was voluntarily given. The court rejected the defendant's argument that he was in custody at the time consent was given. There was no evidence that the defendant's movements were limited by the officers during the encounter. Also, the officers did not supervise the defendant while they were in the home; rather, they simply followed the defendant to his room after he gave consent to search.

Criminal Offenses

Conspiracy

State v. Young, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 2, 2016). There was sufficient evidence of conspiracy to commit armed robbery. Although circumstantial, the evidence supported the inference that the defendant and his accomplices agreed to commit the robbery and other unlawful acts.

State v. Fleming, ___ N.C. App. ___, 786 S.E.2d 760 (June 7, 2016). The State presented insufficient evidence to show that the defendant entered into an agreement to commit common law robbery. The mere fact that the crime the defendant allegedly conspired with others to commit took place does not, without more, prove the existence of a conspiracy. Lacking here was evidence that the defendant conspired to take the property by violence or fear. In fact, his accomplice's use of violence or fear was unknown to the defendant until after the robbery was completed.

Discharging a Barreled Weapon

State v. Charleston, ___ N.C. App. ___, 789 S.E.2d 513 (Aug. 2, 2016). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of discharging a firearm into occupied property. The trial court improperly instructed the jury that it had to find that the defendant knew or had reasonable grounds to believe that the dwelling *was* occupied; this instruction raised the evidentiary bar for the State, as this offense only requires proof that the defendant had reasonable grounds to believe that the building *might be* occupied. The court rejected the defendant's argument that the State was bound by the higher standard stated in the jury instruction. Evidence that the shooting occurred in a residential neighborhood in the evening and resident's car was parked outside of her home sufficiently established that the defendant knew or had reasonable grounds to believe that the dwelling might be occupied. (2) The court rejected the defendant's argument that the trial court's jury instruction on discharging a firearm into occupied property was an improper disjunctive instruction. The defendant was indicted for firing into the home of Ms. Knox. At trial, all the evidence pertains to Knox's home. The trial court's jury instruction referred to discharging a firearm "into a dwelling," without specifying Knox's home. The jury instruction was not phrased in the disjunctive nor did it have "the practical effect of disjunctive instruction," as argued by the defendant.

Child Abuse

State v. Reed, ___ N.C. App. ___, 789 S.E.2d 703 (Aug. 16, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 6, 2016). Considering the defendant's evidence, along with the State's evidence, in this appeal from a denial of a motion to dismiss, the court held, over a dissent, that the evidence was insufficient to support a conviction of misdemeanor child abuse. The evidence showed that the defendant went to use the bathroom in her home for a few minutes, and her toddler, Mercadiez, managed to fall into their outdoor pool and drown. The defendant's evidence, which supplemented and did not contradict the State's evidence, showed that the defendant left the child in the care of another responsible adult while she used the bathroom. Although the concurring judge did not agree, the court went on to hold that the motion should also have been granted even without consideration of the defendant's evidence. Specifically, the State's evidence failed to establish that the defendant's conduct was "by other than accidental means." Reviewing prior cases, the court found: "the State's evidence never crossed the threshold from 'accidental' to 'nonaccidental.'" It continued:

> The known danger here was an outdoor pool. The only purposeful action defendant took, even in the light most favorable to the State, was that defendant went to the bathroom for five to ten minutes. In choosing to go to the restroom, defendant did not leave her child in a circumstance that was likely to create physical injury. . . . If defendant's conduct herein is considered enough to sustain a conviction for misdemeanor child abuse, it seems that any parent who leaves a small child alone in her own home, for even a moment, could be prosecuted if the child is injured during that time, not because the behavior she engaged in was negligent or different from what all other parents typically do, but simply because theirs is the exceedingly rare situation that resulted in a tragic accident.

(2) With the same lineup of opinions, the court held that the evidence was insufficient to support a conviction of contributing to the delinquency of a minor where the evidence showed that the defendant left the victim the care of a competent adult while she used the bathroom.

State v. Frazier, ___ N.C. App. ___, ___ S.E.2d ___ (July 5, 2016). Child-abuse under G.S. 14-318.4(a) requires that the defendant intentionally inflict serious physical injury on a child *or* intentionally commit an assault on the child which results in serious physical injury. These are two separate prongs and the State is not required to prove that the defendant specifically intended that the injury be serious; proof that the defendant intentionally committed an assault on the child which results in serious physical injury is sufficient.

