

Magistrate's Spring Conference Criminal Law Update March 16, 2022

Cases covered include published criminal and related decisions from the U.S. Supreme Court, the Fourth Circuit Court of Appeals, and North Carolina appellate courts decided between March 1, 2022, and October 5, 2021. Summaries are prepared by School of Government faculty and staff. To view all of the case summaries, go the [Criminal Case Compendium](#). To obtain summaries automatically by email, sign up for the [Criminal Law Listserv](#). Summaries are also posted on the [North Carolina Criminal Law Blog](#).

Stops and Seizures

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

[State v. Jonas](#), ___ N.C. App. ___, 2021-NCCOA-660 (Dec. 7, 2021). In this Cabarrus County case, the defendant was convicted of possession of a Schedule II controlled substance based on 0.1 grams of methamphetamine found in a backpack in the trunk of a vehicle in which the defendant was a passenger. The defendant moved to suppress the evidence on the basis that it was seized in connection with a traffic stop that was not supported by reasonable suspicion. The trial court denied the motion. Defendant pled guilty, without a plea arrangement with the State, and appealed.

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

(2) The officer who stopped the car in which the defendant was traveling testified that he stopped the car because it emerged from the empty parking lot of a closed business, a trailer had recently been stolen in that area, and the car was equipped with transporter plate, which the officer had never seen placed on a vehicle other than a truck. The Court of Appeals noted that, despite the officer's belief to the contrary, G.S. 20-79.2 "clear[ly] and unambiguous[ly]" permits transporter plates to be used on motor vehicles generally, not just trucks. Though the Fourth Amendment tolerates objectively reasonable mistakes, the Court concluded that the officer's mistake about the transporter plates was not objectively reasonable because the statute was not ambiguous. Thus, the officer's belief regarding the transporter plates could not support reasonable suspicion. The Court determined that the additional

facts that the business was closed and there was a recent trailer theft in the area were insufficient to support reasonable suspicion. Accordingly, the Court held that the trial court erred in denying the defendant's motion to suppress. It reversed the trial court's order and remanded the case to the trial court for entry of an order vacating the defendant's guilty plea.

Reasonable suspicion of trespassing, impaired driving, and illegal parking supported stop of defendant parked in high school parking lot during school hours, even without presence of crossbow in backseat; crossbow alternatively provided reasonable suspicion and any mistake of law as to the legality of the weapon on school property was reasonable

[U.S. v. Coleman](#), 18 F.4th 131 (Fourth Cir. 2021). A school official in the Western District of Virginia noticed a man parked in the high school's parking lot one morning as the school day began. The man appeared to be asleep in his car and had a crossbow in the backseat. The car was running, had its brakes on, and was parked partially in a lane of travel. The school resource officer responded. As the deputy pulled behind the defendant's car, the defendant began to drive away. The deputy then stopped the car. He saw the crossbow upon making contact and asked the defendant about other weapons. The defendant acknowledged a gun in the car, and the deputy asked him out of the car. As the defendant exited, the deputy noticed apparent marijuana inside. The defendant appeared tired and submitted to field sobriety testing. The car was searched and a gun, baggies, a scale, and methamphetamine was discovered. The defendant was charged with various federal drug and gun offenses and moved to suppress, arguing that the stop was unjustified because possession of a crossbow on school grounds is not illegal in Virginia. The district court denied the motion, finding that the deputy had reasonable suspicion to stop the vehicle based on the corroborated report from the school official about a sleeping man on school grounds with a weapon and the defendant's driving away upon the deputy's approach. It further found that any mistake by the deputy about the legality of the crossbow on school grounds was an objectively reasonable mistake of law under *Heien v. N.C.*, 574 U.S. 54 (2014). The defendant was convicted at trial and sentenced to 211 months.

On appeal, a unanimous panel of the Fourth Circuit affirmed. Even without the crossbow, the deputy had reasonable suspicion to stop the defendant's car for suspicion of trespassing on school grounds, impaired driving, and illegal parking. In the alternative, the court found that the crossbow provided reasonable suspicion by itself or in combination with other factors. The deputy was not required to ignore the presence of a strange man with a weapon on school grounds, whether or not the crossbow was legal to possess. "Here, as in *Terry*, the underlying behavior does not have to be illegal for us to conclude that Deputy Johnson had reasonable suspicion to stop Coleman." *Id.* at 15. The district court's denial of the motion to suppress was therefore affirmed.

Though none of the circumstances alone would satisfy constitutional requirements, together they provided officers with reasonable suspicion to stop the defendant

[State v. Royster](#), ___ N.C. App. ___, 2021-NCCOA-595 (Nov. 2, 2021). In this Forsyth County case, the defendant was charged with possession of a firearm by a felon, several drug crimes including trafficking opium or heroin by possession, possession of a weapon on school property, and attaining the status of habitual felon after an investigatory stop on school grounds stemming from an anonymous tip. The police received a detailed anonymous report saying that a black male named Joseph Royster who went by the nickname "Gooney" had heroin and a gun in the armrest of his black Chevrolet Impala with a specific license plate number, that he was wearing a white t-shirt and blue jeans, had gold teeth and a gold necklace, and that he was parked near South Fork Elementary School. An experienced officer who

received the tip searched a police database that showed a person by that name as a black male with gold teeth and a history of drug and weapon charges. Officers went to the named elementary school, saw a vehicle with the specified license plate number matching the description in the tip in the parking lot, and eventually saw a person matching the description in the tip return to the vehicle. When that person quickly exited the vehicle, reached back into it and turned it off, began to walk away from officers and reached for his waistband, officers frisked him for weapons and detained him for a narcotics investigation. The defendant moved to suppress, arguing that officers did not have reasonable articulable suspicion for the stop. The trial court denied the motion and the defendant pled guilty.

