CRIMINAL CASE UPDATE

Covering significant cases decided June 10, 2013 through October 1, 2013

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Contents

Criminal Procedure

Bond Forfeiture

State v. Cortez, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). (1) Even though the surety's name was not listed on the first page of form AOC-CR-201 (Appearance Bond for Pretrial Release) the surety was in fact the surety on a $570,000.00 bond, where among other things, the attached power of attorney named the surety and the surety collected the premium on the bond and did not seek to return it until 3 years later when the trial court ordered a forfeiture. (2) The trial court did not err by concluding that the surety's exclusive remedy for relief from a final judgment of forfeiture is an appeal pursuant to G.S. 15A-544.8. (3) The trial court did not err in granting the Board monetary sanctions against the surety and the bondsmen pursuant to G.S. 15A-544.5(d)(8). The court rejected the surety's argument that the Board's sanctions motion was untimely. (4) The trial court properly considered the relevant statutory factors before imposing monetary sanctions against the surety under G.S. 15A-544.5(d)(8) where there was no evidence that the surety's failure to attach the required documentation was unintentional. (5) The trial court did not abuse its discretion by imposing a monetary sanction of $285,000 on the surety.

Competency

State v. Ashe, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2013). The trial court erred by failing to sua sponte order a hearing to evaluate the defendant's competency to stand trial. Although no one raised an issue of competency, a trial court has a constitutional duty to sua sponte hold a competency hearing if there is substantial evidence indicating that the defendant may be incompetent. Here, that standard was satisfied. The defendant proffered evidence of his extensive mental health treatment history and testimony from a treating psychiatrist showing that he has been diagnosed with paranoid schizophrenia, anti-social personality disorder, and cocaine dependency in remission. Additionally, his conduct before and during trial suggests a lack of capacity, including, among other things, refusing to get dressed for trial and nonsensically interrupting. The court rejected the remedy of a retrospective competency hearing and ordered a new trial.

Counsel Issues

State v. Wray, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). The trial court did not err by failing to appoint counsel for the defendant after his case was remanded from the appellate division and before ordering the defendant to submit to a capacity to proceed evaluation. The court held: "the trial court's order committing defendant to a competency evaluation was not a critical stage and defendant was not denied his Sixth Amendment right to counsel."

Pleas & Plea Procedure

State v. Tinney, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The defendant's plea was valid even though the plea agreement contained an unenforceable provision preserving his right to appeal the transfer of his juvenile case to superior court. Distinguishing cases holding that the inclusion of an invalid provision reserving the right to obtain appellate review of a particular issue rendered a plea agreement unenforceable, the court noted that in this case the defendant had ample notice that the provision was, in all probability, unenforceable and he elected to proceed with his guilty plea in spite of this. Specifically, he was so informed by the trial court.

State v. Harwood, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). By pleading guilty to multiple counts of felon in possession, the defendant waived the right to challenge his convictions on double jeopardy grounds.

Discovery & Related Issues

State v. Cooper, __ N.C. App. __, __ S.E.2d __ (Sept. 3, 2013). (1) In this murder case, the trial court abused its discretion by excluding, as a discovery sanction, testimony by defense expert Masucci. The defendant offered Masucci after the trial court precluded the original defense expert, Ward, from testifying that key incriminating computer files had been planted on the defendant's computer. The State made no pretrial indication that it planned to challenge Ward's testimony. At trial, the defendant called Ward to testify that based upon his analysis of the data recovered from the defendant's laptop, tampering had occurred with respect to the incriminating files found on the defendant's computer. The State successfully moved to exclude this testimony on the basis that Ward was not an expert in computer forensic analysis. The defendant then quickly located Masucci, an expert in computer forensic analysis, to provide the testimony Ward was prevented from giving. The State then successfully moved to exclude Masucci as a sanction for violation of discovery rules. The only State's evidence directly linking the defendant to the murder was the computer file evidence. Even if the defendant violated the discovery rules, the trial court abused its discretion with respect to the sanction imposed and violated the defendant's constitutional right to present a defense. (2) The trial court erred by failing to conduct an in camera inspection of discovery sought by the defense regarding information related to FBI analysis of the computer files. The trial court found that FBI information was used in counterterrorism and counterintelligence investigations and that disclosure would be contrary to the public interest. The court held that the trial court's failure to do an in camera review constituted a violation of due process. It instructed that on remand, the trial court "must determine with a reasonable degree of specificity how national security or some other legitimate interest

would be compromised by discovery of particular data or materials, and memorialize its ruling in some form allowing for informed appellate review."

State v. McCoy, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). The trial court did not err by refusing to provide defense counsel with an internal investigation report prepared by the police department's Office of Professional Standards and Inspections regarding a lead detective in the investigation. During the trial prosecutors learned of an ongoing internal investigation of the detective. The State informed the trial court and defense counsel of this and decided not to call the detective as a witness. The trial court examined the report in camera and issued an oral ruling noting that the report detailed a problem in the detective's life that could have affected his job performance. However, it found that there was no evidence that the detective was experiencing the problem at the time of the investigation in question. The trial court noted that the report suggests that the detective may not have been honest in his internal investigation disclosures but again found no connection to the case at hand. The court of appeals held that the trial court did not violate the defendant's constitutional rights by refusing to disclose the contents of the report to counsel. The court found that it was unable to conclude that the report was material "when the State was able to prove its case through the testimony of other law enforcement officers and without [the] Detective . . . ever taking the stand."

State v. Marino, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). (1) In this misdemeanor DWI case the trial court did not err by denying the defendant's motions to examine the Intoximeter source code. The court rejected the defendant's argument that the source code was *Brady* evidence, reasoning that he failed to show that it was favorable and material. The court noted that the jury found the defendant guilty under both prongs of the DWI statute. The court also rejected the defendant's argument that under *Crawford* and the confrontation clause he was entitled to the source code. (2) The court held that the defendant had no statutory right to pretrial discovery and rejected the defendant's argument that G.S. 15A-901 violated due process. The court noted, however, that the defendant did have discovery rights under *Brady.*

Habeas Corpus

State v. Chapman, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). The trial court erred by granting the defendant habeas relief and dismissing two first-degree capital murder charges. The trial court concluded that the victims were previable fetuses that did not meet the born alive rule for murder. It thus dismissed the murder charges. The court concluded that this was error, reasoning that whether the fetuses could be deemed living persons within the meaning of the homicide statute was a factual issue for the jury.

Indictment Issues

State v. Land, __ N.C. __, __ S.E.2d __ (June 13, 2013). The court, per curiam, affirmed the decision below in *State v. Land*, __ N.C. App. __, 733 S.E.2d 588 (2012), holding that a drug indictment was not fatally defective. Over a dissent, the court of appeals had held that when a defendant is charged with delivering marijuana and the amount involved is less than five grams, the indictment need not allege that the delivery was for no remuneration. Relying on G.S. 90-95(b)(2) (transfer of less than five grams of marijuana for no remuneration does not constitute a delivery in violation of G.S. 90-95(a)(1)), the defendant argued that the statute "creates an additional element for the offense of delivering less than five grams of marijuana -- that the defendant receive remuneration -- and that this additional element must be alleged." Relying on *State v. Pevia*, 56 N.C. App. 384, 387 (1982), the court of appeals held that an indictment is valid under G.S. 90-95 even without that allegation.

State v. Gilbert, __ N.C. App. __, __ S.E.2d __ (Sept. 3, 2013). (1) A short form indictment under G.S. 15-144.1 was sufficient to charge the defendant with attempted statutory rape of a 13, 14, or 15 year old. The defendant had argued that the statutory short form does not apply to an indictment alleging statutory rape of a 13 year old. (2) The indictment conformed to the requirements of G.S. 15-144.1 even though it failed to allege that the act occurred "by force and against her will" or that the defendant attempted to "ravish and carnally know" the victim.

State v. Pennell, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). A larceny indictment was fatally defective where it described the property taken as "various items of merchandise."

State v. Sheppard, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). The trial court lacked jurisdiction to sentence the defendant for larceny of goods worth more than $1,000 when the indictment charged that the stole more than $1,000 of "U.S. CURRENCY."

State v. Stevens, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). (1) An indictment for contributing to the delinquency/neglect of a minor was not defective. The indictment tracked the statutory language but did not specify the specific acts at issue. An indictment for a statutory offense is sufficient if the offense is charged in the words of the statutes, or equivalent words. Any error in the caption of the indictment was immaterial. (2) With respect to assault on a child under 12, the trial court erred by permitting the jury to convict on a criminal negligence theory of intent, which was not alleged in the indictment.

Motion to Continue

State v. Blackwell, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). In this drug case, the trial court did not violate the defendant's constitutional rights to due process and effective assistance of counsel by denying a motion to continue. The defendant argued that defense counsel had been appointed only 54 days before trial and had just become aware of material witnesses that might testify favorably for the defendant. Also, the defendant argued, on the Friday before trial week, the State turned over a confidential informant's statements. The court noted that the trial was a retrial and that the underlying facts–two hand-to-hand sales to an undercover officer--were straightforward. Furthermore, the defendant failed to explain how a period of two months was insufficient to prepare for trial. With respect to the additional witnesses, the defendant failed to explain why he was unable to find them in the more than three years since his indictment and why their testimony was material. Also, the defendant already had copies of the informant's statements.

