Criminal Case Update

Covering Significant Cases Decided June 9, 2015 – Sept. 25, 2015

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Contents

Criminal Procedure

Counsel Issues

State v. Smith, ___ N.C. App. ___, 773 S.E.2d 114 (June 16, 2015). (1) Where appointed counsel moved, on the sixth day of a bribery trial, for mandatory withdrawal pursuant to Rule 1.16(a) of the N.C. Rules of Professional Conduct, the trial court did not abuse its discretion by allowing withdrawal upon counsel's citation of Comment 3 to Rule 1.16 as grounds for withdrawal. Comment 3 states in relevant part:

> Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

In light of the Comment, the trial court did not abuse its discretion by accepting counsel's assertion that his withdrawal was mandatory in light of professional considerations. (2) After allowing the withdrawal, the trial court was not required to appoint substitute counsel. Under G.S. 7A-450(b), appointment of substitute counsel at the request of either an indigent defendant or original counsel is constitutionally required only when it appears that representation by original counsel could deprive the defendant of his or her right to effective assistance. The statute also provides that substitute counsel is required and must be appointed when the defendant shows good cause, such as a conflict of interest or a complete breakdown in communications. Here, counsel's representation did not fail to afford the defendant his constitutional right to counsel nor did the defendant show good cause for the appointment of substitute counsel. Nothing in the record suggests a complete breakdown in communications or a conflict of interest. Indeed, the court noted, "there was no indication that [counsel]'s work was in any way deficient. Rather, [his] withdrawal was caused by [defendant] himself demanding that [counsel] engage in unprofessional conduct. (3) The court rejected the defendant's argument that private counsel retained after this incident was presumptively ineffective given the limited time he had to review the case. The defendant noted that new counsel entered the case on the seventh day of trial and requested only a four-hour recess to prepare. Given the status of the trial and the limited work to be done, the court rejected the defendant's argument. The court also rejected the

defendant's argument that new counsel rendered deficient performance by failing to request a longer or an additional continuance.

Indictment and Pleading Issues

State v. Campbell, ___ N.C. ___, 772 S.E.2d 440 (June 11, 2015). Reversing the decision below, *State v. Campbell*, __ N.C. App. __, 759 S.E.2d. 380 (2014), the court held that a larceny indictment was not fatally flawed even though it failed to specifically allege that a church, the co-owner of the property at issue, was an entity capable of owning property. The indictment named the victim as Manna Baptist Church. The court held: "[A]lleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a 'company' or 'incorporated,' signifies an entity capable of owning property, and the line of cases from the Court of Appeals that has held otherwise is overruled."

State v. Ellis, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2015). Reversing the opinion below, *State v. Ellis*, __ N.C. App. __, 763 S.E.2d 574 (Oct. 7, 2014), the court held that an information charging injury to personal property was not fatally flawed. The information alleged the victims as: "North Carolina State University (NCSU) and NCSU High Voltage Distribution." The court noted that the defendant did not dispute that North Carolina State University is expressly authorized to own property by statute, G.S. 116-3, "and is, for that reason, an entity inherently capable of owning property." Rather, the defendant argued that the information was defective because "NCSU High Voltage Distribution" was not alleged to be an entity capable of owning property. The court held: "Assuming, without deciding, that the … information did not adequately allege that 'NCSU High Voltage Distribution' was an entity capable of owning property, that fact does not render the relevant count facially defective." In so holding the court rejected the defendant's argument that when a criminal pleading charging injury to personal property lists two entities as property owners, both must be adequately alleged to be capable of owning property. The court continued:

> [A] criminal pleading purporting to charge the commission of a property-related crime like injury to personal property is not facially invalid as long as that criminal pleading adequately alleges the existence of at least one victim that was capable of owning property, even if the same criminal pleading lists additional victims who were not alleged to have been capable of owning property as well.

State v. Pendergraft, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2015) (per curiam). Because the participating Justices were equally divided, the decision below, *State v. Pendergraft*, ___ N.C. App. ___, 767 S.E.2d 674 (Dec. 31, 2014), was left undisturbed and without precedential value. In the decision below the court of appeals had held, over a dissent, 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 of appeals 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 of appeals 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 of appeals 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. Sullivan, ___ N.C. App. ___, 775 S.E.2d 23 (July 7, 2015). (1) The court rejected the defendant's argument that there was a fatal variance between a sale and delivery indictment which alleged that the defendant sold the controlled substance to "A. Simpson" and the evidence. Although Mr. Simpson testified at trial that his name was "Cedrick Simpson," not "A. Simpson," the court rejected the defendant's argument, stating:

> [N]either during trial nor on appeal did defendant argue that he was confused as to Mr. Simpson's identity or prejudiced by the fact that the indictment identified "A. Simpson" as the purchaser instead of "Cedric Simpson" or "C. Simpson." In fact, defendant testified that he had seen Cedric Simpson daily for fifteen years at the gym. The evidence suggests that defendant had no question as to Mr. Simpson's identity. The mere fact that the indictment named "A. Simpson" as the purchaser of the controlled substances is insufficient to require that defendant's convictions be vacated when there is no evidence of prejudice, fraud, or misrepresentation.

(2) Indictments charging the defendant with drug crimes were fatally defective where they did not name controlled substances listed in Schedule III. The possession with intent and sale and delivery indictments alleged the substances at issue to be "UNI-OXIDROL," "UNIOXIDROL 50" and "SUSTANON" and alleged that those substances were "included in Schedule III of the North Carolina Controlled Substances Act." Neither Uni-Oxidrol, Oxidrol 50, nor Sustanon are included in Schedule III and none of these names are trade names for substances so included.

State v. Pender, ___ N.C. App. ___, ____ S.E.2d ___ (Sept. 1, 2015). (1) There was no fatal variance between a kidnapping indictment that named "Vera Alston" as a victim and the evidence at trial that showed the victim's last name was "Pierson." The court concluded:

> [T]he evidence is undisputed that one of defendant's victims for kidnapping and assault on the date alleged in the indictment naming "Vera Alston" as the victim was defendant's mother-in-law, Vera Pierson. Given this, there was no uncertainty that the identity of the alleged victim "Vera Alston" was actually "Vera Pierson." Further, [a]t no time … did Defendant indicate any confusion or surprise as to whom Defendant was charged with having kidnapped and assaulted. (quotation omitted).

(2) Indictments charging kidnapping with respect to victims under 16 were not defective. The indictments alleged that the defendant unlawfully confined and restrained each victim "without the victim's consent." The court rejected the defendant's argument that because the indictments failed to allege a lack of parental or custodial consent, they were fatally defective. The court explained:

> "'[T] he victim's age is not an essential element of the crime of kidnapping itself, but it is, instead, a factor which relates to the state's burden of proof in regard to consent. If the victim is shown to be under sixteen, the state has the burden of

> showing that he or she was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian. Otherwise, the state must prove that the action was taken without his or her own consent.'" (quoting State v. Hunter, 299 N.C. 29, 40 (1980)).

The court concluded: "Because age is not an essential element of the crime of kidnapping, and whether the State must prove a lack of consent from the victim or from the parent or custodian is contingent upon the victim's age, … the indictments … are adequate even though they allege that the victim ─ and not the parent ─ did not consent." (3) The court rejected the defendant's argument that there was a fatal variance between a kidnapping indictment with respect to victim D.M. and the evidence at trial. The defendant argued that the indictment alleged that D.M. was at least 16 years old but the evidence showed that D.M. was 16 at the time. The court concluded: "because D.M.'s age does not involve an essential element of the crime of kidnapping, any alleged variance in this regard could not have been fatal." (4) The issue of fatal variance is not preserved for purposes of appeal if not asserted at trial. (5) Because it is a jurisdictional issue, a defendant's argument that a criminal indictment is defective may be raised for the first time on appeal notwithstanding the defendant's failure to contest the validity of the indictment at trial.

State v. James, ___ N.C. App. ___, 774 S.E.2d 871 (July 7, 2015). Over a dissent, the court held that the indictment in a sex offender failure to notify of change of address case was not fatally defective. The indictment alleged that the defendant failed to notify the sheriff of a change of address "within three (3) days of the address change." The statute, however, requires that the notice be made within three *business* days. The defendant argued that omission of the word "business" rendered the indictment fatally defective. The court disagreed:

> While we agree that the better practice would have been for the indictment to have alleged … that Defendant failed to report his change of address within "three business days," … the superseding indictment nevertheless gave Defendant sufficient notice of the charge against him and, therefore, was not fatally defective.

Among other things, the court noted that the defendant did not argue that the omission prejudiced his ability to prepare for trial.

State v. Williams, ___ N.C. App. ___, 774 S.E.2d 880 (July 21, 2015). (1) Count 1 of an indictment charging the defendant with possessing a Schedule I controlled substance, "Methylethcathinone," with intent to manufacture, sell or deliver was fatally defective. Although 4-methylethcathinone falls within the Schedule I catch-all provision in G.S. 90-89(5)(j), "Methylethcathinone" does not. Therefore, even though 4-methylethcathinone is not specifically named in Schedule I, the trial court erred by allowing the State to amend the indictment to allege "4-Methylethcathinone" and the original indictment was fatally defective. (2) Noting that the indictment defect was a jurisdictional issue, the court rejected the State's argument that the defendant waived the previous issue by failing to object to the amendment. (3) Count two of the indictment charging the defendant with possessing a Schedule I controlled substance, "Methylone," with intent to manufacture, sell or deliver was not fatally defective. The court rejected the defendant's argument that the indictment was required to allege that methylone, while not expressly mentioned by name in G.S. 90-89, falls within the "catch-all" provision subsection (5)(j).

