

Criminal Case Update

Cases covered include reported decisions from the North Carolina Appellate Courts and the U.S. Supreme Court decided between June 1, 2020 and October 6, 2020. The summaries were prepared by Shea Denning, Phil Dixon, Jonathan Holbrook, Jamie Markham, John Rubin, Christopher Tyner, and Brittany Williams. To view all of the summaries, go to the [Criminal Case Compendium](#). To obtain the summaries automatically by email, sign up for the [Criminal Law Listserv](#).

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Appellate Issues

(1) Since the defendant timely moved to dismiss and timely renewed his motion, he sufficiently preserved for appellate review whether the State presented sufficient evidence of each element of the crime for which he was convicted; (2) The trial court properly denied the defendant's motion to dismiss as the defendant falls within the "teacher" category as defined in G.S. 14-27.7.

State v. Smith, ___ N.C. ___, 846 S.E.2d 492 (Aug. 14, 2020)

The defendant worked full-time at Knightdale High School, initially as an In-School Suspension teacher and then as a Physical Education teacher. Although not certified as a teacher, he worked the same hours as a certified teacher, which included a regularly scheduled planning period. During his time teaching at the school, the defendant met a minor, D.F., a student at the school. On October 29, 2014, D.F. went to the defendant's home and later alleged the two engaged in sexual activity.

The defendant was indicted for two counts of engaging in sexual activity with a student pursuant to G.S. 14-27.7. At the close of the State's evidence, defense counsel made a motion to dismiss based on insufficient evidence, asserting that the State's evidence was conflicting. The trial court denied the motion. At the end of all the evidence, defense counsel renewed the motion to dismiss, asserting that there was no physical evidence. The trial court again denied the motion, and the defendant was ultimately convicted of two counts of sexual activity with a student.

(1) On appeal, the defendant argued that (1) the evidence at trial did not establish that he was a "teacher" within the meaning of G.S. 14-27.7, and (2) alternatively, there was a fatal variance between the indictment and proof at trial since the indictment alleged that he was a "teacher," but his status as a substitute teacher made him "school personnel" under G.S. 14-27.7(b). The Court of Appeals concluded that the defendant failed to preserve either argument for appellate review, reasoning that because the defendant's motions to dismiss "focused on the veracity of D.F.'s testimony and the lack of physical evidence" that sexual conduct had occurred, the defendant preserved a sufficiency of the evidence argument for only that specific element. The Court of Appeals also concluded that the fatal variance argument was not preserved because it was not expressly presented to the trial court.

At the time that the Court of Appeals decided this case, the Supreme Court has not addressed the issue of when a motion to dismiss preserves all sufficiency of the evidence issues for appellate review. Subsequently, in *State v. Golder*, the Court held that "Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." 374 N.C. 238 (2020). The Court held that because the defendant here made a general motion to dismiss at the appropriate time and renewed that motion to dismiss at the close of the evidence., his motion properly preserved all sufficiency of the evidence issues.

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(2) On the merits of the case, the defendant argued that there was no substantial evidence that he was a “teacher” under the statute. G.S. 14-27.7(b) (2013) provides: “For purposes of this subsection, the terms “school”, “school personnel”, and “student” shall have the same meaning as in G.S. 14-202.4(d),” which in turn refers to G.S. 115C-332. The latter statute provides that “school personnel” includes substitute teachers, driving training teachers, bus drivers, clerical staff, and custodians. The Court determined that it was “evident that the General Assembly intended to cast a wide net prohibiting criminal sexual conduct with students by any adult working on school property” and that “a person’s categorization as a ‘teacher’ should be based on a common-sense evaluation of all of the facts of the case, not a hyper-technical interpretation based solely on the individual’s title.”

Despite his lack of certification, defendant was at the school on a long-term assignment, an employee of Wake County Public Schools, and held to the same standards as a certified teacher. Defendant taught at the school daily, had a planning period, and had full access to students as any certified teacher would. The only difference between the defendant and other teachers was his title based on his lack of a teaching certificate at that time. The Court held that the defendant was correctly deemed a teacher in this case and the trial court properly denied the defendant’s motion to dismiss.

(1) Court of Appeals had appellate jurisdiction despite defective notices of appeal where court granted defendant’s petitions for writ of certiorari in its discretion and State did not object; (2) Sufficiency of evidence argument was not preserved and defendant’s argument did not warrant invocation of Rule 2 of the Appellate Rules of Procedure; (3) Where the defendant was not given an opportunity to be heard and no other evidence showed that the defendant had notice and an opportunity to be heard, attorney fee award was vacated

State v. Baungartner , ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2020)

The defendant was convicted at trial of driving while impaired and habitual DWI in Guilford County. (1) In its discretion, the Court of Appeals granted the defendant’s petitions for writ of certiorari to review the criminal judgment and civil judgment for attorney fees. Following his conviction for habitual impaired driving, the defendant filed two pro se notices of appeal. Those notices did not contain a certificate of service indicating service on the State and failed to name the court to which the appeals were taken. Appellate counsel was later appointed, who recognized the pro se notices of appeal were potentially defective and filed two petitions for writ of certiorari seeking appellate review. The pro se notices of appeal were an indication that the defendant intended to preserve his right to appellate review, and the Court of Appeals previously held in an unpublished case that the types of defects in the notices of appeal at issue did not require dismissal for lack of jurisdiction. Where (as happened here) the State does not object, the Court of Appeals may exercise jurisdiction by granting the petitions for writ of certiorari. Thus, the Court of Appeals had jurisdiction to consider the defendant’s arguments.

(2) During trial, the defendant moved to dismiss for insufficiency of the evidence at the close of the State’s case in chief. The defendant thereafter presented evidence and failed to renew the sufficiency motion at the close of all evidence. Because sufficiency review was therefore not

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preserved, the defendant requested that the Court of Appeals invoke Rule 2 of the Rules of Appellate Procedure to suspend the preservation rules and review the issue. The court declined to do so and thus affirmed the habitual DWI conviction.

(3) The trial court awarded the defendant's trial counsel attorney fees as a civil judgment without giving the defendant an opportunity to personally be heard, in violation of G.S. § 7A-455. More than 35 recent cases have reversed the attorney fee award in similar circumstances. Following that line of cases, the majority of the panel vacated the attorney fee order and remanded for a hearing on the matter where the defendant could be personally heard or for "other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." Slip op. at 11.

Judge Tyson dissented. He would have refused to grant the petitions for writ of certiorari and dismissed all the defendant's arguments as frivolous.

By failing to move to strike testimony that had been the subject of pretrial suppression motions which were denied, the defendant failed to preserve his arguments concerning the admissibility of the testimony

State v. Anthony, ___ N.C. App. ___, 845 S.E.2d 452 (June 2, 2020)

In a case involving charges of possession of a firearm by a felon and possession of a weapon on educational property, the defendant failed to preserve for appellate review his argument that the trial court erred by denying his pretrial suppression motions related to the lawfulness of a traffic stop and a subsequent weapons frisk. At trial, the defendant objected to an officer's testimony regarding the officer's discovery of a handgun in the defendant's pocket, but the defendant did not move to strike the testimony. Citing precedent with regard to situations where the inadmissibility of testimony is not indicated by a question but becomes apparent by some feature of a witness's answer, the court stated that the "[d]efendant was obligated to move to strike [the officer's] answer after objecting for the record and before the jury to preserve his objection." Because he did not move to strike at trial or specifically argue plain error on appeal, the defendant failed to preserve his arguments concerning the admission of evidence about the handgun.

The court went on to reject the defendant's argument that his trial counsel was ineffective during the pretrial hearing on the suppression motion related to the weapons frisk. During that hearing, defense counsel expressed the view that the officer had the reasonable and articulable suspicion necessary to conduct a frisk upon seeing a bulge in the defendant's pocket while arguing that the officer unlawfully had decided to conduct the frisk prior to seeing the bulge. Noting that the defendant could not show prejudice and that the trial court did not rely on defense counsel's statement when ruling on the motion, the court overruled the defendant's IAC argument.

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The trial court's inquiry of the defendant regarding her waiver of counsel satisfied the requirements of G.S. 15A-1242 and the pro se defendant's failure to comply with Rule 4 of the Rules of Appellate Procedure did not warrant dismissal of the appeal

State v. Jenkins, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2020)

In this case involving a waiver of counsel at a probation revocation hearing and the defendant's appeal of the trial court's revocation of her probation, the court declined to dismiss the appeal due to the defendant's failure to comply with Rule 4 of the Rules of Appellate Procedure and held that the defendant's waiver of counsel was knowing, intelligent, and voluntary. The defendant timely filed a handwritten notice of appeal that failed to comply with Rule 4 in that it did not indicate that it had been served on the State. Noting that the State was informed of the appeal and was able to timely respond, and that the violation had not frustrated the adversarial process, the court held that the nonjurisdictional Rule 4 defect was neither substantial nor gross and proceeded to the merits. As to the merits, the court found that the trial court's inquiry of the defendant regarding her waiver of counsel, a waiver which the defendant also executed in writing, was similar to that in *State v. Whitfield*, 170 N.C. App 618 (2005) and satisfied the requirements of G.S. 15A-1242.

Bond Forfeiture

The trial court properly denied the Surety's motion for relief from a bond forfeiture order where the motion was made prior to entry of final judgment and was not based on one of the seven grounds for relief enumerated in G.S. 15A-544.5(b)

State v. Roulhac, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 1, 2020)

The trial court properly denied the Surety's motion for relief from a bond forfeiture order where the motion was made prior to entry of final judgment and was not based on one of the seven grounds for relief enumerated in G.S. 15A-544.5(b). The basis for the Surety's motion for relief was that the clerk did not provide notice of the bond forfeiture within the 30-day period after the date the defendant failed to appear as required by G.S. 15A-544.4(e). Failure to provide timely notice of a bond forfeiture is not among the seven "reasons for set aside" enumerated in G.S. 15A-544.5, the statute which is the exclusive avenue of relief from a bond forfeiture when the forfeiture has not yet become a final judgment. The court noted that G.S. 15A-544.8 permits a trial court to set aside a final judgment of forfeiture on the grounds of untimely notice.

A pretrial detainee subject to an ICE detainer who was held in custody until he was picked up by federal authorities and deported was not "released" from custody within the meaning of the bail statutes and the trial court therefore had no authority to enter a bail bond forfeiture based on the defendant's failure to appear at trial

State v. Lemus, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2020)

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The trial court had no statutory authority to enter a bail bond forfeiture where the defendant was not “released” from custody within the meaning of Article 26 of G.S. Chapter 15A because he was subject to an ICE detainer, was picked up by federal agents, and was deported to Mexico. In 2018, the defendant was charged with a felony and a \$100,000 secured bond was set as a condition of his pretrial release. The defendant and his surety posted the bond, but the defendant was not released. Instead, he was held for about 24 hours until ICE agents took him into custody directly from deputies from the Granville County Sheriff’s Office and eventually deported him. Because he had been deported, the defendant failed to appear at trial and, consequently, the trial court entered a bond forfeiture order. The surety filed a petition for remission of forfeiture under the “extraordinary circumstances” provision of G.S. 15A-544.8(b)(2). The trial court denied the petition and the court of appeals reversed. Saying that the case was one of first impression, the court conducted plain-language statutory interpretation and summarized that analysis as follows:

The bond forfeiture statutes apply only to “a defendant who was released” under those statutes. Lemus was never released. Therefore, the trial court had no authority to conduct a forfeiture proceeding and should have granted the petition to set aside the forfeiture for that reason.

The court went on to reject various procedural and policy arguments advanced by the school board as to why the forfeiture was properly ordered.

The trial court’s order setting aside a bond forfeiture failed to identify a permissible ground for the set aside

State v. Smith, ___ N.C. App. ___, 845 S.E.2d 473 (June 16, 2020)

Because the trial court’s order setting aside a bond forfeiture failed to make material findings of fact, conclusions of law, or any ruling as to whether a bail agent’s motion to set aside the forfeiture should be considered and set aside under G.S. 15A-544.5(b)(7), rather than under subsection (b)(6), the court vacated the order and remanded for entry of a new order addressing this issue. On 31 October 2018 the defendant failed to appear in Cumberland County Superior Court on two criminal charges. It was undisputed that the defendant was in federal custody in Virginia on that date. After a Bond Forfeiture Notice was issued, the bail agent filed a motion to set aside the forfeiture and checked Box 6 on AOC-CR-213, which corresponds to G.S. 15A-544.5(b)(6), indicating that the basis for the motion was that the defendant was incarcerated within the borders of North Carolina. As developed at a hearing on the motion, it appeared that the bail agent meant to check Box 7 of AOC-CR-213, which corresponds to G.S. 15A-544.5(b)(7) (generally providing as a basis for a motion to set aside that the defendant was incarcerated anywhere within the borders of the United States). It also appeared that the trial court may have intended to treat the motion as one under subsection (b)(7) and to grant relief under that subsection. The order drafted by the school board’s attorney and signed by the trial court did not reflect this apparent intent. As entered, the order failed to identify a permissible ground for setting aside the bond forfeiture under G.S. 15A-

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544.5(b) and the court vacated the order for that reason and remanded for additional findings and a determination on the subsection (b)(7) issue.

Counsel Issues

The *Harbison* rule applies to situations where defense counsel makes an implied admission of the defendant's guilt to the jury

State v. McAllister, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2020)

The rule of *State v. Harbison*, 315 N.C. 175 (1985) that a criminal defendant suffers a per se violation of the right to effective assistance of counsel when counsel concedes the defendant's guilt to the jury without the defendant's prior consent applies to situations involving an implied admission. The defendant was charged with habitual misdemeanor assault based on an underlying offense of assault on a female, assault by strangulation, second-degree sexual offense, and second-degree rape. During a recorded interview with police that was played for the jury, the defendant made inculpatory statements indicating that he had "pushed [the victim]," was in a "tussle" with her, had "backhanded" and "smacked" her, and that she was visibly injured as a result. During closing argument, defense counsel referenced these statements and referred to them as admissions while arguing that the jury should set aside its negative feelings about the defendant arising from that behavior to see that there was no basis for convicting him of rape, sexual offense, and assault by strangulation. The jury found the defendant guilty of assault on a female and not guilty of all other charged offenses. Following an extensive review of its precedent flowing from *Harbison*, the court explained that while this was not a case where defense counsel expressly asked the jury to find the defendant guilty of a specified offense, *Harbison* violations are not limited to such situations and also occur in situations where counsel "impliedly concedes his client's guilt without prior authorization." The court said that counsel's argument to the jury in this case was "problematic for several reasons," including his attestations to the accuracy of the defendant's admissions, his reminder to the jury that the victim was "hurt," and counsel's own opinion that "God knows he did [wrong]." The court further noted that counsel specifically asked the jury to return a not guilty verdict for every charged offense except assault on a female, and characterized this conspicuous omission as implicitly conceding the defendant's guilt on that charge in violation of *Harbison*. The court concluded by emphasizing "that a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence," and remanded the case for a determination of whether the defendant knowingly consented in advance to the admission.

Justice Newby, joined by Justice Ervin, dissented, stating the view that the jury argument in this case did not constitute the functional equivalent of an explicit admission and that a finding of ineffective assistance of counsel in a case like this requires proof of prejudice in accordance with *Strickland*.

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The record on appeal did not support a determination that the defendant forfeited his right to counsel

State v. Patterson, ___ N.C. App. ___, 846 S.E.2d 814 (July 21, 2020)

The defendant was charged with multiple crimes related to a break-in at the home of the elected district attorney. The trial court allowed the defendant's first appointed lawyer to withdraw based on an unspecified conflict in February 2018. In April 2018 his second appointed lawyer also moved to withdraw when the defendant was uncooperative. The trial court allowed the motion and appointed a third lawyer. The third lawyer moved to withdraw in November 2018. The court held a hearing on that motion, ultimately granting it and finding that the defendant had forfeited his right to counsel based on his conduct, "including incessant demands and badgering" of his three appointed lawyers. The trial judge appointed the third lawyer as standby counsel. The defendant represented himself at trial, presented no evidence, was convicted of all charges and sentenced. On appeal, the defendant argued that the trial court erred by determining that he had forfeited his right to counsel. In light of *State v. Simpkins*, 373 N.C. 530 (2020)—a case decided by the Supreme Court while the defendant's appeal was pending—the Court of Appeals agreed. The test first articulated in *Simpkins* is that a finding that a defendant has forfeited his right to counsel requires "egregious dilatory or abuse conduct on the part of the defendant which undermines the purpose of the right to counsel." The Supreme Court further clarified that forfeiture is appropriate when the defendant's behavior is so threatening or abusive toward counsel that it makes the representation itself physically dangerous, or when the defendant's actions related to counsel are an attempt to obstruct the proceedings and prevent them from coming to completion. Here, the defendant's attorneys moved to withdraw because the defendant was uncooperative, uncivil, and made unreasonable demands based at least in part on his concern that any court-appointed counsel would be biased against him due to his or her relationship with the victim in the case—the District Attorney. However, no evidence in the record suggested that the defendant threatened or physically abused his lawyers. And nothing in the record indicated that the defendant's behavior actually delayed or obstructed the proceedings. The defendant's actions therefore did not fit within the forfeiture criteria recently spelled out in *Simpkins*, and the Court of Appeals vacated the criminal judgments. Nevertheless, based on the reference in the trial court's order to the defendant's "abusive nature" and "abuse of counsel," the court remanded the matter for a new forfeiture hearing at which the trial judge could put into the record any evidence from prior in-chambers discussions with counsel that might support a forfeiture under either prong of the new *Simpkins* test.

The trial court did not abuse its discretion by denying a mistrial and issuing a curative instruction in response to the State's objectionable questioning of a witness; Defense counsel was not ineffective by admitting an element of the charged offense in closing argument and the admission did not constitute structural error under *McCoy v. Louisiana*

State v. Crump, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 1, 2020)

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In this sex offense case, the trial court did not abuse its discretion by denying the defendant's motion for a mistrial and instead giving a curative instruction to the jury in response to the State's objectionable questioning of a witness. Defense counsel did not admit the defendant's guilt over his objection in violation of *State v. Harbison* or *McCoy v. Louisiana* by admitting an element of the charged offense in closing argument.

(1) Prior to trial in response to the defendant's motion to exclude certain potential testimony, the State agreed to refrain from asking a detective about the victim's grandmother allegedly pressuring the victim not to testify. At trial, the State asked the victim about the manner in which she had been pressured not to testify and the defendant objected. The trial court sustained the objection but denied the defendant's motion for a mistrial, instead issuing a curative instruction striking the testimony from the record and from the jury's consideration. The Court of Appeals determined that the trial court did not abuse its discretion in denying a mistrial and properly exercised its discretion and cured any potential prejudice by issuing the curative instruction and polling the jury.

(2) Even if defense counsel admitted an element of second-degree forcible sexual offense by saying in closing argument that the State would have had a "slam-dunk incest case" if the defendant and the victim were related to each other and referring to an issue of consent under the "dirty and unpalatable" facts of the case, counsel did not violate the defendant's Sixth Amendment rights by admitting the defendant's guilt without his consent. The court explained that defense counsel's statements may have constituted admissions of the "sexual act with another person" element of the crime, but did not constitute an admission of guilt because counsel "vociferously argued" that the defendant did not perpetrate the sexual contact "by force and against the will" of the victim, another element of the crime. First addressing the issue through the lens of ineffective assistance of counsel, the court explained that an admission of an element does not constitute an admission of guilt and consequently counsel's comments were not a *Harbison* violation. The court then distinguished defense counsel's admission of "at most" an element of the offense from the situation in *McCoy v. Louisiana*, ___ U.S. ___, 138 S. Ct. 1500 (2018) where defense counsel admitted his client's guilt and found that no Sixth Amendment structural error occurred.

