

Criminal Case Update

Cases covered include two opinions from the Supreme Court of the United States and all published opinions from the North Carolina Appellate Courts from May 12 to September 15, 2023. 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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Criminal Procedure

Appellate Issues

Defendant’s agreement to redactions of interview recording did not prevent appeal under invited error doctrine, but admission of the recording did not represent plain error; DCI-CCH printout was sufficient to prove prior convictions justifying defendant’s prior record level.

[State v. Miller](#), COA22-453, ___ N.C. App. ___ (June 20, 2023). In this Mecklenburg County case, defendant appealed his convictions for first-degree felony murder and possession of a firearm by a felon, arguing plain error in admitting an interview recording and error in calculating his prior record level. The Court of Appeals found no plain error or error.

Defendant was convicted of a murder committed at a Charlotte bus stop in May of 2018. At trial, a recording of an interview conducted by detectives with defendant was published to the jury. The recording was redacted by agreement between the parties. Defendant did not object to the publication of the recording to the jury during trial. However, on appeal, defendant argued that admitting the recording was plain error as portions contained hearsay, inadmissible character evidence, was unfairly prejudicial, and shifted the burden of proving his innocence.

Although the State argued that defendant’s appeal was barred by the invited error doctrine, the Court of Appeals rejected this argument, noting that although defendant agreed to the redactions of the recording, he did not take any affirmative action to admit the recording. Despite this, the court found no plain error in admitting the recording, noting that the record also contained two eyewitnesses who identified defendant as the shooter, surveillance evidence showing someone dressed like defendant at the scene, and testimony from defendant himself corroborating the testimony of the witnesses and surveillance footage. The court also found no issue with the prior record level calculation, noting the trial court used computerized criminal history information known as DCI-CCH to establish defendant’s prior convictions. The court explained that “a DCI-CCH is a record maintained by the Department of Public Safety and may be used to prove Defendant’s prior convictions pursuant to N.C. Gen. Stat. § 15A-1340.14(f).” Slip Op. at 10.

Capacity to Proceed & Related Issues

Trial court was not required to conduct a *sua sponte* inquiry into defendant’s competency after he overdosed during jury deliberations, as no substantial evidence called defendant’s competency into question before his overdose.

[State v. Minyard](#), COA22-962, ___ N.C. App. ___ (June 20, 2023). In this Burke County case, defendant appealed the partial denial of his motion for appropriate relief (MAR), arguing he was entitled to a new trial because the trial court did not conduct a *sua sponte* inquiry into his competency after he overdosed and fell into a stupor during jury deliberations. The Court of Appeals affirmed the superior court order on the MAR and denied a new trial.

Defendant first appealed his conviction in *State v. Minyard*, 231 N.C. App. 605, *disc. rev. denied*, 367 N.C. 495 (2014). Defendant was convicted in 2012 for five counts of indecent liberties with a minor and first-degree sexual offense, as well as habitual felon status. During the jury deliberations and outside the presence of the jury, defendant managed to consume fifteen Klonopin along with alcohol and suffered an overdose in the courtroom. Defendant was treated by emergency medical services and missed the

remainder of deliberations as well as the verdict. Defendant was present for the habitual felon status and sentencing portions of his proceeding. After his conviction, defendant appealed and ultimately filed several MARs, none of which resulted in a new trial.

Defendant's MAR giving rise to the current case was filed in response to the Supreme Court's decision in *State v. Sides*, 376 N.C. 449 (2020). Based upon the reasoning in that case, the superior court judge considering the MAR only found error with the trial court's failure to conduct a competency hearing prior to the habitual felon and sentencing phases of the proceeding, not the initial trial. As a result, the MAR order vacated defendant's habitual felon status and sentence, but denied the request for a new trial. The State did not cross-appeal the habitual felon and sentencing issues.

Taking up the MAR order, the Court of Appeals waded into the caselaw surrounding a defendant's competency and the right to be voluntarily absent from trial. The court examined the facts in *Sides*, where the defendant took sixty Xanax tablets on the third day of trial; a doctor subsequently recommended she be involuntarily committed, and a magistrate agreed. The *Sides* decision held "that while a defendant may voluntarily waive the constitutional right to be present at trial, the defendant may only waive the right when she is competent." Slip Op. at 12. In *Sides*, the trial court skipped the important determination of the defendant's competency before assuming that she voluntarily took an act to absent herself from trial, and should have conducted a competency hearing once it was presented with "substantial evidence" of the defendant's incompetence. *Id.* at 12-13, quoting *Sides*. However, in [State v. Flow](#), ___ N.C. ___ (Apr. 28, 2023), the Supreme Court drew a distinction between a defendant who jumped off a jailhouse balcony and the defendant in *Sides*. In *Flow*, the defendant's capacity had not been called into question before his jump, and the evidence considered by the trial court did not indicate that the defendant was incompetent. As a result, the *Flow* trial court found, "implicitly at least," that the defendant was competent when he acted voluntarily to waive his right to be present at trial, a decision the Supreme Court upheld. Slip Op. at 15, quoting *Flow*.

Looking to the current case, the court concluded that "[n]o substantial evidence tended to alert the court or counsel nor cast doubt on Defendant's competency prior to his voluntary actions," and "[u]nlike in *Sides*, the trial court was not presented with any evidence of a history of Defendant's mental illness." *Id.* at 15-16. The court concluded that *Sides* was inapplicable and defendant's request for a new trial was properly denied. The court then determined, without deciding whether an error occurred, that any violation was not a structural error, and was harmless error beyond a reasonable doubt. Affirming the MAR order, the court remanded for habitual felon proceedings and resentencing.

No substantial evidence before trial court indicating defendant's lack of capacity; ineffective assistance of counsel claim required development of the record through motion for appropriate relief; handwritten changes to waiver of defendant's right to indictment required remand to trial court.

[State v. George](#), COA23-62, ___ N.C. App. ___ (July 18, 2023). In this Wayne County case, defendant appealed judgments for possession of heroin and cocaine and resisting a public officer, arguing error in failing to order a competency hearing *sua sponte* and ineffective assistance of counsel. Defendant's appellate counsel also filed a brief under *Anders v. California*, 386 U.S. 738 (1967), requesting the Court of Appeals conduct an independent review of the record. After review, the court found no error with the lack of a competency hearing, dismissed the ineffective assistance of counsel argument without prejudice, and remanded the matter to the trial court for review of whether defendant validly waived indictment.

Defendant's convictions arose from separate incidents in December 2018 and April 2021, where defendant was found with heroin and cocaine, respectively. In May of 2022 defendant pleaded guilty to the charges. Defendant's appellate counsel then filed an *Anders* brief and defendant filed arguments on his own.

Examining defendant's first argument, the Court of Appeals disagreed that the trial court committed error by failing to order a competency hearing. The court noted that no party raised the issue of defendant's capacity, and "the trial court extensively inquired as to Defendant's mental capacity and understanding of the proceedings." Slip Op. at 4. The applicable standard from *State v. Heptinstall*, 309 N.C. 231 (1983), only requires a trial court to order a hearing *sua sponte* if substantial evidence before the court indicates the defendant is incompetent. Because there was no substantial evidence of defendant's lack of capacity before the trial court here, there was no error.

Considering the ineffective assistance of counsel argument, the court explained that generally these claims "should be considered through motions for appropriate relief and not on direct appeal." Slip Op. at 7. Because the record here was not fully developed to consider defendant's argument regarding his representation, the court dismissed the claim without prejudice so that defendant could file a motion for appropriate relief with the trial court.

Conducting the independent review requested by defense counsel's *Anders* brief, the court identified one possible error with the information related to the April 2021 charges. On the last page of the information, a file number was crossed out and replaced with a partially illegible handwritten number. The court explained "[w]hile this may be a scrivener's error, our independent review of the Record at least reveals this potential issue of whether Defendant validly waived his right to indictment by a grand jury specifically in file number 18 CRS 55019." *Id.* at 9. Based on this issue, the court remanded to the trial court to ensure the waiver of indictment was valid.

Counsel Issues

State's disclosure of discovery material on second day of trial did not justify mistrial; defense counsel's statements in closing argument did not represent *Harbison* error.

[State v. Mahatha](#), COA20-656, ___ N.C. App. ___ (May 16, 2023). In this Guilford County case, defendant appealed his convictions for communicating threats and assault charges, arguing abuse of discretion in denying his motion for a mistrial based on the late disclosure of discoverable material, and ineffective assistance of counsel by implicitly conceding guilt. The Court of Appeals found no abuse of discretion or error.

Defendant came to trial in February of 2020 for charges related to a dispute with his girlfriend regarding access to her phone. On the Thursday before the trial, the state provided a set of body camera videos. On the first day of trial, the state provided additional photographs of the crime scene and injuries after they were mislabeled with the wrong case number. And on the second day of trial, the state provided a set of 29 phone call recordings from defendant while he was in jail. Defense counsel only raised a discovery objection to the phone call recordings produced on the second day of trial. The trial court denied the motion and allowed the state to play one of the recorded calls for the jury. At the close of state's evidence, defendant moved for a mistrial based on the discovery violations. The trial court denied the motion.

On appeal, the Court of Appeals first noted that the right to a mistrial was not automatic, and that a mistrial was one of several sanctions permitted under G.S. 15A-910 for failure to comply with required disclosures, all of which are discretionary. Because defense counsel only objected to the phone call recordings, that was the only evidence considered by the court when reviewing the motion for mistrial. The court noted that defense counsel could not identify any element of the calls which would have been exculpatory for defendant. Additionally, the court noted that G.S. 15A-910 did not establish any other basis for granting the mistrial or finding an abuse of discretion.

Turning to defendant's ineffective assistance of counsel claim, the court noted that the standards from *State v. Harbison*, 315 N.C. 175 (1985), applied to defendant's claim regarding admission of guilt, and that *State v. McAllister*, 375 N.C. 455 (2020), showed implied concessions of guilt may rise to the level of a *Harbison* error. However, the court explained that implied concessions of guilt must be based on statements that "cannot logically be interpreted as anything other than an implied concession of guilt." Slip Op. at 16-17, quoting *McAllister*. The court did not find that logical conclusion from either of the statements pointed to by defendant as indicative of error. Instead, the court distinguished the statements from the *McAllister* examples, finding no *Harbison* error.

Dispute between defense counsel and defendant did not represent absolute impasse justifying reversal of judgment.

[State v. Holliday](#), COA22-852, ___ N.C. App. ___ (July 18, 2023). In this Mecklenburg County case, defendant appealed his conviction of trafficking in fentanyl by possession, arguing error in the trial court's failure to instruct defense counsel to call an out-of-state witness. The Court of Appeals found no error.

An officer from the Cornelius Police Department observed defendant and a woman parked at a hotel in Cornelius, and as the couple left the car and headed to the hotel, the officer approached and inquired about the vehicle. Defendant eventually consented to a search of the vehicle that turned up fentanyl and other substances. Defendant was arrested, but the woman (a resident of West Virginia) was allowed to leave. At trial, defendant brought his dissatisfaction with his counsel to the court's attention, and defense counsel acknowledged that he had disagreed with defendant about calling the woman to testify. The trial court explained that defense counsel could not subpoena a witness from outside the state to testify, and inquired about the dissatisfaction with defense counsel. After a discussion regarding defendant's plans to hire alternative counsel, the trial court determined that defendant had not actually taken steps to hire another attorney, and that the disagreement with defense counsel was primarily over trial strategy. The trial court denied defendant's motion to substitute counsel and the trial proceeded, resulting in defendant's conviction.

On appeal, defendant argued that the trial court should have either allowed substitute counsel or directed defense counsel to call the out-of-state witness. The Court of Appeals disagreed, noting that while "it is reversible error for the court to allow the attorney's decision to prevail over the defendant's wishes" when an absolute impasse has been reached, "not all tactical disagreements between a defendant and his or her attorney rise to the level of 'absolute impasse.'" Slip Op. at 9-10. Here, the record reflected that defense counsel though the issue was resolved after their disagreement and did not realize that defendant still expected him to pursue securing the woman's testimony. Since defendant could not demonstrate an absolute impasse, the trial court committed no error. The court

also considered defendant's motion to substitute counsel, concluding that it was abandoned as defendant offered no supporting arguments on appeal.

Trial court adequately inquired into potential conflict before denying defense counsel's motion to withdraw, and defendant knowingly waived any potential conflict.

[State v. Bridges](#), COA22-208, ___ N.C. App. ___ (August 1, 2023). In this Johnston County case, defendant appealed his convictions for assault with a deadly weapon and attempted robbery, arguing error in the denial of defense counsel's motion to withdraw, and ineffective assistance of counsel. The Court of Appeals found no error and dismissed the ineffective assistance of counsel claim without prejudice.

In October of 2018, defendant went to a car lot in Garner with another man and a woman. While the woman discussed purchasing a car with the manager, defendant and his accomplice entered with handguns and asked for the manager's money. The manager was subsequently shot through the neck, and the group fled the lot. When the matter came for trial, the woman testified for the State that defendant was the shooter. Prior to the witness's testimony, defense counsel encountered her in the hallway crying, and had a conversation with her where she allegedly told him that she was not present at the scene of the crime. Defense counsel alerted the trial court, and an inquiry was held outside the presence of the jury. The State was also permitted to meet with the witness during lunch recess. After all these events, defense counsel made a motion to withdraw and a motion for a mistrial, arguing that he had a conflict of interest based upon the discussion with the witness, and he had become a necessary witness in defendant's case. The trial court denied this motion, and defendant was subsequently convicted.

The Court of Appeals first looked at defendant's argument that defense counsel became a necessary witness for defendant, depriving him of his Sixth Amendment right to conflict-free and effective counsel. The court explained that a trial court must conduct an adequate inquiry when it is aware of a possible conflict with defense counsel; to be adequate, the inquiry must determine whether the conflict will deprive the defendant of his constitutional rights. Here, the trial court discussed the conflict and its implications with the parties at length before denying defense counsel's motion to withdraw. The court also noted that defendant made a voluntary, knowing, and intelligent waiver of any conflict, as he "explicitly stated, after witnessing the entirety of [the witness's] testimony, including his counsel's cross-examination of her, that he did not wish for his counsel to withdraw." Slip Op. at 13. The court concluded that no error occurred based on the adequate inquiry and defendant's waiver.

