Criminal Case Update

Significant Cases Decided October 8, 2014─June 8, 2015

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Criminal Procedure

Counsel & Capacity Issues

State v. Floyd, ___ N.C. App. ___, 766 S.E.2d 361 (Dec. 16, 2014), *review allowed*, ___ N.C. ___, 771 S.E.2d 295 Apr. 9, 2015). The trial court erred by failing to adequately address an impasse between the defendant and defense counsel regarding the questioning of a prosecution witness. The record "clearly reveals" that the defendant and counsel "reached an absolute impasse concerning a specific tactical issue--the extent to which specific questions should be posed to Detective Braswell on cross-examination." In the face of the defendant's repeated statements that his trial counsel refused to ask questions that the defendant wanted posed, the trial court instructed the defendant, "that's between you and [counsel]" and stated that it was not the trial court's place "to interject" in the matter. As such, the trial court failed to inquire into the nature of the impasse and order defense counsel to comply with the defendant's lawful instructions.

State v. Newson, ___ N.C. App. ___, 767 S.E.2d 913 (Feb 3, 2015). The defendant was competent to stand trial and to represent himself. As to competency to stand trial, the defendant had several competency evaluations and hearings; the court rejected the defendant's argument that a report of the one doctor who opined that he was incompetent was determinative of the issue, noting that numerous other doctors opined that he was malingering. The court also rejected the defendant's argument that even after several competency hearings, the trial court erred by failing to hold another competency hearing when the defendant disrupted the courtroom, noting in part that four doctors had opined that the defendant's generally disruptive behavior was volitional. The court also rejected the defendant's argument that even if he was competent to stand trial, the trial court erred by allowing him to proceed pro se. The court found *Indiana v. Edwards* inapplicable because here--and unlike in *Edwards*--the trial court granted the defendant's request to proceed pro se. Also, the defendant did not challenge the validity of the waiver of counsel colloquy.

State v. Joiner, __ N.C. App. __, 767 S.E.2d 557 (Dec. 2, 2014). (1) Based on assessments from mental health professionals and the defendant's own behavior, the trial court did not abuse its discretion by ruling

that the defendant was competent to represent himself at trial. (2) The court rejected the defendant's argument that the trial court failed to make the proper inquiry required by G.S. 15A-1242 before allowing him to proceed pro se, concluding that the defendant's actions "absolved the trial court from this requirement" and resulted in a forfeiture of the right to counsel. As recounted in the court's opinion, the defendant engaged in conduct that obstructed and delayed the proceedings. (3) Because the defendant would not allow the trial to proceed while representing himself, the trial court did not err by denying the defendant the right to continue representing himself and forcing him to accept the representation of a lawyer who had been serving as standby counsel.

State v. Brown, ___ N.C. App. ___, 768 S.E.2d 896 (Mar. 3, 2015). Because defendant engaged in repeated conduct designed to delay and obfuscate the proceedings, including refusing to answer whether he wanted the assistance of counsel, he forfeited his right to counsel. Citing *State v. Leyshon*, 211 N.C. App. 511 (2011), the court began by holding that defendant did not waive his right to counsel. When asked whether he wanted a lawyer, defendant replied that he did not and, alternatively, when the trial court explained that defendant would proceed without counsel, defendant objected and stated he was not waiving any rights. Defendant's statements about whether he waived his right to counsel were sufficiently equivocal such that they did not constitute a waiver of the right to counsel. However, defendant forfeited his right to counsel. In addition to refusing to answer whether he wanted assistance of counsel at three separate pretrial hearings, defendant repeatedly and vigorously objected to the trial court's authority to proceed. Although defendant on multiple occasions stated that he did not want assistance of counsel, he also repeatedly made statements that he was reserving his right to seek Islamic counsel, although over the course of four hearings and about 3½ months he never obtained counsel. As in *Leyshon*, this behavior amounted to willful obstruction and delay of trial proceedings and therefore defendant forfeited his right to counsel.

State v. Jastrow, __ N.C. App. __, 764 S.E.2d 663 (Nov. 18, 2014). The trial court did not err by allowing the defendant to waive his right to counsel and proceed pro se. Notwithstanding the defendant's refusal to acknowledge that he was subject to court's jurisdiction, the trial court was able to conduct a colloquy that complied with G.S. 15A-1242. The court reminded trial judges, however, that "our Supreme Court has approved a series of 14 questions that can be used to satisfy the requirements of Section 15A-1242." "[B]est practice," it continued "is for trial courts to use the 14 questions . . . which are set out in the Superior Court Judges' Benchbook provided by the University of North Carolina at Chapel Hill School of Government."

Ineffective Assistance

Woods v. Donald, 575 U.S. ___, 135 S. Ct. 1372 (Mar. 30, 2015) (per curiam). In this habeas corpus case, the Court reversed the Sixth Circuit, which had held that defense counsel provided per se ineffective assistance of counsel under *United States v. Cronic*, 466 U. S. 648 (1984), when he was briefly absent during testimony concerning other defendants. The Court determined that none of its decisions clearly establish that the defendant is entitled to relief under *Cronic*. The Court clarified: "We have never addressed whether the rule announced in *Cronic* applies to testimony regarding codefendants' actions." The Court was however careful to note that it expressed no view on the merits of the underlying Sixth Amendment principle.

State v. Hunt, 367 N.C. 700 (Dec. 19, 2014). The court affirmed per curiam that aspect of the decision below that generated a dissenting opinion. In the decision below, *State v. Hunt*, 221 N.C. App. 489 (July 17, 2012), the court of appeals held, over a dissent, that the trial court did not err by conducting a voir dire when an issue of attorney conflict of interest arose and denying the defendant's mistrial motion. A dissenting judge believed that the trial court erred by failing to conduct an evidentiary hearing to determine whether defense counsel's conflict of interest required a mistrial.

State v. Barksdale, __ N.C. App. __, 768 S.E.2d 126 (Dec. 2, 2014). (1) Even if counsel provided deficient performance by informing the trial court, with the defendant's consent, that the defendant wanted to go to trial and "take the chance that maybe lightning strikes, or I get lucky, or something," no prejudice was shown. (2) The court declined the defendant's invitation to consider his ineffective assistance claim a conflict of interest that was per se prejudicial, noting that the court has limited such claims to cases involving representation of adverse parties.

Discovery, Subpoenas & Related Issues

State v. Davis, ___ N.C. App. ___, 768 S.E.2d 903 (Mar. 3, 2015). In this child sexual assault case no discovery violation occurred when the State's experts testified about their own observations regarding the characteristics of sexual abuse and the reasons for delayed reporting. At trial the State offered expert testimony of two medical professionals who had treated the victim. The defendant objected, arguing that because the State had not provided defendant with the experts' opinions prior to trial, they should not be permitted to offer expert opinions at trial. The trial court sustained defendant's objection, ruling that the witnesses could testify to their own observations, but could not offer expert opinions. Because neither witness offered an expert opinion, no error occurred.

State v. Johnson, ___ N.C. App. ___, 767 S.E.2d 891 (Dec. 31, 2014). The trial court erred by ordering, under threat of contempt, that defense counsel's legal assistant appear as a witness for the State. The State served the assistant with a subpoena directing her to appear to testify on the weeks of Friday, November 8, 2013, Monday, December 2, 2013, and Monday, January 13, 2014. However, the trial did not begin on any of the dates listed on the subpoena; rather, it began on Monday, November 18, 2013 and ended on Wednesday, November 20, 2013. Because the assistant had not been properly subpoenaed to appear on Tuesday, November 19th, the trial court erred by ordering, under threat of contempt, that she appear on that day as a witness for the State. The court went on to find the error prejudicial and ordered a new trial.

DWI Procedure

State v. Sisk, ___ N.C. App. ___, 766 S.E.2d 694 (Dec. 31, 2014). In this habitual impaired driving case, the trial court did not err in admitting the defendant's blood test results into evidence. The court rejected the defendant's argument that the officer's failure to re-advise him of his implied consent rights before the blood draw violated both G.S. 20-16.2 and 20-139.1(b5). Distinguishing *State v. Williams*, __ N.C. App. __, 759 S.E.2d 350 (2014), the court noted that in this case the defendant—without any prompting—volunteered to submit to a blood test. The court concluded: "Because the prospect of Defendant submitting to a blood test originated with Defendant—as opposed to originating with [the officer]—we are satisfied that Defendant's statutory right to be readvised of his implied consent rights was not triggered."

State v. Chavez, __ N.C. App. __, 767 S.E.2d 581 (Dec. 2, 2014). The court rejected the defendant's argument that the right to have a witness present for blood alcohol testing performed under G.S. 20-16.2 applies to blood draws taken pursuant to a search warrant. The court also rejected the defendant's argument that failure to allow a witness to be present for the blood draw violated his constitutional rights, holding that the defendant had no constitutional right to have a witness present for the execution of the search warrant.

State v. Shepley, ___ N.C. App. ___, 764 S.E.2d 658 (Nov. 4, 2014). Relying on *State v. Drdak*, 330 N.C. 587, 592-93 (1992), and *State v. Davis*, 142 N.C. App. 81 (2001), the court held that where an officer obtained a blood sample from the defendant pursuant to a search warrant after the defendant refused to

submit to a breath test of his blood alcohol level, the results were admissible under G.S. 20-139.1(a) and the procedures for obtaining the blood sample did not have to comply with G.S. 20-16.2.

State v. Roberts, __ N.C. App. __, 767 S.E.2d 543 (Dec. 2, 2014). The trial court properly denied the defendant's motion to suppress the results of the chemical analysis of his breath. The defendant argued that the officer failed to comply with the statutory requirement of a 15 minute "observation period" prior to the administration of the test. The observation period requirement ensures that "a chemical analyst observes the person or persons to be tested to determine that the person or persons has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen." However, that "nothing in the relevant regulatory language requires the analyst to stare at the person to be tested in an unwavering manner for a fifteen minute period prior to the administration of the test." Here, the officer observed the defendant for 21 minutes, during which the defendant did not ingest alcohol or other fluids, regurgitate, vomit, eat, or smoke; during this time the officer lost direct sight of the defendant only for very brief intervals while attempting to ensure that his right to the presence of a witness was adequately protected. As such, the officer complied with the observation period requirement.

Habitual Felon

State v. Duffie, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2015). The court remanded for resentencing where the trial court imposed consecutive sentences based on a misapprehension of G.S. 14-7. The jury found the defendant guilty of multiple counts of robbery and attaining habitual felon status. The trial court sentenced the defendant as a habitual felon to three consecutive terms of imprisonment for his three common law robbery convictions, stating that "the law requires consecutive sentences on habitual felon judgments." However, under G.S. 14-7.6, a trial court only is required to impose a sentence consecutively to "any sentence being served by" the defendant. Thus, if the defendant is not currently serving a term of imprisonment, the trial court may exercise its discretion in determining whether to impose concurrent or consecutive sentences.

State v. Jarman, ___ N.C. App. ___, 767 S.E.2d 370 (Dec. 16, 2014). The trial court did not err by ordering the defendant to serve a habitual felon sentence consecutive to sentences already being served. The defendant argued that the trial court "misapprehend[ed]" the law "when it determined that it did not have the discretion to decide" to run the defendant's sentence concurrently with his earlier convictions. The court noted that G.S. 14-7.6 "has long provided" that habitual felon sentences "shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section."

Indictment & Pleading Issues

State v. Hicks, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). In this first-degree murder case, the trial court did not abuse its discretion by denying the defendant's motion for a bill of particulars. The defendant argued that because the State used a short-form indictment to charge murder, he lacked notice as to which underlying felony supported the felony murder charge. Although a defendant is entitled to a bill of particulars under G.S. 15A-925, the bill of particulars provides factual information not legal theories. The court concluded: "the State's legal theories are not 'factual information' subject to inclusion in a bill of particulars, and no legal mandate requires the State to disclose the legal theory it intends to prove at trial."

State v. Pierce, ___ N.C. App. ___, 766 S.E.2d 854 (Dec. 16, 2014). In a failing to register case the trial court did not err by allowing the State to amend the indictment and expand the dates of offense from 7 November 2012 to June to November 2012. It reasoned that the amendment did not substantially alter the

charge "because the specific date that defendant moved to Wilkes County was not an essential element of the crime."

State v. Ortiz, ___ N.C. App. ___, 768 S.E.2d 322 (Dec. 31, 2014). In this sexual assault case, the State was not excused by G.S. 130A-143 (prohibiting the public disclosure of the identity of persons with certain communicable diseases) from pleading in the indictment the existence of the non-statutory aggravating factor that the defendant committed the sexual assault knowing that he was HIV positive. The court disagreed with the State's argument that alleging the non-statutory aggravating factor would have violated G.S. 130A-143. It explained:

> This Court finds no inherent conflict between N.C. Gen. Stat. § 130A-143 and N.C. Gen. Stat. § 15A-1340.16(a4). We acknowledge that indictments are public records and as such, may generally be made available upon request by a citizen. However, if the State was concerned that including the aggravating factor in the indictment would violate N.C. Gen. Stat. § 130A-143, it could have requested a court order in accordance with N.C. Gen. Stat. § 130A-143(6), which allows for the release of such identifying information "pursuant to [a] subpoena or court order." Alternatively, the State could have sought to seal the indictment. (citations omitted)

State v. Mann, __ N.C. App. __, 768 S.E.2d 138 (Dec. 2, 2014). An indictment charging felony peeping was not defective. Rejecting the defendant's argument that the indictment was defective because it failed to allege that the defendant's conduct was done without the victim's consent, the court concluded that "any charge brought under N.C.G.S. § 14-202 denotes an act by which the defendant has spied upon another without that person's consent." Moreover, the charging language, which included the word "surreptitiously" gave the defendant adequate notice. Further, the element of "without consent" is adequately alleged in an indictment that indicates the defendant committed an act unlawfully, willfully, and feloniously.

State v. Coakley, ___ N.C. App. ___, 767 S.E.2d 418 (Dec. 31, 2014). In this malicious maiming case, the trial court did not err by instructing the jury on a theory that was not alleged in the indictment. The indictment alleged that the defendant "put out" the victim's eye. The jury instructions told the jury it could convict if it found that the defendant "disabled or put out" the victim's eye. Given the evidence in the case—that the victim suffered complete blindness—term "disabled" as used in the instructions can only be interpreted to mean total loss of sight.

State v. Hicks, ___ N.C. App. ___, 768 S.E.2d 373 (Feb. 17, 2015). The trial court committed plain error by instructing the jury on sexual offense with a child by an adult offender under G.S. 14-27.4A when the indictment charged the defendant with first-degree sexual offense in violation of G.S. 14-27.4(a)(1), a lesser-included of the G.S. 14-27.4A crime. The court vacated defendant's conviction under G.S. 14-27.4A and remanded for resentencing and entry of judgment on the lesser-included offense. Additionally, the court appealed to the General Assembly to clarify the relevant law:

> This case illustrates a significant ongoing problem with the sexual offense statutes of this State: the various sexual offenses are often confused with one another, leading to defective indictments.
>
> Given the frequency with which these errors arise, we strongly urge the General Assembly to consider reorganizing, renaming, and renumbering the various sexual offenses to make them more easily distinguishable from one another. Currently, there is no uniformity in how the various offenses are referenced, and efforts to distinguish the offenses only lead to more confusion. For example, because "first degree sexual offense" encompasses two different offenses, a violation of N.C. Gen. Stat. § 14-27.4(a)(1) is often referred to as "first degree sexual offense with a child" or "first degree statutory sexual offense" to distinguish the offense from "first degree sexual offense by force"

> under N.C. Gen. Stat. § 14-27.4(a)(2). "First degree sexual offense with a child," in turn, is easily confused with "statutory sexual offense" which could be a reference to a violation of either N.C. Gen. Stat. § 14-27.4A (officially titled "[s]exual offense with a child; adult offender") or N.C. Gen. Stat. § 14-27.7A (2013) (officially titled "[s]tatutory rape or sexual offense of person who is 13, 14, or 15 years old"). Further adding to the confusion is the similarity in the statute numbers of N.C. Gen. Stat. § 14-27.4(a)(1) and N.C. Gen. Stat. § 14-27.4A. We do not foresee an end to this confusion until the General Assembly amends the statutory scheme for sexual offenses.

(citations omitted).

In re J.F., __ N.C. App. __, 766 S.E.2d 341 (Nov. 18, 2014). Noting that the sufficiency of a petition alleging a juvenile to be delinquent is evaluated by the same standards that apply to indictments, the court held that petitions alleging two acts of sexual offense and two acts of crime against nature were sufficient. In addition to tracking the statutory language, one sexual offense and one crime against nature petition alleged that the juvenile performed fellatio on the victim; the other sexual offense and crime against nature petitions alleged that the victim performed fellatio on the juvenile. The court rejected the defendant's argument that any more detail was required, noting that if the juvenile wanted more information about the factual circumstances underlying each charge he should have moved for a bill of particulars.

State v. Leaks, ___ N.C. App. ___, ___ S.E.2d ___ (April 21, 2015). An indictment charging failing to notify the sheriff of a change in address was not defective. The indictment alleged, in relevant part, that the defendant "fail[ed] to register as a sex offender by failing to notify the Forsyth County Sheriff's Office of his change of address." The defendant argued that the indictment was defective because it failed to allege that he was required to provide "written notice" of a change of address. The court held: "we consider the manner of notice, in person or in writing, to be an evidentiary matter necessary to be proven at trial, but not required to be alleged in the indictment."

State v. Pierce, ___ N.C. App. ___, 766 S.E.2d 854 (Dec. 16, 2014). (1) In a failing to register case the indictment was not defective. The indictment alleged that the defendant failed to provide 10 days of written notice of his change of address to "the last registering sheriff by failing to report his change of address to the Wilkes County Sheriff's Office." The defendant allegedly moved from Burke to Wilkes County. The court rejected the defendant's argument that the indictment was fatally defective for not alleging that he failed to provide "in-person" notice. It reasoned that the defendant was not prosecuted for failing to make an "in person" notification, but rather for failing to give 10 days of written notice, which by itself is a violation of the statute. The court also rejected the defendant's argument that an error in the indictment indicating that the Wilkes County Sheriff's Office was the "the last registering sheriff" (in fact the last registering sheriff was the Burke County sheriff), invalidated the indictment. (2) The trial court did not err by allowing the State to amend the indictment and expand the dates of offense from 7 November 2012 to June to November 2012. It reasoned that the amendment did not substantially alter the charge "because the specific date that defendant moved to Wilkes County was not an essential element of the crime."

State v. Spivey, ___ N.C. App. ___, 769 S.E.2d 841 (April 7, 2015), *temporary stay allowed*, ___ N.C. ___, 771 S.E.2d 533 (Apr. 24, 2015). (1) An indictment charging injury to real property was fatally defective where it alleged the property owner as "Katy's Great Eats" but failed to allege that this entity was one capable of owning property. The court explained that for this offense, "where the victim is not a natural person, the indictment must allege that the victim is a legal entity capable of owning property, and must separately allege that the victim is such a legal entity unless the name of the entity itself, as alleged in the indictment, imports that the victim is such a legal entity." (2) The trial court did not err by allowing the State to amend the victim's name as

stated in an indictment for assault with a deadly weapon from "Christina Gibbs" to "Christian Gibbs."