Defense counsel's performance was deficient in the punishment phase of a capital murder trial because counsel failed to conduct an adequate investigation into the mitigation case as well as into the State's aggravation case

Andrus v. Texas, 590 U.S. ___, 140 S. Ct. 1875 (June 15, 2020)

In a per curiam decision, the Court determined that defense counsel's performance in the punishment phase of a capital murder trial was deficient and remanded the case to the Texas Court of Criminal Appeals for that court to address the prejudice prong of a *Strickland* ineffective assistance of counsel analysis. Noting that under prevailing professional norms defense counsel had an obligation to conduct a thorough investigation of the defendant's background, the Court found that defense counsel fell short of that obligation in multiple ways:

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First, counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence. Second, due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case. Third, counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation.

Calling defense counsel's nominal case in mitigation "an empty exercise," the court explained that counsel was "barely acquainted" with the witnesses he called during the punishment phase and did not prepare them to testify, that he "did not look into or present the myriad tragic circumstances that marked [the defendant's] life," and that he ignored avenues of investigation of which he should have been aware. The Court went on to explain that because of his failure to investigate the mitigation case, defense counsel essentially introduced aggravating evidence as he elicited witness testimony that did not accurately reflect the defendant's life experience and presented the defendant in a poor light. Finally, the court noted that defense counsel's failure to investigate the State's case in aggravation resulted in a deficient failure to rebut critical aggravation evidence. Finding defense counsel's performance deficient as a matter of law, the Court said that there was a "significant question" as to whether the Texas Court of Criminal Appeals had properly considered the prejudice prong of the *Strickland* analysis and remanded the case so that issue could be addressed.

Justice Alito, joined by Justices Thomas and Gorsuch, dissented, disagreeing with the majority's view that the lower court had not properly considered the prejudice prong of the analysis.

Defendant received ineffective assistance of counsel where his attorney failed to object to a non-statutory aggravating factor that was not alleged in the indictment

State v. Gleason, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 15, 2020)

The defendant was indicted for stalking, violating a domestic violence protective order, and making a false report to law enforcement. The state gave notice of two statutory aggravating factors under G.S. 15A-1340.16(d)(5) (disrupting enforcement of laws) and 1340.16(d)(15) (taking advantage of position of trust), and notice that the state would seek to prove the existence of an additional prior record level point under G.S. 15A-1340.14(b)(7) (defendant was on probation at the time of the offense) for sentencing purposes. The state filed superseding indictments alleging additional offenses, and the defendant was ultimately convicted at trial of one count of perjury and one count of violating a DVPO. At sentencing, the state asked to proceed only on an "aggravating factor" for the defendant being on probation at the time of the offense, and defense counsel admitted that the defendant was on probation. The trial judge found it as an aggravating factor under the catch-all provision in G.S. 15A-1340.16(d)(20) for "any other aggravating factor reasonably related to the purposes of sentencing" and entered an aggravated judgment.

On appeal, the defendant argued he received ineffective assistance of counsel based on his attorney's failure to object to the aggravating factor, and the appellate court agreed. To pursue one of the enumerated aggravating factors listed in G.S. 15A-1340.16(d), the state must give notice of its intent, but the factor does not have to be pleaded in the indictment. However,

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aggravating factors under the catch-all provision in section (d)(20) must be “included in an indictment or other charging instrument.” G.S. 15A-1340.16(a4). Defense counsel erred by failing to object to the factor used at sentencing since it was not alleged in any of the indictments, and the defendant suffered prejudice because he otherwise could not have received an aggravated sentence. Even if the state had offered the factor as originally indicated in its notice to add 1 point to defendant’s prior record under G.S. 15A-1340.14(b)(7), it would not have changed his record level and therefore did not expose him to a higher sentence. The appellate court vacated the judgment and remanded for resentencing.

Judge Tyson concurred with the majority opinion, but wrote separately because he also would have found that the trial court erred by accepting a stipulation from defense counsel, instead of addressing the defendant personally to ensure that it was a knowing and voluntary waiver of his right to have the factor proved beyond a reasonable doubt.

Double Jeopardy

(1) Accessory after the fact and obstruction of justice are distinct offenses and evidence supported jury instructions on each; (2) Failure to instruct the jury on the defendant’s belief that the killing was justified by self-defense was not plain error

State v. Cruz, ___ N.C. App. ___, 845 S.E.2d 199 (July 7, 2020)

The defendant was convicted of accessory after the fact to a felony and felony obstruction of justice in Cleveland County relating to her efforts to assist a murder suspect (later convicted of second-degree murder) evade capture. (1) The defendant argued the statutory offense of accessory after the fact abrogated the common law offense of obstruction of justice in part, such that she could not be convicted of both. The North Carolina Supreme Court previously rejected this argument in *In re Kivett*, 309 N.C. 635, 670 (1983), which defeated this claim. The defendant also argued that the two offenses were the same for purposes of double jeopardy, in that they are greater- and lesser-included offenses of each other. This argument has also been rejected by the prior decisions of the Court of Appeals, as the offenses have different elements: “This Court has expressly held that accessory after the fact and obstruction of justice do not constitute the same offense, and that neither is a lesser-included offense of the other.” *Cruz* Slip op. at 9 (citation omitted). Substantial evidence supported each instruction as well. As to the accessory conviction, the evidence showed the defendant provided personal assistance to the suspect while knowing he was wanted for murder. As to the obstruction conviction, the defendant lied to detectives about seeing or communicating with the suspect and deleted information from her phone showing she was in communication with him after police expressed an interest in her phone. This evidence was sufficient to support the instructions for each offense and the trial court did not err by so instructing the jury.

(2) The trial court did not commit plain error by failing to instruct the jury that if the defendant believed the killing was done in self-defense, she could not be convicted of accessory after the fact. Even if the defendant believed the killing was justified, the evidence here was sufficient to raise “a reasonable inference that the [D]efendant knew precisely what had taken place,” as

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she had notice of the suspect's outstanding arrest warrant for murder at the time of her assistance to the defendant and her deceptions to law enforcement. The convictions were therefore unanimously affirmed.

Habeas Corpus

A state trial judge must summarily deny an application for the writ of habeas corpus from a petitioner held pursuant to an immigration-related arrest warrant or detainer by a sheriff who is a party to a 287(g) agreement

Chavez v. McFadden, 374 N.C. 458 (June 5, 2020)

Carlos Chavez and Luis Lopez, initially charged with state crimes and held in pretrial detention in the Mecklenburg County Jail, both became eligible for release from their state charges on October 13, 2017. But they were not released. The Sheriff, a participant in a § 287(g) agreement with the Department of Homeland Security, continued to hold them on immigration-related warrants and detainers. That same day, both men filed petitions for a writ of habeas corpus. A superior court judge entered orders finding that the men were being unlawfully detained and ordered their discharge from custody. The Sheriff declined to release either petitioner and delivered them to federal immigration custody. In November 2017, the Sheriff filed petitions for writ of certiorari with the Court of Appeals to review the trial judge's orders, and a writ of prohibition seeking to preclude similar orders in the future. The next month, the Court of Appeals allowed the petitions and entered an order prohibiting a trial court from issuing a writ of habeas corpus for a person detained pursuant to a 287(g) agreement. The following year the Court of Appeals vacated the trial court orders for lack of jurisdiction, concluding that they infringed upon the federal government's exclusive authority over immigration matters. *Chavez v. Carmichael*, 262 N.C. App. 196 (2018).

The Supreme Court allowed discretionary review and affirmed in part. The Court concluded as a threshold matter that although the matter was rendered moot when the Sheriff turned the men over to immigration authorities, the case fell within the scope of the public interest exception to the mootness doctrine. Proceeding to the merits, the Court concluded that a state court judge cannot interfere with the custody and detention of individuals held pursuant to federal authority, which includes state officials acting in accordance with a § 287(g) agreement. A trial court has jurisdiction to determine as an initial matter whether it has the authority to issue the writ, but once that initial examination of the application shows that the petitioner is being held pursuant to an immigration-related warrant or detainer, the trial court should summarily deny the application. Here, the applications, on their face, informed the judge that the petitioners were being held on immigration related process by a custodian who was a party to a § 287(g) agreement, and should therefore have been denied. The Court said the Court of Appeals erred to the extent that it held that the trial court lacked jurisdiction to make even an initial determination as to the basis for the petitioners' detention, and also by addressing the extent to which habeas relief is available to petitioners detained on immigration-related documents by sheriffs who are not parties to § 287(g) agreements. In a footnote, the Court

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vacated the portion of the Court of Appeals' decision ordering that a copy of its decision be sent to the Judicial Standards Commission.

Indictment & Pleading Issues

The State may amend a criminal pleading after arraignment through a statement of charges if doing so does not change the nature of the charges

State v. Capps, 374 N.C. 621 (June 5, 2020)

The defendant was charged by arrest warrant with misdemeanor injury to personal property, misdemeanor larceny, and reckless driving after he cut off the end of a truck stop's air hose, attempted to strike his passenger with it, and then quickly fled with it when confronted by an undercover officer. He was convicted in district court and appealed to superior court. Before trial in superior court, the State moved to amend the charging language to correct the name of the corporate property owner for the injury to personal property and larceny charges. The prosecutor made the amendment on a misdemeanor statement of charges form with no objection from the defendant. The defendant was convicted and appealed. A divided Court of Appeals held that the superior court lacked jurisdiction to try the charges amended through the statement of charges, reasoning that under the language of G.S. 15A-922(e), a statement of charges may be filed after arraignment only if the defendant objects to the State's original pleading. *State v. Capps*, ___ N.C. App. ___, 828 S.E.2d 733 (2019). The State appealed and the Supreme Court reversed, reinstating the convictions. The Court held that warrants may be amended at any time when doing so does not materially affect the nature of the charged offense or is otherwise authorized by law. And the State may make the amendment through a statement of charges, because the General Assembly intended statements of charges to be generally treated like amendments. The Court rejected the defendant's argument that the defendant's objection to the sufficiency of a warrant is a necessary prerequisite to a post-arraignment statement of charges.

(1) Majority of Court of Appeals holds that attempted armed robbery must specifically name victims and that indictment that alleged victims as employees of business was fatally defective; (2) Whole plea agreement covering defective charge and other charges had to be vacated; parties may enter into new plea agreement or State may proceed to trial on all charges, including new indictment for armed robbery

State v. Oldroyd, ___ N.C. App. ___, 843 S.E.2d 478 (May 19, 2020), *temp stay granted*, ___ N.C. ___, 842 S.E.2d 93 (June 5, 2020)

The defendant was indicted in 2013 for first-degree murder, attempted armed robbery, and conspiracy to commit murder for crimes committed in 1996. Pursuant to a plea agreement, the defendant pled guilty in June 2014 to a reduced charge of second-degree murder, attempted armed robbery, and conspiracy to commit robbery, for which he received a consolidated sentence of 120 to 153 months. In June 2015, the defendant filed a motion for appropriate relief claiming that the indictment for attempted armed robbery was fatally defective by failing

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to name any victim. The trial judge denied the motion, and the defendant petitioned for a writ of certiorari. (1) A majority of the Court of Appeals ruled that the indictment was fatally defective and did not provide the trial court with jurisdiction to enter judgment on the defendant's guilty plea to attempted armed robbery. The Court recognized that armed robbery is a crime against the person. Like common law robbery, it involves the taking of money or goods from the person or presence of another by violence or intimidation. The only difference is the use of a firearm or other dangerous weapon. Indictments for such crimes must specifically name the victim. The Court held that attempted armed robbery is indistinguishable from the completed crime in terms of the subject matter and the victim must be specifically named in the indictment. The indictment in this case alleged the victims as employees of the Huddle House. Relying on prior decisions, including the North Carolina Supreme Court's decision in *State v. Scott*, 237 N.C. 432 (1953), the Court ruled that this allegation was not sufficient to satisfy the requirement that the victim be specifically named. A dissenting judge would have found the indictment sufficient because the allegation that the defendant was attempting to steal property from the employees of Huddle House was sufficient to show that the defendant was taking others' property and the allegation that the lives of the employees were threatened or endangered by the defendant's possession of a firearm was sufficient to put him on notice of the manner and means by which the crime was perpetrated. (2) The Court of Appeals rejected the requested remedy of vacating his conviction for attempted armed robbery. The Court held that by successfully moving to vacate the judgment for armed robbery, the Court was obliged to vacate the whole plea agreement. The Court observed that the parties may enter into a new plea agreement or the State may proceed to trial on the charges, including attempted armed robbery pursuant to a new indictment.

Jurisdictional Issues

(1) Where State filed MAR within 10 days of judgment, trial court retained jurisdiction to amend judgment notwithstanding defendant's notice of appeal; (2) Where the trial court amended to judgment to correct duplicative larceny convictions, that issue was moot on appeal; (3) Where judgment incorrectly reflected a habitual felon sentence rather than a habitual breaking or entering sentence, the matter was remanded for correction of clerical error

State v. Joiner, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2020)

The defendant in this Forsyth County case was charged with two counts felony breaking or entering, two counts felony larceny after b/e, two counts felony larceny of property over \$1000, and habitual breaking or entering, stemming from two break-ins and larcenies from Wake Forest University dormitory rooms. At trial, the jury convicted the defendant of the two felony breaking or entering offenses, two felony larceny after b/e offenses, one felony larceny for theft of property over \$1000, and one misdemeanor larceny, along with habitual breaking and entering. Following his notice of appeal, the State filed a motion for appropriate relief ("MAR") within ten days of the judgment, asking the trial court to arrest judgment on the felony

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larceny for theft of property over \$1000 and the misdemeanor larceny as duplicative. The trial court granted that request and amended the judgment accordingly.

(1) The defendant argued that the trial court was divested of jurisdiction to amend the judgments in the case after he had given notice of appeal. This was incorrect. “The trial court retains jurisdiction until a notice of appeal is given and fourteen days have passed.” Slip op. at 5 (citation omitted). Further, once the State filed a timely 10-day MAR, the period of time for the defendant to give notice of appeal is extended 14 days under G.S. § 15A-1448(a)(2) from the date the trial court rules on the MAR. That statute provides that “when a proper motion for appropriate relief is made, the case shall remain open for the taking of an appeal until the court has ruled on the motion.” *Id.* (citing G.S. § 15A-1448). The trial court thus retained jurisdiction to amend the judgments.

(2) The defendant also argued that the trial court should have granted his motions to dismiss two of the larceny charges, pointing to the established rule that the taking of several items of property in the course of one act or event establishes only one larceny. Here, the defendant was improperly charged and convicted of multiple larcenies based on different items of property taken at one time. Because the trial court fixed the problem of duplicative larceny convictions with its MAR order, the issue was moot, and the argument dismissed.

(3) The trial court’s judgment incorrectly noted the defendant was a habitual felon, rather than one convicted of habitual breaking or entering. This was a clerical error, and the matter was remanded for correction of that error only. The convictions were otherwise affirmed.

Jury Trial Waiver

Defendant’s waiver of his right to a jury trial was sufficient and defendant suffered no prejudice, despite trial court’s failure to fully comply with statutory procedures for taking waiver.

State v. Hamer, ___ N.C. App. ___, 845 S.E.2d 846 (June 16, 2020), *temp. stay granted*, ___ N.C. ___, 843 S.E.2d 255 (June 22, 2020)

The defendant was convicted in district court of a Class III misdemeanor for speeding 94 mph in a 65 mph zone. The defendant filed a pro se appeal for trial de novo in superior court, which the trial court treated as a petition for writ of certiorari and allowed. It was “unclear how Defendant first provided notice of his intent to waive his right to a jury trial” in superior court, as required by G.S. 15A-1201(c), but it was “evident [...] that all parties were aware of Defendant’s intent, as this was the initial matter raised before trial.” The trial judge confirmed that the defendant wished to waive his right to a jury trial, with no objection by the state, and a bench trial commenced. After the state rested, the trial judge noted that he was also statutorily required to personally address the defendant and confirm that he understands his right to a jury trial and wishes to waive it, in accordance with G.S. 15A-1201(d). The judge engaged in a

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brief colloquy with the defendant, who stated he understood and consented. The trial then resumed, and the defendant was convicted of the misdemeanor offense.

On appeal, defendant argued that he was prejudiced by the trial court's failure to fully comply with G.S. 15A-1201, the statute implementing the constitutional amendment that allows a defendant to waive the right to a jury trial. In particular, the trial court failed to comply with subsection (d), which requires the judge to personally address the defendant about the waiver, determine whether the state objects, and consider all arguments of the parties *before* trial commences. The appellate court agreed that the trial judge erred regarding this portion of the statute, but ultimately held that the subsequent colloquy with the defendant, "although untimely," still "satisfied the procedural requirements of subsection (d)(1)." Additionally, the defendant failed to show any prejudice resulting from the error. Considering the strong evidence against the defendant, the defendant did not establish a reasonable possibility that a different result would have been reached without the error. Therefore, the trial court's judgment was affirmed.

Chief Judge McGee dissented, noting the importance of establishing precedent for jury trial waivers in future cases. She would have held that "the relevant requirements set forth in N.C.G.S. § 15A-1201 (2019) are incorporated into the constitutional mandates of N.C. Const. art. I, § 24" and "[n]othing in art. I, § 24 suggests any of the material requirements included may be waived or that violations may be subjected to regular harmless error review." The violation of the defendant's constitutional right to a jury trial was structural error, and the conviction should therefore be reversed.

Jury Selection

The Court of Appeals erred in upholding the trial court's finding that the defendant failed to establish a prima facie case of racial discrimination under *Batson*

State v. Bennett, 374 N.C. 579 (June 5, 2020)

The defendant was charged with possession of a firearm by a felon and multiple drug crimes including drug trafficking. During jury selection, the State peremptorily challenged two potential jurors who were black before accepting a white juror. The defendant made a *Batson* motion, arguing that there was no basis aside from race for excusing the first two jurors. The trial court concluded that the defendant had not made a prima facie showing of racial discrimination, noting in particular that the State had "excused two, but kept three African Americans." The defendant was convicted and appealed. The Court of Appeals affirmed the trial court, holding that the defendant failed to make a prima facie case that the State's challenges were racially motivated. *State v. Bennett*, 262 N.C. App. 89 (2018).

On discretionary review, the Supreme Court reversed the Court of Appeals. As a preliminary matter, the Court agreed with the Court of Appeals that the record contained sufficient information about the relevant jurors' race to permit a substantive review of the defendant's *Batson* claim. There was no dispute among counsel for the parties or the trial judge

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concerning the racial identity of the relevant jurors, resulting in what amounts to a stipulation to their racial identity. The Court then concluded that the Court of Appeals erred in upholding the trial court's rejection of the defendant's *Batson* claim. After noting that a numerical analysis of strike patterns with respect to race is not necessarily dispositive, the Court said that the pattern here—where the State had challenged two of five African American prospective jurors but no white jurors, and where all of the State's peremptory challenges were used to excuse black prospective jurors—was sufficient to raise an inference of purposeful discrimination when there was no other immediately obvious justification for the challenges. The Court rejected the State's argument that the State's acceptance rate for African American prospective jurors (three out of five) was higher than in many previous cases affirming trial court findings of no purposeful discrimination. Those cases included other distinguishing facts beyond the acceptance rate, such as the State using peremptory challenge on at least one white prospective juror, or a juror expressing reservations about the death penalty. Having found that the trial court erred at step one of the *Batson* analysis, the Court remanded the matter for a hearing to complete the second and third steps of the required analysis.

Justice Newby dissented, writing that the defendant did not preserve the race of the jurors for the record, and that Court therefore should not have reached the merits of his claim. And even if the issue had been preserved, he would have concluded that the trial court did not clearly err.

