Criminal Case Update

June 7, 2023

Cases covered include reported decisions from the North Carolina Appellate Courts between October 4, 2022, and May 12, 2023. To view all of the summaries, go to the Criminal Case Compendium. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

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Arrest, Search, and Investigation

Arrests & Investigatory Stops

Officer's show of authority by blocking defendant's vehicle in a driveway and activating blue lights represented a seizure under the Fourth Amendment.

State v. Eagle, 2022-NCCOA-680, 286 N.C. App. 80 (Oct. 18, 2022). In this Orange County case, defendant appealed her conviction for impaired driving, arguing the trial court erred by denying her motion to suppress an unlawful seizure by the arresting officer. The Court of Appeals agreed with defendant and found error in the denial of her motion to suppress.

In November of 2019, an officer from the Orange County Sheriff's Department was performing checks of businesses along a road at 3 am. The officer observed defendant's car pulling into the driveway of a closed business. Driving slowly by the driveway, the officer put the cruiser in reverse, backed up to the driveway and pulled in, blocking defendant's exit while activating the cruiser's blue lights. The officer ran defendant's plates, then approached the vehicle to ask what defendant was doing, noticing a strong odor of alcohol and glassy eyes. Defendant was charged with impaired driving; at trial, the court concluded that the encounter was voluntary up until the time that defendant gave the officer her identification card, denying her motion to suppress.

Reviewing defendant's argument, the Court of Appeals noted it was undisputed that the officer did not observe a crime before pulling in behind defendant. The only issue was when the encounter became a seizure under the Fourth Amendment. The court explained that a "show of authority" such as blocking a vehicle's exit or activating blue lights can be interpreted as a seizure, even when an officer does not physically restrain or touch the defendant. Slip Op. at 13. Emphasizing the difficult choice that the defendant had as a result of the officer's actions, the court noted "in such a situation most people would feel compelled to remain in their car and wait to speak with the officer, knowing that attempting to leave would only end in trouble and/or danger." *Id*. at 17. As a result, the court held that defendant was seized "at the point that [the officer] pulled in behind [d]efendant's car while activating her blue lights and blocked [d]efendant's available exit." *Id*. at 22.

Seizure of marijuana was admissible when police on foot approached vehicle parked in high crime area, identified marijuana by plain view on defendant's lap; seizure of marijuana was supported by additional evidence besides smell and appearance, suggesting it was not hemp.

State v. Tabb, 2022-NCCOA-717, 286 N.C. App. 353 (Nov. 1, 2022). In this Forsyth County case, the Court of Appeals considered for a second time defendant's appeal of his guilty pleas to

possession of cocaine, marijuana, and marijuana paraphernalia based upon the trial court's denial of his motion to suppress. The Court of Appeals affirmed the denial of defendant's motion to suppress.

This matter first came before the court in *State v. Tabb*, 2021-NCCOA-34, 276 N.C. App. 52 (2021) (unpublished), and the facts taken from that decision are presented in pages 2-4 of the slip opinion. The court remanded to the trial court with instructions to consider the sequence of events leading to defendant's arrest and determine if a show of force and seizure of the driver occurred, where one arresting officer approached the driver's side of the vehicle while two other officers approached the passenger's side (where defendant was seated) and noticed marijuana and cash on defendant's lap. Slip Op. at 4-5. The trial court concluded that the actions of the officers occurred almost simultaneously, and that neither defendant nor the driver would have believed they were seized until defendant was removed from the vehicle. As a result, the trial court concluded the search of defendant was constitutional and again denied his motion to suppress.

Considering the current matter, the Court of Appeals first noted that defendant failed to raise the argument that the search violated Article 1, § 20 of the North Carolina Constitution in front of the trial court, dismissing this portion of his argument. The court then considered the argument that the officer who approached the driver's side of the vehicle effected a seizure without proper suspicion, violating the Fourth Amendment. Exploring the applicable precedent, the court explained "[p]olice officers on foot may approach a stationary vehicle with its engine running and its lights turned on in a known area for crimes after midnight to determine if the occupants 'may need help or mischief might be afoot' or to seek the identity of the occupants therein or observe any items in plain view without violating our Fourth Amendment jurisprudence." *Id*. at 10, citing *Brendlin v. California*, 551 U.S. 249 (2007), *Terry v. Ohio*, 392 U.S. 1 (1968), and *State v. Turnage*, 259 N.C. App. 719 (2018). The court then explained that, even if the driver was seized immediately upon the officer's "show of force," the plain view doctrine permitted discovery and admissibility of the marijuana and currency observed by the officers approaching defendant's side of the vehicle. Slip Op. at 11. The "brief period" between the show of force and the officers recognizing the items on defendant's lap did not justify granting defendant's motion to suppress. *Id*.

The court then turned to defendant's argument that the officers could not identify the unburnt marijuana as an illegal substance since industrial hemp is legal in North Carolina and is virtually indistinguishable by smell or visual identification. The court disagreed, noting that "there was more present than just the smell or visual identification . . . [t]here was the evidence of drug distribution, the currency beside the marijuana and [d]efendant's possession of marijuana near his waistband." *Id*. at 13-14. Because of the additional evidence to support reasonable suspicion, the court overruled defendant's argument.

Reasonable suspicion that defendant was armed and dangerous justified frisk of vehicle; defendant waived right to 30-day notice of intent to prove prior record level point for offense while on parole/probation/post-release supervision.

State v. Scott, COA22-326, ___ N.C. App. ___ (Feb. 7, 2023). In this New Hanover County case, defendant appealed his conviction for possessing a firearm as a felon, arguing error in the denial of his motion to suppress and improper sentencing. The Court of Appeals found no error.

In February of 2020, a Wilmington police officer observed defendant enter a parking lot known for drug activity and confer with a known drug dealer. When defendant exited the parking lot, the officer followed, and eventually pulled defendant over for having an expired license plate. During the stop, the officer determined that defendant was a "validated gang member," and had previously been charged with second-degree murder; the officer was also aware that a local gang war was underway at that time. Slip Op. at 2. The officer frisked defendant and did not find a weapon, but defendant told the officer there was a pocketknife in the driver's door compartment. When the officer went to retrieve the pocketknife he did not find it, but while looking around the driver's area he discovered a pistol under the seat. During sentencing for defendant, his prior record level was calculated with nine points for prior crimes and one additional point for committing a crime while on probation/parole/post-release supervision, leading to a level IV offender sentence.

Reviewing defendant's appeal, the court first noted that the initial traffic stop for an expired plate was proper. The frisk of defendant's person and vehicle required the officer to have "a reasonable suspicion that the suspect of the traffic stop is armed and dangerous." *Id*. at 7, quoting *State v. Johnson*, 378 N.C. 236 (2021). The court found the totality of the officer's knowledge about defendant satisfied this standard, as defendant had just exited a parking lot known for drug transactions, had a history of being charged with murder, was a known gang member, and was in an area experiencing a local gang war. Because the officer had a reasonable suspicion that defendant might be armed and dangerous, the frisk of the vehicle leading to the discovery of the pistol was acceptable.

Turning to defendant's sentencing, the court explained that under G.S. 15A-1340.14(b)(7), the state was obligated to provide defendant with notice of its intent to add a prior record level point by proving his offense was committed while on probation, parole, or post-release supervision. While the record did not contain evidence that defendant received the required notice 30 days before trial, the court found that the exchange between defense counsel and the trial court represented waiver for purposes of the requirement. While the trial court did not confirm the receipt of notice through the colloquy required by G.S. 15A-1022.1, the exchange between the trial court and defense counsel fell into the exception outlined in *State v. Marlow*, 229 N.C. App 593, meaning "the trial court was not required to follow the precise procedures . . . as defendant acknowledged his status and violation by arrest in open court." Slip Op. at 18.

Motion to suppress was improperly granted where (1) police had reasonable suspicion for *Terry* frisk, (2) subsequent "plain view" doctrine seizure was lawful, (3) protective sweep of house was justified by circumstances, and (4) smell of marijuana was not only basis for probable cause to support search warrant for house.

State v. Johnson, COA22-363, ___ N.C. App. ___ (April 18, 2023), *temp. stay allowed*, ___ N.C. ___ (April 26, 2023). In this Vance County case, the state appealed from an order granting defendant's motion to suppress evidence seized from his person and inside a house. The Court of Appeals reversed and remanded the matter to the trial court.

While attempting to arrest defendant for an outstanding warrant, officers of the Henderson Police Department noticed the odor of marijuana coming from inside the house where defendant and others were located. All of the individuals were known to be members of a criminal gang. After frisking defendant, an officer noticed baggies of heroin in his open coat pocket. The officers also performed a protective sweep of the residence, observing digital scales and other drug paraphernalia inside. After a search of defendant due to the baggies observed in plain view during the frisk, officers found heroin and marijuana on his person, along with almost $2,000 in fives, tens and twenties. After receiving a search warrant for the house, the officers found heroin, marijuana, drug paraphernalia, and firearms inside. Defendant was indicted on drug possession, criminal enterprise, and possession of firearm by a felon charges. Before trial, the trial court granted defendant's motion to suppress, finding that there was no probable cause to detain defendant or to enter the residence.

The Court of Appeals first established the basis for detaining and frisking defendant, explaining that officers had a "reasonable suspicion" for frisking defendant under *Terry v. Ohio*, 392 U.S. 1 (1968), as they had a valid arrest warrant for defendant for a crime involving a weapon, knew he was a member of a gang, and saw another individual leave the house wearing a ballistic vest. Slip Op. at 14. Applying the "plain view" doctrine as articulated in *State v. Tripp*, 381 N.C. 617 (2022), and *State v. Grice*, 367 N.C. 753 (2015), the court found that the search was constitutional and the arresting officer's eventual seizure of the "plastic baggies he inadvertently and 'plainly viewed'" was lawful. Slip Op. at 16.

The court then turned to the trial court's ruling that the warrantless entry of officers into the house to conduct a protective sweep was unlawful. Noting applicable precedent, the court explained "[t]he Supreme Court of the United States, the Supreme Court of North Carolina, and this Court have all recognized and affirmed a law enforcement officer's ability to conduct a protective sweep both as an exigent circumstance and for officer's safety when incident to arrest." *Id*. at 16-17. The court found that the officers had both justifications here, as defendant was a member of a gang and known for violence involving weapons, and the officers were unsure whether any other people remained inside the house.

Finally, the court examined the probable cause supporting the search warrant for the house. Defendant argued that the smell of marijuana could not support probable cause due to it being indistinguishable from industrial hemp. Looking to applicable precedent such as *State v.*

Teague, 2022-NCCOA-600, ¶ 58 (2022), the court noted that the Industrial Hemp Act did not modify the state's burden of proof, but also noted that like in *Teague*, the smell of marijuana was not the only basis for probable cause in this case. Slip Op. at 25. Here the court found the drugs in defendant's pocket and the drug paraphernalia observed during the protective sweep also supported probable cause.

Dog Sniff

Use of drug sniffing dog did not constitute a search where defendant stored methamphetamine and legal hemp in the same bag; storage of contraband and noncontraband in the same bag did not create legitimate privacy interest in the contraband.

State v. Walters, 2022-NCCOA-796, 286 N.C. App. 746 (Dec. 6, 2022). In this Watauga County case, defendant appealed his conviction for possession of methamphetamine, arguing error in the denial of his motion to suppress the results of a search of his vehicle. The Court of Appeals affirmed the trial court's denial.

In October of 2020, a Watauga County Sherriff's Deputy saw defendant driving a black truck through an intersection in Boone. The deputy was familiar with defendant and knew defendant had outstanding warrants for possession of methamphetamine, so he initiated a traffic stop. A canine unit was called to the scene and conducted a walk-around of the vehicle; after the dog alerted, the deputies searched the vehicle and found a bag with methamphetamine and a substance that appeared to be marijuana. However, after defendant was arrested and indicted for possession of these substances, it was determined that the marijuana was actually hemp, and charges for possession of marijuana were dismissed.

The court summarized defendant's issue on appeal as whether officers "need probable cause to use a drug-detection dog to sniff a vehicle for narcotics when the dog is unable to distinguish between contraband and noncontraband." Slip Op. at 10. Defendant argued Fourth Amendment precedent holding the use of a drug-sniffing dog does not constitute a search must be reexamined now that a dog might alert to hemp, as the person may have a legitimate privacy interest in noncontraband. The court found that the privacy interest did not apply as the "drug-sniffing dog was trained and certified to alert on methamphetamine, and [d]efendant did not create a 'legitimate privacy interest' as to the methamphetamine simply by storing it in the same bag with the hemp," and concluded "the Fourth Amendment does not protect against the discovery of contraband, detectable by the drug-sniffing dog, because [d]efendant decided to package noncontraband beside it." *Id*. at 18. Applying the motor vehicle exception, the court found probable cause to search the vehicle based on the positive alert by the dog, and the deputies' knowledge of defendant's outstanding warrants and previous seizures from defendant of methamphetamine.

Despite the lack of canine alert, officers had probable cause to search vehicle based on totality of the circumstances.

State v. Aguilar, 2022-NCCOA-903, ___ N.C. App. ___ (Dec. 29, 2022). In this Union County case, defendant appealed his conviction for trafficking by possession and transportation of heroin, arguing error in the denial of his motion to suppress the results of a warrantless search of his vehicle. The Court of Appeals found no error.

In January of 2020, the Union County Sheriff's Office was observing several individuals involved in drug trafficking based on information from two confidential informants. Based on the observations and information received, officers ended up detaining defendant and searching his vehicle, finding heroin after searching the vehicle. Although a canine unit was present, the dog did not alert on a search around the perimeter of the car. Despite the lack of alert, the officers believed they had probable cause based on "the tips provided by two unrelated confidential informants and officers' observations that confirmed these specific tips." Slip Op. at 4. Defendant subsequently pleaded guilty to charges of trafficking heroin but reserved his right to appeal the dismissal of his motion to suppress.

The court walked through each challenged finding of fact and conclusion of law, determining that none of the issues highlighted by defendant represented error. In particular, the court explained that the lack of an alert from the canine unit did not prevent the officers from having probable cause, and noted "[d]efendant has cited no case, either before the trial court or on appeal, holding that officers cannot have probable cause to search a vehicle if a canine search is conducted and the canine fails to alert . . . [n]or did we find such a case." *Id*. at 29. Because the totality of the circumstances supported probable cause, the court found no error in the trial court's conclusion.

Searches

Officer shining a flashlight through defendant's windows during a traffic stop was not a "search" for Fourth Amendment purposes.

State v. Hunter, 2022-NCCOA-683, 286 N.C. App. 114 (Oct. 18, 2022). In this Gaston County case, defendant appealed the trial court's denial of his motion to suppress after entering a no contest plea to possession of a controlled substance and drug paraphernalia, and failure to stop at a stop sign. The Court of Appeals affirmed the trial court's judgment.

In October of 2020, police officers observed a car roll through a stop sign and pulled over the vehicle. When officers approached, defendant was behind the wheel; one officer took defendant's license and information to perform a warrant check, while the other officer stayed with defendant and shined a flashlight through the windows to observe the vehicle. After

shining the light around the vehicle, the officer noticed a plastic baggie next to the driver's door, and defendant was detained while the officers retrieved and tested the baggie. The baggie tested positive for crack-cocaine.

On appeal, defendant argued that the stop was inappropriately pretextual, and that the officer shining a flashlight lacked probable cause to search his vehicle. The Court of Appeals disagreed, explaining that "[o]fficers who lawfully approach a car and look inside with a flashlight do not conduct a 'search' within the meaning of the Fourth Amendment." Slip Op. at 4-5, quoting *State v. Brooks*, 337 N.C. 132, 144 (1994). The court then turned to the stop, explaining that "both the United States Supreme Court and our North Carolina Supreme Court have ruled that an officer's subjective motive for a stop has no bearing on the Fourth Amendment analysis." *Id*. at 9, citing *Whren v. United States*, 517 U.S. 806, 813 (1996); and *State v. McClendon*, 350 N.C. 630, 635-36 (1999). Having established for Fourth Amendment analysis that the subjective motive for the stop was irrelevant and that a flashlight through defendant's window was not a search, the court affirmed the trial court's decision to deny the motion.

Imposition of satellite-based monitoring for first-degree sex offense with a child did not represent a violation of the Fourth Amendment.