State v. Holanek, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). (1) In a case involving charges of obtaining property by false pretenses arising out of alleged insurance fraud, the defendant waived the issue of fatal variance by failing to raise it at trial. (2) Counsel rendered ineffective assistance by failing to move to dismiss on grounds of fatal variance. The indictment alleged that the defendant submitted fraudulent invoices for pet boarding services by Meadowsweet Pet Boarding which caused the insurance company to issue payment to her in the amount of $11,395.00. The evidence at trial, however, showed that the document at issue was a valid estimate for future services, not an invoice. Additionally, the document was sent to the insurance company three days after the company issued a check to the defendant. Therefore the insurance company's payment could not have been triggered by the defendant's submission of the document. Additionally, the State's evidence showed that it was not the written estimate that falsely led the insurance company to believe that the defendant's pets remained at Meadowsweet long after they had been removed from that facility, but rather the defendant's oral representations made later. (3) The court rejected the defendant's argument that false pretenses indictments pertaining to moving expenses were fatally defective because they did not allege the exact misrepresentation with sufficient precision. The indictments were legally sufficient: each alleged both the essential elements of the offense and the ultimate facts constituting those elements by stating that the defendant obtained money from the insurance company through a false representation made by submitting a fraudulent invoice which was intended to, and did, deceive the insurance company.

Judge's Expression of Opinion

State v. Berry, ___ N.C. ___, 773 S.E.2d 54 (June 11, 2015), In this child sexual assault case and for the reasons stated in the dissenting opinion below, the supreme court reversed *State v. Berry*, ___ N.C. App. ___, 761 S.E.2d 700 (2014), which had held that the trial court did not express an opinion on a question of fact to be decided by the jury in violation of G.S. 15A-1222 or express an opinion as to whether a fact had been proved in violation of G.S. 15A-1232 when instructing the jury on how to consider a stipulation. In the opinion below the dissenting judge believed that the trial court's instruction could have been reasonably interpreted by the jury as a mandate to accept certain disputed facts in violation of G.S. 15A-1222 and 15A-1232. The stipulation at issue concerned a report by a clinical social worker who had interviewed the victim; in it the parties agreed to let redacted portions of her report come in for the purpose of corroborating the victim's testimony. The dissenting judge interpreted the trial court's instructions to the jury as requiring them to accept the social worker's report as true.

Jury Argument

State v. Dalton, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 15, 2015). In this murder case in which the defendant asserted the insanity defense, the trial court committed prejudicial error by overruling the defendant's objection to the prosecutor's statement during closing argument that if the jury found the defendant not guilty by reason of insanity, it was "very possible" that she could be released from civil commitment in fifty days. This statement was improper because it was contrary to law. The court noted that if a jury finds a defendant not guilty by reason of insanity, the trial court must order the defendant to be civilly committed. Within fifty days of the commitment, the trial court will provide hearing to the defendant; if the defendant shows that he

or she no longer has a mental illness or is no longer dangerous to others, the court will release the defendant. The relevant statute provides in part: "Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others." Here, no evidence suggests that the defendant's release in fifty days was "very possible"; instead it shows the opposite. The defendant's expert testified that she would suffer from bipolar disorder and borderline personality disorder for the rest of her life thus making it unlikely that after fifty days she could show that she was no longer mentally ill. Also the State's uncontroverted evidence showed that the defendant committed a homicide and, under the statute, this constitutes prima facie evidence of dangerousness to others. Based on the evidence, "a quick release would appear to be virtually impossible."

Jury Instructions

State v. Calderon, ___ N.C. App. ___, 774 S.E.2d 398 (July 7, 2015). (1) In this robbery case, no plain error occurred with respect to the trial court's not guilty mandate. The jury instructions for the offenses of armed and common law robbery conformed to the pattern jury instructions with one exception: the court did not expressly instruct the jury that it had a "duty to return a verdict of not guilty" if it had a reasonable doubt as to one or more of the enumerated elements of the offenses. Instead, for the offense of armed robbery, the court ended its charge to the jury with the following instruction: "If you do not so find or have a reasonable doubt as to one or more of these things, then you will not return a verdict of guilty of robbery with a firearm as to that defendant." For the offense of common law robbery, the court ended its charge similarly, substituting the words "common law robbery" for robbery with a firearm. Citing *State v. McHone*, 174 N.C. App. 289 (2005) (trial court erred by failing to instruct the jury that "it would be your duty to return a verdict of not guilty" if the State failed to meet one or more of the elements of the offense), the court held that the trial court's instructions were erroneous. However, it went on to hold that no plain error occurred, reasoning in part that the verdict sheet provided both guilty and not guilty options, thus clearly informing the jury of its option of returning a not guilty verdict. (2) In this case involving three accomplices and charges of armed robbery, common law robbery and attempted armed robbery, the court rejected the defendant's argument that he could not have been convicted of attempted armed robbery under the theory of acting in concert because the trial court did not specifically instruct the jury on that theory in its charge on that count. The trial court gave the acting in concert instruction with respect to the counts of armed and common law robbery; it did not however repeat the acting in concert instruction after instructing on attempted robbery with a firearm. Considering the jury instructions as a whole and the evidence, the court declined to hold that the trial court's failure to repeat the instruction was likely to have misled the jury.

Jury Deliberations

State v. May, ___ N.C. ___, 772 S.E.2d 458 (June 11, 2015). The court reversed *State v. May*, __ N.C. App. __, 749 S.E.2d 483 (2013), which had held that the trial court committed reversible error when charging a deadlocked jury. The court of appeals held that the trial court erred when it instructed the deadlocked jury to resume deliberations for an additional thirty minutes, stating: "I'm going to ask you, since the people have so much invested in this, and we don't want to have to redo it again, but anyway, if we have to we will." The court of appeals concluded that

instructing a deadlocked jury regarding the time and expense associated with the trial and a possible retrial resulted in coercion of a deadlocked jury in violation of the N.C. Constitution. The court of appeals went on to hold that the State had failed to show that the error was harmless beyond a reasonable doubt. The State petitioned for discretionary review on whether the court of appeals had erred in holding that the State had the burden of proving that the purported error in the trial court's instructions was harmless beyond a reasonable doubt. The supreme court reversed, distinguishing *State v. Wilson*, 363 N.C. 478, 484 (2009) (claim that instructions given to less than the full jury violated the constitution was preserved as a matter of law), and concluding that because the defendant failed to raise the constitutional coercive verdict issue below, it was waived on appeal. Nevertheless, the supreme court continued, because the alleged constitutional error occurred during the trial court's instructions to the jury, it could review for plain error. The court also concluded that because the defendant failed to assert at trial his argument that the instructions violated G.S. 15A-1235 and because the relevant provisions in G.S. 15A-1235 were permissive and not mandatory, plain error review applied to that claim as well. Turning to the substance of the claims, the court concluded that the trial court's instructions substantially complied with G.S. 15A-1235. It further held that "Assuming without deciding that the court's instruction to continue deliberations for thirty minutes and the court's isolated mention of a retrial were erroneous, these errors do not rise to the level of being so fundamentally erroneous as to constitute plain error."

State v. Mackey, ___ N.C. App. ___, 774 S.E.2d 382 (June 16, 2015). (1) In this murder and discharging a barreled weapon case in which the jury heard some evidence that the defendant was affiliated with a gang, the trial court did not deprive the defendant of his constitutional right to a fair and impartial jury by failing to question jurors about a note they sent to the trial court. The note read as follows:

> (1) Do we have any concern for our safety following the verdict? Based on previous witness gang [information] and large [number] of people in court during the trial[.] Please do not bring this up in court[.]
> (2) We need 12 letters—1 for each juror showing we have been here throughout this trial[.]

According to the defendant, the note required the trial court to conduct a voir dire of the jurors. The court disagreed, noting that the cases cited by the defendant dealt with the jurors being exposed to material not admitted at trial constituting "improper and prejudicial matter." Here, the information about gang affiliation was received into evidence and the number of people in the courtroom cannot be deemed "improper and prejudicial matter." (2) The trial court violated the defendant's constitutional right to presence at every stage of the trial by failing to disclose the note to the defendant. However, the error was harmless beyond a reasonable doubt. (3) Although the court agreed that the trial court should disclose every jury note to the defendant and that failing to do so violates the defendant's right to presence, it rejected the defendant's argument that such disclosure is required by G.S. 15A-1234. That statute, the court explained, addresses when a trial judge may give additional instructions to the jury after it has retired for deliberations, including in response to an inquiry by the jury. It continued: "nothing in this statute *requires* a trial judge to respond to a jury note in a particular way."

