John Rubin, 919.962.2498, rubin@sog.unc.edu
Shea Denning, 919.843.5120, denning@sog.unc.edu

Criminal Case Update

District Court Judge Summer Conference
(includes selected cases decided between October 6, 2015 and May 31, 2016)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to the Criminal Case Compendium. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

Contents

Investigation Issues 2
Seizures 2
Searches 6
Miranda 9
Pretrial and Trial Procedure 11
Right to Counsel 11
Pleadings 13
Discovery 17
Other Procedural Issues 18
Evidence 20
Confrontation Clause 20
Expert Opinion Testimony 21
Other Evidence Issues 24
Crimes 28
Generally 28
Impaired Driving 34
Impaired Driving Procedures 36
Sexual Offenses 38
Defenses 39
Sex Offender Registration and Satellite-Based Monitoring 40
Sentencing and Probation 43
Appeal and Post-Conviction 46

Investigation Issues

Seizures

(1) Finding that vehicle was being operated fewer than fifteen days after its registration expired did not establish that vehicle was being operated unlawfully; (2) Trial court's conclusion that officer was "justified" in stopping defendant's vehicle was insufficient.

State v. Baskins, ___ N.C. App. ___, ___ S.E.2d ___ (May 17, 2016). (1) DMV information showing that registration for vehicle defendant was driving expired on September 30, 2014 did not provide basis for stopping vehicle on October 6, 2014; G.S. 20-66(g) permits operation of vehicle until midnight on the fifteenth day of the month following the sticker's expiration; (2) The trial court's order denying the defendant's motion to suppress in this traffic stop case contained inadequate conclusions of law concerning the validity of the traffic stop. The trial court's sole conclusion of law is better characterized as a statement of law. A conclusion of law requires the exercise of judgment in making a determination or application of legal principles to the facts found. The court remanded for findings of fact and conclusions of law.

(1) Officer had reasonable suspicion for stop where he saw vehicle drive through red light; (2) Officer had probable cause to arrest for DWI based on a strong odor of alcohol, the defendant's red glassy eyes and admission to drinking before driving, etc.

State v. Miller, ___ N.C. App. ___, 777 S.E.2d 337 (Oct. 20, 2015). (1) Because the officer saw the defendant drive through a red light, the officer had reasonable suspicion to stop the defendant's vehicle. (2) Where upon stopping the defendant's vehicle the officer smelled a strong odor of alcohol and saw that the defendant had red glassy eyes, the defendant failed field sobriety tests, and admitted to drinking before driving, the officer had probable cause to arrest the defendant for DWI.

Officer lacked reasonable suspicion for traffic stop despite observing abrupt acceleration and fishtailing

State v. James Johnson, ___ N.C. App. ___, 784 S.E.2d 633 (April 5, 2016), *temporary stay allowed*, ___ N.C. ___, 784 S.E.2d 483 (Apr. 22, 2016). Because a police officer lacked reasonable suspicion for a traffic stop in this DWI case, the trial court erred by denying the defendant's motion to suppress. While on routine patrol, the officer observed the defendant's truck stopped at a traffic light waiting for the light to change. The defendant revved his engine, and, when the light changed to green, abruptly accelerated into a left-hand turn. Although his vehicle fishtailed, the defendant regained control before it struck the curb or left the lane of travel. The officer was unable to estimate the speed of the defendant's truck. Snow was falling at the time and slush was on the road. These facts do not support the conclusion that the officer had reasonable suspicion that the defendant committed a violation of unsafe movement or traveling too fast for the conditions.

Officer unlawfully extended traffic stop when he told the defendant he was giving him a warning ticket for traffic violations but then required the defendant to exit his car, patted him down, and had him sit in patrol car while the officer ran checks

State v. Bullock, ___ N.C. App. ___, ___ S.E.2d ___ (May 10, 2016). In this post-*Rodriguez* case, the court held, over a dissent, that the officer unlawfully extended a traffic stop. Because the officer initiated the traffic stop for speeding and following too closely, "the mission of the stop was to issue a traffic infraction warning ticket to defendant for speeding and following a truck too closely." Thus, the stop "could … last only as long as necessary to complete that mission and certain permissible unrelated 'checks,' including checking defendant's driver's license, determining whether there were outstanding warrants against defendant, and inspecting the automobile's registration and proof of insurance." The officer completed the mission of the traffic stop when he told the defendant that he was giving him a warning for the traffic violations. While it was permissible for the officer to conduct "permissible checks" of the car rental agreement (the equivalent of inspecting a car's registration and proof of insurance) and of the defendant's license for outstanding warrants, he was not allowed to "do so in a way that prolong[ed] the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." (quotation omitted). Here, rather than taking the defendant's license back to his patrol car and running the checks, the officer required the defendant to exit his car, subjected him to a pat down search, and had him sit in the patrol car while the officer ran his checks. Additionally, the officer ran the defendant's name "through various law enforcement databases" while questioning him at length about subjects unrelated to the mission of the stop. The court held:

> Even assuming [the officer] had a right to ask defendant to exit the vehicle while he ran defendant's license, his actions that followed certainly extended the stop beyond what was necessary to complete the mission. The issue is not whether [the officer] could lawfully request defendant to exit the vehicle, but rather whether he unlawfully extended and prolonged the traffic stop by frisking defendant and then requiring defendant to sit in the patrol car while he was questioned. To resolve that issue, we follow *Rodriguez* and focus again on the overall mission of the stop. We hold, based on the trial court's findings of fact, that [the officer] unlawfully prolonged the detention by causing defendant to be subjected to a frisk, sit in the officer's patrol car, and answer questions while the officer searched law enforcement databases for reasons unrelated to the mission of the stop and for reasons exceeding the routine checks authorized by *Rodriguez*.

The court went on to find that reasonable suspicion did not support extending the stop. It also held that because the officer lacked reasonable suspicion to extend the stop, whether the defendant may have later consented to the search is irrelevant as consent obtained during an unlawful extension of a stop is not voluntary.

(1) Defendant's nervous behavior and association with a known drug dealer did not amount to reasonable suspicion to support extension of traffic stop, (2) Defendant's consent to search vehicle was not obtained during a consensual encounter where the officer had not returned her license at the time she gave consent

State v. Bedient, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). (1) In this post-*Rodriguez* case, the court held that because no reasonable suspicion existed to prolong the defendant's detention once the purpose of a traffic stop had concluded, the trial court erred by denying the defendant's motion to

suppress evidence obtained as a result of a consent search of her vehicle during the unlawful detention. The court found that the evidence showed only two circumstances that could possibly provide reasonable suspicion for extending the duration of the stop: the defendant was engaging in nervous behavior and she had associated with a known drug dealer. It found the circumstances insufficient to provide the necessary reasonable suspicion. Here, the officer had a legitimate basis for the initial traffic stop: addressing the defendant's failure to dim her high beam lights. Addressing this infraction was the original mission of the traffic stop. Once the officer provided the defendant with a warning on the use of high beams, the original mission of the stop was concluded. Although some of his subsequent follow-up questions about the address on her license were supported by reasonable suspicion (regarding whether she was in violation of state law requiring a change of address on a drivers license), this "new mission for the stop" concluded when the officer decided not to issue her a ticket in connection with her license. At this point, additional reasonable suspicion was required to prolong the detention. The court agreed with the defendant that her nervousness and association with a drug dealer did not support a finding of reasonable suspicion to prolong the stop. Among other things, the court noted that nervousness, although a relevant factor, is insufficient by itself to establish reasonable suspicion. It also concluded that "a person's mere association with or proximity to a suspected criminal does not support a conclusion of particularized reasonable suspicion that the person is involved in criminal activity without more competent evidence." These two circumstances, the court held, "simply give rise to a hunch rather than reasonable, particularized suspicion." (2) The defendant's consent to search the vehicle was not obtained during a consensual encounter where the officer had not returned the defendant's drivers license at the time she gave her consent.

Reasonable suspicion supported extension of traffic stop where officer smelled marijuana on defendant's person and masking odors in vehicle, and defendant stated he had an impaired driving conviction based on marijuana, gave a "bizarre" story regarding his travel, and was extremely nervous

State v. Castillo, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). (1) In this post-*Rodriguez* case, the court held that reasonable suspicion supported the officer's extension of the duration of the stop, including: the officer smelled marijuana on the defendant's person, the officer learned from the defendant him that he had an impaired driving conviction based on marijuana usage, the defendant provided a "bizarre" story regarding the nature of his travel, the defendant was extremely nervous, and the officer detected "masking odors." (2) The defendant's consent to search his car, given during a lawful extension of the stop, was clear and unequivocal.

(1) Officer had reasonable suspicion to extend traffic stop where, among other things, driver could not answer basic questions, changed his story, and was extremely nervous; (2) Officer properly frisked defendant based on reasonable suspicion that the defendant was armed and dangerous

State v. Taseen Johnson, ___ N.C. App. ___, 783 S.E.2d 753 (April 5, 2016). (1) In this drug trafficking case, the officer had reasonable suspicion to extend a traffic stop. After Officer Ward initiated a traffic stop and asked the driver for his license and registration, the driver produced his license but was unable to produce a registration. The driver's license listed his address as Raleigh, but he could not give a clear answer as to whether he resided in Brunswick County or Raleigh. Throughout the conversation, the driver changed his story about where he resided. The driver was speaking into one cell phone and had two other cell phones on the center console of his vehicle. The officer saw a vehicle power control (VPC) module on the floor of the vehicle, an unusual item that might be associated with criminal activity. When Ward attempted to question the defendant, a passenger, the defendant mumbled answers and appeared very nervous. Ward then determined that the driver's license was inactive, issued him a

citation and told him he was free to go. However, Ward asked the driver if he would mind exiting the vehicle to answer a few questions. Officer Ward also asked the driver if he could pat him down and the driver agreed. Meanwhile, Deputy Arnold, who was assisting, observed a rectangular shaped bulge underneath the defendant's shorts, in his crotch area. When he asked the defendant to identify the item, the defendant responded that it was his male anatomy. Arnold asked the defendant to step out of the vehicle so that he could do a patdown; before this could be completed, a Ziploc bag containing heroin fell from the defendant's shorts. The extension of the traffic stop was justified: the driver could not answer basic questions, such as where he was coming from and where he lived; the driver changed his story; the driver could not explain why he did not have his registration; the presence of the VPC was unusual; and the defendant was extremely nervous and gave vague answers to the officer's questions. (2) The officer properly frisked the defendant. The defendant's nervousness, evasiveness, and failure to identify what was in his shorts, coupled with the size and nature of the object supported a reasonable suspicion that the defendant was armed and dangerous.