State v. Griffin, 2022-NCCOA-681, 286 N.C. App. 94 (Oct. 18, 2022). In this case, arising from a Craven County court order imposing satellite-based monitoring ("SBM") on defendant after his *Alford* plea to first-degree sex offense with a child, the Court of Appeals considered for the third time whether the imposition of a thirty-year term of SBM represented a violation of defendant's rights under the Fourth Amendment. After reviewing applicable precedent from the North Carolina Supreme Court, the court affirmed the trial court's SBM order.

This opinion is the third to be issued by the Court of Appeals in this matter, following a series of remands due to evolving caselaw regarding the constitutionality of SBM. In a 2018 opinion the court overruled the trial court's imposition of SBM, following the similar case *State v. Grady*, 259 N.C. App. 664 (2018). The path of the *Griffin* and *Grady* matters remained intertwined as the North Carolina Supreme Court released *State v. Grady*, 372 N.C. 509 (2019), creating a new three-factor test for the imposition of SBM. The *Griffin* matter was remanded to the court, which issued a second opinion in 2020, again overturning the SBM order. By the time the matter reached the supreme court a second time, it had already issued *State v. Hilton*, 378 N.C. 692 (2021), and *State v. Strudwick*, 379 N.C. 94 (2021), and the General Assembly had passed several revisions to the SBM laws. As a result, the supreme court remanded a third time for consideration of the applicable caselaw and statutory changes.

In the current opinion, the court applied the three-part test from *Hilton* and *Strudwick*, considering (1) the State's interest in imposing SBM, (2) defendant's privacy interests, and (3) the level of intrusion SBM represents into defendant's privacy interests. Exploring (1), the court noted that the legitimacy of the State's interest in preventing future sex crimes was clear from legislative enactment of the program and weighed in favor of imposing SBM. Considering (2),

the court explained that defendant's status as a sex offender supported a more limited scope of privacy than the general public, holding that since "[d]efendant's liberty and privacy interests are limited for the protection of children particularly, and [] [d]efendant was convicted of sexually abusing a minor . . . his privacy rights are appreciably diminished for purposes of analyzing SBM's reasonableness." Slip Op. at 15. When considering intrusiveness under (3), the court compared the SBM device defendant must wear to the devices in *Hilton* and *Strudwick*, where the supreme court held they were "more inconvenient than intrusive." *Id*. at 16, quoting *Hilton*. Finally the court noted that the recent changes to the SBM program meant that defendant could appeal to have his SBM term capped at ten years, drastically reducing the intrusiveness of the original order.

Search of defendant's home was directly related to probation supervision of defendant's live-in girlfriend.

State v. Lucas, 2022-NCCOA-714, 286 N.C. App. 321 (Nov. 1, 2022). In this Macon County case, defendant appealed after entering a guilty plea to trafficking in opiates/heroin and marijuana, arguing the trial court erred by denying his motion to suppress the evidence obtained during a warrantless search of his residence. The Court of Appeals affirmed the denial of defendant's motion.

Beginning in September of 2017, defendant's live-in girlfriend was on supervised probation, which included conditions that she submit to warrantless searches of her home and that she not use, possess or control any illegal drug or controlled substance. During her probation, probation officers repeatedly found defendant's girlfriend with pills and evidence of drug use. In August of 2018, the girlfriend screened positive for cocaine, THC, and opiates. After the positive screening, probation officers decided to search her vehicle, finding additional pills, and subsequently decided to search her residence, which was defendant's home. Officers smelled marijuana in the residence; after establishing the existence of marijuana in the home, the officers obtained a search warrant for the entire premises, finding drug paraphernalia, opiates, sealed bags of marijuana, and $42,594 in cash. After the trial court denied defendant's motion to suppress, defendant pleaded guilty to the charges, reserving his right to appeal.

On appeal, the court considered three questions: (1) whether the probation officers properly concluded that defendant's home was his girlfriend's residence; (2) did probable cause exist to support the issuance of a search warrant when details from the girlfriend were included without proper evaluation of her reliability as a witness; and (3) was the warrantless search of defendant's home directly related to the purposes of defendant's girlfriend's supervised probation, as required by G.S. 15A-1343(b)(13)? Rejecting defendant's argument in (1), the court explained that, although the record suggested that defendant's girlfriend had moved out on July 24, 2018, an officer observed her back in defendant's yard on July 29, 2018, and the girlfriend confirmed her address as defendant's residence on August 8, 2018. Additionally, defendant did not object that his girlfriend had moved out when probation officers arrived to

perform a warrantless search on August 15, 2018, something a reasonable person would have done if defendant's home was not her residence. Slip Op. at 17.

Reviewing (2), the court explained that the detective who prepared the affidavit for the search warrant included his own observations and experience in law enforcement related to narcotics investigations. The court also pointed out that the trial court "identified [defendant's girlfriend's] statements as hearsay" and found her credibility "highly questionable" for purposes of the affidavit. *Id*. at 24. Despite this, the testimony of the officers involved supported the issuance of the search warrant, and the trial court did not give undue weight to defendant's girlfriend's statements.

Turning finally to (3), the court examined *State v. Powell*, 253 N.C. App. 590 (2017), and recent changes to G.S. 15A-1343(b)(13) requiring a search of a residence by a probation officer to be "directly related to the probation supervision." Slip Op. at 25-26. The court drew a contrast between *Powell*, explaining that in the current matter, defendant's girlfriend failed a drug test screening and was found in possession of narcotics on her person and in her vehicle, activity that was directly related to violations of her probation, and it was these actions that led to the screening. *Id*. at 28. Despite the presence of other law enforcement at the scene, the court found that "[a]lthough the search may have served two purposes, (1) to further the supervisory goals of probation, and (2) to investigate other potential criminal behavior . . . the dual purpose of the search did not make the search unlawful under [G.S. 15A-]1343(b)(13)." *Id*. at 29.

Criminal Procedure

Capacity to Proceed & Related Issues

Defendant did not assert a constitutional right to competency hearing; defendant waived statutory right to competency hearing by failing to assert right at trial.

State v. Wilkins, 2022-NCCOA-911, ___ N.C. App. ___ (Dec. 29, 2022). In this Caswell County case, Defendant appealed his conviction for drug possession charges, arguing error by the trial court for the lack of a competency evaluation and admission of testimony regarding his silence at a traffic stop. The Court of Appeals found no error.

Defendant was in the front seat of an SUV stopped in 2018 under suspicion of throwing contraband into a prison yard. A search of the vehicle found two footballs cut open and filled with drugs; defendant was silent during the stop and search of the vehicle. While awaiting trial, defense counsel moved for a competency hearing; the trial court entered an order finding defendant's competency in question, and ordering an evaluation of defendant. However the defendant was never evaluated and no finding was ever entered as to his competency, as he was instead released on bail. By the time defendant reached trial in 2021, he had new counsel,

who did not assert the right to a competency evaluation, and defendant was convicted of drug possession.

Reviewing defendant's appeal, the court noted that defendant never objected to the lack of a hearing or evaluation on his competency at trial, and this represented waiver of the statutory right to a competency evaluation and hearing. Defendant failed to assert a due process clause claim for the competency hearing, preventing consideration of the constitutional issue. The court explained that the statutory right to a competency hearing comes from G.S. 15A-1002, and under *State v. Young*, 291 N.C. 562 (1977), "our Supreme Court repeatedly has held that 'the statutory right to a competency hearing is waived by the failure to assert that right at trial.'" Slip Op. at 4, quoting *State v. Badgett*, 361 N.C. 234 (2007). Reviewing defendant's objection to the admission of testimony about his silence, the court found no plain error, and noted it was unclear if the issue was even reviewable on appeal. *Id*. at 9-10.

Judge Inman dissented by separate opinion, and would have granted defendant's right to competency hearing. *Id*. at 11.

Counsel Issues

Defendant did not "effectively waive" her right to counsel; forfeiture of counsel requires "egregious misconduct" by defendant.

State v. Atwell, 2022-NCSC-135, 383 N.C. 437 (Dec. 16, 2022). In this Union County case, the Supreme Court reversed the Court of Appeals decision that defendant effectively waived her right to counsel and remanded the case for a new trial.

Defendant was subject to a Domestic Violence Prevention Order (DVPO) entered against her in 2013; the terms of the order required her to surrender all firearms and ammunition in her position, and forbid her from possessing a firearm in the future, with a possible Class H felony for violation. In 2017, defendant attempted to buy a firearm in Tennessee while still subject to the DVPO and was indicted for this violation. Initially defendant was represented by counsel, but over the course of 2018 and 2019, defendant repeatedly filed pro se motions to remove counsel and motions to dismiss. The trial court appointed five different attorneys; three withdrew from representing defendant, and defendant filed motions to remove counsel against the other two. The matter finally reached trial in September of 2019, where defendant was not represented by counsel. Before trial, the court inquired whether defendant was going to hire private counsel, and she explained that she could not afford an attorney and wished for appointed counsel. The trial court refused this request and determined defendant had waived her right of counsel. The matter went to trial and defendant was convicted in January of 2020, having been mostly absent from the trial proceedings.

Examining the Court of Appeals opinion, the Supreme Court noted that the panel was inconsistent when discussing the issue of waiver of counsel verses forfeiture of counsel, an issue that was also present in the trial court's decision. The court explained that "waiver of counsel is a voluntary decision by a defendant and that where a defendant seeks but is denied appointed counsel, a waiver analysis upon appeal is both unnecessary and inappropriate." Slip Op. at 16. Here the trial court, despite saying defendant "waived" counsel, interpreted this as forfeiture of counsel, as defendant clearly expressed a desire for counsel at the pre-trial hearing and did not sign a waiver of counsel form at that time (although she had signed several waivers prior to her request for a new attorney).

Having established that the proper analysis was forfeiture, not waiver, the court explained the "egregious misconduct" standard a trial court must find before imposing forfeiture of counsel from *State v. Harvin*, 2022-NCSC-111, and *State v. Simpkins*, 373 N.C. 530 (2020). Slip Op. at 18. The court did not find such egregious misconduct in this case, explaining that defendant was not abusive or disruptive, and that the many delays and substitutions of counsel were not clearly attributable to defendant. Instead, the record showed legitimate disputes on defense strategy with one attorney, and was silent as to the reasons for withdrawal for the others. Additionally, the state did not move to set the matter for hearing until many months after the indictment, meaning that defendant's counsel issues did not cause significant delay to the proceedings.

Chief Justice Newby, joined by Justices Berger and Barringer, dissented and would have found that defendant forfeited her right to counsel by delaying the trial proceedings. *Id*. at 28.

Defendant's dismissal of two court-appointed attorneys, attempts to represent himself, and requests for assistance in trial preparation did not represent conduct justifying forfeiture of counsel.

State v. Harvin, 2022-NCSC-111, 382 N.C. 566 (Nov. 4, 2022). In this New Hanover County case, the Supreme Court affirmed the Court of Appeals majority decision vacating the judgments against defendant and ordering a new trial because he was denied his constitutional right to counsel.

In May of 2015, defendant was indicted for first-degree murder and associated robbery charges. Over the course of the next three years, defendant had several court-appointed attorneys, and then chose to represent himself with stand-by counsel. When the charges reached trial in April of 2018, defendant expressed uncertainty about his ability to represent himself, leading to an exchange with the trial court regarding his capacity and desire to continue without counsel or obtain appointed counsel from the court, as well as defendant's confusion about an ineffective assistance of counsel claim. After considering arguments from the State regarding defendant's termination of his previous counsel and delay of the proceedings, the trial court concluded that defendant had forfeited his right to counsel for the trial. Defendant was subsequently convicted on all counts.

The Supreme Court majority found that defendant had not engaged in behavior justifying forfeiture of his right to counsel. The court explained that forfeiting the right to counsel is a separate concept from voluntary waiver of counsel, and generally requires (1) aggressive, profane, or threatening behavior; or (2) conduct that represents a serious obstruction of the proceedings. Slip Op. at 32-33. Although defendant cycled through four court-appointed attorneys before choosing to represent himself, two of those attorneys withdrew for reasons totally unrelated to defendant's case, and the other two withdrew at defendant's request, with leave of the court. Applying the relevant standards to defendant's conduct, the majority could not find any behavior rising to the level required for forfeiture, noting that "defendant's actions, up to and including the day on which his trial was scheduled to begin, did not demonstrate the type or level of obstructive and dilatory behavior which allowed the trial court here to permissibly conclude that defendant had forfeited the right to counsel." *Id*. at 41.

Justice Berger, joined by Chief Justice Newby and Justice Barringer, dissented and would have upheld the decision of the trial court that defendant forfeited his right to counsel. *Id*. at 43.

Defense counsel's statements during closing argument represented admissions of guilt requiring consent from defendant.

State v. Hester, 2022-NCCOA-906, ___ N.C. App. ___ (Dec. 29, 2022). In this Duplin County case, the Court of Appeals remanded the case to the trial court for an evidentiary hearing on whether defendant consented to defense counsel's admissions of guilt.

Defendant was charged with breaking or entering, larceny, and possession of stolen goods after a series of break-ins in 2017 at a power plant that was not operational. At trial, defense counsel exhibited issues with hearing loss. Defendant also noted the issue of hearing loss before testifying in his own defense, although the trial court did not take any action on the information. During closing arguments, defense counsel said "Let me level with you. I agree it's not good to be caught in the act while being in somebody else's building without consent," and mentioned "caught" and "in the act" several times, referring to defendant being on the power plant property. Slip Op. at 5.

Reviewing defendant's arguments on appeal, the court agreed that defense counsel's statements that defendant possessed stolen keys from the plant and entered the plant's warehouse without permission amounted to admissions of guilt for lesser included misdemeanors of breaking or entering and possession of stolen goods. The court noted that under *State v. Harbison*, 315 N.C. 175 (1985), and subsequent precedent, a violation of the defendant's constitutional right to counsel occurs whenever defense counsel expressly or impliedly admits guilt without the defendant's consent, and this violation does not require a showing a prejudice to justify a new trial. *Id*. at 8-9. Here, defense counsel made admissions of guilt, but the record did not reflect any consent from defendant. As a result, the Court of

Appeals remanded to the trial court for an evidentiary hearing on whether defendant consented in advance to these concessions of guilt.

Double Jeopardy

Prosecuting defendant for murder 21 years after defendant's conviction for felony child abuse based on the same events did not represent double jeopardy because the requisite element of victim's death did not occur until 2018.

State v. Tripp, 2022-NCCOA-795, 286 N.C. App. 737 (Dec. 6, 2022), *temp. stay allowed*, __ N.C. __ (Feb. 2, 2023). In this Brunswick County case, defendant appealed denial of his motion to dismiss the murder charge against him, arguing that it represented double jeopardy. The Court of Appeals granted certiorari to review defendant's interlocutory appeal, and affirmed the trial court's denial of the motion.

In 1997, the fifteen-month-old child of defendant's girlfriend was taken to the emergency room with severe injuries. A pediatrician who treated the child determined he had Battered Child Syndrome and life-altering brain injuries that would prevent the child from ever living or functioning on his own. One year later, defendant entered an *Alford* plea to four counts of felony child abuse; defendant completed his sentence in 2008. The child lived in long-term care facility until 2018 when he passed away, allegedly from complications related to his injuries. The State brought charges for first-degree murder against defendant after the 2018 death of the child.

Taking up the double jeopardy argument, the court explained that under the same-elements test from *Blockburger v. United States*, 284 U.S. 299 (1932), offenses for the same conduct are considered the same unless "each offense contains an element not contained in the other." Slip Op. at 5, quoting *United States v. Dixon*, 509 U.S. 688, 696 (1993). The court noted that the charges against defendant for felony child abuse and first-degree murder would normally fail the *Blockburger* test. However, the court applied the exception found in *Diaz v. United States*, 223 U.S. 442 (1912), where "a defendant subsequently may be prosecuted for a separate offense if a requisite element for that offense was not an element of the offense charged during the defendant's prior prosecution." Slip Op. at 8, citing *Diaz*. Because the necessary element of the child's death did not occur until 2018, defendant could not have been prosecuted for the murder in 1998. The court rejected defendant's arguments to expand the scope of North Carolina's double jeopardy protection beyond applicable precedent and to apply substantive due process to overturn the denial of his motion.

Prosecuting defendant for murder 21 years after defendant's conviction for felony child abuse based on the same events did not represent double jeopardy; theories of first degree murder other than felony murder involve different elements than felony child abuse, satisfying the *Blockburger* test.