Suppression Motions

State v. Bartlett, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2015). The court reversed the decision below, *State v. Bartlett*, __ N.C. App. __, 752 S.E.2d 237 (Dec. 17, 2013), holding that a new suppression hearing was required. At the close of the suppression hearing, the superior court judge orally granted the defendant's motion and asked counsel to prepare a written order. However, that judge did not sign the proposed order before his term ended. The defendant presented the proposed order to a second superior court judge, who signed it, over the State's objection, and without conducting a hearing. The order specifically found that the defendant's expert was credible, gave weight to the expert's testimony, and used the expert's testimony to conclude that no probable cause existed to support defendant's arrest. The State appealed, contending that the second judge was without authority to sign the order. The court of appeals found it unnecessary to reach the State's contention because that court considered the first judge's oral ruling to be sufficient. Reviewing the law, the Supreme Court clarified, "our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing." It added that to the extent that cases such as *State v. Williams*, 195 N.C. App. 554 (2009), "suggest otherwise, they are disavowed." Turning to the case at hand, the court concluded that at the suppression hearing in this case, disagreement between the parties' expert witnesses created a material conflict in the evidence. Thus, a finding of fact, whether written or oral, was required. Here, however, the first judge made no such finding. The court noted that while he did attempt to explain his rationale for granting the motion, "we cannot construe any of his statements as a definitive finding of fact that resolved the material conflict in the evidence." Having found the oral ruling was inadequate, the Court considered whether the second judge had authority to resolve the evidentiary conflict in his written order even though he did not conduct the suppression hearing. It held that he did not, reasoning that G.S. 15A-977 contemplates that the same trial judge who hears the evidence must also find the facts. The court rejected the defendant's argument that G.S. 15A-1224(b) authorized the second judge to sign the order, concluding that provision applies only to criminal trials, not suppression hearings.

State v. Ingram, ___ N.C. App. ___, 774 S.E.2d 433 (July 7, 2015). On the State's appeal from a trial court order granting the defendant's motion to suppress, the court vacated and remanded for new findings of fact and if necessary, a new suppression hearing. After being shot by police, the defendant was taken to the hospital and given pain medication. He then waived his *Miranda* rights and made a statement to the police. He sought to suppress that statement, arguing that his *Miranda* waiver and statement were involuntarily. The court began by rejecting the State's claim that the trial court erred by considering hearsay evidence in connection with the suppression motion and by relying on such evidence in making its findings of fact. The court noted that the trial court had "great discretion" to consider any relevant evidence at the suppression hearing. However, the court agreed with the State's argument that the trial court erred by failing to resolve evidentiary issues before making its findings of fact. It explained:

> [T]he trial court suppressed Defendant's statements on the grounds Defendant was "in custody, in severe pain, and under the influence of a sufficiently large dosage of a strong narcotic medication[;]" however, the trial court failed to make any specific findings as to Defendant's mental condition, understanding, or coherence—relevant considerations in a voluntariness analysis—at the time his

> *Miranda* rights were waived and his statements were made. The trial court found only that Defendant was in severe pain and under the influence of several narcotic pain medications. These factors are not all the trial court should consider in determining whether his waiver of rights and statements were made voluntarily.

Furthermore, although the defendant moved to suppress on grounds that police officers allegedly coerced his *Miranda* waiver and statements by withholding pain medication, the trial court failed to resolve the material conflict in evidence regarding whether police coercion occurred.

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 15, 2015). In a case where the defendant pled guilty pursuant to a plea agreement without notifying the State of his intent to appeal the suppression ruling and failed to timely file a notice of intent to appeal, the court dismissed the defendant's untimely appeal and his petition for writ of certiorari. Acknowledging *State v. Davis*, ___ N.C. App. ___, 763 S.E.2d 585, 589 (2014), a recent case that allowed, with no analysis, a writ in this very circumstance, the court found itself bound to follow an earlier opinion, *State v. Pimental*, 153 N.C. App. 69, 77 (2002), which requires dismissal of the defendant's efforts to seek review of the suppression issue.

Defendant's Right to Be Present

State v. Mackey, ___ N.C. App. ___, 774 S.E.2d 382 (June 16, 2015). The trial court violated the defendant's constitutional right to presence at every stage of the trial by failing to disclose a note from the jury to the defendant. However, the error was harmless beyond a reasonable doubt.

Sentencing

Aggravating Factors/Sentence

State v. Edgerton, ___ N.C. App. ___, 774 S.E.2d 927 (Aug. 4, 2015). In this violation of a domestic violence protective order (DVPO) case, the trial court did not err by sentencing the defendant within the aggravated range based in part on the G.S. 15A-1340.16(d)(15) statutory aggravating factor (the "defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense"). The defendant argued that because a personal relationship between the parties is a prerequisite to obtaining a DVPO, the abuse of a position of trust or confidence aggravating factor cannot be used aggravate a sentence imposed for a DVPO violation offense. The court concluded that imposing an aggravated sentence did not violate the rule that evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation.

State v. Harris, ___ N.C. App. ___, 775 S.E.2d 31 (July 7, 2015). (1) No violation of due process occurred when the defendant was sentenced in the aggravated range where proper notice was given and the jury found an aggravated factor (that the defendant committed the offense while on pretrial release on another charge). (2) Because G.S. 15A-1340.16 (aggravated and mitigated sentences) applies to all defendants, imposition of an aggravated sentence did not violate equal protection.

Eighth Amendment Issues

State v. Thomsen, ___ N.C. App. ___, 776 S.E.2d 41 (Aug. 4, 2015). The trial court erred by concluding that the defendant's 300-month minimum, 420-month maximum sentence for statutory rape and statutory sex offense violated the Eighth Amendment. The court concluded: "A 300-month sentence is not grossly disproportionate to the two crimes to which Defendant pled guilty. Furthermore, Defendant's 300-month sentence … is less than or equal to the sentences of many other offenders of the same crime in this jurisdiction."

Prior Record Level

State v. Edgar, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). The trial court correctly calculated the defendant's PRL. The defendant argued that the trial court erred by basing its PRL calculation on an ineffective stipulation. The defendant's only prior conviction was one in Michigan for carrying a concealed weapon, which he contended is substantially similar to the NC Class 2 misdemeanor offense of carrying a concealed weapon. The court concluded that the defendant did not make any stipulation as to the similarity of the Michigan offense to NC offense. Instead, the prior conviction was classified as a Class I felony, the default classification for an out-of-state felony. Thus, defendant's stipulations in the PRL worksheet that he had been convicted of carrying a concealed weapon in Michigan and that the offense was classified as a felony in Michigan, were sufficient to support the default classification of the offense as a Class I felony.

Probation

State v. Hoskins, ___ N.C. App. ___, 775 S.E.2d 15 (July 7, 2015). (1) In this case, which came to the court on a certiorari petition to review the trial court's 2013 probation revocation, the court concluded that it had jurisdiction to consider the defendant's claim that the trial court lacked jurisdiction to extend her probation in 2009. (2) The trial court lacked jurisdiction to extend the defendant's probation in 2009. The defendant's original period of probation expired on 27 June 2010. On 18 February 2009, 16 months before the date probation was set to end, the trial court extended the defendant's probation. Under G.S. 15A-1343.2(d), the trial court lacked statutory authority to order a three-year extension more than six months before the expiration of the original period of probation. Also, the trial court lacked statutory authority under G.S. 15A-1344(d) because the defendant's extended period of probation exceeded five years. Because the trial court lacked jurisdiction to extend probation in 2009, the trial court lacked jurisdiction to revoke the defendant's probation in 2013.

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 15, 2015). The trial court erred by revoking the defendant's probation for a violation of the statutory absconding condition, G.S. 15A-1343(b)(3a), when the evidence did not support a finding that he absconded. Though the defendant missed multiple probation appointments, did not live full time at his North Carolina address, and traveled "back and forth" to New Jersey, he stayed in touch with his probation officer and made his whereabouts known. The absconding violation was deemed a mere "re-alleging" of the defendant's other violations for failing to remain in the jurisdiction and failing to

report to his probation officer—technical violations for which a probationer may not be revoked after Justice Reinvestment.

Restitution

State v. Hardy, ___ N.C. App. ___, 774 S.E.2d 410 (July 7, 2015). In this injury to real property case, the trial court did not err by ordering the defendant to pay $7,408.91 in restitution. A repair invoice provided sufficient evidence to support the award of restitution and the restitution award properly accounted for all damage directly and proximately caused by the defendant's injury to the property.

Evidence

Relevancy—Rule 401

State v. Rorie, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). In this sex case involving a six-year-old victim, the trial court committed prejudicial error by excluding evidence that the defendant found the victim watching a pornographic video. The evidence was relevant to explain an alternate source of the victim's sexual knowledge, from which she could have fabricated the allegations in question.

State v. Holanek, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). In a case involving charges of obtaining property by false pretenses arising out of alleged insurance fraud, the trial court did not err by admitting testimony that the defendant did not appear for two scheduled examinations under oath as required by her insurance policy and failed to respond to the insurance company's request to reschedule the examination. The court rejected the defendant's argument that this evidence was not relevant, noting that to prove its case the State had to show that the defendant's acts were done "knowingly and decidedly … with intent to cheat or defraud." The evidence in question constituted circumstantial evidence that the defendant's acts were done with the required state of mind.