The trial court erred by summarily denying the defendant's *Batson* challenge; Any violation of the statutory mandate that prospective jurors be randomly selected did not prejudice the defendant

State v. Hood, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 1, 2020)

In a first-degree felony murder case, the trial court did not err by denying the defendant's motion to strike the initial jury panel and the Court of Appeals remanded the case to the trial court for a proper *Batson* hearing consistent with *State v. Hobbs*, 374 N.C. 345 (2020). Before jury selection, the clerk provided the State and the defendant with a list of the first 12 prospective jurors to be called from the master jury list – 11 had surnames beginning with the letter "B" and the twelfth had a surname beginning with the letter "C." After defense counsel's oral motion on the first day of voir dire to strike the first 12 prospective jurors based on concerns about whether they had been randomly selected in accordance with relevant statutes was denied, defense counsel made a motion in writing on the second day of voir dire to strike the jury panel for lack of randomness. The trial court denied that written motion. On the third day of voir dire, the trial court summarily denied the defendant's *Batson* challenge to the State's exercise of a peremptory strike against an African-American prospective juror. With respect to the denial of the written motion to strike the jury panel, the Court of Appeals determined that even if the mandatory statutory procedure for calling jurors had been violated, the defendant did not show that any such violation was prejudicial because he did not strike any of the first 12 jurors for cause or with a peremptory challenge. With respect to the *Batson* challenge, the court reviewed *Hobbs*, other precedent, and the proceedings in the trial court on its way to determining that the trial court erred by summarily denying the

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challenge without making specific findings of fact and conclusions of law. The court remanded the case with instructions to the trial court to conduct a proper *Batson* hearing.

On the limited record before the Court of Appeals, the trial court did not err in finding that the defendant failed to establish a *prima facie* showing of purposeful discrimination by the State in his *Batson* claim

State v. Campbell, ___ N.C. App. ___, 846 S.E.2d 804 (July 21, 2020)

This case involves a first-degree murder conviction previously upheld by the Court of Appeals, ___ N.C. App. ___, 838 S.E.2d 660 (2020), back before the court for reconsideration in light of the Supreme Court’s recent decisions in *State v. Hobbs*, ___ N.C. ___, 841 S.E.2d 492(2020), and *State v. Bennett*, ___ N.C. ___, 843 S.E.2d 222 (2020).

At his murder trial, the defendant raised a *Batson* challenge in response to the State’s use of three of its four peremptory challenges to strike African American prospective jurors. The trial judge said that he did not find that the defendant established a *prima facie* case of discrimination, but he nonetheless ordered the State to give reasons for its challenges, which the State did. After hearing the State’s explanations, the trial court reiterated its finding that the defendant had not made a *prima facie* showing of purposeful discrimination and denied his *Batson* challenge. The defendant was convicted of first-degree murder and appealed.

The Court of Appeals first rejected the State’s motion to dismiss the appeal in light of the defendant’s failure to include in the appellate record a transcript of jury selection proceedings. At trial, the defendant’s lawyer made a motion for recordation of all proceedings, but specifically noted that she was not requesting recordation of jury selection. The appellate court concluded that the record was minimally sufficient to permit appellate review here, but emphasized that it will generally be extremely difficult for a defendant to prevail on a *Batson* argument without a transcript of jury selection.

The Court of Appeals next determined that the scope of its review was limited to step one of the *Batson* analysis—that is, the trial judge’s finding that the defendant had failed to establish a *prima facie* case of discrimination. The court distinguished this case from *State v. Williams*, 343 N.C. 345 (1996) (step one becomes moot when the State volunteers the reasons for its peremptory challenges before the trial court rules on whether the defendant has made a *prima facie* showing), and *State v. Hobbs*, ___ N.C. App. at ___, 841 S.E.2d at 499–501 (step one becomes moot when the trial judge rules that the defendant has not established a *prima facie* case but nonetheless orders the State to provide nondiscriminatory reasons for its peremptory challenges and then enters findings on those reasons). Unlike *Williams*, the State did not volunteer reasons before the trial court ruled on step one; the State was ordered to give reasons after the court ruled. And unlike *Hobbs*, the trial judge never conducted a full hearing or made findings on the State’s proffered reasons. The step one inquiry therefore was not rendered moot, and Court of Appeals majority thus considered itself precluded from consideration of the State’s proffered nondiscriminatory reasons. The court concluded that the trial court’s order addressing only step one of the inquiry was not facially deficient when that was the only step of the inquiry the trial court technically reached.

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On the merits, the court concluded that based on the limited available record, the defendant had not established that the trial court erred in finding that the defendant failed to make a *prima facie* showing. The transcript showed only the race of the defendant and that the State used three of its four peremptory challenges to remove prospective African American jurors. It did not provide other information about the so-called *Quick* factors (derived from *State v. Quick*, 341 N.C. 141 (1995)), such as the race of the victim, the questions and statements of the prosecutor during jury selection, or the final racial composition of the jury. The court noted its concern that the State used seventy-five percent of its peremptory challenges on African American prospective jurors, but said that alone was not sufficient to establish a *prima facie* case of discrimination.

A judge dissenting in part would have concluded that the rate at which the State used its peremptory challenges on African American jurors obligated the trial court to conduct a more thorough analysis of the defendant's objection. He therefore would have remanded the case for specific findings of fact in order to permit a meaningful appellate review.

Jury Instructions

Appellate counsel was not ineffective for failing to cite *State v. Pakulski*, 319 N.C. 562 (1987) in a case being reviewed for plain error

State v. Collington, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2020)

On discretionary review of a unanimous decision below, 259 N.C. App. 127 (2018), the court reversed the Court of Appeals and held that appellate counsel was not ineffective for failing to cite a particular line of cases because the facts of this case were distinguishable from those in the line of cases the Court of Appeals would have had appellate counsel cite. The Court of Appeals had held that appellate counsel was ineffective for failing to make the argument under *State v. Pakulski*, 319 N.C. 562 (1987) that a trial court commits plain error when it instructs a jury on disjunctive theories of a crime, one of which is erroneous, and it cannot be discerned from the record the theory upon which the jury relied. Noting that its opinion in *Pakulski* "lacks clarity" with respect to the standard of review applied there, the court explained that *Pakulski* applied the harmless error rather than plain error standard, as evidenced by subsequent precedent. Because the defendant in this case did not object to the trial court's jury instructions, the court explained that *Pakulski* "would have had little precedential value in the instant case, and appellate counsel's failure to cite it was not objectively unreasonable." The court went on to explain that the arguments made by appellate counsel were appropriate for plain error review as counsel argued that the jury was presented with multiple theories of guilt, one of which was erroneous, and the error had a probable impact on the jury's verdict.

Justice Ervin, joined by Justice Newby, concurred, agreeing with the court's interpretation of *Pakulski* and its determination that appellate counsel was not ineffective, but writing separately to clarify the general matter that a defendant may be convicted of possession of a firearm by a felon under an acting in concert theory. Noting that neither the North Carolina

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Supreme Court nor the Court of Appeals has ever directly held that a defendant can be convicted of that offense on the basis of an acting in concert theory, Justice Ervin described the “general availability of the acting in concert doctrine in possession-related cases” and stated that he was not persuaded that the theory is inapplicable to the offense of possession of a firearm by a felon.

Justice Earls, joined by Justice Davis, dissented, expressing the view that the majority opinion’s explanations of *Pakulski* and appellate counsel’s arguments were inaccurate. In Justice Earls’ view, *Pakulski* applied the plain error standard of review and appellate counsel did not meet the obligation to argue to the Court of Appeals that the defendant could not be convicted of possession of a firearm by a felon based on someone else’s possession.

(1) “Minor deviation” from pattern instruction on breaking or entering was not error and did not prejudice the defendant; (2) Error to instruct jury on actual possession where evidence did not support that theory, but no prejudice on the facts of the case; (3) Trial court retained jurisdiction to correct sentence the day after the initial sentencing notwithstanding notice of appeal

State v. McMillan, ___ N.C. App. ___, 846 S.E.2d 575 (July 7, 2020)

The defendant was tried in Guilford County on charges of discharging a weapon into occupied property, firearm by felon, first-degree burglary, trafficking cocaine, possession with intent, and two counts of habitual felon. At the charge conference, the defendant requested an instruction on misdemeanor breaking or entering, which the trial judge agreed to give. The defendant objected to jury instructions on actual and constructive possession for the drug offenses, but the trial court overruled the objection and instructed the jury on both theories of possession. The jury convicted on all counts and the defendant appealed.

(1) In its instruction to the jury on misdemeanor breaking or entering, the trial court deviated from the language of the pattern instruction. While the pattern instruction states the offense need not require felonious intent “so long as the breaking or entering was wrongful, *that is, without any claim of right,*” the trial court instructed the jury that the defendant could be found guilty of the crime if they believe he lacked felonious intent but acted “*without consent of the owner or tenant.*” Slip op. at 11-12. This “minor deviation” from the pattern instruction did not amount to error, as the instruction was supported by the evidence and “correct in law.” *Id.* at 13. Even assuming error, the defendant could not show prejudice—he did not make any claim of right to enter the property and the jury convicted on first-degree burglary in any event.

(2) As to the jury instructions on actual and constructive possession, it was error to instruct the jury on actual possession where no evidence supported that theory. However, the defendant again could not demonstrate prejudice. The evidence of defendant’s constructive possession of the drugs was “exceedingly strong,” and this defeated any claim of prejudice.

(3) At the initial sentencing hearing, the trial court failed to impose a sentence for one of the two habitual felon convictions. The next day, the trial court realized its error and imposed the second habitual sentence. The defendant gave notice of appeal following the first hearing and

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contended the trial court lacked jurisdiction to sentence the defendant at the second hearing. The trial court normally loses jurisdiction to act once notice of appeal has been given. However, G.S. 15A-1448(a)(3) authorizes the trial court to act to correct a sentencing error within 14 days of the original sentence, even if the defendant has given notice of appeal and even without a motion for appropriate relief. *See State v. Lebeau*, ___ N.C. App. ___, 843 S.E.2d 317 (April 21, 2020). The trial court was required to sentence the defendant as a habitual felon once the verdict was returned and doing so was not a substantive amendment of the sentence but merely a “statutorily ‘necessary by-product’ of the sentence.” *McMillan* Slip op. at 20. The trial court therefore retained jurisdiction to correct the sentence, and the convictions were unanimously affirmed.

Judge’s Expression of Opinion

(1) Trial court’s instructions that the jury “will determine what the assault was” did not amount to an improper expression of opinion on the evidence in context; (2) The trial court’s response to a jury question during deliberations regarding a prior conviction was an not impermissible expression of opinion on the evidence

State v. Austin, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2020)

The defendant was tried and convicted of assault on female and habitual misdemeanor assault in Forsyth County and thereafter pled guilty to attaining habitual felon status. On appeal, he argued that the trial court erred by expressing an opinion on the evidence during its instructions to the jury and by improperly answering a jury question during deliberations. A majority of the Court of Appeals found no error.

(1) G.S. §§ 15A-1222 and 1223 prohibit the trial court from expressing opinions on the evidence to the jury. An alleged violation of this statutory mandate may be reviewed on appeal notwithstanding the defendant’s failure to object at the time, but the defendant has the burden to show that remarks were prejudicial under the totality of circumstances. Here, the defendant pointed to parts of the jury instructions where the trial court described the various alleged assaults and told the jury “You will determine what the assault was . . .” Slip op. at 9. However, the jury instructions began with the trial court informing the jury that it must determine “*whether* the defendant [was] guilty or not guilty of [the assaults].” *Id.* (emphasis in original). Under the totality of circumstances, the trial court’s instructions properly left the question of guilt or innocence “entirely for the *jury*” and did not amount to an improper expression of opinion. *Id.* at 10 (emphasis in original).

(2) During deliberations, the jury asked the trial court whether the jury had to find guilt beyond a reasonable doubt for the habitual misdemeanor assault charge. One of the records of a prior assault conviction admitted at trial had an apparent mistake as to the dates of the offense and conviction (the date of offense was listed as October 2010 and the date of conviction as March 2010). The trial court had instructed the jury with those dates as to that prior assault conviction and reiterated those instructions in response to the jury question. The trial court also reminded the jury that the reasonable doubt standard applied to all parts of the trial and re-instructed the

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jury on the burden of proof, the presumption of innocence, and reasonable doubt. According to the defendant, the trial court's responses amounted to an impermissible expression of opinion about the existence of the prior conviction. The Court of Appeals again disagreed:

The trial court emphasized that it was the duty of the jury to determine the facts and whether the documents at issue were sufficient to indicate the State had met its burden of proof of as to the charge of habitual misdemeanor assault beyond a reasonable doubt. Thus, upon review of defendant's challenge to these statements . . . [and] the context in which they were made, we discern no improper expression of opinion by the trial court. *Id.*

There was therefore no error, and the convictions affirmed.

Judge Brook dissented. He would have found that that comments by the trial court during its jury instructions "repeatedly assumed the proof of the central fact at issue in the case" (whether the assault occurred or not), that this violated the statutory mandate against expression of opinion, and that the error required new trial. *Id.* at 22 (Brook, J., dissenting).

Motions

The trial court did not err by denying the defendant's motion for a continuance to review rebuttal evidence that the State announced its intention to use on the day before trial

State v. Johnson, ___ N.C. App. ___, 846 S.E.2d 843 (Sept. 1, 2020)

In this felony murder and armed robbery case, the trial court did not err by denying the defendant's motion for a continuance to allow time to review evidence the State intended to introduce to rebut the defendant's expert testimony that he acted with diminished capacity, or in the alternative to not allow the State to introduce that rebuttal evidence. The defendant made this motion on the first day of trial, one day after being informed of the state's intent to use the rebuttal evidence, which consisted of jailhouse call recordings made around the time that he first met with his expert and which the State contended showed that he did not display signs of diminished capacity.

The defendant was sentenced to life imprisonment for felony murder based on the jury's finding that his killing of a store clerk was associated with the defendant's commission of the felony of assault with a firearm on a law enforcement officer as the defendant left the scene of the crime. Citing precedent establishing that diminished capacity is not a defense to a felony murder conviction based on that underlying general intent felony, the court found that any error by the trial court in denying the continuance was non-prejudicial as the expert testimony was not relevant to that conviction.

The jury also convicted the defendant of armed robbery and the trial court sentenced him to a term of imprisonment to run consecutively to his life sentence for felony murder. Because armed robbery is a specific intent crime, the expert testimony on diminished capacity was relevant to the armed robbery conviction. The State's jailhouse recording rebuttal evidence went to the issue of the defendant's mental ability around the time he met with his expert and

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generally showed that he was capable of making plans and adding up money. Reviewing whether the denial of the motion deprived the defendant of his constitutional right to present a defense, the court noted that defense counsel knew of the existence of the recordings for “quite a while” before trial but did not request them and, largely because the recordings did not contradict the expert’s testimony, determined that the defendant was not prejudiced by the denial of his motion for a continuance.

Judge Stroud dissented, expressing the view that the trial court’s denial of the continuance erroneously denied the defendant his right to effective assistance of counsel because of defense counsel’s inability due to time constraints to review the jailhouse call recordings or prepare for their use at trial. In Judge Stroud’s view, because the trial court’s error amounted to a violation of the defendant’s constitutional rights, it was presumptively prejudicial unless the State showed it was harmless beyond a reasonable doubt, a burden that the State did not meet.

Pleas

The defendant did not show any fair and just reason for withdrawing his guilty plea before sentencing

State v. Taylor, 374 N.C. 710 (June 5, 2020)

In 2011 the defendant was charged with first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon for his participation in a murder allegedly committed by Taurus Locklear and Shawn Jones. A plea agreement allowed the defendant to plead guilty to second-degree murder and other crimes in exchange for his cooperation in the pending prosecutions of Locklear and Jones. The trial court accepted the guilty plea in 2014, but deferred sentencing pending the resolution of the case against Locklear. However, in 2015 the State dismissed the charges against Locklear due to issues with the witnesses and evidence against him. At that point, the defendant moved to withdraw his guilty plea. At an evidentiary hearing in April 2016 two officers gave inconsistent accounts of the defendant’s statements during their investigation of the case. At a subsequent hearing in June 2016, the defendant’s lawyer testified that, in light of his own failure to examine the discrepancies between the officers’ accounts, he gave ineffective assistance in the plea agreement process, and that the defendant should therefore be entitled to withdraw his plea. The trial judge denied the motion and entered judgment. The defendant appealed. The Court of Appeals considered whether the defendant had shown “any fair and just reason” for withdrawing the plea—the proper standard for evaluating a motion filed prior to sentencing. Applying the factors spelled out by the Supreme Court in *State v. Handy*, 326 N.C. 532 (1990), the Court of Appeals concluded over a dissent that the trial court did not err by denying the motion. The defendant appealed to the Supreme Court.

The Supreme Court affirmed the Court of Appeals, concluding that the defendant failed to show any fair and just reason for withdrawing the guilty plea. The Court examined each of the *Handy* factors in turn. As to the first factor, whether the defendant asserted his legal

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innocence, the Court concluded that the fact that the defendant's guilty plea was not a no contest or *Alford* plea weighed against allowing him to withdraw it. As to the second factor, the strength of the State's proffer of evidence, the Court noted that the factual basis for the plea presented by the State was "essentially uncontested" and therefore sufficient. As to the third factor, the length of time between entry of the guilty plea and the desire to change it, the Court concluded that the 18-month delay in this case did not favor allowing the defendant to withdraw the plea. As to the fourth factor, the competency of counsel, the Court agreed that the factor was inconclusive. Taking all of the factors into consideration, the Court ultimately agreed with the Court of Appeals' conclusion that the defendant failed to show "any fair and just reason" to withdraw the guilty plea. The Court dismissed the defendant's related ineffective assistance of counsel claim without prejudice to his right to file it as a motion for appropriate relief.

Sentencing

(1) Defendant's constitutional challenges to consecutive terms of life with parole were preserved; (2a) De facto life sentences may violate *Miller* and its progeny; (2b) Consecutive sentences may aggregate to create a de facto life sentence; (2c) Defendant's minimum sentence of 50 years constituted a de facto life sentence in violation of *Miller*

State v. Kelliher, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2020)

The defendant was a participant in a double murder at the age of 17 and sentenced to consecutive terms of life without parole ("LWOP") in Cumberland County in 2001. He moved for resentencing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that mandatory life without parole sentences for juvenile offenders violates the 8th Amendment) and its progeny. The trial court determined at resentencing that the defendant did not present the rare case of an "irredeemable" or "incorrigible" juvenile, and therefore did not qualify for an LWOP sentence. The defendant's evidence at resentencing showed an abusive childhood, early substance abuse, substantial educational and self-improvement while in prison. He also presented expert mental health testimony indicating he was at low-risk to reoffend and evidence of a near-perfect disciplinary record while in prison (among other evidence). The trial court resentenced the defendant to two consecutive terms of life with parole, which meant that the defendant would be parole-eligible after a term of at least 50 years. The defendant appealed, arguing that the sentence amounted to a de facto life sentence in violation of state and federal constitutional protections. The Court of Appeals unanimously agreed.

(1) The defendant's challenge to his sentence was preserved. He raised *Miller*, the 8th Amendment, and comparable provisions of the state constitution in his MAR seeking resentencing, and specifically argued for concurrent life with parole sentences. The specific grounds of his objections to the sentence were thus clear from context and at least amounted to "an implied argument" that his sentence violated constitutional protections. Even if the argument was not preserved, the defendant asked the court to invoke Rule 2 of the Rules of Appellate Procedure to consider the argument, and the court found that invocation of the rule was appropriate here to review the constitutional issue.