State v. Noffsinger, 2022-NCCOA-794, 286 N.C. App. 729 (Dec. 6, 2022), *appeal dismissed*, __ N.C. __ (March 1, 2023). In this Brunswick County case, defendant appealed denial of her motion to dismiss the murder charge against her, arguing that it represented double jeopardy. The Court of Appeals affirmed the trial court's denial of the motion. The facts of this case are substantially similar to *State v. Tripp*, 2022-NCCOA-795, as the defendant in this case is the mother of the child that was abused, and the defendant in *Tripp* was her boyfriend at the time.

Following the same analysis as the opinion in *Tripp*, the court applied the same-elements test from *Blockburger v. United States*, 284 U.S. 299 (1932), and the exception for requisite elements of the crime found in *Diaz v. United States*, 223 U.S. 442 (1912), to establish the prosecution for murder was not double jeopardy under the felony murder theory. The court also noted "prosecution for first-degree murder theories such as premeditation and deliberation or torture satisfies the *Blockburger* test and does not violate [d]efendant's constitutional right to be protected against double jeopardy." Slip Op. at 10. The court dismissed defendant's argument that due process protections prevented her prosecution so long after the events, noting the State could not bring charges for murder until the victim's death.

DWI Procedure

Exigent circumstances justified warrantless blood draw; evidence of impairing substances in defendant's blood represented sufficient evidence to dismiss motion.

State v. Cannon, COA22-572, ___ N.C. App. ___ (May 2, 2023). In this Edgecombe County case, defendant appealed his convictions for second-degree murder and aggravated serious injury by vehicle, arguing error in the denial of his motion to suppress a warrantless blood draw and motion to dismiss for insufficient evidence. The Court of Appeals found no error and affirmed.

In June of 2015, defendant crossed the centerline of a highway and hit another vehicle head on, causing the death of one passenger. Officers responding to the scene interviewed defendant, and noted his responses seemed impaired and the presence of beer cans in his vehicle. A blood draw was performed at the hospital, although the officer ordering the draw did not read defendant his Chapter 20 implied consent rights or obtain a search warrant before the draw. The results of defendant's blood draw showed a benzodiazepine, a cocaine metabolite, two anti-depressants, an aerosol propellant, and a blood-alcohol level of 0.02.

Reviewing defendant's argument that no exigent circumstances supported the warrantless draw of his blood, the Court of Appeals first noted that defense counsel failed to object to the admission of the drug analysis performed on defendant's blood, meaning his arguments regarding that exhibit were overruled. The court then turned to the exigent circumstances exception to justify the warrantless search, noting that the investigation of the scene took significant time and defendant was not taken to the hospital until an hour and forty-five minutes afterwards. Acknowledging Supreme Court precedent "that the natural dissipation of alcohol in the bloodstream cannot, standing alone, create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant," the court looked for additional justification in the current case. Slip Op. at 11. Here the court found such justification in the shift change occurring that would prevent the officer from having assistance, and the delay in going to obtain a warrant from the magistrate's office that would add an additional hour to the process. These circumstances supported the trial court's finding of exigent circumstances.

The court then turned to defendant's argument that insufficient evidence was admitted to establish he was impaired at the time of the accident. The record contained evidence that defendant had beer cans in his truck along with an aerosol can of Ultra Duster, and several witnesses testified as to defendant's demeanor and speech after the accident. The record also contained a blood analysis showing defendant had five separate impairing substances in his system at the time of the accident, "alcohol, benzyl ethylene (a cocaine metabolite), Diazepam (a benzodiazepine such as Valium), Citalopram (an anti-depressant) and Sertraline (another anti-depressant called "Zoloft")." *Id*. at 16. The court found that based on this evidence there was sufficient support for denying defendant's motion.

Indictment & Pleading Issues

Failure to include the essential element of "abuse" rendered indictment for second-degree rape defective, leading to vacated conviction.

State v. Singleton, 2022-NCCOA-656, 285 N.C. App. 630 (Oct. 4, 2022), *temp. stay allowed*, ___ N.C. ___ (Oct. 25, 2022), *review allowed*, __ N.C. __ (March 1, 2023). In this Wake County case, defendant appealed his conviction for second-degree rape due to a missing element in the charging indictment, and his conviction for first-degree kidnapping due to insufficiency of the evidence. The Court of Appeals found the charging indictment was flawed and vacated defendant's rape conviction, but affirmed his conviction for kidnapping.

In November of 2017, a college student went to a bar in downtown Raleigh with a group of friends and became intoxicated. Security camera footage showed defendant helping the victim into his vehicle around 2:25am. The student remembered dancing with her sister and friends around 2:00am; her next memory was around 5:30am when she found herself in defendant's

vehicle while he was engaging in sexual intercourse with her. The student told defendant to stop, tried to find her cellphone, and then fled the vehicle when she could not find her phone. The student reported the incident and defendant was convicted of rape and kidnapping after a trial.

The Court of Appeals first reviewed the charging indictment for defendant's rape conviction, explaining that in North Carolina, one purpose of a charging indictment is to confer jurisdiction on the trial court. Failure to allege each element of a crime is a jurisdictional defect that cannot be waived. The court noted applicable precedent showing that an indictment may use different language that the statute that creates the offense, but the language used must be sufficiently similar to represent all elements of the crime alleged. In the current matter, the indictment used the phrase "engaged in vaginal intercourse" as opposed to the statute's "carnally know and abuse." Slip Op. at 7. The court explained that this was not sufficient because the indictment did not include "abuse," as "[t]he inclusion of 'abuse" is necessary to describe that [d]efendant knew and took advantage of [the victim's] physical inability to resist his advances." *Id*. Because of this flaw, the court vacated the judgment of rape and dismissed the indictment without prejudice.

Reviewing defendant's argument of insufficiency of the evidence for his kidnapping conviction, the court found ample evidence in the record to support the elements of first-degree kidnapping. Explaining the evidence, the court found that defendant transported defendant for purposes of a felony and released her in an area that was unknown to her and not safe in her intoxicated condition.

Jury Selection

Trial court properly determined that defendant failed to make prima facie showing of racial discrimination in jury selection under the first step of *Batson* inquiry.

State v. Campbell, 97A20-2, ___ N.C. ___ (Apr. 6, 2023). In this Columbus County case, the Supreme Court affirmed the Court of Appeals decision finding no error with the determination that defendant failed to establish a prima facie showing of racial discrimination during jury selection.

In July of 2017, defendant's charges of first-degree murder and second-degree kidnapping reached trial. During jury selection, defense counsel raised an objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), arguing that the state had used three of its four peremptory challenges to strike potential jurors who were black. The trial court denied the *Batson* objection, finding defendant did not establish a prima facie case, but required the state to offer race-neutral reasons for all four jurors who were stricken. After defendant was convicted, the matter was appealed in *State v. Campbell (Campbell I)*, 269 N.C. App. 427 (2020). Although the Court of Appeals majority found no error, the Supreme Court remanded for consideration in

light of *State v. Hobbs (Hobbs I)*, 374 N.C. 345 (2020), and *State v. Bennett*, 374 N.C. 579 (2020). In the case giving rise to the current opinion, a Court of Appeals majority again found no error in *State v. Campbell (Campbell II)*, 272 N.C. App. 554 (2020).

Reviewing the appeal from *Campbell II*, the Supreme Court first noted that under both the U.S. and North Carolina constitutions the striking of potential jurors for race through peremptory challenges is forbidden. When a defendant raises a *Batson* objection, the trial court must apply the first step of the *Batson* inquiry, which requires "determin[ing] whether the defendant has met his or her burden of 'establish[ing] a prima facie case that the peremptory challenge was exercised on the basis of race.'" Slip Op. at 10, quoting *State v. Cummings*, 346 N.C. 291, 307–08 (1997). In the current case, the court reviewed the trial court's determination under a "clearly erroneous" standard, finding no error and determining "the *Batson* inquiry should have concluded when the trial court first determined that defendant failed to make a prima facie showing." *Id*. at 14. Because the court held the inquiry should have concluded, it did not explore the adequacy of the state's reasons for each stricken juror.

The court rejected defendant's argument that the mathematical ratio of the strike rate justified a prima facie case of discrimination under *State v. Barden*, 356 N.C. 316 (2002), pointing out that this interpretation would effectively remove the first step of the *Batson* analysis and the deference granted to the trial court. Explaining the holding, the court emphasized "[o]ur decision in *Barden* was not an invitation for defendants to manufacture minimal records on appeal and force appellate courts to engage in a purely mathematical analysis." Slip Op. at 16-17. The court likewise rejected defendant's argument under *Hobbs I*, that the trial court failed to adequately explain its reasoning in denying the *Batson* motion. After noting that *Hobbs I* did not address the prima facie portion of the *Batson* inquiry, the court held that "[d]efendant has provided no case law from this state or any other jurisdiction establishing that a trial court is required to enter extensive written factual findings in support of its determination that a defendant has failed to establish a prima facie case, and we decline to impose such a requirement." *Id*. at 18.

Justice Earls dissented, and would have held that the first step of the *Batson* inquiry was moot due to the trial court's requirement that the state offer race neutral justifications for each stricken juror. *Id*. at 20.

Trial court properly concluded that defendant did not prove purposeful discrimination under the third step of *Batson* inquiry.

State v. Hobbs, 263PA18-2, ___ N.C. ___ (Apr. 6, 2023). In this Cumberland County case, the Supreme Court affirmed the trial court's determination that under the inquiry established by *Batson v. Kentucky*, 476 U.S. 79 (1986), no purposeful discrimination in jury selection occurred when the state used peremptory challenges to strike three black jurors.

This matter was originally considered in *State v. Hobbs (Hobbs I)*, 374 N.C. 345 (2020), where the Supreme Court remanded to the trial court with specific directions to conduct a hearing under the third step of the three-step *Batson* inquiry to determine whether defendant had proven purposeful discrimination. After the hearing, the trial court concluded defendant had not proven purposeful discrimination. In the current opinion, the Supreme Court considered whether the trial court's conclusions were "clearly erroneous."

The Supreme Court first noted that under both the U.S. and North Carolina constitutions the striking of potential jurors for race through peremptory challenges is forbidden, and that it has expressly adopted the *Batson* three-prong test for review of peremptory challenges. Here only the third prong was at issue, where the trial court "determines whether the defendant, who has the burden of proof, established that the prosecutor acted with purposeful discrimination." Slip Op. at 4. The court then explained the basis of its review and detailed the instructions from *Hobbs I* for the trial court to consider when performing its analysis. Walking through the evidence for each stricken juror, the court found that the trial court considered the relevant factors and "conducted side-by-side juror comparisons of the three excused prospective jurors at issue with similarly situated prospective white jurors whom the State did not strike," creating an analysis for each juror. *Id*. at 9.

In addition to the evidence regarding specific jurors, the court pointed out that "the State's acceptance rate of black jurors was 50% after the State excused [the last juror under consideration] which did not support a finding of purposeful discrimination." *Id*. at 20. Reviewing additional evidence, the court noted that "the trial court found that the relevant history of the State's peremptory strikes in the jurisdiction was flawed and therefore misleading." *Id*. This referred to a study by Michigan State University regarding the use of peremptory strikes in North Carolina. The trial court found that all of the *Batson* challenges in cases referenced in the study were rejected by North Carolina appellate courts, and the study had three potential flaws:

> (1) the study identified juror characteristics without input from prosecutors, thus failing to reflect how prosecutors evaluate various characteristics; (2) recent law school graduates with little to no experience in jury selection evaluated the juror characteristics; and (3) the recent law school graduates conducted their study solely based on trial transcripts rather than assessing juror demeanor and credibility in person.

Id. at 8-9. Based on the court's review of the entire evidence, it affirmed the trial court's conclusion of no *Batson* violation.

Justice Earls, joined by Justice Morgan, dissented, and would have found a *Batson* violation. *Id*. at 22.

Under third step of *Batson* analysis, defendant failed to establish racially discriminatory intent for peremptory challenges where prosecution dismissed two black jurors.

State v. Cuthbertson, COA22-92, ___ N.C. App. ___ (April 18, 2023). In this Rowan County case, defendant argued error in overruling his objection under *Batson v. Kentucky*, 476 U.S. 79 (1986) to the prosecution peremptorily striking two black jurors. The Court of Appeals found no error.

Defendant, a black man, reached trial in June of 2021 for charges of misdemeanor assault on a government official/employee. Relevant for the consideration of the objection, the victim of the assault was a white police officer. During jury selection, only four black potential jurors were a part of the jury pool; one black juror was struck for cause, and then the prosecutor used two peremptory challenges on two remaining black potential jurors. At this point, defense counsel objected and the trial court proceeded with the inquiry required by *Batson*.

The Court of Appeals reviewed defendant's arguments, initially noting that under both the U.S. and North Carolina constitutions, the use of peremptory challenges for racially discriminatory reasons is prohibited, and courts in North Carolina apply the *Batson* analysis to determine if a violation occurred. Here, defendant only challenged the third step of the *Batson* inquiry, where the trial court determined that the prosecutor's peremptory strikes were not motivated by discriminatory intent. Defendant also argued in the alternative that the trial court failed to sufficiently explain the basis of its ruling.

The court found no issue with the trial court's description of the basis for its ruling, and denied remand. Using the analogy of a scale, the court found that "[h]ere, unlike in [related *Batson* precedent], the trial court placed all the factors presented to it by the parties on the scale, and thus we do not need to remand." Slip Op. at 17. The court walked through the considerations made by the trial court, including the consideration of issues not raised by either party, and satisfied itself that the trial court "adequately accounted for all the factors presented to it at *Batson*'s third step." *Id*. at 21.

The court then looked directly at the conclusion of no discriminatory purpose in the third step, reviewing the relevant factors to determine if the trial court committed clear error. After conducting a lengthy review spanning pages 22 to 41 of the opinion, the court concluded that "[t]he statistics of strike rates and susceptibility of the case to racial discrimination both weigh on the side of discriminatory intent," but the lack of disparate questioning and investigation, and the race-neutral reasons given by the prosecutor for striking the jurors both weighed on the side of no discrimination. *Id*. at 40-41. Based on this review, the court could not find clear error to support defendant's *Batson* challenge.

Jury Trial, Waiver

Trial court's procedure for consenting to defendant's waiver of jury trial complied with G.S. 15A-1201(d)(1) and did not represent abuse of discretion.

State v. Rollinson, 2022-NCSC-139, 383 N.C. 528 (Dec. 16, 2022). In this Iredell County case, the Supreme Court affirmed the Court of Appeals decision finding that the trial court complied with G.S. 15A-1201(d)(1) when consenting to defendant's waiver of the right to a jury trial for habitual felon status.

After the 2014 amendment to the North Carolina constitution permitting defendants to waive their right to a jury trial in non-death penalty cases with the consent of the trial court, the General Assembly enacted G.S. 15A-1201(d), outlining the process for judicial consent to a defendant's jury trial waiver. Defendant argued that trial court erred by permitting his counsel to respond on his behalf to the trial court's inquiry as to whether he understood the consequences of waiving his right to a jury trial.

The Supreme Court considered the interpretation of G.S. 15A-1201(d) de novo, and noted that while the statute mandates who to address (defendant) and what must be determined (whether defendant understands the consequences of waiving a jury trial), the statute does not specify the procedure the trial court must follow. Because the statute is silent, the appropriate procedure is left to the discretion of the trial court. Here, the trial court asked defendant if he wished to waive the right to jury trial on the habitual felon issue; after asking the court for time and consulting with defendant, defense counsel responded that defendant wished to do so. After this exchange with the trial court, defendant signed a form confirming he understood the consequences and waived his right to a jury trial. The court found that these steps did not represent an abuse of the trial court's discretion under the statute.

Justice Ervin, joined by Justices Hudson and Earls, dissented and would have granted a new trial for defendant's habitual felon status. Slip Op. at 12.

Sentencing and Probation

Trial Court possessed jurisdiction and did not abuse its discretion when revoking defendant's probation after the term of probation had expired.

State v. Geter, 2022-NCSC-137, 383 N.C. 484 (Dec. 16, 2022). In this Buncombe County case, the Supreme Court affirmed the Court of Appeals decision finding no error with the trial court's revocation of defendant's probation over a year after the end of the probation term.