Limits on Relevancy

State v. Young, ___ N.C. ___, 775 S.E.2d 291 (Aug. 21. 2015). In this murder case the court held that the court of appeals erred by concluding that the trial court committed reversible error in allowing into evidence certain materials from civil actions. The relevant materials included a default judgment and complaint in a wrongful death suit stating that the defendant killed the victim and a child custody complaint that included statements that the defendant had killed his wife. The court of appeals had held that admission of this evidence violated G.S. 1-149 ("[n]o pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it") and Rule 403. The court held that the defendant did not preserve his challenge to the admission of the child custody complaint on any grounds. It further held that the defendant failed to preserve his G.S. 1-149 objection as to the wrongful death evidence and that his Rule 403 objection as to this evidence lacked merit. On the 403 issue as to the wrongful death evidence, the court rejected the court of appeals' reasoning that substantial prejudice resulting

from this evidence "irreparably diminished" defendant's presumption of innocence and "vastly outweighed [its] probative value." Instead, the court found that evidence concerning the defendant's response to the wrongful death and declaratory judgment action had material probative value. Although the evidence posed a significant risk of unfair prejudice, the trial court "explicitly instructed the jury concerning the manner in which civil cases are heard and decided, the effect that a failure to respond has on the civil plaintiff's ability to obtain the requested relief, and the fact that '[t]he entry of a civil judgment is not a determination of guilt by any court that the named defendant has committed any criminal offense.'"

State v. Triplett, ___ N.C. ___, ___ S.E.2d ___ (Aug. 21. 2015). Reversing the court of appeals in this murder and robbery case, the court held that the trial court did not abuse its discretion by prohibiting the defendant from introducing a tape-recorded voice mail message by the defendant's sister, a witness for the State, to show her bias and attack her credibility. Although the court found that the voice mail message was minimally relevant to show potential bias, the trial court did not abuse its discretion in its Rule 403 balancing. Because the sister was not a key witness for the State, any alleged bias on her part "becomes less probative." The trial court properly weighed the evidence's weak probative value against the confusion that could result by presenting the evidence, which related to a family feud that was tangential to the offenses being tried.

State v. Bishop, ___ N.C. App. ___, 774 S.E.2d 337 (June 16, 2015). In this cyberbullying case based on electronic messages, the court rejected the defendant's argument that the trial court erred by admitting into evidence the defendant's Facebook posts that, among other things, stated that "there's no empirical evidence that your Jesus ever existed." The comments were relevant to show the defendant's intent to intimidate or torment the victim, as well as the chain of events causing the victim's mother to contact the police. The court rejected the defendant's argument that the posts were overly inflammatory.

Rape Shield

State v. Rorie, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). (1) In this child sex case, evidence that the victim was discovered watching a pornographic video, offered by the defendant to show the victim's sexual knowledge, is not evidence of sexual activity barred by the Rape Shield Statute. (2) Evidence offered by the defendant of the child victim's prior allegations and inconsistent statements about sexual assaults committed by others who were living in the house were not barred by the Rape Shield Statute, and the trial court erred by excluding this evidence. False accusations do not fall within the scope of the Rape Shield Statute and may be admissible to attack the victim's credibility. The court was careful however not to "hold the statements necessarily should have been admitted into evidence at trial;" it indicated that whether the victim's "prior allegations and inconsistent statements come into the evidence at trial should be determined on retrial subject to a proper Rule 403 analysis."

State v. Martin, ___ N.C. App. ___, 774 S.E.2d 330 (June 16, 2015). In this sexual offense with a student case, the trial court committed reversible error by concluding that the defendant's evidence was per se inadmissible under the Rape Shield Rule. The case involved charges that the defendant, a substitute teacher, had the victim perform oral sex on him after he caught her in the

boys' locker room. At trial the defendant sought to introduce evidence that when he found the victim in the locker room, she was performing oral sex on football players. He sought to introduce this evidence to show that the victim had a motive to falsely accuse him of sexual assault. After an in camera hearing the trial court concluded that the evidence was per se inadmissible because it did not fit under the Rape Shield Rule's four exceptions. Citing case law, the court determined that "that there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute." Here, the defendant's defense was that he did not engage in any sexual behavior with the victim but that she fabricated the story to hide the fact that he caught her performing oral sex on the football players in the locker room. The court continued:

> Where the State's case in any criminal trial is based largely on the credibility of a prosecuting witness, evidence tending to show that the witness had a motive to falsely accuse the defendant is certainly relevant. The motive or bias of the prosecuting witness is an issue that is common to criminal prosecutions in general and is not specific to only those crimes involving a type of sexual assault.
>
> The trial court erred by concluding that the evidence was inadmissible per se because it did not fall within one of the four categories in the Rape Shield Statute. Here, the trial court should have looked beyond the four categories to determine whether the evidence was, in fact, relevant to show [the victim]'s motive to falsely accuse Defendant and, if so, conducted a balancing test of the probative and prejudicial value of the evidence under Rule 403 or was otherwise inadmissible on some other basis (e.g., hearsay). (footnote omitted).

Crawford Issues & Confrontation Clause

Ohio v. Clark, 576 U.S. __, 135 S. Ct. 2173 (June 18, 2015). In this child abuse case the Court held that statement by the victim, L.P., to his preschool teachers were non-testimonial. In the lunchroom, one of L.P.'s teachers, Ramona Whitley, observed that L.P.'s left eye was bloodshot. She asked him "[w]hat happened," and he initially said nothing. Eventually, however, he told the teacher that he "fell." When they moved into the brighter lights of a classroom, Whitley noticed "[r]ed marks, like whips of some sort," on L.P.'s face. She notified the lead teacher, Debra Jones, who asked L.P., "Who did this? What happened to you?" According to Jones, L.P. "seemed kind of bewildered" and "said something like, Dee, Dee." Jones asked L.P. whether Dee is "big or little;" L.P. responded that "Dee is big." Jones then brought L.P. to her supervisor, who lifted the boy's shirt, revealing more injuries. Whitley called a child abuse hotline to alert authorities about the suspected abuse. The defendant, who went by the nickname Dee, was charged in connection with the incident. At trial, the State introduced L.P.'s statements to his teachers as evidence of the defendant's guilt, but L.P. did not testify. The defendant was convicted and appealed. The Ohio Supreme Court held that L.P.'s statements were testimonial because the primary purpose of the teachers' questioning was not to deal with an emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution. That court noted that Ohio has a "mandatory reporting" law that requires certain professionals, including preschool teachers, to report suspected child abuse to government authorities. In the Ohio court's view, the teachers

acted as agents of the State under the mandatory reporting law and obtained facts relevant to past criminal conduct. The Supreme Court granted review and reversed. It held:

> In this case, we consider statements made to preschool teachers, not the police. We are therefore presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers. And considering all the relevant circumstances here, L.P.'s statements clearly were not made with the primary purpose of creating evidence for [the defendant's] prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.

The Court reasoned that L.P.'s statements occurred in the context of an ongoing emergency involving suspected child abuse. The Court continued, concluding that "[t]here is no indication that the primary purpose of the conversation was to gather evidence for [the defendant]'s prosecution. On the contrary, it is clear that the first objective was to protect L.P." In the Court's view, "L.P.'s age fortifies our conclusion that the statements in question were not testimonial." It added: "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." The Court continued, noting that as a historical matter, there is strong evidence that statements made in similar circumstances were admissible at common law. The Court noted, "although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L.P. was speaking to his teachers remains highly relevant." The Court rejected the defendant's argument that Ohio's mandatory reporting statutes made L.P.'s statements testimonial, concluding: "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution."

State v. Clark, ___ N.C. App. ___, 775 S.E.2d 28 (July 7, 2015). In this driving while license revoked case, the court held that DMV records were non-testimonial. The documents at issue included a copy of the defendant's driving record certified by the DMV Commissioner; two orders indefinitely suspending his drivers' license; and a document attached to the suspension orders and signed by a DMV employee and the DMV Commissioner. In this last document, the DMV employee certified that the suspension orders were mailed to the defendant on the dates as stated in the orders, and the DMV Commissioner certified that the orders were accurate copies of the records on file with DMV. The court held that the records, which were created by the DMV during the routine administration of its affairs and in compliance with its statutory obligations to maintain records of drivers' license revocations and to provide notice to motorists whose driving privileges have been revoked, were non-testimonial.

Prior Acts—404(b) Evidence

State v. Mangum, ___ N.C. App. ___, 773 S.E.2d 555 (July 7, 2015). In this case where the defendant was convicted of second-degree murder for killing her boyfriend, the trial court did not err by introducing 404(b) evidence pertaining to an incident between the defendant and another boyfriend, Walker, which occurred 14 months before the events in question. The court

found strong similarities between the incidents, noting that both involved the defendant and her current boyfriend; the escalation of an argument that led to the use of force; the defendant's further escalation of the argument; and the defendant's deliberate decision to obtain a knife from the kitchen. Given these similarities, the court found that the Walker evidence was probative of the defendant's motive, intent, and plan. Next, the court found that the prior incident was not too remote.

Opinions

Expert Opinions in Sexual Assault Cases

State v. Purcell, ___ N.C. App. ___, 774 S.E.2d 392 (July 7, 2015). In this child sexual assault case, no error occurred when the State's expert medical witness testified that the victim's delay in reporting anal penetration was a characteristic consistent with the general behavior of children who have been sexually abused in that manner. The court rejected the defendant's argument that the expert impermissibly opined on the victim's credibility.