Taking up defendant's ineffective assistance of counsel claim, the court explained that normally these issues are not taken up on direct appeal, and the appropriate remedy is a motion for appropriate relief (MAR) so that the trial court can conduct further investigation as necessary. Here, the court dismissed defendant's claim without prejudice to allow him to file an MAR.

Appellant counsel's decision not to advance an *Irick* fingerprint evidence argument did not represent ineffective assistance of counsel where fingerprint evidence was not standing alone, and record contained sufficient evidence of guilt.

[State v. Todd](#), COA22-680, ___ N.C. App. ___ (Sept. 12, 2023). In this Wake County Case, defendant appealed the denial of his motion for appropriate relief (MAR), arguing ineffective assistance of appellate counsel. The Court of Appeals affirmed the denial of his MAR.

This matter has a complicated procedural history, outlined by the court in pages 2-8 of the current opinion. Defendant first came to trial for robbery in 2012. The day before trial was set to commence, the State provided a copy of fingerprints found at the scene to defense counsel, although the State had previously provided a report stating that defendant's fingerprints were found at the scene. Defense counsel moved for a continuance, but the motion was denied. Defense counsel cross-examined the State's fingerprint expert during trial, but did not call a fingerprint expert and did not offer any other evidence during the trial. Defendant was convicted, and appealed. The matter reached the Court of Appeals for the first time with this direct appeal, where his appellate counsel argued error in denying the motion for continuance and ineffective assistance of trial counsel, but the Court of Appeals found no error.

After defendant's first appeal was unsuccessful, he filed a MAR for ineffective assistance of appellate counsel, arguing his counsel should have raised the issue of dismissal for lack of evidence based on *State v. Irick*, 291 N.C. 480 (1977) and related precedent. The reviewing court denied defendant's MAR. The defendant appealed this denial, reaching the Court of Appeals a second time in *State v. Todd*, 249 N.C. App. 170 (2016), where the court reversed the MAR denial. This decision was appealed by the State, leading to the Supreme Court's decision in *State v. Todd*, 369 N.C. 707 (2017) where the Court determined that the record was insufficient to evaluate the ineffective assistance of counsel claim. After the Supreme Court's decision, the matter was remanded to the MAR court, but the court failed to act from 2017 until 2021. After finally holding a hearing in February of 2021 and receiving testimony from defendant's appellate counsel, the MAR court determined it could not establish that counsel was unreasonable by failing to raise an *Irick* argument on appeal. Defendant again appealed, leading to the current case.

The Court of Appeals took up defendant's current appeal and applied the two-prong analysis from *Strickland v. Washington*, 466 U.S. 668 (1984), looking for deficient performance of counsel and prejudice from that failure. Turning first to performance, the court explained that the proper analysis was whether appellate counsel failed to raise a claim on appeal that was "plainly stronger" than the ones presented in the appeal at the time the appellate brief was submitted. Slip Op. at 11, quoting *State v. Casey*, 263 N.C. App. 510, 521 (2019). The court first determined that because the fingerprint evidence was not the sole evidence of defendant's guilt, *Irick's* rule requiring proof the fingerprint evidence was impressed at the time the crime was committed did not apply. Having established that *Irick's* rule did not apply, the court shifted back to a normal sufficiency of the evidence analysis, determining that sufficient evidence in the record showed defendant as guilty, and the *Irick* claim (1) would have failed on appeal, and (2) was not "plainly stronger" than the arguments actually advanced by appellate counsel. *Id.* at 20. This determination meant that the court did not need to reach the prejudice prong of the analysis, but the court briefly noted that since sufficient evidence was in the record to show defendant's guilt, he could not show prejudice either.

Indictment & Pleading Issues

Indictment that combined possession of a firearm by a felon with two other firearm charges was not fatally defective despite statutory requirement for separate indictment.

[State v. Newborn](#), 330PA21, ___ N.C. ___ (June 16, 2023). In this Haywood County case, the Supreme Court reversed a unanimous Court of Appeals decision and reinstated defendant's conviction for possession of a firearm by a felon.

In April of 2018, defendant was pulled over for driving with a permanently revoked license. During the stop, the officer smelled marijuana; defendant admitted that he had smoked marijuana earlier but none was in the vehicle. Based on the smell and defendant's admission, the officer decided to search the vehicle, eventually discovering two firearms. Defendant was charged in a single indictment with possession of a firearm by a felon, possession of a firearm with an altered or removed serial number, and carrying a concealed weapon. At trial, defendant did not challenge the indictment, and he was ultimately convicted of all three offenses.

On appeal, defendant argued the indictment was fatally flawed, as G.S. 14-415.1(c) requires a separate indictment for possession of a firearm by a felon. The Court of Appeals agreed, vacating defendant's conviction based on *State v. Wilkins*, 225 N.C. App. 492 (2013), and holding that the statute unambiguously mandates a separate indictment for the charge.

After granting discretionary review, the Supreme Court disagreed with the Court of Appeals, explaining that "it is well-established that a court should not quash an indictment due to a defect concerning a 'mere informality' that does not 'affect the merits of the case.'" Slip Op. at 6, quoting *State v. Brady*, 237 N.C. 675 (1953). The court pointed to its decision in *State v. Brice*, 370 N.C. 244 (2017), which held that failure to obtain a separate indictment required by a habitual offender statute was not a jurisdictional defect and did not render the indictment fatally defective. Applying the same reasoning to the current case, the court explained that "the statute's separate indictment requirement is not jurisdictional, and failure to comply with the requirement does not render the indictment fatally defective." Slip Op. at 9. The court explicitly stated that *Wilkins* was wrongly decided and specifically overruled. *Id.*

Justice Morgan dissented, and would have upheld the Court of Appeals opinion and the reasoning in *Wilkins* finding that the lack of a separate indictment required by G.S. 14-415.1(c) was a fatal defect. *Id.* at 11.

Jury Instructions

Allowing prosecutor to mention probation as possible sentence during voir dire was not error; defense counsel's failure to object to jury instructions on self-defense and failure to request a jury poll were not ineffective assistance.

[State v. Lynn](#), COA22-990, ___ N.C. App. ___ (Sept. 19, 2023). In this Mecklenburg County case, defendant appealed his convictions for assault with a deadly weapon and discharging a weapon into a building and vehicle in operation, arguing error by (1) allowing the prosecutor to tell potential jurors that probation was within the potential sentencing range and (2) substituting an alternative juror after deliberations began, and (3) ineffective assistance of counsel. The Court of Appeals found no prejudicial error.

In December of 2019, defendant was involved in an altercation at a Cook Out in Charlotte, eventually firing several shots that hit a car and the exterior wall of the Cook Out. The matter came for trial in March of 2022. On the second day of deliberations, one of the jurors was ill and did not report for jury duty. The trial court substituted an alternate juror and directed the jury to restart deliberations under G.S. 15A-1215(a). Defendant was subsequently convicted and appealed.

Taking up (1), the Court of Appeals explained that it reviewed a trial court's management of jury selection for abuse of discretion. Here, the State's choice to mention probation during voir dire was "questionable" as "a probationary sentence under these facts requires the trial judge to find extraordinary mitigation," but the statement was "technically accurate" as a statement of law. Slip Op. at 5. The court concluded there was no abuse of discretion in these circumstances as it was not a totally unsupported possibility. Turning to (2), the court explained that defendant argued that "more than twelve persons" were involved in the jury verdict, but defendant failed to preserve the issue for review and the court dismissed it.

Reaching (3), the court explained that defendant's ineffective assistance of counsel argument contained two points, (a) that defense counsel should have objected to the trial court's jury instructions on self-defense, and (b) that counsel should have requested a jury poll. Looking at (3)(a), defendant argued that the instruction did not require the jury to consider whether other patrons at the Cook Out had guns. The court explained that the instruction closely tracked the applicable language of the statute and directed the jury to consider whether "defendant reasonably believed that deadly force was necessary," which would encompass the consideration of whether other people at the scene had guns. *Id.* at 9. The court could not conclude that a different instruction specifically mentioning a gun would have led to a different result, meaning the argument could not support the ineffective assistance claim. The court likewise dispensed with (3)(b), explaining that the trial court was not required to poll the jury unless requested, but "both the jury foreman and the other jurors, as a group, affirmed—in open court—that their verdicts were unanimous." *Id.* at 10. Because there was no evidence of coercion or inducements to the jury, there was no reasonable probability a jury poll would have created a different result for defendant.

[Jury Misconduct & Improper Contact with Jurors](#)

Trial court properly dismissed juror who moved out of the county prior to the commencement of trial.

[State v. Wiley](#), COA22-899, ___ N.C. App. ___ (August 15, 2023). In this Person County case, defendant appealed his conviction for first-degree murder, arguing error in dismissal of a juror who no longer lived in Person County. The Court of Appeals found no error.

On the third day of trial, Juror #4 reported car trouble and that he would be late for the trial proceedings. The trial court dispatched the sheriff to assist the juror. When the sheriff arrived at Juror #4's reported location, he was not there, but arrived soon thereafter. The residents of the address informed the sheriff that the juror did not live there anymore and had moved to Durham County, and Juror #4 confirmed this when he arrived. The juror told the trial court that he had recently moved to Durham County and spent time in both places. After hearing from both sides, the trial court dismissed the juror and replaced him with an alternate.

Taking up defendant's argument, the Court of Appeals noted that G.S. 15A-1211(d) permits the trial court to dismiss a juror even if a party has not challenged the juror, if the trial court determines grounds for challenge are present. Here, Juror #4 was arguably not qualified to serve under G.S. 9-3, which requires jurors to be residents of the county for the trial. The court turned to *State v. Tirado*, 358 N.C. 551 (2004), for a similar fact pattern of a juror being dismissed for moving prior to the trial. Based on this precedent, the trial court committed no abuse of discretion when dismissing Juror #4.

Jury Selection

Trial court properly declined to reopen *voir dire* after questioning juror who expressed confusion that other jurors were asked questions not asked of her.

[State v. Gidderon](#), COA22-681, ___ N.C. App. ___ (June 6, 2023). In this Guilford County case, defendant appealed his conviction for first-degree murder, arguing an abuse of discretion when the trial court declined to reopen *voir dire* of a juror who expressed concerns about the questions asked to other jurors but not her. The Court of Appeals found no abuse of discretion.

After jury selection but before impaneling of the jury, Juror Number 6 expressed concerns to court deputies that she was not asked the same questions as other jurors during *voir dire*. One of the deputies brought the issue to the trial court's attention, and the trial court called the juror in open court to ask her several questions. The court asked the juror "your concern is that some questions were asked of some jurors that perhaps were not asked of other jurors?" to which she replied, "yes." The trial court went on to ask "[a]nd whatever this information is that you were not provided perhaps because the specific question was not asked, in your opinion, does not affect your ability to be fair; is that correct?" to which the juror responded "I don't think so." Slip Op. at 4. After this exchange, the trial court impaneled the jury.

Examining the trial court's actions, the Court of Appeals first noted that the trial court possessed discretion to conduct an inquiry into the juror's comments, and turned to *State v. Boggess*, 358 N.C. 676 (2004), and *State v. Adams*, 285 N.C. App. 379 (2022) to establish the standards applicable to the inquiry. Looking at the substance of the inquiry, the court explained that "Juror Number 6 never expressed doubts about her impartiality, ability to serve as a juror, find the facts, and to fairly apply the law." Slip Op. at 9. Defense counsel also failed to make any further request, as the court explained:

The trial court provided counsel on both sides with the opportunity to request further *voir dire*, and both parties' counsel expressly declined the opportunity. Defense counsel also failed to request additional *voir dire* when asked by the trial court and waived the right to challenge the issue on appeal.

Id. As a result, the court found no abuse of discretion in the actions of the trial court.

Motions

Sufficient evidence to support the trustworthiness of defendant's extrajudicial confession satisfied the *corpus delicti* rule; admitting testimony that mother of victim was in prison for second-degree murder was not error.

[State v. Colt](#), COA22-514, ___ N.C. App. ___ (June 20, 2023). In this Wayne County case, defendant appealed his conviction for concealment of the death of a child who did not die of natural causes,

arguing the State failed to satisfy the *corpus delicti* rule and error in permitting testimony that the child's mother was convicted of second-degree murder. The Court of Appeals found no error and determined the *corpus delicti* rule was satisfied.

In October of 2016, the mother and child in question moved into a house in Goldsboro with defendant and several other individuals. After the child disappeared, investigators interviewed defendant two times. In the second interview, defendant admitted overhearing the mother and another roommate discuss the child's death and that they needed to dispose of the body. Defendant also described taking the mother and roommates to a house where they purchased methamphetamines, and events at the house that seemed to show the mother disposing of the body. Defendant told law enforcement "that he felt bad that he did not call for help, and one of his biggest mistakes was failing to tell people about [the child's] death or report it to law enforcement." Slip Op. at 7. At trial, text messages were admitted showing defendant and one of the roommates discussed covering up the child's death. The prosecutor also asked a line of questions to one witness that revealed the mother was in prison for second-degree murder. Defendant moved for a mistrial several times and made a motion to dismiss, arguing insufficient evidence to satisfy the *corpus delicti* rule as the child's body was never found, but the trial court denied the motions.

Taking up defendant's *corpus delicti* argument, the Court of Appeals first explained the rule's requirement for corroborative evidence when an extrajudicial confession is the substantial evidence relied on to prove a crime. The court noted the N.C. Supreme Court adopted the "trustworthiness version" of the rule, meaning "the adequacy of corroborating proof is measured not by its tendency to establish the *corpus delicti* but by the extent to which it supports the trustworthiness of the admissions." Slip Op. at 12-13, quoting *State v. DeJesus*, 265 N.C. App. 279 (2019). Having established the standard, the court looked to the substantial evidence supporting the trustworthiness of the confession and supporting each element of the crime charged, determining that the trial court properly denied the motion to dismiss.