In January of 2017, the Asheville Police Department executed a search warrant of defendant's residence, recovering marijuana, a digital scale, a firearm, and cash, including $40 used in a previous controlled buy of narcotics from defendant. At the time of the search warrant, defendant was already on supervised probation. Defendant was subsequently charged with possession of marijuana and related drug offenses and possessing a firearm by a felon. Defendant's probation officer prepared violation reports identifying defendant's offenses while on probation and filed them in February of 2018, more than two weeks before defendant's probation expired on February 28, 2018. Although defendant successfully filed a motion to suppress the results of the search warrant, leading to the state dismissing the charges against him, the probation violations reached the trial court in April of 2019. The trial court found that defendant committed a new criminal offense while on probation and revoked defendant's probation.

The Supreme Court first considered whether the trial court had jurisdiction to revoke defendant's probation, examining the question de novo. The three requirements of G.S. 15A-1344(f) determine if a trial court has jurisdiction to revoke a defendant's probation after it has expired; here the court found that all three were satisfied, but examined the adequacy of the "good cause shown and stated" to satisfy the requirement in (f)(3). Slip Op. at 10. The court turned to similar uses of "good cause" such as continuance motions, and examined related precedent to find that the trial court's determination was not an abuse of discretion and was justified under the circumstances. The court also rejected defendant's argument that the state must show "reasonable efforts" to schedule the probation revocation hearing at an earlier time, explaining the caselaw referenced by defendant examined a version of G.S. 15A-1344(f) no longer in effect. *Id*. at 19.

Justice Earls, joined by Justice Hudson, dissented and would have found that the trial court did not possess good cause to revoke defendant's probation. *Id*. at 21.

No abuse of discretion by trial court when declining to adjust defendant's mandatory minimum sentence downward for defendant's substantial assistance to law enforcement.

State v. Robinson, 2022-NCSC-138, 383 N.C. 512 (Dec. 16, 2022). In this Guilford County case, the Supreme Court affirmed the Court of Appeals majority that found no abuse of discretion by the trial court when declining to adjust defendant's sentence downward for defendant's substantial assistance to law enforcement.

Defendant was first arrested in 2016 after a search of his home, leading to charges of trafficking a controlled substance and possession of a firearm by a felon. In 2018, after defendant was released but before the charges reached trial, defendant was arrested and indicted with a second trafficking charge. Defendant ultimately pleaded guilty to two trafficking a controlled substance charges and a firearm possession charge. During sentencing, defense counsel argued that defendant had provided substantial assistance to law enforcement and deserved a downward deviation in the required minimum sentences. The trial court acknowledged that

defendant had provided substantial assistance but declined to lower the sentences, instead choosing to consolidate the three offenses to one sentence of 90 to 120 months.

The Supreme Court agreed with the opinion of the Court of Appeals majority that the actions of the trial court did not represent abuse of discretion, explaining that G.S. 90-95(h)(5) granted complete discretion to the trial court. The court noted two decision points, (1) whether the defendant provided substantial assistance, and (2) whether this assistance justified a downward adjustment in the mandatory minimum sentencing. Further, the court noted that this assistance could come from any case, not just the case for which the defendant was being charged; this was the basis of the dissent in the Court of Appeals opinion, but the Supreme Court did not find any evidence that the trial court misinterpreted this discretion. Slip Op. at 15. Instead, the court found that the trial court appropriately exercised the discretion granted by the statute, as well as G.S. 15A-1340.15(b), to consolidate defendant's offenses.

Justice Earls dissented and would have remanded for resentencing. *Id*. at 20.

Reasonable suspicion that defendant was armed and dangerous justified frisk of vehicle; defendant waived right to 30-day notice of intent to prove prior record level point for offense while on parole/probation/post-release supervision.

State v. Scott, COA22-326, ___ N.C. App. ___ (Feb. 7, 2023). In this New Hanover County case, defendant appealed his conviction for possessing a firearm as a felon, arguing error in the denial of his motion to suppress and improper sentencing. The Court of Appeals found no error.

In February of 2020, a Wilmington police officer observed defendant enter a parking lot known for drug activity and confer with a known drug dealer. When defendant exited the parking lot, the officer followed, and eventually pulled defendant over for having an expired license plate. During the stop, the officer determined that defendant was a "validated gang member," and had previously been charged with second-degree murder; the officer was also aware that a local gang war was underway at that time. Slip Op. at 2. The officer frisked defendant and did not find a weapon, but defendant told the officer there was a pocketknife in the driver's door compartment. When the officer went to retrieve the pocketknife he did not find it, but while looking around the driver's area he discovered a pistol under the seat. During sentencing for defendant, his prior record level was calculated with nine points for prior crimes and one additional point for committing a crime while on probation/parole/post-release supervision, leading to a level IV offender sentence.

Reviewing defendant's appeal, the court first noted that the initial traffic stop for an expired plate was proper. The frisk of defendant's person and vehicle required the officer to have "a reasonable suspicion that the suspect of the traffic stop is armed and dangerous." *Id*. at 7, quoting *State v. Johnson*, 378 N.C. 236 (2021). The court found the totality of the officer's knowledge about defendant satisfied this standard, as defendant had just exited a parking lot known for drug transactions, had a history of being charged with murder, was a known gang

member, and was in an area experiencing a local gang war. Because the officer had a reasonable suspicion that defendant might be armed and dangerous, the frisk of the vehicle leading to the discovery of the pistol was acceptable.

Turning to defendant's sentencing, the court explained that under G.S. 15A-1340.14(b)(7), the state was obligated to provide defendant with notice of its intent to add a prior record level point by proving his offense was committed while on probation, parole, or post-release supervision. While the record did not contain evidence that defendant received the required notice 30 days before trial, the court found that the exchange between defense counsel and the trial court represented waiver for purposes of the requirement. While the trial court did not confirm the receipt of notice through the colloquy required by G.S. 15A-1022.1, the exchange between the trial court and defense counsel fell into the exception outlined in *State v. Marlow*, 229 N.C. App 593, meaning "the trial court was not required to follow the precise procedures . . . as defendant acknowledged his status and violation by arrest in open court." Slip Op. at 18.

Order of restitution was not abuse of discretion where defendant presented no evidence of her inability to repay; G.S. 15A-1340.36(a) does not specify procedure for hearing from defendant regarding ability to pay restitution.

State v. Black, COA22-426, ___ N.C. App. ___ (Feb. 21, 2023). In this Buncombe County case, defendant argued error by the trial court when ordering that she pay restitution of $11,000. The Court of Appeals found no error and affirmed the judgment.

The current opinion represents the second time this matter came before the Court of Appeals; previously defendant appealed her convictions of possession of a stolen motor vehicle and attempted identify theft after pleading guilty, arguing mistakes in calculating her prior record level and error in ordering a civil judgment for attorney's fees without permitting defendant to be heard. In *State v. Black*, 276 N.C. App. 15 (2021), the court found error by the trial court on both issues, and remanded for resentencing while vacating the attorney's fees. After the trial court's hearing on remand, defendant brought the current appeal, arguing that the trial court erred because it did not hear from her or consider her ability to pay before ordering the $11,000 restitution.

The Court of Appeals disagreed with defendant, noting that defendant did not present evidence of her inability to pay the restitution, and the burden of proof was on her to demonstrate an inability to pay. The applicable statute, G.S. 15A-1340.36(a), requires the trial court to consider the defendant's ability to pay restitution, but does not require any specific testimony or disclosures from defendant. Looking at the record, the court found no abuse of discretion by the trial court, explaining that defendant even conceded "she previously stipulated to the $11,000 restitution amount set out in the May 2019 Restitution Worksheet." Slip Op. at 6.

Vacating judgment without remand was appropriate remedy for failure to find good cause when revoking defendant's probation after expiration.

State v. Lytle, COA22-675, ___ N.C. App. ___ (Feb. 21, 2023). In this Buncombe County case, defendant appealed an order revoking his probation, arguing the trial court failed to make a finding of good cause to revoke his probation along with other errors. The Court of Appeals agreed with defendant and vacated the trial court's judgment without remand.

Defendant's probation was revoked at a hearing held 700 days after the expiration of his probation term. The court noted that "the trial court failed to find good cause to revoke probation after the expiration of the probation period as required by [G.S.] 15A-1344(f)(3)." Slip Op. at 2. Subsection (f)(3) requires a finding of good cause to support the trial court's jurisdiction to revoke probation; here, the record did not show any findings supporting good cause. Considering the appropriate remedy, the court applied *State v. Sasek*, 271 N.C. App. 568 (2020), holding that where no evidence in the record supports a finding of "reasonable efforts" by the state to hold a revocation hearing sooner, the appropriate remedy for failure to make findings of good cause under G.S. 15A-1344(f)(3) is vacating the judgment without remand. Slip Op. at 4.

Delay in releasing defendant and subsequent concussion while in custody did not represent flagrant violation of defendant's constitutional rights; aggravating factors were improperly found by trial court instead of jury for driving while impaired sentence; trial court improperly sentenced defendant without making specific findings justifying community punishment term.

State v. King, COA22-469, ___ N.C. App. ___ (April 18, 2023). In this Buncombe County case, defendant appealed his convictions for driving while impaired and reckless driving, arguing error in (1) denying his motion to dismiss, (2) improperly applying aggravating factors to his impaired driving conviction, and (3) imposing a reckless driving sentence without making specific findings justifying the length of community punishment. The Court of Appeals vacated and remanded for new sentencing hearings on the convictions, but otherwise affirmed.

Defendant's driving offenses came for trial at district court in August of 2021. After being found guilty at district court, defendant timely appealed to superior court. However, due to a court system error, defendant's appeal was not properly entered, and defendant was held in detention for six additional days. While he was in detention, he was not provided with necessary medication, and he suffered a seizure resulting in a concussion. At superior court, defendant filed a motion to dismiss arguing irreparable prejudice to his ability to prepare a defense due to the concussion, a motion denied by the trial court. Defendant was found guilty and during sentencing, the trial court found three aggravating factors: "(1) defendant's driving was especially reckless; (2) defendant's driving was especially dangerous; and (3) defendant

was convicted of death by motor vehicle in August 2015." Slip Op. at 3. This led to defendant receiving a sentence at Level III for the impaired driving conviction.

Considering (1) defendant's motion to dismiss, the Court of Appeals explained that G.S. 15A-954(a)(4) governed motions to dismiss for flagrant violations of a defendant's constitutional rights. The court looked for "structural errors" in the framework of the trial process as explained in *State v. Hamer*, 377 N.C. 502 (2021). Slip Op. at 6. Defendant did not testify at the district court level, and it appeared unlikely he would have testified regardless of his injury at superior court, leading the court to conclude that he could not meet the burden of irreparable prejudice required for dismissal. The court also noted defendant was acquitted of two of the charges against him at superior court, suggesting that he mounted a solid defense.

Considering (2) the aggravating factors for driving while impaired, the court explained that on December 1, 2006, changes in the applicable law moved the responsibility for consideration of aggravating factors from the trial judge to the jury. The current law in G.S. 20-179(a1) places the responsibility on the state to prove these factors beyond a reasonable doubt to the jury. The court examined the caselaw arising from *Blakely v. Washington*, 542 U.S. 296 (2004), and the concept of harmless error review when a judge fails to submit aggravating factors to the jury. Slip Op. at 9. After exploring applicable federal and state precedent on the failure to submit an aggravating factor to the jury and harmless error, the court concluded:

> Since the relevant federal cases provide the bare minimum, and all relevant state cases are distinguishable because they were decided prior to the modification of the statute where it is clear from the timing and language of the statute that the legislature intended to change the standards adopted by our courts, we hold aggravating factors must be decided by the jury or the case must be remanded for a new sentencing hearing.

Id. at 12. As a result, the court vacated the trial court's judgement and remanded for resentencing.

Considering the final issue, (3) defendant's reckless driving sentence, the court explained that G.S. 15A-1343.2(d)(1) requires a trial court to make specific findings if they sentence a defendant to a community punishment longer than 18 months for a misdemeanor like reckless driving, and here defendant received a 36-month community punishment without specific findings. The state conceded this was error, and the matter was also vacated and remanded for resentencing.

Judge Gore dissented by separate opinion, and would have found the trial court's error as harmless under the harmless error standard. *Id*. at 14.

Speedy Trial & Other Issues

District Attorney holds exclusive discretionary power to reinstate criminal charges dismissed with leave; trial court does not have authority to compel district attorney to reinstate charges dismissed with leave.

State v. Diaz-Tomas, 2022-NCSC-115, 382 N.C. 640 (Nov. 4, 2022). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision denying defendant's petition for writ of certiorari, and dismissed as improvidently allowed issues related to defendant's petition for discretionary review and the denial of his petition for writ of mandamus.

This matter has a complicated procedural history as detailed on pages 4-10 of the slip opinion. Defendant was originally charged with driving while impaired and driving without an operator's license in April of 2015. Defendant failed to appear at his February 2016 hearing date; an order for arrest was issued and the State dismissed defendant's charges with leave under G.S. 15A-932(a)(2). This meant defendant could not apply for or receive a driver's license from the DMV. Defendant was arrested in July of 2018, and given a new hearing date in November of 2018, but he again failed to appear. In December of 2018, defendant was arrested a second time, and given another new hearing date that same month. However, at the December 2018 hearing, the assistant DA declined reinstate the 2015 charges, leading to defendant filing several motions and petitions to force the district attorney's office to reinstate his charges and bring them to a hearing. After defendant's motions were denied by the district court, and his writ for certiorari was denied by the superior court and the Court of Appeals, the matter reached the Supreme Court.

The court first established the broad discretion of district attorneys, as "[s]ettled principles of statutory construction constrain this Court to hold that the use of the word 'may' in N.C.G.S. § 15A-932(d) grants exclusive and discretionary power to the state's district attorneys to reinstate criminal charges once those charges have been dismissed with leave . . . ." Slip Op. at 13. Due to this broad authority, the court held that district attorneys could not be compelled to reinstate charges. The court next turned to the authority of the trial court, explaining that "despite a trial court's wide and entrenched authority to govern proceedings before it as the trial court manages various and sundry matters," no precedent supported permitting the trial court to direct the district attorney in this discretionary area. *Id*. at 16. Because the district attorney held discretionary authority to reinstate the charges, and the trial court could not interfere with the constitutional and statutory authority of the district attorney, the court affirmed the denial of defendant's motions for reinstatement and petition for writ of certiorari.

The court also considered defendant's various petitions for writ of mandamus, noting they were properly denied under the applicable standard because "[defendant] does not have a right to compel the activation of his charges which have been dismissed with leave or to require the exercise of discretionary authority to fit his demand for prosecutorial action regarding his charges." *Id*. at 22.

State v. Nunez, 2022-NCSC-112, 382 N.C. 601 (Nov. 4, 2022). The Supreme Court affirmed per curiam the order denying defendant's petition for writ of certiorari issued by a Wake County Superior Court judge. The court allowed a petition for discretionary review prior to determination by the Court of Appeals and combined this matter with *State v. Diaz-Tomas*, 2022-NCSC-115, for oral argument. The court affirmed the order for the reasons stated in *Diaz-Tomas*.

No speedy trial violation where defendant was tried three times between 2018 and 2021, eventually convicted after third trial.

State v. Ambriz, 2022-NCCOA-711, 286 N.C. App. 273 (Nov. 1, 2022). In this Guilford County case, Defendant appealed his convictions for trafficking in methamphetamine, arguing insufficient evidence to support his convictions and denial of his right to a speedy trial. The Court of Appeals found no error.

In February of 2016, defendant was a part of a group who were involved in a drug deal with a confidential informant working with the Greensboro Police Department. The deal involved transport of a large amount of methamphetamine from Alabama to Greensboro. After observing defendant and his associates transport methamphetamine to a storage unit, police arrested defendant, and he was indicted on the trafficking charges. Defendant was tried three separate times; the first two, in April of 2018 and August of 2019, resulted in deadlocked juries. Defendant was eventually convicted after a trial in May of 2021.

The court first considered defendant's arguments regarding sufficiency of the evidence to support his convictions, noting that the State presented substantial evidence to support defendant possessed the methamphetamine under an "acting in concert" theory. Slip Op. at 9-10. The court then applied the same evidence to the transporting element of defendant's convictions, again finding substantial evidence in the record. *Id*. at 11-12. Finally, examining the conspiracy elements, the court found ample evidence of communication and cooperation with co-conspirators supporting the conviction. *Id*. at 14.