Expression of Opinion by Judge

State v. Summey, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). (1) In a statutory rape case, the trial court committed reversible error by expressing an opinion regarding the victim's age--an element of the offense--when responding to a note from the jury. During deliberations, the jury sent a note asking: "May we please have the date and age of [the victim] when she was raped the first time regarding the first-degree rape?" The trial court informed the jurors that the information they sought was in the victim's testimony and that it was their duty to recall that testimony from memory. Juror number 5 then immediately asked: "[W]ould it be an accurate statement that the Court would not be able to charge him with that particular charge if it were not in corroboration with the age reference?" The trial court answered: "You're correct." (2) The trial court did not commit plain error by referring to the prosecuting witnesses as "victims" in its jury instructions. The trial court's statements did not constitute an opinion.

Jury Instructions

State v. Evans, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). (2) The trial court did not err by failing to include self-defense in its mandate on felony-murder charges that were based on the underlying offenses of attempted robbery. Self-defense is only relevant to felony-murder if it is a defense to the underlying felony. The court continued: "We fail to see how defendant could plead self-defense to a robbery the jury found he had attempted to commit himself." (2) The trial court did not err by failing to include self-defense in its mandate on felony-murder charges based on underlying assault offenses. The trial court gave the full self-defense instructions with respect to the assault charges. It then referenced these instructions, and specifically the self-defense instructions, in its instructions concerning felony-murder based upon the assault charges. Taken as a whole, this was not error.

State v. Gaston, __ N.C. App. __, __ S.E.2d __ (Sept. 3, 2013). In this murder case, the trial court did not err by denying the defendant's request for jury instructions on self-defense and voluntary manslaughter. The defendant's theory of the case was that the gun went off accidentally. Additionally, there was no

evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm.

State v. Fisher, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). In this involuntary manslaughter case, the trial court did not commit plain error by failing to instruct the jury that foreseeability was an essential element of proximate cause. The court noted that foreseeability is an essential element of proximate cause. It further noted that a trial court should, as a general proposition, incorporate a foreseeability instruction into its discussion of proximate cause when the record reflects the existence of a genuine issue as to whether the injury which resulted from a defendant's allegedly unlawful conduct was foreseeable. But on the facts of this case, the court found that no plain error occurred.

State v. Walston, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In this child sex case, the trial court committed prejudicial error by identifying the prosecuting witnesses as "victims" rather than "alleged victims" in its jury instructions. The court noted that in this case an issue before the jury was whether any sexual assault occurred two decades earlier as alleged in the indictment and the defense objected to the relevant language at trial.

State v. Oliphant, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). In a case involving two defendants, no plain error occurred where the trial court's instructions referred to the defendant and his accomplice collectively as "defendants." The court noted that when two or more defendants are tried jointly for the same offense, a charge that is susceptible to the construction that the jury should convict all if it finds one guilty is reversible error. However, it noted, it is not necessary to give wholly separate instructions as to each defendant when the charges and the evidence as to each defendant are identical, provided that the trial court either gives a separate final mandate as to each defendant or otherwise clearly instructs the jury that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant. Noting that the trial court failed to give a separate mandate as to each defendant or a separate instruction clarifying that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant, the court held that even if error occurred, it did not rise to the level of plain error.

Jury Deliberations

State v. Blackwell, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). (1) The trial court did not coerce a verdict by giving an *Allen* charge pursuant to G.S. 15A-1235. The jury sent the judge a note at 3:59 pm, after 70 minutes of deliberations, indicating that they were split 11-to-1 and that the one juror "will not change their mind." The court rejected the defendant's argument that a jury's indication that it may be deadlocked requires the trial court to immediately declare a mistrial, finding it inconsistent with the statute and NC case law. (2) The trial court did not coerce a verdict when it told the deliberating jury, in response to the same note about deadlock, that if they did not reach a verdict by 5 pm, he would bring them back the next day to continue deliberations. Although threatening to hold a jury until they reach a verdict can under some circumstances coerce a verdict, that did not happen here. After receiving the note at approximately 4:00 pm, the trial judge told the jurors that although they were divided, they had been deliberating for only approximately 75 minutes. The judge explained that he was going to have them continue to deliberate for the rest of the afternoon and that if they needed more time they could resume deliberations the next day. The trial judge further emphasized that the jurors should not rush in their deliberations and reminded them that it was "important that every view of the jury be considered, and that you deliberate in good faith among yourselves." The court found that these statements cannot be viewed as coercive.

State v. Summey, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). The trial court did not coerce a verdict by instructing the jurors to continue deliberating after they three times indicated a deadlock. Although the trial court did not give an *Allen* instruction every time, G.S. 15A-1235 does not require the trial court to do so every time the jury indicates that it is deadlocked.

Verdict

State v. Barbour, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court did not err by examining the verdict sheet returned by the jury, rejecting the verdict, and instructing the jury to answer each question. The trial court acted before consulting with counsel but did consult with counsel after the jury was removed from the courtroom. The court noted that "While it would have been preferable for the trial court to have excused the jury from the courtroom, and allowed counsel to view the verdict sheet and to be heard prior to the court's instructions to the jury, we can discern no prejudice to defendant based upon what [actually] happened." The court noted that because the trial court instructed the jury to re-mark the verdict sheet next to their original markings, the original markings were preserved.

State v. Marsh, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The defendant's MAR claim was without merit where it alleged ineffective assistance because of counsel's failure to assert that extraneous information had been presented to the jury. The court found that evidence proffered from a juror was not "extraneous prejudicial information" and thus was inadmissible under N.C.R. Evid. 606(b).

Sentencing

Alleyne v. United States, 570 U.S. __ (June 17, 2013). The Court overruled *Harris v. United States*, 536 U.S. 545 (2002), and held that any fact that increases a mandatory minimum sentence must be submitted to the jury. The defendant was charged with several federal offenses, including using or carrying a firearm in relation to a crime of violence under § 924(c)(1)(A). The statute provided in part that anyone who "uses or carries a firearm" in relation to a "crime of violence" shall be sentenced to a term of imprisonment of not less than 5 years and that if the firearm is "brandished," the term of imprisonment is not less than 7 years. The jury convicted the defendant of the offense and indicated on the verdict form that he had "[u]sed or carried a firearm during and in relation to a crime of violence"; it did not indicate a finding that the firearm was brandished. The trial court applied the "brandishing" mandatory minimum and sentenced the defendant to seven years' imprisonment. The Court of Appeals affirmed, noting that the defendant's objection to the sentenced was foreclosed by *Harris*, which had held that judicial fact-finding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. The Court reversed.

State v. Lee, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). The trial court erred by granting the defendant's MAR and retroactively applying 2009 amendments to the Structured Sentencing Act (SSA) to the defendant's 2005 offenses. The court reasoned that the Session Law amending the SSA stated that "[t]his act becomes effective December 1, 2009, and applies to offenses committed on or after that date." Thus, it concluded, it is clear that the legislature did not intend for the 2009 grid to apply retroactively to offenses committed prior to December 1, 2009.

State v. Pemberton, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). Under *Miller v. Alabama,* 132 S. Ct. 2455 (2012), the trial court violated the defendant's constitutional right to be free from cruel and unusual punishment by imposing a mandatory sentence of life imprisonment without the possibility of parole upon him despite the fact that he was under 18 years old at the time of the murder. Because the defendant was convicted of first-degree murder solely on the basis of the felony-murder rule, and because his case was pending on direct review when *Miller* was decided, he must be resentenced to life imprisonment with parole in accordance with G.S. 15A-1340.19B(a).

State v. Bowden, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). (1) In a case involving a life-sentenced inmate from the 1970s, the trial court did not err by finding that the defendant had a liberty interest in having appropriate sentence reduction credits applied to his 80-year life-sentence for all purposes, including calculation of his unconditional release date. The inmate committed his crimes at a time when G.S. 14-2 defined a life sentence as a term of 80 years. Based on good time, gain time, and merit time credit accumulated between 1975 and 2009, the inmate completed his 80-year life sentences in 2009. (2) The trial court did not err by distinguishing the defendant's case from *Jones v. Keller*, 364 N.C. 249 (2010), in which the Supreme Court held that life sentenced inmates convicted of first-degree murder were not entitled to have sentence reduction credits applied to their unconditional release date. Unlike *Jones*, competent record evidence in Bowden's case showed that corrections officials actually applied sentence reduction credits toward the defendant's unconditional release date, informed him that his

sentence had expired, and prepared him for release. By reference to a series of emails between corrections officials, the court rejected the State's argument that the Department of Correction (DOC) never actually applied sentence reduction credits to the defendant's unconditional release date. (3) Having found that DOC actually awarded the sentence reduction credits to Bowden, the trial court did not err by finding that DOC's revocation of the credits violated the Ex Post Facto Clause and due process. Judge McCollough filed a concurring opinion reaching the same result through application of the law of the case doctrine, based on the timing and sequence of prior appellate orders related to Mr. Bowden. [Author's note: Thanks to my colleague Jamie Markham for providing this summary.]