State v. Bohannon, ___ N.C. App. ___, 786 S.E.2d 781 (June 7, 2016). Because subarachnoid hemorrhaging constitutes "serious bodily injury," the evidence was sufficient to convict the defendant of felonious child-abuse inflicting serious bodily injury under G.S. 14-318.4(a3). The court rejected the defendant's argument that since the child did not actually suffer acute consequences from the hemorrhages, his brain injury never presented a substantial risk of death. Among other things, a medical expert testified that bleeding on the brain could lead to a number of issues including developmental delays and even "acute illness and death." Citing this and other evidence, the court concluded that there was sufficient evidence that the child's brain injury created a substantial risk of death.

Cyberbullying

State v. Bishop, ___ N.C. ___, 787 S.E.2d 814 (June 10, 2016). Reversing the Court of Appeals, the court held that subsection G.S. 14-458.1(a)(1)d (criminalizing use of a computer or computer network, with the intent to intimidate or torment a minor, to post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor) of the cyberbullying statute was unconstitutional under the First Amendment. It concluded that the statute "restricts speech, not merely nonexpressive conduct; that this restriction is content based, not content neutral; and that the cyberbullying statute is not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying."

Indecent Exposure

State v. Hayes, ___ N.C. App. ___, 788 S.E.2d 651 (July 19, 2016). Where in the course of one instance the defendant exposed himself to multiple people, one of which was a minor and one of which was an adult, the defendant could not be found guilty of both misdemeanor indecent exposure under G.S. 14-190.9(a) and felonious indecent exposure under G.S. 14-190.9(a1). The misdemeanor indecent exposure statute provides in part: "Unless the conduct is punishable under subsection (a1) of this section" a person who exposes him or herself "in the presence of any other person or persons" shall be guilty of a class 2 misdemeanor. Subsection (a1) makes it a felony to expose oneself, in certain circumstances, to a person less than 16 years of age. The defendant was convicted of a felony under subsection (a1) because one of the victims was under 16. However, subsection (a), by its terms, forbids conduct from being the basis of a misdemeanor conviction if it is also punishable as felony indecent exposure. The court framed the issue as one of statutory construction, not double jeopardy.

Kidnapping

State v. James, ___ N.C. App. ___, 789 S.E.2d 543 (Aug. 2, 2016). The trial court properly denied the defendant's motion to dismiss a first-degree kidnapping charge. (1) There was sufficient evidence that the defendant removed the victim for the purpose of terrorizing her where multiple witnesses heard the defendant threaten to kill her in broad daylight. The defendant assaulted the victim, placed her in headlock, and choked her. Evidence showed that the victim was in a state of intense fright and apprehension; several witnesses heard her yelling for help. (2) The defendant did not leave the victim in a safe place where he dragged her to the middle of a gravel driveway and left her, unconscious and injured. The defendant did not consign her to the care of the witnesses who happened to be nearby; he was running away because they saw him. Additionally, the defendant took one of her cell phones, perhaps not realizing that she had a second phone. Additionally, the statute requires finding either that the victim was not left in a safe place or that the victim suffered serious injury (or sexual assault, not at issue here). Here, the State's evidence established that the victim suffered serious injury requiring emergency room treatment, as well as serious emotional trauma which required therapy for many months continuing through the time of trial. (3) The restraint of the victim was not inherent in the also charged offense of assault by strangulation. The evidence showed two separate, distinct restraints sufficient to support the two offenses. After the initial restraint when the defendant choked the victim into unconsciousness, leaving her unresponsive on the ground, he continued to restrain her by holding her hair, wrapping his arm around her neck, and dragging her to a new location 100 to 120 feet away. (4) The trial court did not err by failing to instruct the jury on the lesser-included offense of false imprisonment where substantial evidence showed that the defendant threatened and terrorized the victim.

State v. King, ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). In this kidnapping and sexual assault case, the evidence was sufficient to establish confinement or restraint for purposes of kidnapping that was separate and apart from the force necessary to facilitate the sexual offense. Here, the defendant forced the victim into his car *after* he had sexually assaulted her.

State v. Gordon, ___ N.C. App. ___, 789 S.E. 2d. 659 (July 19, 2016). In this kidnapping case, there was sufficient evidence that the defendant failed to release the victim in a safe place. The defendant left the victim in a clearing in the woods located near, but not easily visible from, a service road that extended off an interstate exit ramp. The area was described at trial as "very, very remote," "very, very secluded" and almost impossible to see from the highway. The victim "in a traumatized state, had to walk out of the clearing, down an embankment, and across a four-lane highway to get to her apartment. Defendant did not take any affirmative steps to release [her] in a location where she was no longer exposed to harm. He chose to abandon [her] in the same secluded location he had chosen to assault her."

