

Criminal Case Law Update

Covering significant cases for trial judges, decided Oct. 3, 2018 – June 4, 2019

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Criminal Procedure
Attorney's Fees

State v. Mayo , ___ N.C. App. ___, 823 S.E.2d 656 (Jan. 15, 2019)

The court considered the defendant's petition for writ of certiorari which argued that he did not receive notice and an opportunity to be heard on the amount of attorney's fees and costs. The court noted that a criminal defendant may file a petition for a writ of certiorari to appeal a civil judgment for attorney's fees and costs. Here, after the defendant pleaded guilty to felony speeding to elude arrest he was sentenced and the trial court ordered him to pay court costs in the

amount of \$1,572.50. Before entering monetary judgments against indigent defendants for fees imposed for court appointed counsel, the trial court should ask defendants personally whether they wish to be heard on the issue. Absent a colloquy directly with the defendant, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard, and chose not to be heard. Here, nothing in the record indicated that the defendant understood he had a right to be heard on the issue, and the trial court did not inform him of that right. The court thus vacated the civil judgment for attorney's fees and remanded to the trial court.

Bond Forfeiture

State v. Isaacs, ___ N.C. App. ___, 821 S.E.2d 300 (Oct. 2, 2018)

The trial court did not err by allowing the Surety's motion to set aside a bond forfeiture. The motion to set aside asserted as a reason that the defendant had been served with an order for arrest for the failure to appear on the criminal charge as evidenced by a copy of an official court record. The court first concluded that in the bond forfeiture proceeding, the trial court did not err by taking judicial notice of the file as evidence that the defendant was served with the order of arrest. A trial court may take judicial notice of earlier proceedings in the same case, including matters in the file not offered into evidence. Here, the trial court took judicial notice of a fact beyond a reasonable controversy. It is undisputed that the defendant was served with the order for arrest before the 150-day deadline for filing a notice to set aside a forfeiture expired and the trial court attached the order for arrest as an exhibit to the court's order.

The court went on to reject the Board's argument that the trial court committed reversible error by granting the Surety's motion to amend the motion to set aside the bond forfeiture and attach a copy of the order for arrest after expiration of the 150-day deadline for filing the notice. The Surety's original motion contained a copy of the initial warrant for arrest in the case, not the order for arrest issued after the failure to appear. A bond forfeiture proceeding, while ancillary to the underlying criminal proceeding, is a civil matter to which the Rules of Civil Procedure apply. Under those rules, leave to amend a pleading shall be freely given except when the objecting party can show material prejudice. In this case no undue prejudice was shown; in so holding the court noted that the Surety offered to pay the Board's attorney's fees incurred in connection with the hearing.

Counsel Issues

Absolute Impasse

State v. Dawkins, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019)

In this felon in possession of a firearm case, the defendant was not deprived of effective assistance of counsel when the trial court rejected defense counsel's attempt to stipulate to the fact that the defendant was a convicted felon where the defendant disagreed with the stipulation. Before trial, the State and defense counsel agreed to stipulate that the defendant had previously been convicted of a felony. After conferring with the defendant, defense counsel told the trial court that the defendant did not want to sign the stipulation. Defense counsel stated that he believed the stipulation was in the defendant's best interest. The trial court rejected the proposed stipulation. The court noted that the defendant's argument was premised on a notion rejected by

the state high court: that where the defendant and his lawyer reach an impasse regarding a tactical decision, defense counsel's decision trumps the defendant's decision. This notion is inconsistent with North Carolina law regarding the absolute impasse rule. The court rejected the defendant's argument that the absolute impasse rule did not apply because he was not fully informed regarding his stipulation and that an absolute impasse had not been established.

Waiver and Forfeiture

State v. Simpkins, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 21, 2019)

In this resisting a public officer and failing to exhibit/surrender a license case, because the trial court failed to properly instruct the defendant on the waiver of the right to counsel under G.S. 15A-1242 and because the defendant did not forfeit his right to counsel, a new trial is required. At a trial de novo in superior court, the defendant proceeded pro se and was convicted. The defendant appealed, arguing that the trial court erred by failing to make a thorough inquiry of his decision to proceed pro se as required by the statute. Here, the defendant did not clearly and unequivocally waive his right to counsel, nor did the trial court comply with the statute. Specifically, it failed to inform the defendant of the nature of the charges and proceedings and the range of permissible punishments. Thus, no waiver of counsel occurred. The court continued, finding that no forfeiture of the right to counsel occurred. It noted:

[D]efendant was not combative or rude. There is no indication defendant had ever previously requested the case to be continued, so defendant did not intentionally delay the process by repeatedly asking for continuances to retain counsel and then failing to do so. As a whole defendant's arguments did not appear to be designed to delay or obstruct but overall reflected his lack of knowledge or understanding of the legal process. Ultimately, defendant was neither combative nor cooperative, and both trial court and defendant's tone express frustration.

The court continued, distinguishing precedent and noting that the defendant had not fired or refused to cooperate with multiple lawyers, was not disruptive, did not use profanity or throw objects, and did not explicitly waive counsel but then fail to hire his own attorney over the course of months. A dissenting judge concluded that the defendant forfeited his right to counsel.

Ineffective Assistance of Counsel

Garza v. Idaho, 586 U.S. ___, 139 S. Ct. 738 (Feb. 27, 2019)

The presumption of prejudice recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), applies regardless of whether the defendant has signed an appeal waiver. Defendant Garza signed two plea agreements arising from charges brought by the State of Idaho. Each agreement included a provision stating that Garza waived his right to appeal. The trial court accepted the agreements and sentenced Garza. Shortly thereafter Garza told his trial counsel that he wanted to appeal. Although Garza continuously reminded his attorney of this directive, counsel did not file a notice of appeal informing Garza that appeal was problematic because of the waiver. About four months after sentencing Garza sought post-conviction relief in state court, alleging that trial counsel provided ineffective assistance by failing to file notices of appeal despite his requests.

The trial court denied relief, and this ruling was affirmed by the state appellate courts. The U.S. Supreme Court granted certiorari to resolve a split of authority on this issue.

As a general rule, a defendant claiming ineffective assistance of counsel must prove that counsel's representation fell below an objective standard of reasonableness and that prejudice occurred. In certain circumstances however prejudice is presumed, such as where the defendant is denied counsel at a critical stage or where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. Additionally, in *Flores-Ortega*, 528 U.S. 470 (2000), the Court held that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice is presumed. The question presented in this case was: whether that rule applies even when the defendant has, in the course of pleading guilty, signed an "appeal waiver"—that is, an agreement forgoing certain, but not all, possible appellate claims. The Court held that it does.

The Court first determined that Garza's lawyer provided deficient performance: "Where, as here, a defendant has expressly requested an appeal, counsel performs deficiently by disregarding the defendant's instructions." Turning to the crux of the case, the Court held that the *Flores-Ortega* presumption of prejudice applied despite the appeal waiver. The Court reasoned that because there is no dispute that Garza wished to appeal, a direct application of that case resolves this one. It held: When counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal, with no need for a further showing of the merit of his claim, regardless of whether an appeal waiver was signed.

State v. Mills, ___ N.C. ___, ___ S.E.2d ___ (May 10, 2019)

The court per curiam affirmed an unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 813 S.E.2d 478 (2018) holding that the trial court erred by denying the defendant's motion for appropriate relief (MAR) alleging ineffective assistance of appellate counsel with respect to admission of 404(b) evidence of the defendant's prior sexual acts. The Court of Appeals concluded that the defendant made a sufficient showing of both deficient performance by appellate counsel and actual prejudice. The defendant was charged with statutory sexual offense, sex offense by a substitute parent, indecent liberties with a minor, and sexual battery. The defendant filed two motions in limine to preclude testimony of Melissa and Tony (the defendant's adult niece and nephew) regarding sexual encounters with the defendant that allegedly occurred while the defendant was a teenager. The trial court denied the defendant's motions and allowed the witnesses to testify under Rule 404(b). Without any contemporaneous objection by defense counsel, the witnesses testified at trial. The defendant was found guilty and was sentenced to prison. Appellate counsel argued that the trial court erred by admitting testimony by Melissa and Tony. However counsel's brief ignored the fact that trial counsel failed to object to the testimony when it was offered and did not seek plain error review. After reviewing the brief, a member of the Office of Appellate Defender contacted appellate counsel by email and suggested that he either file a substitute brief requesting plain error review or submit a reply brief explaining how the issue had, in fact, been preserved. Appellate counsel responded stating, in part, that it was not necessary to allege plain error. Subsequently the Court of Appeals held that the defendant failed to preserve the issue for review because trial counsel failed to object to the 404(b) evidence at trial. It further stated that it would not review an appeal for plain error where that issue had not been alleged. The defendant subsequently filed a MAR arguing that appellate counsel's failure to assert plain error deprived him of his right to effective

assistance of appellate counsel. At a hearing on the MAR, appellate counsel acknowledged that his representation was deficient. The trial court however denied the MAR, finding that appellate counsel's performance did not prejudice the defendant because even if appellate counsel had argued plain error, there was no reasonable probability that the Court of Appeals would have found plain error and reversed the conviction. The defendant filed a petition for writ of certiorari seeking review of the MAR order. The Court of Appeals reversed. It began by considering whether the 404(b) evidence was properly admitted at trial as proof of common plan or scheme. It concluded that assuming *arguendo* that the acts described were sufficiently similar to the instances alleged by the child victim, the temporal proximity requirement of the 404(b) analysis was not met. Having found that the trial court erred by admitting the 404(b) evidence, the court found that the defendant met his burden of showing a reasonable probability that, had the issue been properly raised on appeal, the Court of Appeals would have found plain error and reversed the conviction. Specifically, the court evaluated the evidence in conjunction with the jury's assessment of the victim's credibility and the weaknesses in the State's case, as discussed in the court's opinion.

Finally, the court determined that appellate counsel performed below an objective standard of reasonableness, satisfying the first prong of the *Strickland* ineffective assistance of counsel analysis. The court noted, in part, that appellate counsel ignored the fact that trial counsel had failed to object to the evidence at trial, meaning that the issue was not properly preserved for appeal. Although a request for the court of appeals to conduct plain error review was the only recourse available under the circumstances, appellate counsel failed to invoke the plain error doctrine in his appellate brief. This issue was immediately flagged by a member of the Office of Appellate Defender.

State v. McAllister, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019)

In this habitual misdemeanor assault case, the court held, over a dissent, that no *Harbison* error occurred. A jury found the defendant guilty of habitual misdemeanor assault, with assault on a female constituting the predicate offense. The defendant argued that a *Harbison* error occurred when counsel conceded his guilt without the defendant's consent. The evidence showed that the defendant assaulted and struck the victim by pushing her down, biting her, and hitting her in the face, causing injuries of scrapes and bruises to her back and fingers, and bleeding and swelling of her lips. In closing, defense counsel asserted that the defendant and the victim got drunk and argued, which escalated into a fight. Counsel stated, "You heard him admit that things got physical. You heard him admit that he did wrong. God knows he did." These statements relate to and summarize the evidence presented, including an officer's testimony and the defendant's recorded interview. While defense counsel acknowledged that the jurors may "dislike" the defendant for injuring the victim, he did not state that the defendant assaulted, struck, pushed, bit, or committed any of the specific acts or elements as alleged by the State. Nor did counsel acknowledge the defendant's age or prior criminal record, both elements of habitual misdemeanor assault. The court concluded: "Our controlling precedents ... hold that where counsel admits an element of the offense, but does not admit defendant's guilt of the offense, counsel's statements do not violate *Harbison*."

State v. Casey, ___ N.C. App. ___, 823 S.E.2d 906 (Jan. 15, 2019)

In this child sexual assault case, the court reversed the trial court's order denying the defendant's Motion for Appropriate Relief (MAR) seeking a new trial for ineffective assistance of counsel

related to opinion testimony by the State's expert. The defendant was convicted of sexual offenses against Kim. On appeal the defendant argued that the trial court should have granted his MAR based on ineffective assistance of both trial and appellate counsel regarding expert opinion testimony that the victim had in fact been sexually abused.

(1) The court began by concluding that the testimony offered by the State's expert that Kim had, in fact, been sexually abused was inadmissible. The court reiterated the rule that where there is no physical evidence of abuse, an expert may not opine that sexual abuse has in fact occurred. In this case the State offered no physical evidence that Kim had been sexually abused. On direct examination the State's expert testified consistent with governing law. On cross-examination, however, the expert expressed the opinion that Kim "had been sexually abused." And on redirect the State's expert again opined that Kim had been sexually abused. In the absence of physical evidence of sexual abuse, the expert's testimony was inadmissible.

(2) The court went on to hold, however, that because the defendant failed to raise the issue on direct appeal, his claim that trial counsel was ineffective by failing to move to strike the expert's opinion that victim Kim had in fact been sexually abused was procedurally defaulted. The record from the direct appeal was sufficient for the court to determine in that proceeding that trial counsel provided ineffective assistance of counsel. Defense counsel failed to object to testimony that was "clearly inadmissible" and the court could not "fathom any trial strategy or tactic which would involve allowing such opinion testimony to remain unchallenged." And in fact, the trial transcript reveals that allowing the testimony to remain unchallenged was not part of any trial strategy. Moreover trial counsel's failure to object to the opinion testimony was prejudicial. Because the "cold record" on direct appeal was sufficient for the court to rule on the ineffective assistance of counsel claim, the MAR claim was procedurally barred under G.S. 15A-1419(a)(3).

(3) The court continued, however, by holding that the defendant was denied effective assistance of appellate counsel in his first appeal when appellate counsel failed to argue that it was error to allow the expert's testimony that Kim had, in fact, been sexually abused. The court noted that the ineffective assistance of appellate counsel claim was not procedurally barred. And, applying the *Strickland* attorney error standard, the court held that appellate counsel's failure to raise the issue on direct appeal constituted ineffective assistance of counsel. The court thus reversed and remanded for entry of an order granting the defendant's MAR.

One judge on the panel concurred with the majority "that appellate counsel was ineffective"; concurred in result only with the majority's conclusion that the claim regarding trial counsel's ineffectiveness was procedurally barred; but, concluding that the defendant was not prejudiced by the expert's testimony, dissented from the remainder of the opinion.

State v. Hyman, ___ N.C. App. ___, 823 S.E.2d 146 (Dec. 18, 2018)

Addressing the merits of an IAC claim raised in a MAR, the court rejected the defendant's argument that attorney Warmack provided ineffective assistance of counsel at an evidentiary remand hearing because of a dual representation conflict arising from having previously represented codefendant Swain. With respect to issues involving successive or simultaneous representation of clients in related matters, a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Here,

the trial court's unchallenged findings concluded, in part, that the defendant presented no evidence that Warmack's representation of the defendant was in any way influenced by his prior representation of codefendant Swain.

State v. McQueen, ___ N.C. App. ___, 821 S.E.2d 272 (Oct. 2, 2018)

In this second-degree murder and armed robbery case, the court rejected the defendant's argument that trial counsel was ineffective by failing to ensure the jury knew that the State's key witness, Damon Bell, could have been but was not charged with first-degree murder in the case. The defendant's argument hinged on the notion that Bell's testimony was the result of a deal or immunity agreement with the State that the jury should have been informed about. The defendant argued that he suffered prejudice because the jury did not know that Bell was receiving something of value in exchange for his testimony which might bear on his credibility. However, counsel repeatedly attempted to elicit that information on cross-examination of both Bell and a Detective. Moreover, during the charge conference counsel requested that the trial court instruct the jury on the testimony of a witness with immunity or quasi-immunity. The prosecutor adamantly maintained that there had been no discussions with Bell or his lawyer related to testifying in exchange for immunity, a reduction in sentencing, or any other concession that might undermine his credibility. The trial court denied the request for the instruction but went on to state that it would instruct the jury on the testimony of interested witnesses and accomplice testimony. The record reveals that no deal or immunity agreement with the State existed. On these facts the court rejected the ineffective assistance of counsel claim.

Defendant's Right to Testify

State v. Wilson , ___ N.C. App. ___, 823 S.E.2d 892 (Jan. 15, 2019)

The trial court did not err by declining to reopen the case after the defendant reconsidered his decision not to testify. After the close of the State's evidence, the trial court addressed the defendant regarding his decision whether or not to testify. The defendant informed the trial court that he would not testify. The defense did not present any evidence and rested, and the jury was excused. After the charge conference defense counsel informed the trial court that the defendant had reconsidered his decision and now wished to testify. The trial court declined to reopen the case and bring the jury back in order to allow the defendant to testify. The court found no abuse of discretion in the trial court's decision to decline to reopen the case to allow the defendant to testify.

Discovery, Subpoenas & Related Issues

State v. Hamilton, ___ N.C. App. ___, 822 S.E.2d 548 (Dec. 4, 2018)

(1) In this drug trafficking case, the trial court did not err by denying the defendant's motion to dismiss all charges due to the State's failure to preserve and disclose a blank audio recording of a conversation between an accomplice and the defendant. After the accomplice Stanley was discovered with more than 2 pounds of methamphetamine in his vehicle, he told officers that the defendant paid him and a passenger to pick up the drugs in Atlanta. Stanley agreed to help officers establish that the defendant was involved by arranging a control delivery of artificial methamphetamine. With Lt. Moody present, Stanley used a cell phone to call the defendant to arrange a pick up at a specified location. The defendant's associates were arrested when they

arrived at the site and testified as witnesses for the State against the defendant. During trial, defense counsel asked Moody on cross-examination if he attempted to record the telephone conversations between Stanley and the defendant. Moody said that he tried to do so with appropriate equipment but realized later that he had failed to record the call. Defense counsel told the trial court that no information had been provided in discovery about Moody's attempt to record the call. After questioning Moody outside of the presence of the jury, the defendant filed a motion for sanctions seeking dismissal of the charges for a willful violation of the discovery statutes and his constitutional rights. The trial court denied the motion. The defendant was convicted and appealed. The defendant argued that the State violated his *Brady* rights by not preserving and disclosing the blank audio recording of the conversation. The court disagreed. The defendant had the opportunity to question Stanley about the phone call, cross-examine Moody about destruction of the blank recording, and argue the significance of the blank recording to the jury. Although the blank recording could have been potentially useful, the defendant failed to show bad faith by Moody. Moreover, while the evidence may have had the potential to be favorable, the defendant failed to show that it was material. In this respect, the court rejected the notion that the blank recording implicated Stanley's credibility.

(2)The trial court did not err by failing to provide a jury instruction with respect to the audio recording. The court noted that in *State v. Nance*, 157 N.C. App. 434 (2003), it held that the trial court did not err by declining to give a special instruction requested by the defendant concerning lost evidence when the defendant failed to establish that the police destroyed the evidence in bad faith and that the missing evidence possessed an exculpatory value that was apparent before it was lost. As in this case, the defendant failed to make the requisite showing and the trial court did not err by declining to give the requested instruction.

DWI Procedure

State v. Cole, ___ N.C. App. ___, 822 S.E.2d 456 (Nov. 20, 2018)

In this DWI case, the trial court did not err by denying the defendant's motion to suppress intoxilyzer results. The defendant argued that the trial court improperly concluded that the officer was not required, under G.S. 20-139.1(b5), to re-advise him of his implied consent rights before administering a breath test on a second machine. The defendant did not dispute that the officer advised him of his implied consent rights before he agreed to submit to a chemical analysis of his breath; rather, he argued that because the test administered on the first intoxilyzer machine failed to produce a valid result, it was a "nullity," and thus the officer's subsequent request that the defendant provide another sample for testing on a different intoxilyzer machine constituted a request for a "subsequent chemical analysis" under G.S. 20-139.1(b5). Therefore, the defendant argued, the officer violated the defendant's right under that statute to be re-advised of implied consent rights before administering the test on the second machine. The court disagreed, finding that G.S. 20-139.1(b5) requires a re-advisement of rights only when an officer requests that a person submit to a chemical analysis of blood or other bodily fluid or substance in addition to or in lieu of a chemical analysis of breath. Here, the officer's request that the defendant provide another sample for the same chemical analysis of breath on a second intoxilyzer machine did not trigger the re-advisement requirement of G.S. 20-139.1(b5).

Habeas Corpus

Chavez v. Carmichael, ___ N.C. App. ___, 822 S.E.2d 131 (Nov. 6, 2018), *review allowed*, ___ N.C. ___, 824 S.E.2d 399 (Mar. 27, 2019)

In this appeal by the Mecklenburg County Sheriff from orders of the Superior Court ordering the Sheriff to release two individuals from his custody, the court vacated and remanded to the trial court to dismiss the habeas corpus petitions for lack of subject matter jurisdiction. Defendant Lopez was arrested for common law robbery and other charges and was incarcerated in the County Jail after arrest on a \$400 secured bond. He then was served with an administrative immigration arrest warrant issued by the Department of Homeland Security (DHS). Additionally DHS served the Sheriff with an immigration detainer, requesting that the Sheriff maintain custody of Lopez for 48 hours to allow DHS to take custody of him. Defendant Chavez was arrested for impaired driving and other offenses and detained at the County Jail on a \$100 cash bond. He also was served with a DHS administrative immigration warrant, and the Sheriff's office was served with a DHS immigration detainer for him. On October 13, both defendants satisfied the conditions of release set on their state charges, but the Sheriff continued to detain them pursuant to the immigration detainers and arrest warrants. That day they filed petitions for writs of habeas corpus in Superior Court. The Superior Court granted both petitions and, after a hearing, determined that the defendant's detention was unlawful and ordered their immediate release. However, before the court issued its orders, the Sheriff's office had turned physical custody of both of the defendants over to ICE officers. The Sheriff sought appellate review.

The court began by rejecting the defendants' argument that the cases were moot because they were in ICE custody. The court found that the matter involves an issue of federal and state jurisdiction invoking the "public interest" exception to mootness, specifically, the question of whether North Carolina state courts have jurisdiction to review habeas petitions of alien detainees held under the authority of the federal government.

The court also rejected the defendants' argument that it should not consider the 287(g) Agreement between the Sheriff and ICE because the Agreement was not submitted to the Superior Court. It noted, in part, that the Agreement is properly in the record on appeal and an appellate court may consider materials that were not before the lower court to determine whether subject matter jurisdiction exists.

On the central issue, the court held that the Superior Court lacked subject matter jurisdiction to review the defendants' habeas petitions. It began by rejecting the defendants' argument that the Superior Court could exercise jurisdiction because North Carolina law does not allow civil immigration detention, even when a 287(g) Agreement is in place. Specifically, they argued that G.S. 162-62 prevents local law enforcement officers from performing the functions of immigration officers or assisting DHS in civil immigration detentions. The court declined to adopt a reading of the statute that would forbid Sheriffs from detaining prisoners who were subject to immigration detainers and administrative warrants beyond the time they would otherwise be released from custody or jail under state law. Moreover, the court noted that G.S. 128-1.1 specifically authorizes state and local law enforcement officers to enter into 287(g) agreements and perform the functions of immigration officers, including detaining aliens.

Finding the reasoning of cases from other jurisdictions persuasive, the court held that "[a] state court's purported exercise of jurisdiction to review the validity of federal detainer requests and immigration warrants infringes upon the federal government's exclusive federal authority over immigration matters." As a result, the trial court did not have subject matter jurisdiction or

any other basis to receive and review the habeas petitions or issue orders other than to dismiss for lack of jurisdiction.

Further, it held that even if the 287(g) Agreement between the Sheriff and ICE did not exist or was invalid, federal law—specifically, 8 U.S.C. § 1357(g)(10)(A)-(B)—allows and empowers state and local authorities and officers to communicate with ICE regarding the immigration status of any person or otherwise to cooperate with ICE in the identification, apprehension, detention, or removal of aliens unlawfully in the United States. It continued: “A state court’s purported exercise of jurisdiction to review petitions challenging the validity of federal detainers and administrative warrants issued by ICE, and to potentially order alien detainees released, constitutes prohibited interference with the federal government’s supremacy and exclusive control over matters of immigration.”

The court added: “[a]n additional compelling reason that prohibits the superior court from exercising jurisdiction to issue habeas writs to alien petitioners, is a state court’s inability to grant habeas relief to individuals detained by federal officers acting under federal authority.” The court cited Supreme Court decisions as standing for the proposition that no state judge or court after being judicially informed that a person is imprisoned under the authority of the United States has any right to interfere with the person or require the person to be brought before the court. On this point it stated: “In sum, if a prisoner’s habeas petition indicates the prisoner is held: (1) under the authority, or color of authority, of the federal government; and, (2) by an officer of the federal government under the asserted ‘authority of the United States’, the state court must refuse to issue a writ of habeas corpus.” Here, it was undisputed that the Sheriff’s continued detention of the defendants after they were otherwise released from state custody was pursuant to federal authority delegated to the Sheriff’s office under the 287(g) Agreement, and after issuance of immigration arrest warrants and detainers. Additionally, 8 U.S.C. § 1357(g)(3) indicates state and local law enforcement officers act under color of federal authority when performing immigration functions authorized under 287(g) agreements. Thus, the Sheriff was acting under the actual authority of the United States by detaining the defendants under the immigration enforcement authority delegated to him under the agreement, and under color of federal authority provided by the administrative warrants and detainer requests. The court next turned to whether the Sheriff was acting as a federal officer under the 287(g) Agreement by detaining the defendants pursuant to the detainers and warrants, noting that the issue was one of first impression. Considering federal authority on related questions, the court concluded: “To the extent personnel of the Sheriff’s office were deputized or empowered by DHS or ICE to perform immigration functions, including detention and turnover of physical custody, pursuant to the 287(g) Agreement, we find . . . federal cases persuasive to conclude the Sheriff was empowered and acting as a federal officer by detaining Petitioners under the detainer requests and administrative warrants.” Because the defendants were being detained under express, and color of, federal authority by the Sheriff who was acting as a de facto federal officer, the Superior Court was without jurisdiction, or any other basis, to receive, review, or consider the habeas petitions, other than to dismiss them for lack of jurisdiction, to hear or issue writs, or intervene or interfere with the defendants’ detention in any capacity. The court went on to hold that the proper jurisdiction and venue for the defendants’ petitions is federal court.

Indictment & Pleading Issues

Citation

State v. Jones, ___ N.C. ___, 819 S.E.2d 340 (Oct. 26, 2018)

On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 701 (2017), the court affirmed, holding that the citation charging the offense in question was legally sufficient to properly invoke the trial court’s subject matter jurisdiction. The defendant was cited for speeding and charged with operating a motor vehicle when having an open container of alcohol while alcohol remained in his system. With respect to the open container charge, the citation stated that the defendant “did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING (G.S. 20-138.7(A))[.]” The defendant moved to dismiss the open container charge on grounds that the citation was fatally defective. The District Court denied the motion and found the defendant guilty of both offenses. The defendant appealed to Superior Court and a jury found him guilty of the open container offense. Before the Court of Appeals, the defendant argued that the trial court lacked jurisdiction to try him for the open container offense because the citation failed to allege all of the essential elements of the crime. The Court of Appeals found no error and the Supreme Court affirmed. Relying in part on the Official Commentary to the statutes, the Supreme Court held that a citation need only identify the crime at issue; it need not provide a more exhaustive statement of the crime as is required for other criminal pleadings. If the defendant had concerns about the level of detail contained in the citation, G.S. 15A-922(c) expressly allowed him to move that the offense be charged in a new pleading. The court further determined that because the defendant did not move in District Court to have the State charge him in a new pleading while the matter was pending in the court of original jurisdiction, the defendant was precluded from challenging the citation in another tribunal on those grounds. The court concluded: “A citation that identifies the charged offense in compliance with N.C.G.S. § 15A-302(c) sufficiently satisfies the legal requirements applicable to the contents of this category of criminal pleadings and establishes the exercise of the trial court’s jurisdiction. Under the facts and circumstances of the present case, the citation at issue included sufficient criminal pleading contents in order to properly charge defendant with the misdemeanor offense for which he was found guilty, and the trial court had subject-matter jurisdiction to enter judgment in this criminal proceeding.”

State v. Cole, ___ N.C. App. ___, 822 S.E.2d 456 (Nov. 20, 2018)

In this DWI case, the superior court properly denied the defendant’s motion to dismiss the indictment for lack of jurisdiction. The defendant asserted that because the State failed to dismiss the citation charging the offense in district court, that charge remained valid and pending in district court, depriving the superior court of jurisdiction. The court concluded that because the charge in superior court was initiated by presentment, that court acquired jurisdiction over the offense when the indictment was issued. The court rejected the defendant’s argument that because the State never dismissed the citation in district court, that charge remained pending and active requiring the superior court to dismiss the indictment. Although the State never filed a formal dismissal of the citation in district court, it abandoned that prosecution in favor of the superior court prosecution, “which effectively served as the functional equivalent of a dismissal of the district court charge, rendering it no longer valid and pending.” The court further rejected the defendant’s argument that the two courts had concurrent jurisdiction and that as the first

court exercising jurisdiction, the district court had jurisdiction to the exclusion of the superior court. The court found no evidence of the district court's exercise jurisdiction over the offense after the existence of concurrent jurisdiction with the superior court.

Naming the Victim

State v. White, ___ N.C. ___, ___ S.E.2d ___ (May 10, 2019)

On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 563 (2017) in this child sex case, the court held that an indictment identifying the alleged victim only as "Victim #1" is facially invalid. Although the arrest warrant and the original indictment identified the victim by her full name, a superseding indictment charging the defendant with sexual offense with a child by an adult stated that he engaged in a sexual act with "Victim #1, a child who was under the age of 13 years, namely 7 years old." The defendant was found guilty and appealed. The Supreme Court found G.S. 15-144.2(b) to be clear and unambiguous: it requires that the child be named in the indictment. In common understanding, to name someone is to identify that person in a way that is unique to that individual and enables others to distinguish between the named person and all other people. The phrase "Victim #1" does not distinguish this victim from other children or victims. The court went on to clarify that facial validity of an indictment is determined by evaluating only the allegations in the criminal pleading; it rejected the notion that a court may supplement the allegations in an indictment by referring to extrinsic evidence.

State v. Shuler, ___ N.C. App. ___, 822 S.E.2d 737 (Dec. 18, 2018)

An indictment charging statutory rape of a person who is 13, 14, or 15 years old was facially defective where it did not identify the victim by name, identifying her only as "Victim #1." An indictment charging this crime must name the victim. The indictment need not include the victim's full name; use of the victim's initials may satisfy the "naming requirement." However, an indictment "which identifies the victim by some generic term is not sufficient."

State v. Speas, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019)

An indictment charging the defendant with felony larceny was not defective. The indictment alleged that the victim was "Sears Roebuck and Company." The defendant argued that although the indictment contains the word "company," it does not identify the victim as a company or other corporate entity. The Court disagreed. Noting prior case law holding defective an embezzlement indictment which alleged the victim's name as "The Chuck Wagon," the court noted that in this case the word "company" is part of the name of the property owner, "Sears Roebuck and Company." It noted that that the words corporation, incorporated, limited, or company, or their abbreviated form sufficiently identify a corporation in an indictment.

Waiver

State v. Nixon, ___ N.C. App. ___, 823 S.E.2d 689 (Feb. 5, 2019)

The trial court erred by denying the defendant's motion for appropriate relief alleging that the trial court lacked subject matter jurisdiction to enter judgment where the defendant was charged with a bill of information that did not include or attach a waiver of indictment. G.S. 15A-642 allows for the waiver of indictment in non-capital cases where a defendant is represented by

counsel. The statute further requires: “Waiver of Indictment must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of information.” G.S. 15A-642(c). The court rejected the State’s argument that the statute’s requirements about waiver of indictment were not jurisdictional.

State v. Nickens, ___ N.C. App. ___, 821 S.E.2d 864 (Nov. 6, 2018)

By failing to object at trial to a fatal variance between a second-degree trespass indictment and the evidence at trial, the defendant failed to preserve the issue. The court declined to invoke Rule 2 to address the issue on the merits.

State v. Bice , ___ N.C. App. ___, 821 S.E.2d 259 (Oct. 2, 2018)

The defendant failed to properly preserve the argument that there was a fatal variance between a drug trafficking indictment and the evidence at trial, where the issue was raised for the first time on appeal. The defendant never alleged a fatal variance when he moved to dismiss the charge. Rather, his motion was based on insufficiency of the evidence.

Misdemeanor Statement of Charges

State v. Capps, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019)

Over a dissent, the court held that the trial court lacked jurisdiction to try the defendant for offenses alleged in a misdemeanor statement of charges. A magistrate issued arrest warrants charging the defendant with misdemeanor larceny and injury to personal property. The defendant was convicted in district court and filed notice of appeal to Superior Court for trial de novo. Prior to jury selection, the court allowed the State to amend the charges with a misdemeanor statement of charges. The defendant was found guilty and appealed, arguing that the Superior Court lacked jurisdiction. The court agreed. The timing of arraignment in district court is determinative as to how, when, and for what reason a prosecutor may file a statement of charges. The prosecutor may file a statement of charges on his or her own determination at any time prior to arraignment in district court. After arraignment, the State only may file a statement of charges when the defendant objects to the sufficiency of the pleading and the trial court rules that the pleading is in fact insufficient. Here, the State filed an untimely and unauthorized misdemeanor statement of charges and the trial court lacked jurisdiction to try the defendant.

Presentment

State v. Baker, ___ N.C. App. ___, 822 S.E.2d 902 (Dec. 18, 2018)

Although the State improperly circumvented district court jurisdiction by simultaneously obtaining a presentment and an indictment from a grand jury, the proper remedy is to remand the charges to district court, not dismissal. The defendant was issued citations for impaired driving and operating an overcrowded vehicle. After the defendant’s initial hearing in district court, she was indicted by the grand jury on both counts and her case was transferred to Superior Court. The grand jury was presented with both a presentment and an indictment, identical but for the titles of the respective documents. When the case was called for trial in Superior Court, the defendant moved to dismiss for lack of subject matter jurisdiction due to the constitutional and statutory invalidity of the presentment and indictment procedure. The Superior Court granted the defendant’s motion and the State appealed.

G.S. 15A-641 provides that “[a] presentment is a written accusation by a grand jury, made on its own motion” It further provides that “[a] presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment . . . and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so.” The plain language of G.S. 15A-641 “precludes a grand jury from issuing a presentment and indictment on the same charges absent an investigation by the prosecutor following the presentment and prior to the indictment.” The court rejected the State’s argument that G.S. 15A-644 governs the procedure for presentments and that because the presentment met the requirements of that statute it is valid, concluding in part: “It is not the sufficiency of the presentment form and contents that is at issue, but the presentment’s simultaneous occurrence with the State’s indictment that makes both invalid.” Here, the prosecutor did not investigate the factual background of the presentment after it was returned and before the grand jury considered the indictment. Because the prosecutor submitted these documents to the grand jury simultaneously and they were returned by the grand jury simultaneously in violation of G.S. 15A-641 “each was rendered invalid as a matter of law.” The court thus affirmed the superior court’s ruling that it did not have subject matter jurisdiction over the case.

The court went on to affirm the lower court’s conclusion that the superior court prosecution violated the defendant’s rights under Article I, Section 22 of the state constitution, but found that it need not determine whether the defendant was prejudiced by this violation. It further held that the trial court erred in holding that the State violated the defendant’s rights under Article I, Sections 19 and 23 of the North Carolina Constitution.

On the issue of remedy, the court agreed with the State that the proper remedy is not dismissal but remand to District Court for proceedings on the initial misdemeanor citations.

Homicide

State v. Tart, ___ N.C. ___, 824 S.E.2d 837 (Mar. 29, 2019)

On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 808 S.E.2d 178 (2017), the court reversed the decision below holding that the short form indictment for attempted first-degree murder was not fatally defective. G.S. 15-144 provides short form language for charging murder. It provides: “[I]t is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid” The indictment here charged the defendant with attempted first-degree murder and alleged, in relevant part, that the defendant “did attempt to kill and slay” the victim with malice aforethought. Although agreeing that the terms “murder” and “slay” are not interchangeable, the court concluded that use of the word slay in place of the word murder in the indictment at issue “is a distinction without a difference” where the indictment also charged that the killing was done with malice aforethought. The court noted that “[w]hile it may have been a better practice” for the State to use the exact language provided in the statute, “the prosecution’s failure to do so did not render the indictment fatally defective.” It held: “the use of the term ‘slay’ instead of ‘murder’ in an indictment that also includes an allegation of ‘malice aforethought’ complies with the relevant

constitutional and statutory requirements for valid murder offense indictments and serves its functional purposes with regard to both the defendant and the court.”