The court next considered defendant's arguments that the testimony regarding the mother's conviction for second-degree murder was (1) irrelevant under Rule of Evidence 401, (2) unfairly prejudicial under Rule of Evidence 403, and (3) constituted a violation of the Confrontation Clause of the U.S. and N.C. Constitutions. For (1), the court found relevancy "because it was relevant to whether [the child] was dead." *Id.* at 21. Considering (2), the court found that since substantial evidence established the child died of unnatural causes, testimony regarding the mother's conviction for murder was not unfairly prejudicial. Finally, for (3), the court noted that defendant's argument that the mother's guilty plea represented testimony was not directly addressed by North Carolina case law, but found an unpublished 4th Circuit per curiam opinion holding that a guilty plea was not testimonial evidence. The court also noted that no statement in the record seemed to alert the jury that the mother offered a guilty plea, and even if there was such a statement, it would represent harmless error based on the other evidence of the child's death of unnatural causes.

Chief Judge Stroud concurred in the result only by separate opinion, disagreeing with the analysis of admitting the testimony under Rules 401 and 403, but not considering the error prejudicial.

Pleas

Trial court failed to strictly adhere to plea agreement when imposing a 30-day split sentence not mentioned in the agreement.

[State v. Robertson](#), COA23-24, ___ N.C. App. ___ (Sept. 5, 2023). In this Cabarrus County case, defendant appealed judgment entered on his guilty plea, arguing that the trial court refused to allow him to withdraw his plea after imposing a sentence differing from the plea agreement. The Court of Appeals agreed, vacating the judgment and remanding for further proceedings.

In August of 2022, defendant entered a plea agreement for felony fleeing to elude arrest. The agreement specified that defendant would receive a suspended sentence in the presumptive range. However, at defendant’s plea hearing, the trial court imposed an additional “split sentence of 30 days” in jail as a special condition of probation. Slip Op. at 2. Defense counsel moved to strike the plea, but the trial court denied the motion.

After reviewing the applicable caselaw and statutes, the Court of Appeals held that the trial court erred by failing to strictly adhere to the terms of the plea agreement. Based upon the transcript, it appeared that the trial court felt the addition was permitted because the plea agreement did not mention special conditions related to probation. The court explained:

Our courts have held that strict adherence to plea arrangements means giving the defendant what they bargained for. . . [t]o the extent the terms of the arrangement—including whether the parties had agreed to the imposition of a special condition of probation—were unclear, the trial court should have sought clarification from the parties rather than impose a sentence it decided was appropriate.

Id. at 6-7.

Sentencing

Witness’s testimony represented additional competent evidence for the revocation of defendant’s probation.

[State v. Bradley](#), 105A22, ___ N.C. ___ (June 16, 2023). In this Moore County case, the Supreme Court per curiam affirmed and modified [State v. Bradley](#), 282 N.C. App. 292 (2022), a case where the Court of Appeals majority concluded the trial court did not err by revoking defendant’s probation after finding substantial evidence showed defendant had possessed controlled substances. The Supreme Court noted there was additional competent evidence through the testimony of one witness to support the trial court’s findings of fact and conclusions of law. The court modified the opinion of the Court of Appeals to the extent that “the lower appellate court may have mistakenly misconstrued [the witness’s] statements as incompetent evidence upon which the trial court could not and did not rely.” Slip Op. at 2.

Sentence entered seven years after prayer for judgment continued did not represent unreasonable delay; prayer for judgment continued was not final judgment as it did not impose conditions amounting to punishment.

[State v. McDonald](#), COA22-672, ___ N.C. App. ___ (August 1, 2023). In this Robeson County case, defendant appealed his conviction for misdemeanor death by vehicle, arguing error as (1) the prayer for judgment continued (PJC) was intended to be a final judgment in the matter, and (2) the almost seven-

year delay in entering judgment was unreasonable. The Court of Appeals affirmed the trial court's judgment.

In October of 2011, defendant crossed the center line of a roadway when attempting to turn left, causing a collision with a motorcyclist who died of injuries sustained in the collision. Defendant pleaded guilty to misdemeanor death by vehicle in October of 2014. Defendant's plea agreement required him to plead guilty and acknowledge responsibility in open court, and stated the trial court would then enter a prayer for judgment in the matter. In August of 2020, defendant was charged with involuntary manslaughter due to another motor vehicle accident, and the State moved to pray judgment in the misdemeanor death by vehicle case. Over defendant's opposition, the trial court granted the State's motion and entered a judgment imposing a sentence of imprisonment that was suspended for supervised probation.

Considering issue (1), the Court of Appeals noted that applicable precedent has made a distinction between PJs that impose conditions "amounting to punishment" versus PJs that do not. Slip Op. at 5. Conditions amounting to punishment include fines and imprisonment terms, whereas orders such as requiring defendant to obey the law or pay court costs do not represent punishment for this distinction. Here the court found no conditions amounting to punishment and rejected defendant's argument that the trial court's statement "that he hoped 'both sides can have some peace and resolution in the matter'" represented an intention for the judgment to be final. *Id.* at 7.

Turning to (2), the court noted that a sentence from a PJ must be entered "within a reasonable time" after the conviction, and looked to *State v. Marino*, 265 N.C. App. 546 (2019) for the considerations applicable to determining whether the sentence was entered in a reasonable time. Slip Op at 8-9. Here, the court noted the circumstances supported a finding of reasonableness, as (1) the State delayed its motion to pray judgment until defendant committed a second motor vehicle offense, (2) defendant tacitly consented to the delay by not objecting to the PJ and not asking for judgment to be entered, and (3) defendant could not show actual prejudice by the delay of entering a sentence.

Judge Riggs dissented by separate opinion, and would have held that the delay divested the trial court of jurisdiction to enter the sentence.

Trial court erroneously checked box 4 on form AOC-CR-343 when revoking defendant's probation, but error did not justify reversal of judgment revoking probation.

[State v. Daniels](#), COA22-756, ___ N.C. App. ___ (Sept. 12, 2023). In this Pitt County case, defendant appealed the revocation of her probation, arguing the trial court improperly considered all of defendant's probation violations as bases to revoke her probation in violation of G.S. 15A-1344(a). The Court of Appeals found that the trial court committed error in one of its findings, but affirmed the revocation of defendant's probation.

In June of 2021, while defendant was on probation for a driving while intoxicated offense, the probation officer filed a violation report with the trial court identifying (1) positive drug screens for marijuana, (2) failure to pay court costs, and (3) commission of a new criminal offense. At the revocation hearing, defendant admitted to the violations and requested confinement rather than revocation. The trial court declined this request and revoked her probation due to willful and intentional violations. When filling out form AOC-CR-343 after the judgment, the trial court checked box 4, which represented a finding

that “each violation is, in and of itself, a sufficient basis upon which [the trial court] should revoke probation and activate the suspended sentence.” Slip Op. at 4.

Reviewing defendant’s argument, the Court of Appeals first explained that G.S. 15A-1344(a) only permitted revocation of defendant’s probation after the new criminal offense, not the other two violations in the report. To revoke defendant’s probation under this provision, the trial court was required to exercise discretion in determining that there was a willful violation of the terms of probation when defendant committed the new criminal offense. Here the trial court made just such a finding by checking box 5(a) on form AOC-CR-343. The court determined that checking box 4 was error, but that “[the trial court] properly considered and understood the statutory basis for revoking Defendant’s probation and properly exercised its discretion.” Slip Op. at 8. As a result, the court reversed the finding represented by checking box 4, but affirmed the judgment revoking probation.

Testimony of probation officer and arrest warrants were sufficient evidence to revoke probation; defendant’s inability to cross examine a probation officer who filed reports against her was not prejudicial error.

[State v. Singletary](#), COA22-1068, ___ N.C. App. ___ (Sept. 19, 2023). In this Wilson County case, defendant appealed the revocation of her probation, arguing (1) insufficient evidence to support the finding she committed a new crime on probation and (2) violation of her right to confront the probation officer who filed the violation reports against her. The Court of Appeals found no error.

Defendant’s probation officer “W” filed two probation violation reports against her from November and December 2021. The reports alleged defendant was committed new crimes while on probation as she was charged with obtaining property by false pretenses and uttering a forged instrument. When the matter came before the trial court in May 2022, probation officer W was replaced by probation officer “H,” who testified regarding the two 2021 reports, as well as a third report from February 2022 that officer H prepared alleging a second uttering a forged instrument offense. Defendant objected to the absence of officer W, as she wished to cross-examine the officer who filed the 2021 reports against her. The trial court noted the objection in the record but otherwise proceeded with the hearing. At the conclusion of the hearing the trial court revoked defendant’s probation and activated her prison sentences.

For (1), defendant argued “the State needed to call law enforcement witnesses to present evidence about the investigations relating to the crimes, civilian victim witnesses, or [bank] employees” to support the alleged crimes committed by defendant. Slip Op. at 10. The Court of Appeals disagreed, explaining that the violation reports, arrest warrants, and testimony from officer H supported the conclusion that defendant was the person on security camera footage committing the crimes. The court explained “[a] probation revocation hearing is not a trial, and the State need not present evidence sufficient to convict Defendant nor call as witnesses the investigating officers of the crimes alleged.” *Id.* at 12.

Turning to (2), the court noted that the Sixth Amendment did not apply to a probation revocation hearing, and that G.S. 15A-1345(e) was the basis for confrontation rights in the proceeding. Because G.S. 15A-1345(e) controlled, the issue before the court was “whether the trial court committed prejudicial error by not making an explicit finding that good cause existed for not allowing Defendant to confront [officer W].” *Id.* at 14. The court referenced *State v. Terry*, 149 N.C. App. 434 (2002), explaining that

failure to require an adverse witness to testify is not error if “(1) the adverse witness’s testimony would have been merely extraneous evidence in light of other competent evidence presented through the probation officer’s testimony and (2) defendant failed to request the professor be subpoenaed.” Slip Op. at 14. Here, the court found the testimony of officer W would have been extraneous in light of the other evidence in the record supporting defendant’s commission of the crimes. Additionally, defendant did not subpoena officer W. This led the court to conclude the trial court did not abuse its discretion in allowing the hearing to proceed without officer W. Finally, the court noted that if any error occurred, it was not prejudicial, as sufficient competent evidence before the trial court supported the revocation of defendant’s probation without the testimony from officer W.

Verdict

Attempt to bribe witness represented intimidation or interference with a witness for purposes of G.S. 14-226; disjunctive jury instruction was not error where the statute did not specifically enumerate criminal acts constituting an offense.

[State v. Patton](#), COA22-994, ___ N.C. App. ___ (August 1, 2023). In this Buncombe County case, defendant appealed his convictions for second-degree forcible sexual offense, intimidating or interfering with a witness, and habitual felon status, arguing (1) the trial court lacked jurisdiction over the interfering with a witness charge, (2) error in denying his motion to dismiss the interfering charge due to insufficient evidence, and (3) error in the jury instruction related to the interfering charge. The Court of Appeals found the trial court did have sufficient jurisdiction and committed no error.

The charges against defendant arose from a 2019 incident where he forced himself upon a woman after a night of drinking and smoking marijuana. While defendant was in the Buncombe County Jail prior to trial, he made a call to the victim using a fake name. When the victim answered, defendant told her “[i]f you’re still in Asheville, I’m gonna try and send you some money,” and “I got \$1,000 for ya.” Slip Op. at 4-5. The victim informed law enforcement of the call, leading to the additional charge of intimidating or interfering with a witness. At trial, the victim testified about the phone call and the recording was published to the jury. Defense counsel’s motions to dismiss the charges were denied by the trial court.

The Court of Appeals first explained the basis of defendant’s argument (1), that the trial court lacked jurisdiction because the alleged conduct from the indictment, bribing the witness/victim not to testify, was not criminalized by G.S. 14-226. Defendant argued that bribery was not an act to intimidate the witness under the language of the statute, and that only threatening or menacing a witness represented a violation of the statute. The court rejected this interpretation, explaining that G.S. 14-226 “prohibits intimidation of witnesses or attempts to deter or interfere with their testimony ‘by threats, menaces or in any other manner,’” and that this language “given its plain and ordinary meaning, straightforwardly expands the scope of prohibited conduct beyond ‘threats’ and ‘menaces’ to include any other act that intimidates a witness or attempts to deter or interfere with their testimony.” *Id.* at 9-10.

The court likewise rejected (2), defendant’s motion to dismiss argument. Here the court explained that direct evidence was not required to prove intent, and that circumstantial evidence was sufficient to support a finding that defendant intended to dissuade the witness from testifying. The court held that “the circumstantial evidence that the State did introduce in this case supports a reasonable inference that [defendant] acted with just that intent given the context in which he made the offer.” *Id.* at 13.

Taking up (3), defendant's objections to the jury instructions, the court explained that defendant objected to four elements of the instructions. First, defendant objected that the instruction did not require the jury to find that defendant threatened the witness/victim; the court explained this was precluded by its holding discuss above on bribery in G.S. 14-226. Second, defendant argued that the instruction did not convey the required intent to the jury; the court rejected this argument as the instruction was based on a pattern jury instruction previously held to be consistent with the statute. Third, defendant argued that the structure of the instruction allowed the jury to convict him for simply offering the witness/victim \$1,000, which is not illegal conduct; again the court pointed to the context and circumstances around the conduct and bribery to dissuade the testimony.

Defendant's final argument regarding the jury instruction was that the disjunctive structure of the instruction allowed a jury verdict that was not unanimous, as he asserted that various jury members may have found him guilty under separate parts of the instruction. The court explained that some disjunctive instructions are unconstitutional, particularly where a jury can choose from one of two underlying acts to find a defendant guilty of a crime such as in *State v. Lyons*, 330 N.C. 298 (1991). Slip Op. at 18. However, the crime of intimidating or interfering with a witness does not consist of a list of specific criminal acts, and the court pointed to the example of *State v. Hartness*, 326 N.C. 561 (1990), where indecent liberties was identified as a similar statute where any of several disjunctive acts can constitute the elements of the offense for purposes of a jury's guilty verdict. Slip Op. at 19. As there was no danger of jurors convicting defendant of separate offenses under G.S. 14-226, the court found no issue with the disjunctive nature of the jury instruction in the current case. The court further noted that the evidence and verdict rested solely on the attempt to bribe the witness/victim, and did not provide other possible behaviors that could create ambiguity.