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

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

Other Suppression Issues

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

[State v. Lane](#), ___ N.C. App. ___, 2021-NCCOA-593 (Nov. 2, 2021). In this Wake County case, evidence of the defendant's crimes was obtained using a GPS tracking device installed, pursuant to a court order, on a car owned by Sherry Harris and driven by Ronald Lee Evans. Evans was the target of the investigation. When officers intercepted the vehicle as it returned from a trip to New York, the defendant was driving, and Evans was a passenger. The defendant ultimately pled guilty to attempted trafficking and trafficking heroin by transportation and preserved his right to appeal the denial of his motion to suppress the GPS evidence.

The Court of Appeals concluded that the defendant did not have standing to challenge use of the GPS device. Under the common law trespass theory of a search, a search happens when government agents intrude into a constitutionally protected area to obtain information. Here, the defendant offered no

evidence that he possessed the car to which the GPS device was attached such that any trespass by the government violated his rights as opposed to the rights of the owner (Harris) or usual driver (Evans). Likewise, under a reasonable expectation of privacy theory, the defendant could not show that he had a reasonable expectation of privacy in his movements in someone else's car on a public thoroughfare. To the contrary, the Court said, "[f]or the Defendant, the [car] was a vehicle for a trip to conduct a heroin transaction. Defendant did not have a reasonable expectation of privacy to confer standing to challenge the court order issue on probable cause." Slip op. ¶ 30.

Recent occupant of car did not have standing to challenge search or stop when he was not actually present at the time and otherwise had no possessory or other interest in the property

[U.S. v. Smith](#), 21 F.4th 122 (Fourth Cir. 2021). Greensboro police were surveilling a nightclub and saw the defendant leave in a car with a known felon around 2 am. The defendant was sitting in the front passenger seat of car, which police followed from the nightclub to a gas station. Officers believed the car had a fake license plate, but it was later determined that an officer misread the license plate number. At the gas station, the defendant exited the car with the driver and was inside the convenience store when police arrived. The backseat passenger was in the parking lot at the time and was detained at gunpoint by law enforcement. Officers shined a light inside the car the men had been travelling in and immediately saw a gun on the floorboard of the front passenger area. Another officer soon noticed a second gun. Two other officers approached the two men inside the store and informed the defendant he was being detained for fictitious tags. The defendant immediately stated that the car did not belong to him. During the encounter inside the store, the officers did not know that guns had been discovered in the car by other officers outside. A full search of the car led to the discovery of heroin on the front passenger side of the car, where the defendant had been sitting, along with the defendant's cell phone. When the defendant was informed that he was being charged with trafficking heroin, he protested that the drugs did not weigh more than 3.5 grams and were therefore under the state trafficking amount of 4.0 grams. The drugs in fact weighed 3.3 grams. The defendant was charged with various federal drug and gun offenses and moved to suppress. The trial court denied the motion, and the Fourth Circuit affirmed.

It is the defendant's burden to demonstrate a reasonable expectation of privacy in property in order for Fourth Amendment protections to apply. Here, the defendant neither owned nor claimed any other interest in the car searched by the police. "[I]f a passenger asserts neither a property or possessory interest in the car and simultaneously disclaims any interest in the seized objects, that passenger normally has no legitimate expectation of privacy." *Smith* Slip op. at 6-7 (citation omitted). The presence of the defendant's cell phone in the car was another factor to be considered but was insufficient on its own to confer an expectation of privacy in the car, particularly in light of the fact that the defendant left it in the car when he went inside the store. According to the court: "When someone leaves personal belongings behind in another's car, he assumes the risk that the car's owner will consent to a search of the car or that the car's contents will come into plain view of the police." *Id.* at 8 (citation omitted). The fact that the defendant was detained inside the store also did not convert the defendant from a recent passenger to an actual one. Once inside, the defendant appeared to ignore the activity in the parking lot outside and admitted to attempting to mislead the police inside about his connection to the car. "Smith cannot initially pretend to be unassociated with the Malibu and then later declare a privacy interest in it. Such conduct suggests that his assertion of privacy is contrived rather than legitimate." *Id.* at 9. For the same reasons that the defendant lacked standing to object to the search of the car, he lacked standing to challenge the stop of the vehicle, and the district court was correct to deny the suppression motion.

Other challenges were similarly rejected, and the district court’s judgment affirmed in all respects. Judge Wynn dissented in part and dissented in judgment. He would have granted the defendant a new trial based on the trial court’s failure to instruct on a lesser-included drug offense, but otherwise concurred in the majority opinion.