Officer had reasonable suspicion for a stop after witnessing what he believed to be a hand-to-hand drug transaction

State v. Travis, ___ N.C. App. ___, 781 S.E.2d 674 (Jan. 19, 2016). In this drug case, the officer had reasonable suspicion for the stop. The officer, who was in an unmarked patrol vehicle in the parking lot of a local post office, saw the defendant pull into the lot. The officer knew the defendant because he previously worked for the officer as an informant and had executed controlled buys. When the defendant pulled up to the passenger side of another vehicle, the passenger of the other vehicle rolled down his window. The officer saw the defendant and the passenger extend their arms to one another and touch hands. The vehicles then left the premises. The entire episode lasted less than a minute, with no one from either vehicle entering the post office. The area in question was not known to be a crime area. Based on his training and experience, the officer believed he had witnessed a hand-to-hand drug transaction and the defendant's vehicle was stopped. Based on items found during the search of the vehicle, the defendant was charged with drug crimes. The trial court denied the defendant's motion to suppress. Although it found the case to be a "close" one, the court found that reasonable suspicion supported the stop. Noting that it had previously held that reasonable suspicion supported a stop where officers witnessed acts that they believed to be drug transactions, the court acknowledged that the present facts differed from those earlier cases, specifically that the transaction in question occurred in daylight in an area that was not known for drug activity. Also, because there was no indication that the defendant was aware of the officer's presence, there was no evidence that he displayed signs of nervousness or took evasive action to avoid the officer. However, the court concluded that reasonable suspicion existed. It noted that the actions of the defendant and the occupant of the other car "may or may not have appeared suspicious to a layperson," but they were sufficient to permit a reasonable inference by a trained officer that a drug transaction had occurred. The court thought it significant that the officer recognized the defendant and had past experience with him as an informant in connection with controlled drug transactions. Finally, the court noted that a determination that reasonable suspicion exists need not rule out the possibility of innocent conduct.

In a post-*Rodriguez* case, officer had reasonable suspicion to extend scope and duration of routine traffic stop to perform dog sniff

State v. Warren, ___ N.C. ___, 782 S.E.2d 509 (Mar. 18, 2016). On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 775 S.E.2d 362 (2015), the court per curiam affirmed. In this post-*Rodriguez* case, the court of appeals had held 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 of appeals 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 of appeals 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."

Court of Appeals holding that seizure was not justified by reasonable suspicion and that de minimus doctrine did not apply remanded for reconsideration in light of *Rodriguez*

State v. Leak, ___ N.C. ___, 780 S.E.2d 553 (Dec. 18, 2015). The supreme court vacated the decision below, *State v. Leak*, ___ N.C. App. ___, 773 S.E.2d 340 (2015), and ordered that the court of appeals remand to the trial court for reconsideration of the defendant's motion to suppress in light of *Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609 (2015). The court of appeals had held that the defendant's Fourth Amendment rights were violated when an officer, who had approached the defendant's legally parked car without reasonable suspicion, took the defendant's driver's license to his patrol vehicle. The court of appeals concluded that until the officer took the license, the encounter was consensual and no reasonable suspicion was required: "[the officer] required no particular justification to approach defendant and ask whether he required assistance, or to ask defendant to voluntarily consent to allowing [the officer] to examine his driver's license and registration." However, the court of appeals concluded that the officer's conduct of taking the defendant's license to his patrol car to investigate its status constituted a seizure that was not justified by reasonable suspicion. Citing *Rodriguez* (police may not extend a completed vehicle stop for a dog sniff, absent reasonable suspicion), the court of appeals rejected the suggestion that no violation occurred because any seizure was "de minimus" in nature.

Searches

Trial court erred by denying defendant's motion to suppress evidence obtained in a warrantless search of external hard drives

State v. Ladd, __ N.C. App. ___, 782 S.E.2d 397 (Mar. 15, 2016). In this peeping with a photographic device case, the trial court erred by denying the defendant's motion to suppress with respect to evidence obtained during a search of the defendant's external hard drives. The court rejected the notion

that the defendant consented to a search of the external hard drives, concluding that while he consented to a search of his laptops and smart phone, the trial court's findings of fact unambiguously state that he did not consent to a search of other items. Next, the court held that the defendant had a reasonable expectation of privacy in the external hard drives, and that the devices did not pose a safety threat to officers, nor did the officers have any reason to believe that the information contained in the devices would have been destroyed while they pursued a search warrant, given that they had custody of the devices. The court found that the Supreme Court's *Riley* analysis with respect to cellular telephones applied to the search of the digital data on the external data storage devices in this case, given the similarities between the two types of devices. The court concluded: "Defendant possessed and retained a reasonable expectation of privacy in the contents of the external data storage devices …. The Defendant's privacy interests in the external data storage devices outweigh any safety or inventory interest the officers had in searching the contents of the devices without a warrant."

No Fourth Amendment violation occurred when officers entered the defendant's driveway to investigate a shooting

State v. Smith, ___ N.C. App. ___, 783 S.E.2d 504 (Mar. 1, 2016). No Fourth Amendment violation occurred when officers entered the defendant's driveway to investigate a shooting. When detectives arrived at the defendant's property they found the gate to his driveway open. The officers did not recall observing a "no trespassing" sign that had been reported the previous day. After a backup deputy arrived, the officers drove both of their vehicles through the open gate and up the defendant's driveway. Once the officers parked, the defendant came out of the house and spoke with the detectives. The defendant denied any knowledge of a shooting and denied owning a rifle. However, the defendant's wife told the officers that there was a rifle inside the residence. The defendant gave oral consent to search the home. In the course of getting consent, the defendant made incriminating statements. A search of the home found a rifle and shotgun. The rifle was seized but the defendant was not arrested. After leaving and learning that the defendant had a prior felony conviction from Texas, the officers obtained a search warrant to retrieve the other gun seen in his home and a warrant for the defendant's arrest. When officers returned to the defendant's residence, the driveway gate was closed and a sign on the gate warned "Trespassers will be shot exclamation!!! Survivors will be shot again!!!" The team entered and found multiple weapons on the premises. At trial the defendant unsuccessfully moved to suppress all of the evidence obtained during the detectives' first visit to the property and procured by the search warrant the following day. He pled guilty and appealed. The court rejected the defendant's argument that a "no trespassing" sign on his gate expressly removed an implied license to approach his home. While the trial court found that a no trespassing sign was posted on the day of the shooting, there was no evidence that the sign was present on the day the officers first visited the property. Also, there was no evidence that the defendant took consistent steps to physically prevent visitors from entering the property; the open gate suggested otherwise. Finally, the defendant's conduct upon the detectives' arrival belied any notion that their approach was unwelcome. Specifically, when they arrived, he came out and greeted them. For these reasons, the defendant's actions did not reflect a clear demonstration of an intent to revoke the implied license to approach. The court went on to hold that the officers' actions did not exceed the scope of a lawful knock and talk. Finally, it rejected the defendant's argument his Fourth Amendment rights were violated because the encounter occurred within the curtilage of his home. The court noted that no search of the curtilage occurs when an officer is in a place where the public is allowed to be for purposes of a general inquiry. Here, they entered the property by through an open driveway and did not deviate from the area where their presence was lawful.

Strip search of defendant did not violate Fourth Amendment

State v. Collins, ___ N.C. App. ___, 782 S.E.2d 350 (Feb. 2, 2016). In this drug case, the court held, over a dissent, that a strip search of the defendant did not violate the Fourth Amendment. When officers entered a residence to serve a warrant on someone other than the defendant, they smelled the odor of burnt marijuana. When the defendant was located upstairs in the home, an officer smelled marijuana on his person. The officer patted down and searched the defendant, including examining the contents of his pockets. The defendant was then taken downstairs. Although the defendant initially gave a false name to the officers, once they determined his real name, they found out that he had an outstanding warrant from New York. The defendant was wearing pants and shoes but no shirt. After the defendant declined consent for a strip search, an officer noticed a white crystalline substance consistent with cocaine on the floor where the defendant had been standing. The officer then searched the defendant, pulling down or removing both his pants and underwear. Noticing that the defendant was clenching his buttocks, the officer removed two plastic bags from between his buttocks, one containing what appeared to be crack cocaine and the other containing what appeared to be marijuana. The court held that because there was probable cause to believe that contraband was secreted beneath the defendant's clothing (in this respect, the court noted the crystalline substance consistent with cocaine on the floor where the defendant had been standing), it was not required to officially deem the search a strip search or to find exigent circumstances before declaring the search reasonable. Even so, the court found that exigent circumstances existed, given the observation of what appeared to be cocaine near where the defendant had been standing and the fact that the concealed cocaine may not have been sealed, leading to danger of the defendant absorbing some of the substance through his large intestine. Also, the court noted that the search occurred in the dining area of a private apartment, removed from other people and providing privacy.

A search warrant application failed to provide probable cause to search defendant's residence where it insufficiently identified facts indicating that controlled substances would be found in the residence

State v. Allman, ___ N.C. App. ___, 781 S.E.2d 311 (Jan. 5, 2016). Over a dissent the court held in this drug case that the application in the search warrant failed to establish probable cause to search the defendant's residence. The court found the case indistinguishable from *State v. Campbell*, 282 N.C. 125 (1972), where the affidavit stated that the defendant and two other residents of the premises had been involved with drug sales and possession but insufficiently identified facts indicating that controlled substances would be found in the dwelling to be searched. Here, the affidavit alleged that two individuals residing at the residence were engaged in drug trafficking. However, nothing in the application indicated that the officer had observed or received information that drugs were possessed or sold at the premises in question. The court rejected the State's argument that such an inference arose naturally and reasonably from circumstances indicating that the two individuals were engaged in drug transactions, including the fact that both previously had been convicted of drug crimes and that an officer found marijuana, cash, and a cell phone with messages consistent with marijuana sales in one man's possession during a traffic stop. These facts were relevant to whether those individuals were engaged in drug dealing, but as in *Campbell,* information that a person is an active drug dealer is "not sufficient, without more, to support a search of the dealer's residence." The fact that the men lied about living in the house "while perhaps suggestive that drugs might be present" there, "does not make the drug's presence probable." The court distinguished all cases offered by the State on grounds that in those cases, the relevant affidavits contained "some specific and material connection between drug activity and the place to be searched."

Miranda

Officer's statement that heroin had been recovered from another person in vehicle was not interrogation or functional equivalent of interrogation

State v. Baskins, ___ N.C. App. ___, ___ S.E.2d ___ (May 17, 2016). The court held that the defendant's statements, made during the stop were voluntary and not the result of any custodial interrogation. None of the officers asked or said anything to the defendant to elicit the statement in question. Rather, the defendant volunteered the statement in response to one officer informing another that suspected heroin and had been recovered from a person in the vehicle.

Defendant did not invoke Fifth Amendment right to counsel where he made ambiguous statements regarding whether he wanted assistance of counsel

State v. Taylor, ___ N.C. App. ___, 784 S.E.2d 224 (April 19, 2016). On remand from the NC Supreme Court the court held, in this murder case, that the defendant's Fifth Amendment rights were not violated. The defendant argued on appeal that the trial court erred in denying his motion to suppress because he invoked his Fifth Amendment right to counsel during a custodial interrogation. The court disagreed, holding that the defendant never invoked his right to counsel. It summarized the relevant facts as follows:

> [D]uring the police interview, after defendant asked to speak to his grandmother, Detective Morse called defendant's grandmother from his phone and then handed his phone to defendant. While on the phone, defendant told his grandmother that he called her to "let [her] know that [he] was alright." From defendant's responses on the phone, it appears that his grandmother asked him if the police had informed him of his right to speak to an attorney. Defendant responded, "An attorney? No, not yet. They didn't give me a chance yet." Defendant then responds, "Alright," as if he is listening to his grandmother's advice. Defendant then looked up at Detective Morse and asked, "Can I speak to an attorney?" Detective Morse responded: "You can call one, absolutely." Defendant then relayed Detective Morse's answer to his grandmother: "Yeah, they said I could call one." Defendant then told his grandmother that the police had not yet made any charges against him, listened to his grandmother for several more seconds, and then hung up the phone.