Evidence

Character Evidence

Admission of defendant's text message conversations with a prior girlfriend represented improper character evidence and was plain error.

[State v. Reber](#), COA22-130, ___ N.C. App. ___ (May 16, 2023). In this Ashe County case, defendant appealed his convictions for rape and sex offense with a child, arguing plain error in the admission of two text message conversations with a woman that were improper character evidence. The Court of Appeals agreed, reversing and remanding for a new trial.

In August of 2021, defendant came to trial for four counts of rape and six counts of sex offense with a child based upon conduct that allegedly occurred between him and the daughter of a couple he knew well. At trial, defendant was questioned about his prior sexual relationships with adult women and several text message conversations during cross-examination. In particular, the prosecutor asked about a text message exchange where defendant's adult girlfriend admitted to being too drunk to remember a sexual encounter. Defendant was also questioned about another exchange where defendant and his girlfriend were attempting to find a place to engage in sexual activity as defendant lived with his grandparents and could not have girlfriends spend the night. Defendant texted his girlfriend that he hoped his daughter (who was not the child allegedly abused) would not tell his grandparents, but that she had a big mouth.

On appeal, the Court of Appeals agreed with defendant's argument that the admission of these text message exchanges was plain error. The court explained that this evidence showing defendant's past sexual relationship was unrelated to his alleged abuse of the child in question, and inadmissible for any Rule of Evidence 404(b) purpose. The court noted there was no similarity in how the crimes and the Rule 404(b) offenses occurred other than they both involved sexual intercourse. The events took place in dissimilar locations, and the charges did not involve the consumption of alcohol or drugs with the child. The court also noted the exchange regarding defendant's daughter was not sufficiently similar to defendant allegedly asking the victim not to reveal sexual abuse. The court explained:

Here, the evidence portraying Defendant as manipulative by (1) engaging in sexual intercourse with a woman who had been drinking alcohol, and (2) for contemplating asking his daughter to not share his plans to meet a girlfriend at a motel so they could engage in sexual intercourse is highly prejudicial and impermissibly attacked Defendant's character.

Slip Op. at 18. Examining the other evidence in the case, the court concluded that due to the disputed nature of the allegations, the outcome depended on the perception of truthfulness for each witness, and the improperly admitted evidence had a probable impact on the jury's finding of guilty. The court also found that closing argument remarks by the prosecutor regarding defendant's sexual history were highly prejudicial and "the trial court erred by failing to intervene *ex mero motu* in response to the grossly improper and prejudicial statements." *Id.* at 25.

Judge Dillon dissented by separate opinion, and would have held that defendant failed to show reversible error.

Crawford Issues & Confrontation Clause

The confrontation clause does not bar admission of a nontestifying codefendant's confession when: (1) the confession has been modified to avoid directly identifying the nonconfessing defendant, and (2) the trial court offers a limiting instruction that jurors may consider the confession only with respect to the confessing defendant.

[Samia v. United States](#), 599 U.S. ___ (June 23, 2023). In the Philippines in 2012, crime lord Paul LeRoux believed a real-estate broker, Catherine Lee, had stolen money from him. LeRoux hired three men to kill her: Adam Samia, Joseph Hunter, and Carl Stillwell. Lee was later murdered, shot twice in the head. The four men were eventually arrested. LeRoux turned state's evidence. Stillwell admitted that he was in the van when Lee was killed, but he claimed he was only the driver and that Samia had done the shooting.

Samia, Hunter, and Stillwell were charged with various offenses, including murder-for-hire and conspiracy. They were tried jointly in the Southern District of New York. Hunter and Stillwell admitted participation in the murder while Samia maintained his innocence. At trial, the trial court admitted evidence of Stillwell's confession, redacted to omit any direct reference to Samia ("He described a time when *the other person* he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving."). The trial court instructed the jury that this testimony was admissible only as to Stillwell and should not be considered as to Samia or Hunter. All three men were convicted and Samia sentenced to life plus ten years. On appeal, the Second circuit found no error in admitting Stillwell's confession in its modified form. The Supreme Court granted certiorari to determine whether the

admission of Stillwell's altered confession, subject to a limiting instruction, violated Samia's confrontation clause rights.

The Sixth Amendment guarantees a criminal defendant the right to be confronted with the witnesses against him. In Crawford v. Washington, the Supreme Court held the confrontation clause bars the admission of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him. Crawford, 541 U.S. at 53-54. Stillwell's post-arrest confession to DEA agents was plainly testimonial. In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held a defendant's confrontation clause rights are violated when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. In Richardson v. Marsh, 481 U.S. 200 (1987), however, it found no error in the use of a redacted confession, holding that the confrontation clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction, when the confession is redacted to eliminate any reference to the defendant. Finally, in Gray v. Maryland, 523 U.S. 185 (1998), the Supreme Court held that certain obviously redacted confessions might be directly accusatory and so fall within Bruton's rule, even if they did not explicitly name the defendant.

In Samia, the Supreme Court recited the "general rule" that a witness whose testimony is introduced at a joint trial is not considered to be a witness against a defendant if the jury is instructed to consider that testimony only against a codefendant. Samia, 2023 WL 4139001, at *5 (quoting Richardson, 481 U.S. at 206). It reviewed the historical practice. Id. at *6. It discussed the doctrine that jurors are presumed to follow the trial judge's instructions, and it acknowledged Bruton as "a narrow exception" to this rule. Id. at *6-*7. Reviewing Bruton, Richardson, and Gray, the Supreme Court found its precedents "distinguish between confessions that directly implicate a defendant and those that do so indirectly." Id. at *9. Here, Stillwell's confession was redacted to avoid naming Samia, "satisfying Bruton's rule," and it was not so obviously redacted as to resemble the confession in Gray. Id. at *10. Accordingly, the introduction of Stillwell's confession coupled with a limiting instruction did not violate the confrontation clause. Id. at *7.

Justice Barrett concurred in part and in the judgment. She rejected the historical evidence described in Part II-A of the majority opinion as anachronistic (too late to inform the meaning of the confrontation clause at the time of the founding) and insubstantial (addressing hearsay rules rather than confrontation).

Justices Kagan dissented, joined by Justice Sotomayor and Justice Jackson. Justice Kagan posited that "Bruton's application has always turned on a confession's inculpatory impact." Id. at *14 (Kagan, J., dissenting). She said it would have been obvious to the jury that "the other person" referenced in the redacted confession was Samia, and "[t]hat fact makes Stillwell's confession inadmissible" under Bruton. Id. Justice Kagan accepted the majority's dichotomy between confessions that implicate a defendant directly or indirectly, but she criticized the majority for finding Stillwell's confession only indirectly implicated Samia. Id. at *14-*15. She accused the majority of undermining Bruton without formally overruling it: "Under this decision, prosecutors can always circumvent Bruton's protections." Id. at *16.

Justice Jackson dissented separately. *Id.* at *16 (Jackson, J., dissenting). In her view, the default position under *Crawford* is that Stillwell's confession was not admissible, and in seeking to introduce the confession the Government sought *an exception* from the confrontation clause's exclusion mandate. *Id.* But under the majority's approach, the default rule is that a nontestifying codefendant's incriminating confession is admissible, so long as it is accompanied by a limiting instruction, and *Bruton* represents a narrow exception to this default rule. *Id.* The majority, Justice Jackson charged, turns *Bruton* on its head, setting "the stage for considerable erosion of the Confrontation Clause right that *Bruton* protects." *Id.* at *17.

Cross-Examination, Impeachment, Corroboration & Related Issues

"Opening the door" to discussion of victim's friendly nature did not entitle defendant to question victim's father regarding contents of victim's phone in front of the jury.

State v. McKoy, 71A22, ___ N.C. ___ (Sept. 1, 2023). In this Durham County case, the Supreme Court affirmed the Court of Appeals majority decision upholding defendant's voluntary manslaughter conviction.

In December of 2016, defendant was driving out of his neighborhood when he was followed by the victim. Defendant was familiar with the victim and felt that the victim was violent and posed a threat to his safety. After the victim cut defendant off and blocked his way forward, defendant backed up, but found himself stuck in a ditch. As the victim approached his car, defendant pulled out a gun and fired at the victim. Defendant hit the victim in the back of the head as he ran from the gunfire, killing him. At trial, defendant argued he was acting in self-defense, despite the fact that no gun was found on the victim. Defense counsel attempted to question the victim's father about the contents of the victim's phone, including photos of the victim and friends holding guns. The trial court did not permit this questioning, despite defense counsel's argument that the State had opened the door to examining this issue after testimony regarding the victim's happy, friendly nature. On appeal, the Court of Appeals majority found that the trial court properly applied the Rule of Evidence 403 balancing test and excluded the evidence, and that even if this was error, it was not prejudicial. The dissent would have found that the line of questioning opened the door to allowing the phone evidence and that defendant was entitled to a new trial.

The Supreme Court explained the issue on appeal as "whether, if the door was opened, defendant had the right to ask [the victim's father] specific questions about the cell phone's contents in front of the jury." Slip Op. at 11. The Court explained that the concept of opening the door predated the modern rules of evidence, and that frequently the concept was no longer needed due to the structure of the modern rules. Despite the State's opening the door on "otherwise irrelevant or inadmissible evidence," the trial court retained the power to act as gatekeeper under Rule 403. *Id.* at 14. This gatekeeping function is reviewed for abuse of discretion on appeal, a standard that is "a steep uphill climb" for an appealing party. *Id.* at 15. Here, the trial court struck a balance that the Supreme Court found not an abuse of discretion.

The Court went beyond the abuse of discretion analysis to determine that, even if the trial court committed abuse of discretion, defendant was not prejudiced by the decision and was not entitled to a new trial. Explaining defendant's conviction, the Court noted that the jury found defendant guilty of voluntary manslaughter, meaning that they found he was acting in self-defense but that he used excessive force when doing so. The Court explained that there was no reasonable way the evidence

would have convinced the jury that defendant was acting appropriately, as defendant had never seen or heard about the contents of the victim’s phone prior to the shooting. *Id.* at 18. Likewise, the evidence would not have supported the jury finding that the victim had a gun or shot at defendant, and could not have rebutted the evidence showing the victim was fleeing from defendant when he was shot in the back. After making this determination, the Court concluded “[t]here is no reasonable possibility that a ruling in defendant’s favor [on the phone evidence] would have led to a different jury verdict.” *Id.* at 20.

Hearsay

Transcribed statement given by legally blind witness who could not read or write was improperly admitted under Rule of Evidence 803(5) despite witness’s signature on the statement, as the statement was not read back to the witness to confirm its accuracy at the time it was made.

[State v. Hocutt](#), COA22-851, ___ N.C. App. ___ (July 5, 2023). In this Wayne County case, defendant appealed his conviction for felony cruelty to an animal, arguing plain error in admitting a written hearsay statement under Rule of Evidence 803(5). The Court of Appeals agreed, ordering a new trial.

In March of 2021, a Wayne County Sheriff’s Office deputy responded to the report of a dog being shot with a small caliber rifle. The primary witness to the shooting was a witness who “had memory issues, was legally blind, and was drunk at the time of the shooting.” Slip Op. at 7. This witness was unable to read or write, so he dictated a statement to his son in the presence of the deputy; after the witness’s son transcribed the statement, the witness signed it. No one read the statement back to the witness to confirm its accuracy. At trial, the prosecution published the witness’s written statement to the jury under Rule 803(5) after he testified he could not remember the events in question. The witness also testified that he was legally blind, drunk at the time he allegedly saw defendant shoot the dog, drunk at the time he was giving the statement to his son for transcription, and suffered from short-term memory issues. No other direct evidence was admitted tying defendant to the dog’s shooting.

The Court of Appeals first explained that under the third prong of Rule 803(5), a recorded recollection like the transcribed statement here must be adopted by the witness while “the facts were fresh in his memory.” *Id.* at 10. The court then applied the analysis from *State v. Spinks*, 136 N.C. App. 153 (1999), explaining “[the witness’s] signature on the statement is inadequate to satisfy the third prong of Rule 803(5) when: (1) it was never read back to him for adoption; (2) his in-court testimony contradicted the statements contained therein; and (3) he could not recall the events described.” Slip Op. at 12. The court then established this error was prejudicial, as “[w]hen [the witness’s] hearsay statements are excised from consideration, we can identify no remaining direct evidence that tends to show or identifies [defendant] as [the dog’s] killer.” *Id.* at 14. This represented a probable impact on the jury’s verdict and justified a new trial.

Limits on Relevancy

Trial court properly excluded evidence related to other possible suspects because the evidence did not exculpate defendants.

[State v. Abbitt and Albarran](#), 334A21, ___ N.C. ___ (Sept. 1, 2023). In this Rowan County case, the Supreme Court majority affirmed the Court of Appeals decision upholding the exclusion of evidence offered by defendants to show other individuals committed the crimes for which defendants were

convicted. Defendants were jointly tried and convicted of first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon.

In May of 2016, defendants came to an apartment with the eventual murder victim, apparently searching for money owed by the woman to the defendants. The murder victim's mother and three-year-old son were also in the apartment. Defendants searched the bedroom, and after not finding the money, shot the woman in the head, killing her. The woman's mother witnessed the events, and was at one point struck in the face by one of the defendants. The mother was able to identify defendants to the police and also testified identifying them at trial. During the trial, the State filed a motion in limine to exclude mention of the possible guilt of two other individuals that defendants argued were responsible for the crimes. Defendants' evidence involved the identification of another woman who looked similar to one of the defendants, possessed a gun of the same caliber as the murder weapon, and drove a vehicle that matched a description from a confidential informant of a vehicle present at the scene. The trial court granted the motion in limine, ruling that the proffered evidence was not inconsistent with the guilt of the defendants. The trial court relied on the applicable test under *State v. Cotton*, 318 N.C. 663 (1987), where evidence implicating the guilt of others "must tend both to implicate another and be inconsistent with the guilt of the defendant." Slip Op. at 7.