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

[State v. Robinson](#), __ N.C. App. __, 2021–NCCOA–533 (Oct. 5, 2021). The defendant was indicted for trafficking opium and possession of a firearm by a felon, and he filed a motion to suppress evidence obtained during a search of his residence on the grounds that the officers executing the search turned off their body cameras after conducting the initial walk-through of the residence. The trial court denied the motion to suppress, finding that there was no evidence of bad faith and no showing that any materially exculpatory evidence was lost – only potentially useful evidence was lost. The defendant pleaded guilty, and the trial court declined the defendant’s request to make a substantial assistance deviation at sentencing, but did make note of his assistance and imposed one consolidated sentence of 90 to 120 months. The defendant filed a notice of appeal and a petition for *writ of certiorari*.

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

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

Crimes

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

[Gift Surplus, LLC v. State of North Carolina](#), __ N.C. __, 2022-NCSC-1 (Feb. 11, 2022). The plaintiffs sought a declaratory judgment that their sweepstakes video games were lawful and did not violate [G.S. 14-306.4](#) (banning certain video sweepstakes games). For the third time, the North Carolina Supreme

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

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

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

The Court of Appeals majority opinion below held that the games violated the statute regardless of whether or not they were games of chance because the games constituted an “entertaining display” under the statute. This was error, as entertaining displays are not banned under the statute unless the game is one of chance. “Any doubt about whether the statute is only concerned with games of chance is resolved by subsection (i), the statute’s ‘catch-all provision,’ which prohibits sweepstakes through ‘[a]ny other video game not dependent on skill or dexterity.’” *Id.* at 12. The Court of Appeals was consequently affirmed as modified.

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

[State v. Dew](#), ___ N.C. ___, 2021-NCSC-124 (Oct. 29, 2021). There was sufficient evidence that the defendant committed multiple assaults against his girlfriend and the Court was equally divided as to whether there was sufficient evidence to establish that the defendant used his hands, feet, or teeth as deadly weapons. The Court characterized “the question of how to delineate between assaults—to know where one assault ends and another begins—in order to determine whether the State may charge a defendant with multiple assaults” as an issue of first impression. Reviewing case law, the Court explained that a single assault “might refer to a single harmful contact or several harmful contacts within a single incident,” depending on the facts. The Court declined to extend the three-factor analysis of *State v. Rambert*, 341 N.C. 173 (1995), applicable to discharging a firearm into occupied property, to assault cases generally, saying that the *Rambert* factors were “not the ideal analogy” because of differences in the nature of the acts of discharging a firearm and throwing a punch or kick. The Court determined that a defendant may be charged with more than one assault only when there is substantial evidence that a “distinct interruption” occurred between assaults. Building on Court of Appeals jurisprudence, the Court said:

[W]e now take the opportunity to provide examples but not an exclusive list to further explain what can qualify as a distinct interruption: a distinct interruption may take the form of an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another.

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

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

In this human trafficking case involving multiple victims, (1) the indictments were sufficient to convey subject matter jurisdiction; (2) Trial court did not err by entering judgments for multiple counts of human trafficking for each victim

[State v. Applewhite](#), ___ N.C. App. ___, 2021-NCCOA-610 (Dec. 21, 2021). (1) The Court of Appeals rejected the defendant’s arguments concerning the sufficiency of the seventeen indictments charging him with human trafficking of six different victims. The Court noted that the indictments alleged every element of the offense within a specific time frame for each victim and tracked the language of the relevant statute word for word.

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

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

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

[State v. Tucker](#), ___ N.C. ___, 2022-NCSC-15 (Feb. 11, 2022). In this case from Mecklenburg County, the defendant was convicted of violating a domestic violence protective order (“DVPO”) while in possession of a deadly weapon, as well as felony breaking or entering in violation of the DVPO, assault with a deadly weapon, and assault on a female. The defendant was served with an ex parte DVPO and a notice of hearing on the question of a permanent DVPO. He failed to attend the hearing, and a year-long DVPO was entered in his absence. On appeal, a unanimous Court of Appeals vacated the breaking or entering

and DVPO violation convictions, finding that the defendant lacked notice of the permanent DVPO and therefore could not have willfully violated that order (summarized [here](#)). On discretionary review, the North Carolina Supreme Court reversed.

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

Defendant's statement, 'I know,' in addition to his other statements, conduct, and the timing of such conduct, supports this holding. The existence of evidence that could support different inferences is not determinative of a motion to dismiss for insufficient evidence. The evidence need only be sufficient to support a reasonable inference. *Tucker* Slip op. at 10 (citations omitted).

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

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

[State v. Taylor](#), ___ N.C. ___, 2021-NCSC-164 (Dec. 17, 2021). The facts of this case were previously summarized following the Court of Appeals decision in *State v. Taylor*, 270 N.C. App. 514 (2020), available [here](#). Briefly, the defendant in this case wrote several social media posts allegedly threatening an elected district attorney over her decision not to seek criminal charges in connection with the death of a child. The defendant was convicted of threatening a court officer under G.S. 14-16.7(a) and appealed. The Court of Appeals held that the defendant's convictions were in violation of the First Amendment and vacated the conviction. The state sought and obtained discretionary review at the state Supreme Court. The higher court concluded that the defendant's conviction was properly vacated but remanded the case for a new trial rather than entry of a judgment of acquittal.

