Criminal Case Update

Covering significant cases for superior court judges decided October 5, 2013-June 5, 2013
For a comprehensive listing of NC cases indexed by subject, see my Criminal Case Compendium:
http://www.sog.unc.edu/casecompendium

Jessica Smith, UNC School of Government

Criminal Procedure

Collateral Estoppel/One Judge Overruling Another

State v. Macon, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The trial court did not err when during a retrial in a DWI case it instructed the jury that it could consider the defendant's refusal to take a breath test as evidence of her guilt even though during the first trial a different trial judge had ruled that the instruction was not supported by the evidence. Citing *State v. Harris*, 198 N.C. App. 371 (2009), the court held that neither collateral estoppel nor the rule prohibiting one superior court judge from overruling another applies to rulings in a retrial following a mistrial. On retrial de novo, the second judge was not bound by rulings made during the first trial. Moreover, collateral estoppel applies only to an issue of ultimate fact determined by a final judgment. Here, the first judge's ruling involved a question of law, not fact, and there was no final judgment because of the mistrial.

Counsel Issues

State v. Gentry, __ N.C. App. __, __ S.E.2d __ (June 4, 2013). (1) The trial court did not err by denying defense counsel's motions to withdraw and for the appointment of substitute counsel. The court rejected the defendant's argument that he and his trial counsel experienced "a complete breakdown in their communications" resulting in ineffective assistance of counsel. The court noted that in the absence of a constitutional violation, the decision about whether to replace appointed counsel is a discretionary one. Although the defendant expressed dissatisfaction with counsel's performance on several occasions, he did not establish the requisite "good cause" for appointment of substitute counsel or that assigned counsel could not provide him with constitutionally adequate representation. The court concluded that any breakdown in communication "stemmed largely from Defendant's own behavior" and that the defendant failed to show that the alleged communication problems resulted in a deprivation of his right to the effective assistance of counsel. (2) Although the trial court misstated the maximum sentence during the waiver colloquy, it adequately complied with G.S. 15A-1242. The trial court twice informed the defendant that if he was convicted of all offenses and to be a habitual felon, he could be sentenced to 740 months imprisonment, or about 60 years. However, this information failed to account for the possibility that the defendant would be sentenced in the aggravated range and thus understated the maximum term by 172 months. The court held:

> [W]e do not believe that a mistake in the number of months which a trial judge employs during a colloquy with a defendant contemplating the assertion of his right to proceed pro se constitutes a per se violation of N.C. Gen. Stat. § 15A-1242. Instead, such a calculation error would only contravene N.C. Gen. Stat. § 15A-1242 if there was a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had he or she been more accurately informed about "the range of permissible punishments.

The court found that although the trial court's information "was technically erroneous" the error did not invalidate the defendant's "otherwise knowing and voluntary waiver of counsel." It explained:

> Our conclusion to this effect hinges upon the fact that Defendant was thirty-five years old at the time of this trial, that a sentence of 740 months imprisonment would have resulted in Defendant's incarceration until he reached age 97, and that a sentence of 912 months would have resulted in Defendant's incarceration until he reached age 111. Although such a fourteen year difference would be sufficient, in many instances, to preclude a finding that Defendant waived his right to counsel knowingly and voluntarily as the result of a trial court's failure to comply with N.C. Gen. Stat. § 15A-1242, it does not have such an effect in this instance given that either term of imprisonment mentioned in the trial court's discussions with Defendant was, given Defendant's age, tantamount to a life sentence. Simply put, the practical effect of either sentence on Defendant would have been identical in any realistic sense. In light of this fact, we cannot conclude that there was a reasonable likelihood that Defendant's decision concerning the extent, if any, to which he wished to waive his right to the assistance of counsel and represent himself would have been materially influenced by the possibility that he would be incarcerated until age 97 rather than age 111. As a result, we conclude that Defendant's waiver of the right to counsel was, in fact, knowing and voluntary and that the trial court did not err by allowing him to represent himself.

State v. Cureton, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012). (1) No violation of the defendant's Sixth Amendment right to counsel occurred when the trial court found that the defendant forfeited his right to counsel because of serious misconduct and required him to proceed pro se. The court rejected the defendant's argument that *Indiana v. Edwards* prohibits a finding of forfeiture by a "gray area" defendant who has engaged in serious misconduct. (2) The trial court did not err by finding that the defendant forfeited his right to counsel because of serious misconduct. The court rejected the defendant's argument that the misconduct must occur in open court. The defendant was appointed three separate lawyers and each moved to withdraw because of his behavior. His misconduct went beyond being uncooperative and noncompliant and included physically and verbally threatening his attorneys. He consistently shouted at his attorneys, insulted and abused them, and spat on and threatened to kill one of them. The court also rejected the defendant's argument *State v. Wray*, 206 N.C. App. 354 (2010), required reversal of the forfeiture ruling.

State v. Gray, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013). The defendant was entitled to a new trial where the trial court proceeded to trial over the defendant's objection to continued representation by appointed counsel who had previously represented one of the State's witnesses. At a pretrial hearing the State informed the trial court that defense counsel had previously represented Mr. Slade, a witness for the State. The defendant expressed concern about a conflict of interest and asked for another lawyer. Slade subsequently waived any conflict and the State Bar advised the trial court that since Slade had consented "the lawyer's ability to represent the current client is not affected" and that the current client's consent was not required. The trial court conducted no further inquiry. The court held that the trial court erred by failing to make any inquiry into the nature and extent of the potential conflict and whether the defendant wished to waive the conflict. It concluded:

> [W]e believe that Defendant . . . was effectively forced to go to trial while still represented by his trial counsel, who had previously represented one of the State's witnesses and who acknowledged being in the possession of confidential information which might be useful for purposes of cross-examining that witness, despite having

clearly objected to continued representation by that attorney. As a result, given that prejudice is presumed under such circumstances, Defendant is entitled to a new trial.

State v. Gerald, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). Counsel was ineffective by failing move to suppress evidence obtained by a "patently unconstitutional seizure." The State conceded that the evidence was obtained illegally but argued that counsel's failure could have been the result of trial strategy. The court rejected this argument, noting in part trial counsel's affidavit stating that he had no strategic reason for his failure. Trial counsel's conduct fell below an objective standard of reasonableness and the defendant suffered prejudice.

State v. Canty, __ N.C. App. __, __ S.E.2d __ (Dec. 18, 2012). Counsel rendered ineffective assistance by failing to file what would have been a meritorious motion to suppress.

Discovery

State v. Barnes, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). In a murder case, the trial court did not violate the defendant's constitutional right to reasonable notice of evidence or his statutory right to discovery by allowing the State to present an expert toxicologist's testimony. As part of his investigation, Dr. Jordan, a local medical examiner, sent a specimen of the victim's blood to the Chief Medical Examiner's Office for analysis. During trial, Jordan opined that the cause of death was methadone toxicity and said that his opinion was based upon the CME's report. When defense counsel raised questions about the report, the trial court allowed the State to call as a witness Jarod Brown, the toxicologist at the CME who analyzed the victim's blood. The defendant objected on grounds that he had not been notified that Brown would be a witness. With respect to the alleged statutory discovery violation, the trial court did not abuse its discretion by allowing Brown to testify. The court noted that the defendant had the toxicology report for four years, had it reviewed by two experts, was afforded the opportunity to meet privately with Brown for over an hour prior to a voir dire hearing, and was afforded cross-examination on voir dire. As to the constitutional issues, the court noted that although the defendant argued that he was not afforded adequate time to prepare, he failed to show how his case would have been better prepared if he had more time or that he was materially prejudiced by Brown's testimony. Because the defendant had the report for four years, had two experts review it, was afforded an opportunity to confer with Brown prior to his testimony, and cross-examined Brown, the defendant failed to demonstrate that a constitutional error occurred.

State v. Dorman, __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013). (1) The trial court erred by ordering dismissal with prejudice of murder charges as a sanction for discovery violations where the record did not reveal a basis for the determination that dismissal was an appropriate sanction. Additionally, because the defendant actually received the evidence the State initially failed to disclose pretrial, any harm is either speculative or moot. (2) The trial court erred by ordering suppression as a sanction for failing to document and disclose various communications between the police department and related agencies. The court began by noting that G.S. 15A-903 requires production already existing documents; it imposes no duty on the State to create or continue to develop additional documentation regarding an investigation. Thus, to the extent the trial court concluded that the State violated statutory discovery provisions because it failed to document various conversations, this was error. The trial court also erred by concluding that the State violated the discovery statutes by failing to provide other documented conversations. In addition to failing to make findings justifying the sanction on this basis, the defendant received the documentation prior to trial.

State v. Ramseur, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). The trial court did not err by failing to grant the defendant a new trial on his MAR where the State failed to disclose in discovery more than 1,800 pages of material to which the defendant was entitled. The court was unable to conclude that but for the nondisclosure a different result would have occurred at trial.

Double Jeopardy

Evans v. Michigan, 568 U.S. __ (Feb. 20, 2013). When the trial court enters a directed verdict of acquittal based on a mistake of law the erroneous acquittal constitutes an acquittal for double jeopardy purposes barring further prosecution. After the State rested in an arson prosecution, the trial court entered a directed verdict of acquittal on grounds that the State had provided insufficient evidence of a particular element of the offense. However, the trial court erred; the unproven "element" was not actually a required element at all. The Court noted that it had previously held in *Arizona v. Rumsey*, 467 U. S. 203, 211 (1984), that a judicial acquittal premised upon a "misconstruction" of a criminal statute is an "acquittal on the merits . . . [that] bars retrial." It found "no meaningful constitutional distinction between a trial court's 'misconstruction' of a statute and its erroneous addition of a statutory element." It thus held that the midtrial acquittal in the case at hand was an acquittal for double jeopardy purposes.

DWI Procedure

State v. McKenzie, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013), *review & temp. stay allowed* (N.C. Jan. 23, 2013). (1) Over a dissent the court held that prosecuting the defendant for DWI violated double jeopardy where the defendant previously was subjected to a one-year disqualification of his commercial driver's license under G.S. 20-17.4. (2) Over a dissent the court held that the issue whether the defendant's one-year disqualification violated his due process rights was moot. However, it added: "[W]e believe [G.S.] 20-17.4 raises due process concerns because it does not afford defendants any opportunity for a hearing. Nonetheless, in the absence of a justiciable claim, it is the role of the state legislature, not this Court, to remedy constitutionally suspect statutes." The dissenting judge did not believe that the trial court had jurisdiction to consider the due process issue.

State v. Cathcart, __ N.C. App. __, __ S.E.2d __ (May 21, 2013). The trial court erred by granting the defendant's motion to suppress breath test results from an Intoximeter EC/IR II. The trooper administered the first breath test, which returned a result of .10. When the trooper asked for a second sample, the defendant did not blow hard enough and the machine produced an "insufficient sample" result. The machine then timed out and printed out the first test result ticket. The trooper reset the machine and asked the defendant for another breath sample; the trooper did not wait before starting the second test. The next sample produced a result of .09. The sample was printed on a second result ticket. The trial court granted the defendant's motion to suppress, concluding that the trooper did not follow the procedures outlined in N.C. Admin. Code tit. 10A, r. 41B.0322 (2009) and because he did not acquire two sequential breath samples on the same test record ticket. Following *State v. White*, 84 N.C. App. 111 (1987), the court held that the trial court erred by concluding that the breath samples were not sequential. With respect to the administrative code, the court held that it was not necessary for the trooper to repeat the observation period.

State v. Buckheit, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012). The trial court erred by denying the defendant's motion to suppress intoxilyzer results. After arrest, the defendant was informed of his rights under G.S. 20-16.2(a) and elected to have a witness present. The defendant contacted his witness by phone and asked her to witness the intoxilyzer test. Shortly thereafter his witness arrived in the lobby of

the County Public Safety Center; when she informed the front desk officer why she was there, she was told to wait in the lobby. The witness asked the front desk officer multiple times if she needed to do anything further. When the intoxilyzer test was administered, the witness was waiting in the lobby. Finding the case indistinguishable from *State v. Hatley*, 190 N.C. App. 639 (2008), the court held that after her timely arrival, the defendant's witness made reasonable efforts to gain access to the defendant but was prevented from doing so and that therefore the intoxilyzer results should have been suppressed.

Indictment Issues

State v. Sergakis, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012). The trial court committed plain error by instructing the jury that it could find the defendant guilty of conspiracy if the defendant conspired to commit felony breaking and entering or felony larceny where the indictment alleged only a conspiracy to commit felony breaking or entering.

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012). (1) No fatal variance occurred in an identity theft case. The defendant argued that there was a fatal variance between the indictment, which alleged that he possessed credit card numbers belonging to four natural persons and the evidence, which showed that three of the credit cards were actually business credit cards issued in the names of the natural persons. The court explained: "[N]o fatal variance exists when the indictment names an owner of the stolen property and the evidence discloses that that person, though not the owner, was in lawful possession of the property at the time." Here the victims were the only authorized users of the credit cards and no evidence suggested they were not in lawful possession of them. (2) The trial court did not err by dismissing an obtaining property by false pretenses indictment for failing to specify with particularity the property obtained. The indictment alleged that the defendant obtained "services" from two businesses but did not describe the services or specify their monetary value. (3) In a trafficking in stolen identities case, the court held, over a dissent, that the indictment was defective because it did not allege the recipient of the identifying information or that the recipient's name was unknown.

State v. Seelig, __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). (1) Indictments charging the defendant with obtaining property by false pretenses were not defective. The indictments alleged in part that "[t]he defendant sold bread products to the victim that were advertised and represented as Gluten Free when in fact the defendant knew at the time that the products contained Gluten." The court rejected the argument that the indictments were defective because they failed to sufficiently allege that he himself made a false representation. (2) There was no fatal variance between an indictment alleging that the defendant obtained value from the victim and the evidence, which showed that he obtained value from the victim's husband. Citing G.S. 14-100(a), the court concluded that because an indictment for obtaining property by false pretenses need not allege any person's ownership of the thing of value obtained, the allegation was surplusage.

State v. Rogers, __ N.C. App. __, __ S.E.2d __ (June 4, 2013). Although the trial court erred when instructing the jury on first-degree burglary, no plain error occurred. The first-degree burglary indictment alleged that the defendant entered the dwelling with intent to commit larceny. The trial court instructed the jury that it could find the defendant guilty if at the time of the breaking and entering he intended to commit robbery with a dangerous weapon. Citing *State v. Farrar*, 361 N.C. 675 (2007) (burglary indictment alleged larceny as underlying felony but jury instructions stated that underlying felony was armed robbery; reviewing for plain error, the court held that the defendant had not been prejudiced by the instruction; because larceny is a lesser-included of armed robbery, the jury

instructions benefitted defendant by adding an additional element for the State to prove), the court found that the defendant was not prejudiced by the error.

State v. Tucker, __ N.C. App. __, __ S.E.2d __ (June 4, 2013). The trial court did not err by allowing the State to amend an embezzlement indictment. The indictment originally alleged that "the defendant . . . was the employee of MBM Moving Systems, LLC . . . ." The amendment added the words "or agent" after the word "employee." The court rejected the defendant's argument that the nature of his relationship to the victim was critical to the charge and thus that the amendment substantially altered the charge. The court held that the terms "employee" and "agent" "are essentially interchangeable" for purposes of this offense. The court noted that the defendant was not misled or surprised as to the charges against him.

State v. Lovette, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013). In an appeal from a conviction obtained in the Eve Carson murder case, the court held that a robbery indictment was not fatally defective. The indictment alleged that the defendant:

> unlawfully, willfully and feloniously did steal, take, and carry away and attempt to steal, take and carry away another's personal property, A 2005 TOYOTA HIGHLANDER AUTOMOBILE (VIN: JTEDP21A250047971) APPROXIMATE VALUE OF $18,000.00; AND AN LP FLIP PHONE, HAVING AN APPROXIMATE VALUE OF $100.00: AND A BANK OF AMERICA ATM CARD, HAVING AN APPROXIMATE VALUE OF $1.00; AND APPROXIMATELY $700.00 IN U.S. CURRENCY of the value of $18,801.00 dollars, from the presence, person, place of business, and residence of _____. The defendant committed this act having in possession and with the use and threatened use of firearms and other dangerous weapons, implements, and means, A SAWED OFF HARRINGTON & RICHARDSON TOPPER MODEL 158, 12 GAUGE SHOTGUN (SERIAL # L246386) AND AN EXCAM GT-27 .25 CALIBER SEMI-AUTOMATIC PISTOL (SERIAL # M11062) whereby the life of EVE MARIE CARSON was endangered and threatened.