Possession of Stolen Goods

State v. Jester, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 16, 2016). The evidence was sufficient to support a conviction for possession of stolen property. The defendant challenged only the sufficiency of the evidence that he knew or had reasonable grounds to believe that the items were stolen. Here, the defendant had possession of stolen property valued at more than $1,000, which

he sold for only $114; although the defendant told a detective that he obtained the stolen property from a "white man," he could not provide the man's name; and the defendant did not specifically tell the detective that he bought the items from this unidentified man and he did not produce a receipt.

Robbery

State v. Todd, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 16, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 2, 2016). Over a dissent the court held that the evidence was insufficient to support a conviction for armed robbery where it consisted of a single partial fingerprint on the exterior of a backpack worn by the victim at the time of the crime and that counsel rendered ineffective assistance by failing to raise this issue on the defendant's first appeal. Evidence showed that the assailants "felt around" the victim's backpack; the backpack however was not stolen. The backpack, a movable item, was worn regularly by the victim for months prior to the crime while riding on a public bus. Additionally, the defendant left the backpack unattended on a coat rack while he worked in a local restaurant. Reviewing the facts of the case and distinguishing cases cited by the State, the court concluded that the circumstances of the crime alone provide no evidence which might show that the fingerprint could only have been impressed at the time of the crime. The court went on to reject the State's argument that other evidence connected the defendant to the crime.

State v. Whisenant, ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). In this armed robbery case, the evidence was sufficient to establish that the defendant used a dangerous weapon in a way that endangered the victim. A store loss prevention officer questioned the defendant about having taken some store jewelry in the store foyer. During the exchange, the victim saw a knife in the defendant's pocket. The defendant attempted to force his way out of the store foyer and pulled the unopened knife out of his pocket. The victim grabbed the defendant's hand and wrestled the closed knife away from the defendant while the defendant repeatedly said, "I will kill you." Deciding an issue of first impression, the court cited cases from other jurisdictions and held that a closed knife can constitute a dangerous weapon for purposes of armed robbery. It stated: "Defendant's brandishing and use of the knife satisfied the element of a dangerous weapon. The manner and circumstances in which Defendant displayed the knife alludes to its purpose: Defendant yelled 'I will kill you,' attempted to push past [the victim], removed the knife from his pocket and brandished it when [the victim] mentioned police involvement." The court went on to hold that the State presented sufficient evidence tending to show that the victim's life was endangered or threatened by the defendant's actions and threats.

State v. Clevinger, ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). Where the State's evidence was positive and uncontroverted as to whether a weapon used during an armed robbery was in fact a dangerous weapon and there was no evidence from which a rational juror could find that the weapon was anything other than a dangerous one, no error occurred when the trial court submitted the issue of whether the weapon was dangerous to the jury but did not instruct on common law robbery. The State's evidence showed that during the robbery the defendant grabbed the victim, pulled her head back, and held a chef's knife against her neck as he threatened to slit her throat.

Financial Transaction Card Offenses

State v. Sellers, ___ N.C. App. ___, 789 S.E.2d 459 (July 5, 2016). The evidence was sufficient to establish financial transaction card theft. The defendant argued that the evidence was insufficient to prove he took or obtained the victim's card with the intent to use it. The evidence showed that on the day that the card was stolen someone other than the victim used it at Food Lion and The Pantry. Surveillance video showed the defendant at The Pantry at the time the card was swiped and an employee testified that the defendant tried to use a card with another person's name on its face. This was sufficient evidence that the defendant obtained the card with the intent to use it.

Breaking or Entering a Vehicle, Etc.

State v. Covington, ___ N.C. App. ___, 788 S.E.2d 671 (Aug. 2, 2016). The trial court did not commit plain error by failing to instruct the jury on first-degree trespass as a lesser-included of breaking or entering a motor vehicle. Although the defendant argued that he may have broken into the vehicle in order to sleep and thus lacked the intent to commit a larceny therein, no evidence supported that argument.