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(2) Conducting an extensive review of the *Miller* line of cases, the court made three rulings of first impression in the state. (2a) A “clear majority” of jurisdictions have held that a de facto life sentence is reviewable under *Miller*, and North Carolina joined that majority. To allow *Miller* protections to be circumvented by labeling a sentence a term of years as opposed to life without parole when the effect of the sentence would preclude a meaningful opportunity for release would render the constitutional protections hollow. “*Roper, Graham, and Miller* are all concerned with ‘imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.’ A *de jure* LWOP sentence is certainly as ‘harsh’ as its functional equivalent.” *Kelliher* Slip op. at 30. (2b) Concurrent sentences that aggregate to create a de facto life sentence for juveniles not otherwise eligible for LWOP violate the constitutional protections for the punishment of juveniles. The court recognized that courts around the country are “sharply divided” on this point. A majority of jurisdictions have determined that concurrent sentences may lead to an impermissible de facto life sentence, and North Carolina again joined that majority. “The applicability and scope of protection found in the Eighth Amendment . . . [turn] on the identity of the defendant, not on the crimes perpetrated.” *Id.* at 35. The court distinguished North Carolina law from that of other jurisdictions holding otherwise. (2c) The defendant’s sentence to consecutive life with parole terms was unconstitutional. The defendant would become eligible for parole at age 67 under his current sentence. This was long enough to constitute a de facto life sentence. In the words of the court:

To release an individual after their opportunity to directly contribute to society—both through a career and in other respects, like raising a family—does not provide a meaningful opportunity to demonstrate the ‘maturity and rehabilitation’ required to obtain release and reenter society as required by *Graham*. *Id.* at 40 (citation omitted) (cleaned up).

The court observed that the defendant would not necessarily be released from prison even after becoming parole eligible. However, to afford the defendant the constitutional protections established by the *Miller* line of cases, the defendant’s consecutive sentences could not stand. The sentences were therefore vacated, and the trial court was ordered to impose concurrent life with parole sentences on remand.

The trial court erred in calculating the defendant’s prior record level by using a joinable offense as a prior conviction

State v. High, ___ N.C. App. ___, 845 S.E.2d 150 (June 2, 2020)

The trial court erred in calculating the defendant’s prior record level, which was proved by stipulation, by using a joinable offense as a prior conviction for sentencing purposes. In 2004 the defendant was convicted of first-degree murder and armed robbery based on an incident where he killed his father and took money from his father’s bedroom. The defendant was 15 years old at the time of the offenses but was tried as an adult and sentenced to life in prison without the possibility of parole. In 2014 post-conviction proceedings based on *Miller v. Alabama*, the first-degree murder conviction was vacated and the defendant pleaded guilty to

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second-degree murder. As part of that plea agreement, the State and the defendant stipulated that the defendant had a prior record level of III, a record level that was the result of six prior record points arising from the 2004 armed robbery conviction. Noting that a defendant's stipulation regarding his or her prior record level does not preclude the court's review where calculation of the record level requires answering a legal question, the court found that use of the 2004 armed robbery conviction violated the rule from *State v. West*, 180 N.C. App. 664 (2006) that a joinable offense may not be used in calculating a defendant's prior record level.

Trial court did not commit a clerical error in sentencing the defendant to a maximum sentence that was calculated based on the minimum term actually imposed

State v. Wohlers, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 4, 2020)

The defendant was convicted of indecent liberties with a child and felony child abuse by sexual act based on crimes committed against his daughter and stepdaughter. The court of appeals held that the trial court properly determined the defendant's maximum term of imprisonment for felony child abuse by sexual act, a Class D felony, based upon the minimum term it had selected (64 months) rather than the minimum term permitted by statute (51 months). G.S. 15A-1340.17(f) provides that, for offenders sentenced for reportable convictions that are Class B1 through E felonies, the maximum term of imprisonment "shall be equal to the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus 60 additional months." Once the trial court set the defendant's minimum term of imprisonment at 64 months (the top of the presumptive range), it properly added 64 plus 13 (20 percent of 64, 12.8, rounded to the next highest month) plus 60, totaling 137 months.

Sex Offenders

When SBM enrollment would not occur for at least 30 years, the State could not demonstrate the reasonableness of the search; SBM order reversed

State v. Strudwick, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2020)

In this Mecklenburg County case, the defendant pled guilty to various sex offenses and was ordered to enroll in satellite-based monitoring ("SBM") for life, following a contested hearing on that issue. The defendant appealed and the Court of Appeals reversed the order in an unpublished opinion. The State sought review in the North Carolina Supreme Court. That court granted the state's petition for discretionary review and remanded the matter back to the Court of Appeals in light of *State v. Grady*, 372 N.C. 509 (2019) ("*Grady III*"). On remand, the Court of Appeals reached the same conclusion and reversed the trial court's SBM order.

The defendant was sentenced to at least 30 years in prison for his crimes in this case. While *Grady III* dealt with recidivists specifically (a category of potential SBM registrants not at issue in this case), the Court of Appeals nonetheless determined that the *Grady III* analysis was a guidepost. The facts of this case were parallel to those in *State v. Gordon*, 840 S.E.2d 907 (2020). There, the SBM enrollment and Fourth Amendment search would not take effect until

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the defendant was released from prison—at least 15 years later. Here, the SBM search would not begin for at least 30 years. As in *Gordon*, that the defendant will not enroll in SBM for a matter of decades reduced the ability of the State to demonstrate the search is reasonable. Citing *Gordon*, the court observed that the State “is hampered by a lack of knowledge concerning the unknown future circumstances relevant to that analysis.” Slip op. at 7 (citation omitted). A concurring judge in the original Court of Appeals opinion in *Gordon* noted that this created “an impossible burden” for the State to meet. The court noted that if the SBM statutes were amended to provide for SBM hearings at the time of a defendant’s release from prison, that burden would be alleviated. “But until we receive further guidance from the Supreme Court or new options for addressing the SBM procedure from the General Assembly, under existing law, we are required to reverse defendant’s SBM order.” *Id.* at 9.

Judge Tyson dissented. He would have found that *Grady III* did not require this result and that the majority improperly extended the reach of that case. He would have affirmed the trial court’s SBM order.

(1) Wake County Superior Court retained jurisdiction over hearing to determine whether the defendant was required to register as a sex offender based upon his conviction for felony secret peeping when defendant agreed to subsequent hearing that was postponed to allow defendant to demonstrate that he was not a danger to the community and where defendant received adequate notice of hearing; (2) Order remanded for correction of clerical error.

State v. Vorndran, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 4, 2020)

On March 21, 2018, the defendant pled guilty in Wake County Superior Court to felony secret peeping in violation of G.S. 14-202(e). Pursuant to a plea agreement, the defendant was placed on four years of supervised probation. Among other conditions, the defendant was not permitted to be unsupervised around children under the age of 14. The trial judge conducted a separate hearing the same day on whether the defendant would be required to register as a sex offender pursuant to G.S. 14-202(l). The trial court opted, in light of the defendant’s age, to give him a chance to show that he was not a danger to the community. The court announced that there would be a hearing in 12 months to see whether the defendant was in compliance with probation. The parties agreed to a subsequent hearing, which they agreed could be accelerated for noncompliance.

On December 1, 2018, the defendant was arrested in New Hanover County for felony secret peeping. Three days later, the State notified the defendant that based on his recent arrest he should be required to register for his Wake County conviction and that his registration hearing was being accelerated. On December 20, 2018, the defendant appeared in Wake County Superior Court before a superior court judge who was not the sentencing judge in the original Wake County case. The judge ordered the defendant to register as a sex offender for 30 years.

(1) The defendant argued on appeal that the trial court lacked jurisdiction over the December 20 hearing because the presiding judge was not the “sentencing court” as contemplated by G.S. 14-202(l).

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The court of appeals rejected the defendant's argument, noting that the defendant agreed to a subsequent hearing, which he agreed could be accelerated, and agreed that he would not be unsupervised around any children under the age of 14. Thus, when he was arrested for felony secret peeping involving a nine-year-old child, he was in violation of the terms of his probation, and his hearing could be accelerated pursuant to the plea agreement. In addition, the State notified the defendant that it was accelerating his registration hearing, and the issues before the court in that hearing were to determine in the first instance whether the defendant was a danger to the community and whether his registration would further the purpose of the registration scheme. On these facts, the appellate court determined that Wake County Superior Court retained jurisdiction over the defendant's second hearing and affirmed its order.

(2) The trial court erroneously checked box 1(b) on form AOC-CR-615 (the sex offender registration determination form), indicating the defendant was convicted of a sexually violent offense rather than box 1(d), to indicate that the defendant was convicted of felony secret peeping. The court of appeals remanded the matter to the trial court for the limited purpose of correcting that error.

Imposition of lifetime SBM was an unreasonable warrantless search in violation of the Fourth Amendment

State v. Hutchens, ___ N.C. App. ___, 846 S.E.2d 306 (June 16, 2020)

In this rape and sex offense case, the Court of Appeals reversed the trial court's order imposing lifetime SBM. First addressing its appellate jurisdiction, the court explained that it allowed the defendant's petition for writ of certiorari in its discretion, notwithstanding procedural defects in his notice of appeal, because of the "meritorious nature" of the defendant's argument regarding SBM and the current "tumultuous" state of the law. Before turning to the merits of the SBM issue, the court also dismissed a portion of the defendant's appeal having to do with attorney's fees because an order for those fees had not been entered as a civil judgment.

As the defendant was not a recidivist and, consequently, the order requiring lifetime SBM was not facially unconstitutional under *State v. Grady*, 259 N.C. App. 664 (2018) ("*Grady III*"), the court conducted a reasonableness analysis guided by the principles of *Grady III*, namely that it is the State's burden to show that under the totality of the circumstances lifetime SBM is reasonable because its intrusion upon Fourth Amendment interests is balanced by its promotion of legitimate government interests. As to the intrusion side of the analysis, the court likened this case to *State v. Gordon*, ___ N.C. App. ___, 840 S.E.2d 907 (2020) where it explained that the State's ability to show the reasonableness of lifetime SBM is hampered in situations where it is imposed at sentencing but will not be implemented upon the defendant until he or she is released after a lengthy prison sentence. The court also noted the deeply intrusive nature of the ET-1 monitoring device at issue and the fact that the defendant's privacy interests will be less diminished following his completion of PRS. As to the State's interest in SBM and its efficacy, the court rejected the State's argument that SBM would discourage recidivism, saying that the State had not presented evidence to support that assertion, either generally or with respect to the defendant specifically. The court also rejected the State's

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argument that lifetime SBM would serve the purpose of keeping the defendant out of “exclusion zones,” noting that his status as a registered sex offender already barred him from many such zones and that his offense involved an adult roommate. For a lack of evidence, the court also rejected the argument that lifetime SBM would ensure that he abided by an order to have no contact with the victim. Under the totality of the circumstances, the State did not show that lifetime SBM was a reasonable warrantless search in this case.

There was uncertainty in the record as to which of two studies the trial court relied upon when ordering SBM and the court of appeals remanded for clarification of that issue

State v. Lindquist, ___ N.C. App. ___, 847 S.E.2d 78 (Aug. 18, 2020)

In this case involving rape and other sex crimes where the defendant was ordered to enroll in lifetime SBM, the court of appeals vacated the order imposing SBM because of uncertainty surrounding the evidentiary basis of the trial court’s decision. With regard to the issue of efficacy of SBM, at the SBM hearing a DPS employee testified regarding a 2015 California study of GPS monitoring of sex offenders and that study was introduced into evidence. However, the trial court’s order imposing SBM referred to a 2012 California study of GPS monitoring of sex offenders. The court of appeals vacated the order and remanded for clarification as to which California study the trial court relied upon.

Evidence

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Best Evidence Rule

The admission of an ACIS printout for the purpose of establishing the defendant's habitual felon status was proper

State v. Waycaster, ___ N.C. ___, 846 S.E.2d 688 (Aug. 14, 2020)

After violating his probation, the defendant was indicted on charges of interfering with an electronic monitoring device and attaining the status of a habitual felon. The habitual felon indictment charged defendant with attaining habitual felon status based on three prior felony convictions in McDowell County: (1) a June 4, 2001 conviction for felonious breaking and entering; (2) a February 18, 2010 conviction for felonious breaking and entering; and (3) a July 22, 2014 conviction for safecracking. At trial, the State admitted into evidence certified copies of the judgments for the latter two convictions to prove their existence.

Although the State could not obtain the original judgment associated with the June 4, 2001 conviction, the State introduced as an exhibit a computer printout from the Automated Criminal/Infraction System (ACIS). The Clerk of Court for McDowell County testified that ACIS is a statewide computer system relied on by courts and law enforcement agencies for accessing information regarding a defendant's criminal judgments, offense dates, and conviction dates, manually entered into the database by an employee in the Clerk of Court's office. The ACIS printout offered by the State showed that the defendant had been convicted of felonious breaking and entering on June 4, 2001, and the Clerk testified that the printout was a "certified true copy of the ACIS system." The trial court admitted the printout into evidence over the defendant's objection, and the jury found that the defendant had attained the status of a habitual felon.

On appeal, the defendant unsuccessfully argues that the trial court improperly allowed the ACIS printout because G.S. 14-7.4 contained the exclusive methods for proving prior convictions in a proceeding to determine habitual felon status. The Court of Appeals concluded that the statute was permissive and did not exclude methods of proof not specifically delineated in the Habitual Felons Act. The Supreme Court affirmed. The Court relied on the presence of the word "may" in the statute, as well as its prior interpretation of the Fair Sentencing Act, which contained similar language.

The dissenting Court of Appeals judge concluded that the introduction of the printout violated the best evidence rule because the printout was introduced as evidence of the defendant's prior convictions and was not the original judgment. The majority rejected this argument, noting that the best evidence rule applies only when the contents of a document are at issue. The Court reasoned that here, the issue was not the contents of the conviction but rather the existence of the conviction. However, in a concurring opinion, Chief Justice Beasley noted that the nature of the Habitual Felons Act requires that the State prove that the defendant did, in fact, commit three prior felony offenses, and to do so requires the court to consider the contents of the record to be introduced for the purpose of confirming "that said person has been convicted of former felony offenses." While the Chief concluded that the best evidence

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rule did apply to the introduction of the printout, the Chief noted that the State complied with the rule through the printout coupled with the Clerk's testimony.

Relevancy – Rule 401

(1) Error, but no prejudice, in admitting field test results on suspected cocaine in assault and attempted robbery case; (2) Defendant waived variance issue with habitual felon indictment.

State v. Cobb, ___ N.C. App. ___, 845 S.E.2d 870 (June 16, 2020)

An officer initiated a voluntary encounter with the defendant sitting in the driver's seat of a parked car. The officer detected a marijuana odor, and the defendant admitted he was smoking a blunt and handed it to the officer. Once backup arrived, the officer asked the defendant to step out of the car and searched him incident to arrest. Upon discovering a "wad of money" totaling thousands of dollars and asking defendant about it, the defendant fled on foot. During the resulting pursuit and takedown, the defendant attempted to take the officer's firearm and also placed a bag of white powder in his mouth. Believing the defendant was destroying evidence and putting himself at risk, the officer forcibly removed the bag from the defendant's mouth. The defendant resisted and bit the officer's finger hard enough to break the skin. The powder later field-tested positive for cocaine. At the defendant's subsequent trial for assault inflicting serious injury on an officer and attempted common law robbery, testimony about the bag of white powder and the positive field test was admitted. The defendant was convicted of lesser charges, and pleaded guilty to attaining habitual felon status.

The appellate court held that admission of evidence about the field test result was error. The test result was irrelevant since the test was conducted after the assault and attempted robbery were over, and defendant was not charged with any controlled substance offenses. Testimony about the officer's belief that the powder was cocaine was relevant to explain why the officer believed it was necessary to remove the bag from the defendant's mouth, but the confirmatory test had no relevance to establishing any of the elements of the charged offenses. However, the error was not prejudicial in light of all the other evidence of defendant's guilt as to the charged offenses.

Defendant's remaining argument, alleging a fatal variance in the habitual felon indictment, was waived since the defendant pleaded guilty. The error, which incorrectly listed one of the defendant's convictions as occurring in superior court rather than district court, did not constitute an exceptional circumstance that warranted allowing discretionary review under Rule 2.

Opinions

(1) Expert testimony of victim's PTSD diagnosis was properly admitted for corroborative purposes; failure of trial court to give unrequested limiting instruction on the use of that evidence was not plain error; (2) Where the State raised and the court addressed Fourth

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Amendment concerns during SBM hearing, the issue was preserved for review despite defendant's lack of constitutional objection; (2a) lifetime SBM order was unreasonable and reversed where defendant would not enroll in the program for at least 50 years; (2b) second SBM order for term of 10 years was reasonable and was affirmed

State v. Thompson, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2020)

The defendant was convicted at trial of numerous sex offenses against minor children, including statutory sex offense, sexual activity by substitute parent, and sale of controlled substances to minors in Cleveland County. He was sentenced to a minimum of 600 months and ordered to enroll in satellite-based monitoring ("SBM") for life upon release based on the convictions relating to one victim, with an additional 10 year term of SBM for the other victim. The defendant properly appealed his convictions but failed to give notice of appeal of the SBM orders. In its discretion, the Court of Appeals granted his petition for writ of certiorari to review that issue.

(1) A therapist for one of the minor victims testified as an expert in childhood and teen trauma for the State at trial. She testified that the child had post-traumatic stress disorder ("PTSD") and major depression and relayed to the jury disclosures by the victim of instances of sexual abuse by the defendant. This testimony was offered for corroborative purposes. The defendant did not object, and no limiting instruction about the testimony was given to the jury. The court therefore reviewed for plain error only. The North Carolina Supreme Court has held that it is improper to admit evidence of a PTSD diagnosis for substantive purposes. *See State v. Hall*, 330 N.C. 808, 821 (1992). However, such testimony may be admitted to corroborate substantive evidence, to rebut defense evidence of consent, or to explain why disclosure of the crime was delayed. When such evidence is admitted, the trial court should provide a limiting instruction to the jury regarding the use of the testimony. Failure to give the limiting instruction is not error, however, if the defendant fails to request one. Here, the testimony was properly admitted for corroborative purposes. Further, "even if a limiting instruction were required in the absence of a specific request by defendant, defendant was not prejudiced by the omission such that it would amount to fundamental error." *Thompson* Slip op. at 8. There was therefore no plain error in the admission of the therapist's diagnosis of PTSD.

(2) The defendant failed to raise a Fourth Amendment objection during the SBM hearing. However, because the State raised the constitutional issue and it was considered by the trial court in its ruling, the issue was preserved for appellate review. (2a) Here, the defendant's enrollment in SBM would not occur until at least the expiration of his minimum term of imprisonment, at least 50 years from the time of judgment. As in *State v. Gordon*, 840 S.E.2d 907 (2020), "it is therefore difficult to assess the reasonableness of subjecting him to SBM given the unknown future circumstances of the program." *Thompson* Slip op. at 16. Finding that the State failed to meet its burden to show that the lifetime SBM search was reasonable under the Fourth Amendment, the trial court's order of lifetime SBM was reversed.

(2b) The second SBM order requiring the defendant to enroll in SBM for a term of 10 years was proper. The evidence supported the finding that the offenses involved the sexual abuse of a minor child, and the trial court properly considered the relationship between the victim and

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defendant, the offenses, and the age of the victims. The defendant's risk assessment indicated he was "low-risk," but the trial judge was free to make its own determination of the defendant's risk based on the totality of evidence, as it did here. Furthermore, "ten years is not 'significantly burdensome and lengthy,' especially given that the defendant will be subject to post-release supervision for half of that time period." *Id.* at 20. The trial court committed a mere clerical error in failing to make a finding that the defendant required the highest possible level of supervision. This SBM order was therefore affirmed and remanded for correction of the clerical error.

Judge Berger concurred with the majority opinion as to the criminal judgment and concurred in result with the SBM portion of the opinion, joined by Judge Dietz. These judges would have found that the precedent by which the majority found the defendant's Fourth Amendment challenge preserved (based on the State's act of raising the constitutional issue) was inconsistent with the preservation requirements under the Rules of Appellate Procedure. However, given the uncertain and evolving nature of SBM case law in the State, as well as the fact that the SBM order here was issued before *Gordon* was decided, the concurring judges would have found that the defendant could not have preserved his constitutional arguments [and presumably would have found the issue preserved on that basis, rather than the precedent relied upon by the majority.]