The defendant argued that the indictment was defective because it failed to name the person from whose presence property was taken. The court reasoned that Carson's life could not have been endangered and threatened unless she was the person in the presence of the property.

State v. Galloway, __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). The trial court erred by instructing the jury on the offense of discharging a firearm into a vehicle that is in operation under G.S. 14-34.1(b) where the indictment failed to allege that the vehicle was in operation. However, because the indictment properly charged discharging a firearm into an occupied vehicle under G.S. 14-34.1(a), the court vacated the conviction under G.S. 14-34.1(b) and remanded for entry of judgment under G.S. 14-34.1(a).

State v. Wilkins, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013). An indictment for felon in possession of a firearm was fatally defective because the charge was included as a separate count in a single indictment also charging the defendant with assault with a deadly weapon. G.S. 14-415.1(c) requires that possession of a firearm by a felon be charged in a separate indictment from other related charges.

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012). In a trafficking case, there was no fatal variance between the indictment, alleging that the defendant trafficked in opium, and the evidence at trial, showing that the substance was an opium derivative. G.S. 90-95(h)(4) does not create a separate

crime of possession or transportation of an opium derivative, but rather specifies that possession or transportation of an opium derivative is trafficking in opium, as alleged in the indictment.

State v. Land, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012). Over a dissent, the court held that when a defendant is charged with delivering marijuana and the amount involved is less than five grams, the indictment need not allege that the delivery was for no remuneration. Relying on G.S. 90-95(b)(2) (transfer of less than five grams of marijuana for no remuneration does not constitute a delivery in violation of G.S. 90-95(a)(1)), the defendant argued that the statute creates an additional element for the offense of delivering less than five grams of marijuana -- that the defendant receive remuneration -- and that this additional element must be alleged. Relying on *State v. Pevia*, 56 N.C. App. 384, 387 (1982), the court held that an indictment is valid under G.S. 90-95 even without that allegation.

Pleas

State v. Rico, __ N.C. __, __ S.E.2d __ (Dec. 14, 2012). For the reasons stated in the dissenting opinion below, the court reversed *State v. Rico,* __ N.C. App. __, 720 S.E.2d 801 (Jan. 17, 2012) (holding, over a dissent, that where there was a mistake in the plea agreement and where the defendant fully complied with the agreement, and the risk of any mistake in a plea agreement must be borne by the State; according to the court, both parties mistakenly believed that the aggravating factor of use of a firearm could enhance a sentence for voluntary manslaughter by use of that same firearm; the court determined that the State remains bound by the plea agreement and that the defendant must be resentenced on his guilty plea to voluntary manslaughter; the dissenting judge argued that the proper remedy was to set aside the plea arrangement and remand for disposition of the original charge (murder)).

State v. Khan, __ N.C. __, __ S.E. 2d __ (Mar. 8, 2013). (1) There was no ambiguity regarding whether the defendant understood that as part of the plea agreement he was stipulating to an aggravating factor that could apply to both indictments. Although the Plea Form listed only a file number for the first indictment, the document as a whole referenced all of the charges and the in-court proceedings confirmed that the stipulation applied to both indictments. (2) The trial court properly followed the procedure in G.S. 15A-1022.1 for accepting an admission of an aggravating factor. (3) The evidence was sufficient to establish the aggravating factor that the defendant took advantage of a position of trust or confidence to place the victim in a vulnerable position. The defendant referred to the victim as his "twin," was brought into the murder conspiracy as the victim's friend, participated in hatching the details of the plan to kill the victim, and agreed to incapacitate the victim so others could kill him.

Motions to Suppress

State v. Morgan, __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). The trial court erred by failing to issue a written order denying the defendant's motion to suppress. A written order is necessary unless the court announces its rationale from the bench and there are no material conflicts in the evidence. Here, although the trial court announced its ruling from the bench, there was a material conflict in the evidence. The court remanded for entry of the required written order.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013). The trial court did not impermissibly place the burden of proof on the defendant at a suppression hearing. Initially the burden is on the defendant to show that the motion to suppress is timely and in proper form. The burden then is on the State to demonstrate the admissibility of the challenged evidence. The party who bears the burden of

proof typically presents evidence first. Here, the fact that the defendant presented evidence first at the suppression hearing does not by itself establish that the burden of proof was shifted to the defendant.

State v. Franklin, __ N.C. App. __, __ S.E.2d __ (Dec. 18, 2012). (1) The court rejected the defendant's argument that the trial court lacked jurisdiction to enter its written order on his motion to suppress because the order differed materially from the court's oral ruling. The appellate court found no material difference between the orders. (2) The trial court had jurisdiction to enter a written order denying the defendant's motion to suppress when the written order was entered after the defendant had given notice of appeal but had the effect of merely reducing the court's oral ruling to writing.

Motion to Continue

State v. King, __ N.C. App. __, __ S.E.2d __ (May 21, 2013). In this murder case the trial court did not abuse its discretion by denying the defendant's motion to continue. The defendant sought the continuance so that he could procure an expert to evaluate and testify regarding the State's DNA evidence. The court rejected the defendant's argument that by denying his motion to continue, the trial court violated his right to the effective assistance of counsel. The State provided discovery, including all SBI-generated reports and data 9 June 2011. It produced one DNA analysis report in hard copy and included a second on a CD containing other material. Defense counsel did not examine the CD until around 5 March 2012, when he e-mailed the prosecutor and asked if he had missed anything. The prosecutor informed him that the CD contained a second DNA report. Trial was set for 9 April 2012. However, after conferring with a DNA expert, the defendant filed a motion to continue on 16 March 2012. At a hearing on the motion, defense counsel explained his oversight and an expert said that he needed approximately 3-4 months to review the material and prepare for trial. The trial court denied defendant's motion to continue. The court concluded:

> Although the trial court might have justifiably granted defendant's motion and could have avoided a potential question of ineffective assistance of counsel by doing so, we cannot say that where defendant had been provided the DNA report nearly a year before trial the trial court erred or violated defendant's constitutional rights in denying his motion to continue in order to secure an expert witness for trial.

The court went on to dismiss the defendant's claim of ineffective assistance without prejudice to him being able to raise it through a MAR.

Motion to Dismiss/Dismissal of Charges

State v. Miles, __ N.C. __, __ S.E.2d __ (April 12, 2013). The court per curiam affirmed the decision below, *State v. Miles,* __ N.C. App. __, 730 S.E.2d 816 (Aug. 21, 2012), a murder case in which the court of appeals held, over a dissent, that the trial court did not err by denying the defendant's motion to dismiss. The court of appeals held that there was sufficient evidence that the defendant was the perpetrator of the offense and that the defendant possessed the motive, means, and opportunity to murder the victim. The victim owed the defendant approximately $40,000. The defendant persistently contacted the victim demanding his money; in the month immediately before the murder, he called the victim at least 94 times. A witness testified that the defendant, his business, and his family were experiencing financial troubles, thus creating a financial motive for the crime. On the morning of the murder the defendant left the victim an angry voicemail stating that he was going to retain a lawyer, but not to collect his money, and threatening that he would ultimately get "a hold of" the victim; a rational juror could reasonably infer from this that the defendant intentionally threatened the victim's life. Another witness testified that on the day of the murder, the defendant confided that if he did not get

his money soon, he would kill the victim, and that he was going to the victim to either collect his money or kill the victim; this was evidence of the defendant's motive and intention to murder the victim. The victim's wife and neighbor saw the defendant at the victim's house on two separate occasions in the month prior to the crime. On the day of the murder, the victim's wife and daughter observed a vehicle similar one owned by the defendant's wife at their home. The defendant's phone records pinpointed his location in the vicinity of the crime scene at the relevant time. Finally, the defendant's false alibi was contradicted by evidence putting him at the crime scene.

State v. Carver, __ N.C. __, __ S.E.2d __ (Jan. 25, 2013). The court per curiam affirmed *State v. Carver,* __ N.C. App. __, 725 S.E.2d 902 (June 5, 2012), in which the court of appeals held, over a dissent, that there was sufficient evidence that the defendant perpetrated the murder. The State's case was entirely circumstantial. Evidence showed that at the time the victim's body was discovered, the defendant was fishing not far from the crime scene and had been there for several hours. Although the defendant repeatedly denied ever touching the victim's vehicle, DNA found on the victim's vehicle was, with an extremely high probability, matched to him. The court of appeals found *State v. Miller*, 289 N.C. 1 (1975), persuasive, which it described as holding "that the existence of physical evidence establishing a defendant's presence at the crime scene, combined with the defendant's statement that he was never present at the crime scene and the absence of any evidence that defendant was ever lawfully present at the crime scene, permits the inference that the defendant committed the crime and left the physical evidence during the crime's commission." The court of appeals rejected the defendant's argument that the evidence was insufficient given that lack of evidence regarding motive.

State v. Dorman, __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013). The trial court erred by dismissing murder charges against the defendant under G.S. 15A-954(a)(4) (flagrant violation of constitutional rights causing irreparable prejudice). The court first held that the trial court erred in finding that destruction of the purported bones of victim resulted in a flagrant violation of constitutional right to due process under *Brady*. An autopsy by the Medical Examiner's Office (ME) identified the victim and found that cause of death was blunt head trauma consistent with a shotgun wound. After the autopsy, the ME released most of the victim's skeletal remains to the family and they were cremated. A partial fragment of the victim's skull was retained by that office As to the *Brady* issue, the court concluded that even if, as the trial court found, there was evidence of bad faith on the part of governmental officials, bad faith standing alone is insufficient to support a dismissal. Even if a flagrant violation of rights has occurred, there also must be irreparable prejudice to the defendant such there is no remedy other than dismissal. In this respect, the court held:

> [T]he trial court was premature in concluding that the alleged violations "caused such irreparable harm to [Defendant's] case as to require a dismissal with prejudice[,]" because Defendant cannot meet his burden of demonstrating his defense has been irreparably harmed. . . . [T]he unavailability of the bones for independent testing makes it impossible to determine to what extent those bones would have been helpful to Defendant's case. Under the circumstances of this case as it has progressed thus far, Defendant cannot meet his burden of demonstrating his defense has been actually, as opposed to potentially, prejudiced.

Furthermore, the court continued, the motion to dismiss and the trial court's order was premature given that no trial has occurred. It explained:

> The defense has yet to engage any expert, and has failed to attempt to conduct any tests, whether for DNA or to attempt to replicate the photographic identification of the decedent using the radiographs of her teeth. It may well be that upon the hiring of an expert and analyzing the partial skull remains which still are being held by the [ME],

> Defendant's expert may concur in the [autopsy results] that the jaw bone is indeed that of [the victim]. Until it can be established that the partial remains are untestable or that the identification of the deceased is somehow flawed or incapable of repetition, we fail to see how the defense has been irreparably prejudiced.

The court also disagreed with the trial court's conclusion that dismissal was the only appropriate remedy, noting the trial judge's wide discretion in determining how to most fairly address any flagrant violation of rights. Second, the court held that the trial court erred by determining that the State's failure to disclose "the role its agents took in assisting, facilitating, and paying for the permanent destruction" of the remains and the failure by a doctor at the ME's Office to produce the email records subject to subpoena flagrantly violated the defendant's constitutional rights. Because the defendant was provided with that information prior to trial, no *Brady* violation occurred. Third, trial court erred by concluding that three instances in which the State "fail[ed] to correct misrepresentations of material fact . . . flagrantly violated [the defendant's] constitutional rights[.]" Although the trial court cited *Napue v. Illinois*, 360 U.S. 264 (1959), in support of its ruling, the court found that case inapplicable given that no trial and no conviction had been obtained. Fourth, with respect to the trial court's conclusion that a flagrant violation of 8th Amendment rights, the court rejected this basis for dismissal, stating: "Upon review of the trial court's order, we cannot determine the precise factual or legal basis for the trial court's specific conclusion that an Eighth Amendment violation occurred . . . ."

State v. Wilson, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013). The trial court erred by dismissing a misdemeanor DWI charge under G.S. 15A-954. The trial court erroneously dismissed the charges under G.S. 15A-954(a)(1) (statute alleged to have been violated is unconstitutional on its face or as applied to the defendant) without making a finding that the DWI statute, G.S. 20-138.1, was unconstitutional as applied to the defendant. The fact that G.S. 20-139.1(d1) was violated was not a basis for dismissal under G.S. 15A-954. Nor did G.S. 15A-954(a)(4) (flagrant violation of constitutional rights causing irreparable prejudice) support dismissal of the charges where there was no finding that the defendant suffered irreparable prejudice. The proper vehicle for the defendant to have asserted his arguments was a motion to suppress; since the State had stipulated that it would not seek to introduce the challenged blood evidence at trial, the trial court was required to summarily grant the defendant's suppression motion.

State v. Hoff, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012). Where a burglary victim identified the defendant as the perpetrator in court, the rule of *State v. Irick,* 291 N.C. 480 (1977) (fingerprint evidence can withstand a motion for nonsuit only if there is substantial evidence that they were impressed at the time of the crime), did not require dismissal. Although the identification was not clear and unequivocal, it was not inherently incredible.

Habitual Felon

State v. Wilkins, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013). The trial court erred by sentencing the defendant as a habitual felon where the issue was neither submitted to the jury nor addressed by a guilty plea. A stipulation to the prior felonies is insufficient; there must be a jury verdict or a plea.

State v. Shaw, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012). Habitual misdemeanor assault cannot serve as a prior felony for purposes of habitual felon.

Jury Selection

State v. Broom, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013). (1) In a case in which the defendant was charged with various crimes related to shooting his pregnant wife, the trial court did not err by limiting the defendant's voir dire of prospective jurors. The charges included first-degree murder of the child, who was born alive after the defendant's attack on her mother but died one month later. Defense counsel attempted to ask prospective jurors about their views on abortion and when life begins, and whether they held such strong views on those subjects that they would be unable to apply the law. The trial court sustained the State's objection to this questioning. These questions apparently confused prospective jurors as several inquired about the relevancy of their opinions on abortion. The trial court did not abuse its discretion by sustaining the State's objection to questioning that was confusing and irrelevant. (2) The trial court did not abuse its discretion by denying the defendant's request to be provided, prior to voir dire, with the trial court's intended jury instructions regarding the killing of an unborn fetus. The defendant wanted the instruction to "clarify the law" before questioning of the jurors. The trial court properly instructed the jury on the born alive rule and killing of an unborn fetus was not an issue in the case.

Use of Defendant's Silence

State v. Richardson, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). The trial court committed plain error by allowing the State to cross-examine the defendant about his failure to make a post-arrest statement to officers and to comment in closing argument on the defendant's decision to refrain from giving such a statement. The following factors, none of which is determinative, must be considered in ascertaining whether a prosecutorial comment concerning a defendant's post-arrest silence constitutes plain error: whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; whether there was substantial evidence of the defendant's guilt; whether the defendant's credibility was successfully attacked in other ways; and the extent to which the prosecutor emphasized or capitalized on the improper testimony. After concluding that the State improperly cross-examined the defendant about his post-arrest silence and commented on that silence in closing argument, the court applied the factors noted above and concluded that the trial court's failure to preclude these comments constituted plain error.

Jury Instructions

State v. Vaughn, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The trial court committed plain error by instructing the jury that the defendant was not entitled to the benefit of self-defense if she was the aggressor when no evidence suggested that the defendant was the aggressor.

State v. Hope, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012). (1) In an assault with a deadly weapon with intent to kill inflicting serious injury case where the weapon was not a deadly weapon per se, the trial court did not err by declining to give self-defense instruction N.C.P.I.—Crim. 308.40 and did not commit plain error by declining to give self-defense instruction N.C.P.I.—Crim. 308.45 over the defendant's objection. The court clarified that when a defendant is charged with assault with a deadly weapon and the weapon is a deadly weapon per se, the trial judge should instruct that the assault would be excused as being in self-defense only if the circumstances would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself or herself from death or great bodily harm. If, however, the weapon is not a deadly weapon per se, the trial judge should further instruct the jury that if they find that the defendant assaulted the victim but do not find that the defendant used a deadly weapon, that assault would be excused as being in self-defense if the circumstances would create in the mind of a person of ordinary firmness a reasonable belief that such

action was necessary to protect himself or herself from bodily injury or offensive physical contact. (2) In an assault with a deadly weapon inflicting serious injury case, the defendant is not entitled to a simple assault instruction where the deadly weapon element is left to the jury but there is uncontroverted evidence of serious injury.

State v. Sessoms, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). The trial court did not commit plain error by failing to instruct on defense of others. The defendant's statement that he was defending himself, his vehicle and his wife was not evidence from which the jury could find that the defendant reasonably believed a third person was in immediate peril of death or serious bodily harm at the hands of another.