Sexual Exploitation

State v. Jones, ___ N.C. App. ___, 789 S.E.2d. 651 (July 19, 2016). In this second-degree sexual exploitation of a minor case, there was sufficient evidence with respect to the knowledge element of the crime. The court disagreed with the defendant's argument that there was insufficient evidence tending to show that he was aware of the contents of the pornographic files found on his computer. Among other things, the titles of the files clearly indicated that they contained pornographic images of children.

Obstruction of Justice & Related Offenses

State v. Dove, ___ N.C. App. ___, 788 S.E.2d 198 (June 21, 2016). The evidence was insufficient to support a conviction for altering, stealing, or destroying criminal evidence under G.S. 14-221. The charges were based on the defendant's alleged theft of money obtained from the controlled sale of illegal drugs. The money in question was not evidence as defined by the statute: "any article or document in the possession of a law-enforcement officer or officer of the General Court of Justice."

Drug Offenses

State v. Dulin, ___ N.C. App. ___, 786 S.E.2d 803 (June 7, 2016). (1) Because there was sufficient evidence that the defendant possessed drug paraphernalia, the trial court did not err by denying his motion to dismiss. The paraphernalia was found in plain view in a common living area of a home over which the defendant exercised nonexclusive control. The court found that following constituted "other incriminating circumstances" necessary to prove constructive possession: the defendant spent hours at the house on the day of the search; the defendant admitted that he had a "blunt" in the black truck parked in front of the house and the police

found marijuana in the truck's console; the police found marijuana in the house behind a photograph of the defendant; and several people visited the house while the defendant was there, including a man who shook hands with defendant "as if they were passing an item back and forth." Of these facts, the most significant was that marijuana was found in a picture frame behind a photograph of the defendant. (2) Because there was insufficient evidence that the defendant constructively possessed marijuana found in an uncovered fishing boat located in the yard of a home occupied by multiple people, including the defendant, the trial court erred by denying his motion to dismiss the drug possession charge. The boat was located roughly 70 feet from the side of the house, in a non-fenced area of the yard. There was no evidence that the defendant had any ownership interest in or possession of the boat and the defendant was never seen near the boat.

Motor Vehicle Offenses

State v. Lindsey, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The trial court did not err by denying the defendant's motion to dismiss a DWI charge. Here, after the officer stopped the defendant's vehicle, he noticed a moderate amount of alcohol coming from the defendant's breath, the defendant had red and glassy eyes, the defendant admitting to consuming alcohol hours before, the officer noted five out of six indicators of impairment on the HGN test and the officer believed that the defendant was impaired.

Defenses

Automatism

State v. Frazier, ___ N.C. App. ___, ___ S.E.2d ___ (July 5, 2016). Where the trial court submitted an instruction on automatism as a defense to a charge of felony child abuse, it was not required to instruct the jury on lesser included child abuse offenses. Automatism is a complete defense to a criminal charge and did not render any of the elements of felonious child abuse in conflict.

Duress

State v. Burrow, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 2, 2016). In this attempted felony breaking or entering and habitual felon case, the trial court did not err by denying the defendant's request to instruct the jury on duress. To be entitled to an instruction on duress, a defendant must present evidence that he feared he would suffer immediate death or serious bodily injury if he did not act. Moreover, duress cannot be invoked as an excuse by someone who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm. Here, the evidence showed that the defendant's accomplice drove the defendant's vehicle to the home in question while the defendant was a passenger. The accomplice, carrying a knife, and the defendant, carrying a lug wrench walked to the premises. After realizing that the resident was taking their pictures, both fled. When asked if he attempted to get away from his accomplices at any point, the defendant testified only that his accomplices "pretty much had control of my car;" he also testified that at some point he "did get scared" of his accomplices because they talked about stealing his truck. He admitted however that they never pulled a weapon on him.

Additionally, although the defendant argued that his accomplices held him against his will for several days, he had at least two opportunities to seek help and escape, including one instance when he was alone with an officer. Based on this evidence, the defendant was not entitled to a jury instruction on duress.