State v. Schmieder, ___ N.C. App. ___, ___ S.E. 2d ___ (Apr. 16, 2019)

In a case involving a conviction for second-degree murder following a fatal motor vehicle accident, the indictment was sufficient. On appeal the defendant argued that the indictment only charged him with Class B1 second-degree murder, a charge for which he was acquitted, and not the Class B2 version of second-degree murder for which he was convicted. The court disagreed. Under G.S. 15-144, “it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed).” Here, the indictment alleged that the defendant “unlawfully, willfully, and feloniously and of malice aforethought did kill and murder Derek Lane Miller.” This is sufficient to charge the defendant with second-degree murder as a B2 felony. The defendant however argued that the indictment was insufficient because, by only checking the box labeled “Second Degree” and not checking the box beneath it labeled “Inherently Dangerous Without Regard to Human Life,” the defendant was misled into believing he was not being charged with that form of second degree murder. The court disagreed, stating: “by checking the box indicating that the State was charging ‘Second Degree’ murder, and including in the body of the indictment the necessary elements of second degree murder, the State did everything necessary to inform [the defendant] that the State will seek to prove second degree murder through any of the legal theories the law allows.” Moreover, it noted, the defendant did not show that he was actually misled, and the record indicates that he understood that the State would seek to introduce his prior driving record and argue that his pattern of driving demonstrated that he engaged in an act that is inherently dangerous to human life done recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

Drug Offenses

State v. Lofton, ___ N.C. ___, ___ S.E.2d ___ (May 10, 2019)

On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 816 S.E.2d 207 (2018), the court held that a manufacturing marijuana indictment was not fatally defective. The indictment alleged that the defendant “did manufacture [marijuana] . . . by producing, preparing, propagating and processing a controlled substance.” The defendant was found guilty of attempting to manufacture marijuana and other charges, and he appealed. The offense of manufacturing a controlled substance does not require an intent to distribute unless the activity constituting manufacture is preparation or compounding. Here, the indictment alleged that the defendant manufactured marijuana in four different ways, only one of which required a showing of an intent to distribute. After acknowledging that certain ways in which the defendant allegedly manufactured did not require proof that he acted with an intent to distribute, the Court of Appeals concluded that it was necessary that all four of those bases were alleged with sufficiency to confer jurisdiction on the trial court. The Supreme Court found that conclusion to be inconsistent with prior case law establishing that the use of the conjunctive in an indictment does not require the State to prove the various alternative matters alleged. Assuming without deciding that a valid indictment charging manufacturing by preparing or compounding must allege that the defendant acted with an intent to distribute, the indictment gave the trial court

jurisdiction to enter judgment for manufacturing given that it also alleged that he did so by producing, propagating, and processing.

Kidnapping

State v. Hill, ___ N.C. App. ___, 821 S.E.2d 631 (Oct. 16, 2018)

The trial court erred by allowing the State to amend a second-degree kidnapping indictment. The indictment alleged that the defendant restrained the victim for the purpose of facilitating the felony of assault inflicting serious injury. However, that offense is a misdemeanor. During trial, the State was allowed to amend the indictment to add the term “bodily” such that the crime specified was “assault inflicting serious bodily injury,” which is a felony. The court held that the State was bound by the crime alleged in the original indictment. However, the court continued, the indictment does allege false imprisonment, a lesser-included offense of kidnapping. Here, where the jury found that the defendant committed the acts as alleged in the indictment, the court vacated the judgment and remanded for entry of judgment and resentencing on the lesser-included offense of false imprisonment.

Embezzlement

State v. Booker , ___ N.C. App. ___, 821 S.E.2d 877 (Nov. 6, 2018)

An embezzlement indictment was not fatally defective. The indictment alleged that the defendant:

unlawfully, willfully and feloniously did embezzle three thousand nine hundred fifty seven dollars and eighty one cents (\$3,957.81) in good and lawful United States currency belonging to AMPZ, LLC d/b/a Interstate All Battery Center. At the time the defendant was over 16 years of age and was the employee of AMPZ, LLC d/b/a Interstate All Battery Center and in that capacity had been entrusted to receive the property described above and in that capacity the defendant did receive and take into her care and possession that property.

The defendant argued that the indictment failed to allege that she acted with fraudulent intent. The court determined that “the concept of fraudulent intent is already contained within the ordinary meaning of the term ‘embezzle,’” as used in the indictment. The court noted that the defendant did not argue that she was prejudiced in her ability to prepare a defense because of this issue. It further noted that to convict the defendant of embezzlement, the State must prove that she fraudulently *or* knowingly and willfully misapplied or converted the property. Here, the indictment can fairly be read to allege that the defendant “knowingly and willfully” embezzled from her employer.

The court also rejected the argument that the indictment was defective for failing to specify the acts constituting embezzlement. The indictment alleges that the defendant embezzled a specific sum of money entrusted to her in a fiduciary capacity as an employee of the company. The court “fail[ed] to see how these allegations would not adequately apprise Defendant as to the charges facing her or prejudice her ability to prepare a defense.”

Resist, Delay, Obstruct

State v. Nickens, ___ N.C. App. ___, 821 S.E.2d 864 (Nov. 6, 2018)

The indictment properly charged resisting a public officer. On appeal the defendant argued that the indictment was invalid because it failed to sufficiently allege the officer's public office. The indictment alleged that the defendant "did resist, delay and obstruct Agent B.L. Wall, a public officer holding the office of North Carolina State Law Enforcement Agent, by refusing commands to leave the premises, assaulting the officer, refusing verbal commands during the course of arrest for trespassing and assault, and continuing to resist arrest." Count I of the indictment which charged the separate offense of assault on a government officer, identified the officer as "Agent B.L. Wall, a state law enforcement officer employed by the North Carolina Division of Motor Vehicles." Both counts, taken together, provided the defendant sufficient information to identify the office in question.

The court also rejected the defendant's argument that the indictment was defective because it failed to fully and clearly articulate a duty that the officer was discharging. After noting the language in Count II, the court noted that Count III, alleging trespass, asserted that the defendant remained on the premises of the specified DMV office "after having been notified not to remain there by a person in charge of the premises." The court held that "the charges" specifically state the duties the officer was attempting to discharge, namely: commanding the defendant to leave the premises and arresting or attempting to rest her when she failed to comply.

The court went on to hold that the officer was acting within the scope of his duties at the time. It noted that G.S. 20-49.1(a) "contains an expansive grant of power," vesting DMV inspectors with the same powers vested in law enforcement officers by statute or common law. Thus, the officer was acting under the authority given to him under the statute at the time and was acting within the scope of his duties. The court concluded: "Even though the indictment could have been be more specific, we decline to require that it be hyper-technical."

Assault

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2019)

An indictment charging the defendant with discharging a weapon into an occupied dwelling was not fatally defective. The defendant argued that the indictment was defective because it charged him with discharging a weapon into occupied property causing serious bodily injury, but failed to allege that any injury resulted from the act. The court noted that the defendant's argument was based on the indictment's reference to G.S. 14-34.1(c) as the statute violated. However, a statutory reference in an indictment is surplusage and can be disregarded. Moreover, the body of the indictment charges the defendant with the version of the offense for which he was convicted, which does not require serious injury.

State v. Hill, ___ N.C. App. ___, 821 S.E.2d 631 (Oct. 16, 2018)

An indictment charging assault with a deadly weapon inflicting serious injury on victim E.D. was not defective. The defendant asserted that the indictment was defective because it failed to include the word "assault" in its description of the offense. The court concluded that while the indictment failed to include that word, it sufficiently charged the offense. Specifically, it alleged, in relevant part: "that . . . the defendant . . . did E.D. with a screwdriver, a deadly weapon, inflicting serious injury, against the form of the statute in such case made and provided and

against the peace and dignity of the State.” Additionally, it correctly listed the offense as “AWDW SERIOUS INJURY” and referenced the correct statute. As such it sufficiently apprised the defendant of the crime.

Joinder

State v. Knight, ___ N.C. App. ___, 821 S.E.2d 622 (Oct. 16, 2018)

In this gang-related case involving two shootings and charges of first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree murder, and discharging a weapon into an occupied dwelling, the trial court did not err by denying the defendant’s motion to sever. Here, the transactional connection between the offenses was sufficient for joinder. Each arose from a continuous course of violent criminal conduct related to gang rivalries. The evidence tended to show that the second shooting was in retaliation for the first. The two shootings occurred the same day; the same pistol was used in both; and witnesses testified to evidence that applied to both shootings, or testified that they were present at both crime scenes. Additionally, neither the number of offenses nor the complexity of the evidence offered required severance. The evidence was not unduly complicated or confusing. The jury instructions clearly and carefully separated the offenses, and the verdict forms unmistakably distinguished the offenses by using the victim’s names. The court rejected the defendant’s argument that severance was necessary to protect his constitutional right to choose to testify with respect to some of the charges but not others. The court noted that a trial court does not abuse its discretion by refusing to sever multiple offenses against the same defendant where the defendant’s only assertion of prejudice is that he might have elected to testify in one of the cases and not in the others.

Jury Selection

State v. Bennett, ___ N.C. App. ___, 821 S.E.2d 476 (Oct. 16, 2018), *review allowed*, ___ N.C. ___, 824 S.E.2d 405 (Mar. 27, 2019)

In this drug case, the court rejected the defendant’s *Batson* claim, concluding that the defendant failed to make a prima facie case. With respect to the trial court’s findings regarding the jurors’ race, the court rejected the notion “that the only method a trial court may use to support a finding concerning the race of a prospective juror is to ask that juror (and, apparently, just accept the juror’s racial self-identification).” It held, in part:

[I]f the trial court determines that it can reliably infer the race of a prospective juror based upon its observations during voir dire, and it thereafter makes a finding of fact based upon its observations, a defendant’s burden of preserving that prospective juror’s race for the record has been met. Absent evidence to the contrary, it will be presumed that the trial court acted properly – i.e. that the evidence of the prospective juror’s race was sufficient to support the trial court’s finding in that regard. If the State disagrees with the finding of the trial court, it should challenge the finding at trial and seek to introduce evidence supporting its position. Questioning the juror at that point could be warranted. Here, however, the State clearly agreed with the trial court’s findings related to the race of the five identified prospective jurors. Absent any evidence that the trial court’s findings were

erroneous, “we must assume that the trial court's findings of fact were supported by substantial competent evidence.” (citations omitted)

The court continued, noting that nothing in the case law requires “the trial court to engage in needless inquiry if a prospective juror’s race is clearly discernable without further inquiry.” (quotation omitted) Citing the record, the court determined that here it was clearly discernable to the trial court and the lawyers that five African-Americans had been questioned on voir dire, that three made it onto the jury, and that the other two were excused pursuant to the State’s peremptory challenges. The trial court found that on these facts, the defendant failed to make a prima facie case. Assuming arguendo, that defendant’s argument was properly preserved for appeal, the court found no error. One judge concurred only in the result, concluding that the defendant had waived the *Batson* issue by failing to preserve an adequate record setting forth the race of the jurors.

Jury Argument

State v. Guy, ___ N.C. App. ___, 822 S.E.2d 66 (Nov. 6, 2018)

The trial court did not err by failing to intervene ex mero motu during the State’s closing argument. At issue was the prosecutor’s reference to the defendant’s gang ties. Here, when the defendant called two codefendants as witnesses, both testified that they were gang members and one admitted that he and the defendant belonged to the same gang. The prosecutor’s statements merely commented on the evidence that had been presented. Also, the prosecutor’s argument did not center on gang involvement. The prosecutor’s only reference to gang involvement was in one paragraph of her closing argument. As such the prosecutor’s statement did not render the trial fundamentally unfair.

State v. Shelton , ___ N.C. App. ___, 824 S.E.2d 136 (Feb. 5, 2019)

(1) In this felony death by vehicle case the prosecutor did not improperly appeal to the jury’s passion and prejudice requiring the trial court to intervene ex mero motu. The prosecutor asserted that the jury “can send a message” with its verdict and told the jury that it was “the moral voice and conscience of this community.” Neither of these arguments are improper.

(2) In this felony death by vehicle case, the prosecution did not incorrectly state the standard for impairment in jury argument. The defendant asserted that the prosecutor’s statements suggested that the jury could find the defendant guilty merely if impairing substances were in his blood. The court disagreed finding that the when viewed in totality, the prosecutor’s statements made clear that the defendant could only be convicted if he was, in fact, legally impaired.

State v. Degraffenried, ___ N.C. App. ___, 821 S.E.2d 887 (Nov. 6, 2018)

In this drug trafficking case, the court rejected the defendant’s argument that the trial court erred by failing to intervene ex mero motu during the State’s closing argument. During those arguments, the prosecutor, without objection, made references to the defendant’s right to a jury trial and noted that the defendant had exercised that right despite “[a]ll of the evidence” being against him. The defendant has a constitutional right to plead not guilty and be tried by a jury. Reference by the State to a defendant’s failure to plead guilty violates the defendant’s constitutional right to a jury trial. Here, the prosecutor’s comments were improper. The court

stated: “Counsel is admonished for minimalizing and referring to Defendant’s exercise of his right to a trial by jury in a condescending manner.” However, because the evidence of guilt was overwhelming the defendant failed to show that the comments were so prejudicial as to render the trial fundamentally unfair.

State v. Greenfield, ___ N.C. App. ___, 822 S.E.2d 477 (Dec. 4, 2018), *temp. stay allowed*, ___ N.C. ___, 822 S.E.2d 411 (Jan. 23, 2019)

In this case arising out of homicide and assault charges related to a drug deal gone bad, the trial court did not err by failing to intervene ex mero moto to a statement made by the prosecutor during closing argument. During argument, the prosecutor stated that “[p]erhaps [Defendant] had [the weapon] in some other robbery [and] discharged it then.” This statement suggests that the defendant may have committed another offense, though there is no evidence that he had done so. However, having reviewed the statement in context of the entire closing argument, the court concluded that even the statement was improper, it was not so grossly improper as to require sua sponte intervention by the trial court.

State v. Wardrett, ___ N.C. App. ___, 821 S.E.2d 188 (Oct. 2, 2018)

In this felon in possession of a firearm case, the court held that although some of the prosecutor’s statements were improper, they were not so improper as to deprive the defendant of a fundamentally fair trial.

The court first determined that, in context, the prosecutor’s use of the term “fool” was not improper. The prosecutor’s remarks related to a gunfight and did not single out the defendant as a fool, but compared him to other fools who behave recklessly with firearms. Additionally there were no repeated ad hominem attacks on the defendant.

Although the prosecutor’s expressions of personal belief were improper, they were not so grossly improper as to warrant reversal. Specifically, “[t]he prosecutor went too far when he asserted that the witnesses were ‘telling the truth.’” These statements improperly vouched for the truthfulness of the witnesses.

Although the prosecutor’s statements as to the defendant’s guilt were improper, they did not deprive the defendant of a fair trial. The prosecutor proclaimed that the defendant was “absolutely guilty” and that there was “just no question about it.”

The court rejected the defendant’s argument that the prosecutor made arguments on matters outside of the record and unsupported by the evidence when he remarked that the defendant told another person to get rid of the gun. The prosecutor’s assertion fairly summarized the evidence and argued a reasonable inference arising from it.

The court rejected the defendant’s argument that the prosecutor impermissibly advocated that the jury’s accountability to the community should compel a guilty verdict. A prosecutor can argue that the jury is the voice and conscience of the community and ask the jury to send a message to the community regarding justice. A prosecutor may not ask or embolden the jury to lend an ear to the community, such that the jury is speaking for the community or acting for the community’s desires. Here, the prosecutor’s remarks were proper because they involved commonly held beliefs and merely attempted to motivate the jury to come to an appropriate conclusion, rather than to achieve a result based on the community’s demands. Additionally, the prosecutor did not urge that society wanted the defendant to be punished, but rather requested, based on the evidence, that the jury make an appropriate decision.

The court concluded with this note:

While we reject Defendant’s arguments, we do not condone remarks by prosecutors that exceed statutory and ethical limitations. Derogatory comments, epithets, stating personal beliefs, or remarks regarding a witness’s truthfulness reflect poorly on the propriety of prosecutors and on the criminal justice system as a whole. Prosecutors are given a wide berth of discretion to perform an important role for the State, and it is unfortunate that universal compliance with “seemingly simple requirements” are hindered by “some attorneys intentionally ‘push[ing] the envelope’ with their jury arguments.” Jones, 355 N.C. at 127, 558 S.E.2d at 104. But, because Defendant has failed to overcome the high burden to prove that these missteps violated his due process rights, he is not entitled to relief.

State v. Copley, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019)

In this first-degree murder case, the court held, over a dissent, that the trial court committed prejudicial error by allowing the prosecutor to argue that the defendant shot the victim because he was black where that argument was not supported by the evidence and was “wholly gratuitous and inflammatory.” The defendant argued that the trial court erred by overruling his objections to the prosecutor’s statements during closing argument that the “undercurrent” of the case and the “elephant in the room” was that the defendant was scared of black males who had congregated outside of his home. The prosecutor argued that when considering self-defense, jurors could ask themselves whether the situation would have been different if the people outside of the house were young white males. The prosecutor asserted that fear “based out of race is not a reasonable fear” and that the defendant was afraid of the group outside because he thought they may be in a gang. Long-standing precedents of the US and NC Supreme Courts “prohibit superfluous injections of race into closing arguments.” However, where race is relevant, reference to it may be appropriate. Here, no evidence was presented to the jury suggesting that the defendant had a racially motivated reason for shooting the victim. In fact, the prosecutor prefaced his final argument by acknowledging the absence of any evidence of racial bias. Despite that, the prosecutor argued that because the defendant is white, he was motivated to shoot and kill the victim because he was black. The court concluded: “Race was irrelevant to the defendant’s case.” The court rejected the State’s argument that any evidence supported the prosecutor’s argument that the defendant feared the black males because he thought they were in a gang. The court assessed the State’s argument as “equat[ing] gang membership to black males.” It continued:

The State’s argument insinuates Defendant could have believed the individuals outside his house were gang members because they were black. No admitted evidence suggests Defendant might have thought the individuals were gang members because of their race. The State’s argument that Defendant might have inferred the individuals were gang members because of their race is offensive, invalid, and not supported by any evidence before the jury.

The court concluded that the prosecutor’s comments “are a wholly gratuitous injection of race into the trial and were improper.” It continued: “The prosecutor’s comments improperly cast Defendant as a racist, and his comment implying race was ‘the elephant in the room’ is a brazen

and inflammatory attempt to interject race as a motive into the trial and present it for the jury's consideration." Finding the error to be prejudicial, the court ordered a new trial.

State v. Tart, ___ N.C. ___, 824 S.E.2d 837 (Mar. 29, 2019)

On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 808 S.E.2d 178 (2017), the court held that the prosecutor's remarks during closing argument in this first-degree murder case were not so grossly improper as to require the trial court to intervene ex mero motu. In the first challenged comments, the prosecutor told the jury that the defendant's mental health history was ripe with examples of violence, homicidal ideations, and the desire and intent to kill other people. The prosecutor argued that any mental illness that the defendant had did not prevent him from forming the specific intent to kill. The prosecutor continued: "He had the specific intent to kill many people, over a 20-year period of time." These statements were premised on matters in the record and were not otherwise improper.

The defendant also pointed to statements by the prosecutor that the jury could ensure that a "homicidal, manipulative, sociopath is not unleashed, yet again, onto our streets." The defendant argued that the term "unleashed" was inflammatory and prejudicial. The court disagreed, concluding that this statement "falls within the realm of permissible hyperbole."

Finally, the defendant challenged the prosecutor's reference to the defendant's potentially delusional, but factually plausible, motives for stabbing the victim. Again, the court found no gross impropriety with respect to these comments.

Jury Deliberations & Misconduct

State v. Mumma, ___ N.C. ___, ___ S.E.2d ___ (May 10, 2019)

On writ of certiorari of a divided decision of the Court of Appeals, ___ N.C. App. ___, 811 S.E.2d 215 (2018), the court held that the defendant was not prejudiced by the trial court's decision to allow the jury to review photographs in the jury room without the defendant's consent. At trial at least 179 photographs were admitted into evidence, all but one of them without any objection from the defendant. While deliberating, the jury sent a note to the trial court requesting the photographs. After noting that whether to send the photos back was in the trial court's discretion, trial counsel objected to allowing the jury to review the photos in the jury room and stated his preference that the jurors rely on testimony and recollection. The trial court decided, in its discretion, to allow the jury to have all of the photographs, and those items were delivered to the jury room. The defendant was convicted and he appealed. G.S. 15A-1233(b) provides, in part, that, "[u]pon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." Permitting juries to take evidence to the jury room without the consent of the parties constitutes error. While the trial court erred by allowing the jury to examine the photographs in the jury room without the defendant's consent, the error was not prejudicial given the extensive evidence of the defendant's guilt and the weakness of the defendant's claim of self-defense when considered in connection with other evidence in the record. Here, the central issue was whether or not the defendant acted in self-defense. In arguing prejudice, the defendant asserted that the lengthy period of time that the jury was allowed to have photographs showing injuries inflicted upon the victim's body and photographs of the relatively minor injuries

inflicted on him could easily have led the jury to reject his self-defense claim. For reasons discussed in the court's opinion, the court did not find this argument persuasive.

State v. Knight, ___ N.C. App. ___, 821 S.E.2d 622 (Oct. 16, 2018)

The trial court did not err by dismissing an empaneled juror. During trial the State moved for the trial court to inquire into the competency of Juror 7 to render a fair and impartial verdict. The trial court conducted a hearing in which a bailiff testified that the juror asked the bailiff "if they could have prayer during the breaks in the jury room," and said that "he felt it was inappropriate and rude for [the District Attorney] to be pointing at people in the audience while a witness was testifying." Upon questioning, the juror said that he did not remember making any statement pertaining to the case and agreed that he had not formed an opinion that would affect his ability to be a fair and impartial juror. Rather than dismiss the juror, the trial court gave curative instructions to the jury. Later that day, the State played audio from a jailhouse call between the defendant and his mother, revealing that the defendant's mother knew Juror 7. The State renewed its request to dismiss the juror. The trial court again asked the juror whether he had made the comment about the district attorney being rude. The juror admitted that he could "vaguely remember" discussing the jury's security and whether he could pray for the jury because he believed they were "in jeopardy somehow." The trial court made findings of fact indicating that the juror provided a different response to the same question during separate hearings and ignored the trial court's instructions. In these circumstances, the trial court did not abuse its discretion by dismissing the juror.

Jury Instructions **Use of Word "Victim"**

State v. Davis, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019)

In this sexual assault case, no plain error occurred when the trial court referred to the complaining witness as "the victim" in the jury instructions. It is well-settled that when a judge properly places the burden of proof on the State, referring to the complaining witness as "the victim" does not constitute plain error. The court noted however that the best practice is for the trial court to modify the pattern jury instructions at the defendant's request to use the phrase "alleged victim" or "prosecuting witness" instead of "victim." Here however the defendant did not request such a change and the trial court properly placed the burden of proof on the State.

Flight

State v. Parks, ___ N.C. App. ___, 824 S.E.2d 881 (Feb. 19, 2019)

In this assault case, the trial court did not err by instructing the jury that it could consider the defendant's alleged flight as evidence of guilt. The court began: "The probative value of flight evidence has been 'consistently doubted'" in our legal system, and we note at the outset that we similarly doubt the probative value of Defendant's alleged flight here." However, it went on to conclude that the evidence supports a flight instruction. Specifically, witnesses testified that the defendant ran from the scene of the altercation.

Bias

State v. Smith, ___ N.C. App. ___, 823 S.E.2d 678 (Jan. 15, 2019)

(1) In this first-degree murder case, the trial court did not err by declining to give the defendant's requested special jury instruction regarding potential bias of a State's witness. Because the issue involves the trial court's choice of language in jury instructions, the standard of review was abuse of discretion. With respect to witness Brown, the defendant requested a special jury instruction stating: "There is evidence which tends to show that a witness testified with the hope that their testimony would convince the prosecutor to recommend a charge reduction. If you find that the witness testified for this reason, in whole or in part, you should examine this testimony with great care and caution. If, after doing so, you believe the testimony, in whole or in part, you should treat what you believe the same as any other believable evidence." The trial court denied the requested special instruction and gave the pattern jury instruction on interested witnesses and informants, N.C.P.I. 104.20; 104.30, and the general pattern jury instruction concerning witness credibility, N.C.P.I. 101.15. Considering the facts of the case, the court found that the trial court's charge to the jury, taken as a whole, was sufficient to address the concerns motivating the defendant's requested instruction. The entire jury charge was sufficient to apprise the jury that they could consider whether Brown was interested, biased, or not credible; was supported by the evidence; and was in "substantial conformity" with the instruction requested by the defendant. The court further noted that the defendant's requested instruction—that Brown testified with the hope that his testimony would convince the prosecutor to recommend a charge reduction—was not supported by the law or the evidence; there was no possibility that Brown could receive any charge reduction because he had no pending charges at the time of his testimony. Even if the trial court erred with respect to the jury instruction, the defendant could not demonstrate prejudice.

Self Defense

State v. Mumma, ___ N.C. ___, ___ S.E.2d ___ (May 10, 2019)

On writ of certiorari from a divided decision of the Court of Appeals, ___ N.C. App. ___, 811 S.E.2d 215 (2018), the court held that the trial court's decision to include an "aggressor" instruction in its self-defense instructions did not constitute plain error. The trial court, without any defense objection instructed the jury on self-defense, stating that the defendant would not be excused from murder or manslaughter on self-defense grounds if he "was the aggressor with the intent to kill or inflict serious bodily harm upon the deceased." According to the defendant, no evidence was introduced showing him to be the aggressor. The court noted however that because he did not object to the instruction at trial, he waived his right to challenge the aggressor instruction on appeal. Applying the plain error standard, the court found it not satisfied. It noted that the defendant sent multiple text messages to another individual in the hours before the victim's death indicating that he wanted to kill the victim. Additionally, the record contains no physical evidence tending to validate the defendant's otherwise unsupported claim of self-defense and does contain substantial physical evidence tending to undercut this claim, including evidence that the victim sustained defensive wounds to her hand, that she sustained stab wounds inflicted from the rear, and that the defendant's wounds were much less severe than those inflicted upon the victim. As a result, given that the defendant's claim to have acted in self-defense rested on his otherwise unsupported testimony and that the record contained ample justification for questioning the credibility of the defendant's account surrounding the victim's

death, the court found itself unable to conclude that any error associated with the instruction rose to the level of plain error.

State v. Bass, ___ N.C. ___, 819 S.E.2d 322 (Oct. 26, 2018)

On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 477 (2017), the court affirmed, holding that the trial court committed prejudicial error by omitting stand-your-ground language from the self-defense jury instructions. The incident in question occurred outside of the Bay Tree Apartments. The defendant gave notice of his intent to pursue self-defense and throughout the trial presented evidence tending to support this defense. At the charge conference, the defendant requested that the jury charge include language from Pattern Jury Instruction 308.45 providing, in relevant part, that the defendant has no duty to retreat in a place where the defendant has a lawful right to be and that the defendant would have a lawful right to be at his place of residence. Believing that the no duty to retreat provisions applies only to an individual located in his own home, workplace, or motor vehicle, the trial court declined to give the requested instruction. After deliberations began, the jury asked for clarification on duty to retreat. Outside the presence of the jury, the defendant again requested that the trial court deliver a no duty to retreat instruction, this time pointing to Pattern Jury Instruction 308.10, including its language that the defendant has no duty to retreat when at a place that the defendant has a lawful right to be. The trial court again concluded that because the defendant was not in his residence, workplace, or car, the no duty to retreat instruction did not apply. The Court of Appeals held that the trial court committed reversible error in omitting the no duty to retreat language from its instruction. Reviewing the relevant statutes, the Supreme Court affirmed this holding, concluding that “wherever an individual is lawfully located—whether it is his home, motor vehicle, workplace, or any other place where he has the lawful right to be—the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another.”

State v. Copley, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019)

In this first-degree murder case involving a shooting outside of the defendant’s home that was reversed on other grounds, the court noted an error in the trial court’s jury instructions with respect to defense of habitation. Noting a problem in the current pattern jury instruction on defense of habitation, the court stated:

In the instant case, the trial court failed to provide a definition for “home” in the jury instructions. While not argued, a discrepancy exists between N.C.P.I. Crim. 308.80 and the controlling N.C. Gen. Stat. § 14-51.2. The jury could have potentially believed that Defendant could only have exercised his right of self-defense and to defend his habitation only if [the victim] was attempting to enter the physical confines of Defendant’s house, and not the curtilage or other areas.

The absence of a definition for “home” or “curtilage” in the pattern instruction, and the reference to *State v. Blue* and the now repealed statute, is not consistent with the current statute. The pattern instruction should be reviewed and updated to reflect the formal and expanded definition of “home” as is now required by N.C. Gen. Stat. § 14-51.2.

State v. Parks, ___ N.C. App. ___, 824 S.E.2d 881 (Feb. 19, 2019)

In this assault case, the trial court committed prejudicial error by failing to instruct the jury on self-defense. Aubrey Chapman and his friend Alan McGill attended a party. During the party, the defendant punched McGill in the face. Chapman saw the confrontation and hit the defendant. Security escorted the defendant out of the venue. Chapman followed, as did others behind him. The evidence conflicts as to what occurred next. Chapman claimed that the defendant charged him with a box cutter. Reggie Penny, a security guard who was injured in the incident, said that people rushed the defendant and started an altercation. Sherrel Outlaw said that while the defendant had his hands up, a group of guys walked towards him. When the defendant took a couple of steps back, someone hit him in the face and a group of guys jumped on him. Outlaw did not see the defendant with a weapon. The trial court denied the defendant's request for a self-defense instruction. The defendant was convicted and appealed. The court found that the trial court erred by failing to instruct the jury on self-defense, finding that the defendant presented competent evidence that he reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm. Citing Penny and Outlaw's testimony, it held that the evidence is sufficient to support the defendant's argument that the assault on him gave rise to his reasonable apprehension of death or great bodily harm. Although the State correctly asserts that some of the evidence shows that the defendant was the initial aggressor, conflicting evidence indicates that he was not brandishing a weapon and was attacked without provocation. The court noted that it must view the evidence in the light most favorable to the defendant. The court went on to conclude that the trial court's error was prejudicial.

State v. Coley, ___ N.C. App. ___, 822 S.E.2d 762 (Dec. 18, 2018), *temporary stay allowed*, ___ N.C. ___, 821 S.E.2d 836 (Jan. 4, 2019)

In this case involving convictions of assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon, the court held—over a dissent—that the trial court committed prejudicial error by declining to instruct the jury on self-defense and defense of habitation. The case involved the defendant's shooting of Derrick Garris. The events began when Garris punched the defendant while he was sitting outside of his neighbor's house. The defendant was recovering from a broken leg and was using crutches and a wheelchair; the punch caused him to fall out of his chair. The defendant got up and began walking home on crutches. When he arrived home, Garris grabbed the defendant and threw him against the door, over two chairs, and into a recliner, while suggesting that the defendant had “snitched” on Garris's brothers. Garris left but then returned, punched the defendant again and left. The defendant testified that by the time he had climbed from the floor into his wheelchair, Garris re-entered the house. The defendant reached down beside his wheelchair, retrieved a gun, and shot Garris. The trial court denied the defendant's request for a jury instruction on self-defense and defense of habitation. The defendant was convicted and he appealed.

The court began by concluding that the trial court erred by failing to instruct on self-defense. Here, the defendant's testimony supports his argument that he intentionally shot at Garris. In so holding the court rejected the State's argument that the evidence showed that the defendant made only a warning shot, and did not intend to hit Garris. Here, the defendant's testimony indicates that he had a reasonable belief that Garris would continue to severely injure or kill him and that he shot Garris to prevent further assault or death. The defendant testified to his fear of Garris due to Garris's suggestion that he was a snitch. He further testified to his uncertainty as to whether Garris was armed and to his need to protect himself. Viewed as a

whole, the jury could reasonably infer that the defendant intended to strike a blow when he aimed and shot at Garris. Ample testimony was presented showing that the defendant had an objectively reasonable belief that he needed to use deadly force to repel another physical attack to his person by Garris. Because of Garris's previous assaults the defendant, who required a wheelchair and crutches to ambulate, was reasonably afraid of further injury or death. He did not know whether or not Garris had retrieved a weapon before he returned. The State's argument focuses on a very brief portion of the defendant's testimony in which he stated that he fired a "warning shot," but neglects to review it in the light most favorable to the defendant. Although contradictory evidence exists, sufficient evidence was presented for an instruction on self-defense.

The trial court also erred by refusing to give an instruction on defense of habitation. The defendant was inside his home when Garris entered. Garris had repeatedly assaulted the defendant that evening and the defendant barely managed to get himself off the floor and into his wheelchair when Garris returned. The court rejected the notion that Garris also had a right to be in the house, negating the defense of home presumption in G.S. 14-51.2(b). The defendant testified that Garris "stayed" in the house occasionally, and Garris testified that he had some clothes, but no other belongings, at the house. Presuming a conflict in the evidence exists as to whether Garris had a right to be in the home, it should have been resolved by the jury. Because the defendant intended to and did shoot at Garris while under attack inside his home, the trial court erred by denying the instruction on defense of habitation.

State v. Greenfield , ___ N.C. App. ___, 822 S.E.2d 477 (Dec. 4, 2018), *temp. stay allowed*, ___ N.C. ___, 822 S.E.2d 411 (Jan. 23, 2019)

In this case arising out of homicide and assault charges related to a drug deal gone bad, the trial court erred in its instructions. The defendant was charged with first-degree murder of victim Jon and assault with a deadly weapon with intent to kill inflicting serious injury as to victim Beth. The State's evidence tended to show that the defendant shot the victims. The defendant admitted that he shot the victims but asserted self-defense. Specifically, he testified that Jon shot first; that the defendant returned fire in self-defense; and that the defendant was only trying to hit John not Beth.

With respect to the homicide of Jon, the trial court instructed the jury on felony murder, premeditated and deliberate murder, second-degree murder, and voluntary manslaughter. On its verdict sheet, the jury indicated that it found the defendant guilty of both first-degree felony murder, based on the felony of assault with a deadly weapon with intent to kill inflicting serious injury and second-degree murder. The trial court entered judgment on first-degree felony murder. On appeal, the court held that the jury instructions on felony-murder constituted reversible error because they allowed the jury to convict the defendant on this theory even if they believed that the defendant intended to shoot Jon rather than Beth with the fatal shots. The court stated, "it would be error for the jury to base its felony murder conviction for the killing of Jon on a felony that Defendant *was intending to assault Jon.*" Where the defendant intentionally assaults a victim with a gun and causes the victim's death and no other felony is involved, the State cannot elevate the homicide to first-degree murder based solely on the fact that the defendant committed the deadly assault with a deadly weapon. To hold otherwise would mean every homicide with a gun would be first-degree felony murder. If the jury believed that the defendant intended to shoot Beth with the shots that killed John, they were free to convict him on first-degree felony murder based on the underlying assault charge. The court however could not determine from the jury

instructions or the verdict sheet whether the jury believed that the defendant intended to shoot Jon or Beth. Thus, the instructions did not clearly inform the jury that it could find the defendant guilty of first-degree felony murder based on the assault charge only if it determined that the fatal bullet was meant for Beth. Here, there was evidence from which the jury could have inferred either finding. Therefore the jury instructions constituted reversible error. However, because the court found no error in the jury instruction as to second-degree murder, it vacated the judgment convicting the defendant of first-degree felony murder and remanded for entry of judgment for second-degree murder. One judge dissented from this aspect of the court's opinion, finding that the defendant was entitled to a new trial as to this charge.