State v. Golden, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012). The trial court erred by instructing on flight. The defendant fled from an officer responding to a 911 call regarding violation of a domestic violence protective order. After being arrested the defendant's vehicle was searched and he was charged with perpetrating a hoax on law enforcement officers by use of a false bomb on the basis of a device found in his vehicle. The defendant's initial flight cannot be considered as evidence of his guilt of the hoax offense. However, the error did not prejudice the defendant.

Jury Review of Evidence

State v. Hinton, __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). The trial court committed prejudicial error by failing to exercise discretion in responding to the deliberating jury's request to review evidence. The trial court indicated that the requested information was "not in a form which can be presented to [the jury.]" The court found that this statement "demonstrated a belief that [the trial court] was not capable of complying with the jury's transcript request" and that as a result the trial court failed to exercise discretion in responding to the jury's request.

State v. Hatfield, __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). The court reversed and remanded for a new trial where the trial court failed to exercise its discretion regarding the jury's request to review the victim's testimony and the error was prejudicial. Responding to the jury's request, the trial court stated, in part, "We can't do that." This statement suggests that the trial court did not know its decision was discretionary.

Mistrial

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013). In a resist, delay and obstruct case arising out of an incident of indecent exposure, the trial court did not abuse its discretion by denying the defendant's mistrial motion when an officer testifying for the State indicated that the defendant said he was a convicted sex offender. The trial court sustained the defendant's objection, granted the defendant's motion to strike, and gave the jury a curative instruction.

Sentencing

Prior Record Level

State v. Threadgill, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The court rejected the defendant's argument that the trial court violated his rights under the ex post facto clause when it assigned points to his prior record level based upon a conviction that was entered after the date of the offenses for which he was sentenced in the present case. The court noted that the conviction for the prior was entered

more than a year before entry of judgment in the present case and G.S. 15A-1340.11(7) (defining prior conviction) was enacted prior to the date of the present offense.

State v. Claxton, __ N.C. App. __, 736 S.E.2d 603 (Jan. 15, 2013). The trial court did not err by finding that a NY drug conviction for third-degree drug sale was substantially similar to a NC Class G felony under G.S. 90-95. Comparing the two states' statutes, the offenses were substantially similar, notwithstanding the fact that the states' drug schedules are not identical. The court noted: the requirement in G.S. 15A-1340.14(e) "is not that the statutory wording precisely match, but rather that the offense be 'substantially similar.'"

State v. Sanders, __ N.C. App. __, 736 S.E.2d 238 (Jan. 15, 2013). In determining whether out-of-state convictions were substantially similar to NC offenses, the trial court erred by failing to compare the elements of the offenses and instead comparing their punishment levels.

State v. Davis, __ N.C. App. __, 738 S.E.2d 417 (Mar. 19, 2013). When determining prior record level, the trial court erroneously concluded that a Georgia conviction for theft was substantially similar to misdemeanor larceny without hearing any argument from the State. Additionally, the Georgia offense is not substantially similar to misdemeanor larceny; the Georgia offense covers both temporary and permanent takings but misdemeanor larceny covers only permanent takings.

State v. Phillips, __ N.C. App. __, __ S.E.2d __ (May 21, 2013). Based on the elements of the two offenses, the trial court erred by concluding that a prior Ohio conviction was substantially similar to the North Carolina crime of assault with a deadly weapon with intent to kill.

State v. Gardner, __ N.C. App. __, 736 S.E.2d 826 (Jan. 15, 2013). The trial court erred by assigning a PRL point under G.S. 15A-1340.14(b)(6) (one point if all the elements of the present offense are included in any prior offense). The trial court assigned the point because the defendant was convicted of felony speeding to elude (Class H felony) and had a prior conviction for that offense. However, the new felony speeding to elude conviction was consolidated with a conviction for assault with a deadly weapon on a governmental officer (AWDWOGO), a more serious offense (Class F felony). When offenses are consolidated, the most serious offense controls, here AWDWOGO. Analyzed in this fashion, all of the elements of AWDWOGO are not included in the prior felony speeding to elude conviction. The court rejected the State's argument that because both felonies were elevated to Class C felonies under the habitual felon law, assignment of the prior record level was proper.

Extraordinary Mitigation

State v. Williams, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) The trial court did not put the burden on the State to disprove extraordinary mitigating factors. After the defendant presented evidence of mitigating factors, the trial court asked the State to respond to the defendant's evidence by explaining why it believed these factors were not sufficient reasons for finding extraordinary mitigation. The trial court did not presume extraordinary mitigating factors and then ask the State to present evidence to explain why they did not exist. (2) The trial court erred by finding extraordinary mitigation. The trial court found ten statutory mitigating factors and four extraordinary factors. Two extraordinary factors were the same as corresponding normal statutory mitigating factors and thus were insufficient to support a finding of extraordinary mitigation. The third factor was not a proper factor in support of mitigation; the fourth was not supported by the evidence.

Life Sentences; Life without Parole

State v. Lovette, __ N.C. App. __, 737 S.E.2d 432 (Feb. 5, 2013). In an appeal from a conviction obtained in the Eve Carson murder case, the court held that the defendant was entitled to a new sentencing hearing in accordance with G.S. 15A-1476 (recodified as G.S. 15A-1340.19A), the statute enacted by the North Carolina General Assembly to bring the State's sentencing law into compliance with *Miller v. Alabama*, 567 U.S. __, 183 L. Ed. 2d 407 (2012) (Eighth Amendment prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile homicide offenders). The State conceded that the statute applied to the defendant, who was seventeen years old at the time of the murder and whose case was pending on direct appeal when the Act became law.

Lovette v. N.C. Dep't of Corr., __ N.C. __, 737 S.E.2d 737 (Mar. 8, 2013). In a per curiam decision, the court reversed the court of appeals for the reasons stated in the dissenting opinion. In the opinion below, *Lovette v. North Carolina Department of Correction*, __ N.C. App. __, 731 S.E.2d 206 (2012), the court of appeals, over a dissent, affirmed a trial court order holding that the petitioners had fully served their life sentences after credits had been applied to their unconditional release dates. Both petitioners were sentenced to life imprisonment under former G.S. 14-2, which provided that a life sentence should be considered as imprisonment for eighty years. They filed habeas petitions alleging that based on credits for "gain time," "good time," and "meritorious service" and days actually served, they had served their entire sentences and were entitled to be discharged from incarceration. The trial court distinguished *Jones v. Keller*, 364 N.C. 249 (2010) (in light of the compelling State interest in maintaining public safety, regulations do not require that the DOC apply time credits for purposes of unconditional release to those who committed first-degree murder during the 8 Apr. 1974 through 30 June 1978 time frame and were sentenced to life imprisonment), on grounds that the petitioners in the case at hand were not convicted of first-degree murder (one was convicted of second-degree murder; the other was convicted for second-degree burglary). The trial court went on to grant the petitioners relief. The State appealed. The court of appeals held that the trial court did not err by distinguishing the case from Jones. The court also rejected the State's argument that the trial court's order changed the petitioners' sentences and violated separation of powers. Judge Ervin dissented, concluding that the trial court's order should be reversed. According to Judge Ervin, *Jones* applied and required the conclusion that the petitioners were not entitled to have their earned time credits applied against their sentences for purposes of calculating their unconditional release date.

Court Costs

State v. Patterson, __ N.C. App. __, 735 S.E.2d 602 (Oct. 16, 2012). (1) The trial court erred by failing to exercise discretion when ordering the defendant to pay court costs. Ordering payment of costs, the court stated: "I have no discretion but to charge court costs and I'll impose that as a civil judgment." Amended G.S. 7A-304(a) does not mandate imposition of court costs; rather, it includes a limited exception under which the trial court may waive court costs upon a finding of just cause. The trial court's statement suggests that it was unaware of the possibility of a just cause waiver. (2) Court costs must be limited to the amounts authorized by G.S. 7A-304.

Prayer for Judgment Continued

State v. Broom, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013). When the trial court enters a PJC, there is no final judgment from which to appeal.

Probation Violations

State v. Jones, __ N.C. App. __, 736 S.E.2d 634 (Jan. 15, 2013). The trial court did not abuse its discretion by revoking the defendant's probation under the Justice Reinvestment Act when the defendant was convicted of another criminal offense while on probation.

State v. Boone, __ N.C. App. __, 741 S.E.2d 371 (Feb. 5, 2013). The trial court erred by revoking the defendant's probation. The defendant pleaded guilty and was sentenced to 120 days confinement suspended for one year of supervised probation. The trial court ordered the defendant to perform 48 hours of community service, although no date for completion of the community service was noted on the judgment, and to pay $1,385 in costs, fines, and fees, as well as the probation supervision fee. The schedule required for the defendant's payments and community service was to be established by the probation officer. The probation officer filed a violation report alleging that the defendant had willfully violated his probation by failing to complete any of his community service, being $700 in arrears of his original balance, and being in arrears of his supervision fee. The defendant was found to have willfully violated and was revoked. The court concluded that absent any evidence of a required payment schedule or schedule for community service, the evidence was insufficient to support a finding of willful violation.

State v. Tindall, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The trial court lacked jurisdiction to revoke the defendant's probation on the basis of a violation that was not alleged in the violation report and of which she was not given notice. The violation reports alleged that the defendant violated two conditions of her probation: to "[n]ot use, possess or control any illegal drug" and to "participate in further evaluation, counseling, treatment or education programs recommended . . . and comply with all further therapeutic requirements." The specific facts upon which the State relied were that "defendant admitted to using 10 lines of cocaine" and that the defendant failed to comply with treatment as ordered. However, the trial court found that the defendant's probation was revoked for "violation of the condition(s) that he/she not commit any criminal offense . . . or abscond from supervision."

Sex Offender Registration and Monitoring

Registration

Walters v. Cooper, __ N.C. App. __, 739 S.E.2d 185 (Mar. 19, 2013), *temp. stay and petition for writ of supersedeas allowed*, __ N.C. __, 739 S.E.2d 838 (Apr. 3, 2013). Over a dissent, the court held that a PJC entered upon a conviction for sexual battery does not constitute a "final conviction" and therefore cannot be a "reportable conviction" for purposes of the sex offender registration statute.

Termination of Registration

In re Dunn, __ N.C. App. __, 738 S.E.2d 198 (Jan. 15, 2013). Holding, in a case in which the trial court denied the defendant's motion to terminate his sex offender registration, that the superior court did not have jurisdiction to enter its order. Under G.S. 14-208.12A(a), a petition to terminate must be filed in the district where the person was convicted. Here, the defendant was convicted in Montgomery County but filed his petition to terminate in Cumberland County.

In re McClain, __ N.C. App. __, __ S.E.2d __ (April 16, 2013). The court rejected the defendant's argument that the trial court erred by denying his petition for removal from the sex offender registry

because the incorporation of the Adam Walsh Act and SORNA into G.S. 14-208.12A(a1)(2) was an unconstitutional delegation of legislative authority.

In re Bunch, __ N.C. App. __, __ S.E.2d __ (May 21, 2013). On the State's appeal from the trial court order terminating the defendant's sex offender registration, the court noted that when a defendant seeks to be removed from the registry because he was erroneously required to register, the more appropriate avenue for relief is a declaratory judgment; however, it found that a declaratory judgment is not the exclusive avenue for relief. The fact that a person has not actually registered for 10 years in NC does not deprive the trial court of jurisdiction to rule on a petition to terminate.

Restrictions on Sex Offenders

State v. Daniels, __ N.C. App. __, 741 S.E.2d 354 (Dec. 31, 2012). (1) G.S. 14-208.18(a)(1)-(3) creates three separate and distinct criminal offenses. (2) Although the defendant did not have standing to assert that G.S. 14-208.18(a)(3) was facially invalid, he had standing to raise an as applied challenge. (3) G.S. 14-208.18(a)(3), which prohibits a sex offender from being "at any place" where minors gather for regularly scheduled programs, was unconstitutionally vague as applied to the defendant. The defendant's two charges arose from his presence at two public parks. The State alleged that on one occasion he was "out kind of close to the parking lot area or that little dirt road area[,]" between the ballpark and the road and on the second was at an "adult softball field" adjacent to a "tee ball" field. The court found that on these facts, the portion of G.S. 14-208.18(a)(3), prohibiting presence "at any place," was unconstitutionally vague as applied to the defendant because it fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, and it fails to provide explicit standards for those who apply the law. (4) The trial court lacked jurisdiction to rule that G.S. 14-208.18(a)(2) was unconstitutional where the defendant only was charged with a violation of G.S. 14-208.18(a)(3) and those provisions were severable.

Satellite-Based Monitoring (SBM)

State v. Martin, __ N.C. App. __, 735 S.E.2d 238 (Nov. 20, 2012). The court affirmed the trial court's order requiring the defendant to enroll in SBM over the defendant's assertion that SBM enrollment violated his Fourth Amendment rights.

State v. Boyett, __ N.C. App. __, 735 S.E.2d 371 (Dec. 4, 2012), *temp. stay allowed*, __ N.C. __, 735 S.E.2d 343 (Dec. 21, 2012). Considering the elements of the offense, second-degree sexual offense is not an "aggravated offense" requiring lifetime satellite-based monitoring or lifetime registration.

State v. Arrington, __ N.C. App. __, 741 S.E.2d 453 (April 2, 2013). (1) The trial court properly required the defendant to enroll in lifetime SBM. When deciding whether a conviction counts as a reportable conviction as an "offense against a minor", the trial court is not restricted to considering the elements of the offense; the trial court may make a determination as to whether or not the defendant was a parent of the abducted child. The defendant had a 2009 conviction for abduction of a child. Although the State did not present any independent evidence at the SBM hearing that the defendant was not the child's parent, the trial court previously made this determination at the 2009 sentencing hearing when it found the conviction to be a reportable offense. This prior finding supported the trial court's determination at the SBM hearing that the defendant's conviction for abduction of a child was a reportable conviction as an offense against a minor. (2) There was sufficient evidence that the defendant was a recidivist for purposes of lifetime SBM. The prior record worksheet and defense counsel's stipulation to the prior

convictions support a finding that the defendant had been convicted of indecent liberties in 2005, even though it appears that the State did not introduce the judgment or record of conviction from that case, or a copy of defendant's criminal history.

State v. Thomas, __ N.C. App. __, 741 S.E.2d 384 (Feb. 19, 2013). (1) The trial court erred by concluding that the defendant required the highest level of supervision and monitoring and ordering the defendant to enroll in SBM for ten years when the STATIC-99 risk assessment classified him as a low risk for reoffending and that the trial court's additional findings were not supported by the evidence. The trial court had made additional findings that the victim suffered significant emotional trauma, that the defendant took advantage of a position of trust, and that the defendant had a prior record for a sex offense. The trial court stated that these factors "create some concern for the court on the likelihood of recidivism." The finding that the victim suffered from trauma was based solely on unsworn statements by the victim's mother and thus were insufficient to support this finding. The defendant's prior record and likelihood or recidivism was already accounted for in the STATIC-99 and thus did not constitute additional evidence outside of the STATIC-99. However, because the State had presented evidence which could support a determination of a higher level of risk, the court remanded for a new SBM hearing. (2) The trial court erred by concluding that indecent liberties was an offense against a minor as defined by G.S. 14-208.6(1m). However, that offense may constitute a sexually violent offense, and could thus support a SBM order.

Entry of an Order

State v. Oates, __ N.C. __, __ S.E.2d __ (Oct. 5, 2012). The court reversed *State v. Oates*, __ N.C. App. __, 715 S.E.2d 616 (Sept. 6, 2011), and held that the State's notice of appeal of a trial court ruling on a suppression motion was timely. The State's notice of appeal was filed seven days after the trial judge in open court orally granted the defendant's pretrial motion to suppress but three months before the trial judge issued his written order of suppression. The court held that the window for filing a written notice of appeal in a criminal case opens on the date of rendition of the judgment or order and closes 14 days after entry of the judgment or order. The court clarified that rendering a judgment or an order means to pronounce, state, declare, or announce the judgment or order and is "the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy." Entering a judgment or an order is "a ministerial act which consists in spreading it upon the record." It continued:

> For the purposes of entering notice of appeal in a criminal case . . . a judgment or an order is rendered when the judge decides the issue before him or her and advises the necessary individuals of the decision; a judgment or an order is entered under that Rule when the clerk of court records or files the judge's decision regarding the judgment or order.