After the defendant refused to sign a *Miranda* waiver form, explaining that his grandmother told him not to sign anything, Morse asked, "Are you willing to talk to me today?" The defendant responded: "I will. But [my grandmother] said—um—that I need an attorney or a lawyer present." Morse responded: "Okay. Well you're nineteen. You're an adult. Um—that's really your decision whether or not you want to talk to me and kind-of clear your name or—" The defendant then interrupted: "But I didn't do anything, so I'm willing to talk to you." The defendant then orally waived his *Miranda* rights. The defendant's question, "Can I speak to an attorney?", made during his phone conversation with his grandmother "is ambiguous whether defendant was conveying his own desire to receive the assistance of counsel or whether he was merely relaying a question from his grandmother." The defendant's later statement —"But [my grandmother] said—um—that I need an attorney or a lawyer present"—"is also not an invocation since it does not unambiguously convey *defendant's* desire to receive the assistance

of counsel." (quotation omitted). The court went on to note: "A few minutes later, after Detective Morse advised defendant of his *Miranda* rights, he properly clarified that the decision to invoke the right to counsel was defendant's decision, not his grandmother's."

Trial court erred by determining that defendant voluntarily waived *Miranda* rights where the State did not show defendant had meaningful awareness of the rights and the consequences of waiving them

State v. Knight, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). Over a dissent, the majority held that although the trial court erred in concluding that the defendant voluntarily waived his *Miranda* rights, the defendant was not prejudiced by the error. The court found that "there is no persuasive evidence that the defendant actually understood his *Miranda* rights" before waiving them. Although the defendant had experience in the criminal justice system, there was no evidence that he had ever been *Mirandized* before or that if he had, he understood his rights on those previous occasions. Additionally, the court concluded, "[j]ust because defendant appeared to have no mental disabilities does not mean he understood the warnings expressly mandated by *Miranda*." The court found "no indication that defendant understood he did not have to speak with [the Detective], and that he could request counsel." Finally, the court noted that when asked if he understood his rights, the defendant never affirmatively acknowledged that he did. In this respect, the court held: "As a constitutional minimum, the State had to show that defendant intelligently relinquished a known and understood right." Thus, while the State presented sufficient evidence of an implied waiver, it did not show that the defendant had a meaningful awareness of his *Miranda* rights and the consequences of waiving them. The dissenting judge believed that the State failed to demonstrate that the error was harmless beyond a doubt.

(1) The defendant was not automatically in custody for purposes of *Miranda* based simply upon his involuntary commitment, and a reasonable person in the defendant's position would understand that the restriction on his movement was not due to police interrogation; **(2) The defendant's confession was not involuntary**

State v. Hammonds, ___ N.C. App. ___, 777 S.E.2d 359 (Oct. 20, 2015). (1) In this armed robbery case, and over a dissent, the court rejected the defendant's argument that when police interrogated him in the hospital for approximately 1 ½ hours and procured a confession, he was in custody, triggering his right to *Miranda* warnings. The defendant argued that because he had been involuntarily committed, he was automatically "in custody" for purposes of *Miranda*. Agreeing that involuntary commitment is different from a voluntary hospitalization, the court found instructive cases holding that the fact that a person is incarcerated does not automatically mean that he or she is in custody for purposes of *Miranda*. In continued: "Since involuntary commitment is arguably less restrictive than incarceration, and certainly not more restrictive, we do not adopt a more restrictive rule for involuntary commitment than for incarceration." It went on to consider the circumstances of the interrogation as it would for an incarcerated defendant, specifically: whether the person was free to refuse to go to the place of the interrogation; whether the person was told that participation in the interrogation was voluntary and that he was free to leave at any time; whether the person was physically restrained from leaving the place of interrogation; and whether the person was free to refuse to answer questions. Here, the court noted, the officers told the defendant he was not under arrest, they never told him that he could not stop the conversation or could not request that they leave, the officers never raised their voices, and the defendant was not isolated from others such as nurses. The court went on to "hold that a reasonable person in defendant's position would understand that the restriction on his movement was due to his

involuntary commitment to receive medical treatment, not police interrogation." (2) Based on the trial court's findings, the court concluded, over a dissent, that the defendant's confession was not involuntary. Among other things, the trial court found that the officers never threatened the defendant and that their exhortations that he tell the truth did not make his confession involuntary.

Pretrial and Trial Procedure

Right to Counsel

Defendant's right to secure counsel was violated when government froze defendant's legitimate untainted assets

Luis v. United States, 578 U.S. ___, 136 S. Ct. 1083 (Mar. 30, 2016). The defendant's Sixth Amendment right to secure counsel of choice was violated when the government, acting pursuant to 18 U.S.C. § 1345, froze pretrial the defendant's legitimate, untainted assets and thus prevented her from hiring counsel to defend her in the criminal case. Critical to the Court's analysis was that the property at issue belonged to the defendant and was not "loot, contraband, or otherwise 'tainted.'"

(1) In murder case, trial counsel's closing argument did not exceed scope of defendant's consent given during *Harbison* inquiry; (2) *Harbison* standard did not apply to trial counsel's comments that were not concessions of guilt

State v. Cook, ___ N.C. App. ___, 782 S.E.2d 569 (Mar. 15, 2016). (1) In this murder case, counsel's statement in closing argument did not exceed the scope of consent given by the defendant during a *Harbison* inquiry. In light of the *Harbison* hearing, the defendant knowingly, intelligently and voluntarily, and with full knowledge of the awareness of the possible consequences agreed to counsel's concession that he killed the victim and had culpability for some criminal conduct. The court noted that counsel's trial strategy was to argue that the defendant lacked the mental capacity necessary for premeditation and deliberation and therefore was not guilty of first-degree murder. (2) The *Harbison* standard did not apply to counsel's comments regarding the "dreadfulness" of the crimes because these comments were not concessions of guilt. Considering these statements under the *Strickland* standard, the court noted that counsel pointed out to the jury that while the defendant's crimes were horrible, the central issue was whether the defendant had the necessary mental capacity for premeditation and deliberation. The defendant failed to rebut the strong presumption that counsel's conduct was reasonable. Additionally no prejudice was established given the overwhelming evidence of guilt.

In murder case, trial counsel did not render IAC by failing to produce evidence of self-defense or justification promised in counsel's opening statement

State v. Givens, __ N.C. App. ___, 783 S.E.2d 42 (Mar. 1, 2016). In this murder case, trial counsel did not render ineffective assistance by failing to produce evidence, as promised in counsel's opening statement to the jury, that the shooting in question was justified or done in self-defense. After the trial court conducted a *Harbison* inquiry, defense counsel admitted to the jury that the defendant had a gun and shot the victim but argued that the evidence would show that the shooting was justified. The concession

regarding the shooting did not pertain to a hotly disputed factual matter given that video surveillance footage of the events left no question as to whether the defendant shot the victim. The trial court's *Harbison* inquiry was comprehensive, revealing that the defendant knowingly and voluntarily consented to counsel's concession. The court also rejected the defendant's argument that making unfulfilled promises to the jury in an opening statement constitutes per se ineffective assistance of counsel. And it found that because counsel elicited evidence supporting a defense of justification, counsel did not fail to fulfill a promise made in his opening statement. The court stated: "Defense counsel promised and delivered evidence, but it was for the jury to determine whether to believe that evidence."

Trial court erred by requiring defendant to proceed pro se where defendant never asked to proceed pro se and never indicated an intent to proceed to trial without the assistance of counsel; defendant did not forfeit right to counsel

State v. Blakeney, ___ N.C. App. ___, 782 S.E.2d 88 (Feb. 16, 2016). The trial court erred by requiring the defendant to proceed pro se. After the defendant was indicted but before the trial date, the defendant signed a waiver of the right to assigned counsel and hired his own lawyer. When the case came on for trial, defense counsel moved to withdraw, stating that the defendant had been rude to him and no longer desired his representation. The defendant agreed and indicated that he intended to hire a different, specifically named lawyer. The trial court allowed defense counsel to withdraw and informed the defendant that he had a right to fire his lawyer but that the trial would proceed that week, after the trial court disposed of other matters. The defendant then unsuccessfully sought a continuance. When the defendant's case came on for trial two days later, the defendant informed the court that the lawyer he had intended to hire wouldn't take his case. When the defendant raised questions about being required to proceed pro se, the court indicated that he had previously waived his right to court-appointed counsel. The trial began, with the defendant representing himself. The court held that the trial court's actions violated the defendant's Sixth Amendment right to counsel. The defendant never asked to proceed pro se; although he waived his right to court-appointed counsel, he never indicated that he intended to proceed to trial without the assistance of any counsel. Next, the court held that the defendant had not engaged in the type of severe misconduct that would justify forfeiture of the right to counsel. Among other things, the court noted that the defendant did not fire multiple attorneys or repeatedly delay the trial. The court concluded:

> [D]efendant's request for a continuance in order to hire a different attorney, even if motivated by a wish to postpone his trial, was nowhere close to the "serious misconduct" that has previously been held to constitute forfeiture of counsel. In reaching this decision, we find it very significant that defendant was not warned or informed that if he chose to discharge his counsel but was unable to hire another attorney, he would then be forced to proceed pro se. Nor was defendant warned of the consequences of such a decision. We need not decide, and express no opinion on, the issue of whether certain conduct by a defendant might justify an immediate forfeiture of counsel without any preliminary warning to the defendant. On the facts of this case, however, we hold that defendant was entitled, at a minimum, to be informed by the trial court that defendant's failure to hire new counsel might result in defendant's being required to represent himself, and to be advised of the consequences of self-representation.

Court held that advice provided by the defendant's attorney regarding immigration consequences of the guilty plea did not comply with *Padilla v. Kentucky,* and remanded for determination of prejudice

State v. Nkiam, ___ N.C. App. ___, 778 S.E.2d 863 (Nov. 3, 2015). In this appeal from a motion for appropriate relief (MAR), the court held that advice provided by the defendant's counsel in connection with his plea and did not comply with *Padilla v. Kentucky*, 559 U.S. 356 (2010) (incorrect advice regarding the immigration consequences of a guilty plea may constitute ineffective assistance). The defendant was a permanent resident of the United States. After he pled guilty to aiding and abetting robbery and conspiracy to commit robbery, the federal government initiated deportation proceedings against him. The defendant then filed a MAR asserting ineffective assistance of counsel. At issue was counsel's advice regarding the immigration consequences of the defendant's guilty plea. It was undisputed that defense counsel informed the defendant that his plea carried a "risk" of deportation. The court noted that "[t]his case is the first in which our appellate courts have been called upon to interpret and apply *Padilla*'s holding." The court interpreted *Padilla* as holding: "when the consequence of deportation is unclear or uncertain, counsel need only advise the client of the risk of deportation, but when the consequence of deportation is truly clear, counsel must advise the client in more certain terms." In this case, "there was no need for counsel to do anything but read the statute," to understand that the deportation consequences for the defendant were truly clear. Thus, counsel was required, under *Padilla*, "'to give correct advice' and not just advise defendant that his 'pending criminal charges may carry a risk of adverse immigration consequences.'" The court remanded for determination of whether the defendant was prejudiced by counsel's deficient performance.