State v. Chavez, ___ N.C. App. ___, 773 S.E.2d 108 (June 16, 2015). In this child sexual abuse case, no error occurred when the medical doctor who examined the victim explained the victim's normal examination, stating that 95% of children examined for sexual abuse have normal exams and that "it's more of a surprise when we do find something." The doctor further testified that a normal exam with little to no signs of penetrating injury could be explained by the "stretchy" nature of the hymen tissue and its ability to heal quickly. For example, she explained, deep tears to the hymen can often heal within three to four months, while superficial tears can heal within a few days to a few weeks. Nor was it error for the doctor to testify that she was made aware of the victim's "cutting behavior" through the victim's medical history and that cutting behavior was significant to the doctor because "cutting, unfortunately, is a very common behavior seen in children who have been abused and frequently sexually abused." The doctor never testified that the victim in fact had been abused.

Expert Opinions Regarding Impaired Driving

State v. Turbyfill, ___ N.C. App. ___, ____ S.E.2d ___ (Sept. 1, 2015). (1) In this DWI case, the trial court did not abuse its discretion by allowing the State's witness, a field technician in the Forensic Test of Alcohol Branch of the NC DHHS, who demonstrated specialized knowledge, experience, and training in blood alcohol physiology, pharmacology, and related research on retrograde extrapolation to be qualified and testify as an expert under amended Rule 702. (2) The trial court erred by allowing a law enforcement officer to testify as to the defendant's blood alcohol level; however, based on the other evidence in the case the error did not rise to the level of plain error. The court noted that Rule 702(a1) provides:

> A witness, qualified under subsection (a) … and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> > (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

At trial, the officer's testimony violated Rule 702(a1) on the issue of the defendant's specific alcohol concentration level as it related to the results of the HGN Test.

Lay Opinions

State v. Taylor, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2015) (per curiam). The court reversed the opinion below, *State v. Taylor*, ___ N.C. App. ___, 767 S.E.2d 585 (Dec. 16, 2014), for the reasons stated in the dissenting opinion. Over a dissent, the court of appeals had 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 court of appeals held that 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. The dissenting judge did not believe that admission of the testimony in question met the threshold needed for plain error.

State v. Bishop, ___ N.C. App. ___, 774 S.E.2d 337 (June 16, 2015). In this cyberbullying case based on electronic messages, the trial court did not abuse its discretion by allowing the investigating detective to testify that while investigating the case, he took screen shots of anything that appeared to be evidence of cyberbullying. The defendant argued that the detective's testimony was inadmissible opinion testimony regarding the defendant's guilt. The detective testified about what he found on Facebook and about the course of his investigation. When asked how he searched for electronic comments concerning the victim, he explained that examined the suspects' online pages and "[w]henever I found anything that appeared to have been to me cyber-bullying I took a screen shot of it." He added that "[i]f it appeared evidentiary, I took a screen shot of it." This testimony was not proffered as an opinion of the defendant's guilt; it was rationally based on the detective's perception and was helpful in presenting to the jury a clear understanding of his investigative process and thus admissible under Rule 701.

Arrest, Search, and Investigation

Stops

State v. Jackson, ___ N.C. ___, 772 S.E.2d 847 (June 11, 2015). Reversing the decision below, *State v. Jackson*, __ N.C. App. __, 758 S.E.2d 39 (2014), the court held that an officer had reasonable suspicion for the stop. The stop occurred at approximately 9:00 pm in the vicinity of Kim's Mart. The officer knew that the immediate area had been the location of hundreds of drug investigations. Additionally, the officer personally had made drug arrests in the area and was aware that hand to hand drug transactions occurred there. On the evening in question the officer saw the defendant and another man standing outside of Kim's Mart. Upon spotting the officer in his patrol car, the two stopped talking and dispersed in opposite directions. In the officer's experience, this is typical behavior for individuals engaged in a drug transaction. The officer tried to follow the men, but lost them. When he returned to Kim's Mart they were standing 20 feet from their original location. When the officer pulled in, the men again separated and started walking in opposite directions. The defendant was stopped and as a result contraband

was found. The court found these facts sufficient to create reasonable suspicion to justify the investigatory stop. The court noted that its conclusion was based on more than the defendant's presence in a high crime and high drug area.

State v. Benton, ___ N.C. ___, 772 S.E.2d 238 (June 11, 2015). In this companion case to *Jackson* (above), the court vacated and remanded to the court of appeals in light *Jackson.* The opinion below in this case was unpublished.

State v. Warren, ___ N.C. App. ___, 775 S.E.2d 362 (Aug. 4, 2015). In this post-*Rodriguez* case, the court held, over a dissent, that the officer had reasonable suspicion to extend the scope and duration of a routine traffic stop to allow a police dog to perform a drug sniff outside the defendant's vehicle. The court noted that under *Rodriguez v. United States*, ___ U.S. ___, 191 L.Ed. 2d 492 (2015), an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop. It further noted that earlier N.C. case law applying the de minimus rule to traffic stop extensions had been overruled by *Rodriguez.* The court continued, concluding that in this case the trial court's findings support the conclusion that the officer developed reasonable suspicion of illegal drug activity during the course of his investigation of the traffic offense and was therefore justified to prolong the traffic stop to execute the dog sniff. Specifically:

> Defendant was observed and stopped "in an area [the officer] knew to be a high crime/high drug activity area[;]" that while writing the warning citation, the officer observed that Defendant "appeared to have something in his mouth which he was not chewing and which affected his speech[;]"that "during his six years of experience [the officer] who has specific training in narcotics detection, has made numerous 'drug stops' and has observed individuals attempt to hide drugs in their mouths and . . . swallow drugs to destroy evidence[;]" and that during their conversation Defendant denied being involved in drug activity "any longer."

Interrogation and Confession

State v. Saldierna, ___ N.C. App. ___, 775 S.E.2d 326 (July 21, 2015), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (Aug. 3, 2015). Deciding an issue of first impression, the court held that an ambiguous statement by a juvenile implicating his statutory right to have a parent present during a custodial interrogation requires that the law enforcement officer conducting the interview clarify the meaning of the juvenile's statement before continuing questioning. The 16-year-old defendant was arrested in connection with several home break-ins. During a custodial interrogation, the defendant waived his rights on the Juvenile Waiver of Rights form and indicated that he wished to proceed without a parent. However, at the beginning of the interrogation, the defendant asked to call his mother. The defendant tried to call his mother but was unable to reach her. The interrogation then continued and the defendant gave incriminating statements, which he unsuccessfully moved to suppress. (1) The court found that rather than being an unambiguous request to have his mother present during questioning, the defendant's question, "Can I call my mom?" was an ambiguous request. (2) The court continued, holding that, in the face of this ambiguous statement, the interrogating officer was required to clarify the

defendant's desire to proceed without his mother before continuing with questioning. The officer's failure to do so violated G.S. 7B-2101.

Search Warrants

State v. Elder, ___ N.C. ___, 773 S.E.2d 51 (June 11, 2015). Modifying and affirming the decision below, *State v. Elder*, __ N.C. App. __, 753 S.E.2d 504 (2014), the supreme court held that the district court exceeded its statutory authority under G.S. 50B-3 by ordering a search of defendant's person, vehicle, and residence pursuant to an ex parte civil Domestic Violence Order of Protection ("DVPO") and that the ensuing search violated the defendant's constitutional rights. Relying on G.S. 50B-3(a)(13) (authorizing the court to order "any additional prohibitions or requirements the court deems necessary to protect any party or any minor child") the district court included in the DVPO a provision stating: "[a]ny Law Enforcement officer serving this Order shall search the Defendant's person, vehicle and residence and seize any and all weapons found." The district court made no findings or conclusions that probable cause existed to search the defendant's property or that the defendant even owned or possessed a weapon. Following this mandate, the officer who served the order conducted a search as instructed. As a result of evidence found, the defendant was charged with drug crimes. The defendant unsuccessfully moved to suppress, was convicted and appealed. The supreme court concluded that the catch all provision in G.S. 50B-3 "does not authorize the court to order law enforcement, which is not a party to the civil DVPO, to proactively search defendant's person, vehicle, or residence." The court further concluded "by requiring officers to conduct a search of defendant's home under sole authority of a civil DVPO without a warrant or probable cause, the district court's order violated defendant's constitutional rights" under the Fourth Amendment.

State v. McKinney, ___ N.C. ___, ___ S.E.2d ___ (Aug. 21. 2015). Reversing the court of appeals in this drug case, the court held that the trial court properly denied the defendant's motion to suppress, finding that probable cause existed to justify issuance of a search warrant authorizing a search of defendant's apartment. The application was based on the following evidence: an anonymous citizen reported observing suspected drug-related activity at and around the apartment; the officer then saw an individual named Foushee come to the apartment and leave after six minutes; Foushee was searched and, after he was found with marijuana and a large amount of cash, arrested; and a search of Fouchee's phone revealed text messages between Foushee and an individual named Chad proposing a drug transaction. The court rejected the defendant's argument that the citizen's complaint was unreliable because it gave no indication when the citizen observed the events, that the complaint was only a "naked assertion" that the observed activities were narcotics related, and that the State failed to establish a nexus between Foushee's vehicle and defendant's apartment, finding none of these arguments persuasive, individually or collectively. The court held that "under the totality of circumstances, all the evidence described in the affidavit both established a substantial nexus between the marijuana remnants recovered from Foushee's vehicle and defendant's residence, and also was sufficient to support the magistrate's finding of probable cause to search defendant's apartment."