The Supreme Court reviewed defendants' appeal de novo, and noted that the parties agreed that the evidence in question was relevant, meaning the only consideration in front of the Court was whether the evidence was inconsistent with defendants' guilt. The Court looked to *State v. McNeill*, 326 N.C. 712 (1990), for explanation of the relevant standard, emphasizing that the evidence must show another person actually committed the crimes instead of defendants, not just that another person had the opportunity to commit the crimes. Walking through the evidence, the Court concluded that "while defendants' proffered evidence implicates other suspects which were suggested by defendants, such evidence does not exculpate defendants." Slip Op. at 23. The Court explained that because the evidence did not tend to show the innocence of either defendant, it did not satisfy the applicable test and was inadmissible.

Justice Earls dissented by separate opinion and would have allowed the admission of the excluded evidence. *Id.* at 25.

Opinions

Whether fentanyl was an opiate for purposes of trafficking statute was a question of law not fact.

[State v. Gibbs](#), 402A21, ___ N.C. ___ (June 16, 2023). In this New Hanover County case, the Supreme Court per curiam vacated and remanded an unpublished Court of Appeals opinion that reversed defendant's conviction for trafficking by possession of an opiate. The Court of Appeals majority ruled that the trial court abused its discretion by ruling that the State's expert was qualified to testify that fentanyl is an opiate. The State appealed based on the dissent, which held that it was not an abuse of discretion to allow the expert's testimony.

The Supreme Court explained that the trial court erred by treating the issue as a fact question, as "whether fentanyl was an opiate for purposes of the trafficking statute in 2018 is a question of law." Slip Op. at 3. As such, the court concluded that "[b]ecause it is a legal question of statutory interpretation, it was not necessary to have expert testimony to establish whether fentanyl is an opiate." *Id.* The court remanded to the Court of Appeals for consideration of whether fentanyl was an opiate under the version of the trafficking statute in effect at the time of the events in the case.

Prior Acts--404(b) Evidence

Expert opinion testimony regarding vehicle's speed was properly admitted under Rule 702(a); evidence of prior DWI charge was properly admitted under Rule 404(b) to show malice; fatally defective indictment and sentencing errors justified vacating and remanding for resentencing.

[State v. Taylor](#), COA22-788, ___ N.C. App. ___ (July 5, 2023). In this Vance County case, defendant appealed his convictions for second-degree murder, felony hit and run, DWI, reckless driving, failure to reduce speed, and failure to comply with license restrictions, arguing improperly admitted expert testimony and evidence of a prior DWI charge, a fatally defective indictment for the license restriction charge, and sentencing errors. The Court of Appeals found no error for the evidence issues but agreed that the indictment for the license restriction charge was defective and the sentencing issues were valid, remanding the matter for resentencing.

In May of 2018, highway patrol troopers responded to the scene of an accident in Henderson where an SUV ran into the back of a sedan and seriously injured the passengers. The SUV was found several yards away from the sedan, wrecked into a fence, with a cold six-pack in the front seat and no driver inside. After a canine search, defendant was found hiding under a boxcar nearby, with the keys to the SUV in his pocket. When defendant's blood alcohol level was sampled it was 0.15. At trial, a state trooper who was not one of the investigating officers testified as an expert regarding the speed of the SUV and whether it exceeded the speed limit. The trial court also admitted evidence of a pending 2017 DWI charge against defendant under Rule of Evidence 404(b). Defendant's objections to both were overruled.

The Court of Appeals first took up the expert testimony issue, turning to *State v. McGrady*, 368 N.C. 880 (2016), to explain the wide discretion granted to a trial court under Rule of Evidence 702(a) when determining whether to admit expert testimony. Slip Op. at 7-8. Here, the trooper was unable to use a scientific method for determining speed due to the circumstances of the crash, so he testified using his experience and specialized training. The Court found no issue with the testimony and noted defendant was able to fully cross-examine and challenge the expert testimony.

Turning to the Rule 404(b) issue, the court noted that evidence of the 2017 DWI charge was admitted "to show his intent, knowledge, or absence of mistake to support malice, an essential element of second-degree murder." *Id.* at 11. Finding that the admission was not error, the court pointed to a N.C. Supreme Court decision, *State v. Jones*, 353 N.C. 159 (2000), where evidence of a previous DWI charge was admitted for just such a purpose.

For the license restriction charge, the court explained "[t]he State concedes the license restriction violation indictment was facially invalid," and likewise conceded issues with prior record level and DWI level sentencing. Slip Op. at 13. As a result, the court found no error for all charges except the license restriction violation, which it vacated, and remanded the judgments for resentencing.

Threats & Related Offenses

The State must prove in true threats cases that the defendant had some subjective understanding of the threatening nature of his statements.

[Counterman v. Colorado](#), 600 U.S. ____ (June 27, 2023). For about two years, Counterman, the petitioner in this case, sent hundreds of Facebook messages to a local artist. The two had never met, and the woman never responded. A number of the messages expressed anger at the artist and envisaged harm upon her. The messages put the artist in fear and upended her daily life. Counterman was charged under a Colorado stalking statute making it unlawful to “[r]epeatedly . . . make[] any form of communication with another person” in “a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.” Slip Op. at 2.

Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not “true threats” and thus could not form the basis of a criminal prosecution. In line with Colorado law, the State had to show that a reasonable person would have viewed the Facebook messages as threatening but did not have to prove that Counterman had any subjective intent to threaten. The trial court decided that Counterman’s statements rose to the level of a true threat, and the Colorado Court of Appeals Affirmed. The United States Supreme Court granted certiorari to consider (1) whether the First Amendment requires proof of a defendant’s subjective mindset in true threats cases and (2) if so, what *mens rea* is sufficient.

In an opinion by Justice Kagan, the Supreme Court concluded that in order to prevent a chilling effect on speech, the State must show a culpable mental state. The Court reasoned that although this requirement make prosecution of some otherwise prohibited speech more difficult, it reduces the prospect of chilling fully protected expression.

The Court further concluded that recklessness was the most appropriate *mens rea* in the true threats context. A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the conduct will cause harm to another. In the threats context, it means that the speaker is aware that others could regard his statements as threatening violence and delivers them anyway. Slip Op. at 11. The Court concluded that the recklessness standard “offers enough breathing space for protected speech without sacrificing too many of the benefits of enforcing laws against true threats.” Slip Op. at 14.

The State had to show only that a reasonable person would have understood Counterman’s statements as threats but did not have to show any awareness on his part that the statements could be understood that way. The Court held that this was a violation of the First Amendment, vacated the judgment, and remanded the case for further proceedings.

Justice Sotomayor, joined partly by Justice Gorsuch, concurred in the conclusion that some subjective *mens rea* is required in true-threats cases and that in this particular case, a *mens rea* of recklessness is sufficient, but noting that she would not reach the distinct conclusion that a *mens rea* of recklessness is sufficient for true threats prosecutions generally and that requiring nothing more than a *mens rea* of recklessness is inconsistent with precedent and history.

Justice Barrett dissented in an opinion joined by Justice Thomas. The dissent reasoned that the requirement of a subjective element unjustifiably grants true threats preferential treatment as compared to other contexts involving unprotected speech, and the result may sweep much further than the opinion lets on.

Miscellaneous Cases

Supreme Court affirmed per curiam the unpublished Court of Appeals decision finding defendant's statistical analysis evidence lacked relevant benchmarks to demonstrate discrimination.

[State v. Johnson](#), 197AP20-2, ___ N.C. ___ (Sept. 1, 2023). In this Wake County case, the Supreme Court affirmed per curiam the unpublished Court of Appeals opinion [State v. Johnson](#), COA19-529-2, 275 N.C. App. 980 (table), 2020 WL 7974001 (Dec. 31, 2020). Previously, the Court of Appeals issued an unpublished opinion on April 21, 2020, which the Supreme Court remanded for consideration of defendant's equal protection claims. The current opinion affirms the Court of Appeals' decision after remand that found no error in the denial of defendant's motion to suppress.

The matter arose from an arrest in November of 2017. A police officer noticed defendant, a black man, parked at an apartment complex and approached his vehicle. As the officer approached, defendant left his vehicle, and the officer smelled marijuana. Defendant attempted to flee, and the officer detained him, eventually finding cocaine and marijuana on his person. At trial, defendant moved to suppress the results of the search, arguing the discriminatory intent and violation of his equal protection rights. During the hearing on the motion to suppress for equal protection violations, defendant introduced statistical evidence of the arresting officer's law enforcement actions to show that the arrest was discriminatory and represented selective enforcement of the law. Defense counsel told the trial court that the burden of proof for the motion to suppress was on the defense, and the trial court agreed, assigning the initial burden to defendant. After the hearing, the trial court denied defendant's motion.

Taking up the case after the Supreme Court's remand, the Court of Appeals established that the initial burden was properly placed on defendant after looking to applicable equal protection caselaw under the U.S. and N.C. Constitutions. The Court of Appeals then dispensed with defendant's statistical analysis evidence as it lacked adequate benchmarks for the data, explaining that "without reliable data indicating the population and demographics in southeast Raleigh and further details on [the officer's] patrol history, these statistics do not establish a prima facie case that [the officer's] actions had a discriminatory effect or evinced a discriminatory purpose." [State v. Johnson](#), COA19-529-2 at 21, 2020 WL 7974001 at *8.

Justice Earls, joined by Justice Morgan, dissented by separate opinion, and would have held that the data collected under G.S. 143B-903, referenced by defendant's witnesses when discussing the history of the arresting officer's actions, could support a claim of discriminatory intent without additional benchmarking statistics. The dissent also would have held that defendant's evidence represented a prima facie showing of discrimination.

Justices Berger and Dietz did not participate in consideration or decision of the case.

Arrest, Search, and Investigation

Arrests & Investigatory Stops

Asking defendant to exit vehicle and patting him down did not unconstitutionally extend traffic stop, and K-9 free air sniff was permitted as it did not prolong stop's duration.

[State v. Furtch](#), COA22-643, ___ N.C. App. ___ (June 20, 2023). In this Henderson County case, defendant appealed his convictions for trafficking methamphetamine, possession with intent to manufacture, sell and/or deliver, and maintaining a vehicle used for keeping and selling a controlled substance, arguing error in the denial of his motion to suppress the results obtained from an unconstitutionally extended traffic stop. The Court of Appeals found no error.

In February of 2019, two officers from the Henderson County Sheriff's Office performing drug interdiction pulled over defendant for weaving and following another vehicle too closely. The officers had received a tip from the narcotics unit to be on the lookout for a silver minivan similar to the vehicle defendant was driving. The officers decided to issue a warning citation to defendant for traveling left of the centerline and following too closely. One officer asked defendant to step out of the vehicle, frisked him for weapons, then explained the warning to him outside the vehicle. While the officer was explaining the warning citation, a K-9 unit performed a free air sniff around the vehicle and alerted, leading to a search that discovered methamphetamine.

Rejecting defendant's argument that the officers deviated from the mission of the stop and unconstitutionally extended it, the Court of Appeals turned to precedent supporting an officer's ability to perform ordinary inquiries related to a stop as long as they do not measurably extend the duration. The court also noted that a K-9 free air sniff could be conducted without reasonable suspicion if it did not prolong the stop. Here, the court explained that the officers were permitted to order defendant out of his car and pat him down to ensure their safety during the stop, and these steps did not measurably extend the stop's duration or convert it into an unlawful seizure. Likewise, "[a]lthough the K-9 free air sniff was unrelated to the reasons for the traffic stop, it did not prolong the traffic stop and was therefore permissible." Slip Op. at 16. Finding no error, the court affirmed the denial of defendant's motion to suppress.

Officer's actions during traffic stop represented unlawful seizure negating defendant's consent to the search of his vehicle.

[State v. Moua](#), COA22-839, ___ N.C. App. ___ (July 18, 2023). In this Mecklenburg County case, defendant appealed his judgment for trafficking methamphetamine and maintaining a vehicle for keeping or selling methamphetamine, arguing that his motion to suppress the evidence obtained from a search of his vehicle was improperly denied. The Court of Appeals agreed, reversing the denial of his motion and vacating the judgment.

In December of 2019, defendant was pulled over by officers of the Charlotte-Mecklenburg Police Department for speeding. During the stop, one officer determined defendant was on active probation while checking his license. The officer asked defendant to step out of the car and speak with him, and during their discussion, the officer asked for defendant's consent to search the vehicle. Defendant told the officer he could go ahead and search the vehicle, resulting in the discovery of a bag of methamphetamine under the driver's seat. At trial, defendant moved to suppress the results of the search, and the trial court denied the motion after conducting a hearing. Defendant subsequently

pleaded guilty to the charges without negotiating a plea agreement. Defendant did not give notice of his intent to appeal prior to entering a plea but made oral notice of appeal during the sentencing hearing.

The Court of Appeals first discussed whether defendant had a right of appeal after pleading guilty without giving notice of his intent, explaining that the recent precedent in *State v. Jonas*, 280 N.C. App. 511 (2021), held that notice of intent to appeal is not required when a defendant did not negotiate a plea agreement. However, the court also noted that *Jonas* was stayed by the North Carolina Supreme Court. As a result, the court granted defendant's petition for *writ of certiorari* to consider his arguments on appeal. Judge Murphy dissented from the grant of *certiorari* and would have found jurisdiction under *Jonas*. Slip Op. at 11, n.1.

On appeal, defendant argued that when he consented to the search of his vehicle, he was unlawfully seized. The Court of Appeals agreed, explaining “[b]ased upon the totality of the circumstances, a reasonable person would not have felt free to terminate this encounter and a search of the car was not within the scope of the original stop.” *Id.* at 11. Here, after the officer returned defendant's license and registration documents, the purpose for the traffic stop had ended. When the officer reached inside defendant's vehicle to unlock the door, instructed him to “come out and talk to me real quick” behind the vehicle, and began asking questions about defendant's probation status, the officer improperly extended the stop and engaged in a show of authority. *Id.* at 19. At trial, the officer testified that he used the technique of separating operators from their vehicles “because people are more likely to consent to a search when they are separated from their vehicle.” *Id.* After reviewing the totality of the circumstances, the court concluded “the seizure was not rendered consensual by the return of the documents, the request to search was during an unlawful extension of the traffic stop, and [defendant]'s consent to search was invalid.” *Id.* at 20.