With respect to the assault charge on victim Beth, the trial court instructed the jury that it could convict the defendant of that offense for injuries to Beth; it did not give a self-defense instruction on this charge but did properly instruct on transferred intent. This was error because "we do not know if the jury determined that the shot that struck Beth was meant for Jon, which may have been legally justified under self-defense, or if it was meant for Beth. That is, with the transferred intent instruction, it is possible that the jury convicted Defendant of AWDWIKISI, though believing that Defendant intended all his shots to hit Jon, as he testified. And based on transferred intent, he should have been acquitted if the jury believed he was firing at Jon in self-defense." The defendant was entitled to a new trial on this charge.

State v. Irabor, ___ N.C. App. ___, 822 S.E.2d 421 (Nov. 20, 2018)

In a case where the defendant was found guilty of second-degree murder, assault with a deadly weapon, and discharging a firearm into an occupied dwelling, the trial court committed prejudicial error by failing to include no duty to retreat and stand your ground provisions in the jury instruction on self-defense. Viewed in the light most favorable to the defendant, the defendant was aware of the victim's violent and dangerous propensities on the night of the shooting. The defendant's testimony established, among other things, that the victim had achieved high-ranking gang membership by killing a rival gang member, that the defendant saw the victim rob others multiple times, and that he knew the victim always carried a gun. The defendant's knowledge of the victim's violent propensities, being armed, and prior acts support a finding that the defendant reasonably believed it was necessary to use deadly force to save himself from death or great bodily harm. Prior to the shooting, the victim stood outside of the defendant's apartment with two others and waited to confront the defendant about an alleged prior incident. The defendant also testified that he borrowed a gun for protection. When the victim noticed the defendant walking towards his apartment, the victim told the defendant, "this is war, empty your pocket", continued to advance after the defendant fired two warning shots, and lunged at the defendant while reaching behind his back towards his waistband. In the light most favorable to the defendant, a jury could conclude that the defendant actually and reasonably believed that the victim was about to shoot him and it was necessary to use deadly force to protect himself. The fact that the defendant armed himself does not make the defendant the initial aggressor. Although law enforcement officers did not find a gun when they searched the victim's body, evidence presented at trial suggested that he may have been armed. Thus, a jury could infer that the defendant reasonably believed the victim was armed at the time of the altercation.

Homicide

State v. Holmes, ___ N.C. App. ___, 822 S.E.2d 708 (Dec. 18, 2018)

In a case where the defendant was convicted of first-degree murder, the trial court did not err by failing to submit an instruction on second-degree murder and/or voluntary manslaughter. The defendant argued that the evidence negated premeditation and deliberation. The court disagreed, finding that the State offered substantial evidence of those elements. Specifically, the defendant had a tumultuous relationship with the victim, with ill-will existing between the two. The victim planned to call off their wedding and sent the defendant a text message telling him that he needed to move out of the home and that she would be changing the locks. Moreover, she told the defendant, who had financial troubles, that she would continue to seek child support payments. Her body was found the next day. After the killing, the defendant gave inconsistent statements about events of the day. He told the victim's friend that he left early for work and that the victim was not at the home, and said that she had a doctor's appointment. However, the defendant had the victim's vehicle and the keys to his own car with him, leaving her with no vehicle. When the friend asked the defendant whether the victim's vehicle was at the home when he went to work, the defendant never responded. Moreover, there was no evidence that the victim provoked the defendant. This constituted substantial evidence of premeditation and deliberation. The only evidence claimed by the defendant to negate premeditation and deliberation is the text message from the victim telling him to move out and signs of struggle in the home. From this evidence, the defendant claims that premeditation and deliberation were negated because the jury could have concluded that an argument aroused a sudden passion in him. The court rejected the notion that this evidence negated premeditation and deliberation. Likewise the court determined that the trial court did not err by failing to instruct the jury on voluntary manslaughter, again noting the lack of evidence of heat of passion.

Assault

State v. Hill, ___ N.C. App. ___, 821 S.E.2d 631 (Oct. 16, 2018)

In this assault inflicting serious bodily injury case, no plain error occurred with respect to the trial court's jury instructions defining "serious bodily injury" as to victim E.D. The court noted that while it prefers trial courts to use the Pattern Jury Instructions, an instruction is sufficient if it adequately explains each essential element of the offense. The Pattern Instruction provides that "[s]erious bodily injury is bodily injury that creates or causes [a substantial risk of death][serious permanent disfigurement]." Here, the trial court's instruction stated, in pertinent part: "Serious bodily injury is injury that creates or causes a substantial risk of serious permanent disfigurement." Although the trial court's instruction was imperfect, the jury was not misled: The instruction, viewed as a whole, correctly placed the burden of proof on the State for the two elements of felonious assault inflicting serious bodily injury. The trial court merely conjoined the language of two parentheticals from the pattern jury instruction. Moreover, the evidence put on by the State goes to prove the creation of serious permanent disfigurement, not a risk of serious substantial disfigurement. Therefore, even though the jury was incorrectly instructed that the State's burden may be satisfied by the Defendant causing a substantial risk of serious permanent disfigurement, the State's evidence sufficiently proved that E.D. actually suffered serious permanent disfigurement. We cannot say that it is reasonably probable that the outcome would have been different, but for the error in the jury instruction.

Frauds

State v. Koke, ___ N.C. App. ___, 824 S.E.2d 887 (Feb. 19, 2019)

(1) The trial court did not err in its obtaining property by false pretenses instructions. The charge arose out of the defendant's alleged fraud in connection with an insurance claim. The trial court instructed the jury that to find the defendant guilty it must find that he made a representation, that the representation was false, that it was calculated and intended to deceive, that the victim was deceived by it, and that the defendant thereby obtained property from the victim. The defendant argued that the lack of specificity in the instructions would allow the jury to convict him if they found *any* false representation. The court noted prior case law holding that a jury instruction that is not specific as to the misrepresentation in the indictment is acceptable so long as there is no fatal variance between the indictment, proof at trial, and the jury instructions. Here, the indictment alleged that the defendant obtained the property by failing to disclose on his insurance application that he had previously pled guilty to a felony offense. At trial the defendant stipulated that he had pled guilty to a felony offense. The defendant failed to show any fatal variance between the indictment, proof, and jury instructions and thus no error occurred.

(2) The trial court did not err with respect to its instructions on insurance fraud. The instructions informed the jury that to find the defendant guilty they must find that an insurance policy existed; that the defendant presented a written statement in support of the claim; that the statement contained material false or misleading information; that the defendant knew the statement contained false or misleading information; and that the defendant acted with intent to defraud. The court noted that it has found plain error where there is evidence of various misrepresentations which the jury could have considered in reaching a verdict and the trial court fails to instruct on the specific misrepresentation. Here, however, the only evidence of false or misleading information was the defendant's affidavit in which he failed to disclose that major repairs were done to the vehicle after purchase. Thus, no fatal variance exists between the indictment, the evidence, and the jury instructions, and no error occurred.

Theory Not Supported by Evidence

State v. Malachi, ___ N.C. ___, 821 S.E.2d 407 (Dec. 7, 2018)

On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 799 S.E.2d 645 (2017), in this felon in possession of a firearm case, the court reversed, holding that though the trial court erred in its jury instructions with respect to possession of a firearm, the error did not require a new trial. At trial, the defendant objected to any reference in the jury instructions to constructive possession, arguing that the facts showed only actual possession. The trial court overruled the defendant's objection and instructed that possession could be either actual or constructive. During deliberations, the jury requested "a legal definition of possession of a firearm," and the court re-instructed the jury consistent with its prior instructions. The defendant was convicted and he appealed. The Court of Appeals awarded the defendant a new trial, finding that the evidence supported an instruction only for actual possession and that the trial court erred by instructing on constructive possession. That court reasoned that inclusion of a jury instruction unsupported by the evidence is reversible error. The State sought discretionary review and the Supreme Court reversed.

The Supreme Court began by noting that it has treated actual and constructive possession as alternative means of showing possession of an item necessary for guilt. Thus, the Court of Appeals correctly determined that the trial court erred by allowing the jury to potentially convict the defendant of possession of a firearm by a felon on the basis of constructive possession where no evidence supported that theory.

Turning to whether that error required a new trial, the court held that it did not. Concluding that its “existing jurisprudence does not conclusively establish that existing North Carolina law encompasses an automatic reversal rule” in these circumstances, it turned to a determination of whether it should adopt such a rule. It declined to do so, holding that the defendant’s challenge to an unsupported constructive possession instruction is subject to traditional harmless error analysis. The court went on to note that as a general matter, a defendant seeking to obtain appellate relief on the basis of an error to which there was an objection at trial must establish that there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. It noted however that cases involving submission of erroneous jury instructions are “exceedingly serious and merit close scrutiny to ensure that there is no ‘reasonable possibility’ that the jury convicted the defendant on the basis of such an unsupported legal theory.” However, if the State presents exceedingly strong evidence of guilt on the basis of a theory and that evidence is neither in dispute nor subject to serious credibility-related questions, “it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory.” Turning to the case at hand, it noted that the undisputed evidence showed that officers went to a location after receiving report that an individual possessed a firearm. They discovered the weapon while searching the defendant, who matched the description that had been provided. On these facts the defendant failed to establish that there is a reasonable possibility that, in the absence of the erroneous instruction, the jury would have acquitted. Justice Morgan dissented.

State v. Fowler, ___ N.C. ___, 821 S.E.2d 165 (Dec. 7, 2018)

On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 800 S.E.2d 724 (2017), the court, in a per curiam opinion, vacated and remanded to the Court of Appeals for reconsideration in light of *State v. Malachi*, ___ N.C. ___, 821 S.E.2d 407 (2018). In this impaired driving case, the Court of Appeals had held that the trial court committed reversible error by instructing the jury that it could find the defendant guilty if he was driving under the influence of an impairing substance or had a blood alcohol concentration of .08 or more, where no evidence supported a conviction under the .08 prong of the impaired driving statute. The Court of Appeals reasoned that although disjunctive jury instructions generally are permissible for impaired driving, in this case the State presented no evidence supporting the .08 prong. That court thus concluded that the trial court improperly instructed the jury on alternative theories, one of which is not supported by the evidence. It further held that because it is impossible to conclude, based on the record and the general verdict form, upon which theory the jury based its verdict, it must assume that the jury based its verdict on the theory for which it received an improper instruction. The Court of Appeals went on to reject the State’s argument that the error was harmless or non-prejudicial and noted that this is not a case where there is overwhelming evidence of impaired driving.

State v. Steen, ___ N.C. App. ___, 826 S.E.2d 478 (Mar. 19, 2019)

In a case where a felony-murder conviction was based on an attempted murder of a second victim, the court held—over a dissent—that the trial court’s error in instructing the jury that the defendant could be convicted if it found that he attempted to murder the second victim with a garden hoe, an alternative type of deadly weapon in addition to the defendant’s hands and arms, was harmless. The defendant argued that there was insufficient evidence that the hoe was used in the attack. The court concluded that any error resulting from the trial court’s instruction was harmless even assuming that the weapons constituted separate and distinct theories of the crime and that reference to the garden hoe was unsupported by the evidence. The victim testified that her attacker grabbed her from behind and tightly wrapped his right arm around her neck before placing his left hand over her nose and mouth. A struggle ensued until the victim lost consciousness. The victim sustained a skull fracture, multiple rib fractures, and a collapsed lung. This testimony clearly constitutes substantial evidence to support an instruction that hands and arms were used as weapons during the attack. Although the evidence plainly established that the garden tool was used to murder another victim, no evidence was presented linking it to this victim’s attack. Thus the evidence supported only one of the deadly weapon theories instructed on by the trial court—hands and arms. However, based on the evidence in the case, the error in referencing the hoe was harmless.

A concurring judge concluded that the instruction regarding the garden hoe was supported by the evidence. One judge dissented on the issue of whether the defendant had demonstrated reversible error from the trial court’s erroneous jury instruction.

State v. Booker, ___ N.C. App. ___, 821 S.E.2d 877 (Nov. 6, 2018)

In this embezzlement case, the trial court did not commit plain error with respect to the jury instructions. The defendant argued that the trial court committed plain error by instructing the jury on an alternative theory of guilt not supported by the evidence; specifically, by including as an element of embezzlement that she “did take and make away with” money entrusted to her. She conceded however that the jury was correctly instructed on the law during the trial court’s summation of the elements of embezzlement. Nevertheless the defendant argued she was deprived of a right to a unanimous jury because of the trial court’s error. No plain error occurred where the evidence that the defendant misapplied money entrusted to her in a fiduciary capacity was overwhelming and it cannot reasonably be argued that the jury would have returned a different verdict but for the trial court’s error in instructing on the alternate theory.

Mistrial

State v. Sheridan, ___ N.C. App. ___, 824 S.E.2d 146 (Feb. 5, 2019)

In this child sexual assault case, the court rejected the defendant’s argument that the trial court erred by denying his motion for mistrial when an expert witness mentioned the defendant as “a person who had a history of criminality.” Dr. Elizabeth Witman, the director of SAFEchild Advocacy Center, testified about the victim’s medical evaluation and diagnostic interview. When asked whether she had any concerns about the victim’s biological family, Witman replied said that she did, stating, in part, that “because of her mother’s homelessness and probably financial struggles and some other issues it was my opinion that she was neglected by being allowed to live with a person who had a history of criminality.” The defendant moved to strike. The trial court sustained the objection and instructed the jury to disregard the witness’s statement but

denied the defendant's motion for mistrial. Finding no abuse of discretion by the trial court in denying the mistrial motion, the court noted that the trial court sustained the defendant's objection and instructed the jury to disregard. Moreover the disclosure of the defendant's history of criminality was vague and "did not suggest Defendant had previously been convicted of anything."

Motion to Continue

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019)

In this child sexual assault case, the defendant failed to show prejudice caused by the trial court's denial of the defendant's motion for a continuance. That motion asserted that the district attorney did not file an adequate trial calendar 10 or more days before trial in violation of G.S. 7A-49.4(e). In July 2016, the trial court entered an order setting the case for trial on 14 November 2016. The case however was continued several times until the eventual 24 July 2017 trial date. The case also was placed on what the State calls a "trial session calendar" more than 10 days before the trial. However that calendar included more than a dozen criminal cases set for trial on 24 July 2017, listed in alphabetical order by the defendants' last names. The defendant argued that this calendar does not comply with the statute because it does not list cases "in the order in which the district attorney anticipates they will be called for trial" and, given the number of complicated criminal cases on the list, necessarily includes cases that the DA does not reasonably expect to be called for trial that day. The defendant argued that the "true trial calendar" was a document filed 11 July 2017 and emailed to defense counsel on 12 July 2017. That document, entitled "Trial Order the Prosecutor Anticipates Cases to be Called," listed the defendant's case as the first case for trial on 24 July 2017. The defendant argues that this trial calendar did not give him 10 days notice before trial. The court agreed that the 11 July 2017 document is the only trial calendar that complies with the statute and that it was not published 10 or more days before the trial date. However, it concluded that the defendant did not show that he was prejudiced by the failure to receive the required notice. In so holding, the court rejected the defendant's argument that he is not required to show prejudice. Here, the defendant argued that with more time he may have been able to call witnesses who would have established how the victim's story changed over time and that she was coached. This however was speculation, as the defendant failed to produce any evidence that the witnesses would have so testified. Likewise, he did not assert that the trial court denied him the opportunity to make an offer of proof or build a record of what testimony these witnesses would have provided. Thus, no prejudice was shown.

Motion to Dismiss

State v. DeJesus, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019)

In this child sexual assault case, there was substantial independent evidence to support the trustworthiness of the defendant's extrajudicial confession that he engaged in vaginal intercourse with the victim on at least three occasions and therefore the corpus delicti rule was satisfied. The defendant challenged the trial court's denial of his motion to dismiss two of his three statutory rape charges, which arose following the defendant's confession that he had sex with the victim on three separate occasions. The defendant recognized that there was "confirmatory circumstance" to support one count of statutory rape because the victim became pregnant with the defendant's child. However, he asserted that there was no evidence corroborating the two

other charges other than his extrajudicial confession. The court disagreed, finding that there was substantial independent evidence establishing the trustworthiness of his confession that he engaged in vaginal intercourse with the victim on at least three separate occasions. Specifically, the victim's pregnancy, together with evidence of the defendant's opportunity to commit the crimes and the circumstances surrounding his statement to detectives provide sufficient corroboration "to engender a belief in the overall truth of Defendant's confession." The court began by noting that here there is no argument that the defendant's confession was produced by deception or coercion. Additionally, in his confession he admitted that he engaged in intercourse with the victim on at least three occasions "that he could account for," suggesting his appreciation and understanding of the importance of the accuracy of his statements. The trustworthiness of the confession was further reinforced by his ample opportunity to commit the crimes given that he was living in the victim's home during the relevant period. Finally, and most significantly, the undisputed fact that the defendant fathered the victim's child unequivocally corroborated his statement that he had engaged in vaginal intercourse with her. Thus, strong corroboration of the confession sufficiently establishes the trustworthiness of the concurrent statement regarding the number of instances that he had sexual intercourse with the victim.

State v. Holmes, ___ N.C. App. ___, 822 S.E.2d 708 (Dec. 18, 2018)

The trial court did not err by denying the defendant's motion to dismiss a charge of first-degree murder. On appeal the defendant argued that the State failed to introduce sufficient evidence with respect to an unlawful killing and the defendant's identity as the perpetrator.

The defendant argued that the State failed to show that the victim died by virtue of a criminal act. The court disagreed. The victim was found dead in a bathtub, with a hairdryer. Although the forensic pathologist who performed the autopsy was unable to determine a cause of death, he testified that he found red dots similar to bruising inside of the victim's eyelids, causing him to believe that there was some type of pressure around her upper chest or neck and head area. He also found a large bruise on her right side that was less than 18 hours old, and an abrasion on her right thigh. A witness testified that the victim had no bruises the night before her death. Additionally, the pathologist found a hemorrhage on the inside of the victim's scalp. The pathologist testified that her toxicology report was negative for alcohol and drugs and he ruled out drowning as a cause of death. He also found no evidence to support a finding that the victim died of electrocution. Taken in the light most favorable to the State, the evidence was sufficient to establish that the cause of death was a criminal act.

The evidence was also sufficient to establish that the defendant was the perpetrator. The State presented substantial evidence of a tumultuous relationship between the defendant and the victim, colored by the defendant's financial troubles, and that animosity existed between the two. The victim explicitly told a friend that she did not want to marry the defendant because of financial issues. The day before her death, the victim sent the defendant a text message, stating "You have until Tuesday at 8:00 as I'm leaving to go out of town Wednesday or Thursday. And my locks will be changed. So do my [sic] act stupid. Thanks." She then sent an additional text stating, "I will also be [sic] send a request not to stop child support FYI." The defendant's financial difficulties, coupled with his tempestuous relationship with the victim and her threat to end the relationship and remove the defendant from her home are sufficient for a reasonable juror to conclude that the defendant had a motive to kill the victim. Additionally, the State presented evidence of opportunity. Specifically, evidence that the defendant was in the home

between when the victim returned the night before and when her body was found the next day. Additionally, the evidence supported a conclusion that the victim was suffocated, and evidence connected the defendant to the method of killing. A white feather pillow was found behind a mattress in the room where the defendant stayed. Also in that room was an unopened pack of white socks. White feathers were found on the floor in the bedroom, in a trash bin outside the home, and in the bathroom where the victim's body was found. A pair of wet white socks was found in the trashcan in the kitchen, with a feather on them. This evidence would allow a reasonable juror to conclude that the defendant had the means of suffocating the victim with the feather pillow found in his room and that he was connected to the means of the killing.

Motion to Suppress

State v. Loftis , ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 26, 2019)

In this drug case, the defendant failed to preserve her argument that the trial court erred by failing to sua sponte conduct a hearing to confirm that the defendant's in-custody statements to law enforcement were knowing and voluntary. The defendant did not move to suppress the statements before or at any time during trial. When the State first asked about the statements at trial, defense counsel stated "objection." The trial court overruled the objection, and defense counsel said nothing more. When no exception to making a motion to suppress before trial applies, a defendant's failure to make a pretrial motion to suppress waives any right to contest the admissibility of evidence at trial on constitutional grounds. Thus, the trial court properly overruled the defendant's objection as procedurally barred.

State v. Rivera , ___ N.C. App. ___, 826 S.E.2d 511 (Mar. 19, 2019)

In this indecent liberties case, the defendant waived any right of appellate review with respect to his arguments challenging admission of his inculpatory statements (he had asserted a Miranda violation and that the statements were involuntary). The defendant has the burden of establishing that a motion to suppress is made both timely and in proper form. Here, the defendant failed to meet that burden and thus waved appellate review of these issues. The court continued, however, holding that the record was insufficient to consider the defendant's related ineffective assistance of counsel claim, and dismissed that claim without prejudice to the defendant's right to file a motion for appropriate relief in superior court.

State v. Dixon, ___ N.C. App. ___, 821 S.E.2d 232 (Oct. 2, 2018)

The court rejected the defendant's argument that the findings and conclusions made by the trial court from the bench with respect to his motions to suppress are insufficient because the trial court expressly ordered the State to prepare written orders on the motions but the State failed to do so. North Carolina law requires findings of fact only where there is a material conflict in the evidence, and allows the trial court to make those findings of fact either orally or in writing. Regardless of whether findings of fact are required, the trial court must make conclusions of law in the record. Considering each of the defendant's motions to suppress the court found that the "trial court's oral rulings on the motions are without error, because they state sufficient findings of fact resolving any material conflicts in the evidence and conclusions of law that apply the law to those factual findings."

Pleas

State v. Marsh, ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2019)

The trial court erred by imposing a sentence inconsistent with that set out in his plea agreement without informing the defendant that he had a right to withdraw his guilty plea. The defendant was charged with multiple counts involving multiple victims and occurring between 1998 and 2015. On the third day of trial, he negotiated a plea agreement with the State, whereby he would plead guilty to a number of offenses and would receive a single, consolidated active sentence of 290 to 408 months imprisonment. Over the next weeks and prior to sentencing, the defendant wrote to the trial court asserting his innocence to some of the charges and suggesting his desire to withdraw from the plea agreement. The trial court acknowledged receipt of the letters and forwarded them to defense counsel. When the defendant later appeared for sentencing, he formally moved to withdraw his guilty plea, which was denied. Contrary to the plea agreement, the trial court entered two judgments, one for the 2015 offenses and one for the 1998 offenses, based on the different sentencing grids that applied to the crimes. Specifically, the trial court sentenced the defendant to 290 to 408 months for the 2015 offenses, and for the 1998 offenses a separate judgment sentencing the defendant to 288 to 355 months imprisonment. The trial court ordered that the sentences would run concurrently. The defendant appealed. Because the concurrent sentences imposed by the trial court differed from the single sentence agreed to by the defendant in his plea agreement, the defendant was entitled to withdraw his plea. Any change by the trial judge in the sentence agreed to in the plea agreement, even a change benefiting the defendant, requires the judge to give the defendant an opportunity to withdraw his plea.

State v. Chandler , ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 16, 2019)

In a child sexual assault case, the court held, over a dissent, that the trial court did not err by refusing to accept a tendered guilty plea. The defendant was indicted for first-degree sex offense with a child and indecent liberties. The defendant reached a plea agreement with the State and signed the standard Transcript of Plea form. The form indicated that the defendant was pleading guilty, as opposed to entering a no contest or Alford plea. However, during the trial court's colloquy with the defendant at the plea proceeding, the defendant stated that he did not commit the crime. Because the defendant denied his guilt, the trial court declined to accept the plea. At trial, the defendant continued to maintain his innocence. The defendant was convicted and appealed, asserting that the trial court improperly refused to accept his guilty plea in violation of G.S. 15A-1023(c). That provision states that if the parties have entered into a plea agreement in which the prosecutor has not agreed to make any recommendations regarding sentence, the trial court must accept the plea if it determines that it is the product of informed choice and that there is a factual basis. Here, the trial court correctly rejected the plea where it was not the product of informed choice. When questioned about whether he understood his guilty plea, the defendant maintained his innocence. Because of the conflict between the defendant's responses during the colloquy and the Transcript of Plea form, the trial court could not have found that the plea was knowingly, intelligently, and understandingly entered. The court explained: "To find otherwise would be to rewrite the plea agreement as an *Alford* plea." In a footnote, it added:
[I]f we were to accept Defendant's argument, the likelihood that factually innocent defendants will be incarcerated in North Carolina increases because it removes discretion and common sense from our trial judges. Judges would be required to accept guilty pleas, not just *Alford* pleas, when defendants maintain innocence. Such a result is incompatible with our system of justice.

Recusal of District Attorney

State v. Perry, ___ N.C. App. ___, 821 S.E.2d 617 (Oct. 16, 2018)

In this habitual felon common-law robbery case, the trial court did not err by denying the defendant's motions to recuse the entire Henderson County District Attorney's Office. The defendant's recusal motions asserted that ADA Bender previously represented the defendant in one of the felonies underlying the habitual felon charge and that the State later violated the trial court's express condition that Bender not participate in the prosecution. In 2015 the defendant was indicted for injury to property, resisting an officer, giving false information to the police, and common-law robbery ("the four charges"). He was later indicted for attaining habitual felon status based on three unrelated prior felony convictions. At a pretrial hearing, the defendant moved for recusal of the District Attorney's Office, arguing that Bender had previously represented him on one of the priors supporting the habitual felon charge. The trial court denied the motion and noted that the other prosecutor involved in the case, ADA Mundy, had given assurances that Bender would not be involved in the case in any way. At the start of the trial on the four charges, the defendant renewed his recusal motion; the trial court denied it, adopting its previous ruling. During trial on the four charges, Mundy served as the primary prosecutor. However, the trial court introduced both Mundy and Bender to the jury as the State's attorneys. Bender attended bench and chambers conferences and argued certain jury instruction issues. After the jury found the defendant guilty of resisting an officer and robbery, the habitual felon phase began. Defense counsel made a third recusal motion, this time on the additional basis that Bender had participated in the trial. After an unrecorded conference with counsel, the defendant never obtained a ruling on his third recusal motion, and instead pled guilty to attaining habitual felon status. After judgment was entered the defendant appealed. The court noted that a prosecutor may not be disqualified unless and until the trial court determines that an actual conflict of interest exists. Here, because Bender did not previously represent the defendant with respect to the substantive charges at issue, the defendant "failed to show the actual conflict of interest required . . . to disqualify ADA Bender, much less the entire [DA's] Office from prosecuting those charges." Without proof of an actual conflict of interest as to those charges, further inquiry or direction by the trial court was unnecessary. Accordingly, the defendant failed to show the trial court's denial of his disqualification motion as to the prosecution of those charges was an abuse of discretion.

Turning to the recusal issue regarding the habitual felon charge, the court noted that because Bender represented the defendant with respect to one of the prior felony convictions, "the trial court should have inquired into whether ADA Bender divulged any confidential information to other prosecutors that could have been detrimental to defendant's trial on the habitual felon charge in order to find whether an actual conflict of interest existed." The court went on to note that the defendant never obtained a ruling on his motion made at the habitual felon phase, instead opting to plead guilty to habitual felon status. It concluded:

Even had the trial court conducted a formal hearing on defendant's motion and found an actual conflict of interest would exist if ADA Bender assisted in prosecuting the habitual felon charge, whether it was a disqualifying conflict was a matter within its sound discretion. . . . [D]isqualifying the entire district attorney's office under these facts, as defendant requested, would have been impermissibly excessive. And given that ADA

Bender's prior representation of defendant was wholly unrelated to the charges in the first phase of trial, the only rulings on the motions were obtained before the jury found defendant guilty of an underlying felony to which a habitual offender charge could attach, two unrecorded attorney conferences were held immediately following defendant's first and third disqualification motions before and at the start of the habitual offender proceeding, and defendant failed to argue on the record how an actual disqualifying conflict might exist when prior convictions necessary to prove habitual felon status are public records but, rather, appeared instead to argue the outmoded appearance of impropriety test, we cannot conclude the trial court's decision not to disqualify ADA Bender from the prosecution at the time it rendered its rulings was "so arbitrary that it could not have been the result of a reasoned decision." (citations and quotations omitted).

Finally, the court rejected the defendant's argument that the trial court erred by not allowing his disqualification motion after the State allegedly violated the condition that Bender not participate in the prosecution, disagreeing with his interpretation of the proceedings. The court noted that during its ruling on the defendant's first recusal motion, which it adopted in its second ruling, the trial judge stated: "I'm going to deny the motion at this time. And the Prosecutor has given assurances that [ADA] Bender will in no way be involved in this case." Although the State concedes that Bender, in contradiction to that assurance, did participate in the prosecution, the court did not interpret the trial court's denials as being conditioned upon Bender not participating in the first phase of trial and thus rejected this argument.

Sentencing **Aggravating Factors/Sentence**

State v. Wright, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019)

Because the defendant waived his right to have a jury determine the presence of an aggravating factor, there was no error with respect to the defendant's sentence. The defendant was arrested for selling marijuana on 7 August 2015. He was arrested a second time for the same conduct on 15 October 2015. On 11 January 2016, the defendant was indicted for charges arising from the second arrest. On 14 April 2016, the State served the defendant with the notice of intent to prove aggravating factors for the charges arising from the second arrest. On 2 May 2016, the defendant was indicted for charges in connection with the first arrest. Over a year later, but 20 days prior to trial on all of the charges, the State added the file numbers related to the defendant's first arrest to a copy of the previous notice of intent to prove aggravating factors. The trial began on 21 August 2017 for all of the charges. The defendant was found guilty only on charges from the first arrest. When the State informed the court that it intended to prove an aggravating factor, defense counsel stated that he received proper notice and the defendant stipulated to the aggravating factor. The trial court sentenced the defendant in the aggravated range and the defendant appealed. On appeal the defendant argued that the trial court erred by sentencing him to an aggravated sentence when the State did not provide 30 days written notice of its intent to prove an aggravating factor for the charges arising from the first arrest, and that the defendant did not waive his right to such notice. Here, the defendant was tried on all pending charges and prior to sentencing stipulated to the existence of the aggravating factor. G.S. 15A-1022.1 requires the trial court, during sentencing, to determine whether the State gave the defendant the required notice or if the defendant waived his right to that notice. Here, when the trial court inquired

about the notice of the aggravating factor, defense counsel informed the trial court that he was provided proper notice and had seen the appropriate documents. The trial court also asked the defendant if he had had an opportunity to speak with his lawyer about the stipulation and what it means. The defendant responded in the affirmative. The trial court's colloquy satisfied the requirements of G.S. 15A-1022.1 and the defendant's knowing and intelligent waiver of a jury trial on the aggravating factor under the circumstances necessarily included waiver of the 30-day advance notice of the State's intent to use the aggravating factor.

Blakely & Apprendi Issues

State v. Hinton, ___ N.C. App. ___, 823 S.E.2d 667 (Jan. 15, 2019)

The court held that even if the trial court erred under *Blakely* by finding the existence of an aggravating factor and sentencing the defendant in the aggravated range, any error was harmless. After the jury found the defendant guilty of two counts of common-law robbery the trial court dismissed the jury and held a sentencing hearing. The State had given timely notice of its intent to prove the existence of an aggravating factor, specifically that during the 10-year period prior to the commission of the offense the defendant was found in willful violation of his conditions of probation (aggravating factor G.S. 15A-1340.16(d)(12a)). At sentencing hearing, the State offered evidence demonstrating the existence of the aggravating factor. Over the defendant's objection that under the statutes and *Blakely* the existence of the aggravating factor must be found by the jury, the trial court sentenced the defendant in the aggravated range. The court opined that "Given the standard of proof that applies in this State, it is arguable whether a judgment of a willful probation violation—be it by admission or court finding—is sufficiently tantamount to a "prior conviction" to allow a sentencing judge to use that previous finding as an aggravating factor justifying an increase in the length of a defendant's sentence beyond that authorized by the jury's verdict alone consonant with the demands of due process." However, it found that it need not decide the issue, concluding instead that even if an error occurred it was harmless given the State's evidence.

DWI Sentencing

State v. Hughes, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 16, 2019), *temp. stay allowed*, ___ N.C. ___, 826 S.E.2d 457 (May 3, 2019)

Because the State failed to give notice of its intent to use aggravating sentencing factors as required by G.S. 20-179(a1)(1), the trial court committed reversible error by using those factors in determining the defendant's sentencing level. The case involved an appeal for trial de novo in superior court. The superior court judge sentenced the defendant for impaired driving, imposing a level one punishment based on two grossly aggravating sentencing factors. On appeal, the defendant argued that the State failed to notify him of its intent to prove aggravating factors for sentencing in the superior court proceeding. The State did not argue that it gave notice to the defendant prior to the superior court proceeding. Instead, it argued that the defendant was not prejudiced because he received constructive notice of the aggravating factors when they were used at the earlier district court proceeding. The court rejected this argument, determining that allowing the State to fulfill its statutory notice obligations by relying on district court proceedings "would render the statute effectively meaningless." The court concluded that the

State “must provide explicit notice of its intent to use aggravating factors in the superior court proceeding.” The court vacated the defendant’s sentence and remanded for resentencing.

State v. Cole, ___ N.C. App. ___, 822 S.E.2d 456 (Nov. 20, 2018)

The trial court did not err by sentencing the defendant as a Level Two offender after finding the existence of a grossly aggravating factor based on upon his prior DWI conviction. The defendant was convicted in superior court of DWI on 15 September 2016. He appealed that conviction on 26 September 2016, which remained pending at the time of the instant 31 August 2017 sentencing hearing. The defendant argued that his prior DWI conviction could not be used to enhance his sentence because the prior conviction was pending on appeal and thus not final. The court disagreed, finding no statutory language limiting convictions that can be used as grossly aggravating factors to only those not challenged on appeal. The court noted however that if the earlier DWI conviction is later overturned, the defendant would be entitled to be resentenced.

Constitutional Issues

Timbs v. Indiana, 586 U.S. ___, 139 S. Ct. 682 (Feb. 20, 2019)

The Court held that the Eighth Amendment’s Excessive Fines Clause is an “incorporated” protection applicable to the States under the Fourteenth Amendment’s Due Process Clause. Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling \$1,203. At the time of Timbs’s arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about \$42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died. The State engaged a law firm to bring a civil suit for forfeiture of the Land Rover, charging that the vehicle had been used to transport heroin. After Timbs’s guilty plea in the criminal case, the trial court held a hearing on the forfeiture. Although finding that Timbs’s vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for \$42,000, more than four times the maximum \$10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs’s offense, hence unconstitutional under the Eighth Amendment’s Excessive Fines Clause. The Indiana Court of Appeals affirmed that determination, but the Indiana Supreme Court reversed. The state Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. The US Supreme Court granted certiorari. The question presented was: Is the Eighth Amendment’s Excessive Fines Clause an “incorporated” protection applicable to the States under the Fourteenth Amendment’s Due Process Clause? The Court answered in the affirmative, stating:

Like the Eighth Amendment’s proscriptions of “cruel and unusual punishment” and “[e]xcessive bail,” the protection against excessive fines guards against abuses of government’s punitive or criminal law-enforcement authority. This safeguard, we hold, is “fundamental to our scheme of ordered liberty,” with “dee[p] root[s] in [our] history and tradition.” *McDonald v. Chicago*, 561 U. S. 742, 767 (2010) (internal quotation marks

omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

The Court went on to reject the State of Indiana's argument that the Excessive Fines Clause does not apply to its use of civil in rem forfeitures.

State v. Seam, ___ N.C. App. ___, 823 S.E.2d 605 (Dec. 18, 2018)

The defendant's sentence of life in prison with the possibility of parole for his conviction of felony murder when he was 16 years old is constitutional.

The defendant asserted that his sentence violates the Eighth Amendment. The court concluded that an as applied challenge is not legally available to the defendant and that he is limited to a review of whether his sentence was grossly disproportionate to his crime. Considering that issue, the court concluded that the defendant sentence of life in prison with the possibility of parole was not grossly disproportionate to his crime. Among other things the defendant was an active participant in the murder, did not provide assistance to the victim, and tried to profit from the crime by selling the murder weapon.