State v. Perry, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). The court rejected the defendant's argument that a sentence of life in prison without the possibility of parole for first-degree felony-murder (child abuse as the underlying felony) violated the 8th Amendment.

State v. Bacon, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). (1) Trial court erred by finding a statutory aggravating factor where the evidence used to support the G.S. 15A-1340.16(d)(8) aggravating factor (knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person) was the same evidence used to support an element of the involuntary manslaughter charge. That charge stemmed from a vehicle accident. The court reasoned: "[D]efendant was not impaired when the accident occurred, and defendant's speed is the only evidence that would support the aggravating factor that he used a device in a manner normally hazardous to the lives of more than one person. Because the evidence of defendant's speed was required to prove the charge of involuntary manslaughter and the finding of the aggravating factor, the trial court erred in sentencing defendant in the aggravated range[.]" (2) Trial court did not err by declining to find two statutory mitigating factors: G.S. 15A-1340.16(e)(12) (good character/reputation in the community) and 15A-1340.16(e)(19) (positive employment history). The court rejected the defendant's argument that the evidence supporting each factor was uncontradicted and manifestly credible.

State v. Marlow, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court did not err by accepting a stipulation to a PRL point under G.S. 15A-1340.14(b)(7) without engaging in the mandated colloquy where the context clearly indicated that it was not required.

State v. Wray, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). G.S. 15A-1335 did not apply when on retrial the trial court sentenced the defendant for a different, more serious offense.

State Watkins, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The court remanded for a determination of whether the trial court had jurisdiction to sentence the defendant more than a year after the date set for the PJC.

State v. Nolen, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). Applying the Justice Reinvestment Act (JRA), the court held that the trial court improperly revoked the defendant's probation. The defendant violated the condition of probation under G.S. 15A-1343(b)(2) that she not leave the jurisdiction without permission and monetary conditions under G.S. 15A-1343(b). She did not commit a new crime, was not subject to the new absconding condition codified by the JRA in G.S. 15A-1343(b)(3a), and had served no prior CRVs under G.S. 15A 1344(d2). Thus, under the JRA, her probation could not be revoked.

State v. Kornegay, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). The trial court lacked jurisdiction to revoke the defendant's probation and activate his sentence. Although the trial court revoked on grounds that the defendant had committed a subsequent criminal offense, such a violation was not alleged in the violation report. Thus, the defendant did not receive proper notice of the violation. Because the defendant did not waive notice, the trial court lacked jurisdiction to revoke.

State v. Romero, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). Defendant had no right to appeal from the trial court's orders modifying the terms of his probation and imposing Confinement in Response to Violation. For a discussion of this case, see my colleague's blog post here.

State v. Pennell, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). Addressing contradicting case law, the court stated a general rule that a defendant may, on appeal from revocation of probation, attack the jurisdiction of the trial court, either directly or collaterally. Here, in his appeal from the probation revocation, the defendant argued that the indictment was defective; the court found his appeal to be proper.

Sex Offenders

State v. Green, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). The trial court erred by ordering lifetime sex offender registration and lifetime SBM because first-degree sexual offense is not an "aggravated offense" within the meaning of the sex offender statutes.

State v. Marlow, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). Where the defendant was convicted of first-degree statutory rape the trial court did not err by ordering the defendant to enroll in lifetime SBM upon release from imprisonment. The offense of conviction involved vaginal penetration and force and thus was an aggravated offense.

Evidence

Authentication

State v. Murray, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In this drug case where the defendant denied being the perpetrator and suggested that the drugs were sold by one of his sons, the State failed to properly authenticate two photographs used in photographic lineups as being of the defendant's sons. An informant involved in the drug buy testified that he had purchased drugs from the people depicted in the photos on previous occasions but not on the occasion in question. The State then offered an officer to establish that the photos depicted the defendant's sons. However, the officer testified that he wasn't sure that the photos depicted the defendant's sons. Given this lack of authentication, the court also held that the photos were irrelevant and should not have been admitted.

Relevancy

State v. Garcia, __ N.C. App. __, __ S.E.2d __ (June 18, 2013). The trial court did not commit plain error by failing to redact portions of a transcript of the defendant's interrogation where the challenged statements were relevant. The court rejected the defendant's argument that the trial court should have redacted statements made by the detective, finding that they provided context for the defendant's responses. The court also rejected the defendant's argument that the detective's statements during the interrogation that the defendant was lying constituted improper opinion testimony on the defendant's credibility and that of the State's witnesses.

State v. McCoy, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). Trial court did not err by excluding defense evidence of guilt of another where the evidence was "sheer conjecture" and was not inconsistent with the defendant's guilt.

Rule 403

State v. Cooper, __ N.C. App. __, __ S.E.2d __ (Sept. 3, 2013). In this murder case, the trial court committed reversible error by excluding, under Rule 403, testimony by a defense expert that certain key incriminating computer files had been planted on the defendant's computer. Temporary internet files recovered from the defendant's computer showed that someone conducted a Google Map search on the laptop while it was at the defendant's place of work the day before the victim was murdered. The Google Map search was initiated by someone who entered the zip code associated with the defendant's house, and then moved the map and zoomed in on the exact spot on near a nearby road where the victim's body later was found.

404(b) Evidence

State v. Gordon, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). In a robbery case involving a purse snatching, a purse-snatching by the defendant 6 weeks prior was properly admitted under Rule 404(b). The court found that the incidents were sufficiently in that they both occurred in Wal-Mart parking lots and involved a purse-snatching from a female victim who was alone. Also, the requirement of temporal proximity was satisfied.

State v. Green, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In a residential robbery case, the trial court did not err by admitting 404(b) evidence of the defendant's robbery at a Holiday Inn two days after the incident in question. As to similarity, the court noted that both incidents were armed robberies. Also, the perpetrators in both wore black hoodies and dark fabric covering part of their faces, immediately demanded money upon entering the buildings, used a black semi-automatic handgun by "pushing" it to the heads of the victims, restrained the victims in a similar manner, and moved the victims from place to place, searching for money.

State v. Hanif, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). In a counterfeit controlled substance case in where the defendant was alleged to have sold tramadol hydrochloride, representing it to be Vicodin, evidence that he also possessed Epsom salt in a baggie was properly admitted under Rule 404(b). The salt bore a sufficient similarity to crack cocaine in appearance and packaging that it caused an officer to do a field test to determine if it was cocaine. Under these circumstances, evidence that the defendant possessed the salt was probative of intent, plan, scheme, and modus operandi.

State v. Walston, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In a child sex case, the trial court did not err by admitting 404(b) evidence. The court found the prior acts sufficiently similar and that the requirement of temporal proximity was met.

State v. Grooms, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2013). In a second-degree murder case arising after the defendant drove while impaired and hit and killed two bicyclists, the trial court did not err by admitting Rule 404(b) evidence. Specifically, Thelma Shumaker testified regarding an incident where the defendant drove while impaired on the same road two months before the collision in question. Shumaker also testified that the defendant habitually drank alcohol, drank alcohol while driving 20 times, and drove while impaired one or two additional times. The trial court found that Shumaker's testimony regarding the specific incident was admissible to show malice. With regard to Shumaker's other testimony, the court held that even if the evidence was inadmissible, the defendant could not establish the requisite prejudice, given the other evidence.

Character Evidence

State v. Tatum-Wade, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In this tax evasion case, the trial court erred by excluding the defendant's character evidence. The facts indicated that the defendant believed advice from others that by completing certain Sovereign Citizen papers, she would be exempt from having to pay taxes. The defendant's witness was permitted to testify to the opinion that the defendant was a truthful, honest, and law-abiding citizen. However, the trial court excluded the witness's testimony regarding the defendant's trusting nature. The court agreed with the defendant that her character trait of being trusting of others was pertinent to whether she willfully attempted to evade paying taxes. The court found the error harmless.

State v. Walston, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In a child sex case, the trial court committed prejudicial error by excluding opinion testimony that the defendant was respectful around children and interacted in a positive way with children. The court reasoned:

> Testimony of Defendant's character for respectful treatment of children is relevant because it has a tendency to make the existence of "any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence of character for respectful treatment of children tends to make the facts central to the charges, that Defendant committed, inter alia, first-degree

> statutory rape of a child, less probable than they would be without such evidence. Testimony of this character trait is therefore relevant and "pertinent."

Slip Op. at p. 10 (citation omitted).

Expert Opinions

State v. Gamez, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). (1) In criminal cases, the amendment to N.C.Evid. R. 702, which is "effective October 1, 2011, and applies to actions commenced on or after that date" applies to cases where the indictment is filed on or after that date. The court noted that it had suggested in a footnote in a prior unpublished opinion that the trigger date for applying the amended Rule is the start of the trial but held that the proper date is the date the indictment is filed. Here, the defendant was initially indicted on 17 May 2010, before the 1 October 2011 effective date. Although a second bill of indictment was filed on 12 December 2011 and subsequently joined for trial, the court held that the criminal proceeding commenced with the filing of the first indictment and that therefore amended Rule 702 did not apply. (2) In a child sex case decided under pre-amended R. 702, the trial court did not abuse its discretion by admitting expert opinion that the victim suffered from post-traumatic stress disorder when a licensed clinical social worker was tendered as an expert in social work and routinely made mental health diagnoses of sexual assault victims. The court went on to note that when an expert testifies the victim is suffering from PTSD, the testimony must be limited to corroboration and may not be admitted as substantive evidence.