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

Undertaking its own review, the state Supreme Court noted that the First Amendment broadly protects the fundamental right of free speech, and only certain limited categories of speech involving obscenity, defamation, incitement, fighting words, and “true threats” can be constitutionally restricted. The court reviewed *Watts v. United States*, 394 U.S. 705 (1969), which distinguished true threats from other types of protected speech. The court identified three factors from *Watts* that were relevant to evaluating the case at hand, although no single factor is dispositive: (i) the statute at issue must be interpreted with the First Amendment in mind; (ii) the public’s right to free speech is even more substantial than the state’s interest in protecting public officials; and (iii) the court must consider the context, nature and language of the statement, and the reaction of the listener. Next, the court reviewed the fractured opinions from another true threats case, *Virginia v. Black*, 538 U.S. 343 (2003). After considering the contrasting interpretations offered by the state and the defendant in the present case as to how *Black’s* holdings should be construed, the court ultimately concluded that “a speaker’s subjective intent to threaten is the pivotal feature separating constitutionally protected speech from constitutionally proscribable true threats.” Based on the precedent above and reiterating the importance of the free speech interest at stake, the court held that a true threat is defined as “an objectively threatening statement communicated by a party which possesses the subjective intent to threaten a listener or identifiable group,” and “the State is required to prove both an objective and a subjective element in order to convict defendant under N.C.G.S. § 14-16.7(a).”

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

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

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

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

[In Re: Z.P.](#), ___ N.C. App. ___, 2021-NCCOA-655 (December 7, 2021). In this Iredell County case, the juvenile, “Sophie,” was adjudicated delinquent for communicating a threat of mass violence on educational property in violation of G.S. 14-277.6 after making a statement, in the presence of four classmates, that she was going to blow up the school. She was also adjudicated delinquent for communicating a threat to harm a fellow student in violation of G.S. 14-277.1 after stating that she was going to kill him with a crowbar and bury him in a shallow grave. Sophie argued that the State failed to present sufficient evidence to support the allegations of the charged offenses.

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

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

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

[State v. Steele](#), ___ N.C. App. ___, 2022-NCCOA-39 (Jan. 18, 2022). The defendant was close friends with older couple in Pamlico County. They considered each other family. When the husband of the couple unexpectedly died, the defendant offered to assist the surviving widow. She ultimately turned over complete control of her finances to the defendant. Two months later, she signed a power of attorney making the defendant her attorney in fact and named the defendant as the primary beneficiary of her will. Money was withdrawn from the widow’s accounts and deposited into new bank accounts opened jointly in the names of the widow and the defendant. The defendant then used the widow’s funds to make personal purchases and pay individual debts. Additionally, some of the widow’s funds were automatically withdrawn by the bank from the joint accounts to cover overdrafts owed by the defendant on his individual bank accounts. After the discovery that more than \$100,000.00 had been withdrawn from the widow’s accounts, the defendant was charged with embezzlement and multiple counts of exploitation of an older adult. At trial, the defense requested a special jury instruction regarding the rights of joint account holders based on provisions in Chapter 54C (“Savings Banks”) of the North Carolina General Statutes. The trial court declined to give the proposed instruction, the jury convicted on all counts, and the defendant was sentenced to a minimum 73-months imprisonment.

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

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

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

Contempt

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

[State v. Robinson](#), ___ N.C. App. ___, 2022-NCCOA-61 (Feb. 1, 2022). In this Gaston County case, the defendant was summarily found in direct criminal contempt by a magistrate. The contempt order arose out of a situation where the defendant came to the magistrate’s office to report a death threat she had received on her cell phone. The magistrate declined to look at the phone because cell phones were not permitted in the courtroom. The magistrate then told the defendant “that she needed to leave and take

the cell phone out or [he] would hold her in contempt.” ¶ 5. The magistrate sat in silence for two or three minutes while the defendant repeated her claim, and then shut the blinds to the magistrate’s window, saying “we’re finished.” *Id.* The defendant left and made it to her car, but by that point the magistrate had informed the sheriff’s office that he was holding the defendant in contempt. Officers returned the defendant to the courtroom where the magistrate, without any additional proceedings, passed the contempt order through the window and gave it to the defendant. On appeal, the superior court found, among other things, that the magistrate told the defendant “that she was going to have to leave the courtroom and stop arguing with him, or he would hold her in contempt of court.” ¶ 8. The superior court concluded that the magistrate twice gave the defendant summary notice of the contempt charge and the conduct on which it was based, and then gave the defendant an opportunity to respond. The superior court entered an order holding the defendant in contempt and sentenced her to 48 hours of time already served.