(1) Rule 702 governs the admission of expert evidence, including experimental evidence, which is reviewed for abuse of discretion (and not de novo, as pre-Rules of Evidence cases held); no abuse of discretion in admitting results of experiment to show pattern of bullet shell ejections; (2) No abuse of discretion to qualify expert to testify in field of bullet shell ejection patterns despite expert's lack of training or experience in that specific field

State v. Turner, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2020)

The defendant was convicted of first-degree murder in Person County. The victim was a neighbor with whom the defendant had long-running disputes. According to the defendant, he shot the neighbor in self-defense. The victim was shot 11 or 12 times, with the vast majority of the bullets having entered the victim from the back and side of his body. The State presented evidence from an experiment performed by a forensic firearms examiner attempting to replicate the production of the layout of bullet shell casings found at the scene in order to demonstrate the shooter's location and to rebut the defendant's self-defense claim. The expert only reported the results of the experiment and did not specifically opine about the shooter's location.

(1) Relying on cases pre-dating the adoption of the Rules of Evidence, the defendant argued this evidence was improperly admitted in violation of the "substantial similarity" test. These older cases imposed stricter requirements for the admission of "experimental evidence" – that is, evidence "about an experiment that is used to prove something about the actual events that occurred in the case." Slip op. at 8. The defendant argued that these rules controlled, rather than Rule of Evidence 702. Under those cases, the standard of review on appeal of this issue

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would have been de novo, rather than the abuse of discretion standard applied to Rule 702 challenges. The defendant did not argue or cite to Rule 702 or to any cases applying the rule since the 2011 amendments adopting the *Daubert* standard for expert testimony. Rejecting this argument, the court found that later cases, even those pre-dating the 2011 amendment to Rule 702, had in fact adopted an abuse of discretion standard of review for experimental evidence. The court also rejected the notion that the substantial similarity test stood apart from Rule 702. “The notion of ‘substantial similarity’ for experimental evidence is one of the many ‘particular factors articulated in previous cases’ that is now baked into the third prong of Rule 702’s reliability test.” *Id.* at 10. Thus, pursuant to Rule 702, the standard of review is abuse of discretion. Even if the defendant’s argument that the evidence was erroneously admitted was not forfeited by his failure to argue Rule 702 or abuse of discretion, the trial court did not err in admitting the testimony. In the words of the court: “Here, the trial court’s determination that the experiment met the Rule 702 criteria was a reasoned one and not manifestly arbitrary. Thus, we cannot hold that the trial court abused its discretion.” *Id.* at 12.

(2) The defendant also argued that the trial court erred in qualifying the expert to give an opinion about shell ejection patterns. Voir dire of the expert revealed that he had not received training on ejection patterns of bullet shells, that no certification for this subject exists, and that he had not previously performed this type of experiment. According to the court, the trial court did not abuse its discretion in so qualifying the expert: “[I]t is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist’ as long as ‘the expert witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.’” *Id.* at 14. Based on his extensive training and experience in the field of firearms, the trial court acted within its discretion and did not err in qualifying the expert.

The conviction was therefore unanimously affirmed with Judges Berger and Arrowood concurring.

(1) Trial court did not err by permitting lay witness to testify that the shots defendant fired were individual shots that were not as rapid as shots fired from an automatic weapon; (2) Evidence of seven distinct shots was sufficient to support seven charges of discharging a firearm into an occupied vehicle

State v. Morrison, ___ N.C. App. ___, 847 S.E.2d 238 (Aug. 4, 2020)

The defendant was convicted of possession of a firearm by a felon, three counts of assault with a deadly weapon and seven counts of discharging a firearm into an occupied vehicle based on an incident in which he chased two women from his house and fired at the car of a Good Samaritan who stopped to assist the women on the highway.

(1) Though the defendant did not object to the testimony at trial, he argued on appeal that the Good Samaritan should not have been permitted to testify as a lay witness that the shots were not fired from an automatic weapon. The court of appeals found no error in the admission of the testimony, which was based on the witness’s first-hand knowledge of the incident and his familiarity with the distinction between automatic and semi-automatic rifle fire, gained through decades of military service.

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(2) Defendant argued on appeal that the State failed to prove the six additional shots fired into the truck after the first shot were discharged willfully or wantonly within the meaning of G.S. 14-34.1(b). The court of appeals rejected the defendant's argument. The court noted that the Good Samaritan's testimony provided evidence that the defendant did not use an automatic weapon but instead used a weapon that required him to pull and release the trigger (and thus employ his thought process) each time he decided to shoot into the occupied truck. In addition, testimony from the Good Samaritan and one of the women established that the shooting continued over an identifiable period of time, as opposed to occurring in a rapid burst of gunfire.

Finally, the court of appeals dismissed the defendant's argument that he had been sentenced in violation of his right to be free from double jeopardy on the basis that the defendant failed to preserve the argument by objecting a trial.

(1) Use of the word "victim" in reference to the accuser by multiple witnesses for the State was not improper vouching or plain error; (2) Defendant could not show prejudice for ineffective assistance claim based on defense counsel's failure to object to the use of "victim" by State's witnesses; (3) Use of "victim" by the trial court in jury instructions was not plain error

State v. Womble, ___ N.C. App. ___, 846 S.E.2d 548 (July 7, 2020)

In this Moore County case, the defendant was convicted of first-degree rape and sex offense, crime against nature, possession of firearm by felon, communicating threats and various assaults stemming from attacks on his estranged then-wife. On appeal, the defendant argued that the trial court plainly erred by permitting multiple witnesses for the State to refer to the woman as the "victim," that his trial counsel was ineffective for failing to object to those references, and that the trial court plainly erred by using "victim" to describe the woman in its jury instructions.

(1) A total of eight witnesses for the State used the term "victim" in reference to the woman, five of whom were law enforcement officers and four of whom were expert witnesses. The defendant contended this amounted to improper vouching for the accuser's credibility and argued the trial court should have intervened *ex mero motu*. The court found that the defendant could not show prejudice and therefore could not establish plain error. "...[T]he strength of the State's evidence against defendant . . . outweighed any potential subliminal effect of the witnesses' occasional references to [the woman] as the victim." Slip. op. at 13.

(2) For the same reasons, the defendant's ineffective assistance of counsel claim failed. The defendant could not demonstrate a reasonable possibility of a different result at trial had his counsel objected to the uses of the word "victim" and therefore could not establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

(3) According to the defendant, the trial court's use of the word "victim" in its jury instruction violated the statutory mandate against expression of judicial opinion. Rejecting this argument, the court observed:

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Our Supreme Court has consistently rejected a defendant's attempt to couch the trial court's use of the term "victim" in its jury instructions as an improper expression of judicial opinion in violation of N.C.G.S. §§ 15A-1222 and 1232. . . Likewise, our Supreme Court has rejected arguments that the trial court's use of the term "victim" in its charge to the jury amounts to plain error . . . *Id.* at 17.

Any constitutional challenge to the jury instructions on this point was not raised in the trial court and therefore waived on appeal. The convictions were thus unanimously affirmed.

Arrest Search, and Investigation

Arrest, Search, and Investigation

Arrests & Investigatory Stops

(1) Presence of pocketknife in center console did not support *Terry* frisk; (2) Defendant's act of fleeing during an illegal search was not an intervening circumstance supporting application of attenuation doctrine; denial of motion to suppress reversed

State v. Duncan, ___ N.C. App. ___, 846 S.E.2d 315 (July 7, 2020)

The defendant was stopped by a Charlotte-Mecklenburg police officer for a broken taillight and a passenger seatbelt violation. A second officer arrived shortly after the stop. The stopping officer saw an approximately five-inch closed pocketknife in the center console between the driver and passenger. The officer then asked the defendant to step out of the car so the knife could be secured and to check the defendant for weapons. The defendant exited the car and stated that having the knife was not a crime. The officer agreed, stating he was acting out of officer safety. The defendant stated he was not armed and did not consent to a frisk. When the officer said he was “just going to pat [Defendant] down,” the defendant said, “all right,” and raised his arms. The officer felt a bulge the size of a “large grape” near the defendant’s exterior coat pocket but could not locate the item within the pocket. The officer suspected the item was marijuana and asked the defendant about it. The defendant replied that it was an item he purchased from a store. When asked to remove the item, the defendant produced several items wrapped in plastic, telling the officer, “It’s not illegal, man.” The officer then grabbed the bulge from the outside, lifted the defendant’s coat, and reached inside an interior pocket. The defendant repeatedly asked for a supervisor on scene and protested: “This is not a *Terry* frisk, man. You’re illegally searching me.” At one point the defendant pushed the officer’s arm away. The officer did not remove his hands from the defendant’s pockets and the defendant eventually fled, falling nearby. As the defendant got up from the fall, the officer observed the defendant “digging in his waistband.” The defendant was then tased and arrested at gunpoint. A bag was found nearby containing crack and powder cocaine. More crack, marijuana, and cash were found on the defendant. The defendant stated the drugs were for personal use during arrest processing. He was charged with possession with intent to sell or deliver cocaine and possession of cocaine and moved to suppress.

The trial court denied the motion. It found the frisk was not based on reasonable suspicion and was therefore unconstitutional, but the defendant’s act of fleeing sufficiently attenuated that violation from the discovery of evidence. The defendant was convicted of two counts of possession of cocaine at trial and appealed. A divided Court of Appeals reversed.

(1) The State argued that the frisk was justified by the presence of the knife in the center console—since the defendant was armed, he was dangerous—and that the trial court erred in concluding otherwise. The majority disagreed. Two officers were present, the defendant was stopped for equipment violations only, and the stop occurred in the middle of the day in uptown Charlotte near the courthouse. The defendant was generally cooperative, did not attempt to conceal the knife, got out of the car (and away from the knife) upon request, and did not otherwise act suspiciously. These facts were “entirely inapposite” from cases where police had “reason to suspect the defendant possessed and concealed a dangerous weapon on

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their person, *coupled* with behavior giving rise to a suspicion the defendant may be dangerous.” Slip op. at 12-13 (emphasis in original) (distinguishing *State v. Malachi*, ___ N.C. App. ___, 825 S.E.2d 666 (2019)). The trial court therefore did not err in concluding the frisk was unconstitutional.

(2) Under the attenuation doctrine, evidence that would be subject to suppression via the exclusionary rule is nonetheless admissible when the connection between the illegal action of law enforcement and the evidence is “remote or has been interrupted by some intervening circumstance.” See *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056 (2016). Courts must examine the closeness in time between the police illegality and the discovery of the evidence, any intervening circumstances, and the “purpose and flagrancy of the official misconduct” when deciding whether the attenuation exception applies. *Duncan* Slip op. at 16 (citation omitted). As to the first factor, *Strieff* held that only the passing of “substantial time” between the police misconduct and the discovery of evidence favors attenuation. Because the discovery of evidence here occurred within minutes of the illegal frisk, this factor weighed against attenuation. As to the second factor, the trial court found that the defendant committed the crime of resisting a public officer by fleeing the encounter—officers then had probable cause to arrest for that offense and to search incident to the arrest, which was a sufficient intervening circumstance. The Court of Appeals disagreed, finding that even if the frisk was within the mission of the stop, the officer’s search of the defendant’s pocket for suspected marijuana was not. “Because the traffic stop was unlawful at the point of [the officer’s] unconstitutional search, the defendant had ‘the right to resist [the] unlawful arrest.’” *Id.* at 21. The court rejected the State’s contention that the defendant could have resisted the search by lesser means, pointing out that the defendant repeatedly asked for a supervisor, repeatedly objected to the search, and tried to remove the officer’s hand from his pocket before fleeing. Thus, the defendant’s flight did not constitute a crime or intervening circumstance weighing in favor of attenuation. The court observed that the final factor, the purpose and flagrancy of law enforcement misconduct, was the most significant factor in the analysis. The trial court found the officers acted in good faith and that this supported application of the attenuation doctrine. The majority again disagreed. “Instead of taking the opportunity—indeed, at Defendant’s invitation—to deescalate the situation, [the officer] proceeded with the flagrantly unconstitutional search.” *Id.* at 26. These “extraordinary facts” weighed against attenuation and in favor of suppression. The trial court’s order denying the motion to suppress was therefore reversed and a new trial ordered.

Judge Tyson dissented. He would have found that the frisk was justified and that attenuation applied to the extent the search became illegal, as well as other grounds supporting the denial of the motion.

Searches

Court order for historical cell-site location information was equivalent to a search warrant, so the defendant’s rights under the state constitution were not violated by an unreasonable

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search and seizure; good faith exception applied to defendant's rights under the federal constitution.

State v. Gore, ___ N.C. App. ___, 846 S.E.2d 295 (June 16, 2020)

The defendant in this case pleaded guilty to manslaughter and armed robbery, while preserving his right to appeal the denial of his motion to suppress historical cell site location information ("CSLI") that the state obtained without a search warrant. Evidence at the suppression hearing showed that police responded to a homicide and learned that a white Altima was seen leaving the scene. Officers soon located and boxed in the car but the driver fled on foot, discarding a bloody handgun as he ran. Inside the car officers found drugs, a gun, and a blood-covered cell phone belonging to the defendant. Officers applied for a court order to obtain the records of the phone, including five days of CSLI from around the time of the homicide. The application was sworn under oath and supported by affidavit, and the order was issued based on a finding of probable cause. The phone records revealed the defendant was in the area of the shooting at the time it occurred, and near the location of the white Altima when it was abandoned. The defendant moved to suppress the records on the basis that they were not obtained pursuant to a search warrant based on probable cause, violating his state and federal constitutional rights. The trial court denied the motion, finding that the court order in this case was the equivalent of a search warrant supported by probable cause. Upon review, the Court of Appeals affirmed the trial court's ruling.

The court first addressed defendant's federal constitutional claim. Citing *Carpenter v. United States*, 201 L.Ed.2d 507 (2018), the appellate court agreed that obtaining historical CSLI constituted a search, which requires a warrant supported by probable cause. A court order issued pursuant to the Stored Communications Act ("SCA") based only on "reasonable grounds" to believe the records would be "relevant and material" to the investigation would not satisfy that standard. However, the order in this case was obtained two years before *Carpenter* was decided, and it was issued in compliance with the law at that time. Therefore, as in *Carpenter*, "even assuming law enforcement did conduct a warrantless search in violation of defendant's Fourth Amendment rights, the federal good faith exception to the exclusionary rule would apply."

Turning to the state constitutional claim, and noting that the state right at issue must be interpreted at least as broadly as the federal right, the court held that "a warrantless search of historical CSLI constitutes an unreasonable search in violation of a defendant's rights under the North Carolina Constitution as well." But after reviewing the statutory requirements for a search warrant and the probable cause standard, the court concluded that the order in this case did satisfy the warrant requirement. First, although it was denominated a court order rather than a warrant, it nevertheless "contained all of the information required in a search warrant" such as the applicant's name, sworn allegations of fact to support the applicant's belief, and a request to produce the records. Second, although a court order issued under the SCA is only required to meet a "reasonable grounds" standard akin to reasonable suspicion, the order in this case was actually based upon a finding that there was "Probable Cause that the information sought is relevant and material to an ongoing criminal investigation, involving a

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First Degree Murder.” That finding of probable cause was “a significant distinction which compels a different outcome than that of *Carpenter*. Accordingly, because the trial court determined there was probable cause to search defendant’s historical CSLI, the requirements for a warrant were met and defendant’s constitutional rights were not violated.” Since it held that the warrant requirement was met, the majority declined to address whether a good faith exception could have applied under state law.

In a partial concurrence, Judge Dillon disagreed with the majority’s holding that the court order in this case was the equivalent of a search warrant. In his view, the application failed to provide a sufficient basis for finding probable cause to believe that evidence of a crime would be discovered in the particular place to be searched. However, he concurred in the result on the grounds that both the federal and state constitutional claims were refuted by the good faith exception. He would have held that North Carolina does have a good faith exception, pursuant to the 2011 amendment to G.S. 15A-974, which provides legislative authority for the exception that was lacking when *State v. Carter*, 322 N.C. 709 (1988) was decided. Alternatively, pursuant to state case law, he would have held that obtaining historical CSLI did not constitute a “search” for state constitutional purposes.

Interrogation and Confession

Confession was voluntary and not the product of improper inducement

State v. Lee, ___ N.C. App. ___, 846 S.E.2d 508 (July 7, 2020)

The defendant was accused of killing his aunt in Lenoir County. Following his arrest, the defendant initially requested an attorney and was not interrogated, but later contacted detectives and signed a *Miranda* waiver. The defendant offered to make a full statement if he could see his family face-to-face again (visits at the jail were conducted by computer and phone only). Officers initially declined the offer but eventually agreed to a face-to-face family visit, and the defendant confessed. The trial court refused to suppress the statement and the defendant was convicted of first-degree murder at trial. He appealed, arguing that his confession was the product of improper inducement by police and therefore not voluntary.

Due process prohibits the admission of an involuntary confession by a person in custody. “[A] confession obtained by the improper ‘influence of hope or fear implanted in the defendant’s mind’ by law enforcement can render the confession involuntary.” Slip. op. at 5. However, for an inducement to be improper, it “must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage.” *Id.* at 6 (citations omitted). Here, the defendant initiated the contact with law enforcement and offered to confess in exchange for the family visit; the plan did not originate with law enforcement. The defendant also testified at suppression that he was motivated in part to confess after talking with his father, who encouraged the defendant to make a truthful statement. The totality of circumstances showed that the confession was knowing and voluntary. Further, the purported inducement here related only to a collateral advantage and did not promise relief from the crime. The denial of the motion to suppress was therefore unanimously affirmed.

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Criminal Offenses

Criminal Offenses

Assaults

- (1) The defendant could not be separately convicted and punished for both habitual misdemeanor assault and felony assault inflicting serious bodily injury based on the same act; (2) the court must arrest judgment on one of the convictions**

State v. Fields, 374 N.C. 629 (June 5, 2020)

The defendant was convicted after a jury trial of habitual misdemeanor assault and felony assault inflicting serious bodily injury for the same assaultive act. The trial court imposed consecutive sentences. The defendant appealed, arguing that the trial court erred by sentencing him for both habitual misdemeanor assault and the felony assault. The Court of Appeals vacated the habitual misdemeanor assault conviction, holding over a dissent that the defendant could not be sentenced for both crimes when the offenses arose from the same act. *State v. Fields*, ___ N.C. App. ___, 827 S.E.2d 120 (2019). The State appealed to the Supreme Court of North Carolina based on the dissent, and also sought discretionary review on the issue of whether, even if it was impermissible for the trial judge to sentence the defendant for both convictions, the Court of Appeals erred by *vacating* one of the convictions instead of *arresting judgment* on it. (1) On the first issue, the Supreme Court affirmed the Court of Appeals, concluding that the defendant could not be sentenced for both convictions that arose out of the same assaultive act. The misdemeanor assault statute, G.S. 14-33, includes prefatory language saying the law applies “[u]nless the conduct is covered under some other provision of law providing greater punishment”—language the appellate courts have generally interpreted to bar simultaneous punishments for the same act. Though the habitual misdemeanor assault statute, G.S. 14-33.2, does not include that language, the Supreme Court concluded that the principle still applies, as the misdemeanor assault is necessarily a part of the “upgraded” habitual misdemeanor assault conviction. The felony assault conviction based on the same assaultive act was a “provision of law providing greater punishment” that invoked the prefatory language of the misdemeanor assault statute, which in turn meant that the defendant could not be punished for habitual misdemeanor assault. (2) On the second issue, the Court concluded that the proper remedy when such prefatory language bars double punishment for the same act is to arrest judgment on one of the judgments, not to vacate it.