Turning to the defendant's argument as to Article 1, Section 27 of the state constitution, the court noted that the North Carolina Supreme Court has historically analyzed cruel and unusual punishment claims similarly under both the federal and state constitutions. Having determined that the defendant's sentence does not violate the Eighth Amendment, the court concluded that it passes muster under the state constitution.

Finally, the defendant argued that because G.S. 15A-1340.19B did not exist at the time he committed his crime, his sentence violates the prohibition against ex post facto laws. As his lawyer conceded at oral argument, however, a virtually identical contention was rejected by the court in *State v. James*, 371 N.C. 77 (2018), and that case forecloses his argument on this issue.

State v. Hill, ___ N.C. App. ___, 821 S.E.2d 631 (Oct. 16, 2018)

In this child sexual assault case, the court rejected the defendant's argument that the trial court's consecutive sentences, totaling a minimum of 138 years, violated his constitutional right to be free from cruel and unusual punishment under the Eighth Amendment. The court began by finding that because the defendant failed to object to the sentencing on constitutional grounds in the trial court, he failed to preserve the issue for appellate review. The court went on however to reject the defendant's argument on the merits. It noted that a punishment may be cruel or unusual if it is not proportionate to the crime for which the defendant has been convicted. Here, the trial court exercised its discretion and consolidated the 70 verdicts into six identical judgments, each of which were sentenced in the presumptive range, and the trial court ordered that these 276-month sentences be served consecutively.

Matters Outside the Record

State v. Johnson, ___ N.C. App. ___, ___ S.E. 2d ___ (Apr. 16, 2019)

In this drug case, the court held, over a dissent, that the trial judge improperly considered her personal knowledge of matters outside the record when sentencing the defendant and that a resentencing was required. The defendant asserted that during sentencing the trial court improperly considered her personal knowledge of unrelated charges arising from a heroin-related death in her home community. A sentence within the statutory limit is presumed regular and

valid. However that presumption is not conclusive. If the record discloses that the trial court considered irrelevant and improper matter in determining the sentence, the presumption of regularity is overcome, and the sentence is improper. The verbatim transcript indicates that the trial court did in fact consider an unrelated homicide. The State did not dispute that there was no evidence of the homicide charge in the record, nor did it argue that the charge was relevant to the defendant's sentencing. Instead, the State argued that, in context, the trial court's statement reflects the seriousness of the drug charges, an appropriate sentencing consideration. The court agreed that the trial court's remarks must be considered in context and that the seriousness of drug crimes is a valid consideration. It noted that if the trial court had only addressed the severity of the offenses by reference to the effects of the drug epidemic in her community or nationwide, "there would be no issue in this case." Here, however, the trial court did not just consider the impact of the defendant's drug offenses on the community, "but clearly indicated in her remarks that she was considering a specific offense in her community for which the defendant was not charged." This was error. The court remanded for resentencing without consideration of matters outside the record.

Prayer for Judgment Continued

State v. Marino, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019)

In this drug trafficking case, G.S. 15A-1331.2 did not deprive the trial court of jurisdiction to enter judgment after a PJC. The defendant pled guilty pursuant to a plea arrangement that provided for a PJC to allow the defendant to provide testimony in another case. Approximately 19 months later, the State prayed for entry of judgment. After judgment was entered, the defendant unsuccessfully filed a motion for appropriate relief, asserting that the trial court lacked jurisdiction to enter the sentence because G.S. 15A-1331.2 requires the trial court to enter final judgment on certain high-level felonies, such as the one at issue here, within 12 months of the PJC. The court noted that the issue was one of first impression. It noted that the trial court's judgment unquestionably failed to comply with the statute, which provides that if the trial court enters a PJC for a class D felony, it must include a condition that the State pray for judgment within a specific period of time not to exceed 12 months. Here, the plea agreement contained no such provision and, approximately 19 months after the defendant's conviction, the State prayed for judgment and judgment was entered. Analyzing the issue as one of legislative intent, the court determined although the PJC failed to comply with the statute, this did not constitute a jurisdictional issue. The court went on to conclude that the trial court's delay in sentencing the defendant was not unreasonable nor was the defendant prejudiced by it.

Prior Record Level

State v. Arrington, ___ N.C. ___, 819 S.E.2d 329 (Oct. 26, 2018)

On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 845 (2017), the court reversed, holding that as part of a plea agreement a defendant may stipulate on his sentencing worksheet that a second-degree murder conviction justified a B1 classification. In 2015 the defendant entered into a plea agreement with the State requiring him to plead guilty to two charges and having attained habitual felon status. Under the agreement, the State consolidated the charges, dismissed a second habitual felon status count, and allowed the defendant to be sentenced in the mitigated range. As part of the agreement, the defendant

stipulated to the sentencing worksheet showing his prior offenses, one of which was a 1994 second-degree murder conviction, designated as a B1 offense. Over a dissent, the Court of Appeals vacated the trial court's judgment and set aside the plea, holding that the defendant improperly stipulated to a legal matter. The Court of Appeals reasoned that because the legislature divided second-degree murder into two classifications after the date of the defendant's second-degree murder offense, determining the appropriate offense classification would be a legal question inappropriate for a stipulation. Reversing, the Supreme Court noted that the crime of second-degree murder has two potential classifications, B1 and B2, depending on the facts. It continued: "By stipulating that the former conviction of second-degree murder was a B1 offense, defendant properly stipulated that the facts giving rise to the conviction fell within the statutory definition of a B1 classification. Like defendant's stipulation to every other offense listed in the worksheet, defendant's stipulation to second-degree murder showed that he stipulated to the facts underlying the conviction and that the conviction existed." The court went on to reject the defendant's argument that he could not legally stipulate that his prior second-degree murder conviction constituted a B1 felony. It noted that before 2012, all second-degree murders were classified at the same level for sentencing purposes. However, in 2012 the legislature amended the statute, elevating second-degree murder to a B1 offense, except when the murder stems from either an inherently dangerous act or omission or a drug overdose. Generally, a second-degree murder conviction is a B1 offense which receives nine sentencing points; when the facts of the murder meet one of the statutory exceptions thereby making it a B2 offense, it receives six points. It is undisputed that the State may prove a prior offense through a stipulation. "Thus," the court continued "like a stipulation to any other conviction, when a defendant stipulates to the existence of a prior second-degree murder offense in tandem with its classification as either a B1 or B2 offense, he is stipulating that the facts underlying his conviction justify that classification." Here, the defendant could properly stipulate to the facts surrounding his offense by either recounting the facts at the hearing or stipulating to a general second-degree murder conviction that has a B1 classification. By stipulating to the worksheet, the defendant simply agreed that the facts underlying his second-degree murder conviction fell within the general B1 category because the offense did not involve either of the two factual exceptions recognized for B2 classification.

State v. Salter, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 2, 2019)

The trial court did not err by accepting the defendant's stipulation that a prior conviction for "No Operator's License" was a Class 2 Misdemeanor. In making this stipulation, the defendant stipulated that the facts underlying his conviction justify that classification. The trial court was under no duty to pursue further inquiry or require the defendant to recount the facts regarding the prior conviction.

State v. McNeil, ___ N.C. App. ___, 821 S.E.2d 862 (Nov. 6, 2018), *temp. stay allowed*, ___ N.C. ___, 820 S.E.2d 519 (Nov. 28, 2018)

Because the State failed to meet its burden of proving that the defendant's 2012 possession of drug paraphernalia conviction was related to a drug other than marijuana, the court remanded for resentencing. Since 2014, state law has distinguished possession of marijuana paraphernalia, a Class 3 misdemeanor, from possession of paraphernalia related to other drugs, a Class 1 misdemeanor. Here, where the State failed to prove that the 2012 conviction was for non-marijuana paraphernalia, the trial court erred in treating the conviction as a Class 1 misdemeanor.

Restitution

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2019)

In this embezzlement case, the trial court did not err by ordering the defendant to pay restitution. On 13 February 2017, the defendant and the victim entered into a settlement agreement resolving civil claims arising from the defendant's conduct. The agreement obligated the defendant to pay the victim \$13,500 and contained a release clause. Subsequently, the defendant was charged by information with embezzlement. She subsequently entered an Alford plea. As part of a plea arrangement, the State agreed, in part, to a probationary sentence to allow the defendant to make restitution payments. Both parties agreed that the trial court would hold a hearing to determine the amount of restitution. At the restitution hearing, the defendant asserted that she did not owe restitution because the release clause in the civil settlement agreement discharged her obligation. The trial court determined \$41,204.85 was owed. The trial court credited the defendant for paying \$13,500 under the civil agreement and set the balance of restitution at the difference. The defendant appealed, arguing that the trial court erred by ordering her to pay criminal restitution where the settlement agreement contained a binding release clause. Noting that the issue was one of first impression, the court held that the release clause in the civil settlement agreement does not bar imposition of criminal restitution.

Probation

State v. Newsome, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 26, 2019)

The trial court did not abuse its discretion when it revoked the defendant's probation. The State presented sufficient evidence that the defendant willfully absconded by failing to report within 72 hours of his release from custody and thereafter avoiding supervision and making his whereabouts unknown from August 20 through the filing of a violation report on September 22. At the hearing, the defendant admitted that he knew he had to report to the probation office within 72 hours of release, that his mother had informed him that a probation officer had stopped by their home, and that his mother had given him a business card with the probation officer's information on it. Moreover, the trial court found the defendant's testimony that he did in fact report to the probation office as instructed to be lacking in credibility. The court rejected the defendant's argument that the trial court abused its discretion because missing scheduled appointments cannot constitute absconding. The court noted that here the defendant did not simply miss an appointment or phone call with his probation officer. After the defendant was taken into custody for a violation based on absconding, the defendant knowingly failed to notify his probation officer of his release from custody. Thereafter, he actively avoided supervision each day after the initial 72-hour time period through and until September 22, 2017. This was a willful course of conduct by the defendant that thwarted supervision. His actions were a persistent avoidance of supervision and a continual effort to make his whereabouts unknown. Thus, the trial court did not abuse its discretion by finding that the defendant had absconded.

Sex Offenders Satellite-Based Monitoring (SBM)

State v. Bursell , ___ N.C. ___, ___ S.E.2d ___ (May 10, 2019)

On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 813 S.E.2d 463 (2018), the court held that although the defendant failed to preserve his argument that the trial court erred by imposing lifetime SBM without determining whether the monitoring was a reasonable search under the Fourth Amendment, the Court of Appeals did not abuse its discretion by invoking Appellate Rule 2 to review the unpreserved constitutional issue. The Court of Appeals concluded that the defendant properly preserved the issue of whether his SBM was reasonable under the Fourth Amendment and that alternatively, if the defendant had failed to preserve the issue, it would invoke Rule 2 to relax Rule 10's issue preservation requirement and review the claim on the merits. The Court of Appeals then vacated the SBM order without prejudice to the State's ability to file a subsequent SBM application. The Supreme Court held that because the defendant failed to object to the SBM order on Fourth Amendment constitutional grounds with the requisite specificity, he waived the ability to raise that issue on appeal. However, the Court of Appeals did not abuse its discretion by invoking Appellate Rule 2 to review the unpreserved argument. In this respect the court found it significant that the State conceded that the trial court committed error relating to a substantial right.

State v. Gentle , ___ N.C. ___, 822 S.E.2d 616 (Feb. 1, 2019)

The court per curiam affirmed a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 833 (2018), in which the court declined the defendant's request to grant his petition for writ of certiorari to review the trial court's order requiring him to enroll in lifetime SBM. The defendant argued that the trial court erred by ordering him to submit to SBM without first making a reasonableness determination as required by *Grady*. The defendant conceded that he failed to make his constitutional argument at trial and that his appeal from the SBM order was untimely.

State v. Gambrell, ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2019)

In a case where the defendant was convicted of taking indecent liberties with a child, the court held that the State failed to meet its burden of showing the reasonableness of the SBM program as applied to the defendant by failing to produce evidence concerning the efficacy of the program. It thus reversed the trial court's order requiring lifetime SBM

State v. Lopez, ___ N.C. App. ___, 826 S.E.2d 498 (Mar. 19, 2019)

In this second-degree rape case, the trial court erred by ordering lifetime SBM where the State did not meet its burden of proving that SBM was a reasonable Fourth Amendment search. The United States Supreme Court has held that SBM is a search. Therefore, before subjecting a defendant to SBM, the trial court must first examine whether the monitoring program is reasonable. Here, the State failed to carry its burden of proving the SBM was a reasonable Fourth Amendment search where it failed to put on any evidence regarding reasonableness. The State will have only one opportunity to prove that SBM is a reasonable search. Here, because it failed to do so, the court reversed the trial court's SBM order.

State v. Sheridan, ___ N.C. App. ___, 824 S.E.2d 146 (Feb. 5, 2019)

Because no evidence was presented prior to or to support the trial court's lifetime SBM order, the court vacated that order and remanded for proper analysis and determination under G.S. 14-208.40A.

State v. Heelan, ___ N.C. App. ___, 823 S.E.2d 106 (Dec. 18, 2018)

As conceded by the State, the trial court erred by ordering the defendant to enroll in SBM. The Static-99 risk assessment of "Moderate-Low" without additional findings by the trial court was insufficient to support the trial court's conclusion that the defendant requires the highest level of supervision and monitoring.

Speedy Trial

State v. Sheridan, ___ N.C. App. ___, 824 S.E.2d 146 (Feb. 5, 2019)

In this child sexual assault case, the court remanded for further findings with respect to the defendant's speedy trial motion. Although the trial court was not obligated to consider the defendant's pro se speedy trial motion while he was represented, because it did so, it erred by failing to consider all of the *Barker v. Wingo*, 407 U.S. 514 (1972) factors and making appropriate findings. The court remanded for a proper *Barker v. Wingo* analysis and appropriate findings.

State v. Farmer, ___ N.C. App. ___, 822 S.E.2d 556 (Dec. 4, 2018)

In this child sexual assault case, the court held, over a dissent, that the defendant's speedy trial right was not violated. On 7 May 2012, the defendant was indicted for first-degree sex offense with a child and indecent liberties. The defendant waived arraignment on 24 May 2012 and 5 November 2012. Although the defendant filed a motion requesting a bond hearing on 15 July 2013, the motion was not calendared. Trial was scheduled for 30 January 2017. However, defense counsel and the prosecutor agreed to continue the case until the 17 July 2017 trial session. On 6 March 2017 the defendant filed a motion for speedy trial, requesting that the trial court either dismiss the case or establish a peremptory date for trial. On 11 July 2017, the defendant filed a motion to dismiss, alleging a violation of his constitutional right to a speedy trial. The trial court denied the motions. The defendant was convicted on both charges and appealed. Applying the *Barker* speedy trial factors, the court first considered the length of delay. It concluded that the length of delay in this case—63 months—is significant enough to trigger an inquiry into the remaining factors. Regarding the 2nd factor—reason for the delay—the defendant asserted administrative neglect by the State to calendar his trial and motions. Considering the record, the court found it "undisputed" that the primary reason for the delay was a backlog of pending cases and a shortage of ADAs to try them. The court also found it significant that the defendant had filed his motion for a speedy trial after he had agreed to continue his case. Noting that "case backlogs are not encouraged," the court found that the defendant did not establish that the delay was caused by neglect or willfulness. It concluded: "The record supports that neither party assertively pushed for this case to be calendared before 2017, and after defendant agreed to continue his case, scheduling conflicts prevented defendant's case from being calendared before 20 July 2017." As to the third *Barker* factor--assertion of the right--the court noted that the defendant formally asserted his speedy trial right on 6 March 2017, almost 5 years after his arrest. His case was calendared and tried within 4 months of his assertion of that right. Given the short period of time between the defendant's demand and the trial, the

court found that the defendant's failure to assert his speedy trial right sooner weighs against him in the balancing test. As to the final *Barker* factor—prejudice—the defendant argued that the delay potentially affected witnesses' ability to accurately recall details and therefore possibly impaired his defense. In this respect the court concluded:

However, the victim, who was nine at the time she testified, was able to recall details of the incident itself although she demonstrated some trouble remembering details before and after the incident which occurred when she was three years old. Other witnesses, however, testified and outlined the events from that day. Also, as the trial court pointed out, defendant has had access to all the witnesses' interviews and statements to review for his case and/or use for impeachment purposes. Considering that the information was available to defendant, we do not believe defendant's ability to defend his case was impaired.

The court went on to conclude that it was unpersuaded by the defendant's argument that he suffered prejudice as a result of the delay. Having considered the four-factor balancing test, the court held that the defendant failed to demonstrate that his speedy trial right was violated.

Verdict

State v. Wilson , ___ N.C. App. ___, 823 S.E.2d 892 (Jan. 15, 2019)

The trial court's instructions with respect to multiple counts of indecent liberties with a child, first-degree rape of a child, and sex offense in a parental role did not deprive the defendant of his constitutional right to a unanimous jury verdict. The trial court provided a single instruction for each offense, without describing the details of the conduct underlying each charge. It did however instruct the jury that it must consider each count individually and the verdict sheets identified each count by victim and included a brief description of the particular conduct alleged by reference to the location where it occurred. Additionally jurors were instructed that they all must agree to the verdict, that they could not reach a verdict by majority vote, and that they should indicate on the verdict forms when they agreed upon unanimous verdicts as to each charge. Applying the test from *State v. Lawrence*, 360 N.C. 368 (2006), the court rejected the defendant's argument that the jury instructions deprived him of his right to a unanimous jury verdict. The court went on to note that "the instant case is not one in which the risk of a non-unanimous verdict would have arisen by virtue of the trial court's instructions." The crimes at issue do not list as elements discrete criminal activities in the disjunctive. Instead, the indecent liberties statute simply forbids any immoral, improper indecent liberties with a child under 13 if taken for the purpose of arousing or gratifying sexual desire. The particular act found to be performed is immaterial to the unanimity inquiry. Thus, even if some jurors were to find that the defendant engaged in one kind of sexual misconduct while others found that he engaged in another, the jury as a whole would still have unanimously found the required sexual misconduct. Here, the defendant was charged with five counts of indecent liberties against the victim. The victim testified to at least five incidents that would have constituted indecent liberties; in fact she testified to 7 such incidents. Similarly, the jury convicted the defendant of four counts of statutory rape and the victim testified to at least four specific incidents that constituted statutory rape and occurred in each of the four locations indicated on the verdict sheet. Therefore there was no danger that the rape verdicts were not unanimous.

Evidence

Limiting Instructions

State v. Knight, ___ N.C. App. ___, 821 S.E.2d 622 (Oct. 16, 2018)

In this gang-related case involving charges of first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree murder, and discharging a weapon into an occupied dwelling, although the trial court erred by failing to instruct the jury on their limited use of hearsay statements for corroboration and impeachment only, the error was harmless. Here, at least twice during trial the defendant specifically requested Pattern Jury Instruction 105.20, which limits the jury's permissible reliance on hearsay statements to corroboration and impeachment purposes only. During the charge conference, the parties and the trial court further agreed that the jury would be charged with this instruction. However, the trial court omitted the instruction from the final charge. By omitting this instruction from the final charge, the trial court erred. However, the defendant failed to demonstrate that there is a reasonable possibility that had the error not been committed a different result would have been reached. The trial court reiterated the instruction, or a close variation of it, six times to the jury throughout the trial. Although the trial court failed to provide the instruction during the final jury charge, the jury was sufficiently advised of the instruction during the trial. Moreover, even if the instructions had not been given during the trial, the defendant cannot show prejudice in light of the overwhelming evidence of guilt.

Authentication

State v. DeJesus, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019)

In this statutory rape case, the victim's Honduran birth certificate was properly authenticated. To establish the victim's age, the State introduced a copy of the victim's Honduran birth certificate, obtained from her school file. That document showed her date of birth to be September 15, 2003 and established that she was 12 years old when the incidents occurred. The defendant's objection that the birth certificate was not properly authenticated was overruled and the defendant was convicted. The defendant appealed. The document was properly authenticated. Here, although the birth certificate was not an original, nothing in the record indicates that it was forged or otherwise inauthentic. The document appears to bear the signature and seal of the Honduran Municipal Civil Registrar, and a witness testified that school personnel would not have made a copy of it unless the original had been produced. Additionally, a detective testified that the incident report had identified the victim as having a birthday of September 15, 2003. The combination of these circumstances sufficiently establish the requisite prima facie showing to allow the trial court to reasonably determine that the document was an authentic copy of the victim's birth certificate.

Judicial Notice

State v. Isaacs, ___ N.C. App. ___, 821 S.E.2d 300 (Oct. 2, 2018)

In a bond forfeiture proceeding, the trial court did not err by taking judicial notice of the file as evidence that the defendant was served with the order of arrest. A trial court may take judicial notice of earlier proceedings in the same case, including matters in the file not offered into evidence. Here, the trial court took judicial notice of a fact beyond reasonable controversy. It is undisputed that the defendant was served with the order for arrest before the deadline for filing a notice to set aside the bond forfeiture expired and the trial court attached the order for arrest as an exhibit to its order.

Relevancy

State v. Dixon, ___ N.C. App. ___, 821 S.E.2d 232 (Oct. 2, 2018)

In this case involving convictions of felony murder, discharging a firearm into an occupied vehicle, and possession of marijuana with intent to sell, the trial court did not err by admitting certain photographs at trial. Two of the photographs (“Gun Photos”) were of firearms; the photos were found on the defendant’s cell phone. A third photograph (“Mustang Photo”) also was recovered from the defendant’s phone; it showed the defendant and another man leaning against the hood of a Silver Mustang with a black racing stripe on the street where the victim was shot. Both men were displaying the hand sign for the number “4” with their left hands, while the man on the right displayed a closed right hand with his middle finger extended.

The defendant argued that the photos should have been excluded under Evidence Rule 404 because possession of a firearm and flashing gang signs show bad character and bad acts. The court found itself unable to conclude that possession of a firearm is indicative of bad acts or character given that gun ownership is protected by the Second Amendment and that the defendant’s own brief fails to identify any basis for such a conclusion. The court failed to see how the hand signals in the Mustang Photo indicate gang affiliation. Nothing in the record suggests that either gesture indicates gang affiliation, and the trial court instructed the prosecutor not to ask any questions about signs or gang affiliation based on the picture. Thus, neither photograph falls within the scope of Rule 404.

The court rejected the defendant’s argument that the photographs were inadmissible under Rules 401 and 402. The court rejected the defendant’s argument that no evidence connected the gun at issue to the weapon used in the crime. There was an evidentiary connection between the photos, the crime, and the accused; specifically, the photos were obtained from the defendant’s phone, showed that he had access to firearms and to the vehicle in question, and depict him at almost the precise location where the shooting occurred. One of the gun photos shows the defendant in possession of a firearm resembling the one used in the shooting. The evidence was relevant and the trial court did not err by admitting the photographs.

The trial court did not abuse its discretion in conducting the Rule 403 balancing test with respect to the photographs. The defendant’s brief assumes that the photographs are irrelevant but because the court concluded to the contrary it rejected this argument as well.

State v. Koke, ___ N.C. App. ___, 824 S.E.2d 887 (Feb. 19, 2019)

In a case where the defendant was found guilty of obtaining property by false pretenses and insurance fraud involving a claim regarding a stolen truck, although the trial court erred by

admitting evidence of a truck later found in a river, the error did not rise to the level of plain error. The defendant applied for a commercial automobile insurance policy for coverage for his Dodge Ram. The application asked in part whether the defendant had been convicted of or pleaded guilty to any felony during the last 10 years. A felony conviction would preclude issuance of a commercial insurance policy, per company regulations. The defendant reviewed and signed the application, falsely answering this question, “no”; the defendant had in fact pleaded guilty to a felony in 2006. The defendant was issued a commercial automobile insurance policy that included theft protection. Five days after obtaining coverage, the defendant reported the Ram stolen. National General Insurance sent the defendant an affidavit to complete, sign, and have notarized. The defendant filled in most of the requested information but left some spaces blank, including one inquiring about “major repairs since purchase.” The defendant did not disclose that the Ram had been in an accident, but it was discovered by the company during its investigation of the theft. Once confronted about it, the defendant disclosed the repairs done to the vehicle. North Carolina Department of Insurance investigator Tyler Braswell was contacted by the police department to assist with locating the Ram. After the investigation, National General issued the defendant two checks, each for \$11,000 on the claim. However, it attempted to stop payment on both after they were mailed, when its underwriting department determined that the defendant’s omission to disclose his prior felony conviction required the insurance policy to be rescinded. After a year, Braswell asked the police department for help searching a river for the vehicle. They looked in the area near a bridge where the defendant was known to keep vehicles and where the repairs to the Ram had been made. A submerged Dodge Ram was located without a license plate, but with damage on the front end. Officials were however unable to tow the truck out of the water. Braswell later discovered that the Ram had been towed out of the river at the defendant’s request. The tower testified that it was a Dodge which appeared to have been in the river for “awhile.” No license plate or VIN number from the recovered vehicle was identified or noted. The defendant was charged with one count of obtaining property by false pretenses and one count of insurance fraud. The defendant moved to exclude all evidence related to the truck found in the river. The trial court agreed in part and allowed the evidence only for the limited purpose of proof of the defendant’s intent to commit insurance fraud. The defendant was found guilty of both charges. He appealed.

On appeal the defendant argued that evidence regarding the truck found in the river was not relevant to the insurance fraud charge. The alleged false statement was the defendant’s failure to disclose on the affidavit of vehicle theft that the vehicle had major repairs since purchase. The court rejected the State’s argument that evidence of the submerged vehicle falls under the chain of circumstance rationale. It further concluded that evidence of the submerged truck does not have any tendency to make any fact of the charged insurance fraud of failing to disclose major repairs more or less probable. The trial court thus erred in admitting the evidence. The court found however that the error did not rise to the level of plain error.

State v. Smith , ___ N.C. App. ___, 823 S.E.2d 678 (Jan. 15, 2019)

In this murder case, the trial court did not err by allowing a State’s witness to testify, over objection, about a jailhouse attack. Witness Brown testified that he was transferred to the county courthouse to testify for the State at a pretrial hearing. When he arrived, the defendant—who was present inside a holding cell—threatened Brown and made a motion with his hands “like he was going to cut me. He was telling me I was dead.” After Brown testified at the pretrial hearing, he was taken back to the jail and placed in a pod across from the defendant, separated by a glass

window. The defendant stared at Brown through the window and appeared to be “talking trash.” A few minutes later “somebody came to him and threatened him” for testifying against the defendant. Soon after Brown returned to his cell, the same person who had threatened him moments earlier came into the cell and assaulted Brown, asking him if he was telling on the defendant. On appeal the defendant argued that evidence of the jailhouse attack was both irrelevant and unduly prejudicial.

The evidence regarding the jailhouse attack was relevant. The defendant’s primary argument on appeal was that there was no evidence that the defendant knew about, suggested, or encouraged the attack. The court disagreed noting, among other things that the defendant stared at Brown through the window immediately before the assailant approached and threatened Brown, and that the assailant asked Brown if he was telling on the defendant. This testimony “clearly suggests” that the defendant “was, at minimum, aware of the attack upon Brown or may have encouraged it.” Evidence of attempts to influence a witness by threats or intimidation is relevant. Additionally, Brown testified that he did not want to be at trial because of safety concerns. A witness’s testimony about his fear of the defendant and the reasons for this fear is relevant to the witness’s credibility. Thus the challenged testimony is clearly relevant in that it was both probative of the defendant’s guilt and of Brown’s credibility.

The court went on to find that the trial court did not abuse its discretion by admitting the challenged testimony under Rule 403, finding that the defendant failed to demonstrate how the challenged testimony was unfairly prejudicial or how its prejudicial effect outweighed its probative value.

State v. Holmes, ___ N.C. App. ___, 822 S.E.2d 708 (Dec. 18, 2018)

In this first-degree murder case, the trial court did not err by admitting letters detailing the defendant’s outstanding debts. The defendant argued that the letters were not relevant. At the time of the victim’s death, she was considering calling off her engagement to the defendant because of his financial problems, and the day before her death she sent him a text message telling him to move out of their home and that, notwithstanding his financial problems, she would continue to seek child support from him. Whether the defendant had a motive to murder the victim was a strongly contested issue in this case. The State alleged that the defendant was facing financial difficulties and that those difficulties created a motive to kill the victim. The letters indicated that the defendant faced financial hardships, both with consumer and child-support debt. This, coupled with evidence that the victim had threatened to remove the defendant from the home and expressed that she would continue to request child-support, made the existence of a financial motive to murder the victim more probable. The letters thus were relevant. The court continued, finding that the trial court did not abuse its discretion by finding that the probative value of the letters was not outweighed by danger of unfair prejudice under Rule 403.

Character of Victim

State v. Bass, ___ N.C. ___, 819 S.E.2d 322 (Oct. 26, 2018)

On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 477 (2017), the Supreme Court reversed, holding that the trial court properly excluded specific instances of the victim’s violent conduct for the purpose of proving that he was the first aggressor. The charges arose from the defendant’s shooting of the victim. The defendant asserted

self-defense. In his case in chief, the defendant sought to introduce testimony describing specific instances of violent conduct by the victim, specifically testimony from three witnesses about times when they had experienced or witnessed the victim's violent behavior. The trial court excluded this evidence but allowed each witness to testify to his or her opinion of the victim's character for violence and the victim's reputation in the community. Construing the relevant evidence rules, the Supreme Court determined that character is not an essential element of self-defense. Therefore, with regard to a claim of self-defense, the victim's character may not be proved by evidence of specific acts. Here, the excluded evidence consisted of specific incidents of violence committed by the victim. Because Rule 405 limits the use of specific instances of past conduct to cases in which character is an essential element of the charge, claim, or defense, the trial court properly excluded testimony regarding these specific prior acts of violence by the victim.

State v. Greenfield, ___ N.C. App. ___, 822 S.E.2d 477 (Dec. 4, 2018), *temp. stay allowed*, ___ N.C. ___, 822 S.E.2d 411 (Jan. 23, 2019)

In this case arising out of homicide and assault charges related to a drug deal gone bad, the trial court did not err by excluding evidence that the deceased victim was a gang leader, had a "thug" tattoo, and previously had been convicted of armed robbery. The defendant argued this evidence showed the victim's violent character, relevant to his assertion of self-defense. The court noted that a defendant claiming self-defense may produce evidence of the victim's character tending to show that the victim was the aggressor. Rule 405 specifies how character evidence may be offered. Rule 405(a) states that evidence regarding the victim's reputation may be offered; Rule 405(b) states that evidence concerning specific instances of the victim's conduct may be offered. Here, the defendant argued that the evidence was admissible under Rule 405(b). The court concluded, however, that the evidence concerning the victim's gang membership, possession of firearms, and tattoo do not involve specific instances of conduct admissible under the rule. Regarding the victim's prior conviction for armed robbery, the court excluded this evidence under Rule 403 finding that prejudice outweighed probative value. Here, the defendant made no argument that the trial court erred in excluding the evidence under Rule 403 and thus failed to meet his burden on appeal as to this issue.

Crawford Issues & Confrontation Clause Substitute Analyst & Related Cases

State v. Pless, ___ N.C. App. ___, 822 S.E.2d 725 (Dec. 18, 2018)

In this drug case, the court held—with one judge concurring in result only—that the trial court did not err by admitting evidence of the identification and weight of the controlled substances from a substitute analyst. Because Erica Lam, the forensic chemist who tested the substances was not available to testify at trial, the State presented Lam's supervisor, Lori Knops, who independently reviewed Lam's findings to testify instead. The defendant was convicted and he appealed, asserting a confrontation clause violation. The court found that no such violation occurred because Knops's opinion resulted from her independent analysis of Lam's data. As to the identity of the substances at issue, Knops analyzed the data and gave her own independent expert opinion that the substance was heroin and oxycodone. With respect to the weight of the substances, Knops's opinion was based on her review of Lam's "weights obtained on that balance tape." Because weight is machine generated, it is non-testimonial.

Stipulations

State v. Loftis, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 26, 2019)

In this drug case, the trial court did not err by admitting a forensic laboratory report after the defendant stipulated to its admission. The defendant argued that the trial court erred by failing to engage in a colloquy with her to ensure that she personally waived her sixth amendment right to confront the analyst whose testimony otherwise would be necessary to admit the report. *State v. Perez*, ___ N.C. App. ___, ___, 817 S.E.2d 612, 615 (2018), establishes that a waiver of Confrontation Clause rights does not require the type of colloquy required to waive the right to counsel or to enter a guilty plea. In that case, the defendant argued that the trial court erred by allowing him to stipulate to the admission of forensic laboratory reports without engaging in a colloquy to ensure that he understood the consequences of that decision. The court rejected that argument, declining the defendant's request to impose on trial courts an obligation to personally address a defendant whose attorney seeks to waive any of his constitutional rights through a stipulation. In *Perez*, the court noted that if the defendant did not understand the implications of the stipulation, his recourse is a motion for appropriate relief asserting ineffective assistance of counsel. The court rejected the defendant's attempt to distinguish *Perez* on grounds that it involved a written stipulation personally signed by the defendant, while this case involves defense counsel's oral stipulation made in the defendant's presence. The court found this a "distinction without a difference." Here, the stipulation did not amount to an admission of guilt and thus was not the equivalent of a guilty plea. The court continued:

[W]e . . . decline to impose on the trial courts a categorical obligation "to personally address a defendant" whose counsel stipulates to admission of a forensic report and corresponding waiver of Confrontation Clause rights. That advice is part of the role of the defendant's counsel. The trial court's obligation to engage in a separate, on-the-record colloquy is triggered only when the stipulation "has the same practical effect as a guilty plea."

Testimonial/Nontestimonial Distinction

State v. Guy, ___ N.C. App. ___, 822 S.E.2d 66 (Nov. 6, 2018)

In this case involving armed robbery and other charges, the victim's statements to a responding officer were nontestimonial. When officer Rigsby arrived at the victim's home to investigate the robbery call, the victim was shaken up, fumbling over his words, and speaking so fast that it sounded like he was speaking another language. Once the victim calmed down he told the officer that a group of black men robbed him, that one of them put a snubnosed revolver to the back of his head, one wore a clown mask, the suspects fled in a silver car, and one of the robbers was wearing red clothing. Shortly thereafter, another officer informed Rigsby that she had found a vehicle and suspects matching the description provided by 911 communications. Rigsby immediately left the victim to assist that officer. Although the suspects had fled the victim's home, an ongoing emergency posing danger to the public existed. The victim's statements to Rigsby were nontestimonial because they were provided to assist police in meeting an ongoing emergency and to aid in the apprehension of armed, fleeing suspects.

Unavailability & Forfeiture

State v. Allen, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019)

(1) In this murder, robbery and assault case, the trial court properly found that a witness was unavailable to testify under Evidence Rule 804 and the Confrontation Clause. The witness, Montes, was arrested in connection with the crimes at issue. She cooperated with officers and gave a statement that incriminated the defendant. She agreed to appear in court and testify against the defendant, but failed to do so. Her whereabouts were unknown to her family, her bondsman and the State. The State successfully moved to allow her recorded statement into evidence on grounds that she was unavailable and that the defendant forfeited his constitutional right to confrontation due to his own wrongdoing. The defendant was convicted and appealed. Considering the issue, the court noted that the evidence rule requires that a finding of unavailability be supported by evidence of process or other reasonable means. To establish unavailability under the Confrontation Clause, there must be evidence that the State made a good-faith effort to obtain the witness's presence at trial. Here, the State delivered a subpoena for Montes to her lawyer, and Montes agreed to appear in court to testify against the defendant. These findings support a conclusion both that the State used reasonable means and made a good-faith effort to obtain the witness's presence at trial.

(2) The trial court properly found that the defendant forfeited his Confrontation Clause rights through wrongdoing. The relevant standard for determining forfeiture by wrongdoing is a preponderance of the evidence and the State met this burden. Here, the defendant made phone calls from jail showing an intent to intimidate Montes into not testifying, and threatened another testifying witness. Additionally, his mother and grandmother, who helped facilitate his threatening calls to Montes, showed up at Montes' parents' house before trial to engage in a conversation with her about her testimony. The trial court properly found that the net effect of the defendant's conduct was to pressure and intimidate Montes into not appearing in court and not testifying.