Pleadings

(1) Fatal variance existed in theft case where State failed to allege the owner or person in lawful custody of the stolen property, (2) Award of restitution from a larceny for which defendant was acquitted was improper

State v. Hill, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). (1) Fatal variance issues not raised at trial are waived on appeal. Exercising discretion to consider one such argument with respect to a theft of money and an iPod from a frozen yogurt shop, the court held that a fatal variance existed. The State alleged that the property belonged to Tutti Frutti, LLC, but it actually belonged to Jason Wei, the son of the sole member of that company, and the State failed to show that Tutti Frutti was in lawful custody and possession of Wei's property when it was stolen. It clarified: "there is no fatal variance between an indictment and the proof at trial if the State establishes that the alleged owner of stolen property had lawful possession and custody of the property, even if it did not actually own the property." (3) The court rejected the defendant's fatal variance argument regarding injury to real property charges, noting that the North Carolina Supreme Court recently held that an indictment charging this crime need only identify the real property, not its owner. (2) An award of restitution that included restitution from a larceny for which the defendant was acquitted was improper.

Court declines to hold citation as charging instrument to the same standard as indictments

State v. Allen, ___ N.C. App. ___, 783 S.E.2d 799 (April 19, 2016). A citation charging transporting an open container of spirituous liquor was not defective. The defendant argued that the citation failed to

state that he transported the fortified wine or spirituous liquor in the passenger area of his motor vehicle. The court declined the defendant's invitation to hold citations to the same standard as indictments, noting that under G.S. 15A-302, a citation need only identify the crime charged, as it did here, putting the defendant on notice of the charge. The court concluded: "Defendant was tried on the citation at issue without objection in the district court, and by a jury in the superior court on a trial *de novo.* Thus, once jurisdiction was established and defendant was tried in the district court, he was no longer in a position to assert his statutory right to object to trial on citation." (quotation omitted).

Indictment charging injury to real property was not fatally defective for failing to identify owner of property as a corporation or entity capable of owning property

State v. Spivey, ___ N.C. ___, 782 S.E.2d 872 (Mar. 18, 2016). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 769 S.E.2d 841 (2015), the court reversed, holding that an indictment charging the defendant with injury to real property "of Katy's Great Eats" was not fatally defective. The court rejected the argument that the indictment was defective because it failed to specifically identify "Katy's Great Eats" as a corporation or an entity capable of owning property, explaining: "An indictment for injury to real property must describe the property in sufficient detail to identify the parcel of real property the defendant allegedly injured. The indictment needs to identify the real property itself, not the owner or ownership interest." The court noted that by describing the injured real property as "the restaurant, the property of Katy's Great Eats," the indictment gave the defendant reasonable notice of the charge against him and enabled him to prepare his defense and protect against double jeopardy. The court also rejected the argument that it should treat indictments charging injury to real property the same as indictments charging crimes involving personal property, such as larceny, embezzlement, or injury to personal property, stating:

> Unlike personal property, real property is inherently unique; it cannot be duplicated, as no two parcels of real estate are the same. Thus, in an indictment alleging injury to real property, identification of the property itself, not the owner or ownership interest, is vital to differentiate between two parcels of property, thereby enabling a defendant to prepare his defense and protect against further prosecution for the same crime. While the owner or lawful possessor's name may, as here, be used to identify the specific parcel of real estate, it is not an essential element of the offense that must be alleged in the indictment, so long as the indictment gives defendant reasonable notice of the specific parcel of real estate he is accused of injuring.

The court further held that to the extent *State v. Lilly*, 195 N.C. App. 697 (2009), is inconsistent with its opinion, it is overruled. Finally, the court noted that although "[i]deally, an indictment for injury to real property should include the street address or other clear designation, when possible, of the real property alleged to have been injured," if the defendant had been confused as to the property in question, he could have requested a bill of particulars.

Statement of charges alleging disorderly conduct in or near a public building or facility sufficiently charged the offense

State v. Dale, ___ N.C. App. ___, 783 S.E.2d 222 (Feb. 16, 2016). A statement of charges, alleging that the defendant engaged in disorderly conduct in or near a public building or facility sufficiently charged the offense. Although the statute uses the term "rude or riotous noise," the charging instrument alleged that the defendant did "curse and shout" at police officers in a jail lobby. The court found that the

charging document was sufficient, concluding that "[t]here is no practical difference between 'curse and shout' and 'rude or riotous noise.'"

Obtaining property by false pretense indictment alleging defendant obtained "a quantity of U.S. currency" from victim was not defective

State v. Ricks, ___ N.C. App. ___, 781 S.E.2d 637 (Jan. 5, 2016). Over a dissent, the court held that an obtaining property by false pretenses indictment was not defective where it alleged that the defendant obtained "a quantity of U.S currency" from the victim. The court found that G.S. 15-149 (allegations regarding larceny of money) supported its holding.

Indictment charging discharging firearm into occupied dwelling was not defective where it used the term "apartment" rather than the statutory term "dwelling"

State v. Bryant, ___ N.C. App. ___, 779 S.E.2d 508 (Nov. 17, 2015). An indictment charging discharging a firearm into an occupied dwelling was not defective. The indictment alleged that the defendant "discharge[d] a firearm to wit: a pistol into an apartment 1727 Clemson Court, Kannapolis, NC at the time the apartment was occupied by Michael Fezza" and that the defendant violated G.S. 14-34. The defendant was convicted of discharging a weapon into an occupied dwelling in violation of G.S. 14-34.1. The court rejected the defendant's argument that the term "apartment," as used in the indictment, was not synonymous with the term "dwelling," the term used in the statute. On this issue the court stated: "We refuse to subject defendant's … indictment to hyper technical scrutiny with respect to form." Next, the court held that although the indictment incorrectly referenced G.S. 14-34 instead of G.S. 14-34.1(b), the error was not a fatal defect.

Fatal variance existed where larceny indictment alleged two owners of property but State failed to prove that both alleged owners had a property interest in the stolen items

State v. Campbell, ___ N.C. App. ___, 777 S.E.2d 525 (Oct. 20, 2015), *temporary stay allowed*, ___ N.C. ___, 778 S.E.2d 97 (Nov. 10, 2015). The trial court erred by failing to dismiss a larceny charge due to a fatal variance with respect to ownership of the stolen property. The indictment alleged that the property was owned by Pastor Stevens and Manna Baptist Church. The court held that when an indictment alleges multiple owners, the State must prove multiple owners. Here, there was no evidence that the property was owned by Pastor Stevens; it showed only that it was owned by the church. The fact that Stevens was an employee of the church, the true owner of the property, did not cure the fatal variance. The State was required to demonstrate that both alleged owners had at least some sort of property interest in the stolen items; here it failed to do that.

(1) No fatal variance where indictment for burning personal property alleged that the defendant set fire to bed, jewelry, and clothing while the evidence showed only that he set fire to bedding; (2) Trial court did not err by failing to instruct jury regarding the defendant's presence at the crime scene; (3) Trial court erred by instructing the jury that it could find that the defendant attained habitual felon status based on a prior conviction for selling cocaine where the indictment did not allege this conviction

State v. Jeffries, ___ N.C. App. ___, 776 S.E.2d 872 (Oct. 6, 2015). (1) In this burning of personal property case where the indictment charged that the defendant set fire to the victim's bed, jewelry, and clothing and the evidence showed only that he set fire to her bedding, no fatal variance occurred. The State was

not required to show that the defendant also set fire to her jewelry and clothing. The court rejected the defendant's argument that there was a fatal variance between the indictment's allegation that he set fire to her bed and the evidence, which showed he set fire to her bedding. Any variance in this regard was not material, given that there was no evidence that the "bedding" was found anywhere other than on the bed. It concluded: "we are unable to discern how Defendant was unfairly surprised, misled, or otherwise prejudiced in the preparation of his defense by the indictment's failure to identify the 'bedding' rather than the 'bed.'" (2) The trial court did not err by failing to instruct the jury regarding the defendant's presence at the crime scene. Contrary to the defendant's argument, his presence at the scene is not an element of the offense. (3) The trial court erred by instructing the jury that it could find that the defendant attained habitual felon status based on a prior conviction for selling cocaine where the indictment did not allege this conviction. The indictment alleged three predicate felonies to establish habitual felon status. However, the trial court instructed the jury on four felonies, the three identified in the indictment as well as sale of cocaine, which was not alleged in the indictment. Because it was impossible for the court to determine whether the jurors relied on the fourth felony not alleged in the indictment, a new hearing on habitual felon was required.

Reversing the Court of Appeals, the Court held that an information charging injury to personal property owned by NCSU was not fatally flawed where it alleged the existence of at least one victim capable of owning property

State v. Ellis, ___ N.C. ___, 776 S.E.2d 675 (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.

Discovery

Expert testimony about general characteristics of child sexual assault victims and possible reasons for delayed reporting of such allegations is expert testimony subject to disclosure in discovery under G.S. 15A-903(a)(2)

State v. Davis, __ N.C. __, ___ S.E.2d __ (April 15, 2016). Modifying and affirming the unanimous decision of the Court of Appeals below, ___ N.C. App. ___, 768 S.E.2d 903 (2015), in this child sexual assault case, the court held that expert testimony about general characteristics of child sexual assault victims and the possible reasons for delayed reporting of such allegations is expert opinion testimony subject to disclosure in discovery under G.S. 15A-903(a)(2). The court rejected the State's argument that because its witnesses did not give expert opinion testimony and only testified to facts, the discovery requirements of G.S. 15A-903(a)(2) were not triggered. Recognizing "that determining what constitutes expert opinion testimony requires a case-by-case inquiry in which the trial court (or a reviewing court) must look at the testimony as a whole and in context," the court concluded that the witnesses gave expert opinions that should have been disclosed in discovery. Specifically, both offered expert opinion testimony about the characteristics of sexual abuse victims. In this respect, their testimony went beyond the facts of the case and relied on inferences by the experts to reach the conclusion that certain characteristics are common among child sexual assault victims. Similarly, both offered expert opinion testimony explaining why a child victim might delay reporting abuse. Here again the experts drew inferences and gave opinions explaining that these and other unnamed patients had been abuse victims and delayed reporting the abuse for various reasons. The court continued: "These views presuppose (*i.e,* opine) that the other children the expert witnesses observed had actually been abused. These are not factual observations; they are expert opinions." However, the court found that the defendant failed to show that the error was prejudicial.