Abuse Offenses

- (1) Trial court did not commit plain error in instructing the jury regarding the charges of felonious child abuse by sexual act based on the pattern jury instruction providing a broader definition of sexual act than applies to offenses under Article 7B of Chapter 14; (2) Trial court did not commit plain error by failing to strike testimony from forensic interviewer that child made a tentative rather than a full disclosure**

State v. Wohlers, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 4, 2020)

Criminal Offenses

The defendant was convicted of indecent liberties with a child and felony child abuse by sexual act based on crimes committed against his daughter and stepdaughter.

(1) The court of appeals determined that the trial court did not plainly err in instructing the jury on felonious child abuse by sexual act. G.S. 14-318.4(a2) provides that any parent or legal guardian of a child under 16 who “commits or allows the commission of any sexual act upon the child is guilty of a Class D felony.” The trial court instructed the jury in accordance with NC Pattern Jury Instruction – Criminal 239-55B that a “sexual act is an immoral, improper or indecent touching or act by the defendant upon the child.” On appeal, the defendant argued that the definition of “sexual act” in G.S. 14-27.20(4) should apply. The term is therein defined as “[c]unninglingus, fellatio, anilingus, or anal intercourse, but does not include vaginal intercourse.” It also includes “the penetration, however slight, by any object into the genital or anal opening of another person’s body.”

The court of appeals in *Wohlert* found the defendant’s argument foreclosed by *State v. Alonzo*, 373 N.C. 437 (2020). In *Alonzo*, the state supreme court concluded that the definitions in G.S. 14-27.20 applied only within Article 7B of Chapter 14. Thus, the *Alonzo* court held that it was error for the court of appeals below to have concluded that the definition of sexual act in G.S. 14-27.20(4) applied to offenses under G.S. 14-318.4(a2), which is contained in Article 39 of Chapter 14.

(2) The court of appeals determined that even if the trial court erred in failing to strike testimony from a forensic interviewer that arguably vouched for the victim’s credibility, the defendant could not show he was prejudiced by the error. The interviewer testified that the defendant’s stepdaughter’s disclosure was “tentative,” and that “she’s a child who falls into the I want to tell someone so this will stop, but I don’t really want it to go past that, and I just want it to be done.” The defendant did not move to strike the testimony at trial, but argued on appeal that it was impermissible vouching of the victim’s credibility.

The court held that the defendant could not show that the alleged error had a probable impact on the jury’s finding that he was guilty, noting that the defendant himself had provided a written statement that was consistent with the victim’s testimony and which was introduced as evidence at trial.

In a neglect of an elder adult case there was sufficient evidence that the defendant was her elderly mother’s “caretaker”; the admission of video of a police interview with the mother containing alleged hearsay was not prejudicial

State v. Stubbs, ___ N.C. App. ___, 845 S.E.2d 125 (June 2, 2020), *temp. stay granted*, 374 N.C. 749 (June 3, 2020)

In this neglect of an elder adult case, the trial court did not err by denying the defendant’s motion to dismiss for insufficient evidence that she was her elderly mother’s “caretaker” as that word is defined by G.S. 14-32.3(d)(1), and the trial court did not commit plain error by allowing a video of the defendant’s mother to be played for the jury. Despite the defendant’s argument that she and her mother, who lived at the defendant’s house, did not have a “close

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relationship” and were “more like roommates” and testimony describing the mother as a “very private person [who] liked to keep to herself,” the court found the State’s evidence sufficient to send the question of the defendant’s caretaker status to the jury. This evidence included that in her mother’s final weeks of life the defendant helped her bathe; purchased food and supplies for her; assisted her in paying her bills; helped with “general normal care, daily things;” and purchased life insurance on her behalf and at her request.

The court went on to determine that the trial court did not commit plain error by admitting a video of a police interview with the defendant’s mother to be played for the jury. The defendant argued that her mother’s statements in that video, which went to the issue of whether the defendant was her caretaker, were inadmissible hearsay. The court found that admission of the video, even if error, was not prejudicial because the State’s other evidence was adequate to prove that the defendant was her mother’s caretaker.

Threats & Related Offenses

The trial court erred by denying the defendant’s motion to dismiss a charge of willfully violating a DVPO and instructing the jury on felonious breaking and entering in violation of a valid DVPO where there was no direct or circumstantial evidence that the defendant knew of the DVPO

State v. Tucker, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2020), *temp. stay granted*, ___ N.C. ___, 846 S.E.2d 748 (Sept. 4, 2020)

Because there was insufficient evidence that the defendant knew of the terms of a domestic violence protective order, the trial court erred by denying the defendant’s motion to dismiss a charge of violating a civil DVPO while in possession of a deadly weapon and the trial court erred by instructing the jury on breaking and entering in violation of a protective order. After being arrested for assaulting the victim, the defendant was served with an ex parte DVPO and notice of a hearing regarding whether another DVPO would be entered. The defendant did not attend that hearing and, at the time of the incident giving rise to the charges at issue, had not been served with a year-long DVPO that was entered at the hearing in his absence. As there was no direct evidence that the defendant had actual or constructive knowledge of the DVPO that was entered at the hearing he did not attend, the trial court erred by denying his motion to dismiss the charge of willfully violating the order. Further, because the defendant did not have knowledge of the DVPO, it was plain error for the trial court to instruct the jury on felony breaking and entering in violation of a valid DVPO.

Judge Murphy concurred in part and in the judgment but dissented from the majority’s discussion of two unpublished cases and also would have sanctioned the State for certain misleading comments included in its brief.

Kidnapping & Related Offenses

Criminal Offenses

(1) Sufficiency of evidence argument as to rape was waived on appeal; convictions for rape and first-degree kidnapping did not violate double jeopardy where a separate sexual assault was used to enhance the kidnapping to first-degree; (2) Sufficient evidence supported aggravating factor of occupying a position of trust over victim; (3) Evidence of prior sexual assaults on the sisters of the victim were properly admitted under Rule 404(b); (4) Substitute analyst testimony was properly admitted and did not violate defendant's confrontation rights; (5a) Rape indictment identifying victim only by her initials was not fatally flawed; (5b) First-degree kidnapping indictment was not defective for failure to specify sexual assault; (6) Jury instructions on aggravating factor were erroneous but not prejudicial and did not constitute plain error; (7) Defendant's challenge to SBM order was not argued on appeal and was deemed waived

State v. Pabon, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2020)

In this Cabarrus County case, the defendant was convicted of first-degree kidnapping and second-degree rape. After developing a friendship with the victim, he drugged her without her knowledge, took her to a friend's house and raped her. The defendant appealed, raising numerous challenges.

(1) The defendant argued there was insufficient evidence to support his convictions and that his motion to dismiss should have been granted. He did not raise an argument about the rape conviction on appeal. Any argument as to the sufficiency of evidence for that offense was therefore deemed abandoned and waived. As to the kidnapping conviction, the defendant argued he could not be sentenced for both kidnapping and the rape as a matter of double jeopardy, since the rape was used to elevate the kidnapping to first degree. "The proper remedy in the event of conviction of first-degree kidnapping and the sexual assault that constitutes an element of first-degree kidnapping is to arrest judgement on the first-degree kidnapping and resentence the defendant for second-degree kidnapping." Slip op. at 10-11 (citation omitted). While the defendant correctly noted this rule, the court found it inapplicable to the defendant's case. The State's evidence showed at least two distinct sexual assaults. In addition to the rape, the defendant also committed a separate sexual battery, and that offense was used to elevate the kidnapping offense to first-degree (and not the rape). Following the sexual battery in one room, the defendant moved the victim to another room to commit the rape. This showed separate and distinct offenses. The trial court also correctly instructed the jury on these principles and its instructions required the jury to find a separate and distinct sexual battery in support of the first-degree kidnapping. Because the defendant was not convicted of the underlying sexual battery used to support the first-degree kidnapping, double jeopardy did not preclude separate punishments for the distinct rape and kidnapping.

(2) There was also sufficient evidence to support the aggravating factor that the defendant took advantage of a position of trust to accomplish the crimes. The Court of Appeals noted it "has upheld a finding of the 'trust or confidence' factor in very limited factual circumstances." *Id.* at 18 (citation omitted). Here, the State presented sufficient evidence of the factor in aggravation. The defendant was a family friend and was close with the victim. Evidence showed the defendant gave the victim's family Christmas gifts, checked on family members, frequently spent time with the victim and advised her on various matters, among other connections. This

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was sufficient to demonstrate a position of trust over the victim which the defendant exploited in order to commit the crimes.

(3) The two sisters of the victim testified to prior instances of sexual assault by the defendant towards each of them. The trial court admitted this evidence pursuant to Rule 404(b) of the Rules of Evidence as proof of a common plan or scheme by the defendant. The defendant raped one of the sisters in a nearly identical manner as the victim and committed sexual battery upon the other sister “in a manner indicating an intent to go further.” *Id.* at 21. Like with the victim, the defendant developed a position of trust with each of the sisters before committing sexual assaults on them. The trial court therefore correctly determined the prior bad acts were substantially similar to the circumstances of the current offense. The assaults occurred 10 and 8 years before the events of the current case. The court agreed with the trial judge that this evidence was not too remote in time to satisfy the requirements of Rule 404(b):

Our Supreme Court has held that ‘[w]hen similar acts have been performed continuously over a period of years, the passage of time serves to prove, *rather than disprove*, the existence of a plan’ rendering the prior bad acts ‘not too remote to be considered as evidence of defendant’s common scheme to abuse the victim sexually.’ *Id.* at 22 (citation omitted) (emphasis in original).

The evidence showed the defendant’s acts were continuous over the course of time and therefore not too remote in time to be admitted under Rule 404(b). The trial court also conducted the necessary balancing under Rule 403 of the Rules of Evidence to determine the testimony was not more prejudicial than probative and instructed the jury about the limited purpose of the evidence. The admission of this evidence was therefore not error or an abuse of discretion.

(4) The defendant argued that the admission of toxicology results by way of a substitute analyst violated his Sixth Amendment rights to confrontation. The court disagreed, noting the rule on substitute analyst testimony:

[A]n expert witness may testify as to the testing or analysis conducted by another expert if: (i) that information is reasonably relied on by experts in the field in forming their opinions; and (ii) the testifying expert witness independently reviewed the information and reached his or her own conclusion in this case. *Id.* at 26 (citation omitted).

The evidence showed that the substitute analyst reviewed the results of the testing done by the non-testifying analysts and formed his own opinion about the results. “Thus, [the analyst’s] opinion was based on his own analysis and not merely surrogate testimony for an otherwise inadmissible lab report . . .” *Id.* at 31. Under these circumstances, the defendant was not entitled to cross-examine the analysts who actually performed the testing. According to the court, “when an expert gives an opinion, the opinion is the substantive evidence, and the expert is the witness whom the defendant has the right to confront.” *Id.* Because the expert opinion was properly admitted and the defendant was able to cross-examine that expert, there was no violation of the defendant’s confrontation rights.

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(5a) The indictment for second-degree rape identified the victim only by reference to her initials, and the defendant argued this constituted a fatal indictment defect for failure to identify the victim. He pointed to a recent case holding that “Victim #1” was insufficient to identify the victim. *State v. McKoy*, 196 N.C. App. 650, 654 (2009), foreclosed this argument. Citing from that case, the court observed:

[W]here the statutes defining second-degree rape and second-degree sexual offense require the offenses to be against ‘another person,’ the indictments charging these offenses do not need to state the victim’s full name, nor do they need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person. *Id.*

Unlike the situation where the indictment names only a “victim,” the use of initials sufficed to identify the victim and did not constitute a fatal defect. [Jeff Welty blogged about the use of initials in charging documents here.]

(5b) The first-degree kidnapping indictment was also not defective. The defendant claimed a fatal flaw based on the indictment’s failure to identify the specific crime constituting the sexual assault for purposes of first-degree kidnapping. There is no requirement that an indictment for first-degree kidnapping identify the felony used to enhance the offense to first-degree. The indictment was otherwise sufficient to put the defendant on notice and was valid in all respects.

(6) The trial court’s instructions to the jury on the existence of the aggravating factor violated G.S. § 15A-1340.16(d). That statute provides in pertinent part that evidence used at trial to support the existence of an element of the offense may not thereafter be used to prove a factor in aggravation. The jury instructions permitted the jury to consider “all of the evidence,” rather than limiting its consideration to evidence not used to support the intent requirements for the two crimes. The defendant did not object to the instructions at the time and alleged plain error on appeal. Plain error requires that the defendant demonstrate “a reasonable possibility that, had the instruction been given, the jury would have failed to find the existence of the aggravating factor.” *Id.* at 36. The court noted that occupying a position of trust is not an element of either of the crimes at issue and rejected the contention that the same evidence was used to prove both the intent to commit the crimes and the aggravating factor. The defendant could not demonstrate the possibility of a different result absent the instructions on the aggravating factor, and accordingly could not demonstrate prejudice for plain error.

(7) The defendant’s argument that his objections to an order requiring him to enroll in satellite-based monitoring (“SBM”) were improperly overruled were abandoned on appeal, because the defendant failed to raise any argument for this issue.

A majority of the court determined there were no reversible error in the trial and the convictions were affirmed.

Judge Murphy dissented in part. He wrote separately to note his disagreement with the majority’s analysis of the Confrontation Clause issue. Judge Murphy would have granted a new trial based on the Sixth Amendment violation and would have held the plain error jury

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instruction issue in (5) above, as well as the SBM issue in (6), were therefore moot. He otherwise concurred in the majority's judgment.

(1) Child abduction is a general intent crime, and the State need only show that the defendant acted knowingly, not willfully; (2) There was sufficient evidence to support child abduction where the defendant continued fleeing in a stolen car after realizing a child was present in the vehicle; (3) Because child abduction is not a specific intent crime, the trial court did not plainly err in failing to instruct the jury that the defendant must have acted willfully; (4) Where the evidence supported each possible theory of first-degree kidnapping, the trial court did not plainly err in instructing the jury on each theory notwithstanding the single theory alleged in the indictment; (5) Where defendant was improperly convicted of larceny of a motor vehicle and possession of stolen goods for the same property, the possession of stolen goods conviction was vacated

State v. French, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2020)

In this Lincoln County case, the defendant stole a car left running outside of a gas station. A three-year old child was in the backseat. Once officers attempted to stop the car, the defendant led police on a high-speed chase and ultimately crashed. The child was not harmed. During the chase, the defendant called 911 and attempted to bargain for the child's release. He was charged with first-degree kidnapping, abduction of a child, larceny of a motor vehicle, possession of stolen property, and habitual felon. The jury convicted on all counts. The defendant did not appeal, but later filed a petition for writ of certiorari seeking review of his convictions, which was granted.

(1) The child abduction statute includes language that the offense must occur "without legal justification or excuse." See G.S. § 14-41(a). The defendant contended that this language required the State to prove that the defendant acted willfully, and that the failure to instruct the jury on *mens rea* improperly treated the crime as a strict liability offense. The Court of Appeals disagreed. There is no requirement of "willfulness" in the language of the statute. While the offense is not a strict liability crime, it is also not a specific intent crime as defendant argued. Rather, the offense is a general intent crime, requiring a showing only that the defendant acted "knowingly." The "without justification or excuse" language in the statute allows the defendant to argue defenses like mistake of fact, necessity, or others, but does not create a specific intent requirement. This argument was therefore rejected.

(2) There was sufficient evidence to support the conviction for child abduction. The evidence showed that the defendant continued driving the car at high speeds while fleeing police, even after realizing that a child was in the backseat. After the point at which the defendant called 911 and acknowledged the presence of the child in the car, he continued to disobey police and dispatch commands to stop and continued fleeing for at least 15 minutes. Though "[a] defendant may exculpate a mistake though subsequent conduct," the defendant here made no such showing. Slip op. at 10.

(3) There was no error, much less plain error, in the trial court's failure to instruct the jury that the defendant must have acted willfully in abducting the child, for the same reasons that the

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statute does not create a specific intent crime. There was therefore no error in the trial court's instructions to the jury for that offense.

(4) During a pretrial conference, the parties agreed that the jury would be instructed only on removal as the State's theory for first-degree kidnapping, which was the theory alleged in the indictment. At charge conference, the State requested and received jury instructions on all three possible theories (restraint, removal, or confinement). See G.S. § 14-39. Trial counsel for the defendant assented to those instructions and did not otherwise object. Despite trial counsel's agreement, this argument was not waived and could be reviewed for plain error. However, the court found no plain error based on the evidence (which supported each theory), and the fact that there was no conflicting evidence as to the three theories. "Defendant cannot demonstrate plain error because it is undisputed that the evidence at trial supported the theory of kidnapping alleged in the indictment—removal—and also supported the two additional theories of kidnapping included in the instruction—restraint and confinement." *French Slip op.* at 12.

(5) The trial court erred in sentencing the defendant for possession of stolen goods (the car) and larceny of a motor vehicle. "A defendant cannot be convicted of both [of these] offenses when the subject property is the same." *Id.* at 14. The Court of Appeals therefore vacated the conviction for the possession of stolen goods conviction and found no error as to the defendant's other convictions.

The State presented sufficient evidence of first-degree kidnapping based upon the defendant terrorizing the victim and also presented sufficient evidence of misdemeanor assault with a deadly weapon

State v. English, ___ N.C. App. ___, 845 S.E.2d 901 (June 16, 2020)

In this case involving convictions for first-degree kidnapping and misdemeanor assault with a deadly weapon, among other offenses, the State presented sufficient evidence of the offenses and the trial court did not err by denying the defendant's motion to dismiss on that basis. With regard to the kidnapping conviction, the defendant argued that the State failed to present substantial evidence the defendant's purpose was to terrorize the victim. Recounting evidence that the defendant hid in the backseat of the victim's car holding a knife while he waited for her to get off work, forced her to remain in the car and drive by choking her and threatening her with the knife, and forcefully struck her on the head when she attempted to scream for help, the court rejected this argument and bolstered its position by describing her frantic efforts to escape.

The court also found sufficient evidence of misdemeanor assault with a deadly weapon under both the show of violence theory of assault and the act or attempt to do injury to another theory of assault. The State's evidence tended to show that after two men scuffled with the defendant in an attempt to aid the victim, the defendant jumped into the driver's seat of the victim's car and attempted to run the men over and nearly did so. This was sufficient evidence of assault under either theory.

Criminal Offenses

Robbery

There was no error in the trial court's ruling where the State presented sufficient evidence at the defendant's trial to show that the defendant possessed the requisite felonious intent by using force in an effort to regain money which was the subject of an illegal transaction

State v. Cox, ___ N.C. ___, 846 S.E.2d 482 (Aug. 14, 2020)

The defendant, along with two others, went to the home of an individual to whom they paid cash to provide them with controlled substances. The individual neither obtained the illegal drugs nor returned any of the drug purchase money to the defendant. At the home of the individual, the individual was assaulted, accompanied by a demand for the return of the money. While leaving, the defendant fired a shot into the residence. The defendant was arrested and charged with first-degree burglary, conspiracy to commit robbery with a dangerous weapon, and discharging a weapon into an occupied property. At trial, the defendant moved to dismiss the charges against him for insufficiency of the evidence, and the trial court denied the motion. The defendant was found guilty on all charges.

The Court of Appeals reversed the defendant's conviction for conspiracy to commit robbery with a dangerous weapon and felonious breaking or entering. The Court of Appeals relied on *State v. Spratt*, 265 N.C. 524 (1965), and *State v. Lawrence*, 262 N.C. 162 (1964), in concluding that the defendant could not be guilty of conspiracy to commit robbery with a dangerous weapon because the defendant did not have the requisite felonious intent when attempting to take property from the individual, under a bona fide claim of right to the money which had been given on defendant's behalf. The Court of Appeals also held that the lack of felonious intent negated the defendant's ability to be convicted of the offense of felonious breaking or entering, and remanded the matter in order for the trial court to enter judgment against defendant for misdemeanor breaking or entering, which does not require felonious intent.