Cross-Examination, Impeachment, Corroboration & Related Issues

State v. Booker, ___ N.C. App. ___, 821 S.E.2d 877 (Nov. 6, 2018)

In this embezzlement case, the trial court did not commit plain error by allowing a detective to testify regarding the defendant's post-arrest silence. The defendant opened the door to the testimony by pursuing a line of inquiry on cross-examination centering around the detective's attempts to contact the defendant before and after her arrest.

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019)

In this child sexual assault case, the trial court did not abuse its discretion by denying the defendant's request to present a rebuttal witness. Because the trial court permitted other testimony that established the same facts that the defendant sought from the rebuttal witness, the defendant failed to show that the trial court abused its discretion.

Prior Acts--404(b) Evidence

State v. Mills , ___ N.C. ___, ___ S.E.2d ___ (May 10, 2019)

The court per curiam affirmed an unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 813 S.E.2d 478 (2018) holding that the trial court erred by denying the defendant's motion for appropriate relief (MAR) alleging ineffective assistance of appellate counsel with respect to admission of 404(b) evidence of the defendant's prior sexual acts. The Court of Appeals concluded that the defendant made a sufficient showing of both deficient performance by appellate counsel and actual prejudice. The defendant was charged with statutory sexual offense, sex offense by a substitute parent, indecent liberties with a minor, and sexual battery. The defendant filed two motions in limine to preclude testimony of Melissa and Tony (the defendant's adult niece and nephew) regarding sexual encounters with the defendant that allegedly occurred while the defendant was a teenager. The trial court denied the defendant's motions and allowed the witnesses to testify under Rule 404(b). Without any contemporaneous objection by defense counsel, the witnesses testified at trial. The defendant was found guilty and was sentenced to prison. Appellate counsel argued that the trial court erred by admitting testimony by Melissa and Tony. However counsel's brief ignored the fact that trial counsel failed to object to the testimony when it was offered and did not seek plain error review. After reviewing the brief, a member of the Office of Appellate Defender contacted appellate counsel by email and suggested that he either file a substitute brief requesting plain error review or submit a reply brief explaining how the issue had, in fact, been preserved. Appellate counsel responded stating, in part, that it was not necessary to allege plain error. Subsequently the Court of Appeals held that the defendant failed to preserve the issue for review because trial counsel failed to object to the 404(b) evidence at trial. It further stated that it would not review an appeal for plain error where that issue had not been alleged. The defendant subsequently filed a MAR arguing that appellate counsel's failure to assert plain error deprived him of his right to effective assistance of appellate counsel. At a hearing on the MAR, appellate counsel acknowledged that his representation was deficient. The trial court however denied the MAR, finding that appellate counsel's performance did not prejudice the defendant because even if appellate counsel had argued plain error, there was no reasonable probability that the Court of Appeals would have found plain error and reversed the conviction. The defendant filed a petition for writ of certiorari seeking review of the MAR order. The Court of Appeals reversed. It began by considering whether the 404(b) evidence was properly admitted at trial as proof of common plan or scheme. It concluded that assuming arguendo that the acts described were sufficiently similar to the instances alleged by the child victim, the temporal proximity requirement of the 404(b) analysis was not met. Each of the acts in question occurred over 20 years before the first incident described by the child victim in this case. Additionally, there was no evidence of recurring sexual acts, nor did the State establish that the defendant's lack of access to children explained the lack of allegations of sexual contact between the defendant and minors during the intervening decades. The court went on to reject the State's alternative argument that the trial court properly admitted the evidence to establish the defendant's motive. In this respect, the court concluded: "Testimony suggesting that a defendant committed a sexual act with a minor in the past is simply not enough by itself to warrant the admission of such evidence under the 'motive' prong of Rule 404(b)."

Having found that the trial court erred by admitting the 404(b) evidence, the court found that the defendant met his burden of showing a reasonable probability that, had the issue been

properly raised on appeal, the Court of Appeals would have found plain error and reversed the conviction. Specifically, the court evaluated the evidence in conjunction with the jury's assessment of the victim's credibility and the weaknesses in the State's case, as discussed in the court's opinion.

Finally, the court determined that appellate counsel performed below an objective standard of reasonableness, satisfying the first prong of the *Strickland* ineffective assistance of counsel analysis. The court noted, in part, that appellate counsel ignored the fact that trial counsel had failed to object to the evidence at trial, meaning that the issue was not properly preserved for appeal. Although a request for the court of appeals to conduct plain error review was the only recourse available under the circumstances, appellate counsel failed to invoke the plain error doctrine in his appellate brief. This issue was immediately flagged by a member of the Office of Appellate Defender.

State v. Thompson, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019)

(1) In this assault and possession of a firearm by a felon case, although the trial court erred by allowing the State to present evidence that the defendant had a history of narcotics activity, the error did not rise to the level of plain error. The trial court allowed a detective to testify that he knew the defendant from when the detective was working “vice/narcotics, and it was a narcotic-related case.” Here, the detective's overall testimony was relevant to establish his familiarity with the defendant's appearance, providing the basis for his identification of the defendant in the surveillance video. However, it was error to allow him to testify that he encountered the defendant in connection with a narcotics case. The court went on to find that the error did not rise to the level of plain error.

(2) The trial court did not commit plain error by admitting certain testimony that may have suggested that the defendant engaged in witness intimidation. Specifically a detective testified that during a photo lineup a victim appeared to not want to identify the suspect. The detective added that the victim “has had personal dealings with a brother of his in the past that had been killed because he had snitched and didn't want to become part of that as well.” Even if this testimony suggested that the defendant intimidated the victim, it was properly admitted as relevant to explain why the victim did not identify the shooter and did not testify at trial.

State v. Schmieder , ___ N.C. App. ___, ___ S.E. 2d ___ (Apr. 16, 2019)

In a case involving a conviction for second-degree murder following a fatal motor vehicle accident, the trial court did not abuse its discretion by admitting evidence of the defendant's past driving offenses. The State's evidence showed that on 23 November 2016, the defendant was stopped for an expired plate and was issued a citation for driving with a suspended license. At the time of the incident in question, the defendant's license had been suspended since 22 May 2014 for failure to appear for a 2013 infraction of failure to reduce speed. Since the defendant's driver's license was originally issued in September 1997, he had multiple driving convictions including: failure to stop for siren or red light, illegal passing, speeding 80 in a 50, and reckless driving in March 1998; speeding 64 in a 55 in September 2000; speeding 64 in a 55 in October 2000; speeding 70 in a 50 in August 2003; driving while license revoked and speeding 54 in a 45 in January 2005; speeding 54 in a 45 in December 2006; failure to reduce speed resulting in accident and injury in February 2007; a South Carolina conviction for speeding 34 in a 25 in March 2011; speeding 44 in a 35 in January 2012; speeding 84 in a 65 in May 2013; and failure to reduce speed in February 2017 (the conviction corresponding to the 2013 charge on which the

defendant failed to appear). Six of these prior convictions resulted in suspension of the defendant's license. On appeal the defendant argued that the trial court erred by admitting his prior driving record without sufficient evidence establishing temporal proximity and factual similarity. The court disagreed. It found that there was no question that his prior driving record was admissible to show malice. It further held that the trial court's finding of similarity was supported by the fact that the vast majority of prior charges involve the same types of conduct that the defendant was alleged to have committed in the present case—namely speeding, illegal passing, and driving while license revoked. Although the State did not present evidence of the specific circumstances surrounding the prior convictions, the similarity was evident from the nature of the charges.

The trial court's finding of temporal proximity was supported by the spread of convictions over the entirety of the defendant's record, from the year his license was issued up until the year of the accident in question, showing a consistent pattern of conduct including speeding, illegal passing, and driving with a revoked license. The gaps in time between charges, never greater than three or four years, were not significant. Moreover, many of the gaps between charges occurred when the defendant's license was suspended and he could not legally drive. The trial court properly determined that the time gaps in this pattern of conduct were less significant in light of the likely causes for the gaps, the defendant's inability to legally drive. Additionally, the trial court properly gave a limiting instruction

The court further rejected the defendant's argument that the evidence should have been excluded because of the 10 year time limit under evidence Rule 609. That rule however only applies to evidence used to impeach a witness's credibility, which is not at issue here.

State v. Godfrey, ___ N.C. App. ___, 822 S.E.2d 894 (Dec. 18, 2018)

In this child sexual assault case, the trial court did not err by admitting 404(b) evidence. In 2016, the victim reported to law enforcement that the defendant sexually assaulted her many times when she was a child, including a final incident on or about May 2004 when she was 12 years old. During the ensuing investigation, the victim recorded the defendant making incriminating statements. The defendant was indicted for first-degree sex offense with a child for the 2004 incident. At trial, the victim testified to the May 2004 incident, describing digital penetration. The victim also testified to an incident of digital penetration by the defendant that occurred a month or two prior to the May 2004 incident (“the bed incident”), and to another incident of digital penetration about two years earlier (the “Lick Mountain incident”). The victim also testified about watching pornography with the defendant on multiple occasions prior to the May 2004 incident during which the defendant would put her hand on his penis. Additionally the recorded conversation between the victim and the defendant was introduced at trial. In that recording the defendant asked the victim if she remembered “[t]he first hand [ride] you ever took” and admitted remembering watching pornography with the victim. The defendant was found guilty and he appealed.

The court found that evidence of the bed incident and the Lick Mountain incident were properly admitted under Rule 404(b). All three incidents involved the same victim, the same type of penetration, and all occurred while the victim was under the defendant's supervision. Thus the incidents were sufficiently similar to the one in question to show a common scheme or plan to take advantage of the victim by digitally penetrating her while she was under his control.

The court rejected the defendant's argument that the Lick Mountain incident was too remote in time to the May 2004 incident. Although that incident occurred 2 or 3 years prior, that

period of time did not eliminate the probative value of the incident, particularly in light of its striking similarity to the May 2004 incident.

The court also rejected the argument that the trial court abused its discretion by allowing evidence of the bed incident and Lick Mountain incidents over a Rule 403 objection.

With respect to the portion of the recording regarding the “hand ride,” the defendant argued that this evidence was inadmissible because the date of the incident was not provided. The court concluded however that because of the similarity of this incident to the other events, the trial court did not err by admitting the statement on grounds of temporal proximity.

With respect to the evidence regarding watching pornography together, the court held that even assuming this evidence was erroneously admitted, the defendant failed to establish prejudice in light of the overwhelming evidence of guilt.

Hearsay

State v. Allen , ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019)

(1) In this murder, robbery and assault case, the trial court properly found that a witness was unavailable to testify under Evidence Rule 804 and the Confrontation Clause. The witness, Montes, was arrested in connection with the crimes at issue. She cooperated with officers and gave a statement that incriminated the defendant. She agreed to appear in court and testify against the defendant, but failed to do so. Her whereabouts were unknown to her family, her bondsman and the State. The State successfully moved to allow her recorded statement into evidence on grounds that she was unavailable and that the defendant forfeited his constitutional right to confrontation due to his own wrongdoing. The defendant was convicted and appealed. Considering the issue, the court noted that the evidence rule requires that a finding of unavailability be supported by evidence of process or other reasonable means. To establish unavailability under the Confrontation Clause, there must be evidence that the State made a good-faith effort to obtain the witness’s presence at trial. Here, the State delivered a subpoena for Montes to her lawyer, and Montes agreed to appear in court to testify against the defendant. These findings support a conclusion both that the State used reasonable means and made a good-faith effort to obtain the witness’s presence at trial.

(2) The trial court properly found that the defendant forfeited his Confrontation Clause rights through wrongdoing. The relevant standard for determining forfeiture by wrongdoing is a preponderance of the evidence and the State met this burden. Here, the defendant made phone calls from jail showing an intent to intimidate Montes into not testifying, and threatened another testifying witness. Additionally, his mother and grandmother, who helped facilitate his threatening calls to Montes, showed up at Montes’ parents’ house before trial to engage in a conversation with her about her testimony. The trial court properly found that the net effect of the defendant’s conduct was to pressure and intimidate Montes into not appearing in court and not testifying.

State v. DeJesus, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019)

In this statutory rape case, the court rejected the defendant’s argument that the trial court erred by admitting the victim’s Honduran birth certificate, asserted by the defendant to be inadmissible hearsay. To establish the victim’s age, the State introduced a copy of the victim’s Honduran birth certificate, obtained from her school file. The defendant argued that the document lacked

sufficient trustworthiness to satisfy Evidence Rule 803(8) (public records and reports). The court disagreed. No circumstances suggest that the birth date on the certificate lacked trustworthiness. Moreover, there was additional evidence presented supporting the victim's age, including photographs taken of her, and a detective's testimony that the victim looked to be 10 or 11 years old at the time of her interview.

State v. Chevallier, ___ N.C. App. ___, 824 S.E.2d 440 (Mar. 5, 2019)

In this drug case the trial court did not err by admitting a hearsay statement under the Rule 801(d)(E) co-conspirator exception. An undercover officer arranged a drug transaction with a target. When the officer arrived at the prearranged location, different individuals, including the defendant, pulled up behind the officer. While on the phone with the officer, the target instructed: "them are my boys, deal with them." This statement was admitted at trial under the co-conspirator exception to the hearsay rule. The defendant was convicted and appealed. On appeal the defendant argued that the statement was inadmissible because the State failed to prove a conspiracy between the target and the defendant and the others in the car. The court disagreed. The officer testified that he had previously planned drug buys from the target. Two successful transactions occurred at a Bojangles restaurant in Warsaw, NC where the target had delivered the drugs to the officer. When the officer contacted the target for a third purchase, the target agreed to sell one ounce of cocaine for \$1200; the transfer was to occur at the same Warsaw Bojangles. When the target was not at the location, the officer called the target by phone. During the conversation, three men parked behind the officer's vehicle and waved him over to their car, and the target made the statement at issue. A man in the backseat displayed a plastic bag of white powder and mentioned that he knew the officer from prior transactions. The officer retrieved his scale and weighed the substance; it weighed one ounce. This was sufficient evidence of a conspiracy between the target and the men in the car. In so holding the court rejected the defendant's argument that because the substance turned out to be counterfeit cocaine, there was no agreement and thus no conspiracy. Because both selling actual cocaine and selling counterfeit cocaine is illegal under state law, the evidence was sufficient to establish a prima facie case of conspiracy by way of an agreement between the target and the men to do an unlawful act.

State v. Mylett, ___ N.C. App. ___, 822 S.E.2d 518 (Dec. 4, 2018)

In this case involving a conviction for conspiracy to harass a juror, the trial court did not err by allowing the juror-witnesses to testify, over objection, about a fraternity fight that formed the basis for the criminal trial in which the defendant was accused of harassing jurors. The criminal trial involved the defendant's brother Dan and the charges against Dan arose out of the fraternity fight. The defendant's charges of intimidating jurors arose out of his conduct with respect to those jurors after they rendered their verdict in Dan's case. The court rejected the defendant's argument that the jurors' testimony regarding the fight constituted hearsay, concluding that it was offered for the legitimate, nonhearsay purpose of proving the jurors' states of mind.

At the same time the trial court properly denied the defendant an opportunity to testify about the fight because his testimony constituted inadmissible hearsay. Specifically, his statement describing the fight that "the officer admitted he didn't try to spit on him" was proffered for the truth of the matter asserted and is inadmissible hearsay.

Opinions, Experts

State v. Davis, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019)

In this sexual assault case although a nurse's testimony was improperly admitted, the error did not rise to the level of plain error. The nurse interviewed and examined the victim. At trial the nurse testified that the victim's exam "was consistent with someone reporting a sexual assault" solely on the grounds that she did *not* have physical evidence of sexual abuse. The court noted that this lack of physical evidence also is consistent with someone who has not been sexually abused. It thus concluded: "in other words, this portion of the expert's testimony -- in which she affirmatively stated that a lack of physical evidence is consistent with someone who has been sexually abused -- should not have been allowed as this testimony did not aid the trier of fact in any way." It continued:

Even if an opinion of the nature offered by the State's expert would be helpful to a jury, there is nothing in the record to indicate a proper basis for the nurse's opinion. Such testimony should generally be based on the science of how and why the human body does not always show signs of sexual abuse. The nurse's testimony here was not based on any science or other medical knowledge she may have possessed. Rather, she based her testimony on her assumption that all of the people that she had ever interviewed and examined were telling the truth, that they had all been sexually abused. (citation omitted).

The court went on to hold that although the expert's opinion testimony was improper, the error did not rise to the level of plain error.

State v. Parks, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019)

In this murder case, the trial court did not abuse its discretion by allowing two forensic pathologists to testify to expert opinions regarding the amount of blood discovered in the defendant's house. Essentially, the experts testified that the significant amount of blood at the scene suggested that the victim would have required medical attention very quickly. The defendant argued that the trial court's ruling was improper under Rule 702, specifically, that reliability had not been established. The three-pronged reliability test under Rule 702 requires that the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and that the witness has applied the principles and methods reliably to the facts of the case. Here, the pathologists' testimony was based on photographs of the crime scene, SBI lab results, and discussions with detectives. They testified that it was routine in the field of forensic pathology to rely on such data and information from other sources and that they use photographs a couple hundred times each year to form medical opinions. They testified that it was less common for them to actually go to a crime scene. They explained how they compare the data and observations with what they have experienced at other crime scenes to form an opinion. Both testified that it was common in the field to form opinions based on comparisons with other cases and acknowledged that they deal with blood loss and render opinions as to cause of death on a daily basis. Testimony was given that it was a normal part of forensic pathology to determine if someone has died or needed medical attention as a result of blood loss. Both testified that they have been involved in hundreds of cases where they had to look at crime scene photographs of blood and a body to which they could compare the data and observations in this case. Based on their experience, they responded to the trial court's inquiry that they were able to testify that the amount of blood in this case would be consistent with the person who would need immediate medical attention. The trial court properly determined that the pathologists' testimony

was based on sufficient facts or data, was the product of reliable principles and methods, and that they reliably applied those principles and methods to this case.

State v. Steen, ___ N.C. App. ___, 826 S.E.2d 478 (Mar. 19, 2019)

In this case involving convictions of first-degree murder, attempted first-degree murder, and armed robbery, the trial court did not err by prohibiting a defense expert from testifying concerning the impact of specific leading questions asked by law enforcement officers during their interviews with one of the victims. The defendant offered testimony from Dr. George Corvin, an expert in general and forensic psychiatry regarding “confabulation.” On voir dire, Corvin defined confabulation as the spontaneous production of false memories or distorted memories in patients who have sustained closed head injuries or other medical trauma resulting in periods of amnesia. He further explained that “induced confabulation” can occur where a person in a position of authority or trust tells or implies to an individual suffering from amnesia what actually occurred during a period of time for which the individual has no genuine memories. The trial court ruled that Corvin would be permitted to testify generally about “those who are susceptible and the risk factors for confabulation,” but could not testify to whether specific questions that officers asked the victim could have caused confabulation to actually occur. Corvin subsequently testified before the jury, defining confabulation and explaining the manner in which it could affect the memories of persons afflicted with periods of amnesia following a traumatic injury. He further testified that based on his review of the victim’s medical records, a risk of confabulation existed due to the nature and location of the traumatic brain injury that she suffered as a result of the attack. He also explained the concept of induced confabulation. Although the trial court prohibited him from testifying as to the relationship between any specific questions that officers asked the victim and the potential for confabulation to have occurred regarding her identification of the defendant as her attacker, counsel did make statements about this during his closing arguments. The court determined that assuming *arguendo* that the limitation on Corvin’s testimony was error, it did not constitute reversible error. As noted, Corvin defined the concept of induced confabulation for the jury and explained why the victim’s injury placed her at risk for creating memories that were not genuine. Furthermore, in his closing argument defense counsel made clear to the jury the defendant’s theory that the manner in which the victim was questioned by officers caused her to create false memories of the attack. Thus, the jurors were expressly given the opportunity consider the possibility that the victim’s identification of the defendant was the result of confabulation and therefore the defendant failed to show any reasonable possibility that a different result would have been reached had Corvin been permitted to testify without restriction.

State v. Lopez, ___ N.C. App. ___, 826 S.E.2d 498 (Mar. 19, 2019)

In this second-degree rape case involving a victim who had consumed alcohol, the trial court did not abuse its discretion by refusing to allow testimony of defense expert, Dr. Wilkie Wilson, a neuropharmacologist. During voir dire, Wilson testified that one of his areas of expertise was alcohol and its effect on memory. He explained that he would testify “about what’s possible and what’s, in fact, very, very likely and [sic] when one drinks a lot of alcohol.” He offered his opinion that “someone who is having a blackout might not be physically helpless.” The State objected to this testimony, arguing that his inability to demonstrate more than “maybe” possibilities meant that his testimony would not be helpful to the jury. The trial court sustained the objection, determining that the expert would not assist the trier of fact to understand the

evidence or to determine a fact in issue in the case. Because the State's theory of physical helplessness did not rest on the victim's lack of memory, the expert's testimony would not have helped the jury determine a fact in issue. Thus, the trial court did not abuse its discretion in excluding this testimony. Even if the trial court had erred, no prejudice occurred given the State's overwhelming evidence of the victim's physical helplessness.

State v. Casey, ___ N.C. App. ___, 823 S.E.2d 906 (Jan. 15, 2019)

In this child sexual assault case, the court reversed the trial court's order denying the defendant's Motion for Appropriate Relief (MAR) seeking a new trial for ineffective assistance of counsel related to opinion testimony by the State's expert. The defendant was convicted of sexual offenses against Kim. On appeal the defendant argued that the trial court should have granted his MAR based on ineffective assistance of both trial and appellate counsel regarding expert opinion testimony that the victim had in fact been sexually abused. The court began by concluding that the testimony offered by the State's expert that Kim had, in fact, been sexually abused was inadmissible. The court reiterated the rule that where there is no physical evidence of abuse, an expert may not opine that sexual abuse has in fact occurred. In this case the State offered no physical evidence that Kim had been sexually abused. On direct examination the State's expert testified consistent with governing law. On cross-examination, however, the expert expressed the opinion that Kim "had been sexually abused." And on redirect the State's expert again opined that Kim had been sexually abused. In the absence of physical evidence of sexual abuse, the expert's testimony was inadmissible.

State v. Piland, ___ N.C. App. ___, 822 S.E.2d 876 (Dec. 18, 2018)

In this drug case, the trial court erred but did not commit plain error by allowing the State's expert to testify that the pills were hydrocodone. With no objection from the defendant at trial, the expert testified that she performed a chemical analysis on a single tablet and found that it contained hydrocodone. On appeal the defendant asserted that this was error because the expert did not testify to the methods used in her chemical analysis. The court agreed holding: "it was error for the trial court not to properly exercise its gatekeeping function of requiring the expert to testify to the methodology of her chemical analysis." However, the court concluded that the error does not amount to plain error "because the expert testified that she performed a "chemical analysis" and as to the results of that chemical analysis. Her testimony stating that she conducted a chemical analysis and that the result was hydrocodone does not amount to "baseless speculation," and therefore her testimony was not so prejudicial that justice could not have been done.

State v. Holmes, ___ N.C. App. ___, 822 S.E.2d 708 (Dec. 18, 2018)

In this first-degree murder case, where the victim was found in a bathtub with a hair dryer and cause of death was an issue, the trial court did not err by admitting expert opinions.

The defendant asserted that expert Michael Kale was not qualified to offer expert testimony that a running hairdryer dropped in a tub of water would not create current leakage if there is no path to the ground for the electrical current. Kale testified that he is an inspection supervisor for Mecklenburg County Code Enforcement specializing in electrical code enforcement, a position he has held for 15 years. In 2001 he received a Level III inspection certification, the highest level certification for electrical inspectors. He continues to take 60 hours in continuing education classes each year. Prior to his current position, he was an electrical contractor since 1987. In the

early 1980s, he began constructing electrical wiring systems and continued to do so until his current position where he switched from constructing to inspecting such systems. His current responsibilities include checking the installation of electrical systems and power distribution systems by testing and visually inspecting electrical wiring to ensure code compliance. Given his knowledge, experience, and training regarding electrical systems, which encompasses how electricity moves, it was not an abuse of discretion for the trial court to determine that Kale had the necessary qualifications to provide his opinion. While Kale lacked a post-secondary degree in electrical engineering, the courts have never required such a formal credential. The court also rejected the defendant's argument that Kale's opinion was not based on reliable methods, finding that the defendant's argument mischaracterized Kale's testimony.

The trial court did not abuse its discretion by admitting testimony from expert Michael McFarlane, an FBI forensic examiner, tendered as an expert in electrical systems and forensic electricity. McFarlane testified that appliances such as a hairdryer have an ALCI safety plug, which disables the electrical current going to the device when a certain amount of current leakage occurs. To test whether the ALCI on the hairdryer found with the victim was working and to determine the exact amount of leakage at which the ALCI would disable the current, McFarlane conducted an experiment. He set up "a trough with water in it" and attached wires to the hairdryer that he then placed in the water. At the other end of the trough, he placed additional wires to provide a secondary pathway for the current to leak to the ground. McFarlane then moved the hairdryer closer to the other wires to determine the exact amount of leakage from the hair dryer circuit to the secondary pathway that occurred before the ALCI plug disabled the current going to the hair dryer. McFarlane conducted the experiment to test the amount of current that would need to be leaked in order for the ALCI safety plug to disable the current going to the device. He used the same hairdryer that was found with the victim and set up a trough to recreate a bathtub. He testified that when he turned on the hairdryer, it functioned correctly with the attached wires. His failure to say what the trough was made of or whether it had a metal drain did not render the experiment void of substantial similarity as suggested by the defendant. He testified that the presence of a metal drain is relevant in determining whether the drain is connected to something that would provide an alternative pathway for the current to reach the ground. However, this experiment was testing the amount of leakage that causes the ALCI safety plug to disable the current and did not concern the medium through which the current travels once it is already leaked. The trial court did not abuse its discretion in admitting this evidence. Even if this test was an experiment, the court held that the trial court did not abuse its discretion in admitting the evidence in this context, noting that candid acknowledgment of dissimilarities and limitations of an experiment--as occurred here--is generally sufficient to prevent experimental evidence from being prejudicial. The court further rejected the defendant's argument that McFarlane's testimony was not based on reliable methods.

State v. Vann, ___ N.C. App. ___, 821 S.E.2d 282 (Oct. 2, 2018)

The trial court did not abuse its discretion by partially sustaining the State's objection to expert testimony by a defense witness regarding the factors affecting the reliability of eyewitness identification. UNC-Charlotte Prof. Dr. Van Wallendael was qualified and accepted by the court as an expert witness in the field of memory perception and eyewitness identification. The defendant sought to have her testify concerning whether any factors were present that could have affected the witnesses' identification of the defendant as the shooter. At a voir dire, the expert witness identified four factors in the case which could have affected the witnesses'

identifications: the time factor; the disguise factor; the stress factor; and the weapon focus effect. According to the time factor, the likelihood of an accurate identification increases the longer in time a witness has to view the perpetrator's face. Under the disguise factor, anything covering the face of the perpetrator decreases the chances of an accurate identification later by the eyewitness. The stress factor states that stress, especially from violent crimes, can significantly reduce an eyewitness's ability to remember accurately. Studies on the weapon focus factor show that people confronted with a weapon tend to concentrate their attention on the weapon itself, and not the individual holding the weapon, which decreases the likelihood of an accurate identification of the assailant or shooter later. The trial court sustained the State's objection to opinion testimony concerning the time and disguise factors, noting that they are commonsense conclusions that would be of little if any benefit to the jury. It did however allow testimony on the stress factor and the weapon focus effect. The defendant failed to show any abuse of discretion by the trial court in partially sustaining the State's objection. The trial court properly found that the time and disguise concepts were commonsense conclusions that would be of little benefit to the jury.

State v. Osborne, ___ N.C. App. ___, 821 S.E.2d 268 (Oct. 2, 2018), *review allowed*, ___ N.C. ___, 822 S.E.2d 639 (Jan. 30, 2019)

The evidence is insufficient to sustain the defendant's conviction for possession of heroin because the controlled substance at issue was not sufficiently identified as heroin. Officers found the defendant unconscious in a hotel room. After being revived, the defendant admitted to using heroin. Officers searched the hotel room and found syringes, spoons with burn marks and residue, and a rock-like substance. The State did not have the substance tested using a scientifically valid chemical analysis. Rather, at trial the State relied on the defendant's statement to officers that she used heroin, as well as officers' descriptions of the rock-like substance and the results of field tests on the substance, including one performed in open court. On appeal the State conceded, or at least did not dispute, that the field tests are not scientifically valid chemical analysis sufficient to support a conviction. Instead, the State relied on *State v. Ortiz-Zape*, 367 N.C. 1 (2013), and related cases. In *Ortiz-Zape*, the court held that an officer's testimony concerning the defendant's out-of-court identification of the substance as cocaine, combined with the officers own testimony that the substance appeared to be cocaine, was sufficient to survive a motion to dismiss. Here however the defendant did not identify the seized substance as heroin. Rather, after being revived she told officers that she had ingested heroin. Although the State's evidence strongly suggests that the substance was heroin, it is not sufficient to establish that fact. The court concluded that a holding otherwise "likely would eliminate the need for scientifically valid chemical analysis in many—perhaps most—drug cases" and undermine the Supreme Court's decision in *State v. Ward*, 364 N.C. 133 (2010).

Opinions, Lay

State v. Denton, ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2019)

In this felony death by vehicle case, the trial court committed reversible error by admitting lay opinion testimony identifying the defendant as the driver of the vehicle, where the expert accident reconstruction analyst was unable to form an expert opinion based upon the same information available to the lay witness. The defendant and Danielle Mitchell were in a car when it ran off the road and wrecked, killing Mitchell. The defendant was charged with felony death

by vehicle and the primary issue at trial was whether the defendant was driving. At trial, Trooper Fox testified that he believed the defendant was driving because “the seating position was pushed back to a position where I did not feel that Ms. Mitchell would be able to operate that vehicle or reach the pedals.” Fox, however, acknowledged that he was not an expert in accident reconstruction. Trooper Souther, the accident reconstruction expert who analyzed the accident, could not reach a conclusive expert opinion about who was driving. The defendant was convicted and he appealed, arguing that the trial court erred by allowing Fox, who was not an expert, to testify to his opinion that the defendant was driving. The court noted that accident reconstruction analysis requires expert testimony and it found no instance of lay accident reconstruction analysis testimony in the case law. Here, Fox based his lay opinion on the very same information used by Souther but without the benefit of expert analysis. The court concluded: “the facts about the accident and measurements available were simply not sufficient to support an expert opinion — as Trooper Souther testified — and lay opinion testimony on this issue is not admissible under Rule 701.” Having found error, the court went on to conclude that it was prejudicial, requiring a new trial.

Rule of Completeness (Rule 106)

State v. Vann, ___ N.C. App. ___, 821 S.E.2d 282 (Oct. 2, 2018)

In this assault case, the trial court did not abuse its discretion by allowing portions of the defendant’s telephone call, made from jail, to his grandmother into evidence but refusing to allow the defendant to offer other portions from the same call into evidence. The defendant argued that the trial court’s ruling violated the rule of completeness. The admitted portions of the telephone conversation show that the defendant had certain knowledge of the crime that only the perpetrator would know. The defendant sought to introduce an additional portion of the conversation in which the defendant’s grandmother said, “you didn’t do it,” and the defendant responded, “I know.” The court concluded that the defendant’s exculpatory statement to his grandmother was neither explanatory of nor relevant to the admitted statements.

Arrest, Search, and Investigation Stops

State v. Thompson, ___ N.C. ___, 822 S.E.2d 616 (Feb. 1, 2019)

On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 809 S.E.2d 340 (2018), the court per curiam vacated and remanded to the Court of Appeals for reconsideration in light of *State v. Wilson*, ___ N.C. ___, 821 S.E.2d 811 (2018). In the decision below the majority held, in relevant part, that where the trial court’s order denying the defendant’s suppression motion failed to resolve disputed issues of fact central to the court’s ability to conduct a meaningful appellate review, the case must be remanded for appropriate findings of fact. In its order denying the defendant’s suppression motion, the trial court concluded that, at the time defendant was asked for consent to search his car, he had not been seized. On appeal, the defendant challenged that conclusion, asserting that because the officers retained his driver’s license, a seizure occurred. It was undisputed that the law enforcement officers’ interactions with the defendant were not based upon suspicion of criminal activity. Thus, if a seizure occurred it was in violation of the Fourth Amendment. The State argued that the trial court’s findings of fact fail to establish whether the officers retained the defendant’s

license or returned it to him after examination. The Court of Appeals agreed, noting that the evidence was conflicting on this critical issue and remanding for appropriate findings of fact. As noted, the Supreme Court remanded for reconsideration in light of *Wilson*. In *Wilson*, a felon in possession of a firearm case, the Supreme Court held that *Michigan v. Summers* justifies a seizure of the defendant where he posed a real threat to the safe and efficient completion of a search.

State v. Wilson, ___ N.C. ___, 821 S.E.2d 811 (Dec. 21, 2018)

On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 698 (2017), in this felon in possession of a firearm case, the court held that *Michigan v. Summers* justifies a seizure of the defendant where he posed a real threat to the safe and efficient completion of a search and that the search and seizure of the defendant were supported by individualized suspicion. A SWAT team was sweeping a house so that the police could execute a search warrant. Several police officers were positioned around the house to create a perimeter securing the scene. The defendant penetrated the SWAT perimeter, stating that he was going to get his moped. In so doing, he passed Officer Christian, who was stationed at the perimeter near the street. The defendant then kept going, moving up the driveway and toward the house to be searched. Officer Ayers, who was stationed near the house, confronted the defendant. After a brief interaction, Officer Ayers searched the defendant based on his suspicion that the defendant was armed. Officer Ayers found a firearm in the defendant's pocket. The defendant, who had previously been convicted of a felony, was arrested and charged with being a felon in possession of a firearm. He unsuccessfully moved to suppress at trial and was convicted. The Court of Appeals held that the search was invalid because the trial court's order did not show that the search was supported by reasonable suspicion. The Supreme Court reversed holding "that the rule in *Michigan v. Summers* justifies the seizure here because defendant, who passed one officer, stated he was going to get his moped, and continued toward the premises being searched, posed a real threat to the safe and efficient completion of the search." The court interpreted the *Summers* rule to mean that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain occupants who are within the immediate vicinity of the premises to be searched and who are present during the execution of a search warrant. Applying this rule, the court determined that "a person is an occupant for the purposes of the *Summers* rule if he poses a real threat to the safe and efficient execution of a search warrant." (quotation omitted). Here, the defendant posed such a threat. It reasoned: "He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. It was obvious that defendant posed a threat to the safe completion of the search."

Because the *Summers* rule only justifies detentions incident to the execution of search warrants, the court continued, considering whether the search of the defendant's person was justified. On this issue the court held that "both the search and seizure of defendant were supported by individualized suspicion and thus did not violate the Fourth Amendment."