State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (Nov. 18, 2014). There was no fatal variance in a resisting an officer case where the indictment alleged that the defendant refused to drop what was in his hands (plural) and the evidence showed that he refused to drop what was in his hand (singular). The variance was not material.

State v. Huckelba, ___ N.C. App. ___, ___ S.E.2d ___ (April 21, 2015), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d. ___ (May 8, 2015). In a carrying a weapon on educational property case, the court rejected the defendant's argument that there was a fatal variance between the indictment, which alleged that the defendant possessed weapons at "High Point University, located at 833 Montlieu Avenue" and the evidence, which showed that the conduct occurred at "1911 North Centennial Street." The court concluded: "The indictment charged all of the essential elements of the crime: that Defendant knowingly possessed a Ruger pistol on educational property—High Point University. We agree with the State that the physical address for High Point University listed in the indictment is surplusage because the indictment already described the 'educational property' element as 'High Point University.'"

State v. Barker, ___ N.C. App. ___, 770 S.E.2d 142 (April 7, 2015). Indictments charging obtaining property by false pretenses were not defective. The charges arose out of the defendant's acts of approaching two individuals (Ms. Hoenig and Ms. Harward), falsely telling them their roofs needed repair, taking payment for the work and then performing shoddy work or not completing the job. At trial, three other witnesses testified to similar incidents. On appeal, the defendant argued that the indictments failed to "intelligibly articulate" his misrepresentations. The court disagreed:

> The indictments clearly state that defendant, on separate occasions, obtained property (money) from Ms. Hoenig and Ms. Harward by convincing each victim to believe that their roofs needed extensive repairs when in fact their roofs were not in need of repair at all. In each indictment, the State gave the name of the victim, the monetary sum defendant took from each victim, and the false representation used by defendant to obtain the money: by defendant "approaching [Ms. Hoenig] and claiming that her roof needed repair, and then overcharging [Ms. Hoenig] for either work that did not need to be done, or damage that was caused by the defendant[.]" As to Ms. Harward, the false representation used by defendant to obtain the money was "by . . . claiming that her shed roof needed repair, [with defendant knowing] at the time [that he] intended to use substandard materials and construction to overcharge [Ms. Harward]." Each indictment charging defendant with obtaining property by false pretenses was facially valid, as each properly gave notice to defendant of all of the elements comprising the charge, including the element defendant primarily challenges: the alleged misrepresentation (i.e., that defendant sought to defraud his victims of money by claiming their roofs needed repair when in fact no repairs were needed, and that defendant initiated these repairs but either failed to complete them or used substandard materials in performing whatever work was done).

State v. Pendergraft, ___ N.C. App. ___, 767 S.E.2d 674 (Dec. 31, 2014). Over a dissent the court held that an indictment alleging obtaining property by false pretenses was not fatally defective. After the defendant filed false documents purporting to give him a property interest in a home, he was found to be occupying the premises and arrested. The court rejected the defendant's argument that the indictment was deficient because it failed to allege that he made a false representation. The indictment alleged that the false pretense consisted of the following: "The defendant moved into the house . . . with the intent to fraudulently convert the property to his own, when in fact the defendant knew that his actions to convert the property to his own were fraudulent." Acknowledging that the indictment did not explicitly charge the

defendant with having made any particular false representation, the court found that it "sufficiently apprise[d] the defendant about the nature of the false representation that he allegedly made," namely that he falsely represented that he owned the property as part of an attempt to fraudulently obtain ownership or possession of it. The court also rejected the defendant's argument that the indictment was defective in that it failed to allege the existence of a causal connection between any false representation by him and the attempt to obtain property, finding the charging language sufficient to imply causation.

State v. Wainwright, ___ N.C. App. ___, 770 S.E.2d 99 (Mar. 17, 2015). In this DWI case, the court rejected the defendant's argument that the trial court erred by denying his motion to quash a citation on grounds that he did not sign that document and the charging officer did not certify delivery of the citation. Specifically, the defendant argued that the officer's failure to follow the statutory procedure for service of a citation divested the court of jurisdiction to enter judgment. The court found that the citation, which was signed by the charging officer, was sufficient. [Author's note: The court's opinion indicates that the citation was converted to a Magistrate's Order and that Order was served on the defendant. Thus, the Magistrate's Order, not the citation, was the relevant charging document and it is not clear why any defect with respect to the defendant's and officer's signatures on the citation was material.]

Jurisdiction

State v. Floyd, ___ N.C. App. ___, 766 S.E.2d 361 (Dec. 16, 2014), *review allowed*, ___ N.C. ___, 771 S.E.2d 295 (Apr. 9, 2015). Because attempted assault with a deadly weapon inflicting serious injury is not a recognized offense in North Carolina, the trial court erred by denying the defendant's motion to dismiss a charge of felon in possession when it was based on a felony conviction for attempted assault. The court noted that prior cases—*State v. Currence*, 14 N.C. App. 263 (1972), and *State v. Barksdale*, 181 N.C. App. 302 (2007)—held that attempted assault is not a crime. It concluded that the trial court lacked jurisdiction to enter judgment on the attempted assault conviction and that therefore that judgment was void. The court rejected the State's argument that a different result should obtain because the defendant plead guilty to attempted assault as part of a plea agreement, stating: "The fact that Defendant's attempted assault conviction stemmed from a guilty plea rather than a jury verdict does not . . . affect the required jurisdictional analysis." The court also rejected the State's argument that the defendant cannot collaterally attack the validity of his attempted assault conviction in an appeal on the felon in possession case; the State had argued that the appropriate procedural mechanism was a motion for appropriate relief. Finally, the court held that for the reasons noted above, the attempted assault conviction could not support a determination that the defendant attained habitual felon status.

Jury Argument

State v. Hembree, ___ N.C. ___, 770 S.E.2d 77 (April 10, 2015). During closing arguments at the guilt-innocence phase of this capital murder trial, the State improperly accused defense counsel of suborning perjury. The prosecutor argued in part: "Two years later, after [the defendant] gives all these confessions to the police and says exactly how he killed [the victims] . . . the defense starts. The defendant, along with his two attorneys, come together to try and create some sort of story." Although the trial court sustained the defendant's objection to this statement it gave no curative instruction to the jury. The prosecutor went to argue that the defendant lied on the stand in cooperation with defense counsel. These latter statements were grossly improper and the trial court erred by failing to intervene ex mero motu.

State v. Roberts, __ N.C. App. __, 767 S.E.2d 543 (Dec. 2, 2014). In this DWI case, the court rejected the defendant's argument that comments made during the prosecutor's final argument and detailed in the court's opinion were so grossly improper that the trial court should have intervened ex mero motu. Among the challenged comments were those relating to the defendant's status as an alcoholic and the extent to which he had developed a tolerance for alcoholic beverages. Finding that "the prosecutor might

have been better advised to refrain from making some of the challenged comments," the court declined to find that the arguments were so grossly improper that the trial court should have intervened ex mero motu.

State v. Salentine, __ N.C. App. __, 763 S.E.2d 800 (Oct. 21, 2014). In this murder case, the trial court did not abuse its discretion by overruling the defendant's objections to the State's closing argument. Although the prosecutor's remarked that the case was one of "the most gruesome and violent murders this community has ever seen," the comment related directly to the State's theory of the case--that the defendant acted intentionally and with premeditation and deliberation.

Jury Instructions

State v. Walston, 367 N.C. 721 (Dec. 19, 2014). Based on long-standing precedent, the trial court's use of the term "victim" in the jury instructions was not impermissible commentary on a disputed issue of fact and the trial court did not err by denying the defendant's request to use the words "alleged victim" instead of "victim" in the jury charge in this child sexual abuse case. The court continued:

> We stress, however, when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase "alleged victim" or "prosecuting witness" instead of "victim."

State v. Davis, ___ N.C. App. ___, 768 S.E.2d 903 (Mar. 3, 2015). Citing *State v. Walston*, 367 N.C. 721 (Dec. 19, 2014), the court held in this child sexual assault case that the trial court did not commit reversible error by using the word "victim" in the jury instructions.

State v. Spence, __ N.C. App. __, 764 S.E.2d 670 (Nov. 18, 2014). In this child sexual abuse case, the trial court did not err by referring to the victim as the "alleged victim" in its opening remarks to the jury and referring to her as "the victim" in its final jury instructions. The court distinguished *State v. Walston*, ___ N.C. App. ___, ___, 747 S.E.2d 720, 728 (2013), *rev'd*, 367 N.C. 721 (Dec. 19, 2014), on grounds that in this case the defendant failed to object at trial and thus the plain error standard applied. Moreover, given the evidence, the court could not conclude that the trial court's word choice had a probable impact on the jury's finding of guilt.

State v. Walton, __ N.C. App. __, 765 S.E.2d 54 (Oct. 21, 2014). No plain error occurred in a sexual assault case where the trial court referred to "the victim" in its jury instructions.

State v. Houser, ___ N.C. App. ___, 768 S.E.2d 626 (Feb. 17, 2015). Although the trial court erred by failing to fully comply with the statutory requirements regarding a charge conference at the sentencing phase of this felony child abuse case, no material prejudice resulted. The court noted that G.S. 15A-1231(b) requires the trial court to hold a charge conference, regardless of whether a party requests one, before instructing the jury on aggravating factors during the sentencing phase of a non-capital case. Here, the trial court informed the parties of the aggravating factors that it would charge, gave counsel a general opportunity to be heard at the charge conference, and gave counsel an opportunity to object at the close of the instructions. However, because the trial court failed to inform counsel of the instructions that it would provide the jury, it deprived the parties of the opportunity to know what instructions would be given, and thus did not comply fully with the statute.

State v. Crockett, ___ N.C. App. ___, 767 S.E.2d 78 (Dec. 16, 2014). In a failure to register (change of address) case, the court rejected the defendant's argument that the trial court violated his right to a unanimous verdict because it was not possible to determine the theory upon which the jury convicted. The trial court instructed the jury, in part, that the State must prove "that the defendant willfully changed his

address and failed to provide written notice of his new address in person at the sheriff's office not later than three days after the change of address to the sheriff's office in the county with which he had last registered." The defendant argued that, based on this instruction, it was impossible to determine whether the jury based his conviction on his failure to register upon leaving the county jail, failure to register upon changing his address, registering at an invalid address, or not actually living at the address he had registered. The court concluded: "because any of these alternative acts satisfies the . . . jury instruction — that Defendant changed his address and failed to notify the sheriff within the requisite time period — the requirement of jury unanimity was satisfied."

State v. Grainger, 367 N.C. 696 (Dec. 19, 2014). In this murder case, the trial court did not err by denying the defendant's request for a jury instruction on accessory before the fact. Because the defendant was convicted of first-degree murder under theories of both premeditation and deliberation and the felony murder rule and the defendant's conviction for first-degree murder under the theory of felony murder is supported by the evidence (including the defendant's own statements to the police and thus not solely based on the uncorroborated testimony of the principal), the court of appeals erred by concluding that a new trial was required.

State v. Baldwin, ___ N.C. App. ___, 770 S.E.2d 167 (April 7, 2015). The trial court did not err by instructing the jury that it could consider wounds inflicted after the victim was felled in determining whether the defendant acted with premeditation and deliberation. The trial court instructed the jury:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances by which they may be inferred such as lack of provocation by the victim; conduct of the defendant before, during, and after the attempted killing; threats and declarations of the defendant; use of grossly excessive force; or inflictions of wounds after the victim is fallen.

The defendant argued this instruction was improper because there was no evidence that he inflicted wounds on the victim after the victim was felled. Following *State v. Leach*, 340 N.C. 236, 242 (1995) (trial court did not err by giving the instruction, "even in the absence of evidence to support each of the circumstances listed" because the instruction "informs a jury that the circumstances given are only illustrative"), the court found no error.

State v. Hinnant, ___ N.C. App. ___, 768 S.E.2d 317 (Dec. 31, 2014). (1) In this assault and second-degree murder case, the trial court did not err by denying the defendant's request to instruct the jury on involuntary manslaughter. Involuntary manslaughter is a killing without malice. However, where death results from the intentional use of a firearm or other deadly weapon, malice is presumed. Here, the defendant intentionally fired the gun under circumstances naturally dangerous to human life and the trial court did not err by refusing to give an instruction on involuntary manslaughter. (2) The trial court did not err by refusing to instruct the jury on self-defense. The court noted that the defendant himself testified that when he fired the gun he did not intend to shoot anyone and that he was only firing warning shots. It noted: "our Supreme Court has held that a defendant is not entitled to jury instructions on self-defense or voluntary manslaughter 'while still insisting . . . that he did not intend to shoot anyone[.]'"

State v. Barker, ___ N.C. App. ___, 770 S.E.2d 142 (April 7, 2015). In an obtaining property by false pretenses case, the trial did not err by failing to specify in the jury instructions the misrepresentation made by defendant or the property the defendant received. Noting that the trial court used the standard pattern jury instruction, N.C.P.I--Crim. 219.10, the court found no error.

Jury Misconduct

State v. Salentine, __ N.C. App. __, 763 S.E.2d 800 (Oct. 21, 2014). In a case where the defendant was convicted of first-degree murder and sentenced to life in prison, the trial court did not abuse its discretion by denying the defendant's mistrial motions based on juror misconduct and refusing the defendant's request to make further inquiry into whether other jurors received prejudicial outside information. During the sentencing phase of the trial, the trial court received a letter from juror Lloyd's brother-in-law claiming that Lloyd contacted his sister and said that one juror failed to disclose information during voir dire, that he went online and found information about the defendant, and that he asked his sister the meaning of the term malice. Upon inquiry by the court Lloyd denied that he conducted online research or asked about the meaning of the term malice. The trial court removed Lloyd from the jury and replaced him with an alternate. The defendant moved for a mistrial before and after removal of Lloyd and asked the trial court to make further inquiry of the other jurors to determine if they were exposed to outside information. Given the trial court's "searching" inquiry of Lloyd, the court found no abuse of discretion. With regard to the trial court's failure to inquire of the other jurors, the court emphasized that there is no rule that requires a court to hold a hearing to investigate juror misconduct when an allegation is made.

Mistrial

State v. Newson, ___ N.C. App. ___, 767 S.E.2d 913 (Feb 3, 2015). The trial court did not err by denying the pro se defendant's motion for mistrial asserting that the jury was prejudiced against him. The record revealed that members of the jury did seem to be frustrated with the pro se defendant who was disruptive in court and asked rambling and irrelevant questions of witnesses. Their frustration was demonstrated through notes to the trial court and the fact that some members stood up several times in apparent exasperation during the proceedings. However, the court concluded that where a defendant was "prejudiced in the eyes of the jury by his own misconduct, he cannot be heard to complain." (quotation omitted).

State v. Joiner, __ N.C. App. __, 767 S.E.2d 557 (Dec. 2, 2014). The trial court did not err by denying the defendant's motion for a mistrial where the motion was based on the defendant's own misconduct in the courtroom.

Motions to Continue & Dismiss

State v. McClaude, __ N.C. App. __, 765 S.E.2d 104 (Nov. 18, 2014). In this drug and drug conspiracy case, the trial court did not abuse its discretion by denying the defendant's request for additional time to locate an alleged co-conspirator and his motion to reopen the evidence so that witness could testify when he was located after the jury reached a verdict. The trial court acted within its authority given that the witness had not been subpoenaed (and thus was not required to be present) and his attorney indicated that he would not testify.

State v. Blow, ___ N.C. App. ___, 764 S.E.2d 230 (Nov. 4, 2014). In a child sexual assault case, the trial court did not err by denying the defendant's motion to continue, made on grounds that defense counsel learned of a potential defense witness on the eve of trial. Specifically, defense counsel learned that a psychologist prepared reports on the defendant and the victim in connection with a prior custody determination. However, the defendant knew about the psychologist's work given his participation in it and defense counsel had two months to confer with the defendant and prepare the case for trial.

State v. Kiselev, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). The State had no right to appeal the trial court's order granting the defendant's motion to dismiss for insufficient evidence, made after the close of all evidence where the trial court erred by taking the defendant's motion under advisement and

failing to rule until after the jury returned its verdict. Under G.S. 15A-1227(c), when a defendant moves to dismiss based on insufficient evidence, the trial court must rule on the motion "before the trial may proceed." Here, after the defendant moved to dismiss the trial court determined that it needed to review the transcript of an officer's trial testimony before ruling. While waiting for the court reporter to prepare the transcript, the trial court allowed the jury to begin deliberations. Shortly after the jury returned a guilty verdict, the court reporter completed the transcript and the trial court reviewed it. The trial court then granted the motion to dismiss, explaining that the transcript showed the State had not met its burden of proof. The trial court added that it considered its ruling as one made "at the close of all the evidence." The State appealed. While double jeopardy prevents the State from appealing the grant of a motion to dismiss for insufficient evidence if it comes before the jury verdict, the State generally can appeal that ruling if it comes after the verdict (because, the court explained, if the State prevails, the trial court on remand can enter judgment consistent with the jury verdict without subjecting the defendant to a second trial). Here, the trial court's violation of the statute prejudiced the defendant; had the trial court ruled at the proper time, no appeal would have been allowed. The court determined that the proper remedy was to preclude the State's appeal.

State v. McCrary, __ N.C. App. __, 764 S.E.2d 477 (Oct. 21, 2014), *temporary stay allowed*, __ N.C. __, 764 S.E.2d 475 (Nov. 07, 2014). In this DWI case, the court rejected the defendant's argument that the trial court erred by denying his motion to dismiss, which was predicated on a flagrant violation of his constitutional rights in connection with a warrantless blood draw. Noting that the defendant's motion failed to detail irreparable damage to the preparation of his case and made no such argument on appeal, the court concluded that the only appropriate action by the trial court under the circumstances was to consider suppression of the evidence as a remedy for any constitutional violation.

Sentencing

Aggravating Factors/Sentence

State v. Houser, ___ N.C. App. ___, 768 S.E.2d 626 (Feb. 17, 2015). In this felony child abuse case the trial court erred by failing to provide an adequate instruction on the especially heinous, atrocious, or cruel (EHAC) aggravating factor. Rather than adapting the EHAC pattern instruction used in capital cases or providing any "narrowing definitions" that are required for this aggravating factor, the trial court simply instructed the jury: "If you find from the evidence beyond a reasonable doubt that . . . the offense was especially heinous, atrocious, or cruel . . . then you will write yes in the space after the aggravating factor[] on the verdict sheet." The court concluded: "The trial court failed to deliver the substance of the pattern jury instruction on EHAC approved by our Supreme Court, and in doing so, instructed the jury in a way that the United States Supreme Court has previously found to be unconstitutionally vague." Having found that the trial court erred, the court went on to conclude that the error did not rise to the level of plain error.