The Supreme Court held that the case precedent on which the Court of Appeals relied did not apply to the facts at hand. The Court concluded that "neither *Spratt*, nor *Lawrence*, nor any other case in this state has heretofore authorized a party to legally engage in 'self-help' by virtue of the exercise of a bona fide claim of right or title to property which is the subject of an illegal transaction," and therefore held that there was no error in the defendant's convictions of the offense of conspiracy to commit armed robbery with a dangerous weapon and the offense of felonious breaking or entering.

(1) Evidence was sufficient to show a taking by force from the victim's presence; (2) Any Rule 404(b) error based on testimony that the defendant provided the victim heroin was not prejudicial; (3) Attorney fee order vacated and remanded for hearing where defendant had no notice or opportunity to be heard

State v. Young-Kirkpatrick, ___ N.C. App. ___, 846 S.E.2d 525 (July 7, 2020)

Criminal Offenses

The defendant in this Davidson County case was tried for common law robbery, habitual misdemeanor assault, and habitual felon. The charges stemmed from an incident between the defendant and his then-girlfriend at her residence, resulting in him assaulting her, damaging her car, and ultimately taking her car after she fled inside the home. The defendant had recently purchased the car for the woman and had been reimbursed by her family for its value, and this was apparently part of the argument. At trial, evidence was also presented that the defendant provided the victim heroin during their relationship. The defendant was convicted on all counts and appealed.

(1) The defendant argued there was insufficient evidence that he used force to take the car or that he took property from the victim's presence. The court rejected the arguments, observing that "even when there is some attenuation between the use of force and the taking, the action can still amount to a continuous transaction." Slip op. at 7. Here, the defendant's acts of assaulting the victim and stealing her car occurred within a 20-minute time period in the victim's front yard, and evidence showed that the argument and assault were related to the car. Viewed in the light most favorable to the State, the victim fled in response to the defendant's assault, and the defendant took her car immediately afterwards. This was sufficient to show a continuous transaction linking the defendant's use of force to the taking of property. The same facts showed that the taking occurred "in the presence of" the victim. In the words of the court:

If the force . . . for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in one continuous course of conduct, the taking is from the "presence" of the victim." *Id.* at 8 (citation omitted).

The trial court did not therefore err in denying the motion to dismiss the common law robbery charge for insufficient evidence.

(2) The defendant argued that the testimony about him giving the victim heroin during their relationship was unduly prejudicial and violated N.C. Evid. R. 404(b). Assuming without deciding that the admission of this testimony violated Rule 404(b), any error was harmless in light of "overwhelming evidence" of the defendant's guilt.

(3) The trial court erred by failing to give the defendant notice and an opportunity to be heard on attorney fees. The record contained no colloquy between the trial judge and the defendant on the issue and no other evidence showed that the defendant was given a chance to be heard. Thus, the civil judgement on attorney fees was vacated and the matter remanded for hearing on that issue only. The convictions were otherwise unanimously affirmed.

There was insufficient evidence that an air pistol and a pellet rifle were dangerous weapons for purposes of attempted armed robbery; Any impermissible expression of opinion by the trial court did not prejudice the defendant; The trial court erred by accepting the defendant's stipulation to attaining habitual felon status without conducting a colloquy

State v. Williamson, ___ N.C. App. ___, 845 S.E.2d 876 (June 16, 2020)

Criminal Offenses

In this robbery case where the defendant was punished as a habitual felon, (1) the defendant failed to preserve a fatal variance argument; (2) there was insufficient evidence of attempted armed robbery; (3) assuming without deciding that the trial court expressed its opinion in violation of G.S. 15A-1222, the defendant was not prejudiced; and (4) the trial court erred by accepting the defendant's stipulation to having attained habitual felon status.

Noting that a defendant must specifically state at trial that a fatal variance is the basis for a motion to dismiss in order to preserve that argument for appellate review, the court found that the defendant waived his variance argument by basing his motion to dismiss solely on insufficiency of the evidence.

With regard to insufficiency of the evidence of attempted armed robbery, the defendant argued that there was insufficient evidence of the use of a dangerous weapon. The defendant had threatened an associate with a pistol and rifle that appeared to be firearms but turned out to be an air pistol and a pellet rifle. Reviewing the rules from *State v. Allen*, 317 N.C. 119 (1986) and related cases about sufficiency of the evidence in situations involving instruments that appear to be but may not in fact be dangerous weapons, the court said that because the evidence was conclusive that the pistol and rifle were not firearms, the State was required to introduce evidence of the weapons' "capability to inflict death or great bodily injury" to merit submission of the attempted armed robbery charge to the jury. As no such evidence was introduced, the trial court erred in denying the defendant's motion to dismiss for insufficient evidence.

During the testimony of a defense witness, the trial court interjected to admonish the witness not to refer to the pistol and rifle as "airsoft" weapons because, in the trial court's view, that terminology was not an accurate description of the items. Assuming without deciding that this admonishment was an improper expression of opinion and accepting for argument that it may have negatively impacted the jury's view of the witness's testimony, there was not a reasonable probability that the jury would have reached a different verdict absent the admonishment.

Finally, the State conceded and the court agreed that the trial court erred by accepting the defendant's stipulation to having attained habitual felon status without conducting the required guilty plea colloquy.

Frauds

(1) Where the defendant was not actively or constructively present at the time of the underlying offense, there was insufficient evidence to show the defendant acted in concert to obtain property by false pretenses; (2) Where defendant's false statement to investigators did not actually impede the investigation, there was insufficient evidence of felony obstruction of justice; (3) Argument that an email sent to AOC at defendant's direction was a command and therefore not hearsay was not presented to the trial court and was waived on appeal; (4) The trial court did not plainly err in failing to instruct the jury on the specific misrepresentations for the obtaining property by false pretense offenses

Criminal Offenses

State v. Bradsher, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2020)

The defendant, the former District Attorney for Person and Caldwell Counties, was tried for obtaining property by false pretenses, conspiracy to obtain property by false pretenses, aiding and abetting obtaining property by false pretenses, three counts of obstruction of justice, and failure to discharge the duties of his office. The jury acquitted on one count of felony obstruction and the conspiracy count but convicted on the remaining charges (with the exception that the jury returned a verdict of guilty of misdemeanor obstruction on one of the remaining felony obstruction counts). The trial court subsequently arrested judgment on the aiding and abetting obtaining property conviction. The charges stemmed from a scheme whereby the defendant and another elected District Attorney hired each other's wives to work in each other's offices. Under this arrangement, both wives were wrongfully paid for working hours that they had not actually worked.

(1) There was insufficient evidence to support the conviction for obtaining property by false pretenses. The State alleged that the defendant acted in concert with the employee who improperly submitted work hours. Acting in concert requires the actual or constructive presence of the defendant at the scene of the crime. "A person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." Slip op. at 15 (citation omitted). Although the employee at issue worked for the defendant, she was allowed to work at her husband's office in another district. The defendant was therefore not physically present when the fraud of reporting unworked hours occurred. The State argued that the defendant was constructively present, pointing out that the fraudulent hours were approved by a supervisor at the defendant's direction. The court rejected this argument, noting that the approval of hours occurred at a much later time than when the hours were submitted. While "actual distance is not determinative, . . . the accused must be near enough to render assistance if need be and to encourage the actual perpetration of the crime." *Id.* at 19 (citation omitted). Here, the defendant was not in the same county as the employee who submitted the fraudulent hours at the time they were submitted. The fact that the employee could have called the defendant for help with the crime at the time was not enough to satisfy the constructive presence element. "To hold the theory of acting in concert would be satisfied merely where 'remote assistance' is possible would broadly expand the universe of criminal conduct under this theory." *Id.* at 22. Thus, the defendant's conviction for acting in concert to obtain property by false pretenses was vacated for insufficient evidence [although the trial court was instructed on remand to reinstate the judgment previously arrested for aiding and abetting obtaining property].

(2) There was also insufficient evidence of felony obstruction of justice. That offense requires the State to prove that the defendant actually impeded the administration of justice. The indictment alleged that the defendant made false statements to an SBI investigator concerning the employee. One of the defendant's statements at issue was "at most misleading, and not false," as it was a misrepresentation by omission and not affirmatively a false statement as the indictment charged. There was sufficient evidence that another of the defendant's statements to the investigator was false, but there was no evidence that this statement actually obstructed the course of the investigation. The defendant responded truthfully to some of the

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investigator's questions about the employee, which actually facilitated the investigation. The defendant was never directly asked whether the employee was in fact performing work for the defendant. "To support a conviction for obstruction of justice, the State must establish substantial evidence for every element of the crime, including that the act in question 'obstructed justice[.]'" *Id.* at 27 (citation omitted). The motion to dismiss for felony obstruction of justice therefore should have been granted, and that conviction was vacated.

(3) The defendant argued that the trial court improperly excluded testimony regarding an email sent by an assistant to the Administrative Office of the Courts at the defendant's direction. At trial, the defendant argued that the email fell within the business records exception to the prohibition on hearsay, that the email was simply not hearsay, and that the State opened the door to the admission of the email through its questions of the witness. On appeal, the defendant argued that the email should have been admitted because it was a directive to his employee, pointing to cases holding that commands are not hearsay because they are not offered for the truth of the matter (rather, they are offered to show that the command was given). It was not apparent from context that the defendant was arguing for the email's admission as a command, and the parties and trial court did not address that argument. Since this argument was not made at the trial level, it was not preserved and was waived on appeal.

(4) The trial court did not commit plain error by failing to instruct the jury on the specific misrepresentations for the obtaining property by false pretenses offenses. "[A] jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds 'no variance between the indictment, the proof presented at trial, and the instructions to the jury.'" *Id.* at 34 (citation omitted). The defendant argued that the evidence showed alternative false representations that the jury could have improperly relied on in rendering its verdict of guilty for the two offenses. Reviewing the evidence, the court rejected this argument. "We hold the trial court did not err, nor plainly err, in failing to give an instruction about the misrepresentation alleged in the indictment." *Id.* at 37.

Bombing, Terrorism, and Related Offenses

Where the defendant presented substantial evidence of lawful possession of weapons of mass destruction, the trial court plainly erred in failing to instruct on that exception to the offense

State v. Carey, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2020)

The defendant was convicted at trial of impersonating an officer and possession of a weapon of mass destruction (flashbang grenades) in Onslow County. On appeal, the Court of Appeals determined that flashbang grenades did not qualify as a weapon of mass destruction and vacated that conviction. The N.C. Supreme Court reversed on that point and remanded for the Court of Appeals to consider the defendant's other arguments. The defendant filed a new brief with the court, arguing the trial court erred by failing to instruct the jury about the exception for lawful possession of weapons of mass destruction. *See* G.S. § 14-288.8(b)(3). The defendant contended that he presented evidence that he qualified for the exception as a person "under

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contract with the United States” and it was error to fail to instruct the jury on the exception. While the defendant challenged jury instructions in his original brief to the Court of Appeals, he did not raise this issue. He therefore asked the court to invoke Rule 2 of the Rules of Appellate Procedure to review this argument, and the court granted that request.

At trial, the defendant presented evidence that he was an active-duty U.S. Marine serving as a weapons technician, and that he came into possession of the grenades as part of his duties in that capacity. The State did not contest this evidence at trial, but argued on appeal that the defendant failed to promptly return the weapons to the Marine Corps and that the defendant was “on a detour” (and not acting in his capacity as a soldier) at the time of the offense. “Even if the State’s argument is true, this would not overcome Defendant’s properly admitted testimony and his right for the jury to resolve this issue.” *Carey* Slip op. at 8. The trial court had a duty to instruct the jury on all substantial features of the case, including the defense of lawful possession raised by the defendant’s evidence, and its failure to do so was plain error. The judgment of conviction for possession of a weapon of mass destruction was therefore vacated and the matter remanded for a new trial on that offense.

Judge Young dissented. According to his opinion, the N.C. Supreme Court’s decision remanding the case was limited to “the defendant’s remaining challenges” – those that were raised but not decided in the defendant’s original appeal to the Court of Appeals. The mandate therefore did not include new arguments that had not previously been raised at all, and Judge Young would not have considered the lawful possession argument.

Drug Offenses

In a keeping or maintaining a vehicle drug case, there was insufficient evidence that the defendant kept or maintained a vehicle; assuming evidence of keeping or maintaining the vehicle was sufficient, there was insufficient evidence that the defendant’s purpose for doing so was keeping or selling controlled substances

State v. Weldy, ___ N.C. App. ___, 844 S.E.2d 357 (June 2, 2020)

In this keeping or maintaining a vehicle for the keeping or sale of controlled substances case, there was insufficient evidence that the defendant kept or maintained a vehicle or did so for the keeping or selling of controlled substances. Officers had received information from another agency indicating that the defendant was selling drugs. During a traffic stop and weapons frisk following 20-25 minutes of surveillance of the defendant driving, approximately 56 grams of methamphetamine and 7 grams of heroin were discovered on the defendant’s person, and an officer later testified that neither amount was consistent with personal use. The defendant was driving a vehicle registered to his wife and mother-in-law.

Noting that North Carolina courts have defined the words “keep” and “maintain” separately, the court explained that they are similar terms, “often used interchangeably, to establish a singular element of the offense” and that whether a vehicle is “kept or maintained” for the keeping or selling of controlled substances depends on the totality of the circumstances. Finding that the State presented no evidence that the defendant “maintained”

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the vehicle because there was no evidence that the defendant had title to or owned the vehicle, had a property interest in it, or paid for its purchase or upkeep, the court turned to whether there was sufficient evidence that the defendant “kept” the car within the meaning of G.S. 90-108(a)(7). Reviewing relevant caselaw, which establishes that the “keep or maintain” language of the statute “refers to possessing something at least for a short period of time—or intending to retain possession of something in the future—for a certain use,” the court determined that evidence of the defendant’s possession of the vehicle for approximately 20-25 minutes, standing alone, was insufficient to prove that the defendant “kept” the vehicle.

The court then turned to whether, assuming there had been sufficient evidence of the defendant’s keeping or maintaining the vehicle, the State presented sufficient evidence that the defendant’s purpose in doing so was the “keeping or selling” of controlled substances. Again reviewing relevant caselaw, the court determined that the discovery on the defendant’s person of single bags containing approximately 56 grams of methamphetamine and 7 grams of heroin was insufficient to prove the purpose of keeping or maintaining the vehicle was the keeping or selling of controlled substances. The court noted that the State presented no evidence that cell phones, cash, scales, baggies or other paraphernalia had been discovered in the vehicle. There also was no evidence that the vehicle had been modified to conceal drugs or that drugs had been discovered in the vehicle itself, hidden or otherwise.

Judge Berger dissented and expressed his view that there was sufficient evidence of the offense and that the majority erroneously conflated “keeping” and “maintaining” in its analysis of whether the defendant kept or maintained the vehicle. In Judge Berger’s view there was sufficient evidence that the defendant “kept” the vehicle based on his possession of the vehicle while engaging in drug activity. He also would have found sufficient evidence that the defendant’s purpose in doing so was the keeping or selling of controlled substances based on the defendant’s use of the vehicle to transport drugs, the discovery of a purported drug ledger in the vehicle, and other evidence that the defendant was involved in the sale of drugs.

In a drug trafficking case, there was insufficient evidence that the defendant knowingly possessed methamphetamine where the defendant mistakenly believed that the drugs provided to him at a controlled sale were fake and handled them only for the purpose of inspection

State v. Campbell, ___ N.C. App. ___, 845 S.E.2d 119 (June 2, 2020)

In this trafficking of methamphetamine case, substantial evidence showed that the defendant believed the white substance handed to him during a controlled drug sale was fake, rather than an impure mixture containing methamphetamine, and therefore there was insufficient evidence that the defendant knowingly possessed the methamphetamine. At a controlled drug sale arranged by law enforcement with the help of an informant, the defendant stated his belief that the substance presented to him as methamphetamine was, contrary to his expectations, “re-rock,” a term that was defined by the State’s witnesses to describe “fake” drugs. In fact, the substance was a mixture of 1 gram of methamphetamine and at least 28 grams of a cutting agent. As the defendant and an associate inspected the substance, law

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enforcement officers entered the room and arrested them. Finding the case to be controlled by *State v. Wheeler*, 138 N.C. App. 163 (2000), the court explained that when there is no evidence that a person intends to continue a drug transaction because he or she believes the drugs are fake, handling the drugs for the sole purpose of inspection does not constitute possession.

Judge Berger dissented and expressed his view that there was sufficient evidence that the defendant knowingly possessed the methamphetamine because of his previous dealings in methamphetamine with the informant and because the defendant's use of the term "re-rock" may have been a reference to impure, rather than fake, methamphetamine. Judge Berger also distinguished *Wheeler* on the grounds that the defendant in this case did not affirmatively reject the methamphetamine mixture.

In possession of a controlled substance on jail premises cases, the State is not required to prove unlawful possession as an element of the offense

State v. Palmer, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2020)

In this possession of a controlled substance on jail premises case involving Oxycodone, the trial court did not err by refusing to instruct the jury that an element of the offense is that the controlled substance be possessed unlawfully. The court explained that a plain reading of the relevant statutes does not require the State to prove unlawful possession of a controlled substance as an element of the offense. Instead, lawful possession is a defense that the defendant carries the burden of proving.

Where the defendant was convicted of sale of cocaine and delivery of cocaine based on a single transfer, the trial court did not commit plain error by arresting judgment on the delivery conviction and sentencing the defendant on the sale conviction

State v. Canady, ___ N.C. App. ___, 844 S.E.2d 353 (June 2, 2020)

In this case involving convictions for, among other offenses, sale of cocaine and delivery of cocaine, the trial court did not commit plain error in its application of G.S. 90-95 and in sentencing the defendant. At sentencing, the trial judge arrested judgment on the conviction of delivering cocaine, a Class H felony, and consolidated other convictions into the single count of selling cocaine, a Class G felony. On appeal the defendant argued that G.S. 90-95, which generally punishes the sale of cocaine more severely than the delivery of cocaine, is ambiguous as to the appropriate punishment for a judgment based on the "sale or delivery" of cocaine and that the rule of lenity requires that the lesser punishment be imposed. Taking note of the North Carolina Supreme Court's decision in *State v. Moore*, 327 N.C. 378 (1990) establishing that a defendant may not be convicted of both the sale and the delivery of a controlled substance when both offenses arise from a single transfer, the court held that the purpose of *Moore* was accomplished here by the trial judge arresting judgment on the delivery of cocaine conviction and that the defendant did not show that plain error occurred.

Defenses

Defenses

Entrapment and Entrapment by Estoppel

The trial court erred by failing to instruct the jury on entrapment

State v. Keller, 374 N.C. 637 (June 5, 2020)

The defendant was charged with solicitation of a child by computer under G.S. 14-202.3 after he responded to a Craigslist personal advertisement posted by a police detective posing as a 15-year-old. At trial the defendant requested a jury instruction on the defense of entrapment, which the trial court denied. The defendant was convicted and appealed. A divided Court of Appeals affirmed, with the majority concluding that the defendant's request for an entrapment instruction was properly denied when the evidence showed that he was willing to engage in criminal activity and defendant failed to show that he was not predisposed to commit the act. *State v. Keller*, ___ N.C. App. ___, 828 S.E.2d 578 (2019). The dissenting judge would have concluded that the defendant was entitled to the instruction.