State v. Carver, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019)

Over a dissent, the court held that no reasonable suspicion supported the warrantless traffic stop based on an anonymous tip. A sheriff's deputy received a dispatch call, originating from an anonymous tipster, just before 11 PM. The deputy was advised of a vehicle in a ditch on a specified road, possibly with a "drunk driver, someone intoxicated" and that "a truck was attempting—getting ready to pull them out." The tip provided no description of the car, truck or driver, nor was there information regarding the caller or when the call was received. When the deputy arrived at the scene about 10 minutes later, he noticed a white Cadillac at an angle partially in someone's driveway. The vehicle had mud on the driver's side and the deputy opined from gouges in the road that it was the vehicle that had run off the road. However he continued driving and saw a truck traveling away from his location. He estimated that the truck was travelling approximately 15 to 20 miles below the posted 55 mph speed limit. He testified that the truck was the only one on the highway and that it was big enough to pull the car out. He did not see any chains, straps, or other devices that would indicate it had just pulled the vehicle out of the ditch. He initiated a traffic stop. His sole reason for doing so was "due to what was called out from communications." The truck was driven by Griekspoor; the defendant was in the passenger seat. When the deputy explained to the driver that there was a report of a truck attempting to pull a vehicle out of the ditch, the driver reported that he had pulled the defendant's car out of the ditch and was giving him a ride home. The deputy's supervisor arrived and went to talk with the defendant. The defendant was eventually charged with impaired driving. At trial he unsuccessfully moved to suppress, was convicted and appealed. The court found that the stop was improper. As the State conceded, the anonymous tip likely fails to provide sufficient reliability to support the stop. It provided no description of either the car or the truck or how many people were involved and there is no indication when the call came in or when the anonymous tipster saw the car in the ditch with the truck attempting to pull it out. The State argued however that because nearly every aspect of the tip was corroborated by the officer there was reasonable suspicion for the stop. The court disagreed. When the deputy passed the Cadillac and came up behind the truck, he saw no equipment to indicate the truck had pulled, or was able to pull, a car out of the ditch and could not see how many people were in the truck. He testified that it was not operating in violation of the law. "He believed it was a suspicious vehicle merely because of the fact it was on the highway." The details in the anonymous tip were insufficient to establish identifying characteristics, let alone allow the deputy to corroborate the details. The tipster merely indicated a car was in a ditch, someone was present who may be intoxicated, and a truck was preparing to pull the vehicle out of the ditch. There was no description of the car, the truck, or any individuals who may have been involved. After the deputy passed the scene and the Cadillac he noticed a truck driving under the posted speed limit. He provided no testimony to show that the truck was engaging in unsafe, reckless, or illegal driving. He was unable to ascertain if it contained a passenger. The court concluded: "At best all we have is a tip with no indicia of reliability, no corroboration, and conduct falling within the broad range of what can be described as normal driving behavior." (quotation omitted). Under the totality of the circumstances the deputy lacked reasonable suspicion to conduct a warrantless stop of the truck.

State v. Brown, ___ S.E. 2d ___, ___ N.C. App. ___ (April 16, 2019). In this DWI case, neither reasonable suspicion nor the community caretaking exception justified the vehicle stop. While standing outside of his patrol car in the early morning hours, a deputy saw a vehicle come down the road and heard the words "mother fucker" yelled in the vehicle. Concerned that someone

might be involved in a domestic situation or argument, he pursued the vehicle and stopped it to “make sure everybody was okay.” The deputy did not observe any traffic violations or other suspicious behavior. The defendant was subsequently charged with DWI. In the trial court, the defendant moved to suppress arguing that no reasonable suspicion supported the stop. The trial court denied the motion to suppress, finding “that the officer’s articulable and reasonable suspicion for stopping the vehicle was a community caretaking function.” The defendant was convicted and he appealed. The court began by noting that the trial court conflated the reasonable suspicion and community caretaking exceptions to the warrant requirement. Analyzing the exceptions separately, the court began by holding that no reasonable suspicion supported the stop where the sole reason for it was that the deputy heard someone yelling a profanity in the vehicle. Turning to the community caretaking doctrine, it held: “we do not think the totality of the circumstances establish an objectively reasonable basis for a community caretaking function.” The sole basis for the stop was that the deputy heard someone in the vehicle yell a profanity. The deputy did not know if the driver or a passenger yelled the words, if the vehicle contained passengers, if the windows were opened, or who the words were directed to. Among other things, he acknowledged that they could have been spoken by someone on the telephone. The court concluded: “We do not believe these facts . . . establish an objectively reasonable basis for a stop based on the community caretaking doctrine.” The court went on to note that it has previously made clear that the community caretaking exception should be applied narrowly and carefully to mitigate the risk of abuse. In cases where the community caretaking doctrine has been held to justify a warrantless search, the facts unquestionably suggested a public safety issue. Here no such facts exist.

State v. Horton, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 2, 2019)

In this drug case, the trial court erred by denying the defendant’s motion to suppress evidence obtained in a traffic stop. Sometime after 8:40 PM, an officer received a dispatch relating an anonymous report concerning a “suspicious white male,” with a “gold or silver vehicle” in the parking lot, walking around a closed business, Graham Feed & Seed. The officer knew that a business across the street had been broken into in the past and that residential break-ins and vandalism had occurred in the area. When the officer arrived at the location he saw a silver vehicle in the parking lot. The officer parked his vehicle and walked towards the car as it was approaching the parking lot exit. When he shined his flashlight towards the drivers side and saw the defendant, a black male, in the driver’s seat. The defendant did not open his window. When the officer asked the defendant, “What’s up boss man,” the defendant made no acknowledgment and continued exiting the parking lot. The officer considered this behavior a “little odd” and decided to follow the defendant. After catching up to the defendant’s vehicle on the main road, and without observing any traffic violations or furtive movements, the officer initiated a traffic stop. Contraband was found in the subsequent search of the vehicle and the defendant was arrested and charged. The trial court denied the defendant’s motion to suppress the evidence seized as a result of the stop. The defendant was convicted and he appealed. The court determined that the officer’s justification for the stop was nothing more than an inchoate and unparticularized suspicion or hunch. The anonymous tip reported no crime and was only partially correct. Although there was a silver car in the parking lot, the tip also said it could have been gold, and there was no white male in the lot or the vehicle. Additionally, the tip merely described the individual as “suspicious” without any indication as to why, and no information existed as to who the tipster was and what made the tipster reliable. As a result there is nothing inherent in the

tip itself to allow a court to deem it reliable and provide reasonable suspicion. Additionally the trial court's findings of fact concerning the officer's knowledge about criminal activity refer to the area in general and to no particularized facts. The officer did not say how he was familiar with the area, how he knew that there had been break-ins, or how much vandalism or other crimes had occurred there. Additionally the trial court's findings stipulated that there was no specific time frame given for when the previous break-ins had occurred. The court rejected the State's argument that the officer either corroborated the tip or formed reasonable suspicion on his own when he arrived at the parking lot. It noted that factors such as a high-crime area, unusual hour of the day, and the fact that businesses in the vicinity were closed can help to establish reasonable suspicion, but are insufficient given the other circumstances in this case. The State argued that the defendant's nervous conduct and unprovoked flight supported the officer's reasonable suspicion. But, the court noted, the trial court did not make either of those findings. The trial court's findings say nothing about the defendant's demeanor, other than that he did not acknowledge the officer, nor do they speak to the manner in which he exited the parking lot. The court went on to distinguish cases offered by the State suggesting that reasonable suspicion can be based on a suspect's suspicious activities in an area known for criminal activity and an unusual hour. The court noted that in those cases the officers were already in the areas in question because they were specifically known and had detailed instances of criminal activity. Here, the officer arrived at the parking lot because of the vague tip about an undescribed white male engaged in undescribed suspicious activity in a generalized area known for residential break-ins and vandalism. The trial court made no findings as to what suspicious activity by the defendant warranted the officer's suspicion. In fact the officer acknowledged that the defendant was not required to stop when he approached the defendant's vehicle. The court concluded:

Accordingly, we are unpersuaded by the State's argument and agree with Defendant that the trial court erred in concluding that Officer Judge had reasonable suspicion to stop him. Though the tip did bring Officer Judge to the Graham Feed & Seed parking lot, where he indeed found a silver car in front of the then-closed business with no one else in its vicinity at 8:40 pm, and although Defendant did not stop for or acknowledge Officer Judge, we do not believe these circumstances, taken in their totality, were sufficient to support reasonable suspicion necessary to allow a lawful traffic stop. When coupled with the facts that (1) Defendant was in a parking lot that did "not have a 'no trespassing' sign on its premises"—making it lawful for Defendant to be there; (2) Defendant was not a white male as described in the tip; (3) Defendant's car was possibly in motion when Officer Judge arrived in the parking lot; (4) Defendant had the constitutional freedom to avoid Officer Judge; and (5) Defendant did not commit any traffic violations or act irrationally prior to getting stopped, there exists insufficient findings that Defendant was committing, or about to commit, any criminal activity.

Concluding otherwise would give undue weight to, not only vague anonymous tips, but broad, simplistic descriptions of areas absent specific and articulable detail surrounding a suspect's actions.

State v. Jones, ___ N.C. App. ___, 825 S.E.2d 260 (Mar. 5, 2019)

The trial court did not err by denying the defendant's motion to suppress, which argued that officers improperly extended a traffic stop. Officers initiated a traffic stop of the vehicle for a

passenger seatbelt violation. The defendant was in the passenger seat. That seat was leaned very far back while the defendant was leaning forward with his head near his knees in an awkward position. The defendant's hands were around his waist, not visible to the officer. The officer believed that based on the defendant's position he was possibly hiding a gun. When the officer introduced himself, the defendant glanced up, looked around the front area of the vehicle, but did not change position. The officer testified that the defendant's behavior was not typical. The defendant was unable to produce an identity document, but stated that he was not going to lie about his identity. The officer testified that this statement was a sign of deception. The officer asked the defendant to exit the vehicle. When the defendant exited, he turned and pressed against the vehicle while keeping both hands around his waist. The defendant denied having any weapons and consented to a search of his person. Subsequently a large wad of paper towels fell from the defendant's pants. More than 56 grams of cocaine was in the paper towels and additional contraband was found inside the vehicle. The defendant was charged with drug offenses. He unsuccessfully moved to suppress. On appeal he argued that the officer lacked reasonable suspicion to extend the traffic stop. The court disagreed, holding that the officer's conduct did not prolong the stop beyond the time reasonably required to complete its mission. When the defendant was unable to provide identification, the officer "attempted to more efficiently conduct the requisite database checks" and complete the mission of the stop by asking the defendant to exit the vehicle. Because the officer's conduct did not extend the traffic stop, no additional showing of reasonable suspicion was required.

State v. Malachi , ___ N.C. App. ___, 825 S.E.2d 666 (Mar. 5, 2019)

In this possession of a firearm by a felon case, the trial court did not err by allowing evidence of a handgun a police officer removed from the defendant's waistband during a lawful frisk that occurred after a lawful stop. Police received an anonymous 911 call stating that an African-American male wearing a red shirt and black pants had just placed a handgun in the waistband of his pants while at a specified gas station. Officer Clark responded to the scene and saw 6 to 8 people in the parking lot, including a person who matched the 911 call description, later identified as the defendant. As Clark got out of his car, the defendant looked directly at him, "bladed" away and started to walk away. Clark and a second officer grabbed the defendant. After Clark placed the defendant in handcuffs and told him that he was not under arrest, the second officer frisked the defendant and found a revolver in his waistband. The defendant unsuccessfully moved to suppress evidence of the gun at trial. The court held that the trial court did not err by denying the motion to suppress. It began by holding that the anonymous tip was insufficient by itself to provide reasonable suspicion for the stop. However, here there was additional evidence. Specifically, as Clark exited his car, the defendant turned his body in such a way as to prevent the officer from seeing a weapon. The officer testified that the type of turn the defendant executed was known as "blading," which is "[w]hen you have a gun on your hip you tend to blade it away from an individual." Additionally the defendant began to move away. And, as the officers approached the defendant, the defendant did not inform them that he was lawfully armed. Under the totality of the circumstances, these facts support reasonable suspicion.

The court then held that the frisk was proper. In order for a frisk to be proper officers must have reasonable suspicion that the defendant was armed and dangerous. Based on the facts supporting a finding of reasonable suspicion with respect to the stop, the officers had reasonable suspicion to believe that the defendant was armed. This, coupled with his struggle during the

stop and continued failure to inform officers that he was armed, supported a finding that there was reasonable suspicion that the defendant was armed and dangerous.

State v. Augustin, ___ N.C. App. ___, 824 S.E.2d 854 (Feb. 19, 2019)

In this carrying a concealed handgun case, the trial court properly denied the defendant's motion to suppress where the officer had reasonable suspicion to seize the defendant. While patrolling a high crime area, the officer saw the defendant and Ariel Peterson walking on a sidewalk. Aware of multiple recent crimes in the area, the officer stopped his car and approached the men. The officer had prior interactions with the defendant and knew he lived some distance away. The officer asked the men for their names. Peterson initially gave a false name; the defendant did not. The officer asked them where they were coming from and where they were going. Both gave vague answers; they claimed to have been at Peterson's girlfriend's house and were walking back to the defendant's home, but were unable or unwilling to say where the girlfriend lived. When the defendant asked the officer for a ride to his house, the officer agreed and the three walked to the patrol car. The officer informed the two that police procedure required him to search them before entering the car. As the officer began to frisk Peterson, Peterson ran away. The officer turned to the defendant, who had begun stepping away. Believing the defendant was about to run away, the officer grabbed the defendant's shoulders, placed the defendant on the ground, and handcuffed him. As the officer helped the defendant up, he saw that a gun had fallen out of the defendant's waistband. Before the trial court, the defendant unsuccessfully moved to suppress discovery of the gun. He pleaded guilty, reserving his right to appeal the denial of his suppression motion. On appeal, the court rejected the defendant's argument that he was unlawfully seized when the officer discovered the gun. Agreeing with the defendant that exercising a constitutional right to leave a consensual encounter should not be used against a defendant "to tip the scale towards reasonable suspicion," the court noted that the manner in which a defendant exercises this right "could, in some cases, be used to tip the scale." However, the court found that it need not determine whether it was appropriate for the trial court to consider the fact that the defendant was backing away in its reasonable suspicion calculus. Rather, the trial court's findings regarding the men's behavior before the defendant backed away from the officer were sufficient to give rise to reasonable suspicion. The defendant was in an area where a "spree of crime" had occurred; Peterson lied about his name; they both gave vague answers about where they were coming from; and Peterson ran away while being searched. This evidence supports the trial court's conclusion that the officer had reasonable suspicion to seize the defendant.

State v. Cole, ___ N.C. App. ___, 822 S.E.2d 456 (Nov. 20, 2018)

In this DWI case, the trial court properly denied the defendant's motion to suppress evidence discovered after a roadside breath test. Specifically, the defendant asserted that the results of roadside sobriety tests and intoxilyzer test should be suppressed as fruit of the poisonous tree of an illegal search and seizure caused by an unlawfully compelled roadside breath test. The court disagreed. An officer observed the defendant exit a bar after midnight and swerve several times within his driving lane; after the initial traffic stop—the legality of which the defendant did not challenge—the officer smelled a strong odor of alcohol, the defendant presented his debit card when asked for his driver's license, and the defendant initially denied but later admitted drinking alcohol. These facts were sufficient to establish reasonable suspicion to justify prolonging the initial stop to investigate the defendant's potential impairment, including administering the

roadside sobriety tests. These findings, in conjunction with findings regarding the defendant's performance on the roadside sobriety tests supported a conclusion that the officer had probable cause to arrest the defendant for DWI, justifying the later intoxilyzer test. Therefore, the trial court properly refused to suppress the results of the roadside sobriety tests and the intoxilyzer test.

State v. McNeil, ___ N.C. App. ___, 822 S.E.2d 317 (Nov. 20, 2018), *temp. stay allowed*, ___ N.C. ___, 825 S.E.2d 641 (Apr. 17, 2019)

In this DWI case, an officer did not unduly prolong a traffic stop. While on patrol, officers ran a vehicle's tag and learned that the registered owner was a male with a suspended license. An officer stopped the vehicle based on the suspicion that it was being driven without a valid license. The officer who approached the vehicle immediately saw that the defendant, a female, was in the driver's seat and that a female passenger was next to her. Although the officer determined that the owner was not driving the vehicle, the defendant ended up charged with DWI. On appeal, the defendant argued that while the officers may have had reasonable suspicion to stop the vehicle, the stop became unlawful when they verified that the male owner was not driving the vehicle. The court disagreed, stating:

Defendant's argument is based upon a basic erroneous assumption: that a police officer can discern the gender of a driver from a distance based simply upon outward appearance. Not all men wear stereotypical "male" hairstyles nor do they all wear "male" clothing. The driver's license includes a physical description of the driver, including "sex." Until [the] Officer . . . had seen Defendant's driver's license, he had not confirmed that the person driving the car was female and not its owner. While he was waiting for her to find her license, he noticed her difficulty with her wallet, the odor of alcohol, and her slurred speech.

Additionally, the time needed to complete a stop includes the time for ordinary inquiries incident to the stop, including checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the vehicle's registration and proof of insurance. The officer's mission upon stopping the vehicle included talking with the defendant to inform her of the basis for the stop, asking for her driver's license, and checking that the vehicle's registration and insurance had not expired. While the officer was pursuing these tasks, the defendant avoided rolling her window all the way down and repeatedly fumbled through cards trying to find her license. Additionally because she was mumbling and had a slight slur in her speech, the officer leaned towards the window where he smelled an odor of alcohol. This evidence gave him reasonable suspicion to believe that the defendant was intoxicated. Because he developed this reasonable suspicion while completing the original mission of the stop, no fourth amendment violation occurred.

Arrests

Nieves v. Bartlett, 587 U.S. ___, ___ S. Ct. ___ (May 28, 2019)

The Court reversed and remanded a decision by the Ninth Circuit, holding that because police officers had probable cause to arrest Respondent Bartlett, his First Amendment retaliatory arrest claim fails as a matter of law. Russell Bartlett sued petitioners—two police officers—alleging

that they retaliated against him for his protected First Amendment speech by arresting him for disorderly conduct and resisting arrest. The Court held that probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment.

State v. Daniel, ___ N.C. ___, ___ S.E.2d ___ (May 10, 2019)

The court per curiam affirmed a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 814 S.E.2d 618 (2018), holding that because an officer had probable cause to arrest the defendant for impaired driving, the trial court erred by granting the defendant's motion to suppress. Here, the trooper "clocked" the defendant traveling at 80 miles per hour in a 65 mile per hour zone on a highway. As the trooper approached the defendant's vehicle, the defendant abruptly moved from the left lane of the highway into the right lane, nearly striking another vehicle before stopping on the shoulder. During the stop, the trooper noticed a moderate odor of alcohol emanating from the defendant and observed an open 24-ounce container of beer in the cup-holder next to the driver's seat. The defendant told the trooper that he had just purchased the beer, and was drinking it while driving down the highway. The defendant admitted that he had been drinking heavily several hours before the encounter with the trooper. The trooper did not have the defendant perform any field sobriety tests but did ask the defendant to submit to two Alco-sensor tests, both of which yielded positive results for alcohol. The Court of Appeals noted that while swerving alone does not give rise to probable cause, additional factors creating dangerous circumstances may, as was the case here.

State v. Jackson, ___ N.C. App. ___, 821 S.E.2d 656 (Nov. 6, 2018)

In this case involving drug charges and a charge of driving without an operator's license, the court declined to address the defendant's argument that the officer lacked reasonable suspicion to prolong the traffic stop and search the defendant, finding that the search was justified as a search incident to arrest for two offenses for which the officer had probable cause to arrest. An officer was on the lookout for a gold Kia sedan in connection with an earlier incident at the Green Valley Inn. As the officer was monitoring an intersection, he saw a Kia sedan drive through a red light. The officer conducted a traffic stop. The officer approached the vehicle and immediately saw an open beer container in the center console. The officer asked the defendant for his license and registration. The defendant said he did not have a license but handed over a Pennsylvania ID card, with a shaky hand. After noticing the defendant's red, glassy eyes and detecting an odor of alcohol from the vehicle, the officer asked the defendant to exit the car so that he could search it and have the defendant perform sobriety tests. Before searching the vehicle the officer frisked the defendant. As the officer returned to his police car to check the defendant's license for outstanding warrants, the defendant spontaneously handed the officer his car keys. Because it was cold, the officer allowed the defendant to sit in the back of the patrol car as he ran the license and warrant checks. The officer determined that the defendant's license was expired, the vehicle was not registered to the defendant, and the defendant had no outstanding warrants. While sitting in the officer's vehicle, the defendant voluntarily made a variety of spontaneous statements and asked the officer if he could drive him back to the Green Valley Inn after the traffic stop completed. After doing the license and warrants check, the officer conducted standardized field sobriety tests, which were performed to his satisfaction. He then asked for and got consent to search the defendant, finding powder and crack cocaine in the defendant's pockets.

On appeal, the defendant argued that the officer lacked reasonable suspicion to extend the stop after determining that the defendant was not intoxicated. The court however concluded that the officer did not need reasonable suspicion to extend the stop; the court reasoned that because the officer had probable cause to justify arrest, the search was justified as a search incident to arrest. Specifically, the officer's discovery of the open container and that the defendant was driving without an operator's license gave the officer probable cause to arrest. An officer may conduct a warrantless search incident to a lawful arrest; a search is incident to an arrest even if conducted prior to the formal arrest.

For similar reasons, the court rejected the defendant's argument that his consent to search was invalid because it was given while the stop was unduly prolonged. The court reasoned that because probable cause existed for the arrest and the search was justified as a search incident to an arrest, the defendant's consent was unnecessary.

The court went on to hold that even if the search was unlawful, discovery of the contraband on the defendant's person was inevitable. Here, the officer testified that he would not have allowed the defendant to drive away from the traffic stop because he was not licensed to operate a motor vehicle. The officer testified that he would have searched the defendant before giving him a ride or transporting him to jail because of his practice of searching everyone transported in his patrol car. Also, the defendant repeatedly asked the officer if he would give him a ride back to the Green Valley Inn. Thus, the State established that the cocaine would have been inevitably discovered because the officer would have searched the defendant for weapons or contraband before transporting him to another location or jail.

Identification of Defendant

State v. Pless, ___ N.C. App. ___, 822 S.E.2d 725 (Dec. 18, 2018)

In this drug case, the trial court did not err by denying the defendant's motion to suppress evidence regarding in-court identifications on grounds that they were unreliable, tainted by an impermissibly suggestive DMV photograph. Detective Jurney conducted an undercover narcotics purchase from a man known as Junior, who arrived at the location in a gold Lexus. A surveillance team, including Sgt. Walker witnessed the transaction. Junior's true identity was unknown at the time but Walker obtained the defendant's name from a confidential informant. Several days after the transaction, Walker obtained a photograph of the defendant from the DMV and showed it to Jurney. Walker testified that he had seen the defendant on another occasion driving the same vehicle with the same license plate number as the one used during the drug transaction. At trial Jurney and Walker identified the defendant as the person who sold the drugs in the undercover purchase. The defendant was convicted and he appealed.

On appeal the defendant argued that the trial court erred by failing to address whether the identification was impermissibly suggestive. The court found that although the trial court did not make an explicit conclusion of law that the identification procedure was not impermissibly suggestive it is clear that the trial court implicitly so concluded. The court found the defendant's cited cases distinguishable, noting in part that there is no absolute prohibition on using a single photograph for an identification. The court noted that even if the trial court failed to conclude that the identification procedure was not impermissibly suggestive, it did not err in its alternative conclusion that the identification was reliable under the totality of the circumstances. It concluded:

While we recognize that it is the better practice to use multiple photos in a photo identification procedure, the trial court did not err in its conclusion that, in this case, the use of a single photo was not impermissibly suggestive. And even if the procedure was impermissibly suggestive, the trial court's findings of fact also support a conclusion that the procedure did not create "a substantial likelihood of irreparable misidentification." The trial court's findings of fact in this order are supported by competent evidence, and these factual findings support the trial court's ultimate conclusions of law.

State v. Mitchell, ___ N.C. App. ___, 822 S.E.2d 51 (Nov. 6, 2018)

The trial court properly denied the defendant's motion to suppress a victim's identification of the defendant as the perpetrator. The defendant was charged with armed robbery of a Game Stop store and threatening use of a firearm against a store employee, Cintron, during the robbery. Although Cintron failed to identify an alleged perpetrator in a photographic lineup shown to him two days after the robbery, he later identified the defendant when shown a single still-frame photograph obtained from the store's surveillance video. Cintron then identified the defendant as the perpetrator in the same photographic lineup shown to him two days after the robbery and again in four close-up, post-arrest photographs of the defendant showing his neck tattoos. The defendant unsuccessfully moved to suppress Cintron's in-court and out-of-court identifications.

On appeal the defendant argued that the State conducted an impermissibly suggestive pretrial identification procedure that created a substantial likelihood of misidentification. The court rejected that argument, finding that the trial court's challenged findings and conclusions—that the authorities substantially followed statutory and police department policies in each photo lineup and that the substance of any deviation from those policies revolved around the defendant's neck tattoos—are supported by the evidence. The defendant fit the victim's initial description of the perpetrator, which emphasized a tattoo of an Asian symbol on the left side of his neck and notable forehead creases. Based on this description, the victim had the ability to identify the defendant both in court and in photographs reflecting a close-up view of the defendant's tattoos, and he specifically testified to his ability to recognize the defendant as the perpetrator independent of any lineup or photo he had been shown. Thus, the trial court's ultimate conclusion—that the procedures did not give rise to a substantial likelihood that the defendant was mistakenly identified—is supported by the totality of the circumstances indicating that the identification was sufficiently reliable.

State v. Juene, ___ N.C. App. ___, 823 S.E.2d 889 (Jan. 15, 2019)

In this case involving armed robbery and other convictions, the trial court did not err by denying the defendant's motion to suppress evidence which asserted that the pre-trial identification was impermissibly suggestive. Three victims were robbed in a mall parking lot by three assailants. The defendant was apprehended and identified by the victims as one of the perpetrators. The defendant unsuccessfully moved to suppress the show-up identification made by the victims, was convicted and appealed. On appeal the defendant argued that the show-up identification should be suppressed because it was impermissibly suggestive. Before the robbery occurred the defendant and the other perpetrators followed the victims around the mall and the parking lot; the defendant was 2 feet from one of the victims at the time of the robbery; the show-up occurred approximately 15 minutes after the crime; before the show-up the victims gave a physical description of the defendant to law enforcement; all three victims were seated together in the back of a police car during the show-up; the defendant and the other perpetrators were

handcuffed during the show-up and standing in a well-lit area of the parking lot in front of the police car; the defendant matched the description given by the victims; upon approaching the area where the defendant and the others were detained, all three victims spontaneously shouted, “That’s him, that’s him”; and all of the victims identified the defendant in court. Although these procedures “were not perfect,” there was not a substantial likelihood of misidentification in light of the reliability factors surrounding the crime and the identification. “Even though the show-up may have been suggestive, it did not rise to the level of irreparable misidentification.”

Interrogation & Confession

State v. Johnson , ___ N.C. ___, 821 S.E.2d 822 (Dec. 21, 2018)

On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 625 (2017), in this first-degree murder case the court held that the defendant’s statements to officers were voluntary. The defendant voluntarily met with detectives at the police station in connection with a robbery and murder. He was questioned in an interview room for just under five hours before being placed under arrest and warned of his rights as required by Miranda. After being advised of his rights, the defendant signed a written waiver of those rights and made inculpatory statements. He was charged with first-degree felony murder. At trial he sought to suppress his statements to officers, arguing that he was subjected to custodial interrogation before being informed of his rights as required by Miranda, and that his inculpatory statements were made in response to improper statements by detectives inducing a hope that his confession would benefit him. The trial court denied his motion and he was convicted. On appeal the Court of Appeals concluded that the defendant’s inculpatory statements to law enforcement were given under the influence of fear or hope caused by the interrogating officers’ statements and actions and were therefore involuntarily made. The unanimous Court of Appeals panel held that the confession should have been suppressed but concluded the error was harmless beyond a reasonable doubt due to the overwhelming evidence of defendant’s guilt. The Supreme Court held that the Court of Appeals erred in condensing the Miranda and voluntariness inquiries into one; that the defendant did not preserve the argument that officers employed the “question first, warn later” technique to obtain his confession in violation of Miranda and Seibert; that the trial court’s conclusion that the requirements of Miranda were met is adequately supported by its findings of fact, as is its conclusion that defendant’s statements to officers were voluntarily made. The court thus modified and affirmed the decision of the Court of Appeals.

State v. Gamez , ___ N.C. App. ___, 824 S.E.2d 904 (Mar. 19, 2019)

Considering the circumstances under which Miranda warnings are required when a member of the Armed Forces is questioned by a superior officer about involvement in the commission of a crime, the court concluded that the trial court’s order denying the defendant’s motion to suppress statements to the officer lacked findings of fact on key issues and that the trial court did not fully apply the correct legal standard; it held however that the trial court properly denied a motion to suppress statements in a jail letter. The defendant’s motion to suppress pertained, in relevant part, to two items of inculpatory evidence: an oral statement made to Sgt. Schlegelmilch, a non-commissioned first sergeant in the third brigade of the United States Army, on 18 August 2011; and written statements contained in a letter sent by the defendant from jail to Sgt. Schlegelmilch.

(1) As to the oral statement made to Schlegelmilch, the court vacated and remanded, finding that the trial court did not make factual findings on several issues integral to the question of whether a Miranda violation had occurred and it failed to fully apply the correct legal standard applicable to the issue. The defendant argued that because he was interrogated by a superior officer who had the power to arrest him, a custodial interrogation occurred. The State countered that no custodial arrest can occur unless the soldier is questioned by a commissioned officer with independent arrest authority. Citing federal law, the court noted that a commanding officer may delegate arrest authority to a non-commissioned officer. When this has occurred, the non-commissioned officer's interrogation of the soldier can trigger the need for Miranda warnings. Here, it is undisputed that Schlegelmilch was a non-commissioned officer. Therefore to resolve the issue of whether the defendant was entitled to Miranda warnings, it is necessary to determine whether she had previously been delegated authority to arrest the defendant by a commanding officer as authorized by federal law. However, the trial court did not make any findings of fact as to whether such a delegation occurred. Additionally, the trial court's order suggests that it failed to understand the potential applicability of Miranda if Schlegelmilch had, in fact, been delegated authority to arrest and then proceeded to question him under circumstances amounting to custodial interrogation. Nor, the court continued, did the trial court make findings about the specific degree to which the defendant's liberty had been restricted when he made the statements. The court thus vacated the portion of the trial court's suppression order relating to the statements and remanded for additional findings of fact and conclusions of law, along with a new hearing if necessary.

(2) The trial court properly denied the defendant's motion to suppress the contents of the jail letter. While the defendant was being held in jail after his arrest, the decision was made to initiate military discharge proceedings against him. When the defendant was delivered a notice of separation, he signed a memorandum indicating that he would not contest the proceedings. Thereafter and while in jail, he exchanged letters with Schlegelmilch. In the reply letter at issue, the defendant gave an account of the victim's death, including inculpatory statements. The defendant argued that the letter should have been suppressed because it was a response to a letter from Schlegelmilch asking the defendant to explain how the victim had died and thus constituted a custodial interrogation. The court rejected this argument, finding the circumstances under which the letter was written did not implicate Miranda. First, it noted the defendant's failure to cite any cases supporting the proposition that questioning conducted through an exchange of letters can constitute a custodial interrogation for purposes of Miranda, nor did the court's own research reveal any legal authority for that proposition. Furthermore, the court noted, when the defendant responded to Schlegelmilch's letter, he was in the midst of being discharged from the military, was not contesting those proceedings, and thus the circumstances "simply do not amount to the type of coercive environment that Miranda was intended to address." The court thus affirmed the trial court's denial of the motion to suppress with respect to the letter.

Search Warrants

State v. Frederick, ___ N.C. ___, 819 S.E.2d 346 (Oct. 26, 2018)

On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 814 S.E.2d 855 (2018), the court per curiam affirmed. The Court of Appeals had held, over a dissent, that the search warrant of the defendant's residence was supported by probable cause. The

warrant was supported by the following information: A detective received information from a reliable confidential source regarding a mid-level drug dealer who sold MDMA, heroin, and crystal methamphetamine. The source had previously provided truthful information that the detective could corroborate, and the source was familiar with the packaging and sale of the drugs in question. The source had assisted the detective with the purchase of MDMA one week prior to the issuance of the search warrant. For that purchase, the detective gave the source money to purchase the drugs. The source met a middleman with whom he then traveled to the defendant's residence. The detective saw the middleman enter the residence and return to the source after approximately two minutes. The detective found this conduct indicative of drug trafficking activity based on his training and experience. The source then met with the detective, and provided him with MDMA. A subsequent purchase of drugs occurred 72 hours prior to the issuance of the search warrant. The details of that transaction were very similar, except that the officer also saw two males enter the residence and exit approximately two minutes later, conduct he believed to be indicative of drug trafficking activity. The Court of Appeals held that this was sufficient to establish probable cause.

State v. Parks, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019)

The trial court did not err by denying the defendant's motion to suppress which asserted that the search warrant in question was issued based on an affidavit containing false and misleading information. The court concluded that although not all of the statements in the affidavit are "entirely accurate," the evidence supports some version of the challenged statements and the defendant has not met his burden to establish by a preponderance that the affiant made the statements in reckless disregard to the truth or in bad faith. Thus, the trial court did not err in denying the defendant's motion to suppress.

Searches of Premises

State v. Piland , ___ N.C. App. ___, 822 S.E.2d 876 (Dec. 18, 2018)

In this drug case, the trial court did not err by denying the defendant's motion to suppress. After receiving a tip that the defendant was growing marijuana at his home, officers drove there for a knock and talk. They pulled into the driveway and parked in front of the defendant's car, which was parked at the far end of the driveway, beside the home. The garage was located immediately to the left of the driveway. An officer went to the front door to knock, while two detectives remained by the garage. A strong odor of marijuana was coming from the garage area. On the defendant's front door was a sign reading "inquiries" with his phone number, and a second sign reading "warning" with a citation to several statutes. As soon as the defendant opened the front door, an officer smelled marijuana. The officer decided to maintain the residence pending issuance of a search warrant. After the warrant was obtained, a search revealed drugs and drug paraphernalia.

The court began by rejecting the defendant's argument that the officers engaged in an unconstitutional search and seizure by being present in his driveway and lingering by his garage. Officers conducting a knock and talk can lawfully approach a home so long as they remain within the permissible scope afforded by the knock and talk. Here, given the configuration of the property any private citizen wishing to knock on the defendant's front door would drive into the driveway, get out, walk between the car and the path so as to stand next to the garage, and continue on the path to the front porch. Therefore, the officers' conduct, in pulling into the

driveway by the garage, getting out of their car, and standing between the car and the garage, was permitted. Additionally the officers were allowed to linger by the garage while their colleague approached the front door. Thus, “the officers’ lingering by the garage was justified and did not constitute a search under the Fourth Amendment.”

The court went hold that by failing to raise the issue at the trial level, the defendant failed to preserve his argument that he revoked the officers’ implied license through his signage and that by ignoring this written revocation, the officers of violated the fourth amendment.

State v. Mitchell, ___ N.C. App. ___, 822 S.E.2d 51 (Nov. 6, 2018)

Because officers had permission from an occupant to enter a home where incriminating evidence was discovered, the subsequent search of the home was valid. Officers responded to a report of domestic violence at a home the defendant shared with his girlfriend Kristy Fink. A 911 call had reported the domestic violence incident and asserted that Fink suspected the defendant of being involved in an armed robbery of a Game Stop store a few days earlier. Officers knocked at the front door and the defendant and Fink answered and exited the home together. Pursuant to Police Department policy of separating parties on domestic calls, the officers separated the two for questioning. Officer Saine remained outside with the defendant, while Officer Francisco entered the home with Fink after being authorized by her to do so. Fink confirmed that the defendant assaulted her and corroborated the 911 caller’s information, telling Francisco that the incident began when she confronted the defendant about the robbery. Fink then led Francisco to a bedroom she shared with the defendant and showed him potentially incriminating evidence she had found prior to the incident. This included money and clothing matching the description of the robbery suspect’s clothing. When Saine entered the home at the defendant’s request for warmer clothing, Fink repeated to Saine what she had told Francisco. Officers got a search warrant and searched the home. The defendant was charged with armed robbery of the Game Stop store. The defendant unsuccessfully filed a motion to suppress evidence obtained from the search. The defendant was convicted and appealed.

On appeal the defendant argued that because the officer’s initial entry into the home was illegal, the fruits of the subsequent search should have been suppressed. The court disagreed. Here, the defendant never objected to the officer’s entry into his home. Thus, the matter was not controlled by *Georgia v. Randolph*, 547 U.S. 103 (2006), in which one spouse consented to the search and the other refused to give consent. The court further rejected the defendant’s argument that the officer’s entry into the home to investigate the allegations of domestic violence was mere subterfuge to investigate the robbery.