The procedural history of defendant's three trials is extensive and detailed on pages 17-18 of the slip opinion; notably the case began before COVID-19 delays but was also subject to delays during 2020. The court explained that North Carolina courts follow the four-factor analysis from *Barker v. Wingo*, 407 U.S. 514 (1972), when performing a speedy trial analysis. *Id*. at 19. To determine whether a violation occurred, the court examined all of defendant's speedy-trial motions and walked through the four *Barker* factors, determining that: (1) the length of the delay was sufficient to trigger a speedy-trial analysis; (2) although the choices to prosecute one of defendant's co-conspirators, and to perform transcription of the contact between co-defendants and of the trial proceedings contributed to the delay, they did not represent the

State's negligence or willful delay; (3) the defendant asserted his right to speedy trial repeatedly; and (4) the delay was not prejudicial to defendant's ability to present a defense as he did present any witnesses or evidence. After walking through the *Barker* analysis, the court concluded that the balance favored the State.

Trial in the Defendant's Absence; Right to Be Present

Trial court did not err by allowing trial to proceed after defendant jumped from a balcony in the jail, severely injuring himself; hearing under G.S. 15A-1002 was statutorily sufficient even though trial court did not consider whether defendant's jump represented a suicidal gesture; trial court was not presented with sufficient evidence of incompetence to trigger hearing under Due Process Clause.

State v. Flow, 202PA21, ___ N.C. ___ (Apr. 28, 2023). In this Gaston County case, the Supreme Court affirmed the Court of Appeals decision finding no error when the trial court declined to conduct further inquiry into defendant's capacity after determining that he voluntarily absented himself by jumping from a balcony on the sixth day of trial.

In May of 2018, defendant forced his way into the home of his ex-girlfriend and held her at gunpoint for several hours, raping her twice. Police eventually forced their way into the home and successfully rescued the ex-girlfriend from defendant. Defendant came for trial on charges of rape, burglary, kidnapping, sexual offense, possession of a firearm by a felon, and violation of a protective order beginning on December 9, 2019. After defendant decided not to testify or present evidence on his own behalf, the trial court conducted two colloquies with defendant to determine if he was making the choices freely and intelligently. The court conducted these colloquies on Friday, December 13, and again on Monday, December 16, 2019. After the second colloquy, the jury was brought back and heard closing arguments from both sides, and trial proceedings concluded for the day. On the morning of December 17, 2019, defendant leaped off a mezzanine in the jail, breaking his leg and ribs. Defense counsel then moved under G.S. 15A-1002 to challenge defendant's competency. After hearing from defense counsel and the state, the trial court determined that defendant voluntarily absented himself from the trial, and the trial moved forward, ultimately resulting in defendant's convictions. A unanimous panel at the Court of Appeals found no error by the trial court, distinguishing the circumstances from *State v. Sides*, 376 N.C. 449 (2020).

On appeal, defendant argued that the trial court erred by failing to conduct an inquiry into his capacity to proceed, basing his arguments on G.S. §§ 15A-1001 & -1002, and the Due Process Clause of the Fourteenth Amendment. The Supreme Court reviewed these interrelated arguments de novo, first looking at the statutory claim. Here, defense counsel's initial motion was sufficient to trigger G.S. 15A-1002's hearing procedures, but the court explained the section only provides "sparse guidance regarding the procedural and substantive requirements of the competency hearing." Slip Op. at 29. The court concluded that the inquiry here, where

the trial court heard from both parties and accepted testimony on the events, was "statutorily sufficient because defendant was provided an opportunity to present any and all evidence relating to his competency that he was prepared to present." *Id*. at 30. Even though the trial court did not consider whether defendant had attempted suicide by his jump, this did not show a failure to consider defendant's capacity, as "[s]uicidality does not automatically render one incompetent," and defendant could be suicidal without being incompetent, or vice versa. *Id*. at 31.

The court next moved to the Due Process Clause argument, explaining that the requirements for a constitutional competency hearing are more involved, but are only triggered when the trial court is presented with substantive evidence of defendant's incompetence. Here, "the determinative issue [was] whether the trial court in the instant case had substantial evidence that defendant may have lacked capacity at the time of his apparent suicide attempt." *Id*. at 36. The court first noted that, as explained in the statutory inquiry, defendant's suicide attempt on its own did not represent substantial evidence of incompetence. Defendant pointed to three categories of evidence showing incompetence: (1) his actions before the arrest, including erratic behavior, the use of a racial slur, and the nature of his crimes, (2) his suicide attempt, and (3) testimony that defendant was heavily medicated and had trouble communicating in the hospital after his attempt at suicide. The court rejected number (3) immediately as it related to after the attempt, and again noted that number (2) by itself did not support incompetence. That left the evidence of number (1), which the court found was inadequate to show substantial evidence of incompetence. Additionally, the trial court was able to observe and interact with defendant over the course of the trial, and received evidence provided by defense counsel at the hearing, none of which indicated a history of mental illness or inability to participate or understand the legal proceedings prior to his suicide attempt. The court concluded that no substantial evidence existed to justify further inquiry.

Justice Earls dissented, and would have held that the trial court held an insufficient hearing under G.S. 15A-1002 and had sufficient evidence to require a competency hearing under the Due Process Clause. *Id*. at 45.

Defendant's willful absence from proceedings represented waiver of right to be present at trial.

State v. Jefferson, COA22-450, ___ N.C. App. ___ (April 4, 2023). In this Rutherford County case, defendant appealed his convictions for assault by strangulation, habitual misdemeanor assault, and habitual felon status, arguing the trial court erred by proceeding in his absence during one day of the trial. The Court of Appeals found no error and affirmed the judgment.

On November 15, 2021, defendant's charges came to trial; on the first day of proceedings defendant told the court he was not ready for his case to go to trial, and the trial court adjourned for the day. The next morning, defendant refused to leave his cell, despite the trial court addressing defendant via defense counsel's cell phone. After two colloquies with

defendant over the phone, the trial court made several findings on the record and announced the trial would go forward without defendant. The state called several witnesses and trial moved forward, although the trial court took a recess and again attempted to convince defendant to attend trial. After the last of the state's witnesses were called, the court recessed again, and at this point, defendant decided to attend the proceedings. Defendant was present for the last day of proceedings, November 17, 2021, and the same day the jury returned guilty verdicts.

On appeal, defendant argued that he did not validly waive his right to be present and he was not made fully aware of his obligation to be present at trial. The Court of Appeals first turned to *State v. Pope*, 257 N.C. 326 (1962), to explain that the defendant has a right to be present in criminal prosecutions, and the power to waive that right. But to effectively waive that right, precedent requires that "'the defendant must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away.'" Slip Op. at 8-9, quoting *State v. Sides*, 376 N.C. 449, 458 (2020). Here, the court found that defendant's behavior expressed a waiver of his right to be present.

The court also considered defendant's argument, based on *State v. Shaw*, 218 N.C. App. 607 (2012), that there is no general right for a defendant to be absent from trial, and the trial court's statements to defendant were misleading in that they suggested he could choose not to attend. The court disagreed with this interpretation, noting "*Shaw* recognized the long-standing rule that a defendant may waive his right to be present and the trial court *may* compel the defendant's presence if the trial court deems it advisable to do so." Slip Op. at 10. Here, the trial court correctly advised defendant that it was his choice to attend the trial, and defendant was not being misled or induced not to attend.

The court also found that the trial court's procedures complied with G.S. 15A-1032, the statute which permits the trial court to remove a disruptive defendant. Even though the trial court was not ordering defendant's removal in this case, the trial court entered into the record the reasons for proceeding without the defendant, and instructed the jury not to consider the defendant's absence in determining his guilt. The trial court also made multiple attempts to communicate with defendant through defense counsel during breaks in the proceedings. The Court of Appeals found this was a separate ground to affirm the trial court.

Evidence

Opinions

Exclusion of testimony from defendant's expert was proper under Rule 702(a); admission of lay opinion testimony was not prejudicial due to substantially similar testimony from other witnesses.

State v. Mason, 2022-NCCOA-684, 286 N.C. App. 121 (Oct. 18, 2022). In this Rowan County case, defendant appeals her conviction for second-degree murder, challenging the exclusion of her expert's testimony and the admission of lay opinion testimony from the State's witness. The Court of Appeals found no prejudicial error.

In April of 2018, defendant was involved in a scuffle at a gaming arcade in Salisbury. Although who initiated the confrontation was unclear from the testimony and video, defendant and the eventual male victim engaged in a physical confrontation while waiting to cash out of the arcade. Two other women were also involved in the initial confrontation, and one woman was physically assaulted by the man involved. After fighting ensued, defendant was thrown against an ATM and knocked to the floor; meanwhile the male victim was on top of another woman engaged in a physical confrontation. Defendant drew her handgun and shot the victim twice, once in the back and once in the chest. At trial, defendant testified that she acted in self-defense and defense of others.

The Court of Appeals first considered the exclusion of testimony from defendant's expert regarding the principles of self-defense and use of force under Rule 702(a) of the North Carolina Rules of Evidence. The court explained that "Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible," a role for the trial court to determine at its discretion. Slip Op. at 10, quoting *State v. McGrady*, 368 N.C. 880, 889 (2016). The court explained the testimony must (1) be from a qualified expert, (2) be relevant to the trial, and (3) reliable in the opinion of the trial court. In this matter, defendant's expert was a former law enforcement officer but he was not an expert in concealed carry class training, and the trial court found that no specialized knowledge was required to determine the reasonableness of defendant's actions. As a result, the court found that the expert "lacked sufficient 'expertise to be in a better position than the trier of fact to have an opinion on the subject' of the appropriate use of force by civilians." *Id*. at 15.

Regarding the admission of lay opinion, the court explained that defendant was challenging the admission of a witness's statement that no lives were in danger that April night in the arcade, which called into question her use of force. Assuming *arguendo* that the admission of this testimony was improper, the court held that defendant could not show prejudice, as several other witnesses testified (without objection) to their perception of the level of danger in the

arcade, specifically that it was low and not likely to result in harm. *Id*. at 22. As a result, defendant could not show any prejudice from the testimony she found objectionable.

Prior Acts--404(b) Evidence

Text messages were admissible as prior bad acts and did not represent abuse of discretion; conviction for maintaining a dwelling resorted to by persons using methamphetamine required evidence that someone other than defendant resorted to his home to use methamphetamine.

State v. Massey, 2023-NCCOA-7, ___ N.C. App. ___ (Jan. 17, 2023). In this Johnston County case, defendant appealed his controlled substance related convictions arguing error in (1) the admission of prior bad act evidence, and (2) denying his motion to dismiss some of the controlled substances charges. The Court of Appeals vacated and arrested the judgment for maintaining a dwelling resorted to by persons using methamphetamine, but otherwise found no error.

In March of 2019, Johnston County Sheriff's Office executed a search warrant on defendant's home, discovering methamphetamine in small baggies, marijuana, and paraphernalia consistent with selling drugs. Defendant was also noncompliant during the search and arrest, struggling with officers and attempting to flee. At trial, the state admitted certain text messages obtained from defendant's cellphone, ranging from October 2018 to February 2019, as evidence of prior bad acts; defendant objected under Rule of Evidence 404(b) but the trial court denied his motion.

For issue (1), the Court of Appeals first found Rule 404(b) did not bar admission of the texts, as "knowledge was at issue during trial, [and] the challenged evidence is relevant as it corroborated the [s]tate's contention that the substance defendant possessed was indeed marijuana and not legal hemp." Slip Op. at 9. The court then determined under Rule 403 that the trial court performed a sufficient analysis of the evidence and did not commit an abuse of discretion when admitting the texts.

Under issue (2), the court found error with one of defendant's convictions, maintaining a dwelling resorted to by persons using methamphetamine under G.S. 90-108(a)(7), as the state did not offer sufficient evidence to show any other person actually used defendant's residence for consuming methamphetamine. The court noted that "the [s]tate failed to establish that anyone outside of defendant, used defendant's home to consume controlled substances . . . [d]efendant cannot 'resort' to his own residence." *Id*. at 18. The court rejected defendant's arguments with respect to his other controlled substance convictions, and arrested judgment instead of remanding the matter as defendant's convictions were consolidated and he received the lowest possible sentence in the mitigated range.

Prior breaking and entering incident was sufficiently similar, held probative value for defendant's intent, and was not too remote in time for admission under Rule 404(b); video surveillance tape was properly authenticated by investigating officer's testimony.

State v. Jones, COA22-151, ___ N.C. App. ___ (March 21, 2023). In this New Hanover County case, defendant appealed his convictions for possession of burglary tools and attempted breaking and entering, arguing error in admitting evidence of a 2018 breaking and entering incident. The Court of Appeals found no error.

In November of 2020, defendant entered the backyard of a Wilmington home and attempted to open the door of a storage shed. The homeowner's security camera alerted the homeowner, who then called 911. Defendant was later found by police in a neighbor's yard with bolt cutters and a box cutter with a screwdriver head. During the trial, the prosecution introduced evidence of a 2018 incident where defendant pleaded guilty to breaking and entering a residential shed using a small knife. Despite defendant's objections, the trial court admitted evidence of defendant's guilty plea to the 2018 incident, as well as testimony from the investigating officer and surveillance video from the 2018 incident.

On appeal, defendant first argued error by the trial court in admitting the testimony and video evidence of the 2018 incident. The Court of Appeals disagreed, finding that the testimony and evidence were relevant and admissible under Rule 404(b) and not unfairly prejudicial under Rule 403. The court first examined defendant's argument that the 2018 incident was not sufficiently similar to the 2020 incident to justify admitting the evidence. Using *State v. Martin*, 191 N.C. App. 462 (2008) as a guiding example, the court noted that here the similarities of breaking into a shed, after midnight, using similar tools, clearly met the Rule 404(b) requirement of similarity. Slip Op. at 12-13. The court also found the other two elements of Rule 404(b) were satisfied by the 2018 incident, as the prior incident had probative value for defendant's intent to break into the shed, and the gap in time between the two incidents was not unusually long based on applicable precedent. After establishing admissibility under Rule 404(b), the court performed the Rule 403 analysis, finding no abuse of discretion in the trial court's weighing of the danger of unfair prejudice verses probative value, and noting that the trial court carefully handled the process.

Defendant's second argument on appeal was that the 2018 video surveillance evidence was not properly authenticated. The court again disagreed, noting that under Rule of Evidence 901, tapes from surveillance cameras can be authenticated as "the accurate product of an automated process" as long as "[e]vidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process" is admitted to support the video. *Id*. at 21, quoting *State v. Snead*, 368 N.C. 811, 814 (2016). Here the court found that the investigating officer's testimony in support of the video satisfied the requirements for authentication. Additionally, the court noted that even if the video was not

properly authenticated, defendant could not show prejudice due to the large amount of evidence supporting his conviction.

Vouching for the Credibility of a Victim

Testimony by an expert that sexual assault victim "did not appear to be coached" was admissible; evidence from school records was properly excluded under Rule 403; video showing equipment related to a polygraph examination was admissible.

State v. Collins, COA22-488, ___ N.C. App. ___ (April 4, 2023). In this Rockingham County case, defendant appealed his convictions for statutory rape, indecent liberties with a child, and sex act by a substitute parent or guardian, arguing error in admitting expert testimony that the victim's testimony was not coached, in granting a motion *in limine* preventing defendant from cross-examining the victim about her elementary school records, and in admitting a video of defendant's interrogation showing equipment related to a polygraph examination. The Court of Appeals found no error.

In 2021, defendant was brought to trial for the statutory rape of his granddaughter in 2017, when she was 11 years old. At trial, a forensic interviewer testified, over defendant's objection, that he saw no indication that the victim was coached. The trial court also granted a motion *in limine* to prevent defendant from cross-examining the victim regarding school records from when she was in kindergarten through second grade showing conduct allegedly reflecting her propensity for untruthfulness. The conduct was behavior such as cheating on a test and stealing a pen.

The Court of Appeals noted "[o]ur Supreme Court has held that 'an expert may not testify that a prosecuting child-witness in a sexual abuse trial is believable [or] is not lying about the alleged sexual assault.'" Slip Op. at 2, quoting *State v. Baymon*, 336 N.C. 748, 754 (1994). However, the court could not point to a published case regarding a statement about coaching like the one in question here. Because there was no controlling opinion on the matter, the court engaged in a predictive exercise and held, "[b]ased upon our Supreme Court's statement in *Baymon*, we conclude that it was not error for the trial court to allow expert testimony that [the victim] was not coached." *Id*. at 3.