Prosecution's failure to disclose material evidence violated defendant's due process rights

Wearry v. Cain, 577 U.S. ___, 136 S. Ct. 1002 (Mar. 7, 2016) (per curiam). In this capital case, the prosecution's failure to disclose material evidence violated the defendant's due process rights. At trial the defendant unsuccessfully raised an alibi defense and was convicted. The case was before the Court after the defendant's unsuccessful post-conviction *Brady* claim. Three pieces of evidence were at issue. First, regarding State's witness Scott, the prosecution withheld police records showing that two of Scott's fellow inmates had made statements that cast doubt on Scott's credibility. One inmate reported hearing Scott say that he wanted to make sure the defendant got "the needle cause he jacked over me." The other inmate told investigators that he had witnessed the murder. However, he recanted the next day, explaining that "Scott had told him what to say" and had suggested that lying about having witnessed the murder "would help him get out of jail." Second, regarding State's witness Brown, the prosecution failed to disclose that, contrary to its assertions at trial that Brown, who was serving a 15-year sentence, "hasn't asked for a thing," Brown had twice sought a deal to reduce his existing sentence in exchange for his testimony. And third, the prosecution failed to turn over medical records on Randy Hutchinson. According to Scott, on the night of the murder, Hutchinson had run into the street to flag down the victim, pulled the victim out of his car, shoved him into the cargo space, and crawled into the cargo space himself. But Hutchinson's medical records revealed that, nine days before the murder, Hutchinson had undergone knee surgery to repair a ruptured patellar tendon. An expert witness testified at the state collateral-review hearing that Hutchinson's surgically repaired knee could not have withstood running, bending, or lifting substantial weight. The State presented an expert witness who

disagreed regarding Hutchinson's physical fitness. Concluding that the state court erred by denying the defendant's *Brady* claim, the Court stated: "Beyond doubt, the newly revealed evidence suffices to undermine confidence in [the defendant's] conviction. The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than [the defendant's] alibi." It continued: "Even if the jury—armed with all of this new evidence—could have voted to convict [the defendant], we have no confidence that it would have done so." (quotations omitted). It further found that in reaching the opposite conclusion, the state post-conviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively, emphasized reasons a juror might disregard new evidence while ignoring reasons she might not, and failed even to mention the statements of the two inmates impeaching Scott.

Other Procedural Issues

Sixth Amendment's speedy trial guarantee does not apply to the sentencing phase of a criminal prosecution

Betterman v. Montana, 578 U.S. __ (May 19, 2016). The Sixth Amendment's speedy trial guarantee does not apply to the sentencing phase of a criminal prosecution. After pleading guilty to bail-jumping, the defendant was jailed for over 14 months awaiting sentence on that conviction. The defendant argued that the 14-month gap between conviction and sentencing violated his speedy trial right. Resolving a split among the courts on the issue, the Court held:

> [T]he guarantee protects the accused from arrest or indictment through trial, but does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges. For inordinate delay in sentencing, although the Speedy Trial Clause does not govern, a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments.

The Court reserved on the question of whether the speedy trial clause "applies to bifurcated proceedings in which, at the sentencing stage, facts that could increase the prescribed sentencing range are determined (e.g., capital cases in which eligibility for the death penalty hinges on aggravating factor findings)." Nor did it decide whether the speedy trial right "reattaches upon renewed prosecution following a defendant's successful appeal, when he again enjoys the presumption of innocence."

Defendant was not denied right to speedy trial despite more than three-year delay between indictment and trial

State v. Kpaeyeh, ___ N.C. App. ___, 784 S.E.2d 582 (April 5, 2016). In this child sexual abuse case, the defendant was not denied his right to a speedy trial. The more than three-year delay between indictment and trial is sufficiently long to trigger analysis of the remaining speedy trial factors. Considering those factors, the court found that the evidence "tends to show that the changes in the defendant's representation caused much of the delay" and that miscommunication between the defendant and his first two lawyers, or neglect by these lawyers, also "seems to have contributed to the

delay." Also, although the defendant made pro se assertions of a speedy trial right, he was represented at the time and these requests should have been made by counsel. The court noted, however, that the defendant's "failure of process does not equate to an absence of an intent to assert his constitutional right to a speedy trial." Finally, the defendant failed to show prejudice caused by the delay. Given that DNA testing confirmed that he was the father of a child born to the victim, the defendant's argument that the delay hindered his ability to locate alibi witnesses failed to establish prejudice.

(1) Following a mistrial, the law of the case doctrine did not apply to bind a second trial judge to a first trial judge's suppression ruling; (2) Following a mistrial, the rule that one trial judge cannot overrule another did not preclude the second trial judge from ruling on the suppression issue in this case; (3) Collateral estoppel did not bar the state from relitigating the suppression issue

State v. Knight, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). (1) The court rejected the defendant's argument that on a second trial after a mistrial the second trial judge was bound by the first trial judge's suppression ruling under the doctrine of law of the case. The court concluded that doctrine only applies to an appellate ruling. However, the court noted that another version of the doctrine provides that when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes law of the case and cannot be challenged in subsequent proceedings in the same case. However, the court held that this version of the doctrine did not apply here because the suppression ruling was entered during the first trial and thus the State had no right to appeal it. Moreover, when a defendant is retried after a mistrial, prior evidentiary rulings are not binding. (2) The court rejected the defendant's argument that the second judge's ruling was improper because one superior court judge cannot overrule another, noting that once a mistrial was declared, the first trial court's ruling no longer had any legal effect. (3) The court rejected the defendant's argument that collateral estoppel barred the State from relitigating the suppression issue, noting that doctrine applies only to an issue of ultimate fact determined by a final judgment.

Defendant waived assertion of error regarding shackling at trial by failing to object at trial

State v. Sellers, ___ N.C. App. ___, 782 S.E.2d 86 (Feb. 16, 2016). By failing to object at trial, the defendant waived assertion of any error regarding shackling on appeal. The defendant argued that the trial court violated G.S. 15A-1031 by allowing him to appear before the jury in leg shackles and erred by failing to issue a limiting instruction. The court found the issue waived, noting that "other structural errors similar to shackling are not preserved without objection at trial." However it continued:

> Nevertheless, trial judges should be aware that a decision by a sheriff to shackle a problematic criminal defendant in a jail setting or in transferring a defendant from the jail to a courtroom, is not, without a trial court order supported by adequate findings of fact, sufficient to keep a defendant shackled during trial. Failure to enter such an order can, under the proper circumstances, result in a failure of due process.

No violation of double jeopardy occurred where defendant was convicted of attempted larceny and attempted common law robbery charges arising out of the same incident but involving different victims

State v. Miller, ___ N.C. App. ___, 782 S.E.2d 328 (Feb. 2, 2016). No violation of double jeopardy occurred where the defendant was convicted of attempted larceny and attempted common law robbery when the offenses arose out of the same incident but involved different victims. The defendant

committed the attempted larceny upon entering the home in question with the intent of taking and carrying away a resident's keys; he committed the attempted common law robbery when he threatened the resident's granddaughter with box cutters in an attempt to take and carry away the keys.

Evidence

Confrontation Clause

Defendant's confrontation rights were violated by admission of anonymous 911 call and dispatcher's call back

State v. McKiver, ___ N.C. App. ___, ___ S.E.2d ___ (May 17, 2016). In this felon in possession case, the court held that the defendant's confrontation rights were violated when the trial court admitted testimonial evidence of an anonymous 911 call and the 911 dispatcher's call back. The anonymous 911 caller stated that a black man was outside with a gun and that there was a possible dispute. When the dispatcher asked whether the person in question was pointing a gun at anyone, the caller responded "I don't know." The dispatcher also asked whether the caller heard anything, such as arguments, and the caller responded in the negative. When the dispatcher asked whether the caller wanted the dispatcher to stay on the line until police arrived the caller responded, "No, I'll be fine." Officer Bramley, who responded to the scene, testified that when he arrived he did not see a black man with a gun. Bramley contacted the 911 dispatcher and asked the dispatcher to initiate a call back to get a better description of the suspect. The dispatcher did so and reported that the caller stated that "it was in the field in a black car " and that "[s]omeone said he might have thrown the gun." Officers eventually found the gun in question approximately 10 feet away from a black vehicle. When Bramley asked the dispatcher whether the caller provided a description of the suspect, the dispatcher replied, "black male, light plaid shirt." Bramley connected this description to the defendant, who he had seen upon his arrival. The court concluded:

> Our review of the record demonstrates that the circumstances surrounding both the initial 911 call and the dispatcher's subsequent call back objectively indicate that no ongoing emergency existed. Indeed, even before … officers arrived on the scene, the anonymous caller's statements during her initial 911 call—that she did not know whether the man with the gun was pointing his weapon at or even arguing with anyone; that she was inside and had moved away from the window to a position of relative safety; and that she did not feel the need to remain on the line with authorities until help could arrive—make clear that she was not facing any bona fide physical threat. Moreover, [Officer] Bramley [testified] that when he arrived …, the scene was "pretty quiet" and "pretty calm." Although it was dark, … officers had several moments to survey their surroundings, during which time Bramley encountered [the defendant] and determined that he was unarmed. While the identity and location of the man with the gun were not yet known to the officers when Bramley requested the dispatcher to initiate a call back, our Supreme Court has made clear that this fact alone does not in and of itself create an ongoing emergency and there is no other evidence in the record of circumstances suggesting that an ongoing emergency existed at that time. We

> therefore conclude the statements made during the initial 911 call were testimonial in nature.
>
> We reach the same conclusion regarding the statements elicited by the dispatcher's call back concerning what kind of shirt the caller saw the man with the gun wearing and the fact that someone saw the man drop the gun. Because these statements described past events rather than what was happening at the time and were not made under circumstances objectively indicating an ongoing emergency, we conclude that they were testimonial and therefore inadmissible. (quotation and citation omitted).

The court went on to reject the State's argument that this error was harmless.

No confrontation clause violation occurred where child sexual assault victim's statements were made for the primary purpose of obtaining a medical diagnosis and were therefore nontestimonial

State v. McLaughlin, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this child sexual assault case, no confrontation clause violation occurred where the victim's statements were made for the primary purpose of obtaining a medical diagnosis. After the victim revealed the sexual conduct to his mother, he was taken for an appointment at a Children's Advocacy Center where a registered nurse conducted an interview, which was videotaped. During the interview, the victim recounted, among other things, details of the sexual abuse. A medical doctor then conducted a physical exam. A DVD of the victim's interview with the nurse was admitted at trial. The court held that the victim's statements to the nurse were nontestimonial, concluding that the primary purpose of the interview was to safeguard the mental and physical health of the child, not to create a substitute for in-court testimony. Citing *Clark,* the court rejected the defendant's argument that state law requiring all North Carolinians to report suspected child abuse transformed the interview into a testimonial one.

Expert Opinion Testimony

Error to prevent defendant from inquiring into the compensation of the State's expert witness

State v. Singletary, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). The trial court erred by preventing the defendant from making any inquiry into the compensation paid to the State's expert witness. "The source and amount of a fee paid to an expert witness is a permissible topic for cross-examination, as it allows the opposing party to probe the witnesses' partiality, if any, towards the party by whom the expert was called." However, the defendant failed to show "harmful prejudice."

Defendant did not establish plain error with respect to claim that State's expert vouched for credibility of child sexual assault victim

State v. Watts, ___ N.C. App. ___, 783 S.E.2d 266 (April 5, 2016), *review allowed*, ___ N.C. ___, 783 S.E.2d 747 (Apr. 13, 2016). The defendant did not establish plain error with respect to his claim that the State's expert vouched for the credibility of the child sexual assault victim. The expert testified regarding the victim's bruises and opined that they were the result of blunt force trauma; when asked whether the victim's account of the assault was consistent with her medical exam, she responded that the victim's "disclosure supports the physical findings." This testimony did not improperly vouch for the victim's

credibility and amount to plain error. Viewed in context, the expert was not commenting on the victim's credibility; rather she opined that the victim's disclosure was not inconsistent with the physical findings or impossible given the physical findings.