State v. Hadden, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). The trial court's order requiring the defendant to enroll in SBM, although signed and dated by the trial court, was never filed with the clerk of court and therefore was a nullity.

Evidence

Right to Present a Defense

Nevada v. Jackson, 569 U.S. __ (June 3, 2013). The Court reversed the Ninth Circuit, which had held that the defendant, who was convicted of rape and other crimes, was entitled to federal habeas relief because the Nevada Supreme Court unreasonably applied clearly established Supreme Court precedent

regarding a criminal defendant's constitutional right to present a defense. At his trial, the defendant unsuccessfully tried to introduce extrinsic evidence that the victim previously reported that the defendant had assaulted her but that the police had been unable to substantiate those allegations. The state supreme court held that this evidence was properly excluded. The Ninth Circuit granted habeas relief. The Court reversed, noting in part that it "has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes" (emphasis in original).

Applicability of the Rules

Johnson v. Robertson, __ N.C. App. __, __ S.E.2d __ (May 21, 2013). The Rules of Evidence do not apply to DMV license revocation hearings pursuant to G.S. 20-16.2.

Rule 401 (Relevancy)

State v. Hinton, __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). In an attempted murder and assault case, the trial court committed plain error by allowing an officer to testify about gangs and gang-related activity where the evidence was not relevant to guilt or to the aggravating factor that the crimes were gang-related. The State's theory was that the defendant attacked the victim because he was having a sexual relationship with the defendant's aunt. Thus, gang evidence "was neither relevant to the alleged criminal act nor to the aggravating factor of which the State had given notice of its intent to show." Additionally, the testimony carried the danger of unfair prejudice that substantially outweighed its non-existent probative value under Rule 403.

State v. Rollins, __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). In a murder case, the trial court did not err by admitting a knife found four years after the crime at issue. The defendant objected on relevancy grounds. The defendant's wife testified that he told her that he murdered the victim with a knife that matched the description of the one that was found, the defendant was seen on the day of the murder approximately 150 yards from where the knife was found, and the knife was consistent with the description of the likely murder weapon provided by the State's pathologist. The court went on to find no abuse of discretion in admitting the knife under Rule 403.

404(b) Evidence

State v. Noble, __ N.C. App. __, __ S.E.2d __ (May 14, 2013). In an involuntary manslaughter case where the under 21 victim died from alcohol poisoning and the defendant was alleged to have aided and abetted the victim in the possession or consumption of alcohol, the trial court did not err by admitting 404(b) evidence that the defendant provided her home as a place for underage individuals, including the victim, to possess and consume alcohol; that the defendant offered the victim and other underage persons alcohol at these parties; that the defendant purchased alcohol at a grocery store while accompanied by the victim; and the defendant was cited for aiding and abetting the victim and other underage persons to possess or consume alcohol one week before the victim's death. The evidence was relevant to prove plan, knowledge, and absence of mistake or accident.

State v. Barnett, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012). In a second-degree rape case, the trial court properly admitted 404(b) evidence of the defendant's prior sexual conduct with the victim to show common scheme. The conduct leading to the charges occurred in 1985 when the victim was 16 years old. After ingesting alcohol and other substances, the victim awoke to find the defendant, her uncle, having sex with her. At trial the victim testified that in 1977, the defendant touched her breasts

several times; in 1978, he touched her breasts, put her hand on his penis, and made her rub his penis up and down; and in 1980 he twice masturbated in front of her. The court found the prior acts sufficient similar to the rape at issue, noting that they show "a progression from inappropriate touching in 1977 to sexual intercourse in 1985." Also all of the incidents occurred where the defendant was living. The incidents were not too remote; although there was a five year gap between the last act and the rape, the defendant did not have access to the victim for three years. The court also found that the evidence was admissible under Rule 403.

State v. Golden, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012). In a case in which the defendant was convicted of perpetrating a hoax on law enforcement officers by use of a false bomb, the trial court did not err by admitting evidence of the defendant's prior acts against his estranged wife. The defendant's wife had a DVPO against him. When she saw the defendant at her house, she called 911. After arresting the defendant, officers found weapons on him and the device and other weapons in his vehicle. At trial his wife testified to her prior interactions with the defendant, including when he threatened her. The evidence of the prior incidents showed the defendant's intent to perpetrate a hoax by use of a false bomb in that they showed his ongoing objective of scaring his wife with suggestions that he would physically harm her and other around her. Also, the prior acts were part of the chain of events leading to the crime and thus completed the story for the jury. The court rejected the defendant's argument that the prior acts were not sufficiently similar to the act charged on grounds that similarity was not pertinent to the 404(b) purpose for which the evidence was admitted. The court also concluded that the trial court did not abuse its discretion by admitting the evidence under Rule 403.

Rule 606 (Competency of juror as witness)

State v. Heavner, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). Although the trial court erred by admitting in a motion for appropriate relief (MAR) hearing a juror's testimony about the impact on his deliberations of his conversation with the defendant's mother during trial, the trial court's findings supported its determination that there was no reasonable possibility the juror was affected by the extraneous information. After the defendant was found guilty it came to light that his mother, Ms. Elmore, spoke with a juror during trial. The defendant filed a MAR alleging that as a result he did not receive a fair trial. At the MAR hearing, the juror admitted that a conversation took place but said that he did not take it into account in arriving at a verdict. The trial court denied the MAR. Although it was error for the trial court to consider the juror's mental processes regarding the extraneous information, the judge's unchallenged findings of fact supported its conclusion that there was no reasonable possibility that the juror could have been affected by the information. The court noted that the juror testified that Elmore said only that her son was in trouble and that she was there to support him; she never said what the trouble was, told the juror her son's name, or specified his charges.

Hearsay

Little v. Little, __ N.C. App. __, __ S.E.2d __ (April 16, 2013). A wife's testimony in a DVPO hearing that a doctor told her that her neck suffered a cervical strain was inadmissible hearsay. Because the trial court relied on the inadmissible hearsay the error was not harmless.

State v. Rollins, __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). The trial court properly admitted an unavailable witness's testimony at a proceeding in connection with the defendant's *Alford* plea under the Rule 804(b)(1) hearsay exception for former testimony. The court rejected the defendant's

argument that the testimony was inadmissible because he had no motive to cross-examine the witness during the plea hearing.

Joines v. Moffitt, __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). In this civil case the court held that an officer's accident report, prepared near the time of the accident, using information from individuals who had personal knowledge of the accident was admissible under the Rule 803(6) hearsay exception.

Crawford Issues

State v. Burrow, __ N.C. App. __, __ S.E.2d __ (June 4, 2013). In this drug trafficking case, notice was properly given under the G.S. 90-95(g) notice and demand statute even though it did not contain proof of service or a file stamp. The argued-for service and filing requirements were not required by *Melendez-Diaz* or the statute. The notice was stamped "a true copy"; it had a handwritten notation that saying "ORIGINAL FILED," "COPY FAXED," and "COPY PLACED IN ATTY'S BOX." The defendant did not argue that he did not in fact receive the notice.

State v. Lanford, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013). The trial court did not err by allowing a child victim to testify out of the defendant's presence by way of a closed circuit television. Following *State v. Jackson*, __ N.C. App. __, 717 S.E.2d 35 (Oct. 4, 2011) (in a child sexual assault case, the defendant's confrontation rights were not violated when the trial court permitted the child victim to testify by way of a one-way closed circuit television system; *Maryland v. Craig* survived *Crawford* and the procedure satisfied *Craig*'s procedural requirements), the court held that no violation of the defendant's confrontation rights occurred. The court also held that the trial court's findings of fact about the trauma that the child would suffer and the impairment to his ability to communicate if required to face the defendant in open court were supported by the evidence.

State v. Seelig, __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). In a case in which the defendant was charged with obtaining property by false pretenses for selling products alleged to be gluten free but which in fact contained gluten, the trial court did not err by allowing an ill witness to testify by way of a two-way, live, closed-circuit web broadcast. The witness testified regarding the results of laboratory tests he performed on samples of the defendant's products. The trial court conducted a hearing and found that the witness had a history of panic attacks, had suffered a severe panic attack on the day he was scheduled to fly from Nebraska to North Carolina for trial, was hospitalized as a result, and was unable to travel to North Carolina because of his medical condition. Applying the test of *Maryland v. Craig,* the court found these findings sufficient to establish that allowing the witness to testify remotely was necessary to meet an important state interest of protecting the witness's ill health. Turning to *Craig's* second requirement, the court found that reliability of the witness's testimony was otherwise assured, noting, among other things that the witness testified under oath and was subjected to cross-examination.

State v. Burrow, __ N.C. __, __ S.E.2d __ (Dec. 14, 2012). The court vacated and remanded *State v. Burrow*, __ N.C. App. __, 721 S.E.2d 356 (Feb. 7, 2012), after allowing the State's motion to amend the record to include a copy of the State's notice under G.S. 90-95 indicating an intent to introduce into evidence a forensic report without testimony of the preparer. In the opinion below, the court of appeals had held that the trial court committed plain error by allowing the State to admit a SBI forensic report identifying the substance at issue as oxycodone when neither the preparer of the report nor a substitute analyst testified at trial.

State v. Barnes, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). In a murder case, the defendant's right of confrontation was not violated when Dr. Jordan, an expert medical examiner, testified that in his opinion the cause of death was methadone toxicity. As part of his investigation, Jordan sent a specimen of the victim's blood to the Chief Medical Examiner's Office for analysis. During trial, Jordan testified that in his opinion the cause of death was methadone toxicity and that his opinion was based upon the blood toxicology report from the Medical Examiner's Office. When defense counsel raised questions about the test showing methadone toxicity, the trial court allowed the State to call as a witness Jarod Brown, the toxicologist at the Medical Examiner's Officer who analyzed the victim's blood. Noting the evolving nature of the confrontation question presented, the court concluded that even assuming arguendo that Jordan's testimony was erroneous, any error was cured by the subsequent testimony and cross-examination of Brown, who performed the analysis.

State v. Ward, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) In a drug case, the trial court did not err by allowing one analyst to testify to the results of an analysis done by another non-testifying analyst. The analysis at issue identified the pills as oxycodone. The defendant did not object to the analyst's testimony at trial or to admission of the underlying report into evidence. Because the defendant and defense counsel stipulated that the pills were oxycodone, no plain error occurred. (2) The court rejected the defendant's argument that the State's failure to comply with the requirements of the G.S. 90-95 notice and demand statute with respect to the analyst's report created error. In addition to failing to object to admission of the report, both the defendant and defense counsel stipulated that the pills were oxycodone. The court also rejected the defendant's argument that his stipulation was not a knowing, voluntary and intelligent waiver of his right to confront the non-testifying analyst, noting that such a stipulation does not require the formality of a guilty plea.

State v. Poole, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012). (1) Admission of a forensic report identifying a substance as a controlled substance without testimony of the preparer violated the defendant's confrontation clause rights. (2) The trial court erred by allowing a substitute analyst to testify that a substance was a controlled substance based on the same forensic report where the substitute analyst did not perform or witness the tests and merely summarized the conclusions of the non-testifying analyst.

State v. Rollins, __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). (1) No violation of the defendant's confrontation rights occurred when the trial court admitted an unavailable witness's testimony at a proceeding in connection with the defendant's *Alford* plea under the Rule 804(b)(1) hearsay exception for former testimony. The witness was unavailable and the defendant had a prior opportunity to cross-examine her at the plea hearing. (2) No violation of the defendant's confrontation rights occurred when an officer testified to statements made to him by others where the statements were not introduced for their truth but rather to show the course of the investigation, specifically why officers searched a location for evidence.

Opinions

Child Sexual Abuse Cases

State v. Ragland, __ N.C. App. __, __ S.E.2d __ (April 16, 2013). (1) In a child sex case, the trial court did not err by allowing the State's properly qualified medical expert to testify that the victim's profile was consistent with that of a sexually abused child. The court rejected the defendant's argument that the State failed to lay a proper foundation for the testimony, concluding that because the witness was properly qualified to testify as an expert regarding the characteristics of sexually abused children, a

proper foundation was laid. (2) The trial court erred by admitting expert testimony regarding DNA evidence that amounted to a "prosecutor's fallacy." That fallacy, the court explained, involves the use of DNA evidence to show "random match probability." Random match probability evidence, it continued, is the probability that another person in the general population would share the same DNA profile as the person whose DNA profile matched the evidence. Citing, *McDaniel v. Brown*, 558 U.S. 120 (2010), the court explained that "[t]he prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample." It continued, quoting from *McDaniel:*

> In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor's fallacy.

Here, error occurred when the State's expert improperly relied on the prosecutor's fallacy. However, the error did not rise to the level of plain error.

State v. Ryan, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012). Improper testimony by an expert pediatrician in a child sexual abuse case required a new trial. After the alleged abuse, the child was seen by Dr. Gutman, a pediatrician, who reviewed her history and performed a physical exam. Gutman observed a deep notch in the child's hymen, which was highly suggestive of vaginal penetration. Gutman found the child's anus to be normal but testified that physical findings of anal abuse are uncommon. Gutman also tested the child for sexually transmitted diseases. The tests were negative, except that the child was diagnosed with bacterial vaginosis. Gutman testified that the presence of bacterial vaginosis can be indicative of a vaginal injury, although it is the most common genital infection in women and can have many causes. The child's mother had indicated the child had symptoms of vaginosis as early as 2006, which predated the alleged abuse. Gutman testified to her opinion that the child had been sexually abused, that she had no indication the child's story was fictitious or that the child had been coached, and that defendant was the perpetrator. (1) Gutman was properly allowed to testify that the child had been sexually abused given the physical evidence of the unusual hymenal notch and bacterial vaginosis. The court noted that Gutman did not state which acts of alleged sexual abuse had occurred. It continued, noting that if Gutman had testified that the child had been the victim of both vaginal and anal sexual abuse, that would have been error given the lack of physical evidence of anal penetration. (2) Gutman's testimony that she was not concerned that the child was "giving a fictitious story" was essentially an opinion that the child was not lying about the sexual abuse and thus was improper. The court rejected the State's argument that the defendant opened the door to this testimony. (3) Citing *State v. Baymon*, 336 N.C. 748 (1994), the court held that Gutman's testimony that the child had not been coached was admissible. (4) It was error to allow Gutman to testify that "there was no evidence that there was a different perpetrator" other than defendant where Gutman based her conclusion on her interview with the child and it did not relate to a diagnosis derived from Gutman's examination of the child.

State v. Dew, __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). (1) In a child sex case, the trial court did not err by qualifying as an expert a family therapist who provided counseling to both victims. The court first concluded that the witness possessed the necessary qualifications. Among other things, she had a master's degree in Christian counseling and completed additional professional training relating to the trauma experienced by children who have been sexually abused; she engaged in private practice as a therapist and was a licensed family therapist and professional counselor; and over half of her clients had been subjected to some sort of trauma, with a significant number having suffered sexual abuse. Second,

the court rejected the defendant's challenge to the expert's testimony on reliability grounds, concluding that he failed to demonstrate that her methods were unreliable. The court noted that our courts have consistently allowed the admission of similar expert testimony, relying upon personal observations and professional experience rather than upon quantitative analysis. (2) The expert did not impermissibly vouch for the credibility of the victims when she testified that "research says is 60% of cases like this do not even get reported." According to the defendant, the expert improperly vouched for the credibility of the children by describing child sexual abuse cases with which she was familiar as "cases like this." Distinguishing prior cases, the court disagreed. It noted that the expert never directly stated that the victims were believable; instead she described the actions and reactions of sexual abuse victims in general. (3) A detective did not impermissibly vouch for the victim's credibility when she testified that the child actually remembered specific events. The challenged testimony was nothing more than a permissible discussion of the manner in which the child communicated with the detective.

State v. Black, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012). Although the trial court erred by allowing the State's expert to testify that the child victim had been sexually abused, the error did not rise to the level of plain error. Responding to a question about the child's treatment, the expert, a licensed clinical social worker, said: "For a child, that means . . . being able to, um, come to terms with all the issues that are consistent with someone that has been sexually abused." She also testified several times to her conclusion that the sexual abuse experienced by the victim started at a young age, perhaps age seven, and continued until she was removed from the home. When asked why the victim lashed out at a family member, the expert said that the behavior was "part of a history of a child that goes through sexual abuse." With respect to her concerns about the adequacy of a family member's care, the expert testified: "She had every opportunity to get the education and the information to become an informed parent about a child that is sexually abused." And, when asked if it was reasonable for a family member to have doubt about the victim's story given that she had recanted, the expert responded: "With me, there was no uncertainty." The testimony was indistinguishable from that found to be error in *State v. Towe*, __ N.C. __, __ S.E.2d __ (June 14, 2012) (expert's testimony was improper when she stated that the victim fell into the category of children who had been sexually abused but showed no physical symptoms of such abuse). Here, it was error for the expert to "effectively assert[]" that the victim was a sexually abused child absent physical evidence of abuse.