Open-air dog sniff did not unreasonably extend traffic stop and was permissible under the circumstances.

[State v. San](#), COA22-664, ___ N.C. App. ___ (July 18, 2023). In this Randolph County case, defendant appealed judgment entered after his *Alford* plea to charges of trafficking in methamphetamine, selling or delivering a controlled substance, and possession of a firearm by a felon, arguing error in the denial of his motion to suppress evidence obtained after a search of his vehicle. The Court of Appeals affirmed the denial of defendant's motion and the judgment.

In May of 2018, officers from the Randolph County Sheriff's Department narcotics unit received a tip that defendant was in possession of a large amount of methamphetamine. They located defendant, who was a passenger in an SUV with a female driver. The officers observed the SUV cross the centerline of the road and called for a marked car to initiate a traffic stop. While one officer discussed the traffic violation and warning ticket with the driver outside the vehicle, a canine unit conducted an open-air sniff and the dog alerted, leading to the search of the vehicle. At trial, defendant challenged the search, arguing the officers had improperly prolonged the traffic stop to conduct the dog sniff. The trial court denied defendant's motion, finding the open-air dog sniff started simultaneously with the officer's discussion with the driver about her warning ticket. Defendant entered an *Alford* plea and appealed.

Taking up defendant's arguments, the Court of Appeals first noted that the challenged finding of fact related to the dog sniff beginning simultaneously with the discussion of the traffic violation was supported by competent evidence in the record. The court explained that defendant's appeal focused solely on the report of one officer, but testimony from another officer supported the timeline of events

in the finding of fact. The court then looked at defendant's challenged conclusion of law, explaining the ultimate issue was whether the open-air dog sniff was conducted prior to the completion of the traffic stop's mission. Here defendant relied on *Rodriguez v. United States*, 575 U.S. 348 (2015), to argue the dog sniff was not related to the mission of the stop and was conducted after the mission of the stop had concluded. The court found that "the trial court's Findings support a determination the dog-sniff which led to the search of the vehicle was validly conducted during the time reasonably required to complete the mission of the traffic stop." Slip Op. at 19. As a result, the trial court properly denied defendant's motion.

Defendant's consent to search backpack was not freely given and voluntary due to coercion from officers surrounding him and repeatedly asking him for consent after his refusal.

[State v. Wright](#), COA22-996, ___ N.C. App. ___ (Sept. 12, 2023). In this Mecklenburg County case, defendant appealed denial of his motion to suppress, arguing that (1) police did not have reasonable suspicion to stop him, and (2) he did not consent to the search of his backpack. The Court of Appeals found reasonable suspicion supported the stop but that defendant did not consent to the search, and reversed the denial of defendant's motion.

In January of 2020, defendant, a homeless man, was walking with a bicycle on a dirt path in Charlotte when two officers of the Charlotte-Mecklenburg Police Department approached him. The officers had previously received a tip that a person matching defendant's description and riding a bike was carrying an illegal firearm. When the officers approached defendant, they gave conflicting reasons for the approach, with one officer referencing trespass and the other officer noting it was a street-level drug sales area. Defendant consented to a pat-down of his person and removed his backpack. At that point, one officer asked for permission to search the backpack; defendant initially consented to the search, but quickly told officers he did not want them to search the backpack. After an exchange with the officers where defendant told them he was cold and scared of the police, defendant eventually opened the backpack and allowed a search, resulting in the officers finding a stolen firearm. The officers arrested defendant, and in the search incident to arrest, discovered cocaine and marijuana in his pockets. At trial, defendant objected to admission of the results of the search, and the trial court denied the motion, finding that the initial contact was voluntary and defendant consented to the search of his backpack. Defendant entered an *Alford* plea and appealed. When defendant's appeal was first taken up by the Court of Appeals, the court remanded for further findings of fact and conclusions of law regarding law enforcement's belief that defendant was trespassing. The trial court entered an amended order denying the motion with new findings of fact and conclusions of law, which defendant again appealed.

Taking up defendant's arguments in the current opinion, the Court of Appeals first looked to the findings of fact and conclusions of law challenged by defendant, finding that three findings related to trespassing and one related to the return of defendant's identification prior to the search were not supported by evidence in the record. After striking four findings of fact, the court turned to (1) the reasonable suspicion analysis, determining that "the officers had reasonable suspicion to stop, question, and perform a protective search of [defendant] based on the informant's tip." Slip Op. at 12. The court noted that evidence in the record provided adequate justification for the reasonable suspicion that defendant was armed, justifying a protective search after stopping him.

Turning to (2), the court found that defendant did not voluntarily consent to the search of his backpack. Explaining the standard for voluntary consent, the court explained that "[t]o be voluntary, consent must be free from coercion, express or implied," and when making this determination "the court must

consider the possibility of subtly coercive questions from those with authority, as well as the possibly vulnerable subjective state of the person who consents.” *Id.* at 17-18. Here, the officers asked defendant “five times within a period of about one and a half minutes” for permission, even though defendant continued to refuse. *Id.* at 18. The court went on to explain that:

The combination of multiple uniformed police officers surrounding an older homeless man and making repeated requests to search his backpack on a cold, dark night after he repeatedly asserted his right not to be searched leads us to the conclusion that Mr. Wright’s consent was the result of coercion and duress and therefore was not freely given.

Id. at 18-19. After establishing the officers did not have consent, the court also established that they did not have probable cause to search the backpack based on the tip. The court explained that while the tip was sufficient to create reasonable suspicion for a frisk of defendant, it did not create sufficient probable cause for a search of the backpack. The informant “did not provide any basis for his knowledge about the criminal activity,” and “did not predict any future behavior,” elements that would have demonstrated sufficient reliability for probable cause. *Id.* at 21. Because the officers did not have consent or probable cause to conduct the search, the court reversed the denial of the motion to dismiss and vacated defendant’s *Alford* plea.

Testimony from police officer that he smelled marijuana in defendant’s vehicle was not “inherently incredible” and supported reasonable suspicion for traffic stop.

[State v. Jacobs](#), COA22-997, ___ N.C. App. ___ (Sept. 19, 2023). In this New Hanover County case, defendant appealed the denial of his motion to suppress the results of a search of his vehicle, arguing error in finding reasonable suspicion for the traffic stop leading to the search. The Court of Appeals found no error.

In March of 2019, a Wilmington police officer was following defendant on a city street when he smelled the strong odor of marijuana coming from defendant’s vehicle. The officer eventually pulled defendant over, based solely on the smell coming from the vehicle. During the stop, the officer continued to smell marijuana, and asked defendant to step out of the vehicle; when defendant stepped out, the officer saw white powder and an open alcohol container. A search of the vehicle found heroin, MDNA, cocaine, and marijuana. At trial for possession and trafficking charges, defendant moved to suppress the results of the search, arguing he was not smoking marijuana while driving, and all the windows of his vehicle were closed, suggesting the officer could not have smelled marijuana coming from his vehicle and had no reasonable suspicion to initiate a stop. The trial court denied the motion, defendant pleaded guilty and appealed.

Taking up defendant’s arguments, the Court of Appeals first noted that normally the appeals court defers to the trial court’s determination of witness credibility when looking at testimony establishing reasonable suspicion. However, when the physical circumstances are “inherently incredible” the deference to a trial court’s determination will not apply. Slip Op. at 8, quoting *State v. Miller*, 270 N.C. 726, 731 (1967). Relevant to the current matter, applicable precedent held that “an officer’s smelling of unburned marijuana can provide probable cause to conduct a warrantless search and seizure, and that an officer’s smelling of such is not inherently incredible.” *Id.* Because the circumstances here were not “inherently incredible,” the court deferred to the trial court’s finding that the officer’s testimony was credible, which in turn supported the finding that the officer had reasonable suspicion to initiate the traffic stop.

Searches

Trial court provided curative instruction to disregard improperly admitted lay opinion testimony; warrantless blood draw was justified by exigent circumstances where defendant was unconscious and taken to a hospital after accident.

[State v. Burris](#), COA22-408, ___ N.C. App. ___ (July 5, 2023). In this Buncombe County case, defendant appealed his convictions for driving while impaired and reckless driving, arguing (1) there was insufficient evidence that he was driving the vehicle, and (2) error in denying his motion to suppress the results of a warrantless blood draw. The Court of Appeals majority found no error.

In November of 2014, a trooper responded to a single vehicle accident and found a heavily damaged pickup truck against a steel fence off the side of the road. Defendant was inside the vehicle, unconscious and seriously injured. The trooper noticed the smell of alcohol and open beer cans in the vehicle. Defendant was the owner of the wrecked vehicle and there were no other people at the scene of the accident. At the hospital, the trooper ordered a warrantless blood draw. The results of this blood draw were that defendant was intoxicated, and these results were admitted at trial. The jury subsequently convicted defendant of drunk driving solely on the grounds that his blood alcohol level was above the legal limit under G.S. 20-138.1(a)(2).

The Court of Appeals first considered (1), noting that admitting opinion testimony from the trooper that defendant was operating the vehicle was improper, as the trooper did not observe defendant actually drive the pickup truck. The court explained this was not reversible error because the trial court provided a curative instruction to the jury, directing them to disregard the trooper's testimony that defendant was the driver. The court found that sufficient evidence beyond the trooper's testimony supported finding that defendant was the driver, justifying denial of defendant's motion to dismiss.

Considering (2), the court explained that exigent circumstances supporting a warrantless blood draw almost always exist where a defendant is unconscious and being taken to a hospital. In *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), the Supreme Court's plurality held that normally law enforcement may order a warrantless blood draw when the suspect is unconscious and taken to a hospital for treatment, but that the defendant must have an opportunity to argue the lack of exigency and show an "unusual case" that would require a warrant. Slip Op. at 8. Here, the court found that defendant had such an opportunity, and found no error in admitting the results of the blood draw.

Judge Tyson concurred in the judgment on (1), but dissented by separate opinion regarding (2), disagreeing with the majority's application of *Mitchell* and the admission of the results obtained through the warrantless blood draw.

Criminal Offenses

General Crimes

Defendant made implied demand by tapping on car window with a gun and telling victim to open the door; multiple shots fired at the victim allowed the inference of intent for attempted murder; trial court properly found substantial similarity for out of state felony convictions.

[State v. Legrand](#), COA22-586, ___ N.C. App. ___ (July 5, 2023). In this Randolph County case, defendant appealed his convictions for attempted first-degree murder, attempted robbery with a dangerous weapon, and possession of a firearm by a felon, arguing error in denying his motions to dismiss for insufficient evidence, and error by the trial court in calculating his prior record level. The Court of Appeals found no error.

In October of 2018, defendant approached the victim at a convenience store and attempted to pull open the victim's driver's side door. The door was locked, so defendant tapped on the glass with a revolver while telling the victim to open the door. The victim opened the door and exited the vehicle, but then attempted to grab the gun from defendant. After a scuffle defendant fell to the ground, causing the gun to fire. As the victim fled, defendant fired two more shots at him, missing both times.

On appeal, defendant argued that since he made no express appeal for money or property, there was insufficient evidence to support his attempted robbery conviction. The Court of Appeals disagreed, noting that defendant "displayed a gun, threatened its use, and made an obvious implied demand." Slip Op. at 7. The court rejected defendant's argument that since the events did not occur in a retail setting his words could not be interpreted as an implied demand.

The court also rejected defendant's argument that intent for attempted murder could not be inferred by the multiple gunshots because his first shot was accidental, and his second and third shots were wide misses. Defendant also argued his intent could have been to scare or warn the victim, not kill him. The court explained that where multiple shots were fired and at least one was aimed at the victim, sufficient evidence existed to infer intent under *State v. Allen*, 233 N.C. App. 507 (2014). Likewise, the court held that defendant's poor aim did not negate the intent or support his argument of scaring or warning the victim, as the victim saw the gun pointed at him before the shots and other factors such as poor lighting likely influenced the accuracy.

Finally, the court rejected defendant's argument that the trial court did not properly find substantial similarity between the out-of-state offenses and in-state offenses. The court explained that defendant admitted no evidence to show improper calculation, and "[g]iven the [trial court's] indication of review in open court and its full execution of the sentencing worksheet finding substantial similarity, this Court presumes the trial court reached this finding properly." *Id.* at 12.

Habitual Felon

South Carolina conviction for larceny in 2005 properly served as a predicate offense for habitual felon status, despite changes to the statute rendering the offense not a felony in 2010.

[State v. Hefner](#), COA22-435, ___ N.C. App. ___ (June 6, 2023). In this Jackson County case, defendant appealed his sentence as a habitual felon, arguing that his South Carolina conviction for larceny could

not serve as a predicate conviction for habitual felon purposes as the statute in question no longer classifies the crime as a felony. The Court of Appeals disagreed, finding no error.

Defendant came to trial for stealing a TV from Wal-Mart in May of 2021. After being found guilty of felony larceny and possession of stolen goods, the trial proceeded to the habitual felon phase. The prosecution offered evidence of defendant's 2005 conviction in South Carolina for grand larceny. Defense counsel objected during the charge conference that the South Carolina code did not refer to the crime as a felony but was overruled; the trial court instructed the jury with the habitual felon status pattern jury instruction, using "crime" to refer to the 2005 conviction instead of "felony" at the request of the prosecutor. Defendant was convicted of habitual felon status and appealed.

The Court of Appeals first noted that the South Carolina larceny statute in question was changed in June of 2010 and the offense is no longer a felony, but the relevant consideration was the status of the offense at the time defendant was convicted. The court then explained that G.S. 14-7.1(b)(3) provides a mechanism for classifying crimes as felonies in states that do not explicitly refer to crimes as felonies or misdemeanors. To incorporate this mechanism, the pattern jury instruction in question was changed to permit the use of "felony" or "crime." Slip Op. at 8-9. Even if the use of "crime" in the present case was erroneous, the court held that the jury had ample evidence to determine the South Carolina conviction was a felony due to the evidence of defendant's conviction and the 2005 version of the statute in effect when he was convicted. The court likewise dismissed defendant's arguments that no substantial evidence of his felony conviction was admitted and that the indictment for habitual felon status was fatally flawed.