Trial court improperly excluded the defendant's expert witness on the suggestibility of children in sexual assault case based on an erroneous belief that the testimony was not admissible as a matter of law

State v. Walston, ___ N.C. App. ___, 780 S.E.2d 846 (Dec. 1, 2015). In this sexual assault case involving adult victims and assaults that allegedly occurred when they were young children, the trial court improperly excluded the defendant's expert witness based on the erroneous belief that the testimony was not admissible as a matter of law. The defendant's expert, Dr. Artigues, would have given testimony concerning the suggestibility of children. Although the trial court did not make findings of fact and conclusions of law in rending its decision, the court reviewed the record and determined that the trial court excluded the testimony for two reasons. First, the trial court determined that the case did not involve repressed memory and therefore the testimony was not relevant. Second, the trial court agreed with the State that it could not allow an expert witness to testify about the general susceptibility of children to suggestion if the expert had not interviewed the alleged victims. The court rejected the notion that its decision in *State v. Robertson*, 115 N.C. App. 249, (1994), created a per se rule to that effect. Rather, *Robertson* simply held that the trial court had not abused its discretion by excluding the expert testimony under Rule 403. It continued: "Neither *Robertson* nor any other North Carolina appellate opinion we have reviewed recognizes any such *per se* rule. We hold that expert opinion regarding the general reliability of children's statements may be admissible so long as the requirements of Rules 702 and 403 … are met." The court went on to reject the notion that such expert testimony only can be allowed when the witness has interviewed the victims, noting that the defendant's expert here had no right to access the victims absent their consent. It continued: "The ability of a defendant to present expert witness testimony on his behalf cannot be subject to the agreement of the prosecuting witness, for that agreement will rarely materialize." The court continued:

> General opinions related to credibility and suggestibility are informed by ongoing practice and research, not based upon interviews with a particular alleged victim of sexual assault. If expert testimony concerning general traits, behaviors, or phenomena can be helpful to the trier of fact — and it satisfies the requirements of Rule 702 and Rule 403 — it is admissible. This is true whether or not the expert has had the opportunity to personally interview the prosecuting witness.

The court was careful to note that expressing an opinion concerning truthfulness of a prosecuting witness is generally forbidden. But here, the defendant's argument was not that the prosecuting witnesses were lying but rather that their alleged memories of abuse were the result of repeated suggestions from people close to them that the abuse had in fact occurred. The defendant argued that the evidence was more consistent with false memories implanted through suggestion than with repressed memories. Dr. Artigues' testimony was directly relevant to this defense; it would have supported the idea that the children's alleged memories have been the result of repeated suggestion.

There was sufficient evidence of conspiracy to traffic in opiates where the State's expert analyzed only one pill and visually examined the rest

State v. Lewis, ___ N.C. App. ___, 779 S.E.2d 147 (Nov. 3, 2015). In this conspiracy to traffic in opiates case, the evidence was sufficient to support the conviction where the State's expert analyzed only one of the pills in question and then confirmed that the remainder were visually consistent with the one that was tested. The police seized 20 pills weighing 17.63 grams. The State's expert analyzed one of the pills and determined that it contained oxycodone, an opium derivative with a net weight of 0.88 grams. The expert visually examined the remaining 19 pills and found them to have "the same similar size, shape and form as well as the same imprint on each of them." The defendant argued that the visual examination was insufficient to precisely establish how much opium derivative was present in the seized pills. The court rejected this argument, citing prior precedent establishing that a chemical analysis of each individual pill is not necessary; the scope of the analysis may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the entire quantity of pills under consideration.

(1) In a child sexual assault case, testimony from the victim's therapist did not constitute impermissible vouching for the victim's credibility; (2) Trial court did not err by allowing a nurse practitioner to testify that she recommended the victim for therapy and that she referred to the victim's mother as the "non-offending" caregiver

State v. Harris, ___ N.C. App. ___, 778 S.E.2d 875 (Nov. 3, 2015). (1) In this child sexual assault case the trial court did not err by admitting testimony from the victim's therapist. The court rejected the defendant's argument that the therapist's testimony constituted impermissible vouching for the victim's credibility. The therapist specialized in working with children who have been sexually abused; she performed an assessment and used trauma-focused cognitive behavioral therapy (TFCBT) to help treat the victim. During treatment the victim talked about the sexual misconduct, how she felt, and wrote a "trauma narrative" describing what had happened. The court noted that the defendant was unable to point to any portion of the therapist's testimony where she opined that the victim was in fact sexually abused by the defendant or stated that sexual abuse did in fact occur. Rather, the therapist explained how TFCBT is used to help treat sexual abuse victims and described therapeutic techniques that she employs in her treatment. She testified that the victim had symptoms consistent with trauma, and explained the process and purpose of writing a trauma narrative. The court found that her explanation laid the foundation for the State to introduce the victim's trauma narrative, which included her written statement about what happened to her. It noted that the narrative was introduced solely for the purpose of corroborating the victim's testimony. It added, "[t]he mere fact that [the therapist's] testimony supports [the victim's] credibility does not render it inadmissible." (2) The trial court did not err by allowing a nurse practitioner to testify that she recommended the victim for therapy despite finding no physical evidence of abuse, and that she referred to the victim's mother as the "non-offending" caregiver. The defendant argued that this testimony impermissibly bolstered the victim's credibility and constituted opinion evidence as to guilt. The court noted that the nurse never asserted that the victim had been sexually abused or explicitly commented on her credibility. Rather, her testimony simply recounted what she did at the conclusion of her examination of the victim and was within the permissible range of expert testimony in child sexual abuse cases. As to her use of the term non-offending caregiver, the witness explained that her organization uses that term to refer to the person with whom the child will be going home and that any parent or caregiver suspected of being an offender is not allowed in the center. The court noted that the witness never testified that the defendant was an offending caregiver.

(1) Trial court did not err by allowing a fire marshal to testify that the fire had been intentionally set in a burning personal property case; (2) Prosecutor's comments regarding the credibility of certain witness testimony during closing arguments did not require the trial court to intervene ex mero motu

State v. Jeffries, ___ N.C. App. ___, 776 S.E.2d 872 (Oct. 6, 2015). (1) The court held, in this burning of personal property case, that the trial court did not err by allowing the State's expert in fire investigation, a fire marshal, to testify that the fire had been intentionally set. The expert testified that the fire was caused by "the application of open flame to … combustible material," and that it had been intentionally set. The court noted that in *State v. Hales*, 344 N.C. 419, 424-25 (1996), the North Carolina Supreme Court held that with the proper foundation, a fire marshal may offer an expert opinion regarding whether a fire was intentionally set. (2) The court held that although some of the prosecutor's comments regarding the credibility of certain witness testimony during closing arguments may have been objectionable, they did not rise to the level of requiring the trial court to intervene ex mero motu. The court noted as objectionable the prosecutor's statement that the victim's testimony was "extraordinarily credible."

Other Evidence Issues

Trial court did not err by failing to exclude testimony of two law enforcement officers who identified defendant in a surveillance video

State v. Hill, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). In this case involving breaking and entering, larceny and other charges, the trial court did not err by failing to exclude the testimony of two law enforcement officers who identified the defendant in a surveillance video. The officers were familiar with the defendant and recognized distinct features of his face, posture, and gait that would not have been evident to the jurors. Also, because the defendant's appearance had changed between the time of the crimes and the date of trial, the officer's testimony helped the jury understand his appearance at the time of the crime and its similarity to the person in the surveillance videos.

Trial court did not err by admitting staged photographs as visual aids to the testimony of an expert in crash investigation

State v. Moultry, ___ N.C. App. ___, 784 S.E.2d 572 (April 5, 2016). In this case involving second-degree murder arising out of a vehicle collision, the trial court did not err by admitting staged photographs into evidence. An expert in crash investigation and reconstruction explained to the jury, without objection, how the accident occurred. The photographs were relevant as visual aids to this testimony. Furthermore, the trial court gave a limiting instruction explaining that the photographs were only to be used for the purpose of illustrating the witness's testimony.

In a child sexual assault case, the trial court committed reversible error by admitting 404(b) evidence of allegations of another person that resulted in defendant being charged with rape and breaking or entering, charges which were later dismissed

State v. Watts, ___ N.C. App. ___, 783 S.E.2d 266 (April 5, 2016), *review allowed*, ___ N.C. ___, 783 S.E.2d 747 (Apr. 13, 2016). In this child sexual assault case, the court held, over a dissent, that the trial

court committed reversible error by admitting 404(b) evidence. The evidence involved allegations by another person—Buffkin—that resulted in the defendant being charged with rape and breaking or entering, charges which were later dismissed. The court held that the trial court erred by determining that the evidence was relevant to show opportunity, explaining: "there is no reasonable possibility that Buffkin's testimony concerning an alleged sexual assault eight years prior was relevant to show defendant's opportunity to commit the crimes now charged." The court further found that the evidence was not sufficiently similar to show common plan or scheme. The similarities noted by the trial court--that both instances involved sexual assaults of minors who were alone at the time, the defendant was an acquaintance of both victims, the defendant's use of force, and that the defendant threatened to kill each minor and the minor's family--were not "unusual to the crimes charged." Moreover, "the trial court's broad labeling of the similarities disguises significant differences in the sexual assaults," including the ages of the victims, the circumstances of the offenses, the defendant's relationships with the victims, and that a razor blade was used in the Buffkin incident but that no weapon was used in the incident in question.

Victim's statement that she "was scared of" defendant was admissible under the Rule 803(3) state of mind hearsay exception

State v. Cook, ___ N.C. App. ___, 782 S.E.2d 569 (Mar. 15, 2016). In this murder case, the trial court did not err by admitting hearsay testimony under the Rule 803(3) state of mind hearsay exception. The victim's statement that she "was scared of" the defendant unequivocally demonstrated her state of mind and was highly relevant to show the status of her relationship with the defendant on the night before she was killed.

In a child sexual assault case, trial court did not err by admitting victim's statements to his mother as excited utterances despite 10-day gap between last incident of sexual abuse and the victim's statement

State v. McLaughlin, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this child sexual assault case, the trial court did not err by admitting the victim's statements to his mother under the excited utterance exception. The court rejected the defendant's argument that a 10-day gap between the last incident of sexual abuse and the victim's statements to his mother put them outside the scope of this exception. The victim made the statements immediately upon returning home from a trip to Florida; his mother testified that when the victim arrived home with the defendant, he came into the house "frantically" and was "shaking" while telling her that she had to call the police. The court noted that greater leeway with respect to timing is afforded to young victims and that the victim in this case was 15 years old. However it concluded: "while this victim was fifteen rather than four or five years of age, he was nevertheless a minor and that fact should not be disregarded in the analysis." The court also rejected the defendant's argument that because the victim had first tried to communicate with his father by email about the abuse, his later statements to his mother should not be considered excited utterances.