Drug Cases

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013). In a misdemeanor possession of marijuana case, the State was not required to test the substance alleged to be marijuana where the arresting officer testified without objection that based on his training the substance was marijuana. The officer's testimony was substantial evidence that the substance was marijuana and therefore the trial court did not err by denying the defendant's motion to dismiss.

State v. Mitchell, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012). In a drug case, an officer properly was allowed to identify the substance at issue as marijuana based on his "visual and olfactory assessment" and a chemical analysis of marijuana was not required.

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012). In a trafficking in opium case, the State's forensic expert properly testified that the substance at issue was an opium derivative where the expert relied on a chemical analysis, not a visual identification.

Rape Shield Statute

State v. Okwara, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012). In the context of an appeal from a contempt proceeding, the court held that by asking the victim at trial about a possible prior instance of rape between the victim and a cousin without first addressing the relevance and admissibility of the question during an in camera hearing, defense counsel violated the Rape Shield Statute.

Cross-Examination and Impeachment

State v. Black, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012). In this child sexual abuse case, the trial court did not impermissibly allow the State to use extrinsic evidence to impeach the defendant on a collateral matter. On cross-examination, the defendant denied that she had told anyone that the victim began masturbating at an early age, given the victim a vibrator, or taught the victim how to masturbate. In rebuttal, the State called a social worker to testify that the defendant told her that the victim started masturbating at age seven or eight and that she gave the victim a vibrator. The defendant's prior statements were not used solely to impeach but as substantive evidence in the form of admissions.

Authentication

State v. Wilkerson, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012). In a felony larceny after a breaking or entering case, the trial court did not abuse its discretion by determining that a text message sent from the defendant's phone was properly authenticated where substantial circumstantial evidence tended to show that the defendant sent the text message. The defendant's car was seen driving up and down the victim's street on the day of the crime in a suspicious manner; an eyewitness provided a license plate number and a description of the car that matched the defendant's car, and she testified that the driver appeared to be using a cell phone; the morning after the crime, the car was found parked at the defendant's home with some of the stolen property in the trunk; the phone was found on the defendant's person the following morning; around the time of the crime, multiple calls were made from and received by the defendant's phone; the text message itself referenced a stolen item; and by referencing cell towers used to transmit the calls, expert witnesses established the time of the calls placed, the process employed, and a path of transit tracking the phone from the area of the defendant's home to the area of the victim's home and back.

Arrest, Search & Investigation

Dog Sniff

Florida v. Jardines, 569 U.S. __ (Mar. 26, 2013). Using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment. The Court's reasoning was based on the theory that the officers engaged in a physical intrusion of a constitutionally protected area. Applying that principle, the Court held:

> The officers were gathering information in an area belonging to [the defendant] and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

Slip Op. at pp. 3-4. In this way the majority did not decide the case on a reasonable expectation of privacy analysis; the concurring opinion came to the same conclusion on both property and reasonable expectation of privacy grounds.

Florida v. Harris, 568 U.S. __ (Feb. 19, 2013). Concluding that a dog sniff "was up to snuff," the Court reversed the Florida Supreme Court and held that the dog sniff in this case provided probable cause to search a vehicle. The Court rejected the holding of the Florida Supreme Court which would have required the prosecution to present, in every case, an exhaustive set of records, including a log of the dog's performance in the field, to establish the dog's reliability. The Court found this "demand inconsistent with the 'flexible, common-sense standard' of probable cause. It instructed:

> In short, a probable-cause hearing focusing on a dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. In all events, the court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements. The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.

Applying that test to the drug dog's sniff in the case at hand, the Court found it satisfied.

Search Warrants

State v. Oates, __ N.C. App. __, __ S.E.2d __ (Dec. 31, 2012). Reversing the trial court, the court held that probable cause supported issuance of a search warrant to search the defendant's residence. Although the affidavit was based an anonymous call, law enforcement corroborated specific information provided so that the tip had a sufficient indicia of reliability. Additionally, the affidavit provided a sufficient nexus between the items sought and the residence to be searched. Finally, the court held that the information was not stale.

Searches

Bailey v. United States, 568 U.S. __ (Feb. 19, 2013). *Michigan v. Summers*, 452 U.S. 692 (1981) (officers executing a search warrant may detain occupants on the premises while the search is conducted), does not justify the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant. In this case, the defendant left the premises before the search began and officers waited to detain him until he had driven about one mile away. The Court reasoned that none of the rationales supporting the *Summers* decision—officer safety, facilitating the completion of the search, and preventing flight—apply with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises. It further concluded that "[a]ny of the individual interests is also insufficient, on its own, to justify an expansion of the rule in *Summers* to permit the detention of a former occupant, wherever he may be found away from the scene of the search." It stated: "The categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched." The Court continued, noting that *Summers* also relied on the limited intrusion on personal liberty involved with detaining occupants incident to the execution of a search warrant. It concluded that where officers arrest an individual away from his or her

home, there is an additional level of intrusiveness. The Court declined to precisely define the term "immediate vicinity," leaving it to the lower courts to make this determination based on "the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors."

Maryland v. King, 569 U.S. __ (June 3, 2013). The defendant's Fourth Amendment rights were not violated by the taking of a DNA cheek swab as part of booking procedures. When the defendant was arrested in April 2009 for menacing a group of people with a shotgun and charged in state court with assault, he was processed for detention in custody at a central booking facility. Booking personnel used a cheek swab to take the DNA sample from him pursuant to the Maryland DNA Collection Act (Maryland Act). His DNA record was uploaded into the Maryland DNA database and his profile matched a DNA sample from a 2003 unsolved rape case. He was subsequently charged and convicted in the rape case. He challenged the conviction arguing that the Maryland Act violated the Fourth Amendment. The Maryland appellate court agreed. The Supreme Court reversed. The Court began by noting that using a buccal swab on the inner tissues of a person's cheek to obtain a DNA sample was a search. The Court noted that a determination of the reasonableness of the search requires a weighing of "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy." It found that "[i]n the balance of reasonableness . . . , the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest." The Court noted in particular the superiority of DNA identification over fingerprint and photographic identification. Addressing privacy issues, the Court found that "the intrusion of a cheek swab to obtain a DNA sample is a minimal one." It noted that a gentle rub along the inside of the cheek does not break the skin and involves virtually no risk, trauma, or pain. And, distinguishing special needs searches, the Court noted: "Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial . . . his or her expectations of privacy and freedom from police scrutiny are reduced. DNA identification like that at issue here thus does not require consideration of any unique needs that would be required to justify searching the average citizen." The Court further determined that the processing of the defendant's DNA was not unconstitutional. The information obtained does not reveal genetic traits or private medical information; testing is solely for the purpose of identification. Additionally, the Maryland Act protects against further invasions of privacy, by for example limiting use to identification. It concluded:

> In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

In re T.A.S., __ N.C. __, __ S.E.2d __ (Oct. 5, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zMzJBMTEtMS5wZGY=). The court vacated and remanded *In re T.A.S.*, __ N.C. App. __, 713 S.E.2d 211 (July 19, 2011) (holding that a search of a

juvenile student's bra was constitutionally unreasonable), ordering further findings of fact. The court ordered the trial court to

> make additional findings of fact, including but not necessarily limited to: the names, occupations, genders, and involvement of all the individuals physically present at the "bra lift" search of T.A.S.; whether T.A.S. was advised before the search of the Academy's "no penalty" policy; and whether the "bra lift" search of T.A.S. qualified as a "more intrusive" search under the Academy's Safe School Plan.

It provided that "[i]f, after entry of an amended judgment or order by the trial court, either party enters notice of appeal, counsel are instructed to ensure that a copy of the Safe School Plan, discussed at the suppression hearing and apparently introduced into evidence, is included in the record on appeal."

State v. Pasour, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012). The trial court erred by denying the defendant's motion to suppress property seized in a warrantless search. After receiving a tip that a person living at a specified address was growing marijuana, officers went to the address and knocked on the front and side doors. After getting no answer, two officers went to the back of the residence. In the backyard they found and seized marijuana plants. The officers were within the curtilage when they viewed the plants, no evidence indicated that the plants were visible from the front of the house or from the road, and a "no trespassing" sign was plainly visible on the side of the house. Even if the officers did not see the sign, it is evidence of the homeowner's intent that the side and back of the home were not open to the public. There no evidence of a path or anything else to suggest a visitor's use of the rear door; instead, all visitor traffic appeared to be kept to the front door and traffic to the rear was discouraged by the posted sign. Further, no evidence indicated that the officers had reason to believe that knocking at the back door would produce a response after knocking multiple times at the front and side doors had not. The court concluded that on these facts, "there was no justification for the officers to enter Defendant's backyard and so their actions were violative of the Fourth Amendment."

State v. Grice, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012). (1) In a drug case, a seizure of marijuana plants was not justified under the plain view doctrine. Officers went to the defendant's home on a tip that he was growing and selling marijuana and parked behind a white car in the driveway. One of the officers walked up the driveway and knocked on the door; the other stayed in the driveway. While one officer was knocking on the door, the other looked "around the residence . . . from [his] point of view." Looking over the hood of the white car, he saw four plastic buckets about fifteen yards away. Plants were growing in three of the buckets which he immediately identified as marijuana. He pointed out the plants to the other officer, who also believed they were marijuana. The officers then walked to the backyard where the plants were growing beside an outbuilding and seized them. The court rejected the State's argument that the officers properly seized the marijuana plants because they were seen in plain view during a valid knock and talk. (2) The trial court's finding that exigent circumstances justified seizure of the marijuana plants was not supported by record evidence. One of the officers testified that no one answered the officer's knock at the door and that nothing prevented the officers from securing the premises and obtaining a search warrant. No evidence to the contrary was presented.

State v. Mitchell, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012). The discovery of marijuana on a passenger provided probable cause to search a vehicle. After stopping the defendant and determining that the defendant had a revoked license, the officer told the defendant that the officer's K-9 dog would walk around the vehicle. At that point, the defendant indicated that his passenger had a marijuana cigarette, which she removed from her pants. The officer then searched the car and found marijuana in the trunk.

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013). In a drug case the court held that probable cause and exigent circumstances supported a roadside search of the defendant's underwear conducted after a vehicle stop and that the search was conducted in a reasonable manner. After finding nothing in the defendant's outer clothing, the officer placed the defendant on the side of his vehicle with the vehicle between the defendant and the travelled portion of the highway. Other troopers stood around the defendant to prevent passers-by from seeing him. The officer pulled out the front waistband of the defendant's pants and looked inside. The defendant was wearing two pairs of underwear—an outer pair of boxer briefs and an inner pair of athletic compression shorts. Between the two pairs of underwear the officer found a cellophane package containing several smaller packages. There was probable cause to search where the defendant smelled of marijuana, officers found a scale of the type used to measure drugs in his car, a drug dog alerted in his car, and during a pat-down the officer noticed a blunt object in the inseam of the defendant's pants. Because narcotics can be easily and quickly hidden or destroyed, especially after a defendant has notice of an officer's intent to discover whether the defendant was in possession of them, sufficient exigent circumstances justified the warrantless search. Additionally, the search was conducted in a reasonable manner. Although the officer did not see the defendant's private parts, the level of the defendant's exposure is relevant to the analysis of whether the search was reasonable. The court reasoned that the officer had a sufficient basis to believe that contraband was in the defendant's underwear, including that although the defendant smelled of marijuana a search of his outer clothing found nothing, the defendant turned away from the officer when the officer frisked his groin and thigh area, and that the officer felt a blunt object in the defendant's crotch area during the pat-down. Finally, the court concluded that when conducting the search the officer took reasonable steps to protect defendant's privacy.

Exigency

Missouri v. McNeely, 569 U.S. __ (April 17, 2013). The Court held that in drunk driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. After stopping the defendant's vehicle for speeding and crossing the centerline, the officer noticed several signs that the defendant was intoxicated and the defendant acknowledged that he had consumed "a couple of beers." When the defendant performed poorly on field sobriety tests and declined to use a portable breath-test device, the officer placed him under arrest and began driving to the stationhouse. But when the defendant said he would again refuse to provide a breath sample, the officer took him to a nearby hospital for blood testing where a blood sample was drawn. The officer did not attempt to secure a warrant. Tests results showed the defendant's BAC above the legal limit. The defendant was charged with impaired driving and he moved to suppress the blood test. The trial court granted the defendant's motion, concluding that the exigency exception to the warrant requirement did not apply because, apart from the fact that as in all intoxication cases, the defendant's blood alcohol was being metabolized by his liver, there were no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant. The state supreme court affirmed, reasoning that *Schmerber v. California*, 384 U. S. 757 (1966), required lower courts to consider the totality of the circumstances when determining whether exigency permits a nonconsensual, warrantless blood draw. The state court concluded that *Schmerber* "requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case." The U.S. Supreme Court granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk driving investigations. The Court affirmed. The Court began by noting that under *Schmerber* and the Court's case law, applying the exigent circumstances exception requires

consideration of all of the facts and circumstances of the particular case. It went on to reject the State's request for a per se rule for blood testing in drunk driving cases, declining to "depart from careful case-by-case assessment of exigency." It concluded: "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances."

Juveniles

In re D.A.C., __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013). The trial court did not err by denying a fourteen-year-old juvenile's motion to suppress his oral admissions to investigating officers. The motion had asserted that he was in custody and had not been advised of his rights under *Miranda* and G.S. 7B-2101. The court found that the juvenile was not in custody. Responding to a report of shots fired, officers approached the juvenile's home. After speaking with the juvenile's parents, the juvenile had a conversation with the officers during which he admitted firing the shots. Among other things, the court noted that the juvenile was asked—not instructed—to step outside the house, the officers remained at arm's length, one of the officers was in plain clothes, and the conversation took place in an open area of the juvenile's yard while his parents were nearby, in broad daylight, and lasted about five minutes. The court rejected the notion that fact that the juvenile's parents told him to be honest with the officers compelled a different conclusion.

Stops—Generally

In Re V.C.R., __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) An officer had reasonable suspicion that a juvenile was violating G.S. 14-313(c) (unlawful for person under 18 to accept receipt of cigarettes) and thus the officer's initial stop of the juvenile was proper. (2) The officer's actions of approaching the juvenile a second time in response to her loud yelling of an obscenity, telling her companions to leave, and questioning the juvenile constituted a seizure as a reasonable person would not feel free to leave. (3) Referencing the offense of disorderly conduct, the court found this seizure "permissible, given [the juvenile's] loud and profane language." (4) The officer's subsequent conduct of ordering the juvenile to empty her pockets constituted a search. (5) This search was illegal; it was not incident to an arrest nor consensual. The district court thus erred by denying the juvenile's motion to suppress.

State v. Phifer, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). The trial court improperly denied the defendant's motion to suppress. An officer saw the defendant walking in the middle of the street. The officer stopped the defendant to warn him about impeding the flow of street traffic. After issuing this warning, the officer frisked the defendant because of his "suspicious behavior," specifically that the "appeared to be nervous and kept moving back and forth." The court found that "the nervous pacing of a suspect, temporarily detained by an officer to warn him not to walk in the street, is insufficient to warrant further detention and search."

Vehicle Stops

State v. Giffin, __ N.C. __, __ S.E.2d __ (April 12, 2013). The defendant's act of stopping his vehicle in the middle of the roadway and turning away from a license checkpoint gave rise to reasonable suspicion for a vehicle stop. The trial court denied the defendant's motion to suppress, finding the stop constitutional. In an unpublished opinion, the court of appeals reversed on grounds that the checkpoint was unconstitutional. That court did not, however, comment on whether reasonable suspicion for the stop

existed. The supreme court allowed the State's petition for discretionary review to determine whether there was reasonable suspicion to initiate a stop of defendant's vehicle and reversed. It reasoned:

> Defendant approached a checkpoint marked with blue flashing lights. Once the patrol car lights became visible, defendant stopped in the middle of the road, even though he was not at an intersection, and appeared to attempt a three-point turn by beginning to turn left and continuing onto the shoulder. From the checkpoint [the officer] observed defendant's actions and suspected defendant was attempting to evade the checkpoint. . . . It is clear that this Court and the Fourth Circuit have held that even a legal turn, when viewed in the totality of the circumstances, may give rise to reasonable suspicion. Given the place and manner of defendant's turn in conjunction with his proximity to the checkpoint, we hold there was reasonable suspicion that defendant was violating the law; thus, the stop was constitutional. Therefore, because the [officer] had sufficient grounds to stop defendant's vehicle based on in conjunction with his proximity to the checkpoint, we hold there was reasonable suspicion that defendant was violating the law; thus, the stop was constitutional. Therefore, because the [officer] had sufficient grounds to stop defendant's vehicle based on reasonable suspicion, it is unnecessary for this Court to address the constitutionality of the driver's license checkpoint.