The court also found no error with the trial court's conclusions regarding the admissibility of the victim's childhood records under Rule of Evidence 403. The court explained that the evidence showed behavior that was too remote in time and only marginally probative regarding truthfulness. Finally, the court found no error with the interrogation video, explaining that while it is well established that polygraph evidence is not admissible, the video in question did not show a polygraph examination. Instead, the video merely showed "miscellaneous items on the table and not the actual polygraph evidence," and all references to a polygraph examination were redacted before being shown to the jury. *Id*. at 5-6.

Criminal Offenses

Animal Cruelty

Defendant's malicious and willful act of arson justified a conviction for felonious cruelty to animals when the house fire set by defendant caused the death of a puppy in the house.

State v. Charles, 2022-NCCOA-628, 285 N.C. App. 494 (Sept. 20, 2022). In this Cumberland County case, defendant appealed after being convicted of second-degree arson and felonious cruelty to animals. The Court of Appeals found no error with the trial court.

In July of 2020, defendant lived in and around Fayetteville in a van with his sister. Defendant frequently spent time with his sister and her boyfriend, who had a residence in Fayetteville. After a confrontation between defendant and the sister's boyfriend, defendant went to the boyfriend's house and set fire to the residence; the fire also killed the boyfriend's puppy which was inside the house, leading to defendant's convictions for arson and animal cruelty.

On appeal, defendant first argued that the jury instruction including the doctrine of transferred intent regarding the animal cruelty charge was error. The Court of Appeals declined to determine whether transferred intent was applicable in the case, because the plain language of N.C.G.S. § 14-360 (cruelty to animals) supported the instruction to the jury. Regarding the elements of felonious cruelty to animals, the court pointed out that "one who merely acts maliciously is guilty of felonious cruelty to animals under the statute if that act 'cause[s] . . . to be . . . killed, any animal.'" Slip Op. at ¶19. Because defendant was convicted of second-degree arson, a crime requiring malicious intent, "[i]t is enough to prove that the defendant acted maliciously and that the act proximately caused the death of an animal. *Id.*

Defendant also argued that the trial court's denial of his motion to dismiss was error as he was not aware there was an animal inside the house; again, the court disagreed. Referencing the jury instruction discussion above, the court explained that defendant's lack of knowledge regarding the puppy was irrelevant. Instead, "it was sufficient for the State to show that [d]efendant intentionally and maliciously started the fire which proximately resulted in the animal's death." *Id*. at ¶22.

Finally, defendant argued that the indictment was deficient as it lacked the elements of "maliciously" and "intentionally" from the charge of felonious cruelty to animals. The court noted that indictments are not subject to rigid rules of construction; while the indictment must adequately allege each element of the charge, it may do so in the words of the statute or similar language. *Id.* at ¶25. Here, the "maliciously" element of the charge was included in the accompanying second-degree arson charge, which stated defendant "unlawfully, willfully and feloniously did *maliciously* burn the dwelling." *Id.* at ¶27. The "intentionally" element was

included as "willfully" in the animal cruelty charge, as the court noted that "'willfully' adequately expresses that the offense requires an intentional act." *Id.* at ¶28.

Drug Offenses

(1) Warrantless seizure and canine sniff of a package in transit at a FedEx facility did not implicate the defendant's Fourth Amendment rights; (2) Assuming the defendant's Fourth Amendment rights were implicated, he failed to preserve the challenge for appellate review; (3) Indictment for possession with intent to sell/deliver THC was not defective for failing to allege an illegal amount of THC under former hemp law; (4) Marijuana extract did not qualify as industrial hemp under former law, and there was sufficient evidence that the defendant possessed unlawful THC despite the lack of quantified chemical analysis; (5) Assuming without deciding that admission of lay opinions that untested substances were marijuana, marijuana wax, and THC was error, the defendant could not show prejudice; (6) Sufficient evidence supported the existence of a conspiracy to traffic marijuana, and the trial court properly admitted a phone call between law enforcement and the sender of the package as a statement of a co-conspirator under N.C. Evid. R. 801(d)

State v. Teague, 2022-NCCOA-600, 286 N.C. App. 160 (Nov. 1, 2022), temp. stay allowed, ___ N.C. ___ (Jan. 4, 2023). In this Wake County case, a drug investigator was working at a local FedEx facility and noticed a package from California with the seams taped shut and with an apparently fake phone number for the recipient. The officer removed the package from the conveyor belt and searched law enforcement databases for information on the sender and the recipient. He discovered that the telephone number for the sender listed on the package was incorrect, that the telephone number for the recipient was fictitious, and that the package had been mailed from a location other than the listed shipping address. The package was placed alongside several other similar packages and was examined by a drug dog already present in the facility. Following an alert by the canine, officer obtained a search warrant for the package. Inside, officers discovered packages of around 15 pounds of suspected marijuana, along with a GPS tracker. Officers visited the address of the recipient, where they noticed the defendant in the driveway. They also noted the presence of a storage unit facility nearby and later learned the defendant rented a unit there. A man (apparently the sender) called the FedEx facility to inquire about the status of the package. An officer called him back, first verifying the intended address and recipient of the package and then identifying himself as law enforcement. The man on the phone cursed and ended the call. The next day, officers visited the storage facility near the defendant's home with a canine unit, which alerted to a certain unit. While officers were obtaining a search warrant for the unit, the defendant arrived on scene holding a bag. Officers saw what they believed to be marijuana extract or "wax" inside the bag and placed the defendant under arrest. Once the search warrant for the storage unit was approved, officers discovered more apparent marijuana and marijuana extract inside. Search warrants for the defendant's house were then obtained, leading to the discovery of marijuana paraphernalia and a substance used to produce marijuana extract.

The defendant was charged with conspiracy to traffic marijuana, possession with intent to sell/deliver marijuana and possession with intent to sell/deliver THC (among other related offenses). The defendant moved to suppress, arguing that the seizure of the package at the FedEx facility was unconstitutional.

The trial court denied the motion, and the defendant was convicted of trafficking and other offenses at trial. On appeal, the defendant challenged the denial of his suppression motion, the denial of his motion to dismiss for insufficient evidence, the admission of lay opinions identifying the substances in the case as marijuana, marijuana wax, and THC, and the admission of the phone call between the officer and the man who called the FedEx facility inquiring about the package. The Court of Appeals affirmed.

(1) The court rejected the argument that the defendant's Fourth Amendment rights were violated by the seizure of the package and canine sniff at the FedEx facility. "[W]e do not accept Defendant's initial contention that the mere removal of the target package from the conveyor belt for a drug dog sniff was a 'seizure' implicating his Fourth Amendment rights. Neither was the drug dog sniff a 'search. . .'" *Teague* Slip op. at 13. While both the sender and recipient of a mailed package have a reasonable expectation of privacy in the contents of a package, the temporary detention and investigation of the package in a manner that does not significantly delay its delivery does not amount to a Fourth Amendment seizure. Officers here had reasonable suspicion to justify a brief investigation and dog sniff of the package. From there, officers properly obtained search warrants of the package, which led to additional search warrants supported by probable cause. Thus, the acts of removing the package for investigation and subjecting it to a canine sniff did not implicate the defendant's Fourth Amendment rights and the motion to suppress was properly denied.

(2) Assuming arguendo that the seizure and canine sniff of the package did implicate the defendant's Fourth Amendment rights, he failed to preserve those arguments for appellate review. While the defendant filed a pretrial motion to suppress and fully litigated those issues (including objecting to the canine alert evidence at trial), he failed to object to testimony at trial about the removal of the package from the conveyor belt for additional investigation. Appellate review of that issue was therefore waived. The dog sniff on its own did not amount to a search, given it took place at the FedEx facility while the item was "still in the mail stream" and was completed within ten minutes. "…Defendant's renewed objection at trial to the introduction of . . . the dog sniff was insufficient to resurrect any prior unpreserved Fourth Amendment argument for appellate review." *Id*. at 25. The trial court also did not plainly err by denying the suppression. Because the defendant's Fourth Amendment rights were not implicated, no error occurred, much less any plain error in the trial court's denial of the suppression motion.

Regarding the defendant's other challenges, the court noted the continued ambiguity surrounding the impact of hemp legalization on marijuana prosecutions, citing *State v. Parker*, 277 N.C. App. 531 (2021). The court opined that the now-defunct Industrial Hemp Act did not impact the State's burden of proof in criminal proceedings "to the degree the Defendant contends," while also acknowledging that "our appellate courts have yet to fully address the effect of industrial hemp's legalization on . . . the various stages of a criminal investigation and prosecution for acts involving marijuana." *Teague* Slip op. at 28 (citation omitted).

(3) The defendant argued that the indictment charging him with possession with intent to sell/deliver THC was fatally defective for failure to state a crime because the indictment failed to specify that the THC possessed by the defendant contained a delta-9 THC concentration of more than 0.3%. The court rejected this argument, finding that the concentration of delta-9 THC is not an element of the crime and that the then-applicable Industrial Hemp Act did not remove THC from the list of prohibited controlled substances under Chapter 90 of the North Carolina General Statues. Moreover, the defendant has the

burden under G.S. 90-113.1 to prove lawful possession of a controlled substance, which is an exception to the prohibitions on controlled substances and (again) not an element of the offense. (The prohibition on possession of THC in G.S. 90-94 has since been amended to exclude all THC products containing no more than 0.3% delta-9 THC, which expressly removes delta-9 THC within the legal limit and all other hemp-derived THCs not exceeding the delta-9 THC limit from the list of prohibited controlled substances).

(4) The trial correctly denied the defendant's motion to dismiss the charge of possession with intent to sell/deliver THC for insufficient evidence. The defendant pointed to the lack of any chemical analysis for the brown marijuana "wax" and argued that the State failed to present proof that the substance was an illegal controlled substance given the existence of legal hemp. The court found that the brown material did not qualify as industrial hemp under the then-existing definition but met the definition of THC in place at the time. "The brown material was neither a *part* nor a *variety* of the plant Cannabis sativa." *Teague* Slip op. at 34 (emphasis in original). Moreover, even if the material did qualify as a part of the plant, "Defendant makes no argument that he was a 'grower licensed by the Commission', or that the brown material was cultivated by such a licensed grower, as the statutory definition of 'industrial hemp' requires." *Id*. at 35. In the light most favorable to the State, there was therefore sufficient evidence that the brown material was THC, and the motion was properly denied. (Industrial hemp is no longer defined under state law and has been replaced by new state definitions for marijuana, hemp and hemp products, as discussed here. Under the new definitions, hemp is defined to include all extracts and derivatives of hemp, and hemp products are defined as anything made from hemp. There is no longer any requirement that hemp be grown by a licensed grower.)

(5) The defendant argued that the legalization of hemp in the state undercut the justifications in the decisions allowing the lay identification of marijuana without the need for a chemical analysis. *See, e.g., State v. Mitchell*, 224 N.C. App. 171, 179 (2013). He complained on appeal that the admission of lay opinion testimony identifying "marijuana wax," "THC," and marijuana as such without a valid chemical analysis violated N.C. Evid R. 702 and was reversible error. The Court of Appeals disagreed. Assuming without deciding that the trial court erred in admitting this testimony, the defendant could not show prejudice. The flower marijuana in the package was properly lab-tested and found to contain illegal levels of delta-9 THC. While the brown wax material was tested only for the presence of delta-9 THC and not for specific levels of THC, the material again did not qualify as industrial hemp under the then-existing definition. While other flower material found in the storage shed was likewise only tested for the presence of THC (and not for quantified THC levels), there was overwhelming evidence of the defendant's guilt. Given the marijuana that was properly tested, along with the discovery of other drugs and drug paraphernalia at the defendant's house, storage unit, and in the bag that the defendant was carrying when he encountered officers at the storage unit (among other evidence), there was no reasonable likelihood of a different result at trial had this identification testimony been excluded.

(6) There was also sufficient evidence supporting the defendant's conviction for conspiring to traffic marijuana by transportation, and the trial court did not err in admitting a recording of the phone call between the apparent sender of the package and the law enforcement officer. The shipping label accurately named the defendant and his address, and the sender acknowledged that information on the call with the officer. The sender was also upset upon learning that the package had been intercepted by law enforcement. Additionally, the drugs in the package were worth more than $150,00.00 and included a GPS tracking device. This was sufficient to show the defendant and co-conspirator's "mutual concern

for and interest in" the package, thus providing sufficient evidence of the conspiracy. *Id*. at 44. The phone call between the sender of the package and law enforcement was properly admitted under the hearsay exception for statements of co-conspirators under N.C. Evid. R. 801(d)(E). The court rejected the defendant's argument that the statement at issue here did not qualify under that exception because it was not a statement made between the conspirators. The court observed:

> [W]hen the State has introduced *prima facie* evidence of a conspiracy, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members *regardless* of their presence or absence at the time the acts and declarations were done or uttered. *Teague* Slip op. at 46 (citation omitted) (emphasis in original).

There was therefore sufficient evidence of the conspiracy conviction and no error in admission of the phone call between law enforcement and the co-conspirator.

Homicide

Sentencing defendant as Class B1 felon was appropriate where the jury found all three types of malice supporting the second-degree murder conviction; presence of depraved-heart malice did not create ambiguity justifying Class B2 felony sentencing.

State v. Borum, 505PA20, ___ N.C. ___ (Apr. 6, 2023). In this Mecklenburg County case, the Supreme Court reversed an unpublished Court of Appeals decision and affirmed the trial court's sentencing of defendant at the Class B1 felony level for second-degree murder.

In February of 2019, defendant went on trial for first-degree murder for shooting a man during a protest. During the jury charge conference, the trial court explained the three theories of malice applicable to the case: actual malice, condition of mind malice, and depraved-heart malice. The verdict form required the jury to identify which type of malice supported the verdict. When the jury returned a verdict of guilty for second-degree murder, all three types of malice were checked on the verdict form. At sentencing, defendant's attorney argued that he should receive a Class B2 sentence, as depraved-heart malice was one of the three types of malice identified by the jury. The trial court disagreed, and sentenced defendant as Class B1. The Court of Appeals reversed this holding, determining the verdict was ambiguous and construing the ambiguity in favor of the defendant.

Reviewing defendant's appeal, the Supreme Court found no ambiguity in the jury's verdict. Explaining the applicable law under G.S. 14-17(b), the court noted that depraved-heart malice justified sentencing as Class B2, while the other two types of malice justified Class B1. Defendant argued that he should not be sentenced as Class B1 if there were facts supporting a Class B2 sentence. The court clarified the appropriate interpretation of the statute, holding that where "the jury's verdict unambiguously supports a second-degree murder conviction based on actual malice or condition of mind malice, a Class B1 sentence is required, even when

depraved-heart malice is also found." *Id*. at 7. The language of the statute supported this conclusion, as "the statute plainly expresses that a person convicted of second-degree murder is only sentenced as a Class B2 felon where the malice necessary to prove the murder conviction is depraved-heart malice . . . this means that a Class B2 sentence is only appropriate where a second-degree murder conviction hinges on the jury's finding of depraved-heart malice." *Id*. at 11. The court explained that "[h]ere . . . depraved-heart malice is not necessary—or essential—to prove [defendant's] conviction because the jury also found that [defendant] acted with the two other forms of malice." *Id*. at 11-12.

Failure to provide jury instruction on involuntary manslaughter represented error justifying new trial; jury finding defendant's offense as "especially heinous, atrocious, or cruel" did not conclusively represent a finding of malice for the offense.

State v. Brichikov, 2022-NCSC-140, 383 N.C. 543 (Dec. 16, 2022). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision granting defendant a new trial because the trial court declined to provide his requested jury instruction on involuntary manslaughter.

In 2018, defendant met his wife at a motel in Raleigh known for drug use and illegal activity; both defendant and his wife were known to be heavy drug users, and defendant's wife had just been released from the hospital after an overdose that resulted in an injury to the back of her head. After a night of apparent drug use, defendant fled the motel for Wilmington, and defendant's wife was found dead in the room they occupied. An autopsy found blunt force trauma to her face, head, neck, and extremities, missing and broken teeth, atherosclerosis of her heart, and cocaine metabolites and fentanyl in her system. Defendant conceded that he assaulted his wife during closing arguments. Defense counsel requested jury instructions on voluntary and involuntary manslaughter, including involuntary manslaughter under a theory of negligent omission, arguing that the victim may have died from defendant's failure to render or obtain aid for her after an overdose. The trial court did not provide instructions on either voluntary or involuntary manslaughter, over defense counsel's objections.