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

The Court went on to note that the superior court appeared to be reviewing validity of the proceedings leading up to the magistrate’s order rather than conducting a *de novo* review. Moreover, the Court noted that summary contempt proceedings by the magistrate were not appropriate in any event where the contempt was not imposed substantially contemporaneously with the offending acts. Here, the magistrate effectively closed court by closing the window blinds and did not actually hold the defendant in summary contempt until she had left the courtroom for her car. Once court was closed, there was no proceeding to be delayed or disrupted, and summary contempt proceedings were therefore inappropriate.

The Court therefore reversed the finding of contempt.

Criminal Procedure

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

[State v. Clegg](#), ___ N.C. ___, 2022-NCSC-11 (Feb. 11, 2022). The defendant was tried for armed robbery and possession of firearm by felon in Wake County. When the prosecution struck two Black jurors from the panel, defense counsel made a *Batson* challenge. The prosecution argued the strikes were based on the jurors’ body language and failure to look at the prosecutor during questioning. The prosecution also pointed to one of the juror’s answer of “I suppose” in response to a question on her ability to be fair, and to the other juror’s former employment at Dorothea Dix, as additional race-neutral explanations for the strikes. The trial court initially found that these reasons were not pretextual and overruled the

Batson challenge. After the defendant was convicted at trial, the Court of Appeals affirmed in an unpublished opinion, agreeing that the defendant failed to show purposeful discrimination. The defendant sought review at the North Carolina Supreme Court. In a special order, the Court remanded the case to the trial court and retained jurisdiction of the case.

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

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

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

A majority of the Court reversed, finding a *Batson* violation by the State. The prosecutor’s shifting and mischaracterized explanation for the strike of the juror who answered “I suppose”—initially argued as an indication the juror could not be fair, but later argued as going to her ability to pay attention—indicated the reason was pretextual, and the trial court correctly rejected that justification for the strike. The trial court also correctly determined that the demeanor-based explanations for the strike of this juror were insufficient without findings of fact on the point. However, the trial court erred in several

critical ways. For one, when the trial court rejects all of the prosecutor’s race-neutral justifications for use of a strike, the defendant’s *Batson* challenge should be granted. According to the Court:

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

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

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

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

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

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

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

[State v. Schalow](#), ___ N.C. ___, 2021-NCSC-166 (Dec. 17, 2021) (“*Schalow II*”). The facts of this case were previously summarized following the Court of Appeals decision in *State v. Schalow*, 269 N.C. App. 369

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

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

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

Second, the state Supreme Court also disagreed with the Court of Appeals’ conclusion that the defendant’s motion to dismiss should have been granted for failure to join offenses under G.S. 15A-926.

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

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

Federal prosecution of the defendant for firearm by felon following state prosecution for capital murder did not violate double jeopardy or amount to a vindictive prosecution; state and federal offenses had different elements and were prosecuted by separate sovereigns; no improper motive shown in timing of federal charge

[U.S. v. Ball](#), 18 F.4th 445 (Fourth Cir. 2021). The defendant killed a police officer during a traffic stop in the Eastern District of Virginia. He eventually pleaded guilty to murder of a law enforcement officer in state court under a plea agreement that provided for release after 36 years. The federal government then charged the defendant with possession of firearm by felon based on the gun used during the murder, and the defendant was ultimately sentenced to a 10-year term consecutive to his state sentence. He argued that the federal prosecution violated double jeopardy and constituted a vindictive prosecution, among other arguments.

Double jeopardy protects against prosecution for the same offense. Offenses under state law are not the same as an offense under federal law, even where both offenses have the same elements and punish the same conduct. See *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (affirming dual-sovereignty doctrine). Further, under *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932), offenses are not the same “when each of the offenses ‘requires proof of a fact which the other does not.’” *Ball* Slip op. at 8 (citation omitted). Here, the defendant’s prosecutions were at the hands of separate sovereigns and each offense—murder of a law enforcement officer and firearm by felon—had different elements requiring different factual proof. The court similarly rejected an argument that the government was collaterally estopped from relitigating the defendant’s possession of the gun, finding that the prosecutions did not involve the same parties and did not involve the same factual issues. The federal gun prosecution therefore did not violate the defendant’s double jeopardy rights.

The defendant also claimed that the federal prosecution was improperly motivated by a desire to punish him for his successful negotiation in the state murder case. He argued that the timing of the federal prosecution—shortly after this murder plea and amidst community backlash about the sentence in that case—showed vindictiveness. The court disagreed, finding the defendant failed to meet the high burden to show a vindictive charging decision:

The federal government has articulated valid federal interests in prosecuting Ball for his violation of federal law, pointing to its prioritization of felon-in-possession cases, as well as the serious nature of Ball’s conduct in murdering a law-enforcement officer. *Ball* Slip op. at 16.

Other procedural and sentencing challenges were also rejected, and the district court was affirmed in full.