State v. Lowe, ___ N.C. App. ___, 774 S.E.2d 893 (July 21, 2015), *temporary stay allowed*, __ N.C. __, 774 S.E.2d 840 (Aug. 11, 2015). A search warrant to search a home was supported by probable cause. The affidavit supporting the warrant indicated that one Terrence Turner was

selling, using and storing controlled substances at a home he occupied at 529 Ashebrook Dr. The court held that the warrant was supported by probable cause. The affidavit stated that after receiving information that Turner was involved in drug activity at the home the officer examined trash and found correspondence addressed to Turner at the home and a small amount of marijuana residue in a fast food bag. Also, Turner had prior drug arrests. (2) Law enforcement exceeded the scope of the warrant when they searched a vehicle parked in the driveway but not owned or controlled by the home's resident; the trial court thus erred by denying the defendant's motion to suppress. As noted above, the affidavit supporting the warrant indicated that one Terrence Turner was selling, using and storing controlled substances at a home he occupied at 529 Ashebrook Dr. No vehicles were specified in the warrant. When executing the warrant officers found Turner inside the home, as well as two overnight guests, the defendant and his girlfriend, Margaret Doctors. Parked in the driveway was a rental car, which the officers learned was being leased by Doctors and operated by both her and the defendant. Although the officers knew that Turner had no connection to the vehicle, they searched it and found controlled substances inside. As a result the defendant was charged with drug offenses. Prior to trial he unsuccessfully moved to suppress, arguing that the warrant was not supported by probable cause and alternatively that the search of his vehicle exceeded the scope of the warrant. The court agreed that the search of the defendant's vehicle exceed the scope of the warrant issued to search Turner's home. Noting that the officers could have searched the vehicle if it belonged to Turner, the court further noted that they knew Turner had no connection to the car. The court stated that the issue presented, "whether the search of a vehicle rented and operated by an overnight guest at a residence described in a search warrant may be validly searched under the scope of that warrant," was one of first impression. The court rejected the State's argument that a warrant to search a home permitted a search of any vehicle found within the curtilage, reasoning: "The State's proffered rule would allow officers to search any vehicle within the curtilage of a business identified in a search warrant, or any car parked at a residence when a search is executed, without regard to the connection, if any, between the vehicle and the target of the search." (3) Finally, the court rejected the State's argument that the good faith exception should apply because police department policy allowed officers to search all vehicles within the curtilage of premises specified in a warrant. The court found the good faith exception "inappropriate" where the error, as here, is attributable to the police, not a judicial official who issued the warrant.

Warrantless Searches

State v. Jordan, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 4, 2015). In this drug case, the trial court erred in denying the defendant's motion to suppress evidence obtained as a result of a warrantless search of her residence. According to the court: "The trial court's findings that the officers observed a broken window, that the front door was unlocked, and that no one responded when the officers knocked on the door are insufficient to show that they had an objectively reasonable belief that a breaking and entering had *recently* taken place or *was still in progress*, such that there existed an urgent need to enter the property" and that the search was justified under the exigent circumstances exception to the warrant requirement. It continued:

> In this case, the only circumstances justifying the officers' entry into defendant's residence were a broken window, an unlocked door, and the lack of response to the officers' knock at the door. We hold that although these findings may be

> sufficient to give the officers a reasonable belief that an illegal entry had occurred *at some point*, they are insufficient to give the officers an objectively reasonable belief that a breaking and entering was in progress or had occurred recently.

State v. Perry, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 15, 2015). In this drug case, no fourth amendment violation occurred when law enforcement officers obtained the defendant's cell cite location information (CSLI) from his service provider, AT&T, without a warrant based on probable cause. The court noted that while courts have held that "real time" CSLI may be obtained only pursuant to a warrant supported by probable cause, the Stored Communications Act (SCA) allows for access to "historical" information upon a lesser showing. It continued: "The distinguishing characteristic separating historical records from "real-time" information is the former shows where the cell phone has been located at some point in the past, whereas the latter shows where the phone is presently located through the use of GPS or precision location data." The court concluded that the CSLI at issue was historical information:

> [Officers] followed Defendant's historical travel by entering the coordinates of cell tower "pings" provided by AT&T into a Google Maps search engine to determine the physical location of the last tower "pinged." Defendant's cell phone was never contacted, "pinged," or its precise location directly tracked by the officers. The officers did not interact with Defendant's cell phone, nor was any of the information received either directly from the cell phone or in "real time." All evidence shows the cell tower site location information provided by AT&T was historical stored third-party records and properly disclosed under the court's order as expressly provided in the SCA.

The court found it significant that an officer testified that there was a 5- to 7-minute delay in the CSLI that he received from AT&T. The court went on to conclude that retrieval of the "historical" information was not a search under the fourth amendment. Noting that the U.S. Supreme Court has not decided whether "historical" CSLI raises a fourth amendment issue, the question is one of first impression North Carolina. The court distinguished the U.S. Supreme Court's recent decision in *United States v. Jones,* 132 S. Ct. 945 (2012) (the government's installation of a GPS tracking device on a vehicle and its use of that device to monitor the vehicle's movements on public streets constitutes a "search" within the meaning of the Fourth Amendment) in three respects. First, unlike in *Jones*, here, there was no physical trespass on the defendant's property. Second, the tracking in question here was not "real-time" the court reiterated: "officers only received the coordinates of historical cell tower 'pings' after they had been recorded and stored by AT&T, a third party." Third, the trespass in *Jones* was not authorized by a warrant or a court order of any kind whereas here a court order was entered. And, "[m]ost importantly," *Jones* did not rely on the third-party doctrine. Citing decisions from the Third, Fifth and Eleventh Circuits, the court held that obtaining the CSLI did not constitute a search under the fourth amendment. The court distinguished the recent Fourth Circuit opinion in United *States v. Graham,* on grounds that in that case the government obtained the defendant's historical CSLI for an extended period of time. Here, only two days of information were at issue. The court rejected the *Graham* court's conclusion that the third-party doctrine did not apply to CSLI information because the defendants did not voluntarily disclose it to their service providers. The court continued, concluding that even if it were to find that a search warrant based on probable cause was required, the good faith exception would apply.

One judge concurred in the final disposition but disagreed with the majority's characterization of the information as historical rather than real-time. That judge "believe[d that] allowing the majority's characterization of the information provided by AT&T to law enforcement, based on the facts in this case, would effectively obliterate the distinction between 'historical' and 'real-time' cell site information." However, she agreed that the good faith exception applied.

Administrative Inspections

Los Angeles v. Patel, 576 U.S. ___, 135 S. Ct. 2443 (June 22, 2015). (1) In this case where a group of motel owners and a lodging association challenged a provision of the Los Angeles Municipal Code (LAMC) requiring motel owners to turn over to the police hotel registry information, the Court held that facial challenges under the Fourth Amendment are not categorically barred. With respect to the relevant LAMC provisions, §41.49 requires hotel operators to record information about their guests, including: the guest's name and address; the number of people in each guest's party; the make, model, and license plate number of any guest's vehicle parked on hotel property; the guest's date and time of arrival and scheduled departure date; the room number assigned to the guest; the rate charged and amount collected for the room; and the method of payment. Guests without reservations, those who pay for their rooms with cash, and any guests who rent a room for less than 12 hours must present photographic identification at the time of check-in, and hotel operators are required to record the number and expiration date of that document. For those guests who check in using an electronic kiosk, the hotel's records must also contain the guest's credit card information. This information can be maintained in either electronic or paper form, but it must be "kept on the hotel premises in the guest reception or guest check-in area or in an office adjacent" thereto for a period of 90 days. LAMC section 41.49(3)(a) states, in pertinent part, that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection," provided that "[w]henever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business." A hotel operator's failure to make his or her guest records available for police inspection is a misdemeanor punishable by up to six months in jail and a $1,000 fine. The respondents brought a facial challenge to §41.49(3)(a) on Fourth Amendment grounds, seeking declaratory and injunctive relief. As noted, the Court held that facial challenges under the Fourth Amendment are not barred. (2) Turning to the merits of the claim, the Court held that the challenged portion on the LAMC is facially unconstitutional because it fails to provide hotel operators with an opportunity for precompliance review. The Court reasoned, in part:

> [A]bsent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. And, we see no reason why this minimal requirement is inapplicable here. While the Court has never attempted to prescribe the exact form an opportunity for precompliance review must take, the City does not even attempt to argue that §41.49(3)(a) affords hotel operators any opportunity whatsoever. Section 41.49(3)(a) is, therefore, facially invalid. (citations omitted)

Clarifying the scope of its holding, the Court continued, "As they often do, hotel operators remain free to consent to searches of their registries and police can compel them to turn them

over if they have a proper administrative warrant—including one that was issued ex parte—or if some other exception to the warrant requirement applies, including exigent circumstances." The Court went on to reject Justice Scalia's suggestion that hotels are "closely regulated" and that the ordinance is facially valid under the more relaxed standard that applies to searches of that category of businesses.