State v. Saunders, ___ N.C. App. ___, 768 S.E.2d 340 (Feb. 17, 2015). In this rape case involving an 82-year-old victim, the court rejected defendant's argument that the trial court erred by failing to instruct the jury that it could not use the same evidence to find both the element of mental injury for first-degree rape and the aggravating factor that the victim was very old. The defendant argued that the jury may have relied on evidence about ongoing emotional suffering and behavioral changes experienced by the victim after the rape to find both an element of the offense and the aggravating factor. Rejecting this argument the court noted that evidence established that after the rape the victim suffered mental and emotional consequences that extended for a time well beyond the attack itself. The court further explained, in part: "These after-effects of the crime were the evidence that the jury considered in finding that the victim suffered a serious personal injury, an element of first-degree rape. None of the evidence regarding the lingering negative impact of the rape on the victim's emotional well-being was specifically related to her age." (citation omitted).

State v. Ortiz, ___ N.C. App. ___, 768 S.E.2d 322 (Dec. 31, 2014). In this sexual assault case, the State was not excused by G.S. 130A-143 (prohibiting the public disclosure of the identity of persons with certain communicable diseases) from pleading in the indictment the existence of the non-statutory aggravating factor that the defendant committed the sexual assault knowing that he was HIV positive. The court disagreed with the State's argument that alleging the non-statutory aggravating factor would have violated G.S. 130A-143. It explained:

> This Court finds no inherent conflict between N.C. Gen. Stat. § 130A-143 and N.C. Gen. Stat. § 15A-1340.16(a4). We acknowledge that indictments are public records and as such, may generally be made available upon request by a citizen. However, if the State was concerned that including the aggravating factor in the indictment would violate N.C. Gen. Stat. § 130A-143, it could have requested a court order in accordance with N.C. Gen. Stat. § 130A-143(6), which allows for the release of such identifying information "pursuant to [a] subpoena or court order." Alternatively, the State could have sought to seal the indictment. (citations omitted)

State v. Myers, ___ N.C. App. ___, 766 S.E.2d 690 (Dec. 16, 2014). Because there was an insufficient factual basis to support an *Alford* plea that included an admission to aggravating factors, the court vacated the plea and remanded for proceedings on the original charge. The defendant was charged with the first-degree murder of his wife. He entered an *Alford* plea to second-degree murder, pursuant to a plea agreement that required him to concede the existence of two aggravating factors. The trial court accepted the plea agreement, found the existence of those aggravating factors, and sentenced the defendant for second-degree murder in the aggravated range. The court found that there was not a sufficient factual basis to support the aggravating factor that the offense was especially heinous, cruel, and atrocious. The record did not show excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects. The court rejected the State's argument that the aggravating factor was supported by the fact that the victim was killed within the "sanctuary" of her home. On this issue, the court distinguished prior case law on grounds that in those cases the defendant was not lawfully in the victim's home; here the crime occurred in a home that the defendant lawfully shared with the victim. The court also rejected the State's argument that the mere fact that the victim did not die instantaneously supported the aggravating factor. The court also found an insufficient factual basis to support the aggravating factor that the defendant took advantage of a position of trust or confidence, reasoning that "[t]he relationship of husband and wife does not *per se* support a finding of trust or confidence where [t]here was no evidence showing that defendant exploited his wife's trust in order to kill her." (quotation omitted). Here, there was no evidence that the defendant so exploited his wife's trust.

DVPO Enhancements

State v. Jacobs, ___ N.C. App. ___, 768 S.E.2d 883 (Feb. 17, 2015). The trial court erred by enhancing under G.S. 50B-4.1(d) defendant's conviction for assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) and attempted second-degree kidnapping. G.S. 50B-4.1(d) provides that a person who commits another felony knowing that the behavior is also in violation of a domestic violence protective order (DVPO) shall be guilty of a felony one class higher than the principal felony. However, subsection (d) provides that the enhancement "shall not apply to a person who is charged with or convicted of a Class A or B1 felony or to a person charged under subsection (f) or subsection (g) of this section." Subsection (g) enhances a misdemeanor violation of a DVPO to a Class H felony where the violation occurs while the defendant possesses a deadly weapon. Here, defendant was indicted for attempted first-degree murder; first-degree kidnapping, enhanced under G.S. 50B-4.1(d); AWDWIKISI, enhanced; and violation of a DVPO with the use of a deadly weapon. He was found guilty

of three crimes: attempted second-degree kidnapping, enhanced; AWDWIKISI, enhanced; and violation of a DVPO with a deadly weapon pursuant to G.S. 50B-4.1(g). The court held:

> We believe the limiting language in G.S. 50B-4.1(d) - that the subsection "shall not apply to a person charged with or convicted of" certain felonies - is unambiguous and means that the subsection is not to be applied to "the person," as advocated by Defendant, rather than to certain felony convictions of the person, as advocated by the State. Accordingly, we hold that it was error for Defendant's convictions for AWDWIKISI and for attempted second-degree kidnapping to be enhanced pursuant to G.S. 50B- 4.1(d) since he was "a person charged" under subsection (g) of that statute.

DWI Sentencing

State v. Roberts, __ N.C. App. __, 767 S.E.2d 543 (Dec. 2, 2014). (1) In this DWI case, the court rejected the defendant's invitation to decide whether G.S. 20-179(d)(1) (aggravating factor to be considered in sentencing of gross impairment or alcohol concentration of 0.15 or more) creates an unconstitutional mandatory presumption. Defendant challenged that portion of the statute that provides: "For purposes of this subdivision, the results of a chemical analysis presented at trial or sentencing shall be sufficient to prove the person's alcohol concentration, shall be conclusive, and shall not be subject to modification by any party, with or without approval by the court." In this case, instead of instructing the jury in accordance with the challenged language, the trial court refrained from incorporating any reference to the allegedly impermissible mandatory presumption and instructed the prosecutor to refrain from making any reference to the challenged language in the presence of the jury. Because the jury's decision to find the G.S. 20-179(d)(1) aggravating factor was not affected by the challenged statutory provision, the defendant lacked standing to challenge the constitutionality of the statutory provision. (2) The court rejected the defendant's argument that a double jeopardy violation occurred when the State used a breath test result to establish the factual basis for the defendant's plea and to support the aggravating factor used to enhance punishment. The court reasoned that the defendant was not subjected to multiple punishments for the same offense, stating: "instead of being punished twice, he has been subjected to a more severe punishment for an underlying substantive offense based upon the fact that his blood alcohol level was higher than that needed to support his conviction for that offense."

Fees

State v. Fennell, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). The trial court erred in calculating the amount of jail fees due where it used the daily rate provided in the wrong version of G.S. 7A-313. The court rejected the State's argument that because the defendant failed to object to the fees on this basis at sentencing, the issue was not properly before the court or, alternatively was bared by res judicata because of the defendant's prior appeals.

Fair Sentencing

State v. Pace, ___ N.C. App. ___, 770 S.E.2d 677 (Mar. 17, 2015). Finding that the trial court erred by sentencing the defendant in the aggravated range in this Fair Sentencing Act (FSA) child sexual assault case, the court remanded for a new sentencing hearing in compliance with *Blakely* and in accordance with the court's opinion regarding how *Blakely* applies to FSA cases.

Impermissibly Based on Exercise of Rights/Poverty

State v. Godbey, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). Although the trial court erred when it based its imposition of sentence on the defendant's exercise of his right to appeal, the issue was moot because the defendant had served his sentence and could not be resentenced. Although the 120-day

sentence was within the statutorily permissible range, the trial court changed its judgment from a split sentence of 30 days followed by probation to an active term in response to the defendant's decision to appeal.

State v. Barksdale, __ N.C. App. __, 768 S.E.2d 126 (Dec. 2, 2014). The trial court did not improperly base its sentencing decision on the defendant's decision to reject an offered plea agreement and go to trial. However, the court repeated its admonition that "judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not."

Life Without Possibility of Parole

State v. Antone, ___ N.C. App. ___, 770 S.E.2d 128 (April 7, 2015). Where the defendant was convicted of first-degree murder on the theories of felony murder and premeditation and deliberation, the trial court violated G.S. 15A-1340.19C(a) by imposing a sentence of life imprisonment without the possibility of parole without assessing mitigating factors, requiring a remand for a new sentencing hearing. The trial court's findings of fact and order failed to comply with the statutory mandate requiring it to "include findings on the absence or presence of any mitigating factors[.]" The trial court's order made "cursory, but adequate findings as to some mitigating circumstances but failed to address other factors at all. The court added:

> We also note that portions of the findings of fact are more recitations of testimony, rather than evidentiary or ultimate findings of fact. The better practice is for the trial court to make evidentiary findings of fact that resolve any conflicts in the evidence, and then to make ultimate findings of fact that apply the evidentiary findings to the relevant mitigating factors . . . . If there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered. (citations omitted).

Prior Record Level

State v. Sturdivant, ___ N.C. App. ___, 771 S.E.2d 560 (April 7, 2015). The trial court correctly determined the defendant's prior record level (PRL) points. At sentencing, the State submitted a print-out of the defendant's Administrative Office of the Courts (AOC) record. The defendant offered no evidence. On appeal, the defendant argued that the State failed to meet its burden of proving that one of the convictions was the defendant's, arguing that the birthdate in the report was incorrect and that he did not live at the listed address at the time of sentencing. The court held that the fact that the defendant was living at a different address at the time of sentencing was of no consequence, in part because people move residences. As to the birthdate, under G.S. 15A-1340.14(f), a copy of a AOC record "bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court."

State v. Sanders, 367 N.C. 716 (Dec. 19, 2014). (1) The trial court erred by determining that a Tennessee offense of "domestic assault" was substantially similar to the North Carolina offense of assault on a female without reviewing all relevant sections of the Tennessee code. Section 39-13-111 of the Tennessee Code provides that "[a] person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim." Section 39-13-101 defines when someone commits an "assault." Here the State provided the trial court with a photocopy section 39-13-111 but did not give the trial court a photocopy of section 39-13-101. The court held: "We agree with the Court of Appeals that for a party to meet its burden of establishing substantial similarity of an out-of-state offense to a North Carolina offense by the preponderance of the evidence, the party seeking the determination of substantial similarity must provide evidence of the applicable law." (2) Comparing the elements of the offenses, the court held that

they are not substantially similar under G.S. 15A-1340.14(e). The North Carolina offenses does not require any type of relationship between the perpetrator and the victim but the Tennessee statutes does. The court noted: "Indeed, a woman assaulting her child or her husband could be convicted of "domestic assault" in Tennessee, but could not be convicted of "assault on a female" in North Carolina. A male stranger who assaults a woman on the street could be convicted of "assault on a female" in North Carolina, but could not be convicted of "domestic assault" in Tennessee."

Probation

Violations & Revocation

State v. Moore (No. 14-665), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The trial court lacked subject matter jurisdiction to revoke the defendant's probation when it did so after his probationary period had expired and he was not subject to a tolling period.

State v. Sanders, ___ N.C. App. ___, 770 S.E.2d 749 (April 7, 2015). The trial court lacked subject matter jurisdiction to revoke the defendant's probation when it did so after his probationary period had expired and he was not subject to a tolling period.

State v. Knox, ___ N.C. App. ___, 768 S.E.2d 381 (Feb. 17, 2015). (1) Because the trial court revoked defendant's probation before the period of probation expired, the court rejected defendant's argument that under G.S. 15A-1344(f) the trial court lacked jurisdiction to revoke. (2) Where counsel stated at the revocation hearing that defendant acknowledged that he had received a probation violation report and admitted the allegations in the report and defendant appeared and participated in the hearing voluntarily, the defendant waived the notice requirement of G.S. 15A-1345(e).

State v. Sitosky, ___ N.C. App. ___, 767 S.E.2d 623 (Dec. 31, 2014). (1) The trial court lacked jurisdiction to revoke the defendant's probation and activate her suspended sentences where the defendant committed her offenses prior to 1 December 2009 but had her revocation hearing after 1 December 2009 and thus was not covered by either statutory provision—G.S. 15A-1344(d) or 15A-1344(g)—authorizing the tolling of probation periods for pending criminal charges. (2) The trial court erred by revoking her probation in other cases where it based the revocation, in part, on probation violations that were neither admitted by the defendant nor proven by the State at the probation hearing.

Right to be Present

State v. Leaks, ___ N.C. App. ___, ___ S.E.2d ___ (April 21, 2015). The trial court violated the defendant's right to be present during sentencing by entering a written judgment imposing a longer prison term than that which the trial court announced in his presence during the sentencing hearing. In the presence of the defendant, the trial court sentenced him to a minimum term of 114 months and a maximum term of 146 months imprisonment. Subsequently, the trial court entered written judgment reflecting a sentence of 114 to 149 months active prison time. The court concluded: "Given that there is no indication in the record that defendant was present at the time the written judgment was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing judgment."

Resentencing

State v. Bowden, 367 N.C. 680 (Dec. 19, 2014). Reversing the court of appeals, the court held that the defendant, who was in the class of inmates whose life sentence was deemed to be a sentence of 80 years, was not entitled to immediate release. The defendant argued that various credits he accumulated during his incarceration (good time, gain time, and merit time) must be applied to reduce his sentence of life imprisonment, thereby entitling him to immediate and unconditional release. The DOC has applied these

credits towards privileges like obtaining a lower custody grade or earlier parole eligibility, but not towards the calculation of an unconditional release date. The court found the case indistinguishable from its prior decision in *Jones v. Keller*, 364 N.C. 249, 254 (2010).

State v. Jarman, ___ N.C. App. ___, 767 S.E.2d 370 (Dec. 16, 2014). The court rejected the defendant's argument that the trial court did not appreciate that a resentencing hearing must be de novo.

Sequestration

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). In this robbery case involving multiple victims, the trial court did not abuse its discretion by denying the defendant's motion to sequester the victim-witnesses where the defendant offered no basis for his motion.

Sex Offenders

Grady v. North Carolina, 575 U.S. ___, 135 S. Ct. 1368 (Mar. 30, 2015) (per curiam). Reversing the North Carolina courts, the Court held that under *Jones* and *Jardines*, satellite based monitoring for sex offenders constitutes a search under the Fourth Amendment. The Court stated: "a State … conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." The Court rejected the reasoning of the state court below, which had relied on the fact that the monitoring program was "civil in nature" to conclude that no search occurred, explaining: "A building inspector who enters a home simply to ensure compliance with civil safety regulations has undoubtedly conducted a search under the Fourth Amendment." The Court did not decide the "ultimate question of the program's constitutionality" because the state courts had not assessed whether the search was reasonable. The Court remanded for further proceedings.

State v. Smith, ___ N.C. App. ___, 769 S.E.2d 838 (Mar. 17, 2015). In this indecent liberties case, the trial court did not err by considering evidence regarding the age of the alleged victims, the temporal proximity of the events, and the defendant's increasing sexual aggressiveness; making findings of fact based on this evidence; and imposing SBM. Although the trial court could not rely on charges that had been dismissed, the other evidence supported the trial court's findings, was not part of the STATIC-99 evaluation, and could be considered by the trial court.

State v. Davis, __ N.C. App. __, 767 S.E.2d 565 (Dec. 2, 2014). The State conceded and the court held that the trial court erred by requiring the defendant to submit to lifetime SBM. The trial court imposed SBM based on its determination that the defendant's conviction for first-degree rape constituted an "aggravated offense" as defined by G.S. 14-208.6(1a). However, this statute became effective on 1 October 2001 and applies only to offenses committed on or after that date. Because the date of the offense in this case was 22 September 2001, the trial court erred by utilizing an inapplicable statutory provision in its determination.

In re Hall, ___ N.C. App. ___, 768 S.E.2d 39 (Dec. 31, 2014). (1) The trial court did not err by relying on the federal SORNA statute to deny the defendant's petition to terminate his sex offender registration. The language of G.S. 14-208.12A shows a clear intent by the legislature to incorporate the requirements of SORNA into NC's statutory provisions governing the sex offender registration process and to retroactively apply those provisions to sex offenders currently on the registry. (2) The retroactive application of SORNA does not constitute an ex post facto violation. The court noted that it is well established that G.S. 14-208.12A creates a "non-punitive civil regulatory scheme." It went on to reject the defendant's argument that the statutory scheme is so punitive as to negate the legislature's civil intent.

Speedy Trial & Related Issues

State v. Broussard, ___ N.C. App. ___, 768 S.E.2d 367 (Feb. 17, 2015). Although the issue does not appear to have been raised by the defendant on appeal in this second-degree murder case, the court noted: "[O]ur review of the record shows defendant was arrested on 1 September 2009 and was tried in August and September of 2013, almost four years later. . . . The record on appeal does not show any motions for speedy trial or arguments of prejudice from defendant." The court continued, in what may be viewed as a warning about trial delays:

> While we are unaware of the circumstances surrounding the delay in bringing defendant to trial, it is difficult to conceive of circumstances where such delays are in the interest of justice for defendant, his family, or the victim's family, or in the best interests of our citizens in timely and just proceedings.

State v. Floyd, ___ N.C. App. ___, 766 S.E.2d 361 (Dec. 16, 2014), *review allowed*, ___ N.C. ___, 771 S.E.2d 295 (Apr. 9, 2015). The trial court did not err by denying the defendant's motion to dismiss on grounds of excessive pre-indictment delay. A challenge to a pre-indictment delay is predicated on an alleged violation of the due process clause. To prevail, a defendant must show both actual and substantial prejudice from the delay and that the delay was intentional on the part of the State in order to impair defendant's ability to defend himself or to gain tactical advantage. Here, the defendant failed to show that he sustained actual and substantial prejudice as a result of the delay.

Evidence

Authentication

State v. Snead, ___ N.C. App. ___, 768 S.E.2d 344 (Feb. 17, 2015), *temporary stay allowed*, __ N.C. __, 768 S.E.2d 568 (Mar. 9, 2015). In this store larceny case, the trial court committed prejudicial error by admitting as substantive evidence store surveillance video that was not properly authenticated. At trial Mr. Steckler, the store's loss prevention manager, explained how the store's video surveillance system worked and testified that he had reviewed the video images after the incident. Steckler also testified that the video equipment was "working properly" on the day of the incident. However, Steckler admitted he was not at the store on the date of the incident, nor was he in charge of maintaining the video recording equipment and ensuring its proper operation. The court also found that Steckler's testimony was insufficient to establish chain of custody of the CD, which was created from the store videotape.

Judicial Notice

State v. James, ___ N.C. App. ___, 770 S.E.2d 736 (April 7, 2015). In this drug trafficking case where an SBI agent testified as an expert for the State and identified the substance in question as oxycodone, the court declined the defendant's request to take judicial notice of Version 4 and 7 of SBI Laboratory testing protocols. Among other things, the defendant did not present the protocols at trial, the State had no opportunity to test their veracity, and the defendant presented no information indicating that the protocols applied at the time of testing.