(1) In an involuntary manslaughter case involving a dog attack, the trial court did not err by admitting recording of defendant performing rap song which was introduced by the State to prove defendant knew his dog was vicious; (2) Trial court did not err by admitting screenshots of defendant's webpage over defendant's objection that the evidence was not properly authenticated; (3) Trial court did not commit plain error by allowing a pathologist to opine that victim's death was caused by dog bites

State v. Ford, ___ N.C. App. ___, 782 S.E.2d 98 (Feb. 16, 2016). In this involuntary manslaughter case, where the defendant's pit bull attacked and killed the victim, the trial court did not err by admitting a rap song recording into evidence. The defendant argued that the song was irrelevant and inadmissible under Rule 403, in that it contained profanity and racial epithets which offended and inflamed the jury's passions. The song lyrics claimed that the victim was not killed by a dog and that the defendant and the dog were scapegoats for the victim's death. The song was posted on social media and a witness identified the defendant as the singer. The State offered the song to prove that the webpage in question was the defendant's page and that the defendant knew his dog was vicious and was proud of that characteristic (other items posted on that page declared the dog a "killa"). The trial court did not err by determining that the evidence was relevant for the purposes offered. Nor did it err in determining that probative value was not substantially outweighed by prejudice. (2) The trial court did not err by admitting as evidence screenshots from the defendant's webpage over the defendant's claim that the evidence was not properly authenticated. The State presented substantial evidence that the website was actually maintained by the defendant. Specifically, a detective found the MySpace page in question with the name "Flexugod/7." The page contained photos of the defendant and of the dog allegedly involved in the incident. Additionally, the detective found a certificate awarded to the defendant on which the defendant is referred to as "Flex." He also found a link to a YouTube video depicting the defendant's dog. This evidence was sufficient to support a prima facie showing that the MySpace page was the defendant's webpage. It noted: "While tracking the webpage directly to defendant through an appropriate electronic footprint or link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique content belong to defendant." (3) The trial court did not commit plain error by allowing a pathologist to opine that the victim's death was due to dog bites. The court rejected the defendant's argument that the expert was in no better position than the jurors to speculate as to the source of the victim's puncture wounds.

(1) A recitation from an air pistol manual regarding the velocity capability of the pistol was not offered for the truth of the matter asserted but rather was offered to explain a detective's conduct when conducting a test fire; (2) Trial court did not err by admitting videotape showing detective's experimental test firing the air pistol

State v. Chapman, ___ N.C. App. ___, 781 S.E.2d 320 (Jan. 5, 2016). (1) In this armed robbery case, the statement at issue was not hearsay because it was not offered for the truth of the matter asserted. At trial one issue was whether an air pistol used was a dangerous weapon. The State offered a detective who performed a test fire on the air pistol. He testified that he obtained the manual for the air pistol to understand its safety and operation before conducting the test. He testified that the owner's manual indicated that the air pistol shot BBs at a velocity of 440 feet per second and had a danger distance of 325 yards. He noted that he used this information to conduct the test fire in a way that would avoid injury to himself. The defendant argued that this recitation from the manual was offered to prove that the gun was a dangerous weapon. The court concluded however that this statement was offered for a proper non-hearsay purpose: to explain the detective's conduct when performing the test fire. (2) The trial court did not err by admitting a videotape showing a detective test firing the air pistol in question.

The State was required to establish that the air pistol was a dangerous weapon for purposes of the armed robbery charge. The videotape showed a detective performing an experiment to test the air pistol's shooting capabilities. Specifically, it showed him firing the air pistol four times into a plywood sheet from various distances. While experimental evidence requires substantial similarity, it does not require precise reproduction of the circumstances in question. Here, the detective use the weapon employed during the robbery and fired it at a target from several close-range positions comparable to the various distances from which the pistol had been pointed at the victim. The detective noted the possible dissimilarity between the amount of gas present in the air cartridge at the time of the robbery and the amount of gas contained within the new cartridge used for the experiment, acknowledging the effect the greater air pressure would have on the force of a projectile and its impact on a target.

(1) In sexual assault case, trial court did not err by admitting, under Rule 404(b), evidence that defendant engaged in hazing techniques against high school wrestlers he coached; (2) Trial court did not abuse its discretion by admitting hazing testimony under Rule 403; (3) Trial court erred by excluding evidence that one victim was biased on basis that evidence was irrelevant because it did not fit into an exception to the Rape Shield Statute; (4) Trial court abused its discretion by excluding the bias evidence under Rule 403; (5) Trial court's errors were not prejudicial

State v. Goins, ___ N.C. App. ___, 781 S.E.2d 45 (Dec. 15, 2015). (1) In this sexual assault case involving allegations that the defendant, a high school wrestling coach, sexually assaulted wrestlers, the trial court did not err by admitting, under Rule 404(b), evidence that the defendant engaged in hazing techniques against his wrestlers. The evidence involved testimony from wrestlers that the defendant choked-out and gave extreme wedgies to his wrestlers, and engaged in a variety of hazing activity, including instructing upperclassmen to apply muscle cream to younger wrestlers' genitals and buttocks. The evidence was properly admitted to show that the defendant engaged in "grooming behavior" to prepare his victims for sexual activity. The court so concluded even though the hazing techniques were not overtly sexual or pornographic, noting: "when a defendant is charged with a sex crime, 404(b) evidence … does not necessarily need to be limited to other instances of sexual misconduct." It concluded: "the hazing testimony tended to show that Defendant exerted great physical and psychological power over his students, singled out smaller and younger wrestlers for particularly harsh treatment, and subjected them to degrading and often quasi-sexual situations. Whether sexual in nature or not, and regardless of whether some wrestlers allegedly were not victimized to the same extent as the complainants, the hazing testimony had probative value beyond the question of whether Defendant had a propensity for aberrant behavior (quotations and citations omitted)." (2) The trial court did not abuse its discretion by admitting the hazing testimony under Rule 403, given that the evidence was "highly probative" of the defendant's intent, plan, or scheme to carry out the charged offenses. The court noted however "that the State eventually could have run afoul of Rule 403 had it continued to spend more time at trial on the hazing testimony or had it elicited a similar amount of 404(b) testimony on ancillary, prejudicial matters that had little or no probative value regarding the Defendant's guilt" (citing State v. Hembree, 367 N.C. 2 (2015) (new trial where in part because the trial court "allow[ed] the admission of an excessive amount" of 404(b) evidence regarding "a victim for whose murder the accused was not currently being tried")). However, the court concluded that did not occur here. (3) The trial court erred by excluding evidence that one of the victims was biased. The defendant sought to introduce evidence showing that the victim had a motive to falsely accuse the defendant. The trial court found the evidence irrelevant because it did not fit within one of the exceptions of the Rape Shield Statute. The court concluded that this was error, noting that the case was "indistinguishable" "in any meaningful way" from *State v. Martin*, __ N.C. App. __, 774 S.E.2d 330 (2015) (trial court erred by concluding that evidence was per se inadmissible because it did not fall within one of the Rape Shield Statute's exceptions). (4) The trial court abused its discretion

by excluding the bias evidence under Rule 403, because the evidence in question had a direct relationship to the incident at issue. Here, the defendant did not seek to introduce evidence of completely unrelated sexual conduct at trial. Instead, the defendant sought to introduce evidence that the victim told "police and his wife that he was addicted to porn . . . [and had] an extramarital affair[,] . . . [in part] because of what [Defendant] did to him." The defendant sought to use this evidence to show that the victim "had a reason to fabricate his allegations against Defendant – to mitigate things with his wife and protect his military career." Thus, there was a direct link between the proffered evidence and the incident in question. (5) The court went on to hold, however, that because of the strong evidence of guilt, no prejudice resulted from the trial court's errors.

Reversing Court of Appeals, Supreme Court held that State properly authenticated surveillance video from a department store in a larceny case through testimony of regional loss prevention manager

State v. Snead, __ N.C. __, ___ S.E.2d __ (April 15, 2016). Reversing a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 344 (2015), the court held, in this larceny case, that the State properly authenticated a surveillance video showing the defendant stealing shirts from a Belk department store. At trial Toby Steckler, a regional loss prevention manager for the store, was called by the State to authenticate the surveillance video. As to his testimony, the court noted:

> Steckler established that the recording process was reliable by testifying that he was familiar with how Belk's video surveillance system worked, that the recording equipment was "industry standard," that the equipment was "in working order" on [the date in question], and that the videos produced by the surveillance system contain safeguards to prevent tampering. Moreover, Steckler established that the video introduced at trial was the same video produced by the recording process by stating that the State's exhibit at trial contained exactly the same video that he saw on the digital video recorder. Because defendant made no argument that the video had been altered, the State was not required to offer further evidence of chain of custody. Steckler's testimony, therefore, satisfied Rule 901, and the trial court did not err in admitting the video into evidence.

The court also held that the defendant failed to preserve for appellate review whether Steckler's lay opinion testimony based on the video was admissible.

Crimes

Generally

Evidence was sufficient to support conviction for unlawfully entering property operated as a domestic violence safe house where defendant attempted to open shelter's locked door

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). The evidence was sufficient to support the defendant's conviction of unlawfully entering property operated as a domestic violence safe house by one subject to a protective order in violation of G.S. 50B-4.1(g1). The evidence showed that the defendant drove his vehicle to shelter, parked his car in the lot and

walked to the front door of the building. He attempted to open the door by pulling on the door handle, only to discover that it was locked. The court rejected the defendant's argument that the State was required to prove that he actually entered the shelter building. The statute in question uses the term "property," an undefined statutory term. However by its plain meaning, this term is not limited to buildings or other structures but also encompasses the land itself.

(1) Trial court did not err by denying defendant's motion to dismiss charge of obtaining property by false pretenses where evidence showed that defendant represented that he was lawful owner of stolen electrical wire in process of selling it as scrap; (2) Trial court erred by instructing jury on acting in concert where all evidence showed that defendant was the sole perpetrator of the crime

State v. Hallum, ___ N.C. App. ___, 783 S.E.2d 294 (April 5, 2016). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of obtaining property by false pretenses. The indictment alleged that the defendant obtained US currency by selling to a company named BIMCO electrical wire that was falsely represented not to have been stolen. The defendant argued only that there was insufficient evidence that his false representation in fact deceived any BIMCO employee. He argued that the evidence showed that BIMCO employees were indifferent to legal ownership of scrap metal purchased by them and that they employed a "nod and wink system" in which no actual deception occurred. However, the evidence included paperwork signed by the defendant representing that he was the lawful owner of the materials sold and showed that based on his representation, BIMCO paid him for the materials. From this evidence, it logically follows that BIMCO was in fact deceived. Any conflict in the evidence was for the jury to decide. (2) The trial court erred by instructing the jury on acting in concert with respect to an obtaining property by false pretenses charge where there was a "complete lack of evidence … that anyone but defendant committed the acts necessary to constitute the crime." However, because all the evidence showed that the defendant was the sole perpetrator of the crime, no prejudice occurred.