Criminal Offenses

Assaults

State v. Pender, ___ N.C. App. ___, ____ S.E.2d ___ (Sept. 1, 2015). In a case with multiple victims, the court rejected the defendant's argument that the State's evidence was too vague for the jury to infer that he pointed the gun at any particular individual. One witness testified that upon defendant's orders, "everybody ran in the room with us … and he was waiving [sic] the gun at us[.]" Another testified that "[w]hen [defendant] came down the hall, when he told everyone to get into one room, all of them came in there … [e]ven the two little ones …." She further testified, "I was nervous for the kids was down there hollering and carrying on, and he hollered – he point [sic] the gun toward everybody in one room. One room. And told them come on in here with me." A third testified that once everybody was in the same bedroom, defendant pointed the shotgun outward from his shoulder.

Threats, Harassment, Stalking & Violation of Domestic Violence Protective Orders

State v. Bishop, ___ N.C. App. ___, 774 S.E.2d 337 (June 16, 2015). (1) The court upheld a provision of the cyberbullying statute, G.S. 14-458.1(a)(1)(d), rejecting the defendant's argument that the provision is an overbroad criminalization of protected speech. G.S. 14-458.1(a)(1)(d) makes it unlawful for any person to use a computer or computer network to, with the intent to intimidate or torment a minor, post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor. (2) Because the defendant failed to preserve the issue, the court declined to address the defendant's argument that the statute was unconstitutionally vague. (3) Because the defendant's motion to dismiss for insufficient evidence was made on other grounds, the court declined to consider the defendant's argument on appeal that insufficient evidence was presented to show he posted private, personal, or sexual information pertaining to the victim.

Rape

State v. Blow, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2015). For the reasons stated in the dissenting opinion, the court reversed the opinion below, *State v. Blow*, ___ N.C. App. ___, 764 S.E.2d 230 (Nov. 4, 2014). In this child sexual assault case in which the defendant was convicted of three counts of first-degree rape, the court of appeals had held that the trial court erred by failing to dismiss one of the rape charges. The court of appeals 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 of appeals 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. The dissenting judge believed that the State presented substantial evidence that was sufficient, if believed, to support the jury's decision to convict of three counts of first degree rape. The dissenting judge agreed with the majority that the victim's testimony about penetration "a couple" of times would have been insufficient to convict the defendant of three counts, but noted that the record contains other evidence, including the defendant's admission that he "had sex" with the victim "about three times."

Kidnapping

State v. Pender, ___ N.C. App. ___, ____ S.E.2d ___ (Sept. 1, 2015). (1) Vacating two of the defendant's second-degree kidnapping convictions on grounds that the plain language of G.S. 14-39(a) does not permit prosecution of a parent for kidnapping, at least when that parent has custodial rights with respect to the children. The court explained:

> "[T]here is no kidnapping when a parent or legal custodian consents to the unlawful confinement of his minor child, regardless whether the child himself consents to the confinement. The plain language requires that only one parent -- "a parent" -- consent to the confinement.

The court was careful to note "We do not address the question whether a parent without custodial rights may be held criminally liable for kidnapping." (footnote 2). (2) The court rejected the defendant's argument that kidnapping charges should have been dismissed because there was insufficient evidence that his purpose in confining the victims was to terrorize them. "A defendant intends to terrorize another when the defendant intends to place that person in some high degree of fear, a state of intense fright or apprehension." (quotation omitted). The court rejected the defendant's argument that the State had to prove that the kidnapping victims were terrorized; State only needs to prove that the defendant's intent was to terrorize the victims. The evidence was sufficient for the jury to infer such an intent. That defendant shot victim Nancy's truck parked outside the house so that everyone could hear it, cut the telephone line to the house at night, shot through the windows multiple times to break into the house, yelled multiple times upon entering the house that he was going to kill Nancy, corralled the occupants of the house into a single bedroom, demanded of those in the bedroom to know where Nancy was, exclaimed that he was going to kill her, and pointed his shotgun at them.

Larceny & Possession

State v. Hardy, ___ N.C. App. ___, 774 S.E.2d 410 (July 7, 2015). The trial court erred by sentencing the defendant for both felony larceny and felony possession of stolen goods when both convictions were based on the same items.

Robbery

State v. Calderon, ___ N.C. App. ___, 774 S.E.2d 398 (July 7, 2015). (1) The evidence was sufficient to support charges of attempted armed robbery against both defendants. The defendants and a third person, Moore, planned to rob Bobbie Yates of marijuana. However, once

they learned there was a poker game going on in the apartment, they retrieved another weapon and returned to the apartment to rob those present. Upon entering the apartment, Moore took money off the kitchen table where several of the people were playing poker, and proceeded to search their pockets for more money. The robbery lasted between two and four minutes, during which time the defendants continuously pointed their weapons at the people present. After Moore took money from those seated around the kitchen table, he—with shotgun in hand—approached Mr. Allen, who was "passed out" or asleep in the living room. One witness saw Moore search Allen's pockets, but no one saw Moore take money from Allen. This evidence was sufficient to show that the defendants, acting in concert with Moore, had the specific intent to deprive Allen of his personal property by endangering or threatening his life with a dangerous weapon and took overt acts to bring about this result. (2) The court rejected the defendants argument that the trial court erred by failing to instruct the jury on attempted larceny and attempted common law robbery as lesser-included offenses of attempted armed robbery of Allen. The defendant argued that because Allen was "passed out" or asleep, his life was not endangered or threatened. The court found that where, as here, the defendants were convicted of attempted robbery, their argument failed.

State v. Holt, ___ N.C. App. ___, 773 S.E.2d 542 (June 16, 2015). The trial court did not err by denying the defendant's motion to dismiss a charge of armed robbery. One of the victims testified that all three perpetrators had handguns. A BB pistol and a pellet gun were found near the scene of the robbery. The defendant argued that the State failed to produce any evidence that these items were dangerous weapons capable of inflicting serious injury or death. Distinguishing *State v. Fleming*, 148 N.C. App. 16 (2001) (trial court erred in denying the defendant's motion to dismiss charge of armed robbery when the evidence showed that he committed two robberies using a BB gun and the State failed to introduce any evidence that the BB gun was capable of inflicting death or great bodily injury), the court held:

> [U]nlike in *Fleming*, where the weapon used to perpetrate the robbery was recovered from the defendant's direct physical possession, here there is no evidence that conclusively links either the BB pistol or the pellet gun to the robbery. Neither Defendant nor his co-conspirators were carrying any weapons when they were apprehended by police. Further, no evidence was offered regarding any fingerprints on, or ownership of, either gun, and neither the victims nor Defendant identified either of the guns as having been used during the robbery. Moreover, even assuming arguendo that both the BB pistol and the pellet gun could be conclusively linked to the robbery, [one of the victims] testified that all three of the men who robbed his home were armed with handguns. Although Defendant's counsel attempted to impeach [the victim] on this point, the trial court properly left the credibility of [his] testimony as a matter for the jury to resolve, and as such, it would have been permissible for a reasonable juror to infer that not all, if any, of the weapons used during the robbery had been recovered or accounted for. Indeed, if taken as true, Defendant's second post-arrest statement to Detective Snipes suggests that Defendant had the motivation and opportunity to "dump" the third weapon just like he claimed to have dumped the ounce of marijuana he purported to have stolen from the residence that investigators never recovered.

Thus, although the mandatory presumption that the weapons were dangerous did not apply, there was sufficient evidence for the case to go to the jury on the armed robbery charge.

Obtaining Property by False Pretenses

State v. Holanek, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). (1) In a case arising out of insurance fraud, the trial court did not err by denying the defendant's motion to dismiss three counts of obtaining property by false pretenses. Two of the counts arose out of payments the defendant received based on false moving company invoices submitted to her insurance company. The defendant submitted the invoices, indicating that they were paid in full. The court rejected the defendant's argument that the State failed to prove that the invoices contained a false representation noting that the evidence showed that investigators were unable to discover any indication that either of the purported moving companies existing in North Carolina. (2) The trial court did not commit plain error by failing to instruct the jury that under G.S. 14-100(b) that "[e]vidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud." Because the jury was instructed that it was required to determine whether the defendant intended to defraud the insurance company through her submission of documents containing false representations in order to return a guilty verdict, no reasonable juror could have been left with the mistaken belief that she could be found guilty based solely on her failure to comply with contractual obligations under her insurance policy.

Burglary

State v. Campbell, ___ N.C. ___, 772 S.E.2d 440 (June 11, 2015). Reversing the decision below, *State v. Campbell*, __ N.C. App. __, 759 S.E.2d. 380 (2014), the court held that the State presented sufficient evidence of the defendant's intent to commit larceny in a place of worship to support his conviction for felonious breaking or entering that facility. The evidence showed that the defendant unlawfully broke and entered the church; he did not have permission to be there and could not remember what he did while there; and the church's Pastor found the defendant's wallet near the place where some of the missing items previously had been stored.