(1) Denial of defense motion for continuance compromised defendant’s right to effective counsel in this case; (2) Error was harmless in conviction for general intent offense, but warranted reversal on specific intent offense, where the evidence at issue related only to negating affirmative defenses to specific intent

[State v. Johnson](#), ___ N.C. ___, 2021-NCSC-165 (Dec. 17, 2021). The state obtained recordings of several hundred phone calls that the defendant made while he was in jail awaiting trial on charges of murder, armed robbery, and assault on a government official. The charges arose out of a robbery at a gas station where the clerk was killed and an officer was threatened with a firearm. The defendant gave notice of the affirmative defenses of diminished capacity, mental infirmity, and voluntary intoxication (insanity was also noticed, but not pursued at trial). Copies of the jail calls were provided to the defense in discovery, but the recordings could not be played. Defense counsel emailed the prosecutor to request a new copy of the calls, and asked the state to identify any calls it intended to use at trial. The prosecutor provided defense counsel with new copies of the calls that were playable, but also indicated that the state did not intend to offer any of the calls at trial, so defense counsel did not listen to them at that time. The evening before trial, the prosecutor notified defense counsel that the state had identified 23 calls that it believed were relevant to showing the defendant’s state of mind and memory at the time of the murder. At the start of trial the next morning, the defense moved for a continuance on the basis that it had not had time to review the calls or assess their impact on the defendant’s experts’ testimony, and argued that denial of a continuance at this point would violate the defendant’s state and federal constitutional rights to due process, effective counsel, and right to confront witnesses. The trial court denied the continuance, as well as defense counsel’s subsequent request to delay opening statements until Monday (after jury selection concluded mid-day Friday) in order to provide the defense an opportunity to listen to the calls and review them with the defendant’s experts.

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

The higher court found no prejudicial error regarding the felony murder conviction, but vacated the armed robbery judgment. First, regarding the correct standard of review, a trial court's decision on a motion to continue is normally reviewed only for abuse of discretion, but if it raises a constitutional issue it is reviewed de novo; however, even for constitutional issues, denial of a motion to continue is only reversible if the error was prejudicial. In this case, the trial court erred because the time allowed to review the calls was constitutionally inadequate. Defense counsel relied on the state's representation that it would not use the calls until receiving a contrary notice the evening before trial began, and defense counsel did not have an opportunity to listen to the nearly four hours of recordings or consult with his expert witnesses before starting the trial. Under the circumstances of this case, the impact this had on defense counsel's ability to investigate, prepare, and present a defense demonstrated that the defendant's right to effective counsel was violated. Additionally, the defendant was demonstrably prejudiced by this violation, since defense counsel could not accurately forecast the evidence or anticipated expert testimony during the opening statements.

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

Defenses

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

[State v. McLymore](#), ___ N.C. ___, 2022-NCSC-12 (Feb. 11, 2022). Under [G.S. 14-51.4](#), a person may not claim self-defense if the person was attempting a felony, committing a felony, or escaping from the commission of a felony at the time of the use of force. The defendant was charged with first-degree murder, armed robbery, and fleeing to elude in Cumberland County. He claimed self-defense and testified on his behalf. Evidence showed that the defendant had multiple prior felony convictions and that he possessed a weapon at the time of the murder. The trial court gave a general instruction on statutory self-defense and instructed the jury that the defendant could not claim self-defense if he was committing the felony of possession of firearm by a felon at the time of his use of force. The jury convicted on all counts and the defendant was sentenced to life without parole. On appeal, the Court of Appeals affirmed, finding that the defendant was disqualified from claiming statutory self-defense under *State v. Crump*, 259 N.C. App. 144 (2018) (strictly interpreting the felony disqualification) and determining that G.S. 14-51.4 supplanted the common law right in the situations covered by the statute. On discretionary review, the Supreme Court modified and affirmed.

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

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

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

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

(3) The Court agreed that G.S.14-51.4 must be read to require a nexus between the defendant's use of force and felony conduct used to disqualify the defendant from use of defensive force. A strict interpretation of this statute would lead to absurd and unjust results and would also contract the common law right to self-defense. "[A]bsent a causal nexus requirement, each individual [committing a felony not related to the need for defensive force] would be required to choose between submitting to an attacker and submitting to a subsequent criminal conviction." *McLymore* Slip op. at 18. The Court also noted that a broad interpretation of the felony disqualifier may violate the North Carolina Constitution's protections for life and liberty. N.C. Const. art. I, sec. 1. The Court therefore held that the State has the burden to demonstrate a connection between the disqualifying felony conduct and the need for the use of force, and the jury must be instructed on that requirement. *Crump* and other decisions to the contrary were expressly overruled. In the Court's words:

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

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

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

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

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

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

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

[State v. Brichikov](#), ___ N.C. App. ___; 2022-NCCOA-33 (Jan. 18, 2022). In this Wake County murder case, the defendant admitted to having assaulted his wife and she was found with physical trauma to her face. She also had cocaine and fentanyl in her blood, had recently overdosed, and had a serious heart condition. There was conflicting evidence at trial on whether the facial injuries alone could have caused her death. The defendant requested instructions on voluntary and involuntary manslaughter. The trial court declined to give the requested instructions and the jury convicted on second-degree murder. A divided Court of Appeals reversed and remanded for a new trial.