State v. Walston, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). For purposes of applying the effective date of the amendment to Rule 702 (the amended rule applies to actions "arising on or after" 1 October 2011), in a case where a superseding indictment is used, the relevant date is the date the superseding indictment is filed, not the filing date of the original indictment.

State v. Frady, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). In this child sex case, the trial court committed reversible error by allowing the State's medical expert to testify to the opinion that the victim's disclosure was consistent with sexual abuse where there was no physical evidence consistent with abuse. In order for an expert medical witness to give an opinion that a child has, in fact, been sexually abused, the State must establish a proper foundation, i.e. physical evidence consistent with sexual abuse. Without physical evidence, expert testimony that sexual abuse has occurred is an impermissible opinion regarding credibility. Although the expert in this case did not diagnose the victim as having been sexually abused, she "essentially expressed her opinion that [the victim] is credible."

State v. Perry, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In a child homicide case, the trial court did not commit plain error by allowing the State's medical experts to testify that their review of the medical records and other available information indicated that the victim's injuries were consistent with previously observed cases involving intentionally inflicted injuries and were inconsistent with previously observed cases involving accidentally inflicted injuries. The defendant asserted that these opinions rested "on previously accepted medical science that is now in doubt" and that, because "[c]urrent medical science has cast significant doubt" on previously accepted theories regarding the possible causes of brain injuries in children, there is currently "no medical certainty around these topics." The court rejected this argument, noting that there was no information in the record about the state of "current medical science" or the degree to which "significant doubt" has arisen with respect to the manner in which brain injuries in young children occur.

State v. Cooper, __ N.C. App. __, __ S.E.2d __ (Sept. 3, 2013). In this murder case, the trial court committed reversible error by ruling that the defendant's expert was not qualified to give expert testimony that incriminating computer files had been planted on the defendant's computer. Temporary internet files recovered from the defendant's computer showed that someone conducted a Google Map search on the laptop while it was at the defendant's place of work the day before the victim was murdered. The Google Map search was initiated by someone who entered the zip code associated with the defendant's house, and then moved the map and zoomed in on the exact spot on near a nearby road where the victim's body later was found. Applying the old version of NC Evidence Rule 702 and the *Howerton* test, the court found that the trial court erred by concluding that the defendant's expert was not qualified to offer the relevant

expert testimony. It went on to conclude that this error deprived the defendant of his constitutional right to present a defense.

State v. Hanif, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). In a counterfeit controlled substance case, the trial court committed plain error by admitting evidence identifying a substance as tramadol hydrochloride based solely upon an expert's visual inspection. The State's witness Brian King, a forensic chemist with the State Crime Lab, testified that after a visual inspection, he identified the pills as tramadol hydrochloride. Specifically he compared the tablets' markings to a Micromedex online database. King performed no chemical analysis of the pills. Finding that *State v. Ward*, 364 N.C. 133 (2010), controlled, the court held that in the absence of a scientific, chemical analysis of the substance, King's visual inspection was insufficient to identify the composition of the pills.

Lay Opinions

State v. Storm, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). In a murder case, the trial court did not err by excluding testimony of Susan Strain, a licensed social worker. Strain worked with the defendant's step-father for several years and testified that she occasionally saw the defendant in the lobby of the facility where she worked. The State objected to Strain's proffered testimony that on one occasion the defendant "appeared noticeably depressed with flat affect." The trial court allowed Strain to testify to her observation of the defendant, but did not permit her to make a diagnosis of depression based upon her brief observations of the defendant some time ago. The defendant tendered Strain as a lay witness and made no attempt to qualify her as an expert; her opinion thus was limited to the defendant's emotional state and she could not testify concerning a specific psychiatric diagnosis. The statement that the defendant "appeared noticeably depressed with flat affect" is more comparable to a specific psychiatric diagnosis than to a lay opinion of an emotional state. Furthermore Strain lacked personal knowledge because she only saw the defendant on occasion in the lobby, her observations occurred seven years before to the murder, she did not spend any appreciable amount of time with him, and the defendant did not present any evidence to indicate Strain had any personal knowledge of his mental state at that time.

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). An officer properly gave lay witness testimony. In a case where data from the defendant's electronic monitoring device was used to place him at the crime scene, the officer-witness testified regarding the operation of the device and tracking data retrieved from the secured server. When questioned about specific tracking points in the sequence of mapped points, he identified the date, time, accuracy reading, and relative location of the tracking points.

Hearsay

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court properly admitted data obtained from an electronic surveillance device worn by the defendant and placing him at the scene. The specific evidence included an exhibit showing an event log compiled from data retrieved from the defendant's device and a video file plotting the defendant's tracking data. The court began by holding that the tracking data was a data compilation and that the video file was merely an extraction of that data produced for trial. Thus, it concluded, the video file was properly admitted as a business record if the tracking data was recorded in the regular course of business near the time of the incident and a proper foundation was laid. The defendant did not dispute that the device's data was recorded in the regular course of business near the time of the incident. Rather, he asserted that the State failed to establish a proper foundation to verify the authenticity and trustworthiness of the data. The court disagreed noting that the officer-witness established his familiarity with the GPS tracking system by testifying about his experience and training in electronic monitoring, concerning how the device transmits data to a secured server where the data was stored and routinely accessed in the normal course of business, and how, in this case, he accessed the tracking data for the defendant's device and produced evidence introduced at trial.

Crawford Issues

State v. Ortiz-Zape, __ N.C. __, __ S.E.2d __ (June 27, 2013). Reversing the Court of Appeals' decision in an unpublished case, the court held that no confrontation clause violation occurred when an expert in forensic science testified to her opinion that the substance at issue was cocaine and that opinion was based upon the expert's independent analysis of testing performed by another analyst in her laboratory. At trial the State sought to introduce Tracey Ray of the CMPD crime lab as an expert in forensic chemistry. During voir dire the defendant sought to exclude admission of a lab report created by a non-testifying analyst and any testimony by any lab analyst who did not perform the tests or write the lab report. The trial court rejected the defendant's confrontation clause objection and ruled that Ray could testify about the practices and procedures of the crime lab, her review of the testing in this case, and her independent opinion concerning the testing. However, the trial court excluded the non-testifying analyst's report under Rule 403. The defendant was convicted and appealed. The Court of Appeals reversed, finding that the Ray's testimony violated the confrontation clause. The NC Supreme Court disagreed. The court viewed the US Supreme Court's decision in *Williams v. Illinois* as "indicat[ing] that a qualified expert may provide an independent opinion based on otherwise inadmissible out-of-court statements in certain contexts." Noting that when an expert gives an opinion, the expert opinion itself, not its underlying factual basis, constitutes substantive evidence, the court concluded:

> Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert. We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely "surrogate testimony" parroting otherwise inadmissible statements.

(quotations and citations omitted). Turning to the related issue of whether an expert who bases an opinion on otherwise inadmissible facts and data may, consistent with the Confrontation Clause, disclose those facts and data to the factfinder, the court stated:

> Machine-generated raw data, typically produced in testing of illegal drugs, present a unique subgroup of . . . information. Justice Sotomayor has noted there is a difference between a lab report certifying a defendant's blood-alcohol level and machine-generated results, such as a printout from a gas chromatograph. The former is the testimonial statement of a person, and the latter is the product of a machine. . . . Because machine-generated raw data, if truly machine-generated, are not statements by a person, they are neither hearsay nor testimonial. We note that representations[ ] relating to past events and human actions not revealed in raw, machine-produced data may not be admitted through "surrogate testimony." Accordingly, consistent with the Confrontation Clause, if of a type reasonably relied upon by experts in the particular field, raw data generated by a machine may be admitted for the purpose of showing the basis of an expert's opinion.

(quotations and citations omitted). Turning to the case at hand, the court noted that here, the report of the non-testifying analyst was excluded under Rule 403; thus the only issue was with Ray's expert opinion that the substance was cocaine. Applying the standard stated above, the court found that no confrontation violation occurred. Providing additional guidance for the State, the court offered the following in a footnote: "we suggest that prosecutors err on the side of laying a foundation that establishes compliance with Rule . . . 703, as well as the lab's standard procedures, whether the testifying analyst observed or participated in the initial laboratory testing, what independent analysis the testifying analyst conducted to reach her opinion, and any assumptions upon which the testifying analyst's testimony relies." Finally, the court held that even if error occurred, it was harmless beyond a reasonable doubt given that the defendant himself had indicated that the substance was cocaine.

State v. Brewington, __ N.C. __, __ S.E.2d __ (June 27, 2013). Reversing the Court of Appeals, the Court held that no *Crawford* violation occurred when the State proved that the substance at issue was cocaine through the use of a substitute analyst. The seized evidence was analyzed at the SBI by Assistant Supervisor in Charge Nancy Gregory. At trial, however, the substance was identified as cocaine, over the

defendant's objection, by SBI Special Agent Kathleen Schell. Relying on Gregory's report, Schell testified to the opinion that the substance was cocaine; Gregory's report itself was not introduced into evidence. Relying on *Ortiz-Zape* (above), the court concluded that Schell presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony.