State v. Mims, ___ N.C. App. ___, 774 S.E.2d 349 (June 16, 2015). (1) The evidence was sufficient to support a conviction for attempted first-degree burglary. In this case, which involved an attempted entry into a home in the wee hours of the morning, the defendant argued that the State presented insufficient evidence of his intent to commit a larceny in the premises. The court concluded that the case was controlled by *State v. McBryde*, 97 N.C. 393 (1887), and that because there was no evidence that the defendant's attempt to break into the home was for a purpose other than to commit larceny, it could be inferred that the defendant intended to enter to commit a larceny inside. The court rejected the defendant's argument that the evidence suggested that he was trying to enter the residence to seek assistance or was searching for someone. (2) Applying the *McBryde* inference to an attempted breaking or entering that occurred during daylights hours, the court held that the evidence was sufficient to support a conviction for that offense.

Injury to Property

State v. Hardy, ___ N.C. App. ___, 774 S.E.2d 410 (July 7, 2015). In this injury to real property case, the court held that an air conditioning unit that was attached to the exterior of a mobile home was real property. The defendant dismantled and destroyed the unit, causing extensive water damage to the home. The trial court instructed the jury that "[a]n air conditioner affixed to a house is real property" and the jury found the defendant guilty of this offense. On appeal the defendant argued that the air conditioning unit was properly classified as personal property. The court rejected the argument that *State v. Primus*, 742 S.E.2d 310 (2013), controlled, finding that case did not resolve the precise issue at hand. After reviewing other case law the court determined that the air-conditioner would be real property if it was affixed to the mobile home such that it "became an irremovable part of the [mobile home]." Applying this test, the court concluded:

> The air-conditioner at issue … comprised two separate units: an inside unit, referred to as the A-coil, which sat on top of the home's heater, and an outside condensing unit, which had a compressor inside of it. The two units were connected by copper piping that ran from the condenser underneath the mobile home into the home. [A witness] testified that the compressor, which was located inside the condensing unit, had been totally "destroyed," and that although the condensing unit itself remained in place, it was rendered inoperable. Thus, . . . the entire air-conditioner could not be removed but had to be "gutted" and removed in pieces. Moreover, when defendant cut the copper piping underneath the home, he caused significant damage to the water pipes that were also located in the crawlspace. Thus, here, not only could the air-conditioner not be easily removed from the mobile home but it also could not be easily removed from other systems of the home given the level of enmeshment and entanglement with the home's water pipes and heater.

The court went on to note that while the mobile home could serve its "contemplated purpose" of providing a basic dwelling without the air-conditioner, the purpose for which the air-conditioner was annexed to the home supports a conclusion that it had become part of the real property: the use and enjoyment of the tenant.

Drug Offenses

State v. Galaviz-Torres, ___ N.C. ___, 772 S.E.2d 434 (June 11, 2015). Reversing an unpublished opinion below in this drug trafficking case, the supreme court held that the trial court did not err in its jury instructions regarding the defendant's knowledge. The court noted that "[a] presumption that the defendant has the required guilty knowledge exists" when "the State makes a prima facie showing that the defendant has committed a crime, such as trafficking by possession, trafficking by transportation, or possession with the intent to sell or deliver, that lacks a specific intent element." However, the court continued: "when the defendant denies having knowledge of the controlled substance that he has been charged with possessing or transporting, the existence of the requisite guilty knowledge becomes 'a determinative issue of fact' about which the trial court must instruct the jury." As a result of these rules, footnote 4 to N.C.P.I. Crim. 260.17 (and parallel footnotes in related instructions) states that, "[i]f the

defendant contends that he did not know the true identity of what he possessed," the italicized language must be added to the jury instructions:

> For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable
> doubt:
>
> First, that the defendant knowingly possessed cocaine *and the defendant knew that what he possessed was cocaine*. A person possesses cocaine if he is aware of its presence and has (either by himself or together with others) both the power and intent to control the disposition or use of that substance.

The defendant argued that the trial court erred by failing to add the "footnote four" language to the jury instructions. The supreme court disagreed, reasoning:

> In this case, defendant did not either deny knowledge of the contents of the gift bag in which the cocaine was found or admit that he possessed a particular substance while denying any knowledge of the substance's identity. Instead, defendant simply denied having had any knowledge that the van that he was driving contained either the gift bag or cocaine. As a result, since defendant did not "contend[ ] that he did not know the true identity of what he possessed," the prerequisite for giving the instruction in question simply did not exist in this case. As a result, the trial court did not err by failing to deliver the additional instruction contained in footnote four . . . in this case. (citation omitted).

The court went on to distinguish the case before it from *State v. Coleman*, ___ N.C. App. ___, 742 S.E.2d 346 (2013).

State v. Williams, ___ N.C. App. ___, 774 S.E.2d 880 (July 21, 2015). The trial court did not err by denying the defendant's motion to dismiss a charge of maintaining a dwelling. The court first held that the evidence established that the defendant kept or maintained the dwelling where it showed that he resided there. Specifically, the defendant received mail addressed to him at the residence; his probation officer visited him there numerous times to conduct routine home contacts; the defendant's personal effects were found in the residence, including a pay stub and protective gear from his employment; and the defendant placed a phone call from the Detention Center and informed the other party that officers had "come and searched his house." Next, the court held that the evidence was sufficient to show that the residence was being used for keeping or selling drugs. In assessing this issue, the court looks at factors including the amount of drugs present and paraphernalia found. Here, a bag containing 39.7 grams of 4-methylethcathinone and methylone was found in a bedroom closet alongside another plastic bag containing "numerous little corner baggies." A set of digital scales and $460.00 in twenty dollar bills also were found.

Hunting Crimes

State v. Oxendine, ___ N.C. App. ___, 775 S.E.2d 19 (July 7, 2015). (1) In this hunting without a license case, the trial court did not err by denying defendant Oxendine's request to instruct the jury on legal justification. The defendant argued that he was exempt under G.S. 113-276 from the requirement of a hunting license because he had been engaged in a Native American religious hunting ceremony. That statute applies to "member[s] of an Indian tribe recognized under Chapter 71A of the General Statutes." Although the defendant argued that he is "an enrolled member of the Haudenosaunee Confederacy of the Tuscarora Nation," he is not a

member of a Native American tribe recognized under Chapter 71A. Additionally the defendant did not show that he was hunting on tribal land, as required by the statute. (2) The evidence was sufficient to convict defendant Pedro of hunting without a license. Based on the facts presented, the court rejected the defendant's argument that the State's evidence was insufficient to show that he "was preparing to immediately kill a dove."

Capital Law

Lethal Injection

Glossip v. Gross, 576 U.S. ___, 135 S. Ct. 2726 (June 29, 2015). In this case, challenging Oklahoma's lethal injection protocol, the Court affirmed the denial of the prisoner's application for a preliminary injunction. The prisoners, all sentenced to death in Oklahoma, filed an action in federal court, arguing that Oklahoma's method of execution violates the Eighth Amendment because it creates an unacceptable risk of severe pain. They argued that midazolam, the first drug employed in the State's three-drug protocol, fails to render a person insensate to pain. After holding an evidentiary hearing, the District Court denied the prisoner's application for a preliminary injunction, finding that they had failed to prove that midazolam is ineffective. The Tenth Circuit affirmed, as did the Supreme Court, for two independent reasons. First, the Court concluded that the prisoners failed to identify a known and available method of execution that entails a lesser risk of pain. Second, the Court concluded that the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.

Mental Retardation Issues

Brumfield v. Cain, 576 U.S. __, 135 S. Ct. 2269 (June 18, 2015). Because the Louisiana state court's decision rejecting the defendant's *Atkins* claim without affording him an evidentiary hearing was based on an unreasonable determination of the facts, the defendant was entitled to have his claim considered on the merits in federal court. After the defendant was convicted, the U.S. Supreme Court held, in *Atkins*, that "in light of . . . 'evolving standards of decency,'" the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." The Court however left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." The Louisiana Supreme Court later held that "a diagnosis of mental retardation has three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage." That court further held that an *Atkins* evidentiary hearing is required when an inmate has put forward sufficient evidence to raise a "reasonable ground" to believe him to be intellectually disabled. In a post-conviction motion in the case at bar, the defendant sought an *Atkins* hearing. Without holding an evidentiary hearing or granting funds to conduct additional investigation, the state trial court dismissed the defendant's petition. After losing in state court, the defendant pursued federal habeas relief. The defendant won at the federal district court but the Fifth Circuit reversed. The U.S. Supreme Court granted review and held that the state court's decision denying his *Atkins* claim was premised on

an "unreasonable determination of the facts." In reaching this decision, the Court focused on the two underlying factual determinations on which the trial court's decision was premised: that the defendant's IQ score of 75 was inconsistent with a diagnosis of intellectual disability and that he had presented no evidence of adaptive impairment. The Court held that both of the state court's critical factual determinations were unreasonable.

Post-Conviction Proceedings

Motions for Appropriate Relief
Appeal & Certiorari

State v. Thomsen, ___ N.C. App. ___, 776 S.E.2d 41 (Aug. 4, 2015). Over a dissent the court held that it had jurisdiction to review the trial court's sua sponte MAR (granting the defendant relief) by way of a writ of certiorari filed by the State.