Relevancy—Rule 401

State v. Hayes, ___ N.C. App. ___, 768 S.E.2d 636 (Mar. 3, 2015). (1) In this homicide case where the defendant was charged with murdering his wife, the trial court did not err by admitting into evidence lyrics of a song, "Man Killer," allegedly authored by defendant and containing lyrics about a murder, including "I'll take the keys to your car", "I'm just the one to make you bleed" and "I'll put my hands on your throat and squeeze." In this case the evidence showed that the victim's car had been moved, the

victim had been stabbed, and that defendant said he strangled the victim. The court concluded: "In light of the similarities between the lyrics and the facts surrounding the charged offense, the lyrics were relevant to establish identity, motive, and intent, and their probative value substantially outweighed their prejudicial effect to defendant." (2) The trial court properly allowed forensic psychologist Ginger Calloway to testify about a report she prepared in connection with a custody proceeding regarding the couple's children. The report contained, among other things, Calloway's observations of defendant's drug use, possible mental illness, untruthfulness during the evaluation process and her opinion that defendant desired to "obliterate" the victim's relationship with the children. Because the report was arguably unfavorable to defendant and was found in defendant's car with handwritten markings throughout the document, the report and Calloway's testimony were relevant for the State to argue the effect of the report on defendant's state of mind—that it created some basis for defendant's ill will, intent, or motive towards the victim.

State v. Broussard, ___ N.C. App. ___, 768 S.E.2d 367 (Feb. 17, 2015). In this homicide case, the trial court did not err by admitting evidence of four firearms found in the car when the defendant was arrested following a traffic stop. The State offered the evidence to show the circumstances surrounding defendant's flight. Defendant argued that the evidence was irrelevant and inadmissible because nothing connected the firearms to the crime. The court disagreed:

> Defendant ran away from the scene immediately after he stabbed [the victim]. Three days later, he was apprehended following a traffic stop in South Carolina. Defendant, who was riding as a passenger in another person's car, possessed a passport bearing a fictitious name. Also found in the car was a piece of paper with directions to a mosque located in Laredo, Texas. Four firearms were found inside the passenger compartment of the car: a loaded assault rifle, two sawed-off shotguns, and a loaded pistol. The circumstances surrounding defendant's apprehension in South Carolina, the passport, the paper containing directions to a specific place in Texas, and the firearms are relevant evidence of flight.

State v. Royster, __ N.C. App. __, 763 S.E.2d 577 (Oct. 21, 2014). In a murder case, the trial court did not err by admitting testimony concerning nine-millimeter ammunition and a gun found at the defendant's house. Evidence concerning the ammunition was relevant because it tended to link the defendant to the scene of the crime, where eleven shell casings of the same brand and caliber were found, thus allowing the jury to infer that the defendant was the perpetrator. The trial court had ruled that evidence of the gun—which was not the murder weapon—was inadmissible and the State complied with this ruling on direct. However, in order to dispel any suggestion that the defendant possessed the nine-millimeter gun used in the shooting, the defendant elicited testimony that a nine-millimeter gun found in his house, in which the nine-millimeter ammunition was found, was not the murder weapon. The court held that the defendant could not challenge the admission of testimony that he first elicited.

State v. Mitchell, ___ N.C. App. ___, 770 S.E.2d 740 (April 7, 2015). In this murder case, the defendant's statements about his intent to shoot someone in order to retrieve the keys to his grandmother's car, made immediately prior to the shooting of the victim, were relevant. The statements showed the defendant's state of mind near the time of the shooting and were relevant to the State's theory of premeditation and deliberation, even though both witnesses to the statements testified that they did not believe that the defendant was referring to shooting the victim.

State v. Davis, __ N.C. App. __, 767 S.E.2d 565 (Dec. 2, 2014). In a sexual assault case involving DNA evidence, the trial court did not err by excluding as irrelevant defense evidence that police department evidence room refrigerators were moldy and that evidence was kept in a disorganized and non-sterile environment where none of the material tested in the defendant's case was stored in those refrigerators during the relevant time period.

Character Evidence

State v. Walston, 367 N.C. 721 (Dec. 19, 2014). In a child sexual abuse case, although evidence of the defendant's law abidingness was admissible under Rule 404(a)(1), evidence of his general good character and being respectful towards children was not admissible. On appeal, the defendant's argument focused on the exclusion of character evidence that he was respectful towards children. The court found that this evidence did not relate to a pertinent character trait, stating: "Being respectful towards children does not bear a special relationship to the charges of child sexual abuse . . . nor is the proposed trait sufficiently tailored to those charges." It continued:

> Such evidence would only be relevant if defendant were accused in some way of being disrespectful towards children or if defendant had demonstrated further in his proffer that a person who is respectful is less likely to be a sexual predator. Defendant provided no evidence that there was a correlation between the two or that the trait of respectfulness has any bearing on a person's tendency to sexually abuse children.

State v. Hembree, ___ N.C. ___, 770 S.E.2d 77 (April 10, 2015). In this capital murder case in which the State introduced 404(b) evidence regarding a murder of victim Saldana to show common scheme or plan, the trial court erred by allowing Saldana's sister to testify about Saldana's good character. Evidence regarding Saldana's character was irrelevant to the charged crime. For this reason the trial court also abused its discretion by admitting this evidence over the defendant's Rule 403 objection.

***Crawford* & Confrontation Clause Issues**

State v. Hayes, ___ N.C. App. ___, 768 S.E.2d 636 (Mar. 3, 2015). In this homicide case where the defendant was charged with murdering his wife, the confrontation clause was not violated when the trial court allowed forensic psychologist Ginger Calloway to testify about a report she prepared in connection with a custody proceeding regarding the couple's children. Defendant argued that Calloway's report and testimony violated the confrontation clause because they contained third party statements from non-testifying witnesses who were not subject to cross-examination at trial. The court rejected this argument concluding that the report and testimony were not admitted for the truth of the matter asserted but to show "defendant's state of mind." In fact, the trial court gave a limiting instruction to that effect, noting that the evidence was relevant "only to the extent it may have been read by . . . defendant" and "had some bearing" on how he felt about the custody dispute with his wife.

State v. Gardner, __ N.C. App. __, 769 S.E.2d 196 (Dec. 2, 2014). In a sex offender residential restriction case, the court held that because GPS tracking reports were non-testimonial business records, their admission did not violate the defendant's confrontation rights. The GPS records were generated in connection with electronic monitoring of the defendant, who was on post-release supervision for a prior conviction. The court reasoned:

> [T]he GPS evidence admitted in this case was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant's compliance with his post-release supervision conditions. The GPS evidence was only pertinent at trial because defendant was alleged to have violated his post-release conditions. We hold that the GPS report was non-testimonial and its admission did not violate defendant's Confrontation Clause rights.

State v. Royster, __ N.C. App. __, 763 S.E.2d 577 (Oct. 21, 2014). The court rejected the defendant's argument that his confrontation clause rights were violated when the trial court released an out-of-state witness from subpoena. The State subpoenaed the witness from New York to testify at the trial. The witness testified at trial and the defendant had an opportunity to cross-examine him. After the witness

stepped down from the witness stand, the State informed the trial court judge that the defense had attempted to serve a subpoena on the witness the day before. The State argued that the subpoena was invalid. The witness refused to speak with the defense outside of court and the trial court required the defense to decide whether to call the individual as a witness before 2:00 p.m. that day. When the appointed time arrived, the defense indicated it had not yet decided whether it would be calling the individual as a witness and the trial court judge released the witness from the summons. The defendant's confrontation rights were not violated where the witness was available at trial and the defendant had the opportunity to cross-examine him. Additionally, under G.S. 15A-814, the defendant's subpoena was invalid.

Corroboration

State v. Duffie, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2015). In this robbery case, the court held that no plain error occurred when the trial court admitted into evidence for purposes of corroboration a videotape of an interview with the defendant's accomplice, when the accomplice testified at trial. The defendant asserted that the accomplice's statements in the videotape contradicted rather than corroborated his trial testimony. The court disagreed noting that the accomplice's statements during the interview established a timeline of the robberies, an account of how they were committed, and the parties' roles in the crimes and that all of these topics were covered in his testimony at trial. While the accomplice did add the additional detail during the interview that he likely would not have committed the robberies absent the defendant's involvement, this did not contradict his trial testimony.

404(b) Evidence

State v. McKnight, ___ N.C. App. ___, 767 S.E.2d 689 (Jan. 20, 2015). In this drug trafficking case in which the defendant was prosecuted for possessing and transporting drugs in his car, the trial court erred by admitting evidence of drug contraband found in a home. The defendant picked up two boxes from suspected drug trafficker Travion Stokes, put them in his car, was stopped by officers and was charged with drug crimes in connection with controlled substances found in the boxes. The defendant claimed that he did not know what was in the boxes and that he was simply doing a favor for Stokes by bringing them to a home on Shellburne Drive. The police got a warrant for the home at Shellburne Drive and found drug contraband there. The State successfully admitted this evidence over the defendant's objection at trial under Rule 404(b) to show the defendant's knowledge that the boxes he was transporting contained controlled substances. Relying on *State v. Moctezuma*, 141 N.C. App. 90 (2000), the court held this was error, finding that no evidence connected the *defendant* to the contraband found in the Shellburne Drive home.

State v. Barker, ___ N.C. App. ___, 770 S.E.2d 142 (April 7, 2015). In this obtaining property by false pretenses case, the trial court did not err by admitting Rule 404(b) evidence. The charges arose out of the defendant's acts of approaching two individuals (Ms. Hoenig and Ms. Harward), falsely telling them their roofs needed repair, taking payment for the work and then performing shoddy work or not completing the job. At trial, three other witnesses testified to similar incidents. This evidence was "properly admitted under Rule 404(b) because it demonstrated that defendant specifically targeted his victims pursuant to his plan and intent to deceive, and with knowledge and absence of mistake as to his actions."

State v. Waddell, ___ N.C. App. ___, 767 S.E.2d 921 (Feb 3, 2015). In this felony indecent exposure case where the defendant exposed himself to a 14-year old boy, his mother and grandmother, the trial court did not err by admitting 404(b) evidence from two adult women who testified that the defendant exposed himself in public on other occasions. The court rejected the defendant's argument that the other acts were insufficiently similar to the charged conduct and only "generic features of the charge of indecent exposure," noting that the 404(b) testimony revealed that the defendant exposed himself to adult women,

who were either alone or in pairs, in or in the vicinity of businesses near the courthouse in downtown Fayetteville, and each instance involved the defendant exposing his genitals with his hand on or under his penis. The court also rejected the defendant's argument that because the current charge was elevated because the exposure occurred in the presence of a child under 16 and the prior incidents involved adult women, the were not sufficiently similar, noting that the defendant acknowledged in his brief that in this case he did in fact expose himself to an adult woman as well. The court also rejected the defendant's argument that the evidence should have been excluded under the Rule 403 balancing test.

State v. Pierce, ___ N.C. App. ___, 767 S.E.2d 860 (Dec. 31, 2014). In this child sexual abuse case, the trial court properly admitted 404(b) evidence from several witnesses. As to two of the witnesses, the defendant argued that the incidents they described were too remote and insufficiently similar. The court concluded that although the sexual abuse of these witnesses occurred 10-20 years prior to trial, the lapses of time between the instances of sexual misconduct involving the witnesses and the victims can be explained by the defendant's incarceration and lack of access to a victim. Furthermore, there are several similarities between what happened to the witnesses and what happened to the victims: each victim was a minor female who was either the daughter or the niece of the defendant's spouse or live-in girlfriend; the abuse frequently occurred at the defendant's residence, at night, and while others slept nearby; and the defendant threatened each victim not to tell anyone. When considered as a whole, the testimony shows that the defendant engaged in a pattern of conduct of sexual abuse over a long period of time and the evidence meets Rule 404(b)'s requirements of similarity and temporal proximity. Testimony by a third witness was properly admitted under Rule 404(b) where it "involved substantially similar acts by defendant against the same victim and within the same time period." The trial court also performed the proper Rule 403 balancing and gave a proper limiting instruction to the jury.

State v. Hembree, ___ N.C. ___, 770 S.E.2d 77 (April 10, 2015). In this capital murder case, the trial court erred by admitting an excessive amount of 404(b) evidence pertaining to the murder of another victim, Saldana. The court began by concluding that the trial court properly admitted evidence of the Saldana murder under Rule 404(b) to show common plan or design. However, the trial court abused its discretion under Rule 403 by admitting "so much" 404(b) evidence given the differences between the two deaths and the lack of connection between them, the uncertainty regarding the cause of the victim's death, and the nature and extent of the 404(b) evidence (among other things, of the 8 days used by the State to present its case, 7 were spent on the 404(b) evidence; also, the jury viewed over a dozen photographs of Saldana's burned remains). The court stated: "Our review has uncovered no North Carolina case in which it is clear that the State relied so extensively, both in its case-in-chief and in rebuttal, on Rule 404(b) evidence about a victim for whose murder the accused was not currently being tried."

Opinions

Expert Opinions

State v. Davis, ___ N.C. App. ___, 768 S.E.2d 903 (Mar. 3, 2015). In this child sexual abuse case, the State's treating medical experts did not vouch for the victim's credibility. The court noted that defendant's argument appears to be based primarily on the fact that the experts testified about the problems reported by the victim without qualifying each reported symptom or past experience with a legalistic term such as "alleged" or "unproven." The court stated: "Defendant does not cite any authority for the proposition that a witness who testifies to what another witness reports is considered to be 'vouching' for that person's credibility unless each disclosure by the witness includes a qualifier such as 'alleged.' We decline to impose such a requirement."

State v. Hicks, ___ N.C. App. ___, 768 S.E.2d 373 (Feb. 17, 2015). (1) In this child sexual abuse case, testimony from a psychologist, Ms. Bellis, who treated the victim did not constitute expert testimony that impermissibly vouched for the victim's credibility. Bellis testified, in part, that the victim "came in

because she had been molested by her older cousin." The court noted that in the cases offered by defendant, "the experts clearly and unambiguously either testified as to their opinion regarding the victim's credibility or identified the defendant as the perpetrator of the sexual abuse." It continued:

> Here, in contrast, Ms. Bellis was never specifically asked to give her opinion as to the truth of [the victim's] allegations of molestation or whether she believed that [the victim] was credible. When reading Ms. Bellis' testimony as a whole, it is evident that when Ms. Bellis stated that "[t]hey specifically came in because [the victim] had been molested by her older cousin[,]" Ms. Bellis was simply stating the reason why [the victim] initially sought treatment from Ms. Bellis. Indeed, Ms. Bellis' affirmative response to the State's follow-up question whether there was "an allegation of molestation" clarifies that Ms. Bellis' statement referred to [the victim]'s allegations, and not Ms. Bellis' personal opinion as to their veracity. Because Ms. Bellis' testimony, when viewed in context, does not express an opinion as to [the victim]'s credibility or defendant's guilt, we hold that the trial court did not err in admitting it.

(2) The court rejected defendant's argument that the trial court committed plain error by admitting Bellis' testimony that she diagnosed the victim with PTSD. The court concluded that the State's introduction of evidence of PTSD on re-direct was not admitted as substantive evidence that the sexual assault happened, but rather to rebut an inference raised by defense counsel during cross-examination. The court further noted that although defendant could have requested a limiting instruction, he did not do so.

State v. Pierce, ___ N.C. App. ___, 767 S.E.2d 860 (Dec. 31, 2014). In this sexual assault case, no plain error occurred when a pediatric nurse practitioner testified to the opinion that her medical findings were consistent with the victim's allegation of sexual abuse. The nurse performed a physical examination of the victim. She testified that in girls who are going through puberty, it is very rare to discover findings of sexual penetration. She testified that "the research, and, . . . this is thousands of studies, indicates that it's five percent or less of the time that you would have findings in a case of sexual abuse -- confirmed sexual abuse." With respect to the victim, the expert testified that her genital findings were normal and that such findings "would be still consistent with the possibility of sexual abuse." The prosecutor then asked: "Were your medical findings consistent with her disclosure in the interview?" She answered that they were. The defendant argued that the expert's opinion that her medical findings were consistent with the victim's allegations impermissibly vouched for the victim's credibility. Citing prior case law, the court noted that the expert "did not testify as to whether [the victim's] account of what happened to her was true," that she was believable or that she had in fact been sexually abused. "Rather, she merely testified that the lack of physical findings was consistent with, and did not contradict, [the victim's] account."

State v. Walton, __ N.C. App. __, 765 S.E.2d 54 (Oct. 21, 2014). No error occurred when the State's experts in a sexual assault case testified that the victim's physical injuries were consistent with the sexual assault she described.

State v. James, ___ N.C. App. ___, 770 S.E.2d 736 (April 7, 2015). (2) In this opium trafficking case where the State's witness was accepted by the trial court as an expert witness without objection from defendant and the defendant did not cross-examine the expert regarding the sufficiency of the sample size and did not make the sufficiency of the sample size a basis for his motion to dismiss, the issue of whether the two chemically analyzed pills established a sufficient basis to show that there were 28 grams or more of opium was not properly before this Court. (2) Assuming arguendo that the issue had been properly preserved, it would fail. The court noted: "[a] chemical analysis is required . . . , but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." (quotation omitted). It noted further that "[e]very pill need not be chemically analyzed, however" and in *State v. Meyers*, 61 N.C. App. 554, 556 (1983), the court held that a chemical analysis of 20 tablets selected at random, "coupled with a visual inspection of the remaining pills for consistency, was sufficient to support a conviction for trafficking in 10,000 or more

tablets of methaqualone." Here, 1 pill, physically consistent with the other pills, was chosen at random from each exhibit and tested positive for oxycodone. The expert testified that she visually inspected the remaining, untested pills and concluded that with regard to color, shape, and imprint, they were "consistent with" those pills that tested positive for oxycodone. The total weight of the pills was 31.79 grams, exceeding the 28 gram requirement for trafficking. As a result, the State presented sufficient evidence to conclude that the defendant possessed and transported 28 grams or more of a Schedule II controlled substance.

State v. Hayes, ___ N.C. App. ___, 768 S.E.2d 636 (Mar. 3, 2015). In this homicide case where the defendant was charged with murdering his wife, that the trial court did not err by allowing the State's expert witness pathologists to testify that the victim's cause of death was "homicide[.]" It concluded:

> The pathologists in this case were tendered as experts in the field of forensic pathology. A review of their testimony makes clear that they used the words "homicide by unde[te]rmined means" and "homicidal violence" within the context of their functions as medical examiners, not as legal terms of art, to describe how the cause of death was homicidal (possibly by asphyxia by strangulation or repeated stabbing) instead of death by natural causes, disease, or accident. Their ultimate opinion was proper and supported by sufficient evidence, including injury to the victim's fourth cervical vertebra, sharp force injury to the neck, stab wounds, and damage to certain "tissue and thyroid cartilage[.]" Accordingly, the trial court did not err by admitting the pathologists' testimony.