State v. Hurt, __ N.C. __, __ S.E.2d __ (June 27, 2013). In another substitute analyst case, the court per curiam and for the reasons stated in *Ortiz-Zape* (above), reversed the Court of Appeals' decision in *State v. Hurt*, 208 N.C. App. 1 (2010) (applying *Crawford* to a non-capital *Blakely* sentencing hearing in a murder case and holding that *Melendez-Diaz* prohibited the introduction of reports by non-testifying forensic analysts pertaining to DNA analysis).

State v. Craven, __ N.C. __, __ S.E.2d __ (June 27, 2013). The court held that admission of lab reports through the testimony of a substitute analyst (Agent Schell) violated the defendant' confrontation clause rights where the testifying analyst did not give her own independent opinion, but rather gave "surrogate testimony" that merely recited the opinion of non-testifying testing analysts that the substances at issue were cocaine. Distinguishing *Ortiz-Zape* (above), the court held that here the State's expert did not testify to an independent opinion obtained from the expert's own analysis but rather offered impermissible surrogate testimony repeating testimonial out-of-court statements made by non-testifying analysts. With regard to the two lab reports at issue, the testifying expert was asked whether she agreed with the non-testifying analysts' conclusions. When she replied in the affirmative, she was asked what the non-testifying analysts' conclusions were and the underlying reports were introduced into evidence. The court concluded: "It is clear . . . that Agent Schell did not offer—or even purport to offer—her own independent analysis or opinion [of the] . . . samples. Instead, Agent Schell merely parroted [the non-testifying analysts'] . . . conclusions from their lab reports." Noting that the lab reports contained the analysts' certification prepared in connection with a criminal investigation or prosecution, the court easily determined that they were testimonial. The court went on to find that this conclusion did not result in error with regard to the defendant's conspiracy to sell or deliver cocaine conviction. As to the defendant's conviction for sale or delivery of cocaine, the six participating Justices were equally divided on whether the error was harmless beyond a reasonable doubt. Consequently, as to that charge the Court of Appeals' decision holding that the error was reversible remains undisturbed and stands without precedential value. However, the court found that the Court of Appeals erroneously vacated the conviction for sale or delivery and that the correct remedy was a new trial.

State v. Williams, __ N.C. __, __ S.E.2d __ (June 27, 2013). Reversing the Court of Appeals, the court held that any confrontation clause violation that occurred with regard to the use of substitute analyst testimony was harmless beyond a reasonable doubt where the defendant testified that the substance at issue was cocaine. When cocaine was discovered near the defendant, he admitted to the police that a man named Chris left it there for him to sell and that he had sold some that day. The substance was sent to the crime lab for analysis. Chemist DeeAnne Johnson performed the analysis of the substance. By the time of trial however, Johnson no longer worked for the crime lab. Thus, the State presented Ann Charlesworth of the crime lab as an expert in forensic chemistry to identify the substance at issue. Over objection, she identified the substance as cocaine. The trial court also admitted, for the purpose of illustrating Charlesworth's testimony, Johnson's lab reports. At trial, the defendant reiterated what he had told the police. The defendant was convicted and he appealed. The Court of Appeals reversed, finding that Charlesworth's substitute analyst testimony violated the defendant's confrontation rights. The NC Supreme Court held that even if admission of the testimony and exhibits was error, it was harmless beyond a reasonable doubt because the defendant himself testified that the seized substance was cocaine.

State v. Brent, __ N.C. __, __ S.E.2d __ (June 27, 2013). Reversing the Court of Appeals, the court held that by failing to make a timely objection at trial and failing to argue plain error in the Court of Appeals, the defendant failed to preserve the question of whether substitute analyst testimony in a drug case violated his confrontation rights. The court noted that at trial the defendant objected to the testimony related to the composition of the substance only outside the presence of the jury; he did not object to admission of either the expert's opinion or the raw data at the time they were offered into evidence. He thus failed to preserve the issue for review. Furthermore, the defendant failed to preserve his challenge to admission of

the raw data by failing to raise it in his brief before the Court of Appeals. Moreover, the court concluded, even if the issues had been preserved, under *Ortiz-Zape* (above), the defendant would lose on the merits.

State v. Hough, __ N.C. __, __ S.E.2d __ (June 27, 2013). With one Justice not taking part in the decision and the others equally divided, the court, per curiam, left undisturbed the decision below, *State v. Hough*, 202 N.C. App. 674 (Mar. 2, 2010). In the decision below, the Court of Appeals held that no *Crawford* violation occurred when reports done by non-testifying analyst as to composition and weight of controlled substances were admitted as the basis of a testifying expert's opinion on those matters. [Author's note: Because the Justices were equally divided, the decision below, although undisturbed, has no precedential value.]

State v. Call, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2013). (1) In a larceny by merchant case, statements made by a deceased Wal-Mart assistant manager to the store's loss prevention coordinator were non-testimonial. The loss prevention coordinator was allowed to testify that the assistant manager had informed him about the loss of property, triggering the loss prevention coordinator's investigation of the matter. The court stated:

> [The] statement was not made in direct response to police interrogation or at a formal proceeding while testifying. Rather, [the declarant] privately notified his colleague . . . about a loss of product at the Wal-Mart store. This statement was made outside the presence of police and before defendant was arrested and charged. Thus, the statement falls outside the purview of the Sixth Amendment. Furthermore, [the] statement was not aimed at defendant, and it is unreasonable to believe that his conversation with [the loss prevention coordinator] would be relevant two years later at trial since defendant was not a suspect at the time this statement was made.

(2) Any assertions by the assistant manager contained in a receipt for evidence form signed by him were non-testimonial. The receipt—a law enforcement document—established ownership of the baby formula that had been recovered by the police, as well as its quantity and type; its purpose was to release the property from the police department back to the store.

Use of Defendant's Silence at Trial

Salinas v. Texas, 570 U.S. __ (June 17, 2013). Use at trial of the defendant's silence during a non-custodial interview did not violate the Fifth Amendment. Without being placed in custody or receiving *Miranda* warnings, the defendant voluntarily answered an officer's questions about a murder. But when asked whether his shotgun would match shells recovered at the murder scene, the defendant declined to answer. Instead, he looked at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, and began "to tighten up." After a few moments, the officer asked additional questions, which the defendant answered. The defendant was charged with murder and at trial prosecutors argued that his reaction to the officer's question suggested that he was guilty. The defendant was convicted and on appeal asserted that this argument violated the Fifth Amendment. The Court took the case to resolve a lower court split over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a non-custodial police interview as part of its case in chief. In a 5-to-4 decision, the Court held that the defendant's Fifth Amendment claim failed. Justice Alito, joined by the Chief Justice and Justice Kennedy found it unnecessary to reach the primary issue, concluding instead that the defendant's claim failed because he did not expressly invoke the privilege in response to the officer's question and no exception applied to excuse his failure to invoke the privilege. Justice Thomas filed an opinion concurring in the judgment, to which Justice Scalia joined. In Thomas's view the defendant's claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his pre-custodial silence did not compel him to give self-incriminating testimony.

State v. Barbour, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The State did not impermissibly present evidence of the defendant's post-*Miranda* silence. After being advised of his *Miranda* rights, the defendant did not remain silent but rather made statements to the police. Thus, no error occurred when an officer indicated that after his arrest the defendant never asked to speak with the officer or anyone else in the officer's office.

Proffer of Evidence

State v. Walston, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). The trial court incorrectly denied defense counsel's request to make a proffer of excluded character evidence.

Criminal Offenses

General Crimes

State v. Oliphant, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). There was sufficient evidence of a conspiracy to commit armed robbery. The victim was approached from behind by both defendants while walking alone. One defendant held the gun while the other reached for her cellphone. Although not showing an express agreement between defendants, the circumstances sufficiently establish an implied agreement to rob the victim with a firearm.

State v. Fish, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). In a case in which the defendant was charged with conspiracy to commit felony larceny, the trial court did not err by denying the defendant's motion to submit a jury instruction on conspiracy to commit misdemeanor larceny. The court determined that evidence of the cumulative value of the goods taken is evidence of a conspiracy to steal goods of that value, even if the conspirators' agreement is silent as to exact quantity. Here, the evidence showed that the value of the items taken was well in excess of $1,000.

Homicide

State v. Horskins, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). In this first-degree murder case, the evidence was sufficient to show premeditation and deliberation. After some words in a night club parking lot the defendant shot the victim, who was unarmed, had not reached for a weapon, had not engaged the defendant in a fight and did nothing to provoke the defendant's violent response. After the victim fell from the defendant's first shot, the defendant shot the victim 6 more times. Instead of then trying to help the victim, the defendant left the scene and attempted to hide evidence.