Criminal Offenses

Participants in Crime

Acting in Concert

State v. Guy, ___ N.C. App. ___, 822 S.E.2d 66 (Nov. 6, 2018)

(1) The trial court properly denied the defendant’s motion to dismiss a charge of armed robbery where the evidence showed that he acted in concert with the perpetrator. Although the defendant was not identified as being at the crime scene, it would have been reasonable for the jury to infer that the defendant acted in concert to commit the crime. A crime scene witness saw a car fly by him, hit a speed bump and blow out a tire. The Sheriff’s Department reported a silver car was involved in an armed robbery involving 3 to 4 suspects. An officer testified that less than one

minute after receiving the 911 communication, she found the defendant changing a flat tire on his vehicle, along with two other individuals, less than a 1/4 mile from the crime scene. The victim's debit card--the item stolen in the robbery--was found close to the defendant's vehicle. Other items identified by the victim—a mask, snubnosed revolver, and red clothing—were located or recovered at or near the defendant's vehicle.

(2) For similar reasons the court held that the trial court did not commit plain error by instructing the jury on acting in concert.

State v. Bennett, ___ N.C. App. ___, 821 S.E.2d 476 (Oct. 16, 2018), *review allowed*, ___ N.C. ___, 824 S.E.2d 405 (Mar. 27, 2019)

In this drug case, the trial court rejected the defendant's argument that the evidence was insufficient to support an acting in concert instruction. Reviewing the evidence, the court rejected the defendant's argument that it showed only mere presence.

Aiding & Abetting

State v. Bauguss, ___ N.C. App. ___, ___ S.E. 2d ___ (Apr. 16, 2019)

In this child sexual assault case, the trial court did not err by denying the defendant's motion to dismiss five statutory sexual offense charges based on a theory of aiding and abetting. The State's theory was that the defendant encouraged the victim's mother to engage in sexual activity with the victim, and that the victim's mother did this to "bait" the defendant into a relationship with her. On appeal the defendant argued that the evidence was insufficient to show that he encouraged or instructed the victim's mother to perform cunnilingus or digitally penetrate the victim, or that any statement by him caused the victim's mother to perform the sexual acts. The court disagreed. The State's evidence included Facebook conversations between the victim's mother and the defendant. The defendant argued that these messages were fantasies and that even if taken at face value, were devoid of any instruction or encouragement to the victim's mother to perform sexual acts, specifically cunnilingus or penetration of the victim. The court rejected this argument, concluding that an explicit instruction to engage in sexual activity is not required. Here, the evidence showed that the defendant knew that the victim's mother wanted a relationship with him and that he believed she was using the victim to try to initiate that relationship. Numerous messages between the defendant and the victim's mother support a reasonable inference of a plan between them to engage in sexual acts with the victim. The victim's mother testified that she described sexual acts she performed on the victim to the defendant because he told her he liked to hear about them. The defendant argued that this description of sexual acts after the fact is insufficient to support a finding that he knew of or about these acts prior to their occurrence, a requirement for aiding and abetting. However, the court concluded, the record supports an inference that he encouraged the victim's mother to perform the acts. Among other things, the defendant specified nude photos that he wanted of the victim and initiated an idea of sexual "play" between the victim's mother and the victim. After the victim's mother videotaped her act of performing cunnilingus on the victim and send it to the defendant, the defendant replied that he wanted to engage in that act. After he requested a video of the victim "playing with it," the victim's mother made a video of her rubbing the victim's vagina. This evidence was sufficient to support an inference that the defendant aided and abetted in the victim's mother's sexual offenses against the victim.

General Crimes Attempt

State v. Melton, ___ N.C. ___, 821 S.E.2d 424 (Dec. 7, 2018)

On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 392 (2017), the court reversed, holding that the evidence was insufficient to sustain a conviction for attempted murder. The evidence showed that the defendant solicited an undercover officer—who he thought to be a hired killer—to kill his former wife. He gave the officer \$2,500 as an initial payment, provided the officer details necessary to complete the killing, and helped the officer plan how to get his former wife alone and how to kill her out of the presence of their daughter. The defendant was arrested after he left his meeting with the officer; he was charged—and later convicted—of attempted murder and solicitation to commit murder.

The court concluded that while the evidence was sufficient to show solicitation, it “fell short of showing the required overt acts for attempted first-degree murder.” Specifically, none of the defendant’s preparatory acts “amount to proof of overt acts amounting to attempt under our law.” In so ruling, the court determined that the Court of Appeals inappropriately looked to decisions from other jurisdictions to conclude that “although mere solicitation is insufficient to constitute attempt, specific acts taken to complete a murder-for-hire, such as those taken by [defendant] here, can satisfy the elements of attempted murder,” where the law regarding attempt in each of those jurisdictions is materially different from North Carolina law. Justice Morgan dissented, joined by Chief Justice Martin and Justice Newby.

State v. Bauguss, ___ N.C. App. ___, ___ S.E. 2d ___ (Apr. 16, 2019)

In this child sexual assault case, trial court did not err by denying the defendant’s motion to dismiss two charges of attempted statutory sex offense of a child by an adult. On appeal, the defendant argued that there was insufficient evidence of his intent to engage in a sexual act with the victim and of an overt act. The court disagreed. The case involved a scenario where the victim’s mother engaged in sexual acts with the victim to entice the defendant into a relationship with her. The first conviction related to the defendant’s attempted statutory sex offense with the victim in a vehicle, which occurred on or prior to 19 July 2013. While the victim sat between the defendant and her mother, the defendant tried to put his hands up the victim’s skirt, between her legs. The victim pushed the defendant away and moved closer to her mother. The defendant asserted that an intention to perform a sexual act cannot be inferred from this action. The court disagreed, noting, among other things, evidence that the defendant’s phone contained a video and photograph depicting the victim nude; both items were created prior to the incident in question. Additionally, the defendant admitted that the photo aroused him. Moreover, conversations of a sexual nature involving the victim occurred between the defendant and the victim’s mother on 9 July 2013. Messages of a sexual nature were also sent on 15 July 2013, including the defendant’s inquiries about sexual acts between the victim’s mother and the victim, and a request for explicit pictures of the victim. Additional communications indicated that the defendant wanted to see the victim in person. In a conversation on 19 July 2013, the defendant indicated that he had feelings for the victim and expressed the desire to “try something” sexual with the victim. In his interview with law enforcement, the defendant stated he would not have engaged in intercourse with the victim but would have played with her vagina by licking and rubbing it. This evidence

supports a reasonable inference that the defendant attempted to engage in a sexual act with the victim when he placed his hands between her legs and tried to put his hand up her skirt. The evidence also supports the conclusion that his act was an overt act that exceeded mere preparation.

The second conviction related to the defendant's attempted statutory sex offense with the victim in a home. The court upheld this conviction, over a dissent. This incident occurred on 27 July 2013 when the defendant instructed the victim's mother to have the victim wear a dress without underwear because he was coming over to visit. The defendant argued that the evidence was insufficient to show his intent to engage in a sexual act with the victim or an overt act in furtherance of that intention. The court disagreed. The evidence showed that the victim's mother and the defendant had an ongoing agreement and plan for the victim's mother to teach the victim to be sexually active so that the defendant could perform sexual acts with her. Evidence showed that the victim's mother sent the defendant numerous photos and at least one video of the victim, including one that showed the victim's mother performing cunnilingus on the victim on 26 July 2013. An exchange took place on 27 July 2013 in which the defendant indicated his desire to engage in that activity with the victim, and her mother's desire to facilitate it. Specifically the defendant asked the victim's mother whether she could get the victim to put on a dress without underwear because he was coming over to their home. Based on the context in which the defendant instructed the victim's mother to have the victim wear a dress without underwear, there was substantial evidence of his intent to commit a sex offense against the victim. Furthermore, the defendant took overt actions to achieve his intention. The victim's mother admitted that she and the defendant planned to train the victim for sexual acts with the defendant, and the defendant's Facebook messages to the victim's mother and his interview with law enforcement show that he agreed to, encouraged, and participated in that plan. The defendant's instruction to dress the victim without underwear was more than "mere words" because it was a step in his scheme to groom the victim for sexual activity, as was other activity noted by the court.

Homicide

State v. Steen , ___ N.C. App. ___, 826 S.E.2d 478 (Mar. 19, 2019)

The trial court did not err by charging the jury that the defendant's hands and arms could constitute deadly weapons for purposes of the felony murder rule based on the underlying felony of attempted murder with a deadly weapon. The court has repeatedly held that hands, arms, and feet can constitute deadly weapons depending on the manner in which they are used and the relative size and conditions of the parties. The court rejected the defendant's argument that hands and arms cannot constitute deadly weapons with respect to an attempted homicide of an adult. Here, the defendant was 40 years old, 5 feet, 11 inches tall, and weighed 210 pounds. The victim was 62 years old, 5 feet, 4 inches tall, and weighed 145 pounds. The assailant engaged in a violent attack on the victim while using his hands and arms that resulted in extensive injuries, including multiple rib fractures and a collapsed lung. The question of whether the defendant's hands and arms constituted deadly weapons was properly submitted to the jury. The court went on to reject the defendant's argument that a weapon must be "external" in order to constitute a deadly weapon for purposes of the felony murder rule.

State v. Schmieder, ___ N.C. App. ___, ___ S.E. 2d ___ (Apr. 16, 2019)

In this case involving a conviction for second-degree murder following a fatal motor vehicle accident, the evidence was sufficient to establish malice. Evidence of the defendant's prior traffic-related convictions are admissible to prove malice in a second-degree murder prosecution based on a vehicular homicide. Here, there was evidence that the defendant knew his license was revoked at the time of the accident and that he had a nearly two-decade-long history of prior driving convictions including multiple speeding charges, reckless driving, illegal passing, and failure to reduce speed. Additionally, two witnesses testified that the defendant was driving above the speed limit, following too close to see around the cars in front of him, and passing across a double yellow line without using turn signals. This was sufficient to establish malice.

Assaults

Serious Bodily Injury

State v. Fields, ___ N.C. App. ___, ___ S.E. 2d ___ (Apr. 16, 2019), *temp. stay allowed*, ___ N.C. ___, 826 S.E.2d 458 (May 6, 2019)

In an assault inflicting serious bodily injury case involving the defendant's assault on a transgender woman, A.R., the evidence was sufficient to establish that serious bodily injury occurred. A.R.'s injury required stitches, pain medication, time off from work, and modified duties once she resumed work. Her pain lasted for as much as six months, and her doctor described it as "significantly painful." This evidence tends to show a "permanent or protracted condition that causes extreme pain." Moreover, the assault left A.R. with a significant, jagged scar, which would support a finding of "serious permanent disfigurement."

State v. Griffin, ___ N.C. App. ___, 826 S.E.2d 253 (Mar. 19, 2019)

The evidence was sufficient to support a conviction for felony assault inflicting serious bodily injury. On appeal the defendant challenged only the element of serious bodily injury. As a result of the assault, the victim suffered from difficulty swallowing, numerous lacerations, a concussion, and severe headaches. The headaches continued at least through the time of trial, four years after the attack. The headaches thus constitute a permanent or protracted condition that causes extreme pain.

Habitual Misdemeanor Assault

State v. Fields, ___ N.C. App. ___, ___ S.E. 2d ___ (Apr. 16, 2019), *temp. stay allowed*, ___ N.C. ___, 826 S.E.2d 458 (May 6, 2019)

The court held, over a dissent, that where a defendant was convicted of both assault inflicting serious bodily injury and assault inflicting serious injury conviction arising from the same assault, the trial court was required to arrest judgment on assault inflicting serious injury and thus it could not support a charge of habitual misdemeanor assault. The habitual misdemeanor assault indictment alleged that the defendant assaulted the victim inflicting serious injury and that he had been convicted of two or more felony or misdemeanor assault offenses. Because the defendant stipulated to the prior assaults, the only issue was whether the defendant committed assault inflicting serious injury under G.S. 14-33(c)(1). That statute begins with the prefatory language "Unless the conduct is covered under some other provision of law providing greater punishment," assault inflicting serious injury is a Class A1 misdemeanor. The jury found the

defendant guilty of assault inflicting serious injury and guilty of assault inflicting serious bodily injury stemming from the same injury. In these circumstances, the conviction for assault inflicting serious injury cannot stand. When the jury returned a verdict of guilty for assault inflicting serious bodily injury, a higher class of assault than the punishment provided for assault inflicting serious injury, the court could not impose judgment for the lesser offense. As such, the trial court then was precluded from entering judgment on the habitual misdemeanor assault charge. Citing precedent, the court concluded that a defendant may not be convicted and sentenced for two substantive assault charges arising from a single assault.

Multiple Convictions

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2019)

A defendant cannot be convicted of two assault offenses (here, assault by pointing a gun and assault with a deadly weapon) based on a single assault. For a defendant to be charged with multiple counts of assault, there must be multiple assaults; this requires evidence of a distinct interruption in the original assault followed by a second assault. Here, the charges arose from actions that occurred in rapid succession without interruption.

Child Abuse

State v. Gonzalez, ___ N.C. App. ___, 823 S.E.2d 886 (Jan. 15, 2019)

Finding itself bound by its prior decision in this felony child abuse case, the Court of Appeals rejected the defendant's argument that the trial court committed plain error by improperly instructing the jury on the definition of the term "sexual act." The defendant was charged under G.S. 14-318.4(a2). That statute does not define the term "sexual act" as used in the proscribed offense. That term is however defined in a separate subchapter of the General Statutes—G.S. 14-27.20(4)--to include various forms of sexual activity but excluding vaginal intercourse. The court noted that in two earlier cases--*State v. Lark*, 198 N.C. App. 82 (2009), and *State v. Stokes*, 216 N.C. App. 529 (2011)--it had applied the definition of sexual act found in G.S. 14-27.20(4) to felony child abuse without explaining why it did so. Then, in *State v. McClamb*, 234 N.C. App. 753 (2014), the court squarely addressed the question of whether the term sexual act as used in the child abuse statute included vaginal intercourse. *McClamb* distinguished *Stokes*, explaining that it only addressed the issue of digital penetration and did not hold that the definition of sexual act in the child abuse statute excludes vaginal intercourse. *McClamb* also distinguished *Lark*, explaining that it was limited to an analysis of fellatio as a sexual act. The court addressed the issue again in *State v. Alonzo*, ___ N.C. App. ___, ___, 819 S.E.2d 584, 587 (2018). That decision noted a conflict between *McClamb*, *Stokes*, and *Lark*, and applying *In re Civil Penalty*, 324 N.C. 373 (1989), declined to follow *McClamb*, concluding that it was bound by the earlier *Lark* decision. Because the state Supreme Court later stayed the mandate in *Alonzo*, that case does not yet have any precedential effect. The court declined the defendant's invitation to adopt the same reasoning applied in *Alonzo* and conclude that *McClamb* is not good law, finding that *In re Civil Penalty* "does not empower us to overrule precedent in this way." It explained:

In re Civil Penalty stands for the proposition that, where a panel of this Court has decided a legal issue, future panels are bound to follow that precedent. This is so even if the previous panel's decision involved narrowing or distinguishing an earlier controlling

precedent—even one from the Supreme Court—as was the case in *In re Civil Penalty*. Importantly, *In re Civil Penalty* does not authorize panels to overrule existing precedent on the basis that it is inconsistent with earlier decisions of this Court.

The court went on to note that the Supreme Court has authorized it to disregard its own precedent in certain rare situations, such as when two lines of irreconcilable precedent developed independently. But this is not such a case. The court concluded that under *In re Civil Penalty* it must follow *McClamb* “because it is the most recent, controlling case addressing the question.” Thus, the trial court’s instructions were not erroneous.

State v. Osborne, ___ N.C. App. ___, 821 S.E.2d 268 (Oct. 2, 2018), *review allowed*, ___ N.C. ___, 822 S.E.2d 639 (Jan. 30, 2019)

The evidence was sufficient to support the defendant’s convictions for misdemeanor child abuse. The charges asserted that the defendant used heroin in the presence of a child. The court rejected the defendant’s argument that the State was required to prove, through chemical analysis, that a substance seized at the premises was in fact heroin. Here, the evidence showed that officers discovered the defendant unconscious from an apparent drug overdose; the defendant admitted to officers that she used heroin before becoming unconscious; and drug paraphernalia consistent with heroin use was found in the hotel room occupied by the defendant and her children. This evidence was sufficient to send the charges to the jury.

Stalking

State v. Shackelford, ___ N.C. App. ___, 825 S.E.2d 689 (Mar. 19, 2019)

Concluding that application of the stalking statute to the defendant violated his constitutional free speech rights, the court vacated the convictions. The defendant was convicted of four counts of felony stalking based primarily on the content of posts made to his Google Plus account. On appeal, the defendant asserted an as-applied challenge to the stalking statute, G.S. 14-277.3A. The court first rejected the State’s argument that the defendant’s Google Plus posts are excluded from First Amendment protection because they constitute “speech that is integral to criminal conduct.” The court reasoned that in light of the statutory language “his speech itself was the crime,” and no additional conduct on his part was needed to support his stalking convictions. Thus, the First Amendment is directly implicated by his prosecution under the statute.

The court next analyzed the defendant’s free speech argument within the framework adopted by the United States Supreme Court. It began by determining that as applied to the defendant, the statute constituted a content-based restriction on speech, and thus that strict scrutiny applies. It went on to hold that application of the statute to the messages contained in the defendant’s social media posts did not satisfy strict scrutiny.

Having determined that the defendant’s posts could not constitutionally form the basis for his convictions, the court separately examined the conduct giving rise to each of the convictions to determine the extent to which each was impermissibly premised on his social media activity. The court vacated his first conviction because it was premised entirely upon five social media posts; no other acts supported this charge. The second and third charges were premised on multiple social media posts and a gift delivery to the victim’s workplace. The gift delivery, unlike the social media posts, constituted non-expressive conduct other than speech and therefore was not protected under the First Amendment. However, because the statute requires a course of

conduct, this single act is insufficient to support a stalking conviction and thus these convictions also must be vacated. The defendant's fourth conviction encompassed several social media posts along with two emails sent by the defendant to the victim's friend. Even if the emails are not entitled to First Amendment protection, this conviction also must be vacated. Here, the jury returned general verdicts, without stating the specific acts forming the basis for each conviction. Because this conviction may have rested on an unconstitutional ground, it must be vacated.

Sexual Assaults & Related Offenses

State v. Heelan, ___ N.C. App. ___, 823 S.E.2d 106 (Dec. 18, 2018)

The evidence was sufficient to support a conviction of attempting to take indecent liberties with a child. The defendant posted a Craigslist advertisement seeking female companionship. An adult police officer posing as a 14-year-old girl named Brittany responded to the ad. The two exchanged over 100 messages over a period of 15 days, during which the defendant sent her numerous sexually explicit messages and formulated a plan for them to meet for sex. When the defendant arrived at the location, he was met by police and arrested. In his car officers found two Viagra pills and a tube of KY jelly. At trial the defendant asserted that he did not believe Britney to be an actual minor, but rather an adult female he was role-playing with to help live out her sexual fantasy of pretending to be an underage female in pursuit of an older man. The State's evidence however indicated that when an officer first interviewed the defendant, he admitted that he believed Britney to be only 14 years old. Additionally in a videotaped custodial interview, the defendant expressed remorse for his action and admitted that he believed Britney to be 14 years old. The defendant was found guilty and appealed. On appeal the defendant argued that the trial court erred by denying his pretrial motion to quash the indecent liberties indictment and his later trial motion to dismiss that charge where the evidence showed that Britney was not an actual child. The court disagreed, finding that the statute covers attempts and here the evidence was sufficient to establish that the defendant attempted to engage in indecent liberties with a child. Specifically, the State presented substantial evidence that the defendant believed Britney to be a minor, with whom he was communicating and sexually pursuing.

State v. Hill, ___ N.C. App. ___, 821 S.E.2d 631 (Oct. 16, 2018)

The trial court did not err by denying the defendant's motion to dismiss 33 counts of statutory rape, two counts of statutory sex offense, and 17 counts of indecent liberties as to victim F.H. At trial, the victim testified to sexual contact during her relationship with the defendant; she stated that she and the defendant had vaginal intercourse at least once a week beginning the day they met, and that she performed oral sex before, during, and after each occurrence of sexual intercourse. Two additional witnesses testified to observing the defendant and the victim have sexual intercourse during this time, one of whom also testified to observing oral sex. The defendant asserted that because the State failed to provide a specific number of times that the two had sexual intercourse and oral sex and how many times the defendant touched the victim in an immoral way, the total number of counts is not supported and his motion to dismiss should have been granted. The court disagreed, concluding that although the victim did not explicitly state the specific number of times that the two had sexual relations, a reasonable jury could find the evidence sufficient to support an inference for the number of counts at issue. Specifically, the victim testified that she and the defendant had sexual intercourse at least once a week for span of seventy-one weeks.

State v. Lopez, ___ N.C. App. ___, 826 S.E.2d 498 (Mar. 19, 2019)

(1) In this second-degree rape case, the trial court did not commit plain error by failing to instruct the jury that lack of consent was an element of rape of a physically helpless person. Because lack of consent is implied in law for this offense, the trial court was not required to instruct the jury that lack of consent was an essential element of the crime.

(2) The evidence was sufficient to support a conviction of second-degree rape. On appeal the defendant argued that there was insufficient evidence showing that the victim was physically helpless. The State presented evidence that the victim consumed sizable portions of alcohol over an extended period of time, was physically ill in a club parking lot, and was unable to remember anything after leaving the club. When the victim returned to the defendant's apartment, she stumbled up the stairs and had to hold onto the stair rail. She woke up the following morning with her skirt pulled up to her waist, her shirt off, and her underwear on the bed. Her vagina was sore and she had a blurry memory of pushing someone off of her. She had no prior sexual relationship with the defendant. Moreover, the defendant's actions following the incident, including his adamant initial denial that anything of a sexual nature occurred and subsequent contradictory admissions, indicate that he knew of his wrongdoings, specifically that the victim was physically helpless. There was sufficient evidence that the victim was physically unable to resist intercourse or to communicate her unwillingness to submit to the intercourse.

State v. Corbett, ___ N.C. App. ___, 824 S.E.2d 875 (Feb. 19, 2019)

The evidence was sufficient to support a conviction for sexual offense of a 13, 14 or 15-year-old. On appeal the defendant argued that the evidence was insufficient as to penetration. At trial the prosecutor asked the victim "How far would you say he was able to get with -- did he actually go between your labia? Do you understand my question?" The victim answered, "Yes." The prosecutor asked again, "Was he able to do that?" The victim responded again, "Yes." Viewing the victim's testimony in the light most favorable to the State, reasonable jurors could have concluded that the State presented sufficient evidence that the defendant penetrated the victim's labia.

State v. Sheridan, ___ N.C. App. ___, 824 S.E.2d 146 (Feb. 5, 2019)

There was sufficient evidence that a parent-child relationship existed between the defendant and the victim to sustain a conviction for sexual offense in a parental role. A parental role includes evidence of emotional trust, disciplinary authority, and supervisory responsibility, with the most significant factor being whether the defendant and the minor "had a relationship based on trust that was analogous to that of a parent and child." The defendant paid for the victim's care and support when she was legally unable to work and maintain herself and made numerous representations of his parental and supervisory role over her. He indicated to police he was her "godfather," represented to a friend that he was trying to help her out and get her enrolled in school, and told his other girlfriends she was his "daughter." Additionally, while there was no indication that the defendant was a friend of the victim's family, he initiated a relationship of trust by approaching the victim with references to his daughter, who was the same age, and being "always" present when the two girls were "hanging out" at his house. This was sufficient evidence of the defendant's exercise of a parental role over the victim.

Kidnapping

State v. Massey, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019)

The trial court did not err by denying the defendant's motion to dismiss a charge of first-degree kidnapping which asserted that the State failed to present substantial evidence that the defendant did not release the victim in a safe place. The defendant held the victim at gunpoint and threatened to shoot him in the back if the victim did not repair his truck. While the victim was examining the truck, the defendant fired a shot into the asphalt near the victim's feet. The defendant then turned his back and fired a second shot into the air. When the defendant turned away, the victim saw an opportunity to run away. The defendant never told or indicated to the victim that he was free to leave, nor gave any indication that he would not shoot the victim if he ran away. The mere act of an armed kidnapper turning his back does not constitute a conscious, willful act on the part of the kidnapper to assure his victim's release in a place of safety.

Thefts, Robbery & Related Offenses

State v. Grandy, ___ N.C. App. ___, 821 S.E.2d 243 (Oct. 2, 2018)

The evidence was sufficient to sustain the defendant's convictions for embezzlement under G.S. 14-90. The defendant, a director of accounting for a Foundation, transferred over \$400,000 from the Foundation's account into her personal account. The defendant asserted that she was not entrusted with the funds in the course of her employment. To access the funds, her employer's bank required the defendant to use both her own security device, which they referred to as a "key fob," along with her supervisor's key fob. Because the bank issued the key fobs to each employee individually, the defendant asserted that she was not entrusted with the funds. Here however the defendant's employer entrusted her with both key fobs, even if the bank intended otherwise. She had lawful possession or control of both her own key fob and her supervisor's key fob when she obtained the funds. Although the bank intended for two employees to participate in each transaction as a security measure, the Foundation did not require its employees to use the key fobs as the bank intended. Instead, it entrusted the entire process to the defendant.

State v. Guy, ___ N.C. App. ___, 822 S.E.2d 66 (Nov. 6, 2018)

(1) The trial court did not err by denying the defendant's motion to dismiss charges of possession of stolen goods (a debit card) and possession of marijuana. The State presented substantial evidence establishing constructive possession of both the items. The items were found in close proximity to the defendant and his vehicle. Because of their proximity to the items, the defendant and his accomplices had the ability to exercise control over the contraband. Additionally, an officer spotted the defendant's car and the suspects about one minute after receiving information from the Sheriff's department about a robbery related to the charges at issue. The brief period between the robbery and locating the suspects with the stolen card supports an inference that the defendant knew of the robbery and the presence of the card. Based on the totality of the circumstances, there was substantial evidence that the defendant had constructive possession of the items.

(2) As a matter of legislative intent, the court held that a defendant may not be convicted for both armed robbery and possession of stolen goods taken during the robbery.

State v. Cox, ___ N.C. App. ___, 825 S.E.2d 266 (Mar. 5, 2019), *temp. stay allowed*, ___ N.C. ___, 824 S.E.2d 127 (Mar. 22, 2019)

The trial court erred by denying the defendant's motion to dismiss a charge of conspiracy to commit armed robbery. The Supreme Court has stated that a defendant is not guilty of robbery if he forcefully takes possession of property under a bona fide claim of right or title to the property. Decisions from the Court of Appeals, however, have questioned that case law, rejecting the notion that a defendant cannot be guilty of armed robbery where the defendant claims a good faith belief that he had an ownership interest in the property taken. Although the court distinguished that case law, it noted that to the extent it conflicts with earlier Supreme Court opinions, the court is bound to follow and apply the law as established by the state Supreme Court. Here, the evidence showed that the defendant and two others—Linn and Jackson--went to the victim's home to retrieve money they provided to her for a drug purchase, after the victim failed to make the agreed-to purchase. All of the witnesses agreed that the defendant and the others went to the victim's house to get money they believed was theirs. Thus, the State presented no evidence that the defendant possessed the necessary intent to commit robbery. Rather, all of the evidence supports the defendant's claim that he and the others went to the victim's house to retrieve their own money. The defendant cannot be guilty of conspiracy to commit armed robbery where he and his alleged co-conspirators had a good-faith claim of right to the money. Because there was no evidence that the defendant had an intent to take and convert property belonging to another, the trial court erred by denying the defendant's motion to dismiss the charge of conspiracy to commit armed robbery.

The court continued, holding that the trial court erred by denying the defendant's motion to dismiss a charge of felonious breaking or entering, where the felonious intent was asserted to be intent to commit armed robbery inside the premises. The court remanded for entry of judgment on misdemeanor breaking or entering, which does not require felonious intent.

State v. Buchanan, ___ N.C. App. ___, 821 S.E.2d 890 (Nov. 6, 2018)

The trial court committed plain error with respect to its obtaining property by false pretenses instructions. The case was before the court on certification from the state Supreme Court for consideration of whether the trial court committed plain error by failing to instruct the jury that it could not convict the defendant of obtaining property by false pretenses and attempting to obtain property by false pretense because such a verdict would violate the "single taking rule." The defendant was indicted for two counts of false pretenses for signing a bank check fraud/forgery affidavit disputing three checks from his account totaling \$900. In fact, the defendant pre-signed the checks, gave them to the mother of his daughter, and authorized her to use them for their child's care. Based on the defendant's representation in the affidavit, the bank gave him a temporary credit for one of the three checks (in the amount of \$600) but denied him credit for the two other checks. The defendant was convicted of obtaining property by false pretenses for the \$600 provisional credit and of attempting to obtain property by false pretenses for the two other checks. Because the defendant did not object to the instructions at trial, plain error applied. Here, plain error occurred. The defendant submitted one affidavit disputing three checks. The submission of the affidavit is the one act, or one false representation, for which the defendant was charged. Therefore there was only a single act or taking under the "single taking rule," which prevents the defendant from being charged or convicted multiple times for a single continuous act or transaction.

Breaking or Entering

State v. Griffin, ___ N.C. App. ___, 826 S.E.2d 253 (Mar. 19, 2019)

The evidence was sufficient to support a conviction for felony breaking or entering with intent to terrorize or injure. On appeal the defendant challenged only the element of intent to injure or terrorize. Here, the evidence shows that the defendant entered uninvited and did not announce himself. When the victim saw the defendant, the defendant began to argue with the victim, believing that he was involved in an incident with the defendant's girlfriend. The defendant, a mixed martial arts fighter, then violently attacked the victim. The jury could find the circumstances put the victim in a high degree of fear or that the defendant acted so recklessly or manifestly indifferent to the consequences to the victim that there was constructive intent to injure. Thus, the evidence was sufficient to support an inference that the defendant entered the victim's home with the intent to terrorize or injure the victim.

Trespass Offenses

State v. Nickens, ___ N.C. App. ___, 821 S.E.2d 864 (Nov. 6, 2018)

(1) The trial court did not err by denying the defendant's motion to dismiss a charge of second-degree trespass. On appeal the defendant argued that she had implied consent to be on the premises of a DMV office. After the defendant raised her voice and began swearing at a DMV employee, an officer told the defendant to leave, thereby revoking her implied consent to remain.

(2) The trial court did not commit plain error in its jury instructions on second-degree trespass. The defendant was indicted for remaining on the premises after having been notified not to remain there by officer Wall, "a person in charge of the premises." The trial court instructed the jury that it could find the defendant guilty if she was told not to remain on the premises "by a person in charge of the premises, a lawful occupant or another authorized person." The additional words "a lawful occupant, or another authorized person" "do not constitute other disjunctive theories included in the jury instructions." The court explained: "Examining the statute's language, it is apparent the list of persons is merely a disjunctive list of descriptors, not additional theories."

Littering

State v. Rankin, ___ N.C. ___, 821 S.E.2d 787 (Dec. 21, 2018)

On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 809 S.E.2d 358 (2018), the court affirmed holding that a littering indictment was fatally defective. In so ruling the court held that subsection G.S. 14-399(a)(1) of the littering statute sets out an element of the offense, not an affirmative defense. It stated: "We conclude that subdivision (a)(1), which requires that the accused be an unauthorized person depositing refuse on land not designated by the State for such use, is an essential element of the crime of felony littering[.]"

Weapons Offenses

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2019)

The evidence was sufficient to support a conviction of discharging a weapon into occupied property. The defendant argued that the evidence was insufficient to show that the defendant knew that the property was occupied when he shot into the house. Here, an eyewitness testified that before discharging his firearm, the defendant loudly “called out” individuals inside the home, challenging them to come outside, and an individual was standing in the doorway just minutes earlier when the defendant slowly drove past, looking at the dwelling.

State v. Chevallier, ___ N.C. App. ___, 824 S.E.2d 440 (Mar. 5, 2019)

The court rejected the defendant’s argument that the evidence was insufficient to support an instruction on actual possession of the firearm in question. Actual possession requires that a party have physical or personal custody of the item. The case arose out of a drug transaction between an undercover officer and the defendant and others in a vehicle at a prearranged transaction site. The undercover officer testified that the defendant was fidgeting, looking around, and acting nervous as if he was “the lookout.” Another officer involved in the arrest saw the defendant in the front passenger seat with his hands “low” and not visible. When the officer opened the front passenger door, he saw a weapon between the seat and the passenger side door, where the defendant’s right hand had been. A photograph confirmed the location of a weapon. Although the firearm was not found on the defendant, the evidence was sufficient to show that he had “personal custody” of it and this was sufficient to support an instruction on actual possession.

State v. Wirt, ___ N.C. App. ___, 822 S.E.2d 668 (Dec. 18, 2018)

In this possession of methamphetamine and felon in possession of a firearm case, the trial court did not err by instructing the jury that the defendant’s status as the driver of a stopped vehicle was sufficient to support an inference that he constructively possessed both methamphetamine and a firearm, even though another person was present in the vehicle. The defendant was stopped by officers while driving a beige Chevrolet pickup truck. Law enforcement had received drug complaints about a man named Sanchez. Officers conducted a two-hour surveillance of Sanchez and the defendant as they drove to several hotels in the area. Both Sanchez and the defendant were seen driving the truck during the two hour surveillance. Officers stopped the vehicle. The defendant was in the driver’s seat; Sanchez was in the passenger seat. A K-9 alert lead to a search of the vehicle. Officers found bags and backpacks in the truck bed that Sanchez stated belonged to him. While searching one of the backpacks they found pills and a notebook containing Sanchez’s name. Another backpack contained a compass with .2 g of a crystalline substance (later determined to be methamphetamine), a digital scale and counterweight, and a notebook containing entries in the defendant’s handwriting concerning the defendant’s wife. A revolver was found beneath the passenger seat. A later strip search of the defendant produced 39 pills, 15 of which were later determined to be diazepam. The defendant was indicted for possession of methamphetamine, possession of a firearm by a felon, and other charges. At the charge conference, the State requested an instruction stating that an inference of constructive possession can arise from evidence showing that a defendant was the custodian of a vehicle in which contraband was found. Over the defendant’s objection, the trial court gave the instruction. The defendant was found guilty and appealed.

There was sufficient evidence to convict the defendant of possession of methamphetamine. Because the methamphetamine was found in a backpack in the bed of the truck, the State was required to show constructive possession. As the vehicle's driver, the defendant's dominion and control over the truck is sufficient to give rise to an inference of constructive possession. The court rejected the defendant's argument that his dominion and control over the truck was insufficient because he was not the only occupant of the vehicle. The court went on to conclude that while the defendant's status as the driver might be sufficient to uphold his conviction for possession of methamphetamine, the State also presented additional incriminating evidence to support an inference of constructive possession. Specifically, the defendant's frequent stops at hotels and gas stations, indicative of drug transactions; the defendant's possession of other controlled substances; and that the backpack in which the methamphetamine was found contained the defendant's personal belongings.

The evidence was also sufficient to show constructive possession of the firearm. As with possession of a controlled substance, the defendant's dominion and control as the driver of the truck was sufficient to give rise to an inference of constructive possession. The court again rejected the defendant's argument that his non-exclusive control over the truck required the State to provide additional incriminating evidence. Again, however, even though the defendant's status as the driver is sufficient to give rise to an inference of possession, the State presented additional incriminating evidence in this case including the defendant's proximity to the firearm and his behavior consistent with the sale of drugs.