On appeal, the Supreme Court considered the issues raised by the Court of Appeals dissent, (1) whether the trial court committed error by failing to provide an instruction on involuntary manslaughter, and (2) did any error represent prejudice "in light of the jury's finding that defendant's offense was 'especially heinous, atrocious, or cruel.'" Slip Op. at 15. The court found that (1) the trial court erred because a juror could conclude "defendant had acted with culpable negligence in assaulting his wife and leaving her behind while she suffered a drug overdose or heart attack that was at least partially exacerbated by his actions, but that it was done without malice." *Id*. at 21. Exploring (2), the court explained "where a jury convicts a criminal defendant of second-degree murder in the absence of an instruction on a lesser included offense, appellate courts are not permitted to infer that there is no reasonable possibility that the jury would have convicted the defendant of the lesser included offense on the basis of that conviction." *Id*. at 22, citing *State v. Thacker*, 281 N.C. 447 (1972). The court did not find the "especially heinous, atrocious, or cruel" aggravating factor dispositive, as it noted

"finding that a criminal defendant committed a homicide offense in an especially heinous, atrocious, or cruel way does not require a finding that he acted with malice in bringing about his victim's death." *Id*. at 24. Instead, the court found prejudicial error in the lack of involuntary manslaughter instruction.

Justice Berger, joined by Chief Justice Newby and Justice Barringer, dissented and would have upheld defendant's conviction for second-degree murder. *Id*. at 27.

Human Trafficking and Related Offenses

Trial court did not err when denying motion to dismiss due to sufficient evidence in the record, despite possibility that victim was also involved in the management of defendant's prostitution ring.

State v. Norman, COA22-812, ___ N.C. App. ___ (March 7, 2023). In this Alamance County case, defendant appealed his convictions for human trafficking and sexual servitude regarding his ex-wife, arguing error in the denial of his motion to dismiss for insufficient evidence. The Court of Appeals found no error.

From 2015 to 2018, defendant operated a prostitution ring in the Alamance County area, operating at truck stops and using websites such as backpage.com to solicit customers. Eight to twelve women were involved in defendant's prostitution ring, and paid him for drugs and hotel rooms that he provided, which were to be used for liaisons with paying customers. One of the women involved in the prostitution ring was defendant's ex-wife, who assisted him in doing whatever was needed to operate the prostitution ring. After several incidents with law enforcement, defendant was arrested and charged with several counts of human trafficking, sexual servitude, and promoting prostitution. Another prostitute that worked with defendant was also charged and reached a plea agreement after agreeing to testify for the state.

Reviewing defendant's appeal, the court found ample evidence to support the denial of defendant's motion to dismiss. Defendant argued that there was insufficient evidence showing he held his wife in sexual servitude or trafficked her. The court pointed to evidence showing that defendant arranged for and transported his ex-wife to a truck stop on at least one occasion in 2017 for prostitution, including evidence showing his name on a business card used by the caller requesting a prostitute. Evidence also showed that defendant sold drugs to his ex-wife and provided her with a room at the hotel where he provided rooms to the other prostitutes he managed. Based on this evidence in the record, the court found no error in dismissing defendant's motion. Although the court noted that some evidence supported the conclusion that the ex-wife may have been involved in the management of the prostitution ring, the court explained that "[c]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." Slip Op. at 12-13, quoting *State v. Scott*, 356 N.C. 591, 596 (2002).

Kidnapping & Related Offenses

Indictment did not specifically identify facilitating flight following commission of felony as purpose of kidnapping; underlying felony of rape was completed before the actions of kidnapping occurred, justifying dismissal.

State v. Elder, 2022-NCSC-142, 383 N.C. 578 (Dec. 16, 2022). In this Warren County case, the Supreme Court affirmed the Court of Appeals decision finding that the second of defendant's two kidnapping charges lacked support in the record and should have been dismissed because the rape supporting the kidnapping charge had already concluded before the events of the second kidnapping.

The two kidnapping charges against defendant arose from the rape of an 80-year-old woman in 2007. Defendant, posing as a salesman, forced his way into the victim's home, robbed her of her cash, forced her from the kitchen into a bedroom, raped her, then tied her up and put her in a closet located in a second bedroom. The basis for the kidnapping charge at issue on appeal was tying up the victim and moving her from the bedroom where the rape occurred to the second bedroom closet. Defendant moved at trial to dismiss the charges for insufficiency of the evidence, and argued that there was no evidence in the record showing the second kidnapping occurred to facilitate the rape.

The Supreme Court agreed with the Court of Appeal majority that the record did not support the second kidnapping conviction. The court explored G.S. 14-39 and the relevant precedent regarding kidnapping, explaining that kidnapping is a specific intent crime and the state must allege one of the ten purposes listed in the statute and prove at least one of them at trial to support the conviction. Here, the state alleged "that defendant had moved the victim to the closet in the second bedroom *for the purpose of facilitating the commission of rape*." Slip Op. at 30. At trial, the evidence showed that defendant moved the victim to the second bedroom "after he had raped her, with nothing that defendant did during that process having made it any easier to have committed the actual rape." *Id*. Because the state only alleged that defendant moved the victim for purposes of facilitating the rape, the court found that the second conviction was not supported by the evidence in the record. The court also rejected the state's arguments that *State v. Hall*, 305 N.C. 77 (1982) supported interpreting the crime as ongoing, overruling the portions of that opinion that would support interpreting the crime as ongoing. Slip Op. at 42.

Chief Justice Newby, joined by Justice Berger, dissented and would have allowed the second kidnapping conviction to stand. *Id*. at 45.

Larceny, Embezzlement & Related Offenses

Clear and positive evidence of each element of larceny justified denial of defendant's requested jury instruction on attempted larceny.

State v. Sisk, 2022-NCCOA-657, 285 N.C. App. 637 (Oct. 4, 2022). In this McDowell County case, defendant appealed his conviction for felony larceny, arguing the trial court erred by denying his request for a jury instruction on the lesser included offense of attempted larceny. The Court of Appeals found no error with the trial court.

In September of 2018, defendant placed several items in a shopping cart at a Tractor Supply store, then pushed the items through the anti-shoplifting alarms and out into the parking lot to a vehicle, disregarding staff who yelled after him that he had not paid for the items. When defendant reached the waiting car, he loaded the items into the back seat; however, after an argument with the driver, defendant threw the items out of the car into the parking lot and the vehicle drove away with defendant inside. When the matter reached trial, defendant was convicted of felony larceny under G.S. 17-72(b)(6) because had previously been convicted of four misdemeanor larceny offenses.

The court examined the trial court's denial of the instruction on attempted larceny, noting that in North Carolina a judge must submit a lesser included offense to the jury unless "the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense." Slip Op. at 6-7, quoting *State v. Peacock*, 313 N.C. 554, 558 (1985). Outlining each element of common law larceny, the court explained that it consisted of (1) taking of property, (2) carrying it away, (3) without the owner's consent, and (4) with the intent to deprive the owner of the property. The court then walked through each element, as the defendant clearly took the property out the doors of the Tractor Supply store, disregarding the anti-shoplifting alarms and warnings from staff, and proceeded to a waiting car in the parking lot. Although defendant argued that leaving the items in the parking lot showed only an attempt at larceny, the court disagreed, explaining "the larceny was completed *before* Defendant removed the items from the vehicle and abandoned them." *Id*. at 10. Because the evidence in the record clearly showed each element of larceny, the court held that an instruction on attempted larceny was not required.

Motor Vehicle Offenses

Specific description of lawful duty being performed by officer not necessary for charge of speeding to elude arrest.

State v. McVay, 2022-NCCOA-907, ___ N.C. App. ___ (Dec. 29, 2022). In this Mecklenburg County case, the Court of Appeals found no error by the trial court when denying defendant's motion to dismiss for insufficient evidence.

In November of 2016, a Charlotte-Mecklenburg police officer received a call from dispatch to look out for a white sedan that had been involved in a shooting. Shortly thereafter, the officer observed defendant speed through a stop sign, and the officer followed. Defendant continued to run stop signs, and after the officer attempted to pull him over, defendant led officers on a high-speed pursuit through residential areas until he was cut off by a stopped train at a railroad crossing. Defendant was indicted and eventually convicted for felonious speeding to elude arrest.

On appeal, defendant argued that the trial court erred by failing to dismiss the charge, because the state did not admit sufficient evidence showing the officer was lawfully performing his duties when attempting to arrest defendant. The crux of defendant's argument relied on the language of the indictment, specifically that the officer was attempting to arrest defendant for discharging a firearm into an occupied vehicle. Although defendant argued that evidence had to show this was the actual duty being performed by the officer, the court explained that the description of the officer's duty in the indictment was surplusage. Although the state needed to prove (1) probable cause to arrest defendant, and (2) that the officer was in the lawful discharge of his duties, it did not need to specifically describe the duties as that was not an essential element of the crime, and here the court found ample evidence of (1) and (2) to sustain the conviction. Slip Op. at 9-10. The court also found that defendant failed to preserve his jury instruction request on the officer's specific duty because the request was not submitted in writing.

Obstruction of Justice and Related Offenses

Defendant's false statement to SBI agent regarding an employee's workload represented sufficient evidence to support obstruction of justice conviction.

State v. Bradsher, 2022-NCSC-116, 382 N.C. 656 (Nov. 4, 2022). In this Wake County case, the Supreme Court reversed the Court of Appeals decision vacating defendant's conviction, reinstating the conviction for felony obstruction of justice.

At trial, the State introduced evidence showing that in 2015, defendant was the elected district attorney for Caswell and Person Counties (District 9A), and he employed a woman married to the elected district attorney for Rockingham County (District 17A). Defendant did not assign an adequate workload to the wife of the Rockingham County district attorney, and eventually reports were filed with the SBI that she was attending nursing school during work hours and was not taking leave. An SBI agent interviewed defendant, who told the agent that the woman in question was working on special projects and conflict cases.

Reviewing the case, the Supreme Court found adequate evidence supported the conclusion that defendant's statements were false, and that "a reasonable jury could conclude that defendant's false statements . . . obstructed, impeded, and hindered the investigation and public and legal justice." Slip Op. at 21. Although the question asked by the SBI agent did not clarify if he meant "currently" when asking about projects, the court explained "there was ample evidence from which a reasonable jury could conclude that he asked defendant that question or questions to that effect and defendant knowingly and intentionally answered falsely." *Id*. at 20-21. The court noted that the knowing and willful act to respond falsely supported the jury's verdict, justifying the reinstatement of the conviction.

Justice Earls, joined by Justice Morgan, dissented, would have dismissed the conviction "because the State did not produce substantial evidence of actual obstruction." *Id*. at 32.

Participants in Crime

Although defendant was in a separate car from the contraband, he was liable under the acting-in-concert theory for purposes of trafficking by possession and trafficking by transportation charges.

State v. Christian, COA22-299, ___ N.C. App. ___ (March 7, 2023). In this Cleveland County case, defendant appealed his convictions for trafficking methamphetamine, arguing that his motion to dismiss should have been granted as he was not physically present when his travel companion was found in possession of the contraband. The Court of Appeals affirmed the denial of defendant's motion to dismiss.

In February of 2020, an associate of defendant was arrested for possession of drugs and chose to assist police with their investigation of defendant in return for leniency. Defendant had asked the associate for assistance in bringing drugs from Georgia to North Carolina, and the police assisted the associate in developing a plan where they would drive together to pick up drugs for sale in North Carolina. The plan would conclude with the pair being pulled over as they re-entered the state. However, as the pair returned from Atlanta with the drugs, they became tired, and defendant called a female friend to assist them with driving from South Carolina to their destination in North Carolina. The female friend arrived with another woman, and the pair split up, leaving defendant's associate in the car with the contraband and one

woman, and defendant in a different car with the other woman. They were both pulled over when they passed into North Carolina, traveling three to five miles apart. At trial, defense counsel moved to dismiss the charges at the close of state's evidence and again at the close of all evidence, but both motions were denied.

The Court of Appeals first explained that a person may be charged with a crime in North Carolina even if part of the crime occurred elsewhere, as long as at least one of the essential acts forming the crime occurred in North Carolina, and the person "has not been placed in jeopardy for the identical offense in another state." Slip Op. at 5, quoting G.S. 15A-134. The court then moved to defendant's arguments that he did not possess or transport the drugs while in North Carolina so he could not be charged with trafficking by possession or trafficking by transportation.

Although defendant did not have actual possession of the drugs in North Carolina, the court noted that the "knowing possession" element of trafficking by possession could also be shown by proving that "the defendant acted in concert with another to commit the crime." Slip Op. at 6, quoting *State v. Reid*, 151 N.C. App. 420, 428 (2002). Along with the evidence in the current case showing the defendant acted in concert with his associate, the trafficking charge required showing that defendant was present when the offense occurred. Here, after exploring the applicable case law, the court found that defendant was "constructively present" because, although "parties in the present case were a few miles away from each other, they were not so far away that defendant could not render aid or encouragement [to his associate]." *Id*. at 11.

Moving to the trafficking by transportation charge, the court noted that "[a]s with trafficking by possession, 'trafficking by transport can be proved by an acting in concert theory.'" *Id*. at 13, quoting *State v. Ambriz*, 880 S.E.2d 449, 459 (N.C. App. 2022). The court explained that "[f]or the same reasons we hold that defendant's motion to dismiss the trafficking by possession charge was properly denied, we also hold that the motion to dismiss the trafficking by transportation charge was properly denied." *Id*.

Robbery

Trial court erred by entering two counts of armed robbery for a single robbery at a gas station with two employees present; admission of lay opinion on guilt was not prejudicial.

State v. Kelly, 2022-NCCOA-713, 286 N.C. App. 311 (Nov. 1, 2022), *review denied*, ___ N.C. ___ (March 1, 2023). In this Pender County case, defendant appealed his convictions for armed robbery, arguing the trial court erred by (1) admitting testimony by a detective identifying defendant as the perpetrator, (2) denying defendant's motion to dismiss, and (3) entering judgment and commitment on two counts of armed robbery. The Court of Appeals found no error with (1) and (2), but did find error under (3), remanding for resentencing.

In October of 2019, a man in a sweatshirt, dark athletic pants, and gray sneakers robbed a gas station in Rocky Point, brandishing a firearm and taking money from the cash registers. After law enforcement responded and reviewed surveillance footage, an officer spotted defendant walking along a road five miles north of the gas station, and detained defendant for questioning by the detective on duty. A subsequent search found $736 in cash in defendant's clothes. Defendant was indicted for robbing the gas station, and at trial, the State admitted surveillance video and called the detective who questioned defendant to testify. During his testimony, the detective said that defendant fit the description of the suspect, and then testified over defendant's objection that "'defendant is the person that robbed the Phoenix Travel Mart.'" Slip Op. at 4.

Reviewing (1) defendant's objection to the detective's testimony, the court first noted that defendant did not properly object by requesting to strike an unresponsive answer. However, the court performed analysis under the plain error standard, concluding that the additional information supporting that defendant met the description of the suspect, and testimony from the arresting officer also supporting that defendant fit the description, suggested the jury would not have reached a different verdict but for the objectionable testimony from the detective. This evidence also supported (2) the denial of defendant's motion to dismiss, as it represented substantial evidence linking defendant to the crime.

When reviewing (3) the entry of judgment and commitment, the Court of Appeals found error with the entry of two counts for what should have been a single count of armed robbery. The court applied the reasoning from *State v. Potter*, 285 N.C. 238 (1974), explaining that although two employees were involved in the robbery, defendant could only be said to have taken property from one person, the employer. Slip Op. at 12-13. The court remanded with instructions to arrest judgment on one of the convictions and resentence the defendant accordingly.

Sexual Assaults & Related Offenses

Defendant's actions when reporting his change of address and homeless status to the sex offender registry did not show an intent to deceive, justifying dismissal of the charge.

State v. Lamp, 2022-NCSC-141, 383 N.C. 562 (Dec. 16, 2022). In this Iredell County case, the Supreme Court reversed the Court of Appeals majority decision affirming defendant's conviction for failure to comply with the sex offender registry.