The Supreme Court reversed the Court of Appeals and remanded for a new trial. A defendant is entitled to jury instructions on entrapment if he presents "some credible evidence" tending to show that he was a victim of entrapment. Here, viewing the evidence in the light most favorable to the defendant, the Court concluded that he made the requisite showing. The defendant testified that he initially believed the undercover detective to be 18 years old because Craigslist requires age verification to post a personal ad. And once the detective said via email that he was 15, the defendant repeatedly said they would have to wait to have sex until the detective was of age, at which point the detective steered the conversation back toward sex. Taking those facts as true, the Court concluded that a reasonable juror could have found that the defendant did not have a willingness or predisposition to commit the charged crime, and that he was thus entitled to an instruction on entrapment. The Court also concluded that the trial court erred by finding that the defendant's request for a jury instruction on entrapment was inconsistent with his testimony that he traveled to meet the detective to help him, not to commit a sexual act with him. In general, a defendant cannot simultaneously deny committing an act and also say that he was entrapped into committing it. Here, however, the defendant did not deny the act, but rather only disputed his criminal intentions for the meeting. The entrapment defense therefore remained available. Finally, the Court held that the error was prejudicial and remanded for a new trial.

Justice Newby dissented, joined by Justice Morgan, stating his view that the entrapment defense is not available to a defendant who does not admit to all the elements of the charged offense, and that the defendant's continued pursuit of the undercover detective even after learning that he was underage showed a predisposition to commit criminal acts that barred an entrapment defense.

Self-Defense

Defenses

The trial court committed prejudicial error by refusing to give the defendant's requested instruction on self-defense and the doctrine of transferred intent with respect to felony murder and an underlying assault charge

State v. Greenfield , ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2020)

In this felony murder case based on the underlying felony of assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred by not instructing the jury on self-defense and the doctrine of transferred intent. The evidence at trial showed that the defendant and a friend arrived at the apartment of Beth and Jon intending to buy marijuana from Jon. By the time the defendant and his friend left the apartment, Jon, Beth, and the defendant had been shot. Jon died as a result. The defendant testified that while in the apartment living room, he picked up a gun he found on a coffee table because "it looked cool," which caused Jon to become aggressive and Beth to emerge from a bedroom pointing a gun at the defendant. After convincing Beth to drop her weapon by threatening to kill Jon, the defendant testified that he ran from the apartment, saw Jon pull a gun, and felt himself be shot in the side. This caused the defendant to shoot in Jon's direction "as best as [he] could" and "intentionally" at him. The court explained that this testimony taken in the light most favorable to the defendant entitled him to a jury instruction on perfect self-defense for any shot intended for Jon because, if believed, it showed (1) he subjectively believed that he was going to die if he did not return fire; (2) such a belief was reasonable; (3) he was not the aggressor; and (4) did not use excessive force. Further, he was entitled to an instruction on self-defense through transferred intent for the AWDWIKISI charge relating to Beth as her injury could have been caused by a bullet intended for Jon. The trial court correctly gave a self-defense instruction on premeditated murder but erred by refusing to give the defendant's requested self-defense instruction on felony murder or any underlying felony, including the assault. This error was prejudicial because it impaired the defendant's ability to present his defense to felony murder and the assault charge.

In addition, the Court of Appeals erred by remanding the case for entry of a judgment convicting the defendant of second-degree murder, a verdict the jury returned after the trial court accepted a partial verdict on the felony murder charge and directed the jury to continue to deliberate on the premeditated murder charge. The trial court's decision to require continued deliberation and its associated instructions could have resulted in an improper finding by the jury that the defendant was guilty of second-degree murder. Thus, the court remanded for a new trial on all charges.

Justice Newby dissented, stating his view that the trial court's jury instructions, which included a general transferred-intent instruction but not the specific instruction requested by the defendant, enabled the defendant to make the jury argument he desired. Justice Newby interpreted the jury's verdicts as a rejection of the defendant's self-defense theory.

Defenses

The defendant presented sufficient evidence at trial to support the defendant's requested instructions to the jury on self-defense and the defense of habitation

State v. Coley, ___ N.C. ___, 846 S.E.2d 455 (Aug. 14, 2020)

The defendant was indicted for attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. On June 7, 2016, the defendant was sitting outside of a neighbor's house with a group of friends when the defendant's house guest, Garris, approached defendant and punched him. The defendant got up and began walking home, followed by Garris. When the defendant arrived at his residence, he was thrown against the door and hurled over two chairs by Garris. Garris left the residence and returned with a friend, at which time he continued to strike the defendant. Garris left the home a second time and returned shortly thereafter. At that time, the defendant retrieved a gun and shot Garris, injuring him.

At trial, the defendant gave notice of his intent to rely on self-defense. The trial court denied the defendant's requested instruction to the jury on self-defense and the defense of habitation. The jury found the defendant guilty of assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon. On appeal, the defendant argued that the trial court erred by (1) denying his request to instruct the jury on self-defense, (2) failing to instruct the jury on the "stand-your-ground" provision, and (3) denying his request to instruct the jury on the defense of habitation. The Court of Appeals agreed, concluding that there was a reasonable possibility that the jury would have reached a different result if the defendant's requested jury instruction had been given to the jury.

The Supreme Court upheld the decision of the Court of Appeals, concluding that, viewing the evidence at trial in the light most favorable to the defendant, the defendant was entitled to both instructions. The Court recognized that "the right to use deadly force to defend oneself is provided both by statute and case law." The defendant relied on both the self-defense statute, G.S. 14-51.3, and the defense of habitation statute, G.S. 14-51.2. The Court reviewed both, as well as the right not to retreat when defending against an aggressor. The Court determined that the defendant in the instant case presented competent and sufficient evidence to warrant the self-defense instruction.

The dissenting Court of Appeals judge focused primarily on the defendant's testimony at trial about the firing of a warning shot, concluding that the warning shot rebutted the statutory presumption of "reasonable fear of imminent death or serious bodily harm" and thereby precluding a jury instruction on self-defense and defense of habitation. The Court noted that the dissenting Court of Appeals judge's perspective ignored the principle that although there may be contradictory evidence from the State or discrepancies in the defendant's evidence, the trial court must nonetheless charge the jury on self-defense where there is evidence that the defendant acted in self-defense.

Capital Law

Capital Law

Racial Justice Act

The retroactivity provision of the Racial Justice Act repeal violates the double jeopardy protections of the North Carolina Constitution; The retroactive application of the RJA repeal violates the prohibitions against ex post facto laws contained in the United States Constitution and the North Carolina Constitution

State v. Augustine, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2020)

The complex procedural history of this case, which involves motions for appropriate relief filed by three defendants under the Racial Justice Act and associated proceedings occurring over a years-long period of time when the RJA was amended and then repealed, is recounted in detail in the court's opinion which vacates the trial court's order ruling that the repeal of the RJA voided the defendant's RJA MAR and remands the case for the reinstatement of the defendant's sentence of life imprisonment without parole. For the reasons stated in *State v. Robinson*, ___ N.C. ___, 846 S.E.2d 711 (2020), the retroactivity provision of the RJA repeal violates the double jeopardy protections of the North Carolina Constitution. For the reasons stated in *State v. Ramseur*, 374 N.C. 658 (2020), the retroactive application of the RJA repeal violates the prohibitions against ex post facto laws contained in the United States Constitution and the North Carolina Constitution.

Justice Davis concurred in the result for the reasons stated in Justice Ervin's concurring opinions in *State v. Golphin*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2020) and *State v. Walters*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2020).

Justice Newby dissented for the reasons stated in his dissenting opinions in *Robinson* and *Ramseur*.

For the reasons stated in *State v. Robinson*, ___ N.C. ___, 846 S.E.2d 711 (2020) the court vacated the trial court's order dismissing the defendant's motion for appropriate relief filed pursuant to the Racial Justice Act

State v. Walters, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2020)

In a per curiam opinion, for the reasons stated in *State v. Robinson*, ___ N.C. ___, 846 S.E.2d 711 (2020) the court vacated the trial court's order dismissing the defendant's motion for appropriate relief filed pursuant to the Racial Justice Act and remanded the case for the reinstatement of the defendant's sentence of life imprisonment without parole.

Justice Ervin, joined by Justice Davis, concurred in the result because he was bound by the decision in *Robinson*, a case in which he dissented. Were he not bound by *Robinson*, Justice Ervin would have dissented for the reasons he stated in *Robinson*.

Justice Newby dissented for the reasons stated in his dissenting opinion in *Robinson*.

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For the reasons stated in *State v. Robinson*, ___ N.C. ___, 846 S.E.2d 711 (2020) the court vacated the trial court’s order dismissing the defendant’s motion for appropriate relief filed pursuant to the Racial Justice Act

***State v. Golphin*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2020)**

In a per curiam opinion, for the reasons stated in *State v. Robinson*, ___ N.C. ___, 846 S.E.2d 711 (2020) the court vacated the trial court’s order dismissing the defendant’s motion for appropriate relief filed pursuant to the Racial Justice Act and remanded the case for the reinstatement of the defendant’s sentence of life imprisonment without parole.

Justice Ervin, joined by Justice Davis, concurred in the result because he was bound by the decision in *Robinson*, a case in which he dissented. Were he not bound by *Robinson*, Justice Ervin would have dissented for the reasons he stated in *Robinson*.

Justice Newby dissented for the reasons stated in his dissenting opinions in *Robinson* and *State v. Ramseur*, 374 N.C. 658 (2020).

The North Carolina Constitution does not allow for the repeal of the Racial Justice Act (RJA) to be retroactive because to do so would violate double jeopardy

***State v. Robinson*, ___ N.C. ___, 846 S.E.2d 711 (Aug. 14, 2020)**

The defendant was convicted of first-degree murder and sentenced to death in 1994. The defendant filed a timely motion for appropriate relief pursuant to the RJA in 2010. After an evidentiary hearing, the trial court resentenced the defendant to life imprisonment without the possibility of parole. Following resentencing of three other defendants under the RJA, the General Assembly repealed the RJA. The repeal stated that it was retroactive and voided all pending motions for appropriate relief but did not apply to a trial court order resentencing a defendant to life without parole if that order was affirmed on appellate review.

A joint hearing was thereafter held by a different trial judge on the motions for appropriate relief by the four defendants, to consider whether the defendant’s claims were rendered void by the RJA repeal. While the trial court found that the defendant’s rights had not vested and that the RJA repeal was not an ex post facto law, the Supreme Court held that the trial court erred by failing to consider the defendant’s double jeopardy argument.

The Supreme Court held that the initial trial court’s order resentencing the defendant to life in prison was an acquittal for purposes of double jeopardy. The Court reasoned that once the trial court found that the defendant had proven all of the essential elements under the RJA to bar the imposition of the death penalty, he was acquitted of that capital sentence, jeopardy terminated, and any attempt by the State to reimpose the death penalty would be a violation of the state constitution. One justice, concurring, agreed with the three-member majority that the judgment and commitment order in which the defendant was sentenced to life imprisonment without the possibility of parole was a final judgment, for which appellate review was neither sought nor obtained, and that double jeopardy barred further review.

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Justice Newby, in dissent, argued that the majority opinion presented three grounds for its ruling, only one of which garnered four votes, resulting in the narrow holding that the State failed to appeal the amended judgment and commitment order so that order is final. Justice Ervin, in dissent, concluded that based on the Court's holding in *State v. Ramseur*, 843 S.E.2d 106 (N.C. 2020), the case should be remanded to the trial court for a full hearing on the merits of the defendant's RJA claim at a proceeding where the State has a further opportunity to respond.

(1) Repeal of the Racial Justice Act violated the state and federal constitutional prohibitions on ex post facto laws; (2) the 2013 amendments to the RJA changing the evidentiary standards applicable to RJA claims violated the constitutional prohibition on ex post facto laws; (3) the trial court erred by dismissing the defendant's RJA motions without an evidentiary hearing and discovery

State v. Ramseur, 374 N.C. 658 (June 5, 2020)

The defendant was convicted of two counts of first-degree murder based on offenses committed in 2007. He was sentenced to death in 2010. That same year he filed a motion for appropriate relief under the North Carolina Racial Justice Act (RJA), but the trial court did not rule on it until after the General Assembly amended the RJA in 2012 and then repealed it in 2013. The repeal was made retroactively applicable to all pending MARs filed before the effective date of the repeal. The trial court therefore determined that the repeal rendered the defendant's MAR void and dismissed it. The trial court also ruled in the alternative that the defendant's RJA claims were without merit and that no evidentiary hearing was necessary to resolve them.

The Supreme Court granted the defendant's petition for writ of certiorari. (1) The Court agreed with the defendant that retroactive application of the RJA repeal violated the prohibitions against ex post facto laws in the state and federal constitutions. The Court reasoned that this was the type of ex post facto law that inflicts a greater punishment for an offense than the law applicable when it was committed. Though the RJA did not exist when the defendant committed his crimes, the effective date coverage of the *original* RJA—which did include the defendant's offense date—made the RJA applicable to crimes committed at that time. The Court concluded that the legislature's repeal of a prior, retroactively-applicable ameliorative law like the RJA violated ex post facto principles. The Court rejected the State's argument that the RJA was a mere procedural overlay that did not substantively change the law governing the death penalty. Through the RJA, the 2009 General Assembly affirmatively sought to allow the review of statistical evidence that the Supreme Court had not allowed in *McCleskey v. Kemp*, 481 U.S. 279 (1987), and to create a new claim for relief not otherwise available. The Court also acknowledged that the RJA repeal happened shortly after four defendants had obtained relief under the original Act, making relevant one of the policy purposes of the Ex Post Facto Clause: to restrain "arbitrary and potentially vindictive legislation." Slip op. at 29.

(2) The Court next considered whether retroactive application of the 2012 RJA amendments to the defendant also violated the prohibition against ex post facto laws. The 2012 amendments

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made three significant changes to the law. And because the 2012 legislation included a severability clause, the Court analyzed each of them separately. The first change was to eliminate the mandatory requirement for an evidentiary hearing upon the filing of an RJA claim. The Court concluded that this was a procedural change that—despite working to the disadvantage of some defendants, including Mr. Ramseur—did not implicate the prohibition on ex post facto laws. The second change altered the evidentiary requirements for establishing racial discrimination in an RJA claim in several ways, including shrinking the relevant geographic region from the entire state to the specific county or prosecutorial district, limiting the relevant time for consideration, and mandating that statistical evidence alone is insufficient to establish a meritorious claim. The Court concluded that this second set of changes implemented a more stringent standard of proof for establishing discrimination that cannot permissibly apply retroactively. The third change added a waiver provision, saying that a defendant must waive any objection to imposition of a sentence of life without parole as a prerequisite for asserting an RJA claim. The Court declined to address the constitutionality of that change because it was not at issue in Mr. Ramseur’s case. In summary, the 2012 amendment eliminating the mandatory hearing requirement could permissibly apply to an RJA claim asserted before the amendments became law, but the other evidentiary changes could not. Therefore, the evidentiary rules of the original RJA must apply to pre-amendment filings like Mr. Ramseur’s.

Finally, the Court concluded that the trial court erred by concluding without an evidentiary hearing that the defendant’s RJA MARs were without merit. The defendant’s motions included extensive evidence, stated with particularity, tending to show race was a significant factor in imposition of death sentences within the meaning of the RJA. The Court said the motions also established that the defendant was entitled to discovery of State files under G.S. 15A-1415(f). The Court remanded the case for proceedings not inconsistent with its opinion.

Justice Newby dissented, concluding primarily that the RJA amendments and repeal did not violate ex post facto principles because they left the defendant no worse off than he was when he committed his offense in 2007, before the RJA was enacted.

(1) Repeal of the Racial Justice Act was unconstitutional as applied to the defendant; (2) the defendant’s motion for appropriate relief was not procedurally barred; and (3) the trial court erred by denying the defendant’s motion for appropriate relief without an evidentiary hearing in light of the evidence in his motion

State v. Burke, 374 N.C. 617 (June 5, 2020)

The defendant was sentenced to death for first-degree murder in 1993. He filed a first motion for appropriate relief in 1997, which was denied in 2011. He filed a new MAR under the North Carolina Racial Justice Act (the RJA MAR) in 2010, amending it twice after the General Assembly amended the RJA in 2012 and then repealed it in 2013. In 2014, the trial court dismissed the defendant’s amended RJA MAR as procedurally barred and, in the alternative, as being without merit. On appeal, the Supreme Court vacated the trial court’s orders and remanded for proceedings not inconsistent with the Court’s opinion in *State v. Ramseur*, ___ N.C. ___ (2020), summarized above. (1) The General Assembly’s 2013 repeal of the RJA was unconstitutional as

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applied to the defendant under the state and federal constitutions, and the 2012 amendment can only be applied insofar as it affects procedural aspects of his claim. (2) The Court held that the trial court erred by concluding that the defendant's RJA MAR was procedurally barred, as the original version of the RJA included language, then codified in G.S. 15A-2012(b), allowing defendants to seek relief "[n]otwithstanding any other provision or time limitation" in the MAR article. (3) The Court also concluded that the trial court abused its discretion by dismissing the defendant's claims without an evidentiary hearing in light of the evidence presented in his motion, including evidence that race was a factor in jury selection, sentencing, and capital charging decisions in the relevant jurisdictions; statistical evidence from Michigan State University College of Law; expert testimony and evidence from another RJA case; and evidence of race-based juror strikes in his own case. The Court remanded for proceedings not inconsistent with its opinion. Justice Newby dissented for the reasons stated in his dissent in *Ramseur*.

Post-Conviction Proceedings

Post-Conviction Proceedings

DNA Testing & Related Matters

The trial court did not err by failing to appoint counsel for a pro se indigent defendant seeking post-conviction DNA testing under G.S. 15A-269

State v. Byers, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2020)

Considering an issue of first impression, the court held that the pro se indigent defendant made an insufficient showing that post-conviction DNA testing “may be material to [his] claim of wrongful conviction” and consequently the trial court did not err by denying his motion for DNA testing under G.S. 15A-269 before appointing him counsel. The court explained that the showing a defendant must make to be entitled to appointment of counsel under G.S. 15A-269(c) is a lesser burden than that required to obtain DNA testing under G.S. 15A-269(a) because subsection (a) requires a showing that the testing “is material” to the defendant’s defense while subsection (c) requires a showing that testing “may be material” to the defense. The term “material,” the meaning of which the court discussed extensively in its opinion, maintains the same definition under both statutory provisions, but the showing differs due to the varying use of the modifiers “is” and “may be.” Here, in light of the overwhelming evidence at trial of the defendant’s guilt, the dearth of evidence at trial implicating a second perpetrator, and the unlikelihood that DNA testing would establish the involvement of a third party, the defendant failed to satisfy his burden of showing that DNA testing may be material to his claim of wrongful conviction.

Post-Conviction Proceedings

Judicial Administration

Contempt

There is no statutory right to counsel under G.S. 7A-451(a)(1) in summary proceedings for direct criminal contempt

State v. Land, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 1, 2020), *temp. stay granted*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 16, 2020)

In this direct criminal contempt case involving summary proceedings where the defendant was sentenced for two instances of contempt, the Court of Appeals determined as a matter of first impression that the defendant did not have a statutory right to appointed counsel under G.S. 7A-451(a)(1). The court explained that precedent from the United States Supreme Court and the North Carolina Supreme Court establishes that there is no Sixth Amendment right to counsel in summary proceedings for direct criminal contempt. The court further explained that discussion in *Jolly v. Wright*, 300 N.C. 83 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124 (1993), suggested that the language in G.S. 7A-451(a)(1) entitling an indigent defendant to appointed counsel in “any case” in which imprisonment or a fine of \$500 or more is likely to be adjudged should be construed to refer to “any criminal case to which Sixth Amendment protections apply.” The court went on to point out that the contemporaneous nature of summary proceedings for direct criminal contempt where the trial court acts on its own first-hand observations supported the conclusion that the statutory right to counsel does not apply, but cautioned trial courts to exercise restraint in such proceedings.

The court remanded the matter to the trial court to correct a clerical error regarding the length of one of the defendant’s contempt sentences. The court also found that the trial court’s written judgment ordering that one of the sentences run consecutive to the other violated the defendant’s right to be present at sentencing because the trial court did not specify the consecutive nature of the sentence when rendering it orally while the defendant was present in the courtroom, and remanded for the entry of a new judgment in the defendant’s presence.