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

(2) The defendant argued that his evidence contradicted the State's evidence of malice with evidence of recklessness, and that he was entitled to an involuntary manslaughter instruction when the evidence was viewed in the light most favorable to him. The State argued that the defendant's use of a deadly

weapon—his hands—“conclusively established” the element of malice, so that no lesser-included instructions were required. The court agreed with the defendant:

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

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

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

Pleadings

There was no fatal variance in charge for injury to personal property where named victim was not the legal owner, but had a special interest in the property

[State v. Redmond](#), __ N.C. App. __, 2022-NCCOA-5 (Jan. 4, 2022). Upon trial de novo in superior court, the defendant in this case was convicted of misdemeanor injury to personal property for throwing a balloon filled with black ink onto a painting during a protest at an arts event in Asheville. The defendant received a suspended 30-day sentence and was ordered to pay \$4,425 in restitution. On appeal, the defendant argued that her motion to dismiss the injury to personal property charge should have been granted due to a fatal variance, and argued that the restitution amount was improperly based on speculative value. The appellate court rejected both arguments.

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

The superior court had original jurisdiction to try a misdemeanor charge that was initiated by indictment but amended by a statement of charges

[State v. Barber](#), ___ N.C. App. ___, 2021-NCCOA-695 (Dec. 21, 2021). In this case arising from a high-profile incident where William Joseph Barber was convicted of second-degree trespass for refusing to leave the office area of the General Assembly while leading a protest related to health care policy after being told to leave by security personnel for violating a building rule prohibiting causing disturbances, the Court of Appeals found that the superior court had subject matter jurisdiction to conduct the trial and that the trial was free from error.

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

Right to Counsel

Trial court did not err by failing to further investigate defendant's complaints about trial counsel or by denying his mid-trial request to represent himself

[State v. Ward](#), ___ N.C. App. ___; 2022-NCCOA-40 (Jan. 18, 2022). In this Pasquotank County case, the defendant was convicted at trial of statutory rape and abduction of a child. (1) During the first day of trial, the defendant complained about his attorney and claimed to have repeatedly fired him during the case. In response, the trial court allowed the defendant to express his concerns and attempted to address them. On the second day of trial, the defendant asked to represent himself, a request the trial court refused. On appeal, he argued that the trial court failed to inquire into an alleged impasse between trial counsel and the defendant and erred by not allowing him to represent himself. A unanimous Court of Appeals disagreed. While the defendant expressed some dissatisfaction with his attorney, his comments did not evince an absolute impasse in the case. In the court's words:

Defendant's complaints . . . were deemed misunderstandings that were corrected during the colloquies by the trial court. . . Defendant may have had a personality conflict with his counsel, and asserted he did not believe defense counsel had his best interest at heart. Defendant has failed to show an 'absolute impasse as to such tactical decisions' occurred during trial. *Ward* Slip op. at 9.

Thus, the trial court did not err by failing to more fully investigate the issue. The trial court also did not err by refusing to allow the defendant to proceed pro se after trial had begun, or by failing to conduct the colloquy for self-represented individuals in G.S. 15A-1242. While waiver of the right to counsel requires a knowing, voluntary, and intelligent waiver by the defendant, the right to self-representation

may be waived by inaction, as occurred here. Further, without the defendant making a timely request to represent himself, the defendant is not entitled to be informed about the right to self-representation. The trial court did not err in disallowing self-representation, or in failing to make the statutory inquiry required for self-representation, under these circumstances. According to the court:

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

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

[State v. Guinn](#), ___ N.C. App. ___; 2022-NCCOA-36 (Jan. 18, 2022). The defendant was on supervised probation in Gaston County after pleading guilty to two counts of uttering a forged instrument. 24 months into a 30-month period of probation, a probation violation was filed, accusing the defendant of willful failure to pay. The defendant was not represented by counsel at the hearing, and the trial court ultimately extended probation by 12 months. A year later, probation filed a violation report accusing the defendant of numerous violations. An absconding violation was filed soon after. A hearing was held where the defendant's probation was revoked, and his sentence activated.

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

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

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

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

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

The trial court did not abuse its discretion by allowing the defendant to represent himself

[State v. Applewhite](#), ___ N.C. App. ___, 2021-NCCOA-610 (Dec. 21, 2021). In this human trafficking case involving multiple victims, the trial court did not abuse its discretion by allowing the defendant to represent himself. The Court of Appeals rejected the defendant's argument that the trial court's statements concluding that he had an "absolute right" to represent himself coupled with the trial court's failure to consider whether he fell into the "gray area" of being competent to stand trial but incapable of representing himself was a mistake of law requiring a new trial. While the defendant suffered from an unspecified personality disorder and drug use disorders, the record showed that the trial court "undertook a thorough and realistic account of Defendant's mental capacities and competence before concluding Defendant was competent to waive counsel and proceed *pro se*." The Court of Appeals noted that after interacting with him, considering his medical conditions, and receiving testimony concerning his forensic psychiatric evaluation, two judges had ruled that Defendant was competent to proceed and represent himself. The Court of Appeals said that even if the trial court erred in allowing the defendant to represent himself, he invited the error by disagreeing with the manner of representation of appointed counsel and any such error was harmless beyond a reasonable doubt.