State v. Conley, ___ N.C. App. ___, 825 S.E.2d 10 (Feb. 19, 2019), *temp. stay allowed*, ___ N.C. ___, 823 S.E.2d 579 (Mar. 6, 2019)

A defendant may not be convicted of multiple offenses of possession of a gun on educational property when the defendant possesses multiple weapon in the same incident. The defendant was found guilty of, among other things, five counts of possession of a gun on educational property. On appeal the defendant argued that G.S. 14-269.2(b) does not permit entry of multiple convictions for the simultaneous possession of multiple guns on educational property. The defendant's argument relied on *State v. Garris*, 191 N.C. App. 276 (2008), a felon in possession case precluding multiple convictions when a defendant possesses several weapons simultaneously. The court agreed with the defendant, holding:

[T]he language of section 14-269.2(b) describing the offense of “knowingly . . . possess[ing] or carry[ing], whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property,” N.C.G.S. § 14- 269.2(b), is ambiguous as to whether multiple punishments for the simultaneous possession of multiple firearms is authorized. And consistent with this Court's application of the rule of lenity, also as applied in *Garris*, we hold that section 14- 269.2(b) does not allow multiple punishments for the simultaneous possession of multiple firearms on educational property.

The court reversed and remanded for resentencing.

Sexual Exploitation of a Minor & Obscenity

State v. Corbett, ___ N.C. App. ___, 824 S.E.2d 875 (Feb. 19, 2019)

The evidence was sufficient to support convictions for first-and second-degree sexual exploitation of a minor. On appeal the defendant argued that a key photograph introduced at trial did not depict the victim engaged in “sexual activity.” The definition of “sexual activity” for purposes of both offenses includes “[t]he lascivious exhibition of the genitals or pubic area.” This prong of the definition of “sexual activity” was the theory on which the State proceeded. The courts have defined the term “lascivious” as “tending to arouse sexual desire.” A reasonable jury could have found that the photograph meets the definition of “lascivious.” The focal point of the picture is the victim’s naked body. She is standing in her father’s bedroom, a setting generally associated with sexual activity, naked except for her socks. The photograph is clearly intended to elicit a sexual response based on the context in which it was taken, which included the defendant’s repeated attempts to touch the victim sexually. The court went on to reject the defendant’s argument that the photograph does not actually contain an exhibition of the victim’s genitals or pubic area. It noted that her fingers are spread far enough apart such that her pubic area is at least partially visible. Viewing the evidence in the light most favorable to the State, reasonable jurors could have determined that the photograph depicted the victim’s pubic area.

State v. Wilson, ___ N.C. App. ___, 823 S.E.2d 892 (Jan. 15, 2019)

The trial court did not err by denying the defendant’s motion to dismiss a charge of disseminating obscene material to a minor. On appeal the defendant argued that there was insufficient evidence that the material was obscene. At trial the victim testified that the defendant showed her movies involving “a guy and a girl” having sex naked. The State introduced a photograph of three pornographic DVDs found in a search of the premises and the victim’s mother testified that the defendant “had so many” pornographic DVDs. According to the victim’s mother, when the allegations came to light, the defendant disposed of some of his pornography collection and put the rest in a shed. The victim’s mother later found that material and gave it to detectives. At trial various titles from the defendant’s pornography collection were read to the jury. This evidence was sufficient to allow a reasonable jury to infer that the material the defendant showed to the victim was of the same nature of that contained in the defendant’s pornography collection and therefore was obscene material under contemporary community standards.

Obstruction of Justice and Related Offenses

State v. Nickens, ___ N.C. App. ___, 821 S.E.2d 864 (Nov. 6, 2018)

The trial court did not err by denying the defendant’s motion to dismiss a charge of resisting an officer. The defendant argued that the State presented insufficient evidence that the officer was discharging a duty of his office. Here, the officer was discharging a duty falling within the scope of G.S. 20-49 and 20-49.1. Specifically, commanding the defendant to leave the premises of a DMV office and arresting her when she failed to comply with that command. Additionally, under G.S. 15A-401 an officer may arrest without a warrant any person the officer has probable cause to believe has committed a criminal offense in the officer’s presence. When the defendant refused to leave the DMV office, the officer had probable cause to believe that the defendant committed a crime.

State v. Mylett, ___ N.C. App. ___, 822 S.E.2d 518 (Dec. 4, 2018)

(1) Over a dissent, the court affirmed the defendant's conviction for conspiracy to harass a juror under G.S. 14-225.2(a)(2), upholding the constitutionality of the statute. In connection with a fight at a fraternity party, the defendant's brother Dan was charged with criminal offenses. A jury found Dan guilty and after sentencing, the defendant, Dan, and Dan's girlfriend Kathryn loudly confronted 6 jurors about the verdict as they exited the courtroom. The defendant was arrested and charged with 6 counts of harassment of a juror and one count of conspiracy to commit harassment of a juror. The defendant moved pretrial to dismiss all charges on grounds that the statute violates the First Amendment both on its face and as applied to his conduct and that it is unconstitutionally vague. The trial court denied the motions. The jury found the defendant guilty of one count of conspiracy to commit juror harassment. The defendant appealed. On appeal the defendant argued that the trial court erred by denying his motions to dismiss. The court began by finding that the statute applies to non-expressive conduct and thus does not implicate the First Amendment. The court went on to conclude however that assuming *arguendo* the statute does implicate the First Amendment, it satisfies constitutional requisites. It found that the statute is content neutral, both on its face and by its purpose and justification. As such, it is subject to and survives intermediate scrutiny analysis. Specifically, it is narrowly tailored to serve the significant governmental interest of ensuring that jurors remain free from threats and intimidation.

The court went on to reject the defendant's void for vagueness argument. In this respect the defendant asserted that the statutory term "intimidate" failed to provide sufficient notice. Citing a previous decision in which it held that the word intimidate, as used in another statute, is not unconstitutionally vague, the court found that the undefined term "intimidate" does not render the statute void for vagueness.

(2) The evidence was sufficient to support the defendant's conviction for conspiracy to intimidate a juror. On appeal the defendant argued that there was insufficient evidence to show an agreement between Dan, the defendant, and Kathryn. The court disagreed, finding that the State presented substantial evidence that the three shared a mutual, implied understanding to commit juror harassment. Specifically, during the sentencing hearing the defendant paced the hallway outside of the courtroom and confronted each of the jurors about the verdict as they exited the courtroom after sentencing. His voice grew louder and his tone more threatening as he became increasingly agitated with each confrontation. Dan and Kathryn mirrored his behavior when they joined him in the hallway. This parallel behavior exhibited by the three as they confronted the jurors is evidence that they mutually understood and implicitly agreed to cooperate in the act in question.

(3) The trial court did not err by denying the defendant's request for a jury instruction on the definition of the statutory term "intimidate." At the charge conference the defendant requested an instruction of the term and submitted proposed definitions. The trial court denied the defendant's request. On appeal the defendant argued that the trial court's failure to provide a "legally sufficient" definition of the term likely confused the jury. However, the court concluded the term intimidate is a word of common usage that may be reasonably construed according to its plain meaning. Since it has a common meaning, the trial court was not required to define the term for the jury.

Drug Offenses Maintaining a Dwelling, Etc.

State v. Miller, ___ N.C. App. ___, 826 S.E.2d 562 (Mar. 19, 2019)

In this maintaining a dwelling case on remand from the state Supreme Court for reconsideration in light of *State v. Rogers*, ___ N.C. ___, 817 S.E.2d 150 (2018), the court held that the evidence was insufficient to support the conviction. The State's evidence showed that the drugs were kept at the defendant's home on one occasion. Under *Rogers*, "the State must produce other incriminating evidence of the 'totality of the circumstances' and more than just evidence of a single sale of illegal drugs or 'merely having drugs in a car (or other place)' to support a conviction under this charge." Here, the State offered no evidence showing any drugs or paraphernalia, large amounts of cash, weapons or other implements of the drug trade at the defendant's home. The State offered no evidence of any other drug sales occurring there, beyond the one sale at issue in the case. It stated: "Under 'the totality of the circumstances,' 'merely having drugs in a car [or residence] is not enough to justify a conviction under subsection 90-108(a)(7).'" It concluded, stating that *Rogers* was distinguishable because it involved keeping of drugs in a motor vehicle, where other drugs and incriminating evidence of ongoing drug sales were present.

Possession

State v. Wirt, ___ N.C. App. ___, 822 S.E.2d 668 (Dec. 18, 2018)

In this possession of methamphetamine and felon in possession of a firearm case, the trial court did not err by instructing the jury that the defendant's status as the driver of a stopped vehicle was sufficient to support an inference that he constructively possessed both methamphetamine and a firearm, even though another person was present in the vehicle. The defendant was stopped by officers while driving a beige Chevrolet pickup truck. Law enforcement had received drug complaints about a man named Sanchez. Officers conducted a two-hour surveillance of Sanchez and the defendant as they drove to several hotels in the area. Both Sanchez and the defendant were seen driving the truck during the two hour surveillance. Officers stopped the vehicle. The defendant was in the driver's seat; Sanchez was in the passenger seat. A K-9 alert lead to a search of the vehicle. Officers found bags and backpacks in the truck bed that Sanchez stated belonged to him. While searching one of the backpacks they found pills and a notebook containing Sanchez's name. Another backpack contained a compass with .2 g of a crystalline substance (later determined to be methamphetamine), a digital scale and counterweight, and a notebook containing entries in the defendant's handwriting concerning the defendant's wife. A revolver was found beneath the passenger seat. A later strip search of the defendant produced 39 pills, 15 of which were later determined to be diazepam. The defendant was indicted for possession of methamphetamine, possession of a firearm by a felon, and other charges. At the charge conference, the State requested an instruction stating that an inference of constructive possession can arise from evidence showing that a defendant was the custodian of a vehicle in which contraband was found. Over the defendant's objection, the trial court gave the instruction. The defendant was found guilty and appealed.

There was sufficient evidence to convict the defendant of possession of methamphetamine. Because the methamphetamine was found in a backpack in the bed of the

truck, the State was required to show constructive possession. As the vehicle's driver, the defendant's dominion and control over the truck is sufficient to give rise to an inference of constructive possession. The court rejected the defendant's argument that his dominion and control over the truck was insufficient because he was not the only occupant of the vehicle. The court went on to conclude that while the defendant's status as the driver might be sufficient to uphold his conviction for possession of methamphetamine, the State also presented additional incriminating evidence to support an inference of constructive possession. Specifically, the defendant's frequent stops at hotels and gas stations, indicative of drug transactions; the defendant's possession of other controlled substances; and that the backpack in which the methamphetamine was found contained the defendant's personal belongings.

State v. Royster, ___ N.C. App. ___, 822 S.E.2d 489 (Dec. 4, 2018), *temp. stay allowed*, ___ N.C. ___, 821 S.E.2d 439 (Dec. 18, 2019)

In this drug trafficking case, the court held, over a dissent, that the evidence was insufficient to establish that the defendant knowingly possessed cocaine found in a black box in a wooded area approximately 18 hours after the defendant allegedly produced the same box in exchange for his kidnapped father. After the defendant's father Mr. Royster was kidnapped, the kidnappers called the defendant; during that call Mr. Royster told the defendant that he needed to come and talk with the kidnappers. The next day, the defendant and a man named Cates went to the location. The defendant produced a black box that was given to one of the kidnappers and Mr. Royster was put in the defendant's car. A shooting then broke out and one of the kidnappers, holding the box, ran into the woods behind the trailer park area. The defendant, Cates and Mr. Royster departed. One of the kidnappers died from gunshot wounds. Approximately 18 hours after the shooting, officers searched the woods behind the trailer park. 50 to 75 yards into the woods they found a black box containing a large amount of cocaine. The box was dry, despite heavy rain the previous night. A mason jar containing additional cocaine was found nearby; it also was dry. The defendant moved to dismiss the trafficking charge on the basis that the State failed to prove that he possessed the drugs in question. The trial court denied the defendant's motion, he was convicted and he appealed. The court agreed that the evidence was insufficient to establish that the defendant possessed the controlled substances at issue. It concluded that the evidence established merely a suspicion that the defendant possessed the drugs at issue.

State v. Guy, ___ N.C. App. ___, 822 S.E.2d 66 (Nov. 6, 2018)

The trial court did not err by denying the defendant's motion to dismiss charges of possession of stolen goods (a debit card) and possession of marijuana. The State presented substantial evidence establishing constructive possession of both the items. The items were found in close proximity to the defendant and his vehicle. Because of their proximity to the items, the defendant and his accomplices had the ability to exercise control over the contraband. Additionally, an officer spotted the defendant's car and the suspects about one minute after receiving information from the Sheriff's department about a robbery related to the charges at issue. The brief period between the robbery and locating the suspects with the stolen card supports an inference that the defendant knew of the robbery and the presence of the card. Based on the totality of the circumstances, there was substantial evidence that the defendant had constructive possession of the items.

State v. Bice, ___ N.C. App. ___, 821 S.E.2d 259 (Oct. 2, 2018)

The trial court did not err by failing to instruct the jury on an exemption to a drug trafficking charge. The defendant argued that he was exempt from prosecution as an “ultimate user” pursuant to G.S. 90-101(c). The statute defines an ultimate user as a person who lawfully possesses a controlled substance for his own use, or for the use of a member of his household. The defendant was found in possession of 54 dosage units of oxycodone weighing 6.89 grams. The defendant argued that the trial court erred by not instructing the jury sua sponte on the ultimate user exception. The court found however that the record lacked substantial evidence by which a jury instruction on this exemption would have been required. The evidence showed that the defendant did not lawfully possess his father’s oxycodone pills solely for his father’s prescribed use, as required to fall within the ultimate user exemption. Rather, the record reflects overwhelming evidence that the defendant possessed his father’s oxycodone for his own purpose of unlawfully selling the pills. Although the defendant presented evidence that the oxycodone was prescribed to his father, that the defendant drove his father to and from appointments related to his care, and that the defendant lived with and cared for his father, “no reasonable person could conclude that Defendant was in lawful possession of his father’s oxycodone at the time of his arrest.” Among other things the defendant gave a written confession admitting that he was selling the pills to make money. Because the defendant failed to present substantial evidence that he possessed the pills solely for his father’s use, he was not entitled to the instruction.

Counterfeit Controlled Substance Offenses

State v. Chevallier, ___ N.C. App. ___, 824 S.E.2d 440 (Mar. 5, 2019)

(1) The evidence was sufficient to support a conviction for attempted sale or delivery of a counterfeit controlled substance. The charges arose out of a drug transaction that was prearranged by an undercover officer. The officer arranged the transaction with a target, but the defendant and other individuals showed up to execute it. The defendant and the others were arrested when they produced what appeared to be cocaine during the drug transaction. The State proceeded on the acting in concert theory. The officer had twice purchased cocaine from the target at a Bojangles restaurant in Warsaw, North Carolina. He contacted the target again for a third purchase and the target agreed to sell him one ounce of cocaine for \$1200 at the same location. When the officer arrived, the defendant and the other men appeared in a vehicle and waved the officer over to their car. The target told the officer by phone “them are my boys, deal with them” and hung up. One of the men in the car displayed a bag of white powder, which was weighed and determined by the men to be one ounce. The men then were arrested, before an actual delivery of the substance or exchange of money occurred. The white powder was later determined to be counterfeit cocaine. This was sufficient evidence of transferring a counterfeit controlled substance under both the attempted sale and delivery theories of transfer.

(2) When a defendant both sells and delivers a counterfeit controlled substance as part of the same transaction, only one conviction may obtain. The focus of the offense is a transfer, committed either by sale or delivery. Here, the defendant was improperly convicted of two offenses—attempted sale and attempted delivery—arising from a single transfer. However because the defendant did not raise the issue on appeal, it was not before the court. The court however noted that the defendant could raise the issue in a Motion for Appropriate Relief.

Manufacture, etc. at or near school, childcare center, or public park

State v. Piland, ___ N.C. App. ___, 822 S.E.2d 876 (Dec. 18, 2018)

The evidence was insufficient to support a conviction for a drug offense within 1000 feet of a child care center. Under G.S. 90-95(e)(8), a defendant is punished as a Class E felon if he commits certain drug offenses within 1000 feet of the boundary of real property used for a child care center. G.S. 110-86(3) defines a child care center as “an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care.” Here, no evidence was elicited from any witness about how many children actually were in the facility at any given time; the witnesses only testified to the facility’s potential capacity. Thus, there was no evidence that the facility met the statutory definition. The court vacated and remanded for resentencing on the lesser included offenses.

Motor Vehicle Offenses

State v. Shelton , ___ N.C. App. ___, 824 S.E.2d 136 (Feb. 5, 2019)

In this felony death by vehicle case involving the presence of narcotics in an unknown quantity in the defendant’s blood, the evidence was sufficient to establish that the defendant was impaired. The State’s expert testified that Oxycodone and Tramadol were present in the defendant’s blood; tests revealed the presence of these drugs in amounts equal to or greater than 25 nanograms per milliliter — the “detection limits” used by the SBI for the test; the half-lives of Oxycodone and Tramadol are approximately 3-6 and 4-7 hours, respectively; she was unable to determine the precise quantities of the drugs present in the defendant’s blood; and she was unable to accurately determine from the test results whether the defendant would have been impaired at the time of the accident. The defendant’s motion to dismiss was denied and the defendant was found guilty of felony death by motor vehicle based on a theory of impairment under G.S. 20-138.1(a)(1) (“While under the influence of an impairing substance”). On appeal the court rejected the defendant’s argument the State’s evidence merely showed negligence regarding operation of his vehicle as opposed to giving rise to a reasonable inference that he was impaired. The court noted that it was undisputed that the defendant ingested both drugs on the day of the accident and that they were present in his blood after the crash. It continued: “Taking these facts together with the evidence at trial regarding Defendant’s lack of awareness of the circumstances around him and his conduct before and after the collision, reasonable jurors could — and did — find that Defendant was appreciably impaired.” Specifically, the court noted: the labels on the medicine bottles warned that they may cause drowsiness or dizziness and that care should be taken when operating a vehicle after ingestion, and these substances are Schedule II and Schedule IV controlled substances, respectively; the defendant testified that he failed to see the victim on the side of the road despite the fact that it was daytime, visibility was clear, the road was straight, and three eyewitnesses saw the victim before the defendant hit her; the defendant admitted that he was unaware that his vehicle had hit a human being despite the fact that the impact of the crash was strong enough to cause the victim’s body to fly 59 feet through the air; and the defendant testified that his brakes had completely stopped functioning when he attempted to slow down immediately before the accident, he decided not to remain at the scene, instead driving his truck out of the ditch and to his home despite the fact that he had no operable brakes. Finding that this was sufficient evidence for the issue of impairment to go to the jury, the court noted that under *Atkins v. Moye*, 277 N.C. 179 (1970), impairment can be shown by a

combination of evidence that a defendant has both (1) ingested an impairing substance; and (2) operated his vehicle in a manner showing he was so oblivious to a visible risk of harm as to raise an inference that his senses were appreciably impaired.

State v. Gorham, ___ N.C. App. ___, 822 S.E.2d 313 (Nov. 20, 2018)

In this felony speeding to elude case, the State presented sufficient evidence that the defendant caused property damage in excess of \$1000, one of the elements of the charge. At trial, an officer testified that the value of damages to a guardrail, vehicle, and house and shed exceeded \$1000. Additionally, the State presented pictures and videos showing the damaged property. The court noted that because the relevant statute does not specify how to determine the value of the property damage, value may mean either the cost to repair the property damage or the decrease in value of the damaged property as a whole, depending on the circumstances of the case. It instructed: “Where the property is completely destroyed and has no value after the damage, the value of the property damage would likely be its fair market value in its original condition, since it is a total loss.” It continued, noting that in this case, it need not decide that issue because the defendant did not challenge the jury instructions, and the evidence was more than sufficient to support either interpretation of the amount of property damage. Here, the officer’s testimony and the photos and video establish that besides hitting the guard rail, the defendant drove through a house and damaged a nearby shed. “The jury could use common sense and knowledge from their ‘experiences of everyday life’ to determine the damages from driving through a house alone would be in excess of \$1000.

Defenses

Entrapment and Entrapment by Estoppel

State v. Keller, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019)

In this solicitation of a minor by computer case, the court held, over a dissent, that the trial court did not err by failing to submit the defense of entrapment to the jury. The majority determined that the defendant failed to prove that he was entitled to an instruction on entrapment where the evidence supports the defendant’s predisposition and willingness to engage in the crime charged.

Capital Law

Lethal Injection

Bucklew v. Precythe, 587 U.S. ___, 139 S. Ct. 1112 (Apr. 1, 2019)

The Court affirmed the decision below, rejecting the defendant’s argument that because of his unusual medical condition the State of Missouri’s lethal injection protocol is unconstitutional as applied to him. For more detail about this decision, see my colleague’s blog post here: <https://unc.live/2uNfWf3>.

Mental Retardation Issues

Moore v. Texas, 586 U.S. ___, 139 S. Ct. 666 (Feb. 19, 2019)

In a per curiam opinion in this capital case, the Court held that the defendant has shown he is a person with intellectual disability. In 2015 a Texas appellate court held that the defendant did not have an intellectual disability and consequently was eligible for the death penalty. The Court

considered the lawfulness of that determination, vacated the court's decision, and remanded the case for further consideration. The Texas court subsequently reconsidered the matter but reached the same conclusion, holding that the defendant had not demonstrated intellectual disability. The defendant filed a petition for certiorari, arguing that the trial court record demonstrates his intellectual disability. The prosecutor agreed with the defendant that he is intellectually disabled and cannot be executed; the Attorney General of Texas however asked the Court to deny the defendant's petition. Considering the merits, the Court agreed with the defendant that the Texas appellate court's determination was inconsistent with its prior opinion in the case. The Court noted: "We have found in its opinion too many instances in which, with small variations, it repeats the analysis we previously found wanting, and these same parts are critical to its ultimate conclusion." For one thing, it explained, the Texas appellate court again relied less on the adaptive deficits to which the trial court had referred than upon the defendant's apparent adaptive strengths. The Court also found that the Texas appellate court relied too heavily upon adaptive improvements made in prison. Furthermore, the Texas court concluded that the defendant failed to show that the cause of his deficient social behavior was related to any deficits in general mental abilities rather than emotional problems. The Court noted, in part, that in its last review, it said that the Court of Appeals had departed from clinical practice when it required the defendant to prove that his problems in kindergarten stemmed from intellectual disability rather than emotional problems. Additionally, despite the appellate court's statement that it would abandon reliance on certain evidentiary factors, it seems to have used many of those factors in reaching its conclusion. The Court concluded:

[T]he appeals court's opinion, when taken as a whole and when read in the light both of our prior opinion and the trial court record, rests upon analysis too much of which too closely resembles what we previously found improper. And extricating that analysis from the opinion leaves too little that might warrant reaching a different conclusion than did the trial court. We consequently agree with Moore and the prosecutor that, on the basis of the trial court record, Moore has shown he is a person with intellectual disability.

Capacity for Execution

Madison v. Alabama, 586 U.S. ___, 139 S. Ct. 718 (Feb. 27, 2019)

If a defendant with no memory of his crime rationally understands why the State seeks to execute him, the Eighth Amendment does not bar execution; if a defendant with dementia cannot rationally understand the reasons for his sentence, it does. What matters, explained the Court, is whether a person has a "rational understanding," not whether he has any particular memory or any particular mental illness.

The Court noted that in *Ford v. Wainwright*, 477 U. S. 399 (1986), it held that the Eighth Amendment's ban on cruel and unusual punishments precludes executing a prisoner who has "lost his sanity" after sentencing. It clarified the scope of that category in *Panetti v. Quarterman* by focusing on whether a prisoner can "reach a rational understanding of the reason for [his] execution." Here, Vernon Madison killed a police officer in 1985. An Alabama jury found him guilty of capital murder and he was sentenced to death. In recent years, Madison's mental condition sharply deteriorated. He suffered a series of strokes, including major ones in 2015 and 2016. He was diagnosed with vascular dementia, with attendant disorientation and confusion, cognitive impairment, and memory loss. Madison claims that he can no longer

recollect committing the crime for which he has been sentenced to die. After his 2016 stroke, Madison petitioned the trial court for a stay of execution on the ground that he had become mentally incompetent, citing *Ford* and *Panetti*. The trial court found Madison competent to be executed. Madison then unsuccessfully sought federal habeas corpus relief. When Alabama set an execution date in 2018, Madison returned to state court arguing again that his mental condition precluded the State from going forward, noting, in part, that he suffered further cognitive decline. The state court again found Madison mentally competent. The U.S. Supreme Court agreed to review the case.

The Court determined that a person lacking memory of his crime may yet rationally understand why the State seeks to execute him; if so, the Eighth Amendment poses no bar to his execution. It explained: “Assuming, that is, no other cognitive impairment, loss of memory of a crime does not prevent rational understanding of the State’s reasons for resorting to punishment. And that kind of comprehension is the *Panetti* standard’s singular focus.” It continued, noting that a person suffering from dementia or a similar disorder, rather than psychotic delusions, may be unable to rationally understand the reasons for his sentence; if so, the Eighth Amendment does not allow his execution. What matters, it explained, “is whether a person has the ‘rational understanding’ *Panetti* requires—not whether he has any particular memory or any particular mental illness.” The Court continued, noting that the “standard has no interest in establishing any precise cause: Psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension.” Ultimately, the Court returned the case to the state court for renewed consideration of Madison’s competency, instructing:

In that proceeding, two matters disputed below should now be clear. First, under *Ford* and *Panetti*, the Eighth Amendment may permit executing Madison even if he cannot remember committing his crime. Second, under those same decisions, the Eighth Amendment may prohibit executing Madison even though he suffers from dementia, rather than delusions. The sole question on which Madison’s competency depends is whether he can reach a “rational understanding” of why the State wants to execute him. *Panetti*, 551 U. S. at 958.

Post-Conviction Proceedings

DNA Testing & Related Matters

State v. Byers , ___ N.C. App. ___, 822 S.E.2d 746 (Dec. 18, 2018), *temp. stay allowed*, ___ N.C. ___, 822 S.E.2d 41 (Jan. 15, 2019)

In this murder and burglary case, the court held—over a dissent—that the trial court erred by denying defendant Terraine Byers’s motion for post-conviction DNA testing without appointing counsel; it further held that the trial court did not err by ruling on the motion before obtaining and reviewing an inventory of evidence. The defendant’s ex-girlfriend, Ms. Burke, was stabbed to death inside of her apartment. Officers previously had been called to Burke’s apartment multiple times because of her fear of the defendant. On the date in question, Mr. Williams was with Burke when they heard a crash at the apartment’s back door. Williams testified that he heard Burke yell “Terraine, stop,” before Williams fled. When officers arrived, they saw the defendant leaving the apartment through a broken door window. After telling officers that Burke was inside and injured, the defendant attempted to flee. He was apprehended and found to have a

laceration on his left hand. Burke was dead inside. Inside the apartment, officers found a knife with a broken blade. Investigators analyzed fingernail scrapings from the defendant's hand, a bloodstain from a couch cushion, the knife handle and blade, and various bloodstains throughout the apartment. The DNA from several samples all matched either the defendant or Burke. The defendant stipulated that the blood on his shirt was Burke's. After a conviction and appeal, the defendant filed a pro se motion for post-conviction DNA testing. He asserted that he was on the other side of town waiting for a bus at the time of the murder. He alleged that one of the State's witnesses testified that she saw the defendant getting on the 9 PM city bus on the night in question and that a private investigator's affidavit stated that it would have been impossible for the defendant to arrive at the apartment prior to the police call related to the incident. He further stated that when he arrived at the apartment the back door was smashed in and that when he entered to investigate he was attacked by a man. The two struggled, which the defendant argues explains the presence of his DNA in the apartment. The defendant stated that the assailant escaped. He argues that because both he and Burke struggled with the unknown assailant, DNA testing of his and Burke's previously untested clothing would reveal the identity of the true perpetrator. He noted that the State's DNA expert reported the presence of human blood in various locations throughout the apartment that did not match either the defendant or Burke and that this information was not introduced at trial. He further requested that the items of clothing be preserved and that an inventory of the evidence be prepared. The trial court denied the defendant's motion, finding that he failed to show how the requested DNA testing would be material to his defense.

The court began by rejecting the defendant's argument that the trial court erred by denying his motion for testing before obtaining and reviewing the requested inventory of physical and biological evidence. Because the record "is devoid of any evidence indicating Defendant ever made a request to a custodial agency" for the inventory, he was not entitled to an inventory under G.S. 15A-268(a7). The court further found that nothing in G.S. 15A-269 requires the trial court to obtain and review the results of a custodial agency's inventory before ruling on a motion for post-conviction DNA testing.

The court went on to hold that the trial court erred by denying the defendant's motion without the appointment of counsel. Under G.S. 15A-269, a defendant is entitled to counsel in connection with a post-conviction DNA testing motion if the defendant is indigent and the DNA testing may be material to a claim of wrongful conviction. The burden of proof to show materiality is on the defendant, and the defendant fails to meet that burden when the defendant provides only conclusory statements. Here, the defendant provided specific reasons that the requested DNA test would be significantly more probative of the perpetrator's identity including: a comprehensive statement of his version of the events, stating that he was on a bus at the time of the murder, arrived at the scene after the victim was attacked, and was attacked by an unknown assailant; his version was consistent with his statements at the scene, his trial defense, and the testimony of at least one eyewitness; he specifically identified items to be DNA tested; he explained how DNA testing of the various items would corroborate his version of events and why the DNA evidence presented at trial offered an incomplete picture of events. His motion avoids many of the issues prior courts have highlighted in finding insufficient allegations of materiality: he did not plead guilty and has maintained his innocence; there was additional evidence supporting his allegation of a different perpetrator, including his statements to officers at the scene and eyewitness testimony regarding his location at the time of the crime; the defendant is hoping to show the presence of an alternative perpetrator's DNA, rather than the

lack of his own DNA; the items he moved to have tested were identified and preserved soon after the murder; the results of the testing could corroborate his defense at trial, and could directly contradict the State's argument that the defendant was the sole perpetrator. The court continued, concluding that although there was substantial evidence at trial tending to show the defendant's guilt, "evidence indicating guilt cannot be dispositive of the issue." The court determined that the weight of the evidence indicating guilt must be weighed against the probative value of the possible DNA evidence. Here, the defendant established materiality.

Counsel Issues

State v. Tilghman, ___ N.C. App. ___, 821 S.E.2d 253 (Oct. 2, 2018)

(1) The trial court did not err by denying the defendant's motion for post-conviction DNA testing without appointing counsel. The statute requires appointment of counsel only on a showing that the DNA testing may be material to the defendant's claim of wrongful conviction. The burden of establishing materiality is on the defendant. To meet this burden, the defendant must do more than make a conclusory statement that the ability to conduct the requested testing is material to the defense. Where—as here--the case involves a guilty plea, the defendant has a heightened burden to show materiality. Here, the defendant's justifications for DNA testing are merely conclusory statements. In a footnote, the court noted that the trial court did not address materiality and that "a specific finding or conclusion of materiality" by the trial court "would be helpful to our appellate review."

(2) The court rejected the defendant's argument that the trial court erred by summarily denying his motion for a complete inventory of evidence under G.S. 15A-268. That statute provides that upon written request by the defendant the custodial agency shall prepare an inventory of biological evidence relevant to the case that is in the custodial agency's custody. However, a request for location and preservation of evidence, as occurred here, is not a request for an inventory of evidence. Thus, the trial court did not err by denying the defendant's motion for post-conviction DNA testing prior to obtaining an inventory of biological evidence which the defendant never requested. Even if the defendant had requested an inventory of biological evidence from the trial court, it would have been improper for the trial court to grant such a request where there was no evidence that the defendant had requested the inventory from the custodial agency.

(3) The court rejected the defendant's argument that the trial court erred by summarily denying his motion for an inventory of evidence under G.S. 15A-269. That statute provides that upon receipt of a motion for post-conviction DNA testing the custodial agency shall inventory the evidence and provide an inventory list to, among others, the defendant. Under the statute, a defendant need not make a request for an inventory of physical evidence. Instead, the custodial agency's obligation to do the inventory is triggered upon receipt of a motion for post-conviction DNA testing. Here, the record lacks proof that either the defendant or the trial court served the custodial agency with the motion for inventory. Assuming *arguendo* that the trial court had the burden to do so, any error that occurred is harmless because the defendant failed to meet his burden of showing materiality.

Motions for Appropriate Relief

State v. Casey, ___ N.C. App. ___, 823 S.E.2d 906 (Jan. 15, 2019)

In this child sexual assault case, the court reversed the trial court's order denying the defendant's Motion for Appropriate Relief (MAR) seeking a new trial for ineffective assistance of counsel related to opinion testimony by the State's expert. The defendant was convicted of sexual offenses against Kim. On appeal the defendant argued that the trial court should have granted his MAR based on ineffective assistance of both trial and appellate counsel regarding expert opinion testimony that the victim had in fact been sexually abused. The court began by concluding that the testimony offered by the State's expert that Kim had, in fact, been sexually abused was inadmissible. In the absence of physical evidence of sexual abuse, the expert's testimony was inadmissible. The court went on to hold, however, that because the defendant failed to raise the issue on direct appeal, his claim that trial counsel was ineffective by failing to move to strike the expert's opinion that victim Kim had in fact been sexually abused was procedurally defaulted. The record from the direct appeal was sufficient for the court to determine in that proceeding that trial counsel provided ineffective assistance of counsel. Defense counsel failed to object to testimony that was "clearly inadmissible" and the court could not "fathom any trial strategy or tactic which would involve allowing such opinion testimony to remain unchallenged." And in fact, the trial transcript reveals that allowing the testimony to remain unchallenged was not part of any trial strategy. Moreover trial counsel's failure to object to the opinion testimony was prejudicial. Because the "cold record" on direct appeal was sufficient for the court to rule on the ineffective assistance of counsel claim, the MAR claim was procedurally barred under G.S. 15A-1419(a)(3).

The court continued, however, by holding that the defendant was denied effective assistance of appellate counsel in his first appeal when appellate counsel failed to argue that it was error to allow the expert's testimony that Kim had, in fact, been sexually abused. The court noted that the ineffective assistance of appellate counsel claim was not procedurally barred. And, applying the *Strickland* attorney error standard, the court held that appellate counsel's failure to raise the issue on direct appeal constituted ineffective assistance of counsel. The court thus reversed and remanded for entry of an order granting the defendant's MAR.

State v. Hyman, ___ N.C. App. ___, 823 S.E.2d 146 (Dec. 18, 2018)

(1) On remand from the state Supreme Court, the court rejected the defendant's argument that the trial court erred by concluding that he was procedurally barred from reasserting in his MAR a dual representation conflict of interest ineffective assistance of counsel claim with respect to attorney Smallwood. Because this court on direct appeal addressed the merits and rejected this claim, the trial court properly concluded that it was procedurally defaulted under G.S. 15A-1419(a)(2) (claim previously determined on the merits).

(2) The court then turned to the defendant's claim that he received ineffective assistance of counsel from attorney Warmack at the evidentiary remand hearing because Warmack had a dual representation conflict arising from having previously represented codefendant Swain. The court held that the trial court erred by finding that this claim was procedurally barred under G.S. 15A-1419(a)(3) (failure to raise on appeal), reasoning that the defendant was not in a position to adequately raise the claim on direct appeal. The court further found that the record was

insufficient to establish that the defendant knowingly, intelligently, and voluntarily waived Warmack's potential conflict and that the trial court erred by concluding otherwise.

State v. McAllister, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019)

The trial court properly summarily denied a motion for appropriate relief asserting ineffective assistance of counsel where the defendant failed to provide any supporting affidavits or other evidence beyond the bare assertions in his motion. The statutes require a MAR to be supported by affidavit or other documentary evidence. Without such support, the summary denial was proper.

State v. Bennett, ___ N.C. App. ___, 822 S.E.2d 92 (Nov. 6, 2018)

The court reversed the trial court's order granting the defendant's motion for reconsideration and motion for appropriate relief (MAR), holding that the requirement that counsel advise the defendant of the immigration consequences of a plea agreement established by *Padilla* does not apply retroactively. The defendant pled no contest to a drug charge in 1997. In 2015 the defendant asserted a MAR claim under *Padilla v. Kentucky*, 559 U.S. 356 (2010), that he was not informed of the impact his conviction would have on his immigration status, particularly the risk of deportation. The trial court initially denied the MAR but subsequently granted a motion to reconsider and entered an order granting the MAR. Reversing, the court noted that it had previously decided, in *State v. Alshaif*, 219 N.C. App. 162 (2012), that *Padilla* does not apply retroactively.