State v. Heien, __ N.C. __, __ S.E.2d __ (Dec. 14, 2012). The court reversed *State v. Heien,* __ N.C. App. __, 714 S.E.2d 827 (Aug. 16, 2011), and held that there was reasonable suspicion for a stop that led to the defendant's drug trafficking convictions. An officer stopped a vehicle on the basis of a non-functioning brake light. The evidence indicated that although the left brake light was operating, the right light was not. Interpreting various statutes, the Court of Appeals held that a vehicle is not required to have more than one operating brake light. It went on to conclude that because no violation of law had occurred, the stop was unreasonable. Before the supreme court, the State did not appeal the court of appeals' interpretation of statutory law; the State appealed only the court's determination that the stop was unreasonable. Thus, the issue before the court was whether an officer's mistake of law may nonetheless give rise to reasonable suspicion to conduct a routine traffic stop. On this issue the court held that an officer's objectively reasonable but mistaken belief that a traffic violation has occurred can provide reasonable suspicion a stop. Applying this standard to the facts at hand, the court found the officer's mistake objectively reasonable and that the stop was justified.

State v. Heien, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) Over a dissent the court held that a valid traffic stop was not unduly prolonged and as a result the defendant's consent to search his vehicle was valid. The stop was initiated at 7:55 am and the defendant, a passenger who owned the vehicle, gave consent to search at 8:08 am. During this time, the two officers discussed a malfunctioning vehicle brake light with the driver, discovered that the driver and the defendant claimed to be going to different destinations, and observed the defendant behaving unusually (he was lying down on the backseat under a blanket and remained in that position even when approached by an officer requesting his driver's license). After each person's name was checked for warrants, their licenses were returned. The officer then requested consent to search the vehicle. The officer's tone and manner were conversational and non-confrontational. No one was restrained, no guns were drawn and neither person was searched before the request to search the vehicle was made. The trial judge properly concluded that the defendant was aware that the purpose of the initial stop had been concluded and that further conversation was consensual. (2) Over a dissent, the court held that the defendant's consent to search the vehicle was valid even though the officer did not inform the defendant that he was searching for narcotics.

State v. Canty, __ N.C. App. __, __ S.E.2d __ (Dec. 18, 2012). (1) A passenger has standing to challenge a stop of a vehicle in which the passenger was riding. (2) No reasonable suspicion supported a traffic stop. The State had argued reasonable suspicion based on the driver's alleged crossing of the fog line, her and her passenger's alleged nervousness and failure to make eye contact with officers as they drove by and alongside the patrol car, and the vehicle's slowed speed. The court found that the evidence failed to show that the vehicle crossed the fog line and that in the absence of a traffic violation, the officers' beliefs about the conduct of the driver and passenger were nothing more than an "unparticularized suspicion or hunch." It noted that nervousness, slowing down, and not making eye contact is not unusual when passing law enforcement. The court also found it "hard to believe" that the officers could tell that the driver and passenger were nervous as they passed the officers on the highway and as the officers momentarily rode alongside the vehicle. The court also found the reduction in speed—from 65 mph to 59 mph—insignificant.

State v. Franklin, __ N.C. App. __, __ S.E.2d __ (Dec. 18, 2012). (1) Although a passenger who has no possessory interest in a vehicle has standing to challenge a stop of the vehicle, that passenger does not have standing to challenge a search of the vehicle. (2) Over a dissent, the court held that where officers have probable cause to believe that a traffic infraction (here, a seatbelt violation) has occurred, it is irrelevant whether their stop of the vehicle on that basis was a pretext. The dissenting judge believed that there was no probable cause that the seatbelt violation had occurred. (3) Over a dissent, the court held that a vehicle stop made on the basis of a seatbelt violation was sufficiently limited in scope and duration. The stop lasted ten minutes and the officer's actions related to the stop. The dissenting judge believed that the stop's duration was unreasonable.

State v. Royster, __ N.C. App. __, __ S.E.2d __ (Dec. 18, 2012). (1) An officer had reasonable suspicion to stop the defendant's vehicle for speeding. The court rejected the defendant's argument that because the officer only observed the vehicle for three to five seconds, the officer did not have a reasonable opportunity to judge the vehicle's speed. The court noted that after his initial observation of the vehicle, the officer made a U-turn and began pursuing it; he testified that during his pursuit, the defendant "maintained his speed." Although the officer did not testify to a specific distance he observed the defendant travel, "some distance was implied" by his testimony regarding his pursuit of the defendant. Also, although it is not necessary for an officer to have specialized training to be able to visually estimate a vehicle's speed, the officer in question had specialized training in visual speed estimation. (2) The court rejected the defendant's argument that an officer lacked reasonable suspicion to stop his vehicle for speeding on grounds that there was insufficient evidence identifying the defendant as the driver. Specifically, the defendant noted that the officer lost sight of the vehicle for a short period of time. The officer only lost sight of the defendant for approximately thirty seconds and when he saw the vehicle again, he recognized both the car and the driver. [Author's note: On this point the opinion discusses the court's earlier opinion in *State v. Lindsey*, __ N.C. App. __, 725 S.E.2d 350 (2012); that opinion was reversed by the N.C. Supreme Court earlier this week. However, because the court distinguished *Lindsey,* its discussion of the now-reversed decision does not seem to undermine the ultimate holding.]

State v. Kochuk, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012). Over a dissent, the court affirmed the trial court's order granting the defendant's motion to suppress all evidence obtained as a result of a vehicle stop. Relying on *State v. Fields,* 195 N.C. App. 740 (2009) (weaving alone is insufficient to support a reasonable suspicion that the defendant was driving while impaired), the trial court had determined that the officer lacked reasonable suspicion for the stop. The officer saw the defendant's vehicle cross over the dotted white line causing both passenger side wheels to enter the right lane for three to four seconds. He also observed the defendant's vehicle drift to the right side of the right lane "where its

wheels were riding on top of the white line . . . twice for a period of three to four seconds each time." The court found these movements were "nothing more than weaving" and thus under *Fields,* the stop was improper.

Interrogation & Confessions

State v. Quick, __ N.C. App. __, __ S.E.2d __ (April 16, 2013). The court rejected the State's argument that the defendant initiated contact with the police following his initial request for counsel and thus waived his right to counsel. After the defendant asserted his right to counsel, the police returned him to the interrogation room and again asked if he wanted counsel, to which he said yes. Then, on the way from the interrogation room back to the jail, a detective told the defendant that an attorney would not able to help him and that he would be served with warrants regardless of whether an attorney was there. The police knew or should have known that telling the defendant that an attorney could not help him with the warrants would be reasonably likely to elicit an incriminating response. It was only after this statement by police that the defendant agreed to talk. Therefore, the court concluded, the defendant did not initiate the communication. The court went on to conclude that even if the defendant had initiated communication with police, his waiver was not knowing and intelligent. The trial court had found that the prosecution failed to meet its burden of showing that the defendant made a knowing and intelligent waiver, relying on the facts that the defendant was 18 years old and had limited experience with the criminal justice system, there was a period of time between 12:39 p.m. and 12:54 p.m. where there is no evidence as to what occurred, and there was no audio or video recording. The court found that the defendant's age and inexperience, when combined with the circumstances of his interrogation, support the trial court's conclusion that the State failed to prove the defendant's waiver was knowing and intelligent.

In re A.N.C., __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013). (1) A thirteen-year-old juvenile was not in custody within the meaning of G.S. 7B-2101 or *Miranda* during a roadside questioning by an officer. Responding to a report of a vehicle accident, the officer saw the wrecked vehicle, which had crashed into a utility pole, and three people walking from the scene. When the officer questioned all three, the juvenile admitted that he had been driving the wrecked vehicle. Noting that under *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2406 (2011), a reviewing court must take into account a juvenile's age if it was known to the officer or would have been objectively apparent to a reasonable officer, the court nevertheless concluded that the juvenile was not in custody. (2) The court rejected the juvenile's argument that his statement was involuntary. The juvenile had argued that because G.S. 20-166(c) required him to provide his name and other information to the nearest officer, his admission to driving the vehicle was involuntary. The court rejected this argument, citing *California v. Byers*, 402 U.S. 424 (1971) (a hit and run statute requiring the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address did not violate the Fifth Amendment).

State v. Randolph, __ N.C. App. __, __ S.E.2d __ (Dec. 18, 2012). The rule of *State v. Walker*, 269 N.C. 135 (1967) (State may not introduce evidence of a written confession unless that written statement bears certain indicia of voluntariness and accuracy) does not apply where an officer testified to the defendant's oral statements.

State v. Graham, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012). In this child sexual abuse case, the defendant's confession was not involuntary. After briefly speaking to the defendant at his home about the complaint, an officer asked the defendant to come to the police station to answer questions. The court rejected the defendant's argument that his confession was involuntary because he was given a

false hope of leniency if he was to confess and that additional charges would stem from continued investigation of other children. The officers' offers to "help" the defendant "deal with" his "problem" did not constitute a direct promise that the defendant would receive a lesser or no charge should he confess. The court also rejected the defendant's argument that the confession was involuntary because one of the officers relied on his friendship with the defendant and their shared racial background, and that another asked questions about whether the defendant went to church or believed in God. Finally, the court rejected the defendant's argument that his confession was involuntarily obtained through deception.

State v. Cureton, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012). (1) After being read his *Miranda* rights, the defendant knowingly and intelligently waived his right to counsel. The court rejected the defendant's argument that the fact that he never signed the waiver of rights form established that that no waiver occurred. The court also rejected the defendant's argument that he was incapable of knowingly and intelligently waiving his rights because his borderline mental capacity prevented him from fully understanding those rights. The court relied in part on a later psychological evaluation diagnosing the defendant as malingering and finding him competent to stand trial. (2) After waiving his right to counsel the defendant did not unambiguously ask to speak a lawyer. The court rejected the defendant's argument that he made a clear request for counsel. It concluded: "Defendant never expressed a clear desire to speak with an attorney. Rather, he appears to have been seeking clarification regarding whether he had a right to speak with an attorney before answering any of the detective's questions." The court added: "There is a distinct difference between inquiring whether one has the right to counsel and actually requesting counsel. Once defendant was informed that it was his decision whether to invoke the right to counsel, he opted not to exercise that right." (3) The defendant's confession was voluntary. The court rejected the defendant's argument that he "was cajoled and harassed by the officers into making statements that were not voluntary," that the detectives "put words in his mouth on occasion," and "bamboozled [him] into speaking against his interest."

Criminal Offenses

Participants

State v. Greenlee, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). In a case involving charges of obtaining property by false pretenses arising out of sales to a pawn shop in which another person told the shop that the items were not stolen, the evidence was insufficient to show that the defendant was acting in concert. Assuming that the State sufficiently established the other elements of acting in concert, there was no evidence that the defendant was either actually present or near enough to render assistance as needed to his alleged accomplice.

State v. Grainger, __ N.C. App. __, __ S.E.2d __ (Dec. 31, 2012). In a non-capital first-degree murder case, the trial court erred by denying the defendant's request for a jury instruction on accessory before the fact to murder where the defendant was neither actually nor constructively present at the murder scene. A defendant who is guilty as an accessory before the fact to a capital felony on the basis of the uncorroborated testimony of a co-conspirator only can be punished as a Class B2 felon. The court held that the defendant was convicted of a "capital felony" even though the case was non-capital. It went on to hold that because the trial court did not submit a special issue to the jury as to whether the defendant was convicted on the uncorroborated testimony of a co-conspirator, prejudicial error occurred. It stated: "Failure to submit this issue to the jury results in prejudicial error as there is no record of whether the jury viewed the testimony of the 'principals, coconspirators, or accessories to the crime' as uncorroborated."

General Crimes

Smith v. United States, 568 U.S. __ (Jan. 9, 2013). In a case involving federal drug and RICO conspiracy charges the Court held that allocating to the defendant the burden of proving withdrawal from the conspiracy does not violate the Due Process Clause. This rule remains intact even when withdrawal is the basis of a statute of limitations defense.

State v. Primus, __ N.C. App. __, __ S.E.2d __ (May 21, 2013). Where the evidence showed that the defendant committed the completed crime of felony larceny, the evidence was sufficient to support a conviction of the lesser charged offense of attempted felony larceny.

State v. Torres-Gonzalez, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) The evidence was sufficient to support a charge of conspiracy to traffic in cocaine by possession. A detective arranged for a cocaine sale. The defendant and an individual named Blanco arrived at the preset location and both came over to the detective to look at the money. The defendant and Blanco left together, with the defendant telling Blanco to wait at a parking lot for delivery of the drugs. Later, the defendant told Blanco to come to the defendant's house to get the drugs. Blanco complied and completed the sale. (2) The court rejected the defendant's argument that verdicts finding him guilty of conspiracy to commit trafficking by possession but not guilty of trafficking by possession were legally inconsistent because both crimes required the defendant to have possession. Because conspiracy to traffic by possession does not include possession as an element, the fact that the defendant was convicted of that crime and not convicted of trafficking by possession does not present any inconsistency, legal or otherwise.

Homicide

State v. Noble, __ N.C. App. __, __ S.E.2d __ (May 14, 2013). The trial court did not err by denying the defendant's motion to dismiss a charge of involuntary manslaughter where a person under 21 years of age died as a result of alcohol poisoning and it was alleged that the defendant aided and abetted the victim in the possession or consumption of an alcoholic in violation or G.S. 18B-302. The victim was found dead in the defendant's house and the evidence showed that on previous occasions the defendant provided and or allowed underage persons to consume alcohol on the premises. The court rejected the defendant's argument that the State was required to prove that the defendant provided the victim with the specific alcohol he drank on the morning of his death. The court concluded, in part, that there was substantial evidence that the defendant knowingly advised, instigated, encouraged, procured, or aided the victim in possessing or consuming the alcohol that caused his death:

> The evidence established that defendant frequently hosted parties at her home during which defendant was aware that underage people, including [the victim], consumed alcohol. On at least one occasion, defendant was seen offering alcohol to [the victim], and defendant knew the [the victim] was under the age of 21. The State presented substantial evidence that defendant's actions of allowing [the victim] to consume, and providing [the victim] with, alcohol were part of a plan, scheme, system, or design that created an environment in which [the victim] could possess and consume alcohol and that her actions were to consume, and providing [the victim] with, alcohol were part of a plan, scheme, system, or design that created an environment in which [the victim] could possess and consume alcohol and that her actions were done knowingly and were not a result of mistake or accident. Viewed in the light most favorable to the State, we conclude the evidence was sufficient to allow a reasonable juror to conclude that

defendant assisted and encouraged [the victim] to possess and consume the alcohol that caused his death.

State v. Barnes, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) In a case in which the victim died after consuming drugs provided by the defendant and the defendant was convicted of involuntary manslaughter, the trial court did not err by instructing the jury on second-degree murder and the lesser of involuntary manslaughter. The defendant objected to submission of the lesser. The evidence showed that the defendant sold the victim methadone and that the defendant had nearly died the month before from a methadone overdose. There was no evidence that the defendant intended to kill the victim by selling him the methadone. This evidence would support a finding by the jury of reckless conduct under either second-degree murder or involuntary manslaughter. (2) The court rejected the defendant's argument that under G.S. 14-17, he only could have been convicted of second-degree murder for his conduct.

State v. Broom, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013). (1) The trial court did not err by denying the defendant's motion to dismiss first-degree murder charges where the victim was in utero at the time of the incident but was born alive and lived for one month before dying. (2) The defendant's shooting of the victim's mother (the defendant's wife) while the victim was in utero was a proximate cause of the victim's death after being born alive. The gunshot wound necessitated the child's early delivery, the early delivery was a cause of a complicating condition, and that complicating condition resulted in her death. (3) The State presented sufficient evidence that the defendant acted with premeditation and deliberation where, among other things, the defendant did not want a second child and asked his wife to get an abortion, he was involved in a long-term extramarital affair with a another woman who testified that the defendant was counting down the seconds until his first child would go to college so that he could leave his wife, the defendant had made plans to move out of his martial home but reacted angrily when his wife suggested that if the couple divorced she might move out of the state and take the children with her, and shortly before he shot his wife, he placed her cell phone out of her reach.