Lay Opinions

State v. Pace, ___ N.C. App. ___, 770 S.E.2d 677 (Mar. 17, 2015). In this child sexual assault case the trial court did not abuse its discretion by allowing the victim's mother to testify about changes she observed in her daughter that she believed were a direct result of the assault. The court rejected the defendant's argument that this testimony was improper lay opinion testimony, finding that the testimony was proper as a shorthand statement of fact.

State v. Houser, ___ N.C. App. ___, 768 S.E.2d 626 (Feb. 17, 2015). In this felony child abuse case, the trial court did not commit plain error by admitting testimony from an investigating detective that the existence of the victim's hairs in a hole in the wall of the home where the incident occurred was inconsistent with defendant's account of the incident, that he punched the wall when he had difficulty communicating with a 911 operator. The detective's testimony did not invade the province of the jury by commenting on the truthfulness of defendant's statements and subsequent testimony. Rather, the court reasoned, the detective was explaining the investigative process that led officers to return to the home and collect the hair sample (later determined to match the victim). Contrary to defendant's arguments, testimony that the hair embedded in the wall was inconsistent with defendant's version of the incident was not an impermissible statement that defendant was not telling the truth. The detective's testimony served to provide the jury a clear understanding of why the officers returned to the home after their initial investigation and how officers came to discover the hair and request forensic testing of that evidence. It concluded: "these statements were rationally based on [the officer's] experience as a detective and were helpful to the jury in understanding the investigative process in this case."

State v. Snead, ___ N.C. App. ___, 768 S.E.2d 344 (Feb. 17, 2015), *temporary stay allowed*, __ N.C. __, 768 S.E.2d 568 (Mar. 9, 2015). In this store larceny case, the trial court committed prejudicial error by admitting into evidence testimony by Mr. Steckler, the store's loss prevention manager, regarding the total number of shirts stolen and the cumulative value of the stolen merchandise where his opinion was based on store surveillance video and not first-hand knowledge.

State v. Taylor, ___ N.C. App. ___, 767 S.E.2d 585 (Dec. 16, 2014), *temporary stay allowed*, __ N.C. __, 767 S.E.2d 53 (Jan. 2, 2015). Over a dissent, the court held that the trial court committed plain error by permitting a Detective to testify that she moved forward with her investigation of obtaining property by false pretenses and breaking or entering offenses because she believed that the victim, Ms. Medina, "seemed to be telling me the truth." The challenged testimony constituted an impermissible vouching for Ms. Medina's credibility in a case in which the only contested issue was the relative credibility of Ms. Medina and the defendant.

State v. Larkin, __ N.C. App. __, 764 S.E.2d 681 (Nov. 18, 2014). In a burglary and felony larceny case, an officer properly offered lay opinion testimony regarding a shoeprint found near the scene. The court found that the shoeprint evidence satisfied the *Palmer* "triple inference" test:

> [E]vidence of shoeprints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) that the shoeprints were found at or near the place of the crime; (2) that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime.

Rape Shield

State v. Davis, __ N.C. App. __, 767 S.E.2d 565 (Dec. 2, 2014). In a rape case, the trial court erred by excluding defense evidence that the victim and her neighbor had a consensual sexual encounter the day before the rape occurred. This prior sexual encounter was relevant because it may have provided an alternative explanation for the existence of semen in her vagina; "because the trial court excluded relevant evidence under Rule 412(b)(2), it committed error." However, the court went on to conclude that no prejudice occurred, in part because multiple DNA tests identified the defendant as the perpetrator.

Arrest, Search, and Investigation

Arrests & Investigatory Stops

Heien v. North Carolina, 574 U.S. ___, 135 S. Ct. 530 (Dec. 15, 2014). Affirming *State v. Heien*, 366 N.C. 271 (Dec. 14, 2012), the Court held that because an officer's mistake of law was reasonable, it could support a vehicle stop. In *Heien*, an officer stopped a vehicle because one of its two brake lights was out, but a court later determined that a single working brake light was all the law required. The case presented the question whether such a mistake of law can give rise to the reasonable suspicion necessary to uphold the seizure under the Fourth Amendment. The Court answered the question in the affirmative. It explained:

> [W]e have repeatedly affirmed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them "fair leeway for enforcing the law in the community's protection." We have recognized that searches and seizures based on mistakes of fact can be reasonable. The warrantless search of a home, for instance, is reasonable if undertaken with the consent of a resident, and remains lawful when officers obtain the consent of someone who reasonably appears to be but is not in fact a resident. By the same token, if officers with probable cause to arrest a suspect mistakenly arrest an individual matching the suspect's description, neither the seizure nor an accompanying search of the arrestee would be unlawful. The limit is that "the mistakes must be those of reasonable men."
>
> But reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the

> relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

Slip op. at 5-6 (citations omitted). The Court went on to find that the officer's mistake of law was objectively reasonable, given the state statutes at issue:

> Although the North Carolina statute at issue refers to "*a* stop lamp," suggesting the need for only a single working brake light, it also provides that "[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps." N. C. Gen. Stat. Ann. §20–129(g) (emphasis added). The use of "other" suggests to the everyday reader of English that a "stop lamp" is a type of "rear lamp." And another subsection of the same provision requires that vehicles "have all originally equipped rear lamps or the equivalent in good working order," §20–129(d), arguably indicating that if a vehicle has multiple "stop lamp[s]," all must be functional.

Slip op. at 12-13.

Rodriguez v. United States, 575 U.S. __, 135 S. Ct. 1609 (April 21, 2015). A dog sniff that prolongs the time reasonably required for a traffic stop violates the Fourth Amendment. After an officer completed a traffic stop, including issuing the driver a warning ticket and returning all documents, the officer asked for permission to walk his police dog around the vehicle. The driver said no. Nevertheless, the officer instructed the driver to turn off his car, exit the vehicle and wait for a second officer. When the second officer arrived, the first officer retrieved his dog and led it around the car, during which time the dog alerted to the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine. All told, 7-8 minutes elapsed from the time the officer issued the written warning until the dog's alert. The defendant was charged with a drug crime and unsuccessfully moved to suppress the evidence seized from his car, arguing that the officer prolonged the traffic stop without reasonable suspicion to conduct the dog sniff. The defendant was convicted and appealed. The Eighth Circuit held that the de minimus extension of the stop was permissible. The Supreme Court granted certiorari "to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff."

The Court reasoned that an officer may conduct certain unrelated checks during an otherwise lawful traffic stop, but "he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." The Court noted that during a traffic stop, beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop" such as checking the driver's license, determining whether the driver has outstanding warrants, and inspecting the automobile's registration and proof of insurance. It explained: "These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." A dog sniff by contrast "is a measure aimed at detect[ing] evidence of ordinary criminal wrongdoing." (quotation omitted). It continued: "Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission."

Noting that the Eighth Circuit's de minimus rule relied heavily on *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam) (reasoning that the government's "legitimate and weighty" interest in officer safety outweighs the "de minimis" additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle), the Court distinguished *Mimms*:

> Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the mission of the stop itself. Traffic stops are "especially fraught with danger to police officers," so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. On-scene

> investigation into other crimes, however, detours from that mission. So too do safety precautions taken in order to facilitate such detours. Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms*, the dog sniff could not be justified on the same basis. Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular. (citations omitted)

The Court went on to reject the Government's argument that an officer may "incremental[ly]" prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. The Court dismissed the notion that "by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation." It continued:

> If an officer can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission." As we said in *Caballes* and reiterate today, a traffic stop "prolonged beyond" that point is "unlawful." The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff "prolongs"—i.e., adds time to—"the stop". (citations omitted).

In this case, the trial court ruled that the defendant's detention for the dog sniff was not independently supported by individualized suspicion. Because the Court of Appeals did not review that determination the Court remanded for a determination by that court as to whether reasonable suspicion of criminal activity justified detaining the defendant beyond completion of the traffic infraction investigation.

State v. Leak, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). In a case in which there was a dissenting opinion, the court held that the defendant's Fourth Amendment rights were violated when an officer, who had approached the defendant's legally parked car without reasonable suspicion, took the defendant's driver's license to his patrol vehicle. Until the officer took the license, the encounter was consensual and no reasonable suspicion was required: "[the officer] required no particular justification to approach defendant and ask whether he required assistance, or to ask defendant to voluntarily consent to allowing [the officer] to examine his driver's license and registration." However, the officer's conduct of taking the defendant's license to his patrol car to investigate its status constituted a seizure that was not justified by reasonable suspicion. Citing the recent U.S. Supreme Court case *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) (police may not extend a completed vehicle stop for a dog sniff, absent reasonable suspicion), the court rejected the suggestion that no violation occurred because any seizure was "de minimus" in nature.

State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (Nov. 18, 2014). Even if the defendant had properly preserved the issue, the officer did not use excessive force by taking the defendant to the ground during a valid traffic stop.

State v. Hargett, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). In the course of rejecting the defendant's ineffective assistance claim related to preserving a denial of a motion to suppress, the court held that no prejudice occurred because the trial court properly denied the motion. The officer received a report from an identified tipster that a window at a residence appeared to have been tampered with and the owner of the residence was incarcerated. After the officer confirmed that a window screen had been pushed aside and the window was open, he repeatedly knocked on the door. Initially there was no response. Finally, an individual inside asked, "Who's there?" The officer responded, "It's the police." The individual indicated, "Okay," came to the door and opened it. When the officer asked the person's identity, the individual gave a very long, slow response, finally gave his name but either would not or could not provide any ID. When asked who owned the house, he gave no answer. Although the individual was asked repeatedly to keep his hands visible, he continued to put them in his pockets. These facts were

sufficient to create reasonable suspicion that the defendant might have broken into the home and also justified the frisk. During the lawful frisk, the officer discovered and identified baggies of marijuana in the defendant's sock by plain feel.

State v. Wainwright, ___ N.C. App. ___, 770 S.E.2d 99 (Mar. 17, 2015). In this DWI case, the officer had reasonable suspicion to stop the defendant's vehicle. The officer observed the defendant's vehicle swerve right, cross the line marking the outside of his lane of travel and almost strike the curb. The court found that this evidence, along with "the pedestrian traffic along the sidewalks and in the roadway, the unusual hour defendant was driving, and his proximity to bars and nightclubs, supports the trial court's conclusion that [the] Officer . . . had reasonable suspicion to believe defendant was driving while impaired."

State v. McKnight, ___ N.C. App. ___, 767 S.E.2d 689 (Jan. 20, 2015). In this drug trafficking case, the trial court did not commit plain error by finding that officers had reasonable suspicion to stop the defendant's vehicle. The court began by rejecting the State's argument that the defendant's evasive action while being followed by the police provided reasonable suspicion for the stop. The court reasoned that there was no evidence showing that the defendant was aware of the police presence when he engaged in the allegedly evasive action (backing into a driveway and then driving away without exiting his vehicle). The court noted that for a suspect's action to be evasive, there must be a nexus between the defendant's action and the police presence; this nexus was absent here. Nevertheless, the court found that other evidence supported a finding that reasonable suspicion existed. Immediately before the stop and while preparing to execute a search warrant for drug trafficking at the home of the defendant's friend, Travion Stokes, the defendant pulled up to Stokes' house, accepted 2 large boxes from Stokes, put them in his car, and drove away. The court noted that the warrant to search Stokes' home allowed officers to search any containers in the home that might contain marijuana, including the boxes in question.

State v. Shaw, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). When determining whether an officer had reasonable suspicion to stop the defendant's vehicle, the trial court properly considered statements made by other officers to the stopping officer that the defendant's vehicle had weaved out of its lane of travel several times. Reasonable suspicion may properly be based on the collective knowledge of law enforcement officers.

State v. McDonald, ___ N.C. App. ___, 768 S.E.2d 913 (Mar. 3, 2015). Although the trial court properly found that the checkpoint had a legitimate proper purpose of checking for driver's license and vehicle registration violations, the trial court failed to adequately determine the checkpoint's reasonableness. The court held that the trial court's "bare conclusion" on reasonableness was insufficient and vacated and remanded for appropriate findings as to reasonableness.

Exclusionary Rule & Related Issues

Combs v. Robertson, ___ N.C. App. ___, 767 S.E.2d 925 (Feb 3, 2015). The Fourth Amendment's exclusionary rule does not apply in civil drivers' license revocation proceedings. The evidence used in the proceeding was obtained as a result of an unconstitutional stop; after the same evidence previously had been used to support criminal charges, it was suppressed and the criminal charges were dismissed. The court held that while the evidence was subject to the exclusionary rule in a criminal proceeding, that rule did not apply in this civil proceeding, even if it could be viewed as "quasi-criminal in nature."

State v. Friend, __ N.C. App. __, 768 S.E.2d 146 (Dec. 2, 2014). In an assault on an officer case, the court rejected the defendant's argument that evidence of his two assaults on law enforcement officers should be excluded as fruits of the poisonous tree because his initial arrest for resisting an officer was unlawful. The doctrine does not exclude evidence of attacks on police officers where those attacks occur while the officers are engaging in conduct that violates a defendant's Fourth Amendment rights;

"[a]pplication of the exclusionary rule in such fashion would in effect give the victims of illegal searches a license to assault and murder the officers involved[.]" (quotation omitted). Thus the court held that even if the initial stop and arrest violated the defendant's Fourth Amendment rights, evidence of his subsequent assaults on officers were not "fruits" under the relevant doctrine.

Exigent Circumstances

State v. McCrary, __ N.C. App. __, 764 S.E.2d 477 (Oct. 21, 2014), *temporary stay allowed*, __ N.C. __, 764 S.E.2d 475 (Nov. 07, 2014). In this DWI case, the court—over a dissent—remanded for additional findings of fact on whether exigent circumstances supported a warrantless blood draw. The trial judge denied the motion to suppress before the U.S. Supreme Court issued its decision in *McNeely*, holding that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every DWI case sufficient to justify conducting a blood test without a warrant. The court remanded for additional findings of fact as to the availability of a magistrate and the "additional time and uncertainties" in obtaining a warrant, as well as the "other attendant circumstances" that may support the conclusion of law that exigent circumstances existed. The dissenting judge would have reversed the trial court's denial of the motion to suppress and remanded for a new trial.

Inevitable Discovery

State v. Larkin, __ N.C. App. __, 764 S.E.2d 681 (Nov. 18, 2014). The trial court did not err by denying the defendant's motion to suppress. The State established inevitable discovery with respect to a search of the defendant's vehicle that had previously been illegally seized where the evidence showed that an officer obtained the search warrant for the vehicle based on untainted evidence.

Interrogation and Confession

State v. Flood, __ N.C. App. __, 765 S.E.2d 65 (Nov. 18, 2014). In a child sexual assault case, the trial court erred by finding that the defendant's statements were made involuntarily. Although the court found that an officer made improper promises to the defendant, it held, based on the totality of the circumstances, that the statement was voluntarily. Regarding the improper promises, Agent Oaks suggested to the defendant during the interview that she would work with and help the defendant if he confessed and that she "would recommend . . . that [the defendant] get treatment" instead of jail time. She also asserted that Detective Schwab "can ask for, you know, leniency, give you this, do this. He can ask the District Attorney's Office for certain things. It's totally up to them [what] they do with that but they're going to look for recommendations[.]" Oaks told the defendant that if he "admit[s] to what happened here," Schwab is "going to probably talk to the District Attorney and say, 'hey, this is my recommendation. Hey, this guy was honest with us. This guy has done everything we've asked him to do. What can we do?' and talk about it." Because it is clear that the purpose of Oaks' statements "was to improperly induce in Defendant a belief that he might obtain some kind of relief from criminal charges if he confessed," they were improper promises. However, viewing the totality of the circumstances (length of the interview, the defendant's extensive experience with the criminal justice system given his prior service as a law enforcement officer, etc.), the court found his statement to be voluntarily.

State v. Davis, __ N.C. App. __, 763 S.E.2d 585 (Oct. 21, 2014). (1) The trial court did not err by finding that the defendant's statements were given freely and voluntarily. The court rejected the defendant's argument that they were coerced by fear and hope. The court held that an officer's promise that the defendant would "walk out" of the interview regardless of what she said did not render her confession involuntary. Without more, the officer's statement could not have led the defendant to believe that she would be treated more favorably if she confessed to her involvement in her child's disappearance and death. Next, the court rejected—as a factual matter—the defendant's argument that officers lied about

information provided to them by a third party. Finally, the court rejected the defendant's argument that her mental state rendered her confession involuntary and coerced, where the evidence indicated that the defendant understood what was happening, was coherent and did not appear to be impaired. (2) The court rejected the defendant's argument that she was in custody within the meaning of *Miranda* during an interview at the police station about her missing child. The trial court properly used an objective test to determine whether the interview was custodial. Furthermore competent evidence supported the trial court's findings of fact that the defendant was not threatened or restrained; she voluntarily went to the station; she was allowed to leave at the end of the interviews; the interview room door was closed but unlocked; the defendant was allowed to take multiple bathroom and cigarette breaks and was given food and drink; and defendant was offered the opportunity to leave the fourth interview but refused.

Plain View

State v. Grice, 367 N.C. 753 (Jan. 23, 2015). (1) Reversing the court of appeals, the court held that officers did not violate the Fourth Amendment by seizing marijuana plants seen in plain view. After receiving a tip that the defendant was growing marijuana at a specified residence, officers went to the residence to conduct a knock and talk. Finding the front door inaccessible, covered with plastic, and obscured by furniture, the officers noticed that the driveway led to a side door, which appeared to be the main entrance. One of the officers knocked on the side door. No one answered. From the door, the officer noticed plants growing in several buckets about 15 yards away. Both officers recognized the plants as marijuana. The officers seized the plants, returned to the sheriff's office and got a search warrant to search the home. The defendant was charged with manufacturing a controlled substance and moved to suppress evidence of the marijuana plants. The trial court denied the motion and the court of appeals reversed. The supreme court began by finding that the officers observed the plants in plain view. It went on to explain that a warrantless seizure may be justified as reasonable under the plain view doctrine if the officer did not violate the Fourth Amendment in arriving at the place from where the evidence could be plainly viewed; the evidence's incriminating character was immediately apparent; and the officer had a lawful right of access to the object itself. Additionally, it noted, "[t]he North Carolina General Assembly has . . . required that the discovery of evidence in plain view be inadvertent." The court noted that the sole point of contention in this case was whether the officers had a lawful right of access from the driveway 15 yards across the defendant's property to the plants' location. Finding against the defendant on this issue, the court stated: "Here, the knock and talk investigation constituted the initial entry onto defendant's property which brought the officers within plain view of the marijuana plants. The presence of the clearly identifiable contraband justified walking further into the curtilage." The court rejected the defendant's argument that the seizure was improper because the plants were on the curtilage of his property, stating:

> [W]e conclude that the unfenced portion of the property fifteen yards from the home and bordering a wood line is closer in kind to an open field than it is to the paradigmatic curtilage which protects "the privacies of life" inside the home. However, even if the property at issue can be considered the curtilage of the home for Fourth Amendment purposes, we disagree with defendant's claim that a justified presence in one portion of the curtilage (the driveway and front porch) does not extend to justify recovery of contraband in plain view located in another portion of the curtilage (the side yard). By analogy, it is difficult to imagine what formulation of the Fourth Amendment would prohibit the officers from seizing the contraband if the plants had been growing on the porch—the paradigmatic curtilage—rather than at a distance, particularly when the officers' initial presence on the curtilage was justified. The plants in question were situated on the periphery of the curtilage, and the protections cannot be greater than if the plants were growing on the porch itself. The officers in this case were, by the custom and tradition of our society, implicitly invited into the curtilage to approach the home. Traveling within the curtilage to seize contraband in plain view within the curtilage did not violate the Fourth Amendment.