Self-Defense

State v. Lee, ___ N.C. App. ___, 789 S.E.2d 679 (Aug. 2, 2016). In this second-degree murder case, the trial court did not err with respect to its self-defense instruction, where it instructed the jury that the defendant would not be guilty of murder or manslaughter if he acted in self-defense, was not the aggressor, and did not use excessive force. (1) The court rejected the defendant's argument that the trial court committed plain error by omitting a no duty to retreat instruction (specifically, the following sentence from N.C.P.I.—Crim. 206.10: "the defendant has no duty to retreat in a place where the defendant has a lawful right to be" as well as N.C.P.I.—Crim. 308.10 (the instruction for self-defense were retreat is at issue)). The court noted that where a person is attacked in a place that is not his or her own home, motor vehicle, or workplace the degree of force he or she may employ in self-defense is conditioned by the type of force used by the assailant. It continued, noting that the unqualified no duty to retreat defense is limited to a lawful occupant within his or her home, motor vehicle, or workplace. To the extent that the no duty to retreat defense in G.S. 14-51.3(a)(1) applies to "any place" where the defendant has a lawful right to be, it is limited to when the defendant reasonably believes that deadly force is necessary to prevent imminent death or great bodily harm to him or herself or to another. Here, where the defendant was standing in the intersection of a public street several houses down from his residence, no plain error occurred. (2) The trial court did not commit plain error by instructing the jury that the defendant was not entitled to the benefit of self-defense if he was the aggressor with the intent to kill or inflict serious bodily injury upon the deceased. The court rejected the defendant's argument that there was no evidence to support a finding that he was the aggressor. (3) The trial court did not commit plain error by omitting a jury instruction on lawful defense of another. At the time the defendant shot the victim, the defendant was aware that the threat of harm to the third-party had concluded.

State v. Mills, ___ N.C. App. ___, 788 S.E.2d 640 (July 5, 2016). In this assault with a deadly weapon case involving two neighbors, the trial court did not err by denying the defendant's request for an instruction on self-defense. The defendant provoked the confrontation by willingly and voluntarily leaving his property and entering the victim's property with a loaded rifle. The defendant was not forced into the confrontation. The defendant escalated the confrontation by affirmatively opting to retrieve his rifle, loaded, and carry it with him on to the victim's property. No evidence showed that the victim possessed a weapon during the altercation or that the defendant had a good faith belief that the victim was armed. The defendant fired the first shot before the victim made any threatening movement. Thus, the defendant was not justified under G.S. 14-51.3 or 14-51.4 to use deadly force against the victim and claim self-defense.

Capital Law

Parole Ineligibility

Lynch v. Arizona, 578 U.S. ___, 136 S. Ct. 1818 (May 31, 2016). Where the State put the defendant's future dangerousness at issue and acknowledged that his only alternative sentence to death was life imprisonment without parole, the Arizona court erred by concluding that the defendant had no right to inform the jury of his parole ineligibility. Under *Simmons v. South Carolina*, 512 U. S. 154 (1994), and its progeny, where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, the Due Process Clause entitles the defendant to inform the jury of his parole ineligibility, either by a jury instruction or in arguments by counsel

Post-Conviction Proceedings

Clerical Errors/Error Correction

State v. Robinson, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The defendant was properly required to register as a sex offender and submit to SBM. Although the trial court mistakenly found that the defendant had been convicted of an offense against a minor, the error was clerical where other findings were made that would require the defendant to register and submit to SBM and the defendant did not dispute these findings.

State v. Allen, ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). Where a plea agreement contemplated that the defendant would be sentenced to community punishment and the trial court indicated that it was so sentencing the defendant, the court remanded for correction of a clerical error in the judgment stating that the sentence was an intermediate one.

State v. Spence, ___ N.C. App. ___, 787 S.E.2d 455 (June 21, 2016). The trial court made clerical errors in sentencing. It made a clerical error when it stated that it was arresting judgment on convictions vacated by the court of appeals; in context it was clear that the trial court meant to state that it was vacating those convictions. The trial court also erred by mentioning that it was arresting another conviction when that conviction had not in fact been vacated by the appellate court. The court remanded for correction of these errors.

Judicial Administration

Contempt

State v. Burrow, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 2, 2016). The trial court did not err by imposing consecutive sentences for multiple findings of contempt. The trial court had sentenced the defendant to six consecutive 30-day terms of imprisonment based on six findings of direct criminal contempt.

Recusal

Williams v. Pennsylvania, 579 U.S. ___, 136 S. Ct. 1899 (June 9, 2016). Due process required that a Pennsylvania Supreme Court Justice recuse himself from the capital defendant's post-conviction challenge where the justice had been the district attorney who gave his official approval to seek the death penalty in the case. The Court stated: "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." It went on to hold that the justice's authorization to seek the death penalty against the defendant constituted significant, personal involvement in a critical trial decision. Finally, it determined that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote; as such the error was not subject to harmless error review.