State v. Elmore, __ N.C. App. __, __ S.E.2d __ (Dec. 18, 2012). G.S. 20-141.4(c) does not bar simultaneous prosecutions for involuntary manslaughter and death by vehicle; it only bars punishment for both offenses when they arise out of the same death.

Assaults

State v. Heavner, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The defendant was properly convicted of two counts of malicious conduct by a prisoner when he twice spit on an officer while officers were attempting to secure him. The defendant had argued that only conviction was proper because his conduct occurred in a continuous transaction. The court found that each act was distinct in time and location: first the defendant spit on the officer's forehead while the defendant was still in the house; five minutes later he spit on the officer's arm after being taken out of the house.

State v. Wilkes, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of assault with deadly weapon with intent to kill, over the defendant's argument that there was insufficient evidence of an intent to kill. This charge was based on the defendant's use of a bat to assault his wife. The court determined that the nature and manner of the attack supported a reasonable inference that the defendant intended to kill, including that he hit her even after she fell to her knees, he repeatedly struck her head with the bat until she lost consciousness, she never fought back, and the wounds could have been fatal. Also, the circumstances of the attack,

including the parties' conduct, provided additional evidence of intent to kill, including that the two had a volatile relationship and the victim had recently filed for divorce. (2) Over a dissent, the court held that the State presented substantial evidence supporting two separate assaults. The defendant attacked his wife with his hands. When his child intervened with a baseball bat to protect his mother, the defendant turned to the child, grabbed the bat and then began beating his wife with the bat. The court concluded that the assaults were the result of separate thought processes, were distinct in time, and the victim sustained injuries on different parts of her body as a result of each assault.

State v. Garrison, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013). In a habitual misdemeanor assault case, the trial court erred by failing to instruct the jury that the defendant's assault under G.S. 14-33 must have inflicted physical injury. However, given the uncontroverted evidence regarding the victim's injuries, the error did not rise to the level of plain error.

State v. Lanford, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of attempted malicious castration of a privy member. The victim was the son of the woman with whom the defendant lived; a doctor found 33 injuries on the victim's body, including a 2.5 inch laceration on his penis. The defendant argued that there was insufficient evidence that he committed an assault with malice aforethought and specific intent to maim the victim's privy member. Although the victim gave conflicting evidence as to how the defendant cut his penis, the defendant's malice and specific intent to maim could be reasonably inferred from the numerous acts of humiliation and violence experienced by the victim prior to the defendant's assault on his penis. (2) The trial court did not err by denying the defendant's motion to dismiss a charge of assault by strangulation on the same victim. The defendant argued that because his obstruction of the victim's airway was caused by the defendant's hand over the victim's nose and mouth, rather than "external pressure" applied to the neck, it was "smothering" not "strangling". Rejecting this argument, the court concluded:

> We do not believe that the statute requires a particular method of restricting the airways in the throat. Here, defendant constricted [the victim's] airways by grabbing him under the chin, pulling his head back, covering his nose and mouth, and hyperextending his neck. Although there was no evidence that defendant restricted [the victim's] breathing by direct application of force to the trachea, he managed to accomplish the same effect by hyperextending [the victim's] neck and throat. The fact that defendant restricted [the victim's] airway through the application of force to the top of his neck and to his head rather than the trachea itself is immaterial.

(3) A defendant may be convicted of assault by strangulation and assault with a deadly weapon inflicting serious injury where two incidents occurred. The fact that these assaults were part of a pattern of chronic child abuse does not mean that they are considered one assault. (4) The State sufficiently proved two distinct incidents of assault with a deadly weapon inflicting serious injury supporting two convictions and three instances of felony child abuse supporting three such convictions. The fact that the assaults form part of chronic and continual abuse did not alter its conclusion.

Stalking and Related Offenses

State v. Williams, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) The trial court committed plain error by instructing the jury on the crime of stalking under the new stalking statute, G.S. 14-277.3A, when the charged course of conduct occurred both before and after enactment of the new statute. The new version of the stalking statute lessened the burden on the State. The court noted that where, as here, a defendant is indicted for a continuing conduct offense that began prior to a statutory modification that

disadvantages the defendant and the indictment tracks the new statute's disadvantageous language, the question of whether the violation extended beyond the effective date of the statute is one that must be resolved by the jury through a special verdict. Here, the trial court's failure to give such a special verdict was plain error. (2) The evidence was insufficient to establish that the defendant knowingly violated a DVPO. The DVPO required the defendant to "stay away from" victim Smith's place of work, without identifying her workplace. The victim worked at various salons, including one at North Hills. The defendant was charged with violating the DVPO when he was seen in the North Hills Mall parking lot on a day that the victim was working at the North Hills salon. The court concluded that it need not determine the precise contours of what it means to "stay away" because it is clear that there was insufficient evidence that the defendant failed to "stay away" from the victim's place of work, and no evidence that defendant knowingly did so. It reasoned:

> The indictment alleges defendant was "outside" Ms. Smith's workplace, and although technically the area "outside" of Ms. Smith's workplace could include any place in the world outside the walls of the salon, obviously such an interpretation is absurd. Certainly the order must mean that defendant could not be so close to Ms. Smith's workplace that he would be able to observe her, speak to her, or intimidate her in any way, but we cannot define the exact parameters of the term "stay away." It is clear only that defendant was not seen in an area that could reasonably be described as "outside" of Ms. Smith's salon, nor was there evidence that he was in a location that would permit him to harass, communicate with, follow, or even observe Ms. Smith at her salon, which might reasonably constitute a failure to "stay away" from her place of work. There was also no evidence that he was in proximity to Ms. Smith's vehicle or that he was in a location which might be along the path she would take from the salon to her vehicle.
>
> Additionally, there was no evidence that defendant was aware that Ms. Smith worked at the North Hills salon, or that he otherwise knew that he was supposed to stay away from North Hills. The order did not identify North Hills as one of the locations that defendant was supposed to stay away from. The order specified no distance that defendant was supposed to keep between himself and Ms. Smith or her workplace. Defendant was seen walking in the parking structure of a public mall at some unknown distance from the salon where Ms. Smith was working on the night in question.

Sexual Assaults & Kidnapping

In re K.C., __ N.C. App. __, __ S.E.2d __ (April 16, 2013). There was insufficient evidence to support a delinquency adjudication for sexual battery. Although there was sufficient evidence of sexual contact, there was insufficient evidence of a sexual purpose. When dealing with children, sexual purpose cannot be inferred from the act itself and that there must be "evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting." It continued, "factors like age disparity, control by the juvenile, the location and secretive nature of the juvenile's actions, and the attitude of the juvenile should be taken into account." Evaluating the circumstances, the court found the evidence insufficient.

State v. Combs, __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). In a case in which the defendant was convicted of rape of a child under G.S. 14-27.2A, there was substantial testimony to establish that the defendant engaged in vaginal intercourse with the victim. The victim testified that the defendant put his "manhood inside her middle hole." Although the victim used potentially ambiguous terms, she explained them, noting that a middle hole is where "where babies come from," a bottom hole is where

things come out of that go in the toilet, and a third hole is for urination. She also described the defendant's manhood as "down at the bottom but on the front" and not a part a woman has.

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013). Because a defendant cannot be convicted of statutory rape of a 13, 14 or 15 year old and second-degree rape based on a single act of intercourse, the trial court erred by denying the defendant's MAR alleging that trial counsel was ineffective by failing to object to the judgment sentencing him for both offenses. Although the court concluded that no violation of double jeopardy had occurred, it considered *State v. Ridgeway*, 185 N.C. App. 423 (2007) (although the trial court properly allowed the jury to review evidence of both statutory rape and first-degree rape arising out of a single act, the defendant could not be convicted of both offenses), and concluded that the legislature intended to prohibit conviction for both offenses when based on the same incident. Because *Ridgeway* was decided prior to the defendant's trial, trial counsel was ineffective by failing to raise the issue.

State v. Daniels, __ N.C. App. __, __ S.E.2d __ (Dec. 31, 2012). (1) G.S. 14-208.18(a)(1)-(3) creates three separate and distinct criminal offenses. (2) Although the defendant did not have standing to assert that G.S. 14-208.18(a)(3) was facially invalid, he had standing to raise an as applied challenge. (3) G.S. 14-208.18(a)(3), which prohibits a sex offender from being "at any place" where minors gather for regularly scheduled programs, was unconstitutionally vague as applied to the defendant. The defendant's two charges arose from his presence at two public parks. The State alleged that on one occasion he was "out kind of close to the parking lot area or that little dirt road area[,]" between the ballpark and the road and on the second was at an "adult softball field" adjacent to a "tee ball" field. The court found that on these facts, the portion of G.S. 14-208.18(a)(3), prohibiting presence "at any place," was unconstitutionally vague as applied to the defendant because it fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, and it fails to provide explicit standards for those who apply the law. (4) The trial court lacked jurisdiction to rule that G.S. 14-208.18(a)(2) was unconstitutional where the defendant only was charged with a violation of G.S. 14-208.18(a)(3) and those provisions were severable.

State v. Huss, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012). (1) In a case involving charges of second-degree sexual offense and second-degree rape, the trial court erred by denying the defendant's motion to dismiss where there was no evidence that the victim was physically helpless. The State proceeded on a theory that the victim was physically helpless. The facts showed that the defendant, a martial arts instructor, bound the victim's hands behind her back and engaged in sexual activity with her. The statute defines the term physically helpless to mean a victim who either is unconscious or is physically unable to resist the sexual act. Here, the victim was not unconscious. Thus, the only issue was whether she was unable to resist the sexual act. The court began by rejecting the defendant's argument that this category applies only to victims who suffer from some permanent physical disability or condition, instead concluding that factors other than physical disability could render a victim unable to resist the sexual act. However, it found that no such evidence existed in this case. The State had argued that the fact that the defendant was a skilled fighter and outweighed the victim supported the conclusion that the victim was physically helpless. The court rejected this argument, concluding that the relevant analysis focuses on "attributes unique and personal of *the victim*." Similarly, the court rejected the State's argument that the fact that the defendant pinned the victim in a submissive hold and tied her hands behind her back supported the conviction. It noted, however, that the evidence would have been sufficient under a theory of force. (2) In a case in which the defendant was charged with kidnapping the victim for the purpose of facilitating second-degree rape, the court reversed the kidnapping conviction on grounds that the State had proceeded under "an improper theory of second-degree rape," as

described above. It concluded: "because the State proceeded under an improper theory of second-degree rape, we are unable to find that the State sufficiently proved the particular felonious intent alleged here."

State v. Boyett, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012). The trial court committed plain error by failing to instruct on attempted rape and attempted incest where the evidence regarding penetration was conflicting. The defendant denied penetration and the victim's statements conflicted on the issue.

Kidnapping

State v. Stokes, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013). The evidence was insufficient to establish removal when during a robbery the defendant ordered the clerk to the back of the store but the clerk refused. The defendant also ordered the clerk to get in a car. Although the clerk walked about five feet, he then refused to go further, never leaving the area of the store near the register.

Larceny & Embezzlement

State v. Tucker, __ N.C. App. __, __ S.E.2d __ (June 4, 2013). (1) North Carolina had territorial jurisdiction to prosecute the defendant for embezzlement. The defendant was a long distance driver employed by a North Carolina moving company. The defendant was charged with having received funds from a customer out-of-state and having converted them to his own use instead of transmitting the funds to his employer. The court adopted a "duty to account" theory under which territorial jurisdiction for embezzlement may be exercised by the state in which the accused was under a duty to account for the property. In this case, the court found that the duty to account was to the victim in North Carolina. (2) Because the defendant's argument about territorial jurisdiction was a legal and not a factual one, the trial court did not err by declining to submit the issue to the jury.

State v. Redman, __ N.C. App. __, __ S.E.2d __ (Dec. 18, 2012). In a felony larceny case, there was sufficient evidence that a stolen vehicle was worth more than $1,000. The value of a stolen item is measured by fair market value and a witness need not be an expert to give an opinion as to value. A witness who has knowledge of value gained from experience, information and observation may give his or her opinion of the value of the stolen item. Here, the vehicle owner's testimony regarding its value constituted sufficient evidence on this element.

State v. Grier, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012). (1) Forgery and larceny of a chose in action are not mutually exclusive offenses. The defendant argued that both forgery and uttering a forged check require a counterfeit instrument while the larceny of a chose in action requires a showing that the defendant "stole a valid instrument." The court concluded that larceny of a chose in action does not require that the bank note, check or other order for payment be valid. (2) For purposes of the offense of larceny of a chose in action, a blank check is not a chose in action.

Robbery

State v. Bell, __ N.C. App. __, __ S.E.2d __ (May 21, 2013). (1) Notwithstanding the defendant's testimony that the gun used in a robbery was unloaded, the trial court properly denied the defendant's motion to dismiss an armed robbery charge. The victim testified that the defendant entered her business, pointed a gun at her and demanded money. The defendant testified that he unloaded the gun before entering. He also testified that upon leaving he saw the police and ran into the woods where he

left his hoodie and gun and jumped off of an embankment. On appeal, the defendant argued that the evidence was insufficient because it showed that the gun was unloaded. Because of the defendant's testimony, the mandatory presumption of danger or threat to life arising from the defendant's use of what appeared to the victim to be firearm disappeared. However, a permissive inference to that effect remained. Given the defendant's flight and attempt to hide evidence, the use of the permissive inference was not inappropriate. (2) The trial court did not err by declining to give a jury instruction regarding the mere possession of a firearm. The defendant argued that the trial court should have given the instruction in footnote six to element seven of N.C.P.I.—Crim. 217.20. That footnote instructs that where use of a firearm is in issue, the trial court should instruct that mere possession of the firearm does not, in itself, constitute endangering or threating the life of the victim. Here, however, the evidence showed that the defendant displayed and threatened to use the weapon by pointing it at the victim; the mere possession instruction therefore was not required.

Frauds

State v. Greenlee, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). In an obtaining property by false pretenses case based on the defendant having falsely represented to a pawn shop that items sold to the shop were not stolen, there was sufficient evidence that the items were stolen. As to the first count, the serial number of the item sold as shown on the shop's records matched the serial number reported by the theft victim; any variance between the model number reported by the victim and the model number reported on the shop's records was immaterial. With respect to the second count, the model number of a recorder sold as shown on the shop's records matched the model number of the item reported stolen by the victim, the item was uncommon and the victim identified it; any difference in the reported serial numbers was immaterial. As to a watch that was stolen with the recorder and described by the victim as a "Seiko dive watch with steel band," the fact that the defendant sold the watch along with the recorder was sufficient to establish that it was stolen.

State v. Renkosiak, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). There was sufficient evidence of embezzlement where the defendant, a bookkeeper controller for the victim company, was instructed to close the company's credit cards but failed to do so, instead incurring personal charges on the cards and paying the card bills from company funds. The court rejected the defendant's argument that the evidence was insufficient because it did not show that she had been physically entrusted with the credit cards. The evidence also showed that the defendant embezzlement funds by paying for her personal insurance with company funds without making a required corresponding deduction from her personal paycheck.

State v. Braswell, __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). The trial court erred by denying the defendant's motion to dismiss false pretenses charges. The State failed to offer sufficient evidence to establish that the defendant made a false representation with the intent to deceive when he told the victims that he intended to invest the money that they loaned him in legitimate financial institutions and would repay it with interest at the specified time. The evidence, taken in the light most favorable to the State, simply tends to show that the defendant, after seriously overestimating his own investing skills, made a promise that he was unable to keep.

State v. Minton, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012). There was sufficient evidence to establish the offense of conversion of property by a bailee in violation of G.S. 14-168.1. The court rejected the defendant's argument that because "[e]vidence of nonfulfillment of a contract obligation" is not enough to establish intent for obtaining property by false pretenses under G.S. 14-100(b), this evidence should

not be sufficient to establish the intent to defraud for conversion. The court also rejected the defendant's argument that there was insufficient evidence of an intent to defraud where the underlying contract between himself and the victim was unenforceable; the court found no prohibition on using unenforceable contracts to support a conversion charge.

State v. Sexton, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012). In an identity theft case, the evidence was sufficient to establish that the defendant "used" or "possessed" another person's social security number to avoid legal consequences. After being detained and questioned for shoplifting, the defendant falsely gave the officer his name as Roy Lamar Ward and provided the officer with the name of an employer, date of birth, and possible address. The officer then obtained Ward's social security number, wrote it on the citation, and issued the citation to the defendant. The defendant neither signed the citation nor confirmed the listed social security number.