(citation omitted). (2) The court went on to hold that the seizure also was justified by exigent circumstances, concluding: "Reviewing the record, it is objectively reasonable to conclude that someone may have been home, that the individual would have been aware of the officers' presence, and that the individual could easily have moved or destroyed the plants if they were left on the property."

Searches

Grady v. North Carolina, 575 U.S. ___, 135 S. Ct. 1368 (Mar. 30, 2015) (per curiam). Reversing the North Carolina courts, the Court held that under *Jones* and *Jardines*, satellite based monitoring for sex offenders constitutes a search under the Fourth Amendment. The Court stated: "a State … conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." The Court rejected the reasoning of the state court below, which had relied on the fact that the monitoring program was "civil in nature" to conclude that no search occurred, explaining: "A building inspector who enters a home simply to ensure compliance with civil safety regulations has undoubtedly conducted a search under the Fourth Amendment." The Court did not decide the "ultimate question of the program's constitutionality" because the state courts had not assessed whether the search was reasonable. The Court remanded for further proceedings.

State v. Miller, 367 N.C. 702 (Dec. 19, 2014). A police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment. Responding to a burglar alarm, officers arrived at the defendant's home with a police dog, Jack. The officers deployed Jack to search the premises for intruders. Jack went from room to room until he reached a side bedroom where he remained. When an officer entered to investigate, Jack was sitting on the bedroom floor staring at a dresser drawer, alerting the officer to the presence of drugs. The officer opened the drawer and found a brick of marijuana. Leaving the drugs there, the officer and Jack continued the protective sweep. Jack stopped in front of a closet and began barking at the closet door, alerting the officer to the presence of a human suspect. Unlike the passive sit and stare alert that Jack used to signal for the presence of narcotics, Jack was trained to bark to signal the presence of human suspects. Officers opened the closet and found two large black trash bags on the closet floor. When Jack nuzzled a bag, marijuana was visible. The officers secured the premises and obtained a search warrant. At issue on appeal was whether Jack's nuzzling of the bags in the closet violated the Fourth Amendment. The court of appeals determined that Jack's nuzzling of the bags was an action unrelated to the objectives of the authorized intrusion that created a new invasion of the defendant's privacy unjustified by the exigent circumstance that validated the entry. That court viewed Jack as an instrumentality of the police and concluded that "his actions, regardless of whether they are instinctive or not, are no different than those undertaken by an officer." The Supreme Court disagreed, concluding that "Jack's actions are different from the actions of an officer, particularly if the dog's actions were instinctive, undirected, and unguided by the police." It held:

> If a police dog is acting without assistance, facilitation, or other intentional action by its handler (. . . acting "instinctively"), it cannot be said that a State or governmental actor intends to do anything. In such a case, the dog is simply being a dog. If, however, police misconduct is present, or if the dog is acting at the direction or guidance of its handler, then it can be readily inferred from the dog's action that there is an intent to find something or to obtain information. In short, we hold that a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution. Therefore, the decision of the Court of Appeals that Jack was an instrumentality of the police, regardless of whether his actions were instinctive, is reversed. (citation omitted)

Ultimately, the court remanded for the trial court to decide whether Jack's nuzzling in this case was in fact instinctive, undirected, and unguided by the officers.

State v. Benters, 367 N.C. 660 (Dec. 19, 2014). The court held that an affidavit supporting a search warrant failed to provide a substantial basis for the magistrate to conclude that probable cause existed. In the affidavit, the affiant officer stated that another officer conveyed to him a tip from a confidential informant that the suspect was growing marijuana at a specified premises. The affiant then recounted certain corroboration done by officers. The court first held that the tipster would be treated as anonymous, not one who is confidential and reliable. It explained: "It is clear from the affidavit that the information provided does not contain a statement against the source's penal interest. Nor does the affidavit indicate that the source previously provided reliable information so as to have an established 'track record.' Thus, the source cannot be treated as a confidential and reliable informant on these two bases." The court rejected the State's argument that because an officer met "face-to-face" with the source, the source should be considered more reliable, reasoning: "affidavit does not suggest [the affiant] was acquainted with or knew anything about [the] source or could rely on anything other than [the other officer's] statement that the source was confidential and reliable." Treating the source as an anonymous tipster, the court found that the tip was supported by insufficient corroboration. The State argued that the following corroboration supported the tip: the affiant's knowledge of the defendant and his property resulting "from a criminal case involving a stolen flatbed trailer"; subpoenaed utility records indicating that the defendant was the current subscriber and the kilowatt usage hours are indicative of a marijuana grow operation; and officers' observations of items at the premises indicative of an indoor marijuana growing operation, including potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers. Considering the novel issue of utility records offered in support of probable cause, the court noted that "[t]he weight given to power records increases when meaningful comparisons are made between a suspect's current electricity consumption and prior consumption, or between a suspect's consumption and that of nearby, similar properties." It continued: "By contrast, little to no value should be accorded to wholly conclusory, non-comparative allegations regarding energy usage records." Here, the affidavit summarily concluded that kilowatt usage was indicative of a marijuana grow operation and "the absence of any comparative analysis severely limits the potentially significant value of defendant's utility records." Thus, the court concluded: "these unsupported allegations do little to establish probable cause independently or by corroborating the anonymous tip." The court was similarly unimpressed by the officers' observation of plant growing items, noting:

> The affidavit does not state whether or when the gardening supplies were, or appeared to have been, used, or whether the supplies appeared to be new, or old and in disrepair. Thus, amid a field of speculative possibilities, the affidavit impermissibly requires the magistrate to make what otherwise might be reasonable inferences based on conclusory allegations rather than sufficient underlying circumstances. This we cannot abide.

As to the affidavit's extensive recounting of the officers' experience, the court held:

> We are not convinced that these officers' training and experience are sufficient to balance the quantitative and qualitative deficit left by an anonymous tip amounting to little more than a rumor, limited corroboration of facts, non-comparative utility records, observations of innocuous gardening supplies, and a compilation of conclusory allegations.

State v. Williford, ___ N.C. App. ___, 767 S.E.2d 139 (Jan. 6, 2015). The trial court did not err by denying the defendant's motion to suppress DNA evidence obtained from his discarded cigarette butt. When the defendant refused to supply a DNA sample in connection with a rape and murder investigation, officers sought to obtain his DNA by other means. After the defendant discarded a cigarette butt in a parking lot, officers retrieved the butt. The parking lot was located directly in front of the defendant's four-unit apartment building, was uncovered, and included 5-7 unassigned parking spaces used by the residents. The area between the road and the parking lot was heavily wooded, but no gate restricted access to the lot and no signs suggested either that access to the parking lot was restricted or that the lot was private. After DNA on the cigarette butt matched DNA found on the victim, the defendant was charged

with the crimes. At trial the defendant unsuccessfully moved to suppress the DNA evidence. On appeal, the court rejected the defendant's argument that the seizure of the cigarette butt violated his constitutional rights because it occurred within the curtilage of his apartment:

> [W]e conclude that the parking lot was not located in the curtilage of defendant's building. While the parking lot was in close proximity to the building, it was not enclosed, was used for parking by both the buildings' residents and the general public, and was only protected in a limited way. Consequently, the parking lot was not a location where defendant possessed "a reasonable and legitimate expectation of privacy that society is prepared to accept."

Next, the court rejected the defendant's argument that even if the parking lot was not considered curtilage, he still maintained a possessory interest in the cigarette butt since he did not put it in a trash can or otherwise convey it to a third party. The court reasoned that the cigarette butt was abandoned property. Finally, the court rejected the defendant's argument that even if officers lawfully obtained the cigarette butt, they still were required to obtain a warrant before testing it for his DNA because he had a legitimate expectation of privacy in his DNA. The court reasoned that the extraction of DNA from an abandoned item does not implicate the Fourth Amendment.

State v. Clyburn, ___ N.C. App. ___, 770 S.E.2d 689 (April 7, 2015). The court reversed and remanded for further findings of fact regarding the defendant's motion to suppress evidence obtained as a result of a search of the digital contents of a GPS device found on the defendant's person which, as a result of the search, was determined to have been stolen. The court held that under *Riley v. California*, 134 S. Ct. 2473 (2014), the search was not justified as a search incident to arrest. As to whether the defendant had a reasonable expectation of privacy in the GPS device, the court held that a defendant may have a legitimate expectation of privacy in a stolen item if he acquired it innocently and does not know that the item was stolen. Here, evidence at the suppression hearing would allow the trial court to conclude that defendant had a legitimate possessory interest in the GPS. However, because the trial court failed to make a factual determination regarding whether the defendant innocently purchased the GPS device, the court reversed and remanded for further findings of fact, providing additional guidance for the trial court in its decision.

State v. Fizovic, ___ N.C. App. ___, 770 S.E.2d 717 (April 7, 2015). A search of the defendant's vehicle was properly done incident to the defendant's arrest for an open container offense, where the officer had probable cause to arrest before the search even though the formal arrest did not occur until after the search was completed. The court noted that under *Gant* "[a]n officer may conduct a warrantless search of a suspect's vehicle incident to his arrest if he has a reasonable belief that evidence related to the offense of arrest may be found inside the vehicle." Here, the trial court's unchallenged findings of fact that it is common to find alcohol in vehicles of individuals stopped for alcohol violations; and that the center console in defendant's car was large enough to hold beer cans support the conclusion that the arresting officer had a reasonable belief that evidence related to the open container violation might be found in the defendant's vehicle. The court rejected the defendant's argument that the search was an unconstitutional "search incident to citation," noting that the defendant was arrested, not issued a citation.

Criminal Offenses

Participants in Crime

State v. Grainger, 367 N.C. 696 (Dec. 19, 2014). In this murder case, the trial court did not err by denying the defendant's request for a jury instruction on accessory before the fact. Because the defendant was convicted of first-degree murder under theories of both premeditation and deliberation and the felony murder rule and the defendant's conviction for first-degree murder under the theory of felony murder is supported by the evidence (including the defendant's own statements to the police and thus not solely

based on the uncorroborated testimony of the principal), the court of appeals erred by concluding that a new trial was required.

General Crimes

State v. McClaude, __ N.C. App. __, 765 S.E.2d 104 (Nov. 18, 2014). Finding *State v. Euceda-Valle*, 182 N.C. App. 268, 276 (2007), controlling, the court held that there was insufficient evidence that the defendant and another person named Hall conspired to sell and deliver cocaine. The evidence showed only that the drugs were found in a car driven by Hall in which the defendant was a passenger.

Homicide

State v. Maldonado, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). In this first-degree murder case, the court rejected the defendant's argument that there was an insufficient relationship between the felony supporting felony-murder (discharging a firearm into occupied property) and the death. The law requires only that the death occur "in the perpetration or attempted perpetration" of a predicate felony; there need not be a causal "causal relationship"' between the felony and the homicide. All that is required is that the events occur during a single transaction. Here, the defendant stopped shooting into the house after forcing his way through the front door; he then continued shooting inside. The defendant argued that once he was inside the victim attempted to take his gun and that this constituted a break in the chain of events that led to her death. Even if this version of the facts were true, the victim did not break the chain of events by defending herself inside her home after the defendant continued his assault indoors.

State v. English, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). The trial court did not err by denying the defendant's motion to dismiss a voluntary manslaughter charge. The court rejected the defendant's argument that there was insufficient evidence that she killed the victim by an intentional and unlawful act, noting that although there was no direct evidence that the defendant was aware that she hit the victim with her car until after it occurred, there was circumstantial evidence that she intentionally struck him. Specifically, the victim had a history, while under the influence of drugs and/or alcohol (as he was on the day in question), of acting emotionally and physically abusive towards the defendant; when the victim was angry, he would tell the defendant to "[g]et her stuff and get out," so the defendant felt "trapped"; on the day in question the victim drank alcohol and allegedly smoked crack before hitting the defendant in the face, knocking her from the porch to the yard; the defendant felt scared and went "to a different state of mind" after being hit; before driving forward in her vehicle, the defendant observed the victim standing in the yard, near the patio stairs; and the defendant struck the stairs because she "wanted to be evil too." The court concluded: "From this evidence, a jury could find Defendant felt trapped in a cycle of emotional and physical abuse, and after a particularly violent physical assault, she decided it was time to break free."

State v. Grullon, ___ N.C. App. ___, 770 S.E.2d 379 (Mar. 17, 2015). In this first-degree murder case, the trial court did not err by instructing the jury on a theory of lying in wait. The court rejected the defendant's argument that this theory required the State to prove a "deadly purpose" to kill, noting that the state Supreme Court has held that "lying in wait is a physical act and does not require a finding of any specific intent." (quotation omitted). The court continued:

> As the Supreme Court has previously held, [h]omicide by lying in wait is committed when: the defendant lies in wait for the victim, that is, waits and watches for the victim in ambush for a private attack on him, intentionally assaults the victim, proximately causing the victim's death. In other words, a defendant need not intend, have a purpose, or even expect that the victim would die. The only requirement is that the assault committed through lying in wait be a proximate cause of the victim's death.

(quotation and citation omitted). The court went on to find that the evidence was sufficient to support a lying in wait instruction where the defendant waited underneath a darkened staircase for the opportunity to rob the victim.

State v. Childress, 367 N.C. 693 (Dec. 19, 2014). The defendant's actions provided sufficient evidence of premeditation and deliberation to survive a motion to dismiss an attempted murder charge. From the safety of a car, the defendant drove by the victim's home, shouted a phrase used by gang members, and then returned to shoot at her and repeatedly fire bullets into her home when she retreated from his attack. The court noted that the victim did not provoke the defendant in any way and was unarmed; the defendant drove by the victim's home before returning and shooting at her; during this initial drive-by, the defendant or a companion in his car yelled out "[W]hat's popping," a phrase associated with gang activity that a jury may interpret as a threat; the defendant had a firearm with him; and the defendant fired multiple shots toward the victim and her home. This evidence supported an inference that the defendant deliberately and with premeditation set out to kill the victim.

State v. Hicks, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). In this first-degree murder case, the evidence was sufficient to go to the jury on the theory of premeditation and deliberation. Among other things, there was no provocation by the victim, who was unarmed; the defendant shot the victim at least four times; and after the shooting the defendant immediately left the scene without aiding the victim.

State v. Mitchell, ___ N.C. App. ___, 770 S.E.2d 740 (April 7, 2015). In this first-degree murder case there was sufficient evidence of premeditation and deliberation. Among other things, the evidence showed a lack of provocation by the victim, that just prior to the shooting the defendant told others that he was going to shoot a man over a trivial matter, that the defendant shot the victim 3 times and that the victim may have been turning away from or trying to escape at the time.

Assaults

State v. Floyd, ___ N.C. App. ___, 766 S.E.2d 361 (Dec. 16, 2014), *review allowed*, ___ N.C. ___, 771 S.E.2d 295 (Apr. 9, 2015). Because attempted assault with a deadly weapon inflicting serious injury is not a recognized offense in North Carolina, the trial court erred by denying the defendant's motion to dismiss a charge of felon in possession when it was based on a felony conviction for attempted assault. The court noted that prior cases—*State v. Currence*, 14 N.C. App. 263 (1972), and *State v. Barksdale*, 181 N.C. App. 302 (2007)—held that attempted assault is not a crime. It concluded that the trial court lacked jurisdiction to enter judgment on the attempted assault conviction and that therefore that judgment was void. The court rejected the State's argument that a different result should obtain because the defendant plead guilty to attempted assault as part of a plea agreement, stating: "The fact that Defendant's attempted assault conviction stemmed from a guilty plea rather than a jury verdict does not . . . affect the required jurisdictional analysis." The court also rejected the State's argument that the defendant cannot collaterally attack the validity of his attempted assault conviction in an appeal on the felon in possession case; the State had argued that the appropriate procedural mechanism was a motion for appropriate relief. Finally, the court held that for the reasons noted above, the attempted assault conviction could not support a determination that the defendant attained habitual felon status.

State v. Hicks, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). The evidence was sufficient to support a conviction for discharging a firearm into occupied property (a vehicle), an offense used to support a felony-murder conviction. The defendant argued that the evidence was conflicting as to whether he fired the shots from inside or outside the vehicle. Citing prior case law, the court noted that an individual discharges a firearm "into" an occupied vehicle even if the firearm is inside the vehicle, as long as the individual is outside the vehicle when discharging the weapon. The court continued, noting that mere

contradictions in the evidence do not warrant dismissal and that here the evidence was sufficient to go to the jury.

State v. Mitchell, ___ N.C. App. ___, 770 S.E.2d 740 (April 7, 2015). With regard to a felony-murder charge, the evidence was sufficient to show the underlying felony of discharging a firearm into occupied property (here, a vehicle). The court rejected the defendant's argument that the evidence failed to establish that he was outside of the vehicle when he shot the victim.

State v. Friend, __ N.C. App. __, 768 S.E.2d 146 (Dec. 2, 2014). The court rejected the defendant's argument that the trial court erred by denying his motion to dismiss the charge of assault causing physical injury on a law enforcement officer, which occurred at the local jail. After arresting the defendant, Captain Sumner transported the defendant to jail, escorted him to a holding cell, removed his handcuffs, and closed the door to the holding cell, believing it would lock behind him automatically. However, the door remained unlocked. When Sumner noticed the defendant standing in the holding cell doorway with the door open, he told the defendant to get back inside the cell. Instead, the defendant tackled Sumner. The defendant argued that there was insufficient evidence that the officer was discharging a duty of his office at the time. The court rejected this argument, concluding that "[b]y remaining at the jail to ensure the safety of other officers," Sumner was discharging the duties of his office. In the course of its holding, the court noted that "unlike the offense of resisting, delaying, or obstructing an officer, . . . criminal liability for the offense of assaulting an officer is not limited to situations where an officer is engaging in lawful conduct in the performance or attempted performance of his or her official duties."