State v. Fisher, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). The trial court properly denied the defendant's motion to dismiss a charge of involuntary manslaughter. The primary issue raised in the defendant's appeal was whether there was sufficient evidence that the defendant committed a culpably negligent act which proximately resulted in the victim's death. The evidence showed that the defendant became angry at the victim during the defendant's party and "kicked or stomped" his face, leaving the victim semiconscious; the defendant was irritated that he had to take the victim to meet the victim's parents at a church; instead of taking the victim to the church, the defendant drove him to an isolated parking area and again beat him; the defendant abandoned the victim outside knowing that the temperature was in the 20s and that the victim had been beaten, was intoxicated, and was not wearing a shirt; the defendant realized his actions put the victim in jeopardy; and even after being directly informed by his father that the victim was missing and that officers were concerned about him, the defendant lied about where he had last seen the victim, hindering efforts to find and obtain medical assistance for the victim. On these facts, the court had "no difficulty" concluding that there was sufficient evidence that the defendant's actions were culpably negligent and that he might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

State v. Perry, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In this child homicide case, the trial court did not err by denying the defendant's motion to dismiss a charge of felony-murder based on an underlying felony child abuse. Prior to the incident in question the victim was a normal, healthy baby. After having been left alone with the defendant, the victim was found unconscious, unresponsive, and barely breathing. The child's body had bruises and scratches, including unusual bruises on her buttocks that were not "typical" of the bruises that usually resulted from a fall and a recently inflicted blunt force injury to her ribs that did not appear to have resulted from the administration of CPR. An internal examination showed extensive bilateral retinal hemorrhages in multiple layers of the retinae, significant

cerebral edema or swelling, and extensive bleeding or subdural hemorrhage in the brain indicating that her head had been subjected to a number of individual and separate blunt force injuries that were sufficiently significant to damage her brain and to cause a leakage of blood. Her injuries, which could have been caused by human hands, did not result from medical treatment or a mere fall from a couch onto a carpeted floor.

State v. Grooms, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2013). In a second-degree murder case arising after the defendant drove impaired and hit and killed two bicyclists, there was sufficient evidence of malice. The defendant's former girlfriend previously warned him of the dangers of drinking and driving; the defendant's prior incident of drinking and driving on the same road led the girlfriend to panic and fear for her life; the defendant's blood alcohol level was .16; the defendant consumed an illegal controlled substance that he knew was impairing; the defendant swerved off the road three times prior to the collision, giving him defendant notice that he was driving dangerously; despite this, the defendant failed to watch the road and made a phone call immediately before the collision; the defendant failed to apply his brakes before or after the collision; and the defendant failed to call 911 or provide aid to the victims.

Robbery

State v. Evans, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). Rejecting the defendant's argument that the State failed to present evidence of an attempted taking, the court held that there was sufficient evidence of attempted robbery. The defendant's accomplice testified that the defendant planned the robbery with her; the defendant waited in a vehicle until the accomplice went into the residence and sent him a message with the location of each individual inside; the defendant entered the apartment and went directly to the victim's bedroom; and the defendant proceeded to wield his firearm in a threatening manner towards the victim. The court noted that while there was no testimony that the defendant made a specific demand for money, an actual demand for the victim's property is not required.

Kidnapping

State v. Boyd, __ N.C. __, __ S.E.2d __ (June 13, 2013). For the reasons stated in the dissenting opinion below, the court reversed *State v. Boyd*, __ N.C. App. __, 730 S.E.2d 193 (Aug. 7, 2012), and held that no plain error occurred in a kidnapping case. In the decision below, the court of appeals held, over a dissent, that the trial court committed plain error by instructing the jury on a theory of second degree kidnapping (removal) that was not charged in the indictment or supported by evidence. The dissenting judge did not believe that the error constituted plain error.

Assaults

State v. Lowery, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). The evidence was sufficient to establish assault by strangulation. The victim testified that the defendant strangled her twice; the State's medical expert testified that the victim's injuries were consistent with strangulation; and photographic evidence showed bruising, abrasions, and bite mark on and around the victim's neck. The court rejected the defendant's arguments that the statute required "proof of physical injury beyond what is inherently caused by every act of strangulation" or extensive physical injury.

Sexual Assaults & Related Offenses

State v. Green, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). Deciding an issue of first impression, the court held that the defendant's act of forcing the victim at gunpoint to penetrate her own vagina with her own fingers constitutes a sexual act supporting a conviction for first-degree sexual offense.

State v. Agustin, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of rape of a child by an adult under G.S. 14-27.2A(a). The defendant had argued that there was insufficient evidence to establish that the offense occurred on or after December 1, 2008, the statute's effective date. (2) The trial court did not err in sentencing the

defendant to 300-369 months imprisonment on this charge. The court rejected the defendant's argument that the trial court had discretion to sentence the defendant to less than 300 months.

State v. Packingham, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). The court held that G.S. 14-202.5, proscribing the crime of accessing a commercial social networking Web site by a sex offender, is unconstitutional. The court held that the statute violated the defendant's First Amendment Rights, finding that the content-neutral regulation of speech was not narrowly tailored, and that it is unconstitutionally vague on its face and overbroad as applied. For a discussion of this case, see my colleague's blog post here.

State v. Marlow, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court did not err by sentencing the defendant for two crimes—statutory rape and incest—arising out of the same transaction. The two offenses are not the same under the *Blockburger* test; each has an element not included in the other.

State v. Boyett, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). On remand by the NC Supreme Court for reconsideration in light of *State v. Carter*, __ N.C. __, 739 S.E.2d 548 (2013) (no plain error occurred in a child sexual offense case when the trial court failed to instruct on attempted sexual offense even though the evidence of penetration was conflicting), the court held that no plain error occurred when the trial court failed to instruct the jury on attempted second-degree rape and attempted incest when the evidence of penetration was conflicting. As in *Carter*, the defendant failed to show that the jury would have disregarded any portions of the victim's testimony stating that penetration occurred in favor of instances in which she said it did not occur. Thus, the defendant failed to show a "probable impact" on the verdict.

Domestic Violence Protective Order Offenses

State v. Poole, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). The trial court erred by dismissing an indictment charging the defendant with violating an ex parte domestic violence protective order (DVPO) that required him to surrender his firearms. The trial court entered an ex parte Chapter 50B DVPO prohibiting the defendant from contacting his wife and ordering him to surrender all firearms to the sheriff. The day after the sheriff served the defendant with the DVPO, officers returned to the defendant's home and discovered a shotgun. He was arrested for violating the DVPO. The trial court granted the defendant's motion to dismiss, finding that under *State v. Byrd,* 363 N.C. 214 (2009), the DVPO was not a protective order entered within the meaning of G.S. 14-269.8 and that the prosecution would violate the defendant's constitutional right to due process. The State appealed. The court concluded that *Byrd* was not controlling because of subsequent statutory amendments and that the prosecution did not violate the defendant's procedural due process rights.

Contributing to the Delinquency of a Minor

State v. Stevens, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). The evidence was sufficient to show that the defendant committed the offense of contributing to the delinquency/neglect of a minor. The court rejected the defendant's argument that the State presented no evidence that the defendant was the minor's parent, guardian, custodian, or caretaker, concluding that was not an element of the offense. The court further found that the State presented sufficient evidence that the defendant put the juvenile in a place or condition whereby the juvenile could be adjudicated neglected. Specifically, he took the juvenile away from the area near the juvenile's home, ignored the juvenile after he was injured, and then abandoned the sleeping juvenile in a parking lot. The court concluded: "Defendant put the juvenile in a place or condition where the juvenile could be adjudicated neglected because he could not receive proper supervision from his parent."

Larceny & Related Offenses

State v. Sheppard, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). (1) A larceny was from the person when the defendant stole the victim's purse, which was in the child's seat of her grocery store shopping cart. At the time, the victim was looking at a store product and was within hand's reach of her cart; additionally she realized that the larceny was occurring as it happened, not some time later. (2) The trial court erred

by sentencing the defendant for both larceny from the person and larceny of goods worth more than $1,000 based on a single larceny. Larceny from the person and larceny of goods worth more than $1,000 are not separate offenses, but alternative ways to establish that a larceny is a Class H felony. While it is proper to indict a defendant on alternative theories of felony larceny and allow the jury to determine guilt as to each theory, where there is only one larceny, judgment may only be entered for one larceny.

State v. Fish, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The State presented sufficient evidence that the fair market value of the stolen boat batteries was more than $1,000 and thus supported a conviction of felony larceny.

Burglary & Related Offenses

State v. Fish, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court erred by denying the defendant's motion to dismiss charges of breaking or entering a boat where the State failed to present evidence that the boats contained items of value. Although even trivial items can satisfy this element, here the record was devoid of any evidence of items of value. The batteries did not count because they were part of the boats.

Weapons Offenses

State v. Kirkwood, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). No violation of double jeopardy occurred when the trial court sentenced the defendant for three counts of discharging a firearm into occupied property. Although the three gunshots were fired in quick succession, the bullet holes were in different locations around the house's front door area. The evidence also showed that at least one shot was fired from a revolver, which, in single action mode, must be manually cocked between firings and, in double action mode, can still only fire a single bullet at a time. The other gun that may have been used was semiautomatic but it did not always function properly and many times, when the trigger was pulled, would not fire. Neither gun was a fully automatic weapon such as a machine gun. There was sufficient evidence to show that each shot was "distinct in time, and each bullet hit the [house] in a different place." In reaching this holding, the court declined to apply assault cases that require a distinct interruption in the original assault for the evidence to support a second conviction.