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012). (1) In an identity theft case, the State presented sufficient evidence that the defendant used the victims' credit card numbers with the intent to fraudulently represent himself as the cardholders. The evidence showed that the defendant possessed the credit card information of several other people without authorization, was the owner of a vehicle which had received a paint job, new tires, and other products and services paid for through unauthorized charges to some of the cards, possessed a cell phone from a store where unauthorized charges were made to some of the credit cards, and had a utility account for which one of the credit cards was used to make a payment. The court held:

> [W]hen one presents a credit card or credit card number as payment, he is representing himself to be the cardholder or an authorized user thereof. Accordingly, where one is not the cardholder or an authorized user, this representation is fraudulent. No verbal statement of one's identity is required, nor can the mere stating of a name different from that of the cardholder negate the inference of misrepresentation.

Gambling

Hest Technologies, Inc. v. North Carolina, __ N.C. __, __ S.E.2d __ (Dec. 14, 2012). The court reversed *Hest Technologies, Inc. v. North Carolina,* __ N.C. App. __, 725 S.E.2d 10 (Mar. 6, 2012), and held that G.S. 14-306.4 does not violate the First Amendment because it regulates conduct, not protected speech. The court also concluded that even if the statute incidentally burdens speech, it passes muster under the test of *United States v. O'Brien* and that the statute was not overbroad.

Sandhill Amusements v. North Carolina, __ N.C. __, __ S.E.2d __ (Dec. 14, 2012). For the reasons stated in *Hest,* the court reversed *Sandhill Amusements v. North Carolina,* __ N.C. App. __, 724 S.E.2d 614 (Mar. 6, 2012) (G.S. 14-306.4 is unconstitutional).

Weapons Offenses

Baysden v. State, __ N.C. __, __ S.E.2d __ (Jan. 25, 2013). With one justice taking no part in consideration of the case, an equally divided court left undisturbed the following opinion below, which stands without precedential value:

> *Baysden v. North Carolina*, __ N.C. App. __, 718 S.E.2d 699 (Nov. 15, 2011). Over a dissent, the court of appeals applied the analysis of *Britt* and *Whitaker* and held that the felon in possession of a firearm statute was unconstitutional as applied to the plaintiff. The plaintiff was convicted of two felony offenses, neither of which involved violent

> conduct, between three and four decades ago. Since that time he has been a law-abiding citizen. After his firearms rights were restored, the plaintiff used firearms in a safe and lawful manner. When he again became subject to the firearms prohibition because of a 2004 amendment, he took action to ensure that he did not unlawfully possess any firearms and has "assiduously and proactively" complied with the statute since that time. Additionally, the plaintiff was before the court not on a criminal charge for weapons possession but rather on his declaratory judgment action. The court of appeals concluded: "[W]e are unable to see any material distinction between the facts at issue in . . . *Britt* and the facts at issue here." The court rejected the argument that the plaintiff's claim should fail because 2010 amendments to the statute expressly exclude him from the class of individuals eligible to seek restoration of firearms rights; the court found this fact irrelevant to the *Britt/Whitaker* analysis. The court also rejected the notion that the determination as to whether the plaintiff's prior convictions were nonviolent should be made with reference to statutory definitions of nonviolent felonies, concluding that such statutory definitions did not apply in its constitutional analysis. Finally, the court rejected the argument that the plaintiff's challenge must fail because unlike the plaintiff in *Britt*, the plaintiff here had two prior felony convictions. The court refused to adopt a bright line rule, instead concluding that the relevant factor is the number, age, and severity of the offenses for which the litigant has been convicted; while the number of convictions is relevant, it is not dispositive.

Booth v. North Carolina, __ N.C. App. __, __ S.E.2d __ (June 4, 2013). G.S. 14-415.1(a), proscribing the offense of felon in possession of a firearm, does not apply to the plaintiff, who had received a Pardon of Forgiveness from the NC Governor for his prior NC felony. The court relied on G.S. 14-415.1(d), which provides in part that the section does not apply to a person who "pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned."

Johnston v. State, __ N.C. App. __, __ S.E.2d __ (Dec. 18, 2012). Over a dissent the court reversed the trial court's ruling that G.S. 14-415.1 (proscribing the offense of felon in possession of a firearm) violated the plaintiff's substantive due process under the U.S. and N.C. constitutions and remanded to the trial court for additional proceedings. The court also reversed the trial court's ruling that the statute was facially invalid on procedural due process grounds, under both the U.S. and N.C. constitutions. The dissenting judge would have held that the plaintiff's substantive due process claim under the N.C. constitution was without merit.

Kelly v. Riley, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012). (1) G.S. 14-415.12 (criteria to qualify for a concealed handgun permit) was not unconstitutional as applied to the petitioner. Relying on case law from the federal circuit courts, the court adopted a two-part analysis to address Second Amendment challenges. First, the court asks whether the challenged law applies to conduct protected by the Second Amendment. If not, the law is valid and the inquiry is complete. If the law applies to protected conduct, it then must be evaluated under the appropriate form of "means-end scrutiny." Applying this analysis, the court held that the petitioner's right to carry a concealed handgun did not fall within the scope of the Second Amendment. Having determined that G.S. 14-415.12 does not impose a burden on conduct protected by the Second Amendment, the court found no need to engage in the second step of the analysis. (2) The sheriff properly denied the petitioner's application to renew his concealed handgun permit where the petitioner did not meet the requirements of G.S. 14-415.12. The court rejected the petitioner's argument that G.S. 14-415.18 (revocation or suspension of permit) applied.

State v. Miles, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012). In a discharging a firearm into occupied property case, a residence was occupied when the family was on the front porch when the weapon was discharged.

State v. Mitchell, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012). In a felon in possession case, there was sufficient evidence that the defendant had constructive possession of the firearm in question. The defendant was driving a rental vehicle and had a female passenger. The gun was found in a purse in the glove container of the car. The defendant was driving the car and his interactions with the police showed that he was aware of the contents of the vehicle. Specifically, he told the officer that the passenger had a marijuana cigarette and that there was a gun in the glove container.

Drug Offenses

State v. Lindsey, __ N.C. __, __ S.E.2d __ (Dec. 14, 2012). For the reasons stated in the dissenting opinion below, the court reversed *State v. Lindsey*, __ N.C. App. __, 725 S.E.2d 350 (Mar. 6, 2012). In the opinion below the court of appeals held—over a dissent—that there was insufficient evidence of constructive possession of controlled substances and that the trial court erred by denying the defendant's motion to dismiss a felony speeding to elude charge where the officer lost sight of the vehicle and was unable to identify the driver.

State v. Ellison, __ N.C. __, __ S.E. 2d __ (Mar. 8, 2013). Affirming the opinion below, the court held that G.S. 90-95(h)(4) (trafficking in opium) applies in cases involving prescription pharmaceutical tablets and pills. The court reasoned that the statute explicitly provides that criminal liability is based on the total weight of the mixture involved and that tablets and pills are mixtures covered by that provision.

State v. Coleman, __ N.C. App. __, __ S.E.2d __ (May 21, 2013). In a heroin trafficking case where the defendant argued that he did not know that the item he possessed was heroin, the trial court committed plain error by denying the defendant's request for a jury instruction that the State must prove that the defendant knew that he possessed heroin (footnote 4 of the relevant trafficking instructions). The court noted that knowledge that one possesses contraband is presumed by the act of possession unless the defendant denies knowledge of possession and contests knowledge as disputed fact. It went on to reject the State's argument that the defendant was not entitled to the instruction because he did not testify or present any evidence to raise the issue of knowledge as a disputed fact. The court noted that its case in chief the State presented evidence that the defendant told a detective that he did not know the container in his vehicle contained heroin; this constituted a contention by the defendant that he did not know the true identity of what he possessed, the critical issue in the case.

State v. Hazel, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) There was sufficient evidence that the defendant had constructive possession of heroin found in an apartment that was not owned or rented by him. Evidence that the defendant was using the apartment included that he had a key to the apartment on his key ring, his clothing was found in the bedroom, he was seen entering and exiting the apartment shortly before the drug transaction, and he characterize the apartment as "where he was staying." Also, the defendant told the officer he had more heroin in the apartment and once inside lead them directly to it. The defendant also told the officers that his roommate was not involved with heroin and knew nothing of the defendant's involvement with drugs. (2) The trial court did not err by allowing heroin recovered from the defendant's person outside the apartment to be combined with the heroin recovered from the apartment for the purposes of arriving at a trafficking amount for trafficking by possession. The defendant was observed entering the apartment immediately before his sale of 3.97

grams of heroin to an undercover officer. Upon arrest, the defendant said that he had more heroin in the apartment, and provided the key and consent for the officers to enter the apartment where 0.97 grams of additional heroin were recovered. This additional heroin was packaged for sale in the same manner as the heroin sold to the officer. The defendant admitted to being a drug dealer. There was no evidence any of the heroin was for the defendant's personal use. Under these circumstances, the defendant possessed the heroin in the apartment simultaneously with the heroin sold to the officer.

State v. Chisholm, __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of possession with the intent to sell or deliver a counterfeit controlled substance. The court rejected the notion that to be considered a counterfeit controlled substance, the State must prove all three factors listed in G.S. 90-87(6)(b); the statute simply sets out factors that can constitute evidence that the controlled substance was intentionally misrepresented as a controlled substance. (2) The court also found sufficient evidence of intent to sell or deliver the counterfeit controlled substance given its packaging and weight and the presence of other materials used for packaging drugs. (3) The trial court did not err by denying the defendant's motion to dismiss a charge of possession with intent to sell and deliver cocaine where there was sufficient evidence of constructive possession. Because the defendant did not have exclusive possession of the bedroom where the drugs were found, the State was required to show other incriminating circumstances. There was sufficient evidence of such circumstances where among other things, the defendant was sleeping in the bedroom, his dog was in the bedroom, his clothes were in the closet, and plastic baggies, drug paraphernalia, and an electronic scale containing white residue were also in the bedroom. Additionally, the nightstand contained a wallet with a Medicare Health Insurance Card and customer service card identifying the defendant, a letter addressed to defendant at the address, and $600 in cash.

State v. Poole, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012). In a case involving a charge of possessing a controlled substance on the premises of a local confinement facility, the defendant's own testimony that he had a "piece of dope . . . in the jail" was sufficient evidence that he possessed a controlled substance on the premises.

State v. Land, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012). (1) In a delivery of marijuana case, the evidence was sufficient to survive a motion to dismiss where it established that the defendant transferred less than five grams of marijuana for remuneration. The State need not show that the defendant personally received the compensation. (2) Where the evidence showed that the defendant transferred less than five grams of marijuana, the trial court erred by not instructing the jury that in order to prove delivery, the State was required to prove that the defendant transferred the marijuana for remuneration. The error, however, did not rise to the level of plain error.

Motor Vehicle Offenses

In re A.N.C., __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013). The evidence was insufficient to adjudicate the thirteen-year-old juvenile delinquent for reckless driving under G.S. 20-140(b). The evidence showed that the juvenile was driving a vehicle registered to his mother at the time of the wreck and that the vehicle that he was driving collided with a utility pole. However there was no evidence showing that the collision resulted from careless or reckless driving. The court concluded that the "mere fact that an unlicensed driver ran off the road and collided with a utility pole does not suffice to establish a violation of [G.S.] 20-140(b)."

Post-Conviction

DNA Testing

State v. Gardner, __ N.C. App. __, __ S.E.2d __ (May 21, 2013). (1) The trial court did not err by failing to appoint counsel to represent the defendant on a motion for post-conviction DNA testing. The trial court is required to appoint counsel for a motion under G.S. 15A-269 only if the defendant makes a showing of indigence and that the DNA testing is material to defendant's claim of wrongful conviction. Here, the defendant did not make a sufficient showing of materiality, which requires more than a conclusory statement that the evidence is material. (2) The court adopted the following standard of review of a denial for post-conviction DNA testing: Findings of fact are binding if supported by competent evidence and may not be disturbed absent an abuse of discretion; conclusions of law are reviewed de novo. (3) The trial court did not err by failing to make specific findings of fact when denying the defendant's request for post-conviction DNA testing under G.S. 15A-269. The statute contains no requirement that the trial court make specific findings of fact.

Habeas Corpus

State v. Leach, __ N.C. App. __, __ S.E.2d __ (May 21, 2013). (1) When a trial judge conducts an initial review of an application for the issuance of a writ of habeas corpus, the issues are whether the application is in proper form and whether the applicant has established a valid basis for believing that he or she is being unlawfully detained and entitled to be discharged. In making this determination, the trial court is simply required to examine the face of the applicant's application, including any supporting documentation, and decide whether the necessary preliminary showing has been made. Given the nature of the inquiry, there is no reason to require findings of fact and conclusions of law at this initial review stage. The decision whether an application should be summarily denied or whether additional proceedings should be conducted is a question of law and is reviewed de novo. (2) Where the trial court summarily denied the defendant's application, it had no obligation to make findings of fact or conclusions of law and thus its failure to do so does not provide a valid basis for overturning its order on appeal. (3) The trial court did not err by summarily denying the defendant's application where the defendant failed to establish that he had a colorable claim to be entitled to be discharged from custody based on an alleged deprivation of a constitutionally protected liberty interest established by a MAPP contract.

Retroactivity

Metrish v. Lancaster, 569 U.S. __ (May 20, 2013). In this federal habeas case, the Court held that the Michigan Court of Appeals did not unreasonably apply clearly established federal law when it retroactively applied to the defendant's case a state supreme court decision rejecting the diminished capacity defense for first-degree murder. The defendant was convicted in Michigan state court of first-degree murder. When the crime was committed, Michigan's intermediate appellate court had repeatedly recognized diminished capacity as a defense negating the mens rea required for first-degree murder. However, by the time the defendant's case was tried, the Michigan Supreme Court, in a decision called *Carpenter,* had rejected the defense and he thus was precluded from offering it at trial. In the Michigan Court of Appeals, the defendant unsuccessfully argued that retroactive application of *Carpenter* denied him due process of law. He then sought federal habeas relief. The Court noted that judicial changes to a common law doctrine of criminal law violate the principle of fair warning and thus must not be given retroactive effect only where the change "is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." Slip Op. at 7 (quotation

omitted). Judged against this standard, the Court held that the Michigan court's rejection of the defendant's due process claim was not an unreasonable application of federal law.

Chaidez v. United States, 568 U.S. __ (Feb. 20, 2013). *Padilla v. Kentucky*, 559 U. S. ___ (2010) (criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas), does not apply retroactively to cases that became final before *Padilla* was decided. Applying the *Teague* retroactivity analysis, the Court held that *Padilla* announced a new rule. The defendant did not assert that *Padilla* fell within either of the *Teague* test's exceptions to the anti-retroactivity rule. [Author's Note: The N.C. Court of Appeals already has held that *Padilla* is not retroactive. State v. Alshaif, __ N.C. App. __, 724 S.E.2d 597 (Feb. 21, 2012)].

MAR Procedure

State v. Williams, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) The trial court gave the State proper notice when it made a sua sponte oral MAR in open court one day after judgment had been entered. (2) The trial court did not violate the MAR provision stating that any party is entitled to a hearing on a MAR where the State did not request a hearing but merely requested a continuance so that the prosecutor from the previous day could be present in court.

State v. Rollins, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012). Over a dissent the court held that the trial court did not abuse its discretion by denying the defendant's MAR without an evidentiary hearing. The defendant's MAR asserted that he "did not receive a fair trial as a result of a juror watching irrelevant and prejudicial television publicity during the course of the trial, failing to bring this fact to the attention of the parties or the Court, and arguing vehemently for conviction during jury deliberations." Although the MAR was supported by an affidavit from one of the jurors, the court determined that the affidavit "merely contained general allegations and speculation." The court noted that the defendant's MAR failed to specify: which news broadcast the juror in question had seen; the degree of attention the juror in question had paid to the broadcast; the extent to which the juror in question received or remembered the broadcast; whether the juror in question had shared the contents of the news broadcast with other jurors; and the prejudicial effect, if any, of the alleged juror misconduct.

Judicial Administration

Closing the Courtroom

State v. Comeaux, __ N.C. App. __, __ S.E.2d __ (Dec. 31, 2012). The trial court did not violate the defendant's constitutional right to a public trial under *Waller v. Georgia* by closing the courtroom during a sexual abuse victim's testimony where the State advanced an overriding interest that was likely to be prejudiced; the closure of the courtroom was no broader than necessary to protect the overriding interest; the trial court considered reasonable alternatives to closing the courtroom; and the trial court made findings adequate to support the closure.