State v. Baldwin, ___ N.C. App. ___, 770 S.E.2d 167 (April 7, 2015). (1) Under *State v. Tirado*, 358 N.C. 551, 579 (2004) (trial court did not subject the defendants to double jeopardy by convicting them of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) arising from the same conduct), no violation of double jeopardy occurred when the trial court denied the defendant's motion to require the State to elect between charges of attempted first-degree murder and AWDWIKISI. (2) Because the assault inflicting serious bodily injury statute begins with the language "Unless the conduct is covered under some other provision of law providing greater punishment," the trial court erred by sentencing the defendant to this Class F felony when it also sentenced the defendant for AWDWIKISI, a Class C felony. [Author's note: Although the court characterized this as a double jeopardy issue, it is best understood as one of legislative intent. Because each of the offenses requires proof of an element not required for the other the offenses are not the "same" for purposes of double jeopardy. Thus, double jeopardy is not implicated. However, even if offenses are not the "same offense," legislative intent expressed in statutory provisions may bar multiple convictions, as it does here with the "unless covered" language. For a more complete discussion of double jeopardy, see the chapter in my judges' Benchbook here]

State v. Ortiz, ___ N.C. App. ___, 768 S.E.2d 322 (Dec. 31, 2014). The trial court did not err by convicting the defendant of both robbery with a dangerous weapon and assault with a deadly weapon where each conviction arose from discreet conduct.

State v. Coakley, ___ N.C. App. ___, 767 S.E.2d 418 (Dec. 31, 2014). (1) The trial court erred by sentencing the defendant for both assault inflicting serious bodily injury under G.S. 14-32.4(a) and assault with a deadly weapon inflicting serious injury under G.S. 14-32(b), when both charges arose from the same assault. The court reasoned that G.S. 14-32(b) prohibits punishment of any person convicted under its provisions if "the conduct is covered under some other provision of law providing greater punishment." Here, the defendant's conduct pertaining to his charge for and conviction of assault with a deadly weapon inflicting serious injury was covered by the provisions of G.S. 14-32(b), which permits a greater punishment than that provided for in G.S. 14-32.4(a). (2) In this malicious maiming case, the court rejected the defendant's argument that the trial court erred by disjunctively instructing the jury that it

could convict him if it found that he had "disabled or put out" the victim's eye. Relying on cases from other jurisdictions, the court held that the total loss of eyesight, without actual physical removal, is sufficient to support a finding that an eye was "put out" and, therefore, is sufficient to support a conviction for malicious maiming under G.S. 14-30. It went on to reject the defendant's argument that because the term disabled could have been interpreted as something less than complete blindness, the trial court's instructions were erroneous. The court reasoned that based on the evidence in the case—it was uncontroverted that the victim completely lost his eyesight because of the defendant's actions—the jury could not have concluded that the term disabled meant something other than complete blindness. Thus, the court concluded that it need not decide whether partial or temporary blindness constitutes malicious maiming under the statute.

State v. Jones, __ N.C. App. __, 767 S.E.2d 341 (Dec. 2, 2014). The trial court erred by sentencing the defendant for both habitual misdemeanor assault and assault on a female where both convictions arose out of the same assault. The statute provides that "unless the conduct is covered under some other provision of law providing greater punishment," an assault on a female is a Class A1 misdemeanor. Here, the conduct was covered under another provision of law providing greater punishment, habitual misdemeanor assault, a Class H felony.

DVPO Offenses

State v. Edgerton, ___ N.C. ___, 769 S.E.2d 837 (April 10, 2015). In a case where the defendant was found guilty of violation of a DVPO with a deadly weapon, the court per curiam reversed and remanded for the reasons stated in the dissenting opinion below. In the decision below, *State v. Edgerton*, ___ N.C. App. ___, 759 S.E.2d 669 (2014), the court held, over a dissent, that the trial court committed plain error by failing to instruct the jury on the lesser included offense, misdemeanor violation of a DVPO, where the court had determined that the weapon at issue was not a deadly weapon per se. The dissenting judge did not agree with the majority that any error rose to the level of plain error.

State v. Jones, __ N.C. App. __, 767 S.E.2d 341 (Dec. 2, 2014). The trial court erred by entering judgment and sentencing the defendant on both three counts of habitual violation of a DVPO and one count of interfering with a witness based on the same conduct (sending three letters to the victim asking her not to show up for his court date). The DVPO statute states that "[u]nless covered under some other provision of law providing greater punishment," punishment for the offense at issue was a Class H felony. Here, the conduct was covered under a provision of law providing greater punishment, interfering with a witness, which is a Class G felony.

Sexual Assaults

Crime Against Nature

In re J.F., __ N.C. App. __, 766 S.E.2d 341 (Nov. 18, 2014). (1) In a delinquency case where the petitions alleged sexual offense and crime against nature in that the victim performed fellatio on the juvenile, the court rejected the juvenile's argument that the petitions failed to allege a crime because the victim "was the actor." Sexual offense and crime against nature do not require that the accused perform a sexual act on the victim, but rather that the accused engage in a sexual act with the victim. (2) The court rejected the juvenile's argument that to prove first-degree statutory sexual offense and crime against nature the prosecution had to show that the defendant acted with a sexual purpose. (3) Penetration is a required element of crime against nature and in this case insufficient evidence was presented on that issue. The victim testified that he licked but did not suck the juvenile's penis. Distinguishing *In re Heil*, 145 N.C. App. 24 (2001) (concluding that based on the size difference between the juvenile and the victim and "the fact that the incident occurred in the presumably close quarters of a closet, it was reasonable for the trial court to find . . . that there was some penetration, albeit slight, of juvenile's penis

into [the four-year-old victim's] mouth"), the court declined the State's invitation to infer penetration based on the surrounding circumstances.

Indecent Liberties

State v. Pierce, ___ N.C. App. ___, 767 S.E.2d 860 (Dec. 31, 2014). The defendant was properly convicted of two counts of indecent liberties with victim Melissa in Caldwell County. The State presented evidence that the defendant had sex with his girlfriend in the presence of Melissa, performed oral sex on Melissa, and then forced his girlfriend to perform oral sex on Melissa while he watched. The defendant argued that this evidence only supports one count of indecent liberties with a child. The court disagreed, holding that pursuant to *State v. James*, 182 N.C. App. 698 (2007), multiple sexual acts during a single encounter may form the basis for multiple counts of indecent liberties.

Rape

State v. Banks, 367 N.C. 652 (Dec. 19, 2014). Because the defendant was properly convicted and sentenced for both statutory rape and second-degree rape when the convictions were based on a single act of sexual intercourse, counsel was not ineffective by failing to make a double jeopardy objection. The defendant was convicted of statutory rape of a 15-year-old and second-degree rape of a mentally disabled person for engaging in a single act of vaginal intercourse with the victim, who suffers from various mental disorders and is mildly to moderately mentally disabled. At the time, the defendant was 29 years old and the victim was 15. The court concluded that although based on the same act, the two offenses are separate and distinct under the *Blockburger* "same offense" test because each requires proof of an element that the other does not. Specifically, statutory rape involves an age component and second-degree rape involves the act of intercourse with a victim who suffers from a mental disability or mental incapacity. It continued:

> Given the elements of second-degree rape and statutory rape, it is clear that the legislature intended to separately punish the act of intercourse with a victim who, because of her age, is unable to consent to the act, and the act of intercourse with a victim who, because of a mental disability or mental incapacity, is unable to consent to the act. . . .
>
> Because it is the General Assembly's intent for defendants to be separately punished for a violation of the second-degree rape and statutory rape statutes arising from a single act of sexual intercourse when the elements of each offense are satisfied, defendant's argument that he was prejudiced by counsel's failure to raise the argument of double jeopardy would fail. We therefore conclude that defendant was not prejudiced.

State v. Miles, ___ N.C. App. ___, 764 S.E.2d 237 (Nov. 4, 2014). In a case where the defendant was convicted of second-degree rape, breaking or entering, and two counts of attempted second-degree sexual offense, the trial court did not err by denying the defendant's motion to dismiss one count of attempted second-degree sexual offense. The defendant asserted that the evidence did not show an intent to commit the act by force and against the victim's will. The court disagreed:

> [W]here the request for fellatio is immediately preceded by defendant tricking the victim into letting him into her apartment, raping her, pulling her hair, choking her, flipping her upside down, jabbing at her with a screwdriver, refusing to allow her to leave, pulling her out of her car, taking her car keys, dragging her to his apartment, slapping her so hard that her braces cut the inside of her mouth, screaming at her, and immediately after her denial of his request, raping her again, we hold that this request is accompanied by a threat and a show of force and thus amounts to an attempt. Had [the victim] complied with defendant's request, thus completing the sexual act, we cannot imagine that the jury would have found that she had consented to perform fellatio. Given the violent, threatening context, defendant's request and presentation of his penis to [the victim]

> amounted to an attempt to engage [the victim] in a sexual act by force and against her will.

State v. Blow, ___ N.C. App. ___, 764 S.E.2d 230 (Nov. 4, 2014). In a child sexual assault case in which the defendant was convicted of three counts of first-degree rape, the court held, over a dissent, that the trial court erred by failing to dismiss one of the rape charges. The court agreed with the defendant that because the victim testified that the defendant inserted his penis into her vagina "a couple" of times, without identifying more than two acts of penetration, the State failed to present substantial evidence of three counts of rape. The court found that the defendant's admission to three instances of "sex" with the victim was not an admission of vaginal intercourse because the defendant openly admitted to performing oral sex and other acts on the victim but denied penetrating her vagina with his penis.

Sexual Offense

State v. Stepp, 367 N.C. 772 (Jan. 23, 2015) (per curiam). For reasons stated in the dissenting opinion below, the court reversed the court of appeals. In the decision below, *State v. Stepp*, __ N.C. App. __, 753 S.E.2d 485 (Jan. 21, 2014), the majority held that the trial court committed reversible error by failing to instruct the jury on an affirmative defense to a sex offense felony that was the basis of a felony-murder conviction. The jury convicted the defendant of first-degree felony-murder of a 10-month old child based on an underlying sexual offense felony. The jury's verdict indicated that it found the defendant guilty of sexual offense based on penetration of the victim's genital opening with an object. At trial, the defendant admitted that he penetrated the victim's genital opening with his finger; however, he requested an instruction on the affirmative defense provided by G.S. 14-27.1(4), that the penetration was for "accepted medical purposes," specifically, to clean feces and urine while changing her diapers. The trial court denied the request. The court of appeals found this to be error, noting that the defendant offered evidence supporting his defense. Specifically, the defendant testified at trial to the relevant facts and his medical expert stated that the victim's genital opening injuries were consistent with the defendant's stated purpose. The court of appeals reasoned:

> We believe that when the Legislature defined "sexual act" as the penetration of a genital opening with an object, it provided the "accepted medical purposes" defense, in part, to shield a parent – or another charged with the caretaking of an infant – from prosecution for engaging in sexual conduct with a child when caring for the cleanliness and health needs of an infant, including the act of cleaning feces and urine from the genital opening with a wipe during a diaper change. To hold otherwise would create the absurd result that a parent could not penetrate the labia of his infant daughter to clean away feces and urine or to apply cream to treat a diaper rash without committing a Class B1 felony, a consequence that we do not believe the Legislature intended.

(Footnote omitted). The court of appeals added that in this case, expert testimony was not required to establish that the defendant's conduct constituted an "accepted medical purpose." The dissenting judge did not believe that there was sufficient evidence that the defendant's actions fell within the definition of accepted medical purpose and thus concluded that the defendant was not entitled to an instruction on the affirmative defense. The dissenting judge reasoned that for this defense to apply, there must be "some direct testimony that the considered conduct is for a medically accepted purpose" and no such evidence was offered here.

State v. Henderson, __ N.C. App. __, 756 S.E.2d 860 (April 15, 2014). The court affirmed a conviction for second-degree sexual offense in a case where the defendant surprised a Target shopper by putting his hand up her skirt and penetrating her vagina. The court rejected the defendant's argument that because his action surprised the victim, he did not act by force and against her will.

In re J.F., __ N.C. App. __, 766 S.E.2d 341 (Nov. 18, 2014). (1) In a sexual offense case involving fellatio, proof of penetration is not required. (2) In a delinquency case where the petitions alleged sexual offense and crime against nature in that the victim performed fellatio on the juvenile, the court rejected the juvenile's argument that the petitions failed to allege a crime because the victim "was the actor." Sexual offense and crime against nature do not require that the accused perform a sexual act on the victim, but rather that the accused engage in a sexual act with the victim. (3) The court rejected the juvenile's argument that to prove first-degree statutory sexual offense and crime against nature the prosecution had to show that the defendant acted with a sexual purpose.

State v. Pierce, ___ N.C. App. ___, 767 S.E.2d 860 (Dec. 31, 2014). With respect to a sexual offense charge allegedly committed on Melissa in Burke County, the court held that the State failed to present substantial evidence that a sexual act occurred. The only evidence presented by the State regarding a sexual act that occurred was Melissa's testimony that the defendant placed his finger inside her vagina. However, this evidence was not admitted as substantive evidence. The State presented specific evidence that the defendant performed oral sex on Melissa—a sexual act under the statute--but that act occurred in Caldwell County, not Burke. Although Melissa also testified generally that she was "sexually assaulted" more than 10 times, presumably in Burke County, nothing in her testimony clarified whether the phrase "sexual assault," referred to sexual acts within the meaning of G.S. 14-27.4A, vaginal intercourse, or acts amounting only to indecent liberties with a child. Thus, the court concluded the evidence is insufficient to support the Burke County sexual offense conviction

State v. Spence, __ N.C. App. __, 764 S.E.2d 670 (Nov. 18, 2014). In this child sexual abuse case, the trial court erred by denying the defendant's motion to dismiss first-degree sex offense charges where there was no substantive evidence of a sexual act; the evidence indicated only vaginal penetration, which cannot support a conviction of sexual offense.

Sex Offender Crimes

State v. Surratt, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). (1) The State presented sufficient evidence to support a conviction for failure to register as a sex offender. The court rejected the defendant's argument that he was not required to register in connection with a 1994 indecent liberties conviction. The court took judicial notice of the fact that the defendant's prison release date for that conviction was Sept. 24, 1995 but that he was not actually released until Jan. 24, 1999 because he was serving a consecutive term for crime against nature. Viewing the later date as the date of the defendant's release from prison, the court held that the registration requirements were applicable to him because they took effect in January 1996 and applied to offenders then serving time for a reportable sexual offense. The court further held that because the defendant was a person required to register when the 2008 amendments to the sex offender registration statute took effect, those amendments applied to him as well. (2) Where there was no evidence that the defendant willfully gave an address he knew to be false, the evidence was insufficient to support a conviction for submitting information under false pretenses to the sex offender registry in violation of G.S. 14-208.9A(a)(1). The State's theory of the case was that the defendant willfully made a false statement to an officer, stating that he continued to reside at his father's residence. Citing prior case law, the court held that the statute only applies to providing false or misleading information on forms submitted pursuant to the sex offender law. Here, the defendant never filled out any verification form listing the address in question. It ruled: "An executed verification form is required before one can be charged with falsifying or forging the document."

State v. Moore (No. 14-1033), ___ N.C. App. ___, 770 S.E.2d 131 (April 7, 2015), *temporary stay allowed*, ___ N.C. ___, 771 S.E.2d 533 (Apr. 27, 2015). In this failure to register case based on willful failure to return a verification form as required by G.S. 14-208.9A, the trial court erred by denying the defendant's motion to dismiss. To prove its case, the State must prove that the defendant actually received

the letter containing the verification form. It noted: "actual receipt could have been easily shown by the State if it simply checked the box marked "Restricted Delivery?" and paid the extra fee to restrict delivery of the … letter to the addressee, the sex offender." The court also found that there was insufficient evidence that the sheriff's office made a reasonable attempt to verify the defendant's address, another element of the offense. The evidence indicated that the only attempt the Deputy made to verify that the defendant still resided at his last registered address was to confirm with the local jail that the defendant was not incarcerated. Finally, the court found that State failed to show any evidence that the defendant willfully failed to return the verification form.

State v. Barnett, ___ N.C. App. ___, 768 S.E.2d 327 (Jan. 20, 2015), *temporary stay allowed*, __ N.C. __, 767 S.E.2d 856 (Feb. 6, 2015). In a failure to register case, there was insufficient evidence that the defendant changed his address. The indictment alleged that the defendant failed to notify the sheriff's office within three business days of his change of address; it did not allege that he failed to update his registration information upon release from a penal institution. The court rejected the State's argument that when the defendant was incarcerated after his initial registration, his subsequent release from incarceration required him to register a change of address, concluding that the statutory provisions regarding registration upon release from a penal institution applied to such situations.

State v. Crockett, ___ N.C. App. ___, 767 S.E.2d 78 (Dec. 16, 2014). There was sufficient evidence that the defendant violated the sex offender registration statutes by failing to notify authorities of a change of address. The defendant listed his address as 945 North College Street, the address of the Urban Ministry Center, a non-profit organization that provides services to the homeless community. The found that "Urban Ministry is not a valid address at which Defendant could register . . . because Defendant could not live there." It explained:

> Critical to our holding . . . that Defendant did not "live" at Urban Ministry is the fact that he was not permitted to keep any personal belongings there, nor could he sleep at Urban Ministry. In addition, Urban Ministry did not permit people to "reside" at the facility, as it closes each day. The activities which Defendant, and many other homeless people, are permitted to perform at the Urban Ministry facility does not make it his "residence" because he cannot "live" there.
>
> Urban Ministry's operational hours are similar to those of a business. It is open from 8:30 a.m. to 4:00 p.m. during the week and from 9:00 a.m. to 12:30 p.m. on weekends. Visitors at Urban Ministry may use the facility for activities such as showering, napping, and changing clothes, but no one is permitted to sleep there and there are no beds. The purpose of the sex offender registration program is "to assist law enforcement agencies and the public in knowing the whereabouts of sex offenders and in locating them when necessary." Allowing Defendant to register Urban Ministry as a valid address would run contrary to the legislative intent behind the sex offender registration statute. (citation omitted).

State v. Pierce, ___ N.C. App. ___, 766 S.E.2d 854 (Dec. 16, 2014). In a failing to register case there was sufficient evidence that the defendant changed his address from Burke to Wilkes County. Among other things, a witness testified that the defendant was at his ex-wife Joann's home in Wilkes County all week, including the evenings. The court concluded: "the State presented substantial evidence that, although defendant may still have had his permanent, established home in Burke County, he had, at a minimum, a temporary home address in Wilkes County." (quotation omitted). It explained:

> [T]he evidence . . . showed that defendant still received mail, maintained a presence, and engaged in some "core necessities of daily living," at his home in Burke County. However, the evidence also would allow a jury to reasonably conclude that he temporarily resided at Joann's in Wilkes County. Specifically, [witnesses] testified that defendant was often at Joann's all week. Furthermore, [a witness] testified that defendant

> engaged in activities that only someone living at Joann's would do. Thus . . . the evidence supported a reasonable conclusion that not only did defendant maintain a permanent domicile in Burke County, but he also had a temporary residence or place of abode at Joann's in Wilkes County. Although defendant may have considered the house in Burke County his "home," . . . his subjective belief and even the fact that he was "in and out" of the Burke County house does not prevent him from having a second, temporary residence. (citations omitted).