Drug Offenses

State v. Barnes, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). (1) Over a dissent, the court held that the trial court did not err by denying the defendant's motion to dismiss a charge of possession of a controlled substance on the premises of a local confinement facility. The defendant first argued that the State failed to show that he intentionally brought the substance on the premises. The court held that the offense was a general intent crime. As such, there is no requirement that a defendant has to specifically intend to possess a controlled substance on the premises of a local confinement facility. It stated: "[W]e are simply unable to agree with Defendant's contention that a conviction . . . requires proof of any sort of specific intent and believe that the relevant offense has been sufficiently shown to exist in the event that the record contains evidence tending to show that the defendant knowingly possessed a controlled substance while in a penal institution or local confinement facility." The court also rejected the defendant's argument that his motion should have been granted because he did not voluntarily enter the relevant premises but was brought to the facility by officers against his wishes. The court rejected this argument concluding, "a defendant may be found guilty of possession of a controlled substance in a local confinement facility even though he was not voluntarily present in the facility in question." Following decisions from other jurisdictions, the court reasoned that while a voluntary act is required, "the necessary voluntary act occurs when the defendant knowingly possesses the controlled substance." The court also concluded that the fact that officers may have failed to warn the defendant that taking a controlled substance into the jail would constitute a separate offense, was of no consequence. (2) The trial court erred by entering judgment for both simple possession of a controlled substance and possession of a controlled substance on the premises of a local confinement facility when both charges stemmed from the same act of possession. Simple possession is a lesser-included offense of the second charge.

Arrest, Search & Investigation

Vehicle Stops

State v. Kochuk, __ N.C. __, __ S.E.2d __ (June 13, 2013). For the reasons stated in the dissenting opinion below, the court reversed and found that an officer had reasonable suspicion for a stop. In the opinion below, *State v. Kochuk*, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012), the court of appeals, over a dissent, affirmed the trial court's order granting the defendant's motion to suppress all evidence obtained as a result of a vehicle stop. Relying on *State v. Fields*, 195 N.C. App. 740 (2009) (weaving alone is insufficient to support a reasonable suspicion that the defendant was driving while impaired), the trial court had determined that the officer lacked reasonable suspicion for the stop. The officer saw the defendant's vehicle cross over the dotted white line causing both passenger side wheels to enter the right lane for three to four seconds. He also observed the defendant's vehicle drift to the right side of the right lane "where its wheels were riding on top of the white line . . . twice for a period of three to four seconds each time." The court of appeals found these movements were "nothing more than weaving" and thus under *Fields*, the stop was improper. The dissenting judge believed that the officer had reasonable suspicion under *State v. Otto*, ––– N.C. ––––, 726 S.E.2d 824 (2012).

State v. Coleman, __ N.C. App. __, __ S.E.2d __ (June 18, 2013). An officer lacked reasonable suspicion to stop the defendant's vehicle. A "be on the lookout" call was issued after a citizen caller reported that there was a cup of beer in a gold Toyota sedan with license number VST-8773 parked at the Kangaroo gas station at the corner of Wake Forest Road and Ronald Drive. Although the complainant wished to remain anonymous, the communications center obtained the caller's name as Kim Creech. An officer responded and observed a vehicle fitting the caller's description. The officer followed the driver as he pulled out of the lot and onto Wake Forest Road and then pulled him over. The officer did not observe any traffic violations. After a test indicated impairment, the defendant was charged with DWI. Noting that the officer's sole reason for the stop was Creech's tip, the court found that the tip was not reliable in its assertion of illegality because possessing an open container of alcohol in a parking lot is not illegal. It concluded: "Accordingly, Ms. Creech's tip contained no actual allegation of criminal activity." It further found that the officer's mistaken belief that the tip included an actual allegation of illegal activity was not objectively reasonable. Finally, the court concluded that even if the officer's mistaken belief was reasonable, it still would find the tip insufficiently reliable. Considering anonymous tip cases, the court held that although Creech's tip provided the license plate number and location of the car, "she did not identify or describe defendant, did not provide any way for [the] Officer . . . to assess her credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions."

State v. Derbyshire, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). In this DWI case, the trial court held that the officer lacked reasonable suspicion to stop the defendant's vehicle. At 10:05 pm on a Wednesday night an officer noticed that the defendant's high beams were on. The officer also observed the defendant weave once within his lane of travel. When pressed about whether he weaved out of his lane, the officer indicated that "just . . . the right side of his tires" crossed over into the right-hand lane of traffic going in the same direction. The State presented no evidence that the stop occurred in an area of high alcohol consumption or that the officer considered such a fact as a part of her decision to stop the defendant. The court characterized the case as follows: "[W]e find that the totality of the circumstances . . . present one instance of weaving, in which the right side of Defendant's tires crossed into the right-hand lane, as well as two conceivable "plus" factors — the fact that Defendant was driving at 10:05 on a Wednesday evening and the fact that [the officer] believed Defendant's bright lights were on before she initiated the stop." The court first noted that the weaving in this case was not constant and continuous. It went on to conclude that driving at 10:05 pm on a Wednesday evening and that the officer believed that the defendant's bright lights were on "are not sufficiently uncommon to constitute valid 'plus' factors" to justify the stop under a "weaving plus" analysis.

Seizure

State v. Verkerk, __ N.C. App. __, __ S.E.2d __ (Sept. 3, 2013). (1) A seizure occurred when the defendant stopped her vehicle after a fire truck following behind her flashed its red lights and activated its

siren. The fireman took this action after observing the defendant, among other things, weave out of her lane of traffic and almost hit a passing bus. (2) The court remanded to the trial court for findings of fact and conclusions of law regarding whether the fireman was acting as a state agent or a private person when the seizure occurred. (3) Whether the fireman lacked the statutory authority to stop the defendant's vehicle is irrelevant to whether the stop violated the Fourth Amendment. The court noted that the US Supreme Court has consistently applied traditional standards of reasonableness to searches or seizures effectuated by government actors who lack state law authority to act as law enforcement officers. Thus, if on remand the trial court determines that the fireman was a government actor, it should then determine whether the stop was constitutionally permissible by determining whether the stop was supported by reasonable articulable suspicion. (4) The trial court erred by holding that the fireman's stop was justified under G.S. 15A-404, which allows for a citizen's arrest when there is probable cause that certain crimes have been committed. Although reasonable suspicion may have supported a stop in this case, the evidence did not support a finding of probable cause. (5) If on remand the trial court finds that the stop was illegal, it should address whether evidence stemming from the defendant's later arrest by the police is admissible under the inevitable discovery and independent source doctrines. One judge concurred in part and dissented in part. This judge concurred with the conclusion that that stop was a seizure and that the fireman was not authorized to stop the defendant under G.S. 15A-404. He dissented however because he found that the fireman was a state actor and that the stop violated the NC Constitution.

State v. Knudsen, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). (1) The trial court did not err by determining that the defendant was seized while walking on a sidewalk. Although the officers used no physical force to restrain the defendant, both were in uniform and had weapons. One officer blocked the sidewalk with his vehicle and another used his bicycle to block the defendant's pedestrian travel on the sidewalk. (2) The trial court did not err by concluding that the seizure was unsupported by reasonable suspicion. The officers observed the defendant walking down the sidewalk with a clear plastic cup in his hands filled with a clear liquid. The defendant entered his vehicle, remained in it for a period of time, and then exited his vehicle and began walking down the sidewalk, where he was stopped. The officers stopped and questioned the defendant because he was walking on the sidewalk with the cup and the officers wanted to know what was in the cup.

Protective Sweep

State v. Dial, __ N.C. App. __, __ S.E.2d __ (June 18, 2013). The trial court did not err by denying the defendant's motion to suppress evidence discovered as a result of a protective sweep of his residence where the officers had a reasonable belief based on specific and articulable facts that the residence harbored an individual who posed a danger to the officers' safety. Officers were at the defendant's residence to serve an order for arrest. Although the defendant previously had answered his door promptly, this time he did not respond after an officer knocked and announced his presence for 10-15 minutes. The officer heard shuffling on the other side of the front door. When two other officers arrived, the first officer briefed them on the situation, showed them the order for arrest, and explained his belief that weapons were inside. When the deputies again approached the residence, "the front door flew open," the defendant exited and walked down the front steps with his hands raised, failing to comply with the officers' instructions. As soon as the first officer reached the defendant, the other officers entered the home and performed a protective sweep, lasting about 30 seconds. Evidence supporting the protective sweep included that the officers viewed the open door to the residence as a "fatal funnel" that could provide someone inside with a clear shot at the officers, the defendant's unusually long response time and resistance, the known potential threat of weapons inside the residence, shuffling noises that could have indicated more than one person inside the residence, the defendant's alarming exit from the residence, and the defendant's own actions that led him to be arrested in the open doorway.