Sentencing and Probation

The trial court did not err by ordering restitution for all the seized animals or by failing to explicitly consider the defendant's ability to pay, but erred in converting the restitution award to a civil judgment absent statutory authorization

[State v. Crew](#), ___ N.C. App. ___, 2022-NCCOA-35 (Jan. 18, 2022). The defendant was charged with and convicted of dogfighting and related offenses in Orange County. The trial court ordered the defendant to pay Animal Services restitution in the amount of \$70,000 for its care and keep of the animals and immediately converted the award to a civil judgment (presumably based on the 60-month minimum active portion of the sentence imposed in the case). Thirty dogs were seized from the defendant's property, but he was only convicted of offenses relating to 17 of the animals. According to the defendant, the restitution award should have therefore been proportionally reduced. The court disagreed, observing that "[t]he trial court may impose restitution for 'any injuries or damages arising directly and proximately out of the offense committed by the defendant,'" pointing to G.S. 15A-1340.34(c). *Crew* Slip op. at 9. Because the defendant's crimes resulted in the removal of all the animals, he could properly be held responsible for the cost of caring for the animals.

The defendant also argued that the trial court erred in failing to consider his ability to pay before ordering restitution. While the trial court need not make express findings on the issue, G.S. 15A-

1340.36(a) requires the judge to consider the defendant's ability to pay among several other factors when deciding restitution. Here, there was evidence in the record concerning the defendant's income, the price of a "good puppy," and of the defendant's living arrangements. "Based on this evidence, the trial court's determination that the defendant had the ability to pay was within the court's sound discretion and certainly not manifestly arbitrary or outside the realm of reason." *Crew Slip op.* at 10-11.

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

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

[State v. Thorne](#), ___ N.C. App. ___, 2021–NCCOA–534 (Oct. 5, 2021). The defendant was placed on 36 months of supervised probation after pleading guilty to one count of conspiracy to obtain property by false pretenses. The defendant's probation officer subsequently filed a violation report alleging that the defendant had violated his probation by using illegal drugs, and an addendum alleging that the defendant had absconded from probation. At the violation hearing, the defendant admitted to using illegal drugs, but denied that he absconded. The state presented testimony at the violation hearing from a probation officer who was not involved in supervising the defendant, but who read from another officer's notes regarding the defendant's alleged violations. The trial court found the defendant in violation, revoked his probation for absconding, and activated his suspended 10-to-21-month sentence. The defendant filed a *pro se* notice of appeal, which was defective, but the court granted his petition for *writ of certiorari* and addressed the merits.

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

the evidence only established that the probationer had committed the lesser violation of failing to allow his probation officer to visit him at reasonable times, the evidence here adequately showed that the defendant had absconded. The court therefore affirmed the revocation but remanded the case for correction of a clerical error because the order erroneously indicated that both violations justified revocation, rather than only the absconding per G.S. 15A-1344(d2).

Restitution amount was not speculative where it was based on evidence of fair market value

[State v. Redmond](#), 2022-NCCOA-5, ___ N.C. App. ___ (Jan. 4, 2022). The restitution amount was supported by competent evidence. A witness for the state testified that a potential buyer at the show asked what the painting would cost when completed and was told \$8,850, which was the gallery’s standard price for paintings of that size by this artist. The artist also testified that the canvas was now completely destroyed, and the black ink could not be painted over. The trial court ordered the defendant to pay half that amount as restitution. The appellate court held that the fact that the painting “had not yet been purchased by a buyer does not mean that the market value assigned by the trial court for restitution was speculative.” The evidence presented at trial was sufficient to establish a fair market value for the painting prior to it being damaged, and the trial court’s restitution order would not be disturbed on appeal.

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

[State v. Thorpe](#), ___ N.C. App. ___, 2021-NCCOA-701 (Dec. 21, 2021). The defendant, who had underlying health conditions, was not entitled to relief on a MAR under G.S. 15A-1415(b)(8) on the basis of his prison sentence being invalid as a matter of law as a form of cruel and unusual punishment due to the coronavirus pandemic. The Court of Appeals explained that the defendant’s 77-to-105-month term of imprisonment was lawful at the time it was imposed before the pandemic began and that the defendant had identified no precedent indicating that requiring a person to serve an otherwise lawful sentence during pandemic times makes the sentence cruel and unusual. The defendant was not entitled to state habeas relief because of procedural deficiencies in his MAR.

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

[State v. Graham](#), ___ N.C. App. ___, 2022-NCCOA-132 (Mar. 1, 2022). The defendant pled guilty to second-degree murder and possession of a firearm by a convicted felon. The defendant was sentenced to active terms of 176-221 months imprisonment for the second-degree murder charge and 16-20 months imprisonment for the possession of a firearm by a convicted felon charge. The active sentence for possession of a firearm by a convicted felon was suspended for 36 months of supervised probation, which commenced in August 2019 after the defendant was released from prison following his active sentence for second-degree murder.

In February 2021, the State filed a violation report alleging that the defendant violated his probation by failing to pay the full monetary judgment entered against him and because he was arrested and charged with possession of a firearm by a felon. Following a hearing, the trial court found that the defendant

committed a crime and revoked the defendant's probation. The Court of Appeals granted the defendant's petition for writ of certiorari.

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