Homicide

Sufficient circumstantial evidence supported defendant's conviction for second-degree murder.

[State v. Wilkie](#), COA22-94, ___ N.C. App. ___ (May 16, 2023). In this Randolph County case, defendant appealed his conviction for second-degree murder, arguing error in denying his motion to dismiss due to no direct evidence he shot the victim. The Court of Appeals found no error.

Defendant was indicted for first-degree murder for the killing of another dump truck driver from the dump site where defendant worked. The jury ultimately convicted defendant of second-degree murder. On appeal, defendant argued that no direct evidence supported the conviction, and the circumstantial evidence was not sufficient to support his conviction. The Court of Appeals disagreed, noting extensive circumstantial evidence that defendant knew and worked with the victim, was seen with the victim shortly before the killing, and defendant was found next to the truck containing the victim with a gun. The court explained "[t]he State was not required to produce an eyewitness to the shooting or physical evidence linking Defendant to the gun as Defendant implies, considering the other substantial evidence." Slip Op. at 5.

Trial court properly refused defendant’s request for instruction on voluntary manslaughter where no evidence supported that he acted in the heat of passion; nature of the killing supported a finding of implicit malice for second-degree murder.

[State v. Gardner](#), COA22-781, ___ N.C. App. ___ (July 5, 2023). In this Guilford County case, defendant appealed his conviction for second-degree murder, arguing error in failure to provide a jury instruction on voluntary manslaughter. The Court of Appeals found no error.

Based on texts and cellphone evidence admitted at trial, defendant arranged to meet with the victim, a gay man, for a sexual encounter on June 9, 2017. The next morning, the Greensboro Fire Department found the victim’s car burned to the frame, with the skeletal remains of the victim inside the trunk. An autopsy determined the victim died of homicidal violence of undetermined means, and that he was most likely dead before being burned. A search of the apartment where defendant sometimes lived with his girlfriend found a missing 4’ x 4’ patch of carpet and blood stains matching the victim’s DNA. At trial defendant requested that the jury be instructed on the lesser-included offense of voluntary manslaughter, but the trial court denied this request, and noted defendant’s objection to the ruling to preserve appellate review.

The Court of Appeals found no evidence in the record to support the argument that defendant acted “in the heat of passion” justifying a voluntary manslaughter instruction. Defendant offered a theory that involved the victim’s HIV-positive status and the possibility of defendant becoming enraged when he discovered this after sexual activity. However, the court explained this theory was “pure speculation” and the record contained no evidence that defendant’s passion was “sufficiently provoked.” Slip Op. at 11. Because no evidence supported the required element of heat of passion to justify a voluntary manslaughter instruction, the court found no error.

The court also found the evidence admitted supported a finding of implicit malice for second degree murder, referencing *State v. Rick*, 126 N.C. App. 612 (1997), for the idea that “implicit malice can be inferred by the nature of the crime and the circumstances of [the victim’s] death.” Slip Op. at 13.

Defendant’s physical and sexual abuse of daughter represented torture and was proximate cause of death for purposes of first-degree murder by torture.

[State v. Smith](#), COA22-880, ___ N.C. App. ___ (July 18, 2023). In this Cumberland County case, defendant appealed his conviction for first-degree murder by torture, arguing error in (1) denying his motion to dismiss for failure to prove proximate cause, and (2) admitting testimony from two experts for the State. The Court of Appeals found no error.

In November of 2015, the victim, defendant’s 3-year-old daughter, was admitted to the hospital unconscious and with a body temperature of only 88 degrees. The care team at the hospital observed injuries that were indicative of physical and sexual abuse, including tearing of the victim’s anus and bruising on her labia and inner thighs, as well as contusions and hemorrhaging under the skin on her limbs and torso. The victim ultimately died at the hospital, and the cause of death was identified as “acute and organizing bilateral bronchopneumonia in the setting of malnutrition, neglect and sexual abuse.” Slip Op. at 5. At trial, the State called the emergency physician who treated the victim, as well as two other experts, the medical examiner who performed the autopsy and a developmental and forensic pediatrician. Defendant did not object to their testimony at trial. Defendant moved to dismiss the charges at the close of State’s evidence, arguing insufficient evidence to show that he withheld food or

hydration to proximately cause the victim's death. The trial court denied the motion, and defendant was subsequently convicted.

Taking up (1), the Court of Appeals held that defendant's conduct was torture sufficient to support the conviction. The court established that first-degree murder by torture does not require a showing of premeditation or specific intent to kill the victim, only a "course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure." *Id.* at 10, quoting *State v. Anderson*, 346 N.C. 158 (1997). Here extensive evidence in the record showed that the victim did not eat around defendant and lost weight when in his care. Evidence also showed that defendant would beat the victim for her lack of appetite, and defendant would withhold water from her as punishment. The court concluded that "[b]eating [the victim] with a belt, forcing her to exercise, withholding water, and sexually assaulting her" clearly constituted torture. Slip Op. at 11-12. The court then turned to proximate cause, explaining "[f]ar from being unfortunate and independent causes, [the victim's] starvation and pneumonia are the 'natural result' of Defendant's 'criminal act[s]' of violently and sexually abusing [the victim] . . . there was no break in the causal chain." *Id.* at 15. Because the victim's death was a reasonably foreseeable result of defendant's actions when applying the standard of a "person of ordinary prudence," the court concluded there was no error in denying defendant's motion. *Id.* at 16.

Looking to (2), the court applied a plain error standard as defendant did not object at trial to the testimony of either expert. Explaining that Rule of Evidence 702 governs expert testimony, the court first noted that it did not see error in the testimony of either expert. Presuming an error was committed, the court concluded the jury would likely have reached the same verdict without the challenged testimony due to the sheer weight of evidence against defendant.

Larceny, Embezzlement & Related Offenses

Single taking rule did not bar conviction for both larceny and obtaining property by false pretenses, and the offenses were not mutually exclusive.

[State v. White](#), COA22-369, ___ N.C. App. ___ (May 16, 2023). In this Union County case, defendant appealed his convictions, arguing error in denying his motion to dismiss either the larceny or obtaining property by false pretenses charge under the single taking rule. The Court of Appeals found no error.

In December of 2018, Defendant and two associates were captured on surveillance video at a Wal-Mart, using an empty child car seat box and a plastic bin to remove several thousand dollars' worth of electronics from a display case. As a part of the scheme to remove the property, defendant and his associates purchased the car seat through a self-checkout line for \$89, instead of the true value of the electronics hidden inside. At trial, defendant moved to dismiss the charges against him, a motion the trial court denied. The trial court instructed the jury on felony larceny, conspiracy to commit felony larceny, and obtaining property by false pretenses, and the jury convicted defendant of all three, as well as habitual felony status.

The Court of Appeals first explained that the single taking rule prevents a defendant from being charged multiple times in a single transaction. However, the court noted that "in each of the cases upon which Defendant relies. . . the defendant was charged with either larceny offenses or obtaining property by false pretenses, but not both." Slip Op. at 7. Previous decisions established that larceny and obtaining property by false pretenses are separate offenses with different elements; in particular, false and

deceptive representation is not an element of larceny. As a result, defendant's apparent purchase of a car seat, when he was actually hiding thousands of dollars of electronics inside, represented a distinguishable offense from larceny, and was not a duplicative charge.

The court also considered defendant's argument under *State v. Speckman*, 326 N.C. 576 (1990), that G.S. 14-100(a) requires the trial court to present larceny and obtaining property by false pretenses as mutually exclusive options for conviction. The court rejected this argument, noting that the crime in question for *Speckman* was embezzlement, which requires first obtaining property lawfully before wrongfully converting it, making it mutually exclusive from obtaining property by false pretenses. Unlike embezzlement, the court explained that "[t]he offenses of larceny and obtaining property by false pretenses are not mutually exclusive, neither in their elements. . . nor as alleged in the instant indictments." Slip Op. at 11-12.

Defendant who offered to act as financial advisor to victim and accepted check for \$17,500 did not act as a bailee for purposes of conversion of property by bailee.

[State v. Storm](#), COA22-685, ___ N.C. App. ___ (June 6, 2023). In this Guilford County case, defendant appealed his conviction for felony conversion of property by bailee, arguing he did not qualify as a bailee under the law. The Court of Appeals agreed, vacating the judgment.

In 2017, defendant accepted a check for \$17,500 from an acquaintance (the alleged victim), and promised to invest the money on her behalf. Defendant had previously told the acquaintance that he was a financial advisor, and the agreement to invest the money was memorialized in a promissory note between the parties. After several months, defendant stopped responding to the victim's communications about the money. The victim reported the issue to the Greensboro Police Department, and a detective conducted an investigation, including an interview with defendant. The investigation determined that defendant had never created an investment account for the money, and defendant no longer had the funds. Defendant was tried in February of 2022 for several charges, but after the trial court dismissed a computer access charge and an embezzlement charge, he was only convicted of felony conversion of property by bailee.

Taking up defendant's argument that he was not a bailee, the Court of Appeals first looked to the language of G.S. 14-168.1 and relevant caselaw. The court noted that "[t]raditionally, the object of bailment is a specific item of real property," and that older North Carolina caselaw used the term "chattel" in this context. Slip Op. at 7. Normally the court would look for a relationship where a bailee controlled property for a limited purpose and had agreed to return that specific property. Because the nature of a bailment agreement is usually one party holding and returning a specific item of property (in the same or some altered form), money is not normally the subject of bailment. Caselaw supported the principle that "whether a bailment relationship has been created with respect to money depends on whether the agreement requires the use of 'exact funds' as opposed to treating the money as fungible." *Id.* at 9. Here, the financial advisor relationship did not satisfy that test, as "[d]efendant was neither obligated nor expected to return the exact check given to him," and "he was entrusted with a complex series of decisions concerning the investment of the funds as a fungible asset." *Id.* at 11. Because defendant was not a bailee, he could not be convicted under the applicable statute.

Judge Arrowood concurred in the judgment only by separate opinion, recommending the Supreme Court of North Carolina revisit the concept of bailment and the return of "exact funds." *Id.* at 12.

Curative instruction coupled with testimony of second witness justified denial of motion for mistrial based on witness's improper testimony; defendant's actions did not represent intent to permanently deprive the victim of his vehicle, justifying dismissal of the charge and remand for judgment on unauthorized use of a motor vehicle.

[State v. Spera](#), COA22-814, ___ N.C. App. ___ (August 15, 2023). In this Union County case, defendant appealed his convictions for misdemeanor larceny of a vehicle and robbery with a dangerous weapon, arguing error in (1) denying his motion for a mistrial after the victim's testimony identifying him was ruled inadmissible, (2) denying his motion to dismiss the charge of larceny of a motor vehicle for insufficient evidence of intent to permanently deprive the victim, and (3) failure to instruct the jury on the concept of temporary deprivation. The Court of Appeals found no error in (1), but found merit in (2) and vacated defendant's conviction for larceny, remanding the case for entry of judgment on unauthorized use of a motor vehicle.

In April of 2017, defendant and several associates burst into a mobile home and robbed several friends who had gathered in the living room. Defendant, armed with a hammer, went through the pockets of the people gathered in the living room, and took the keys of one victim and went on a joyride in his truck, returning the truck 30 minutes later. The owner of the truck was allowed to leave unharmed, although some documentation in the truck was destroyed and a roadside safety kit had been taken out of the vehicle. When the matter reached trial, the victim testified that defendant was the man with the hammer who had robbed him. However, the testifying victim had initially identified defendant through a picture that was not disclosed to the defense, leading to an objection from defense counsel to his testimony. After voir dire and argument from both sides, the trial court struck the victim's identification of defendant and gave a curative instruction to the jury, but denied defendant's motion for a mistrial. The trial court also dismissed several charges against defendant but denied defendant's motion for the robbery and larceny of a motor vehicle charges.

Taking up (1), the Court of Appeals noted that review of the trial court's denial of a mistrial is highly deferential, and that a mistrial is only appropriate in situations where improprieties in the trial were so serious defendant could not receive a fair trial. Here, the court agreed that the victim's testimony was improper and that the trial court's curative instruction was likely too vague to remove the prejudice of the improper testimony. However, because the State offered a second witness that also identified defendant, and defense counsel conducted adequate cross-examination after the improper testimony, the court found that "albeit inadequate standing alone," the cumulative effect of these factors "defeats [defendant's] claim of a gross abuse of discretion by the trial judge." Slip Op. at 8. The court also rejected defendant's attempt to apply *State v. Aldridge*, 254 N.C. 297 (1961) to call into question the second witness's credibility.

Turning to (2), the court agreed with defendant that the State did not present evidence showing intent to permanently deprive the victim of his vehicle. Explaining the elements of larceny, the court noted that intent to permanently deprive the owner of possession must be shown to sustain a conviction, and this intent is typically shown by circumstantial evidence. However, "apart from the act of taking itself, additional facts must be present to support an inference of the requisite criminal intent, including both the intent to wrongfully take and the intent to permanently deprive the owner of possession." Slip Op. at 15. Here, the State pointed to defendant's use of force as evidence of intent, but the court rejected this argument, exploring precedent to show that force alone does not represent evidence of intent to permanently deprive the victim of their property. Defendant returned the truck to the victim willingly

after 30 minutes, representing only a temporary deprivation. The court concluded that the appropriate remedy here was the lesser-included offense of unauthorized use of a motor vehicle, and remanded for entry of judgment for that offense. This remand negated defendant's argument (3), which the court did not consider.

Motor Vehicle Offenses

Evidence showing defendant drove away from officers for several miles, exceeded speed limit, disregarded stop signs, and threw items from the vehicle supported finding specific intent to evade arrest.

[State v. Jackson](#), COA 22-922, ___ N.C. App. ___ (June 20, 2023). In this Johnston County case, defendant appealed her conviction for misdemeanor fleeing to elude arrest, arguing insufficient evidence of her specific intent to evade arrest. The Court of Appeals found no error.