Kidnapping & Related Offenses

State v. Parker, __ N.C. App. __, 768 S.E.2d 1 (Dec. 2, 2014), *temporary stay allowed*, __ N.C. __, 768 S.E.2d 851 (Dec. 19, 2014). In a case in which the defendant was convicted of kidnapping, rape and sexual assault, because the restraint supporting the kidnapping charge was inherent in the rape and sexual assault, the kidnapping conviction cannot stand. The court explained:

> Defendant grabbed Kelly from behind and forced her to the ground. Defendant put his knee to her chest. He grabbed her hair in order to turn her around after penetrating her vaginally from behind, and he put his hands around her throat as he penetrated her vaginally again and forced her to engage him in oral sex. Though the amount of force used by Defendant in restraining Kelly may have been more than necessary to accomplish the rapes and sexual assault, the restraint was inherent "in the actual commission" of those acts. Unlike in *Fulcher*, where the victims' hands were bound before any sexual offense was committed, Defendant's acts of restraint occurred as part of the commission of the sexual offenses. (citation omitted).

State v. Barksdale, __ N.C. App. __, 768 S.E.2d 126 (Dec. 2, 2014). The State conceded and the court held that by sentencing the defendant for both first-degree kidnapping and the underlying sexual assault that was an element of the kidnapping charge a violation of double jeopardy occurred.

Larceny & Related Offenses

State v. Hole, ___ N.C. App. ___, 770 S.E.2d 760 (April 21, 2015). Following *State v. Ross*, 46 N.C. App. 338 (1980), the court held that unauthorized use of a motor vehicle "may be a lesser included offense of larceny where there is evidence to support the charge." Here, while unauthorized use may have been a lesser included of the charged larceny, the trial court did not commit plain error by failing to instruct on the lesser where the jury rejected the defendant's voluntary intoxication defense.

State v. Larkin, __ N.C. App. __, 764 S.E.2d 681 (Nov. 18, 2014). Shoeprint evidence and evidence that the defendant possessed the victim's Bose CD changer and radio five months after they were stolen was sufficient to sustain the defendant's convictions for burglary and larceny.

Robbery

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). In a multi-count robbery case, there was sufficient evidence of common law robbery against victim Adrienne. Although Adrienne herself did not testify, the evidence showed that she was a resident of the mobile home where the robbery occurred, that another victim heard her screaming during the intrusion, her face was injured, two witnesses testified that Adrienne had been beaten, and there was evidence that her personal belongings were taken from on, in, or near a nightstand next to her bed.

State v. Wright, ___ N.C. App. ___, 770 S.E.2d 757 (April 7, 2015). Applying a definitional rather than a factual test, the court held that extortion is not a lesser included offense of armed robbery.

State v. Ortiz, ___ N.C. App. ___, 768 S.E.2d 322 (Dec. 31, 2014). The trial court did not err by convicting the defendant of both robbery with a dangerous weapon and assault with a deadly weapon where each conviction arose from discreet conduct.

State v. Jastrow, __ N.C. App. __, 764 S.E.2d 663 (Nov. 18, 2014). (1) Where the defendant and his accomplices attempted to rob two victims inside a residence, the trial court properly denied the defendant's motion to dismiss one of the charges. The defendant argued that because only one residence was involved, only one charge was proper. Distinguishing cases holding that only one robbery occurs when the defendant robs a business of its property by taking it from multiple employees, the court noted that here the defendant and his accomplices demanded that both victims turn over their own personal property. (2) Although the group initially planned to rob just one person, the defendant properly was convicted of attempting to rob a second person they found at the residence. The attempted robbery of the second person was in pursuit of the group's common plan.

Frauds

State v. Barker, ___ N.C. App. ___, 770 S.E.2d 142 (April 7, 2015). In an obtaining property by false pretenses case, the evidence was sufficient to support a conviction. The charges arose out of the defendant's acts of approaching two individuals (Ms. Hoenig and Ms. Harward), falsely telling them their roofs needed repair, taking payment for the work and then performing shoddy work or not completing the job. The court rejected the defendant's argument that the evidence showed only that he "charged a lot for poor quality work" and not that he "obtained the property alleged by means of a misrepresentation," finding that "[the] evidence demonstrates that defendant deliberately targeted Ms. Harward and Ms. Hoenig, two elderly women, for the purpose of defrauding each of them by claiming their roofs needed significant repairs when, as the State's evidence showed, neither woman's roof needed repair at all."

State v. Pendergraft, ___ N.C. App. ___, 767 S.E.2d 674 (Dec. 31, 2014). The evidence was sufficient to establish obtaining property by false pretenses. After the defendant filed false documents purporting to give him a property interest in a home, he was found to be occupying the premises and arrested. The court rejected the defendant's argument that the evidence shows that he honestly, albeit mistakenly, believed that he could obtain title to the property by adverse possession and that such a showing precluded the jury from convicting him of obtaining property by false pretenses. The court rejected the assertion that anyone who attempts to adversely possess a tract of property does not possess the intent necessary for a finding of guilt, a position it described as tantamount to making an intention to adversely possess a tract of property an affirmative defense to a false pretenses charge.

Weapons Offenses

State v. Huckelba, ___ N.C. App. ___, ___ S.E.2d ___ (April 21, 2015), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d. ___ (May 8, 2015). Deciding an issue of first impression, the court held that to be guilty of possessing or carrying weapons on educational property under G.S. 14-269.2(b) the State must prove that the defendant "both knowingly possessed or carried a prohibited weapon and knowingly entered educational property with that weapon." With regard to proving that the defendant knowingly entered educational property, the court explained:

> [T]he State is not saddled with an unduly heavy burden of proving a defendant's subjective knowledge of the boundaries of educational property. Rather, the State need only prove a defendant's knowledge of her presence on educational property "by reference to the facts and circumstances surrounding the case." If, for example, the

> evidence shows that a defendant entered a school building and interacted with children while knowingly possessing a gun, the State would have little difficulty proving to the jury that the defendant had knowledge of her presence on educational property. If, however, the evidence shows that a defendant drove into an empty parking lot that is open to the public while knowingly possessing a gun—as in this case—the jury will likely need more evidence of the circumstances in order to find that the defendant knowingly entered educational property.

The court went on to hold that to the extent *State v. Haskins*, 160 N.C. App. 349 (2003), "conflicts with this opinion, it is now overruled." It also held, over a dissent, that in light of the above, the trial court committed plain error by failing to instruct the jury that it must find that the defendant knowingly possessed the weapon on educational property. [Author's note: This holding will require modification of the relevant pattern jury instructions, here N.C.P.I.—Crim 235.17.]

Obstruction & Related Offenses

State v. Jones, __ N.C. App. __, 767 S.E.2d 341 (Dec. 2, 2014). In an interfering with a witness case, the trial court properly instructed the jury that the first element of the offense was that "a person was summoned as a witness in a court of this state. You are instructed that it is immaterial that the victim was regularly summoned or legally bound to attend." The second sentence properly informed the jury that the victim need only be a "prospective witness" for this element to be satisfied.

State v. Friend, __ N.C. App. __, 768 S.E.2d 146 (Dec. 2, 2014). The trial court properly denied the defendant's motion to dismiss the charge of resisting, delaying, or obstructing a public officer where the evidence showed that the defendant refused to provide the officer with his identification so that the officer could issue a citation for a seatbelt violation. The court held: "failure to provide information about one's identity during a lawful stop can constitute resistance, delay, or obstruction within the meaning of [G.S.] 14-223." It reasoned that unlike failing to provide a social security number, the "Defendant's refusal to provide identifying information did hinder [the] Officer . . . from completing the seatbelt citation." It continued:

> There are, of course, circumstances where one would be excused from providing his or her identity to an officer, and, therefore, not subject to prosecution under N.C. Gen. Stat. §14-223. For instance, the Fifth Amendment's protection against compelled self-incrimination might justify a refusal to provide such information; however, as the United States Supreme Court has observed, "[a]nswering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances." Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 191, 124 S. Ct. 2451, 2461, 159 L. Ed.2d 292, 306 (2004). In the present case, Defendant has not made any showing that he was justified in refusing to provide his identity to Officer Benton.

State v. Carter, __ N.C. App. __, 765 S.E.2d 56 (Nov. 18, 2014). There was insufficient evidence to support a conviction of resisting an officer in a case that arose out of the defendant's refusal to allow the officer to search him pursuant to a search warrant. Because the arresting officer did not read or produce a copy of the warrant to the defendant prior to seeking to search the defendant's person as required by G.S. 15A-252, the officer was not engaged in lawful conduct and therefore the evidence was insufficient to support a conviction.

Gambling

State v. Spruill, __ N.C. App. __, 765 S.E.2d 84 (Nov. 18, 2014). There was sufficient evidence that the defendants conducted a sweepstakes through the use of an entertaining display, including the entry process or the revealing of a prize in violation of G.S. 14-306.4. The court rejected the defendants' argument that because the prize was revealed to the patron prior to an opportunity to play a game, they did not run afoul of the statute.

Drug Offenses

State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (Nov. 18, 2014). In a possession of cocaine case, the evidence was sufficient to prove that the defendant constructively possessed cocaine. The drugs were found on the ground near the rear driver's side of the defendant's car after an officer had struggled with the defendant. Among other things, video from the officer's squad car showed that during the struggle the defendant dropped something that looked like an off-white rock near rear driver's side of the vehicle. This and other facts constituted sufficient evidence of other incriminating circumstances to establish constructive possession.

Motor Vehicle Offenses

State v. Ricks, __ N.C. App. __, 764 S.E.2d 692 (Nov. 18, 2014). (1) In this impaired driving case, there was insufficient evidence that a cut through on a vacant lot was a public vehicular area within the meaning of G.S. 20-4.01(32). The State argued that the cut through was a public vehicular area because it was an area "used by the public for vehicular traffic at any time" under G.S. 20-4.01(32)(a). The court concluded that the definition of a public vehicular area in that subsection "contemplates areas generally open to and used by the public for vehicular traffic as a matter of right or areas used for vehicular traffic that are associated with places generally open to and used by the public, such as driveways and parking lots to institutions and businesses open to the public." In this case there was no evidence concerning the lot's ownership or that it had been designated as a public vehicular area by the owner. (2) Even if there had been sufficient evidence to submit the issue to the jury, the trial court erred in its jury instructions. The trial court instructed the jury that a public vehicular area is "any area within the State of North Carolina used by the public for vehicular traffic at any time including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley or parking lot." The court noted that

> the entire definition of public vehicular area in [G.S.] 20-4.01(32)(a) is significant to a determination of whether an area meets the definition of a public vehicular area; the examples are not separable from the statute. . . . [As such] the trial court erred in abbreviating the definition of public vehicular area in the instructions to the jury and by preventing defendant from arguing his position in accordance with [G.S.] 20-4.01(32)(a)."

Defenses

Diminished Capacity

State v. Maldonado, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). The trial court did not err by denying the defendant's request for a diminished capacity instruction with respect to a charge of discharging a firearm into occupied property that served as a felony for purposes of a felony-murder conviction. Because discharging a firearm into occupied property is a general intent crime, diminished capacity offers no defense.

Self-Defense

State v. Monroe, 367 N.C. 771 (Jan. 23, 2015) (per curiam). The court affirmed the decision below in *State v. Monroe*, __ N.C. App. __, 756 S.E.2d 376 (April 15, 2014) (holding, over a dissent, that even assuming arguendo that the rationale in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), applies in North Carolina, the trial court did not err by denying the defendant's request to give a special instruction on self-defense as to the charge of possession of a firearm by a felon; the majority concluded that the evidence did not support a conclusion that the defendant possessed the firearm under unlawful and present, imminent, and impending threat of death or serious bodily injury).

State v. Baldwin, ___ N.C. App. ___, 770 S.E.2d 167 (April 7, 2015). (1) The trial court did not commit plain error when it instructed the jury on attempted first-degree murder but failed to instruct on imperfect self-defense and on attempted voluntary manslaughter. In light of the fact that "the State introduced abundant testimony supporting a finding of defendant's murderous intent," the court held that the defendant failed to demonstrate that if the trial court had instructed on imperfect self-defense, the jury probably would have acquitted defendant of attempted first-degree murder.

State v. Edwards, ___ N.C. App. ___, 768 S.E.2d 619 (Feb. 17, 2015). The trial court did not err by denying defendant's request for an instruction on duress or necessity as a defense to possession of a firearm by a felon. On appeal, defendant urged the court to adopt the reasoning of *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), an opinion recognizing justification as an affirmative defense to possession of a firearm by a felon. The court declined this invitation, instead holding that assuming without deciding that the *Deleveaux* rule applies, defendant did not satisfy its prerequisites. Specifically, even when viewed in the light most favorable to defendant, the evidence does not support a conclusion that defendant, upon possessing the firearm, was under unlawful and present, imminent, and impending threat of death or serious bodily injury.

State v. Broussard, ___ N.C. App. ___, 768 S.E.2d 367 (Feb. 17, 2015). In this homicide case in which defendant was found guilty of second-degree murder, the trial court did not err by denying defendant's request to instruct the jury on voluntary manslaughter based on imperfect self-defense. The trial court instructed the jury on first-degree murder, second-degree murder and voluntary manslaughter based on heat of passion. During the charge conference, defendant requested an instruction on voluntary manslaughter based on imperfect self-defense. The trial court denied this request. On appeal, defendant argued that evidence of his stature and weight compared with that of the victim and testimony that the victim held him in a headlock when the stabbing occurred was sufficient to allow the jury to infer that he reasonably believed it was necessary to kill the victim to protect himself from death or great bodily harm. The court disagreed, concluding:

> Here, the uncontroverted evidence shows that defendant fully and aggressively participated in the altercation with [the victim] in the yard of [the victim's] home. No evidence was presented that defendant tried to get away from [the victim] or attempted to end the altercation. Where the evidence does not show that defendant reasonably believed it was necessary to stab [the victim], who was unarmed, in the chest to escape death or great bodily harm, the trial court properly denied defendant's request for a jury instruction on voluntary manslaughter based upon imperfect self-defense.

State v. Hinnant, ___ N.C. App. ___, 768 S.E.2d 317 (Dec. 31, 2014). In this assault and second-degree murder case, the trial court did not err by refusing to instruct the jury on self-defense and by omitting an instruction on voluntary manslaughter. The court noted that the defendant himself testified that when he fired the gun he did not intend to shoot anyone and that he was only firing warning shots. It noted: "our Supreme Court has held that a defendant is not entitled to jury instructions on self-defense or voluntary manslaughter 'while still insisting . . . that he did not intend to shoot anyone[.]'"

Capital Law

State v. Hembree, ___ N.C. ___, 770 S.E.2d 77 (April 10, 2015). In this capital case, the court held that the cumulative effect of several errors at trial denied the defendant a fair trial; the court vacated the conviction and sentence and remanded for a new trial. Specifically, the trial court erred by admitting an excessive amount of 404(b) evidence pertaining to another murder; by admitting evidence of the 404(b) murder victim's good character; and by allowing the prosecution to argue without basis to the jury that defense counsel had in effect suborned perjury.

Post-Conviction Proceedings

DNA Testing & Related Matters

State v. Doisey, ___ N.C. App. ___, 770 S.E.2d 177 (April 7, 2015). (1) The court dismissed the defendant's argument that the trial court erred by failing to order an inventory of biological evidence under G.S. 15A-269(f). Under the statute, a request for post-conviction DNA testing triggers an obligation for the custodial agency to inventory relevant biological evidence. Thus, a defendant who requests DNA testing under G.S. 15A-269 need not make any additional written request for an inventory of biological evidence. However, the required inventory under section 15A-269 is merely an ancillary procedure to an underlying request for DNA testing. Where, as here, the defendant has abandoned his right to appellate review of the denial of his request for DNA testing, there is no need for the inventory required by G.S. 15A-269(f). (2) The court rejected the defendant's argument that the trial court erred by failing to order preparation of an inventory of biological evidence under G.S. 15A-268 where the defendant failed to make a written request as required by G.S. 15A-268(a7). The defendant's motion asked only that certain "physical evidence obtained during the investigation of his criminal case be located and preserved."

State v. Turner, ___ N.C. App. ___, 768 S.E.2d 356 (Feb. 17, 2015). (1) The trial court did not err by denying defendant's motion for post-conviction DNA testing under G.S. 15A-269. Defendant's motion contained only the following conclusory statement regarding materiality: "The ability to conduct the requested DNA testing is material to defendant[']s defense[.]" That conclusory statement was insufficient to satisfy his burden under the statute. (2) The court rejected defendant's argument that the trial court erred in failing to consider defendant's request for the appointment of counsel pursuant to G.S. 15A-269(c), concluding that an indigent defendant must make a sufficient showing of materiality before he or she is entitled to appointment of counsel.

State v. Floyd, __ N.C. App. __, 765 S.E.2d 74 (Nov. 18, 2014). (1) The trial court properly denied the defendant's motion for post-conviction DNA testing. The defendant was convicted of murdering his wife; her body was discovered in a utility shop behind their home. He sought DNA testing of five cigarettes and a beer can that were found in the utility shop, arguing that Karen Fowler, with whom the defendant had an affair, or her sons committed the murder. He asserted that testing may show the presence of DNA from Fowler or her sons at the scene. The defendant failed to prove the materiality of sought-for evidence, given the overwhelming evidence of guilt and the fact that DNA testing would not reveal who brought the items into the utility shop or when they were left there. The court noted: "While the results from DNA testing might be considered 'relevant,' had they been offered at trial, they are not 'material' in this postconviction setting." (2) The post-conviction DNA testing statute does not require the trial court to make findings of fact when denying a motion. "A trial court's order is sufficient so long as it states that the court reviewed the defendant's motion, cites the statutory requirements for granting the motion, and concludes that the defendant failed to show that all the required conditions were met." (3) The court held that trial court was not required to hold an evidentiary hearing on the defendant's motion, noting:

> [A] trial court is not required to conduct an evidentiary hearing where it can determine from the trial record and the information in the motion that the defendant has failed to meet his burden of showing any evidence resulting from the DNA testing being sought would be material. A trial court is not required to conduct an evidentiary hearing on the motion where the moving defendant fails to describe the nature of the evidence he would present at such a hearing which would indicate that a reasonable probability exists that the DNA testing sought would produce evidence that would be material to his defense.

Motions for Appropriate Relief

State v. Stubbs, ___ N.C. ___, 770 S.E.2d 74 (April 10, 2015). Under G.S. 15A-1422, the court of appeals had subject matter jurisdiction to review the State's appeal from a trial court's order granting the defendant relief on his motion for appropriate relief. The court rejected the defendant's argument that Appellate Rule 21 required a different conclusion. In the decisions below, *State v. Stubbs*, __ N.C. App. __, 754 S.E.2d 174 (2014), the court of appeals held, over a dissent that the trial court erred by concluding that the defendant's sentence of life in prison with the possibility of parole violated of the Eighth Amendment.

Judicial Administration

Closing the Courtroom

State v. Spence, __ N.C. App. __, 764 S.E.2d 670 (Nov. 18, 2014). In a child sexual abuse case, the trial court did not violate the defendant's right to a public trial by closing the courtroom for part of the victim's testimony. The trial court made the requisite inquiries under *Waller* and made appropriate findings of fact supporting closure.