Defendant is a registered sex offender, and in June 2019 he registered as a homeless in Iredell County. Because of the county's requirements for homeless offenders, he had to appear every Monday, Wednesday, and Friday to sign a check-in log at the sheriff's office. On June 21, 2019, defendant moved into a friend's apartment, but the apartment was under eviction notice and

defendant vacated this apartment sometime on the morning of June 26, 2019. Defendant reported all of this information at the sheriff's office and signed a form showing his change of address on June 21; however, due to the way the form was set up, there was way to indicate defendant planned to vacate on June 26. Instead, defendant signed the homeless check-in log. A sheriff's deputy went through and attempted to verify this address, unaware that defendant had since vacated; compounding the confusion, the deputy went to the incorrect address, but did not attempt to contact defendant by phone. As a result, the deputy requested a warrant for defendant's arrest, defendant was indicted, and went to trial for failure to comply with the registry requirements. At trial defendant moved to dismiss the charge, arguing that there was no evidence of intent to deceive, but the trial court denied the motion.

Examining the appeal, the Supreme Court agreed with defendant that the record did not contain sufficient evidence of defendant's intent to deceive. The court examined each piece of evidence identified by the Court of Appeals majority, and explained that none of the evidence, even in the light most favorable to the state, supported denial of defendant's motion to dismiss. Instead, the court noted the record did not show any clear intent, and that the state's theory of why defendant would be attempting to deceive the sheriff's office (because he couldn't say he was homeless) made no sense, as defendant willfully provided his old address and signed the homeless check-in log at the sheriff's office. Slip Op. at 16.

Justice Barringer, joined by Chief Justice Newby and Justice Berger, dissented and would have held that sufficient evidence in the record supported the denial of defendant's motion to dismiss. *Id*. at 18.

Missing page from transcript did not justify new trial; a niece-in-law is not a niece for purposes of criminal incest under North Carolina law; clerical error in judgment including dismissed conviction justified remand for correction.

State v. Palacio, COA22-231, ___ N.C. App. ___ (Feb. 21, 2023). In this Onslow County case, defendant appealed his convictions for statutory rape, incest, and indecent liberties with a child. Defendant argued (1) a missing page of the transcript justified a new trial; (2) error in denying his motion to dismiss the incest charge; (3) error in denying his motion to suppress; and (4) a clerical error in the judgment required remand. The Court of Appeals did not find justification for a new trial or error with denial of the motion to suppress, but did vacate defendant's incest conviction and remanded the case for correction of the clerical error on the judgment and resentencing.

In 2018, the 15-year-old victim of defendant's sexual advances moved in with defendant and his wife in Jacksonville. The victim is the daughter of defendant's wife's sister, making her defendant's niece by affinity, not consanguinity. During several encounters, defendant made sexual advances and eventually engaged in sexual contact with the victim, and she reported this conduct to her father, who called the police. Prior to his trial, defendant moved to suppress

statements made to after his arrest by the Onslow County Sherriff's Office, but the trial court denied the motion.

Reviewing (1), the Court of Appeals explained that a missing page from a trial transcript does not automatically justify a new trial. Instead, the applicable consideration is whether the lack of a verbatim transcript deprives the defendant of a meaningful right to appeal, and the court looked to the three-part test articulated in *State v. Yates*, 262 N.C. App. 139 (2018). Because defendant and his counsel "made sufficient reconstruction efforts that produced an adequate alternative to a verbatim transcript, he was not deprived of meaningful appellate review." Slip Op. at 9.

Turning to (2), the incest charge, the court agreed with defendant that "the term 'niece' in [G.S.] 14-178 does not include a niece-in-law for the purposes of incest." *Id*. The opinion explored the history of the incest statute and common law in North Carolina in extensive detail, coming to the conclusion that a niece-in-law does not represent a niece for purposes of criminal incest. As an illustration of the "absurd results" under North Carolina law if a niece by affinity were included, "an individual could marry their niece-in-law . . . [but] that individual would be guilty of incest if the marriage were consummated." *Id*. at 20. As a result, the court vacated defendant's incest conviction.

Considering (3), inculpatory statements made by defendant after his arrest, the court considered defendant's arguments that the findings of fact were incomplete, and that the evidence did not support that he made the statements voluntarily. The court disagreed on both points, explaining that findings of fact "need not summarize all the evidence presented at voir dire," as long as "the findings are supported by substantial and uncontradicted evidence, as they are here." *Id*. at 26. As for the voluntariness of the statements, the court detailed several different points where defendant received *Miranda* warnings, signed an advisement of rights form, and even made a joke about being familiar with the rights through his work as an active duty marine with a law enforcement role.

For defendant's final issue (4), the clerical error, the court agreed with defendant that the trial court had orally dismissed the sexual activity by a substitute parent charge prior to sentencing. Although the jury did convict defendant of this charge, the transcript clearly indicated the trial court dismissed the charge before consolidating the other charges for sentencing. Looking to the rule articulated in *State v. Smith*, 188 N.C. App. 842 (2008), the court found that remand for correction was the appropriate remedy for the clerical error in the judgment to ensure the record reflected the truth of the proceeding.

Defendant's intent to meet with fifteen-year-old before her sixteenth birthday could be inferred from the content of messages and prior conduct, justifying denial of his motion to dismiss.

State v. Wilkinson, COA22-563, ___ N.C. App. ___ (March 7, 2023). In this New Hanover County case, defendant appealed his conviction for soliciting a child by computer, arguing error in denying his motion to dismiss for insufficient evidence. The Court of Appeals found no error.

In 2019, defendant began communicating with a fifteen-year-old girl online. Defendant was aware of her age, but still messaged her regarding sexual activity, and on at least four occasions the girl went to defendant's house. During these visits, defendant groped and kissed the girl. The FBI received a tip regarding defendant's behavior and observed a conversation in August of 2019 where defendant messaged the girl on snapchat. Defendant was indicted on several charges related to his contact with the fifteen-year-old, but during the trial moved to dismiss only the charge of soliciting a child by computer. After being convicted of indecent liberties with a child and several over related offenses, defendant appealed the sufficiency of the evidence regarding the soliciting a child by computer charge alone.

Defendant argued that the evidence for soliciting a child by computer was insufficient because the snapchat messages from August of 2019 did not arrange a plan or show a request to meet in person before the fifteen-year-old's sixteenth birthday. Defendant argued that this evidence failed to prove he intended to "commit an unlawful sex act" as required by G.S. 14-202.3(a). Slip Op. at 4-5. The Court of Appeals disagreed, explaining that although there was no explicit plan to meet in the snapchat messages, defendant's intent could be inferred from the content of the messages and his previous conduct with the girl when she came to his house. Because defendant's intent could be inferred regarding the necessary sex act, the court found no error when dismissing defendant's motion.

Solicitation

Defendant's act of solicitation for first-degree murder did not require full disclosure of plans for killing victims; defendant's argument of a fatal variance in jury instruction was actually instructional error; references in closing argument insinuating defendant might commit a mass murder represented error but not prejudicial error.

State v. Norris, 2022-NCCOA-908, ___ N.C. App. ___ (Dec. 29, 2022). In this Randolph County case, the Court of Appeals upheld defendant's conviction for solicitation to commit first-degree murder, finding no prejudicial error by the trial court.

In 2018, defendant, a high school student, confessed to his girlfriend that he had homicidal thoughts towards several of his fellow students, and attempted to recruit his girlfriend to help him act on them. His girlfriend showed the messages they exchanged to her mother and the

school resource officer, leading to further investigation that found defendant had a cache of guns and knives, as well as a detailed list of persons he wished to kill and methods he would use. When the matter came to trial, the state offered testimony from 11 of the 13 persons on the kill list, and during closing arguments made reference to the "current events" that were presumably mass shootings at high schools. Defendant was subsequently convicted in 2020.

Reviewing the appeal, the court first considered (a) defendant's motion to dismiss for insufficient evidence, reviewing whether defendant solicited his girlfriend for the crime. The court found sufficient evidence of solicitation, explaining that solicitation is an "attempt to conspire," and the offense does not require fully communicating the details of the plan. Instead, once defendant proposed the killings he had planned to his girlfriend, and attempted to recruit her to assist, the offense was complete, despite the fact that he did not fully share his detailed plans. Slip Op. at 12-13.

The court next considered (b), dismissing defendant's argument that the indictment fatally varied from the jury instruction; the court found that this was actually an attempt to present an instructional error "within the Trojan horse of a fatal variance." *Id*. at 15. Considering (c), the court disagreed with defendant's allegation that Rules of Evidence 401 and 402 barred admission of defendant's drawings and notes of the Joker and weapons, and testimony from 11 of the potential victims. The drawings were relevant to show defendant's state of mind and evaluate the nature of the potential crime, and the testimony was relevant to show the potential victims were real people and that defendant had the specific intent to commit the crime. *Id*. at 17-18. The court also considered (d) whether Rule of Evidence 403 barred admission of this evidence as prejudicial, finding no abuse of discretion as "the evidence served a probative function arguably above and beyond inflaming [the jury's passions]." *Id*. at 20.

Considering the final issue (e), whether the trial court should have intervened *ex mero moto* during the state's closing argument, the court found error but not prejudicial error. The court found error in the state's closing argument when the prosecutor "appealed to the jury's sympathies by describing the nature of the Joker and insinuating that [d]efendant was planning a mass shooting." *Id*. at 25. The court presumed that these statements were intended to suggest that defendant's conviction would assist in preventing another mass shooting, but noted that they did not rise to the level of prejudicial error due to the other factual details in the argument, and the "multiple items of physical evidence and segments of testimony evidencing [d]efendant's intent." *Id*. at 28.

Threats & Related Offenses

Subjective element of "true threat" for communicating threats charge was satisfied by charging document and jury instructions tracking language of G.S. 14-277.1, including "willfully threaten."

State v. Guice, 2022-NCCOA-682, 286 N.C. App. 106 (Oct. 18, 2022). In this Buncombe County case, defendant appealed his conviction for communicating threats, arguing that his words did not constitute a true threat and the trial court erred by denying his motion to dismiss and request for a jury instruction on true threats. The Court of Appeals found no error by the trial court.

In May of 2020, a resident at an Asheville apartment complex called security because she heard a disturbance in the neighboring apartment. When security arrived to investigate, defendant opened the apartment door and was aggressively hostile to the security officer, getting into the officer's face and threatening to beat him. At trial, the security officer testified that he believed defendant was going to carry out the threat due to his body language and anger during the interaction. Defendant was subsequently convicted by a jury of the communicating threats charge.

The Court of Appeals first considered whether the charging document contained sufficient facts to allege a "true threat" unprotected by the First Amendment, explaining that there are "objective and subjective" elements to the true threat analysis. Slip Op. at 6. Because the charging document tracked the text of G.S. 14-277.1 and contained "willfully threaten," the court found the subjective element present and sufficient to support the offense charged. *Id*. at 8. The court then turned to the motion to dismiss, finding that the testimony in the record was sufficient to support the conclusion that defendant had the specific intent to make a threat against the security guard. The court last turned to the requested jury instruction, and applied a similar analysis from the charging document. The court concluded that the jury instruction contained all elements of the offense, noting "[t]he subjective component, or specific intent, of true threats is covered by defining the phrase of willfully threaten as 'intentionally or knowingly' 'expressi[ng] . . . an intent or a determination to physically injure another person.'" *Id*. at 12.

Weapons Offenses

Nature of location is an essential element for G.S. 14-277.2 possession of a dangerous weapon at a demonstration charge.

State v. Reavis, 2022-NCCOA-909, ___ N.C. App. ___ (Dec. 29, 2022). In this Chatham County case, the Court of Appeals overturned defendant's conviction for possession of a firearm at a demonstration, finding that the indictment failed to specify the type of land where the violation took place.

Defendant attended a protest in Hillsborough over the removal of a confederate monument in 2019. During the protest, an officer observed defendant carrying a concealed firearm. Defendant was indicted for violating G.S. 14-277.2, and at trial moved to dismiss the charges, arguing that the misdemeanor statement of charges was fatally defective for not specifying the type of location for the offense, specifically the required location of a private health care facility or a public place under control of the state or local government. Defendant's motion was denied and she was convicted of the misdemeanor.

Reviewing defendant's appeal, the court agreed with defendant's argument that her indictment was defective. Although the state moved to amend the location in the statement of charges, and the superior court granted that motion, the Court of Appeals explained that this did not remedy the defect. The court explained that "if a criminal pleading is originally defective with respect to an essential element . . . amendment of the pleading to include the missing element is impermissible, as doing so would change the nature of the offense." Slip Op. at 8-9. The court looked to analogous statutes and determined that the specific type of location for the offense was an essential element of G.S. 14-277.2, and that the state had failed to specify the location in either the statement of charges or the police report provided with the statement. Instead, the statement and police report simply listed the street address and described the location as "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk[,]" failing to specify the essential element related to the type of location. *Id*. at 16-17.

Judge Inman concurred only in the result.

Defenses

Justification

Defendant's conduct failed the four-part test for a justification defense, supporting denial of his requested jury instruction.

State v. Swindell, 2022-NCSC-113, 382 N.C. 602 (Nov. 4, 2022). In this Bladen County case, the Supreme Court reversed the Court of Appeals majority decision overturning defendant's conviction and ordering a new trial. The Supreme Court found no error with the denial of defendant's request for a jury instruction on justification as a defense to possession of a firearm by a felon.

Defendant went to trial for first degree murder and possession of a firearm by a felon in November of 2018. Defense counsel requested an instruction on the affirmative defense of justification to the firearm possession charge, and the trial court denied this request. Explaining the basis for the defense, the Supreme Court noted that justification has four elements outlined by *State v. Mercer*, 373 N.C. 459 (2020), and only two, the second and third elements, were in question in the immediate case. Slip Op. at 6-7. The court outlined the second element under *Mercer*, that defendant "did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct," and concluded that defendant failed to meet this burden by returning to the apartments where an altercation had occurred. *Id*. at 8. Because defendant placed himself in a situation where criminal conduct could occur, he could not meet this burden, and the court did not conduct any further analysis on the third *Mercer* factor.

Justice Morgan, joined by Justices Hudson and Earls, dissented, and would have affirmed the Court of Appeals majority decision. *Id*. at 10.

Judicial Administration

Closing the Courtroom

Trial court failed to utilize *Waller* test or make sufficient findings of fact to support closure of courtroom; city ordinance was not properly pleaded where charging documents did not include the caption of the ordinance.

State v. Miller, COA22-561, ___ N.C. App. ___ (Feb. 21, 2023). In this Union County case, defendant appealed his convictions for attempted first degree murder, going armed to the terror of the people, possession of a handgun by a minor, and discharge of a firearm within city

limits, arguing error by insufficient findings to justify closure of the courtroom and by denial of his motion to dismiss the discharge of a firearm charge. The Court of Appeals agreed, remanding the case and vacating the discharge of a firearm conviction.

In August of 2018, defendant was armed and riding in a car with other armed occupants near a neighborhood basketball court. Defendant was seated in the front passenger seat, and when the vehicle passed a group of pedestrians walking to the basketball court, defendant leaned out the window and began shooting. One bullet hit a pedestrian but did not kill him. During the trial, the prosecution moved to close the courtroom during the testimony of two witnesses, the victim and another witness who was present during the shooting, arguing this was necessary to prevent intimidation. The trial court granted this motion over defendant's objection, but allowed direct relatives of defendant and the lead investigator to be present during the testimony.

The Court of Appeals found that the trial court failed to utilize the four-part test from *Waller v. Georgia*, 467 U.S. 39 (1984), and failed to make findings sufficient for review to support closing the courtroom. The *Waller* test required the trial court to determine whether "'the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to support the closure.'" Slip Op. at 4, quoting *State v. Jenkins*, 115 N.C. App. 520, 525 (1994). In the current case, the trial court did not use this test and made no written findings of fact at all. As a result, the Court of Appeals remanded for a hearing on the propriety of the closure using the *Waller* test.

Turning to defendant's motion to dismiss, the court found that the arrest warrant and indictment were both defective as they did not contain the caption of the relevant ordinance. Under G.S. 160A-79(a), "a city ordinance . . . must be pleaded by both section number and caption." *Id*. at 8. Here, the charging documents only reference the Monroe city ordinance by number, and failed to include the caption "Firearms and other weapons." The court found the state failed to prove the ordinance at trial, and vacated defendant's conviction for the discharge of a firearm within city limits charge.