In October of 2020, officers attempted to pull over defendant for driving through a stop sign at an apartment complex. Defendant initially did not stop, and instead sped up in a residential area, turned on her hazard lights, and called 911 to inquire if the vehicle attempting to pull her over was actually a police vehicle. Even after being advised that the car attempting to pull her over was a police vehicle, defendant kept driving, ignoring several stop signs and exceeding the speed limit. Defendant eventually returned to the apartment complex and stopped, where she was arrested. She was eventually convicted of misdemeanor possession of marijuana and misdemeanor fleeing to elude arrest.

Considering defendant's argument of insufficient evidence of her intent to evade arrest, the Court of Appeals disagreed, pointing to the substantial evidence of defendant's flight from officers. Defendant drove for several miles, passing many safe areas to pull over, at a rate of speed above the posted speed limit. She also threw marijuana out of the vehicle as she drove away from officers, and initially refused to comply when she stopped at the apartment complex. The court explained "[t]his is not a case of a nervous motorist taking a moment longer than necessary to stop for an officer in order to pull into a well-lit or populated parking lot." Slip Op. at 7, quoting *State v. Cameron*, 223 N.C. App. 72 (2012).

Obstruction of Justice and Related Offenses

Participants in Crime

Indictment for aiding and abetting possession of a firearm by a felon was not fatally defective; sufficient evidence supported the aiding and abetting conviction.

[State v. Gunter](#), COA22-669, ___ N.C. App. ___ (May 16, 2023). In this Cleveland County case, defendant appealed his conviction for aiding and abetting possession of a firearm by a felon, arguing a fatally defective indictment and error in dismissing his motion to dismiss for insufficient evidence. The Court of Appeals disagreed on both points and found no error.

Detectives in an unmarked vehicle observed a black pickup truck swerve left of the center line several times while driving, and initiated a traffic stop. Defendant was seated in the passenger seat of the truck when the detectives approached. The driver of the vehicle was known to be a felon by the detectives, and they conducted *Terry* frisks of defendant and the driver of the truck, finding .32 caliber ammunition in the pocket of the driver. After finding the ammunition, the detectives searched the truck, finding a

handgun inside the glovebox and another hidden under the center seat, as well as magazines and ammunition around the vehicle.

Reviewing defendant's challenge to the indictment, the Court of Appeals first explained the necessary elements of aiding and abetting another person in a crime, and then the necessary elements of possession of a firearm by a felon. Turning to the text of the indictment, the court found all the necessary elements for the crime, overruling defendant's argument.

The court next looked to the sufficiency of the evidence, explaining that defendant argued no proof of his intent to commit the crime, even though the elements of the offense do not include an intent requirement, because the indictment referenced his knowledge of the driver's prior felony conviction. Looking at the evidence in the record, the court found sufficient evidence that defendant provided a firearm to the driver of the vehicle, and that defendant was aware of the driver's prior felony conviction. This led the court to conclude sufficient evidence existed to support the conviction.

Sexual Assaults & Related Offenses

Court applied four-factor analysis to determine two of defendant's convictions for indecent liberties were actually one continuous transaction.

[State v. Calderon](#), COA22-822, ___ N.C. App. ___ (Sept. 5, 2023). In this Wake County case, defendant appealed his three indecent liberties with a child convictions, arguing his actions represented only one continuous act rather than three separate incidents. The Court of Appeals majority held that the evidence only supported two convictions, not three, and remanded the case so that the trial court could arrest judgment on one of the convictions and resentence defendant accordingly.

In 2019, defendant met the thirteen-year-old victim after a church service at the home where he rented a room in Raleigh. After a second conversation with the victim at a pool party, defendant became friends with her on social media platforms. On July 5, 2019, defendant showed up at the house where the victim lived while her grandmother was away. Testimony about the events after this varied, as the victim testified that defendant forcibly pulled her into his van and made sexual contact with her, while neighbors observed the two inside defendant's van kissing without any apparent coercion. Defendant testified that the victim messaged him asking him to come over and that she came willingly into his van where they kissed but did not engage in other sexual conduct. After a trial, defendant was convicted of three counts for (1) kissing the victim outside his van, (2) kissing the victim on the mouth inside his van, and (3) a second count of kissing the victim on the mouth inside his van. Defendant was found not guilty of other charges related to sexual conduct with the victim.

Taking up defendant's appeal, the majority agreed that the evidence did not support three distinct charges of indecent liberties. The court first determined that defendant's actions represented "touching" not "sexual acts" for purposes of the indecent liberties charges. After establishing the acts were touching, the court considered relevant caselaw on continuous transactions as opposed to separate and distinct acts. Because no North Carolina case was directly on point, the court turned to a Kansas Supreme Court decision, *State v. Sellers*, 292 Kan. 346 (2011), to adopt a four-factor analysis applicable to "indecent liberties offenses involving multiple, non-sexual acts." Slip Op. at 18. The four factors are:

(1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct.

Id. at 17, quoting *Sellers*.

Applying the factors to the current case, the court concluded that the acts of kissing outside the van and inside the van were distinct, as they were in different locations and there was an intervening event of getting into defendant's van before engaging in a second episode of kissing. The same framework led the court to conclude the kissing inside the van was one continuous transaction as the kisses took place close in time and were not separated by any intervening act. This supported arresting judgment on the third conviction, and resentencing defendant accordingly.

Judge Stading concurred in part and dissented in part by separate opinion, concurring with the majority's adoption of the test from *Sellers* but dissenting from the conclusion that it called for dismissal of one of the three convictions.

Weapons Offenses

State presented insufficient evidence that passenger in the front seat of a vehicle with other occupants had constructive possession of firearm found in the back seat.

[State v. Sharpe](#), COA22-491, ___ N.C. App. ___ (May 16, 2023). In this Nash County case, defendant appealed his conviction for possession of a firearm by a felon, arguing insufficient evidence to establish his constructive possession of the firearm. The Court of Appeals agreed, reversing and remanding for resentencing.

In May of 2020, a problem oriented policing team was attempting to prevent retaliatory shootings by locating individuals that may have been involved in the incidents, and defendant was identified as one person possibly involved. Officers located a vehicle with defendant inside and initiated a traffic stop; defendant was in the front passenger seat of the vehicle. After the stop, defendant exited the vehicle and went inside a gas station, where he resisted being frisked, leading to the officers tasing him and detaining him in the police car. Searching the vehicle, the officers found a rifle in the backseat and ammunition between the driver and passenger seats. No DNA or fingerprints were taken from the firearm. At trial, defendant testified that the vehicle was his mothers, and he was not allowed to drive it because he did not have a license. Defendant also called a witness who testified that he was another passenger in the vehicle and the firearm was his. Despite the testimony, defendant was convicted of resisting a public officer and possession of a firearm by a felon, and he appealed the firearm charge.

On appeal, the Court of Appeals first noted that to establish constructive possession, the prosecutor was required to prove that defendant had the "power and intent to control' the disposition or use of the firearm." Slip Op. at 6, quoting *State v. Taylor*, 203 N.C. App. 448 (2010). Here, the state attempted to show this by first arguing that defendant was the custodian of the vehicle, pointing to *State v. Mitchell*, 224 N.C. App. 171 (2012). The court did not agree with this analysis, examining the relevant caselaw and concluding that "under our existing case law, the driver was *also* a custodian of the vehicle. As such, the evidence fails to show Defendant was in *exclusive* possession of the vehicle at the time the rifle was found." Slip Op. at 9. The court looked for additional incriminating circumstances that could link defendant to constructive possession of the firearm, but found none, concluding "the evidence, without

more, is not sufficient to support a finding Defendant, while seated in the front passenger seat and one of four occupants, was in constructive possession of a firearm found in the rear passenger compartment of a vehicle not owned or operated by Defendant.” *Id.* at 12.

Proximity and indicia of control supported finding that defendant constructively possessed firearm for possession of a firearm by a felon conviction.

[State v. Livingston](#), COA22-678, ___ N.C. App. ___ (Sept. 19, 2023). In this Brunswick County case, defendant appealed his conviction for possession of a firearm by a felon, arguing error in the denial of his motion to dismiss for insufficient evidence. The Court of Appeals found no error.

In June of 2020, deputies with the Brunswick County Sheriff’s Office began observing a vehicle that entered a known drug area. After the vehicle ran a stop sign and went 70 mph in a 55 mph zone, they pulled the vehicle over. Defendant was in the passenger seat when the deputies approached, and they observed marijuana on both the driver and defendant, leading to a search of the vehicle. The search found a bag containing a gun and a smaller crown royal bag containing three identification cards with defendant’s name and picture on them. Defendant admitted to the police he was a felon, and he was arrested for possessing a gun. At trial, defendant moved to dismiss, arguing the evidence had not established the gun was his. The trial court denied the motion and defendant was subsequently convicted.

The Court of Appeals first explained that “possession” for purposes of defendant’s conviction could be actual or constructive; here defendant was not in actual possession, so the caselaw regarding constructive possession in a vehicle applied to defendant’s appeal. To show constructive possession in this situation, the State is required to show “other incriminating circumstances” to allow a finding of constructive possession. Slip Op. at 7. The court noted that two common factors used to satisfy the “incriminating circumstances” inquiry were (1) proximity, and (2) indicia of control. *Id.* Here, (1) the bag containing the gun was located behind the passenger seat where defendant was sitting, and (2) the gun was touching a crown royal bag containing a wallet with defendant’s identification cards in it. The combination of these two factors supported the finding that defendant constructively possessed the gun.

Defenses

Self-Defense

Court of Appeals incorrectly ordered new trial where evidence in the record, in the light most favorable to the State, supported inference that defendant acted as the aggressor.

[State v. Hicks](#), 136PA22, ___ N.C. ___ (Sept. 1, 2023). In this Randolph County case, the Supreme Court majority reversed the Court of Appeals decision overturning defendant’s conviction for second-degree murder, finding no error by the trial court.

In June of 2017, after a tumultuous affair involving the use of methamphetamine, defendant shot the victim while he was in her home. Defendant called 911 to report her shooting of the victim, who was in her bedroom at the time he was killed. An investigation found that the victim was shot in the back and evidence suggested that the shots were fired from more than six inches away. Defendant was indicted for second-degree murder; during trial the court instructed the jury on the aggressor doctrine over

defendant's objection. After defendant was convicted, she appealed, arguing the trial court erred by providing instruction on the aggressor doctrine. The Court of Appeals agreed, ordering a new trial.

The Supreme Court noted that the appropriate inquiry was whether evidence in the record, when interpreted in the light most favorable to the State, supported the conclusion that defendant was the aggressor, and determined that the Court of Appeals failed to properly apply the standard in the current case. The self-defense "castle doctrine" provisions of G.S. §§ 14-51.2 and 14-51.3 allow a person to use deadly force to defend themselves in their home; the "aggressor doctrine" in G.S. 14-51.4 removes this defense if the jury finds that the defendant initially provoked the confrontation and no exceptions apply. When determining whether an instruction on the aggressor doctrine is appropriate, "a trial court must consider whether a jury could reasonably infer from the evidence that the defendant acted as an aggressor." Slip Op. at 15. When making this determination, "the court must view the record in the light most favorable to the State, drawing all reasonable inferences in its favor." *Id.* Here, defendant's testimony at trial contradicted her previous statements, and contained new details not previously disclosed. The Supreme Court pointed out that physical evidence also seemed to contradict defendant's version of events. Because "there was significant evidence from which a jury reasonably could conclude that [defendant] was the aggressor," the trial court provided the proper instruction on the aggressor doctrine, and the Court of Appeals incorrectly ordered a new trial. *Id.* at 21.

Justice Dietz, joined by Justice Berger, concurred by separate opinion to draw a distinction between common law aggressor doctrine and G.S. 14-51.4. *Id.* at 22.

Justice Morgan, joined by Justice Barringer, dissented by separate opinion, and would have found that the aggressor doctrine instruction was inappropriate in this case. *Id.* at 25.

Justice Barringer, joined by Justice Morgan, dissented by separate opinion, and would have held that the speculative evidence in the current case was insufficient to support the conclusion that defendant was the aggressor. *Id.* at 28.

Post-Conviction Proceedings

Motions for Appropriate Relief

Trial court properly denied defendant's MAR without evidentiary hearing where witness who recanted identification did not testify under oath due to defendant's *Alford* plea.

[State v. Brown](#), COA22-525, ___ N.C. App. ___ (August 15, 2023). In this Guilford County case, defendant petitioned for a writ of certiorari, arguing error in denial of his motion for appropriate relief (MAR) after a witness recanted her identification of defendant as the shooter in a homicide. The Court of Appeals majority denied the petition.

In August of 2015, the victim was shot at a Greensboro apartment complex. Surveillance video showed defendant at the apartment complex, along with another man and a woman. Based upon statements from witnesses, the three were there to purchase Xanax from the girlfriend of the victim. Defendant and his male associate were in a gang that was rivals with the victim's gang. After the shooting, both of defendant's associates gave statements to the police identifying him as the shooter. In 2017, defendant entered an *Alford* plea to second-degree murder and an unrelated robbery charge prior to reaching trial. Five years later, the woman who visited the apartment complex with defendant recanted her statement

identifying defendant as the shooter, instead identifying defendant's fellow gang member as the shooter. Defendant subsequently filed a MAR in April of 2022 based upon the recanted statement, which the trial court denied without an evidentiary hearing.

The Court of Appeals explained that the trial court was correct to deny the MAR without an evidentiary hearing, as defendant's choice to enter an *Alford* plea meant that the witness did not offer "testimony" as that term is normally defined. The witness's statement to police was unsworn, and because the matter did not go to trial, she was never called to testify and put under oath. Although G.S. 15A-1415(c) provides that a defendant may file an MAR for recanted testimony, "the unsworn statement given to law enforcement—upon which defendant purports reliance for his guilty plea—does not properly align with the definition of testimony." Slip Op. at 6. The court concluded that declining to hold an evidentiary hearing was proper, as G.S. 15A-1420 only calls for an evidentiary hearing when the trial court is presented with questions of fact, and the issue here was purely a determination of law.

Judge Riggs dissented by separate opinion, and would have remanded for an evidentiary hearing on the MAR, disputing the majority's narrow interpretation of "testimony." *Id.* at 17.