Searches

State v. Miller, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). (1) Exigent circumstances—investigation of a possible burglary—supported officers' warrantless entry into the defendant's home. The police department received a burglar alarm report concerning a suspected breaking and entering at the defendant's home. The first arriving officer noticed a broken back window and that all of the doors

remained locked. Under these circumstances, the officer reasonably believed that the intruder could have still been in the home. (2) The officers' discovery of marijuana in a closet was not fruit of the poisonous tree. The officers entered the home with a police dog and found marijuana in a bedroom dresser drawer. They then continued their search. The dog then alerted on a hall closet, large enough to be a hiding place for a person. Upon opening the closet door, the officers discovered 2 large trash bags of marijuana. The defendant argued that since the search of the dresser drawer was illegal, their discovery of the marijuana in the closet was fruit of the poisonous tree. The court disagreed, concluding that the discovery of marijuana in the closet resulted from constitutional conduct. It explained: "There is no support for defendant's contention that [the] Officers . . . could not have resumed their lawful search after discovering the drugs in the bedroom." (3) The court remanded for further factfinding on the issue of whether the marijuana in the closet was in plain view. On this issue of first impression, the court concluded that if the police dog "opened the bags and exposed the otherwise hidden marijuana, it would not be admissible under the plain view doctrine."

Interrogation & Confessions

State v. Martin, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). The defendant's confession was involuntary. The defendant's first confession was made before *Miranda* warnings were given. The officer then gave the defendant *Miranda* warnings and had the defendant repeat his confession. The trial court suppressed the defendant's pre-*Miranda* confession but deemed the post-*Miranda* confession admissible. The court disagreed, concluding that the circumstances and tactics used by the officer to induce the first confession must be imputed to the post-*Miranda* confession. The court found the first confession involuntary, noting that the defendant was in custody, the officer made misrepresentations and/or deceptive statements, the officer made promises to induce the confession, and the defendant may have had an impaired mental condition.

Identification

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). An out-of-court show-up identification was not impermissibly suggestive. Police told a victim that they "believed they had found the suspect." The victim was then taken to where the defendant was standing in a front yard with officers. With a light shone on the defendant, the victim identified the defendant as the perpetrator from the patrol car. For reasons discussed in the opinion, the court held that the show-up possessed sufficient aspects of reliability to outweigh its suggestiveness.

Post-Conviction

Clerical Errors

State v. Lee, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). Where the trial court determined that the defendant had 16 prior record points and was a prior record level V but the judgment indicated that he had 5 prior record points and was a prior record level III, the entries on the judgment were clerical errors.

Motion for Appropriate Relief

State v. Peterson, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). (1) Under G.S. 15A-1445, the State could appeal the trial court's order granting the defendant's MAR on the basis of newly discovered evidence. (2) In this murder case, the trial court properly granted the defendant a new trial on the basis of newly discovered evidence. At trial one of the State's most important expert witnesses was SBI Agent Duane Deaver, who testified as an expert in bloodstain pattern analysis. Deaver testified that the victim was struck a minimum of four times before falling down stairs. Deaver stated that, based on his bloodstain analysis, the defendant attempted to clean up the scene, including his pants, prior to police arriving and that defendant was in close proximity to the victim when she was injured. The court held that Deaver's misrepresentations regarding his qualifications (discussed in the opinion) constituted newly discovered evidence entitling the defendant to a new trial. (3) At the MAR hearing, the trial court properly excluded the State's expert witness, who did not testify at the original trial. The court viewed the State's

position as "trying to collaterally establish that the jury would have reached the same verdict based on evidence not introduced at trial." It concluded that the trial court properly excluded this evidence:

> Defendant's newly discovered evidence concerned Agent Deaver, arguably, the State's most important expert witness. Thus, the State could have offered its own evidence regarding Agent Deaver's qualifications, lack of bias, or the validity of his experiments and conclusions. Furthermore, the State was properly allowed to argue that the evidence at trial was so overwhelming that the newly discovered evidence would have no probable impact on the jury's verdict. However, the State may not try to minimize the impact of this newly discovered evidence by introducing evidence not available to the jury at the time of trial. Thus, the trial court did not err in prohibiting the introduction of this evidence at the MAR hearing

State v. Lee, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). State could appeal an amended judgment entered after the trial court granted the defendant's MAR. The trial court entered the amended judgment after concluding (erroneously) that the 2009 amendments to the SSA applied to the defendant's 2005 offenses.

State v. Harwood, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). Declining to address whether *State v. Garris*, 191 N.C. App. 276 (2008), applied retroactively, the court held that the defendant's MAR was subject to denial because the *Garris* does not constitute a significant change in the substantive or procedural law as required by G.S. 15A-1415(b)(7), the MAR ground asserted by the defendant. When *Garris* was decided, no reported NC appellate decisions had addressed whether the possession of multiple firearms by a convicted felon constituted a single violation or multiple violations of G.S. 14-415.1(a). For that reason, *Garris* resolved an issue of first impression. The court continued: "Instead of working a change in existing North Carolina law, *Garris* simply announced what North Carolina law had been since the enactment of the relevant version of [G.S.] 14-415.1(a)." As a result, it concluded, "a decision which merely resolves a previously undecided issue without either actually or implicitly overruling or modifying a prior decision cannot serve as the basis for an award of appropriate relief made pursuant to [G.S.] 15A-1415(b)(7)." It thus concluded that the trial court lacked jurisdiction to grant relief for the reason requested and properly denied the MAR.

State v. Marino, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). The trial court did not err by rejecting the defendant's G.S. 15A-1414 MAR without an evidentiary hearing.

Newly Discovered Evidence

State v. Rhodes, __ N.C. __, __ S.E.2d __ (June 13, 2013). Reversing the court of appeals, the court held that information supporting the defendant's motion for appropriate relief (MAR) was not newly discovered evidence. After the defendant was convicted of drug possession offenses, his father told a probation officer that the contraband belonged to him. The trial court granted the defendant's MAR, concluding that this statement constituted newly discovered evidence under G.S. 15A-1415(c). The court concluded that because the information implicating the defendant's father was available to the defendant before his conviction, the statement was not newly discovered evidence and that thus the defendant was not entitled to a new trial. The court noted that the search warrant named both the defendant and his father, the house was owned by both of the defendant's parents, and the father had a history of violating drug laws. Although the defendant's father invoked the Fifth Amendment at trial when asked whether the contraband belonged to him, the information implicating him as the sole possessor of the drugs could have been made available by other means. It noted that on direct examination of the defendant's mother, the defendant did not pursue questioning about whether the drugs belonged to the father; also, although the defendant testified at trial, he gave no testimony regarding the ownership of the drugs.

Ineffective Assistance of Counsel

State v. Pemberton, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). (1) In a murder case, trial counsel did not impermissibly concede the defendant's guilt under *Harbison.* Although defense counsel never explicitly conceded the defendant's guilt during trial, she did make factual concessions, including

admitting that the defendant was present at the shooting and that he believed that he was participating in a plan to commit a robbery. The court found that it did not need to decide whether the factual admissions constituted an admission of guilt of first degree felony-murder given that the defendant expressly consented to counsel's admissions. (2) The court dismissed the defendant's claim that counsel's trial strategy constituted ineffectiveness under *Strickland.* This claim was dismissed without prejudice to the defendant's right to assert the claim in a Motion for Appropriate Relief.

Ex Post Facto

Peugh v. United States, 569 U.S. __ (June 10, 2013). The Court held that retroactive application of amended Federal Sentencing Guidelines to the defendant's convictions violated the Ex Post Facto Clause. The defendant was convicted for conduct occurring in 1999 and 2000. At sentencing he argued that the Ex Post Facto Clause required that he be sentenced under the 1998 version of the Guidelines in effect when he committed the offenses, not under the 2009 version, which was in effect at the time of sentencing. Under the 1998 version, his sentencing range was 30-37 months; under the 2009 version it was 70-87 months. The lower courts rejected the defendant's argument and the Supreme Court reversed.

Defenses

Self-Defense

State v. Presson, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). (1) The trial court did not err by denying the defendant's motion to dismiss homicide charges. The defendant argued that the evidence showed perfect self-defense. Noting that there was some evidence favorable to the defendant as to each of the elements of perfect self-defense, the court concluded that there was also evidence favorable to the State showing that the defendant's belief that it was necessary to kill was not reasonable, and that defendant was the aggressor or used excessive force. (2) The trial court did not commit plain error by instructing the jury that the defendant would lose the right to self-defense if he was the aggressor. The defendant had argued that the State failed to put forth evidence that the defendant was the aggressor.

Judicial Administration

In re Cline, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2013). (1) In a proceeding for removal of an elected district attorney (DA) from office, the trial court did not err by denying the DA's motion to continue where the statute, G.S. 7A-66, mandated that the matter be heard within 30 days. (2) In the absence of a statutory or rule-based provision for discovery in proceedings under the statute, the DA did not have a right to discovery. (3) Where the trial court put the burden of proof in the removal proceeding on the party who had initiated the action by clear, cogent and convincing evidence, no error occurred. (4) The court held that the trial court's rulings in the removal proceeding did not violate the DA's right to due process, noting that the DA had no right to discovery and that the trial court properly allocated the burden of proof. (5) The standard in the relevant provision of the removal statute of conduct prejudicial to the administration of justice which brings the office into disrepute is not unconstitutionally vague. (6) No violation of the prosecutor's First Amendment free speech rights occurred where the DA's removal was based on statements she made about a judge. The statements were made with actual malice and thus were not protected speech by the First Amendment. (7) Qualified immunity does not insulate the DA from removal based on statements made with actual malice. (8) Where the matter was heard without a jury, it is presumed that the trial court considered only admissible evidence, and the trial court did not err in admitting lay testimony.