Evidence of constructive possession of firearm was sufficient to withstand motion dismiss charge of felon in possession of firearm

State v. McKiver, ___ N.C. App. ___, ___ S.E.2d ___ (May 17, 2016). The trial court did not err in denying the defendant's motion to dismiss a charge of felon in possession of a firearm. The court rejected the defendant's argument that there was insufficient evidence establishing that he had constructive possession of the weapon. The evidence showed, among other things, that an anonymous 911 caller saw a man wearing a plaid shirt and holding a gun in a black car beside a field; that someone saw that man dropped the gun; that an officer saw the defendant standing near a black Mercedes wearing a plaid shirt; that the defendant later returned to the scene and said that the car was his; and that officers found a firearm in the vacant lot approximately 10 feet from the Mercedes. This evidence was sufficient to support a reasonable juror in concluding that additional incriminating circumstances existed--beyond the defendant's mere presence at the scene and proximity to where the firearm was found--and thus to infer that he constructively possessed the firearm.

(1) State failed to present substantial evidence of constructive possession in controlled drug buy case; (2) Trial court did not err by denying defendant's motion to dismiss charge of conspiracy to sell methamphetamine; (3) Trial court did not err by denying defendant's motion to dismiss charge of possession of drug paraphernalia

State v. Garrett, ___ N.C. App. ___, 783 S.E.2d 780 (April 5, 2016). (1) The court reversed the defendant's conviction for possession with intent to sell or deliver methamphetamine, concluding that the State failed to present substantial evidence of constructive possession. The case arose out of a controlled drug buy. However the State's evidence showed that "at nearly all relevant times" two other individuals—Fisher and Adams--were in actual possession of the methamphetamine. The defendant led Fisher and Adams to a trailer to purchase the drugs. The defendant entered the trailer with Fisher and Adams' money to buy drugs. Adams followed him in and ten minutes later Adams returned with the methamphetamine and handed it to Fisher. This evidence was insufficient to establish constructive possession. (2) The trial court did not err by denying the defendant's motion to dismiss a charge of conspiracy to sell methamphetamine, given the substantial evidence of an implied understanding among the defendant, Fisher, and Adams to sell methamphetamine to the informants. The informants went to Fisher to buy the drugs. The group then drove to the defendant's house where Fisher asked the defendant for methamphetamine. The defendant said that he didn't have any but could get some. The defendant led Fisher and Adams to the trailer where the drugs were purchased. (3) The trial court did not err by denying the defendant's motion to dismiss the charge of possession of drug paraphernalia. When the arresting officer approached the vehicle, the defendant was sitting in the back seat and did not immediately show his hands at the officer's request. Officers subsequently found the glass pipe on the rear floor board of the seat where the defendant was sitting. The defendant admitted that he smoked methamphetamine out of the pipe while in the car. Additionally Fisher testified that the pipe belonged to the defendant and the defendant had been carrying it in his pocket.

Defendant's due process rights were violated where he was convicted of strict liability offense of possession of pseudoephedrine by a person previously convicted of possessing methamphetamine because defendant lacked notice that such behavior was criminal

State v. Miller, ___ N.C. App. ___, 783 S.E.2d 512 (Mar. 15, 2016), *temporary stay allowed*, ___ N.C. ___, 783 S.E.2d 502 (Mar. 31, 2016). The defendant's due process rights were violated when he was convicted under G.S. 90-95(d1)(1)(c) (possession of pseudoephedrine by person previously convicted of possessing methamphetamine is a Class H felony). The defendant's due process rights "were violated by his conviction of a strict liability offense criminalizing otherwise innocuous and lawful behavior without providing him notice that a previously lawful act had been transformed into a felony for the subset of convicted felons to which he belonged." The court found that "the absence of any notice to [the defendant] that he was subject to serious criminal penalties for an act that is legal for most people, most convicted felons, and indeed, for [the defendant] himself only a few weeks previously [before the new law went into effect], renders the new subsection unconstitutional as applied to him." The court distinguished the statute at issue from those that prohibit selling illegal drugs, possessing hand grenades or dangerous assets, or shipping unadulterated prescription drugs, noting that the statute at issue criminalized possessing allergy medications containing pseudoephedrine, an act that citizens would reasonably assume to be legal. The court noted that its decision was consistent with *Wolf v. State of Oklahoma*, 292 P.3d 512 (2012). It also rejected the State's effort to analogize the issue to cases upholding the constitutionality of the statute prescribing possession of a firearm by a felon.

Statute proscribing disorderly conduct in a public building or facility is not unconstitutionally vague

State v. Dale, ___ N.C. App. ___, 783 S.E.2d 222 (Feb. 16, 2016). The court rejected the defendant's constitutional challenge to G.S. 14-132(a)(1), proscribing disorderly conduct in a public building or facility. Because the North Carolina Supreme Court has already decided that a statute "that is virtually identical" to the one at issue is not void for vagueness, the court found itself bound to uphold the constitutionality of the challenge the statute.

(1) To convict for deterring an appearance by a witness, the State is not required to prove the specific court proceeding the defendant attempted to deter victim from attending; (2) Trial court did not commit plain error in jury instructions

State v. Barnett, ___ N.C. App. ___, 784 S.E.2d 188 (Jan. 19, 2016), *review allowed*, ___ N.C. ___, 784 S.E.2d 474 (Apr. 13, 2016). (1) The evidence was sufficient to support a conviction for deterring an appearance by a witness under G.S. 14-226(a). After the defendant was arrested and charged with assaulting, kidnapping, and raping the victim, he began sending her threatening letters from jail. The court concluded that the jury could reasonably have interpreted the letters as containing threats of bodily harm or death against the victim while she was acting as a witness for the prosecution. The court rejected the defendant's contention that the state was required to prove the specific court proceeding that he attempted to deter the victim from attending, simply because the case number was listed in the indictment. The specific case number identified in the indictment "is not necessary to support an essential element of the crime" and "is merely surplusage." In the course of its ruling, the court noted that the victim did not receive certain letters was irrelevant because the crime "may be shown by actual intimidation or attempts at intimidation." (2) The trial court did not commit plain error in its jury instructions on the charges of deterring a witness. Although the trial court fully instructed the jury as to the elements of the offense, in its final mandate it omitted the language that the defendant must have acted "by threats." The court found that in light of the trial court's thorough instructions on the elements of the charges, the defendant's argument was without merit. Nor did the trial court commit plain error by declining to reiterate the entire instruction for each of the two separate charges of deterring a witness and instead informing the jury that the law was the same for both counts.

There was insufficient evidence to sustain larceny conviction where defendant did not take funds by an act of actual trespass but rather withdrew funds mistakenly deposited into his account after becoming aware of the erroneous transfer

State v. Jones, ___ N.C. App. ___, 781 S.E.2d 333 (Jan. 5, 2016), *review allowed*, ___ N.C. ___, 784 S.E.2d 466 (Apr. 13, 2016). There was insufficient evidence to sustain the defendant's larceny conviction. The defendant worked as a trucker. After a client notified the defendant's office manager that it had erroneously made a large deposit into the defendant's account, the office manager contacted the defendant, notified him of the erroneous deposit and indicated that the client was having it reversed. However, the defendant withdrew the amount in question and was charged with larceny. The court held that because the client willingly made the deposit into the bank account, there was insufficient evidence of a trespass. The defendant did not take the funds from the client by an act of actual trespass. Rather, the money was put into his account without any action on his part. Thus, no actual trespass occurred. Although a trespass can occur constructively, when possession is fraudulently obtained by trick or artifice, here no such act allowed the defendant to obtain the money. The defendant did not trick anyone into depositing the money; rather it was deposited by mistake by the client. The court rejected the State's argument that the taking occurred when the defendant withdrew the funds after being made

aware of the erroneous transfer, noting that at this point the funds were in the defendant's possession not the client's.

Any error in trial court's jury instructions in a possession of weapon on educational property case did not rise to the level of plain error

State v. Huckelba, ___ N.C. ___, 780 S.E.2d 750 (Dec. 18, 2015). In a per curiam decision and for the reasons stated in the dissenting opinion below, the supreme court reversed *State v. Huckelba*, ___ N.C. App. ___, 771 S.E.2d 809 (2015). Deciding an issue of first impression, the court of appeals had held that to be guilty of possessing or carrying weapons on educational property under G.S. 14-269.2(b) the State must prove that the defendant "both knowingly possessed or carried a prohibited weapon and knowingly entered educational property with that weapon" and the trial court committed reversible error by failing to so instruct the jury. The dissenting judge concluded that "even accepting that a conviction … requires that a defendant is knowingly on educational property and knowingly in possession of a firearm" any error in the trial court's instructions to the jury in this respect did not rise to the level of plain error, noting evidence indicating that the defendant knew she was on educational property.

(1) Defendant who was on his own property was in a "public place" within meaning of indecent exposure statute where the place was open to view of the public; (2) Trial court did not commit plain error by failing to instruct the jury that the defendant must have been in view of the public with the naked eye and without resort to technological aids where no evidence supported the instruction

State v. Pugh, ___ N.C. App. ___, 780 S.E.2d 226 (Dec. 1, 2015). (1) The trial court properly denied the defendant's motion to dismiss in this felony indecent exposure case. The evidence showed that a neighbor and her 4-year-old daughter saw the defendant masturbating in front of his garage. The court rejected the defendant's argument that because he was on his own property he was not in a "public place" within the meaning of the statute. The court noted that prior case law has held that a public place includes one that is open to the view of the public at large. Here, the defendant's garage was directly off a public road and was in full view from the street and from the front of his neighbor's house. (2) Where the neighbor and her daughter saw the defendant as they exited their car, the trial court did not commit plain error by failing to instruct the jury that the defendant must have been in view of the public with the naked eye and without resort to technological aids. Even if such an instruction may be appropriate in some cases here it was wholly unsupported by the evidence.

Unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle

State v. Robinson, 368 N.C. 402 (Nov. 6, 2015). The court modified and affirmed the decision below, ___ N.C. App. ___, 763 S.E.2d 178 (2014), holding that unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle. The court noted that it has adopted a definitional test (as distinct from a factual test) for determining whether one offense is a lesser-included offense of another. Applying that rule, it reasoned that unauthorized use contains an essential element that is not an essential element of possession of a stolen vehicle (that the defendant took or operated a motor-propelled conveyance). The court overruled *State v. Oliver*, 217 N.C. App. 369 (2011) (holding that unauthorized use is not a lesser-included offense of possession of a stolen vehicle but, according to the *Robinson* court, mistakenly reasoning that *Nickerson* mandated that result), to the extent that it is inconsistent with its opinion.

There was insufficient evidence of acting in concert where the defendant was not actually or constructively present when the crime was committed

State v. Hardison, ___ N.C. App. ___, 779 S.E.2d 505 (Nov. 3, 2015). Reversing the defendant's convictions for contaminating a public water system, the court held that because the defendant was not constructively present, the evidence was insufficient to support criminal liability under the doctrine of acting in concert. The evidence showed that the defendant offered to pay another person to intentionally break county water lines so that the defendant's company, which was under contract with the county to repair the lines, would be paid by the county for the necessary repairs. The defendant was never present when the accomplice broke the water lines. The court held that the defendant "was not physically close enough to aid or encourage the commission of the crimes and therefore was not actually or constructively present—a necessary element of acting-in-concert liability." The court rejected the State's argument that the defendant was constructively present because she planned the crimes, was accessible if needed by telephone, and later was at the crime scene to repair the broken water lines. In this respect, the court held, in part, that "one cannot be actually or constructively present for purposes of proving acting in concert simply by being available by telephone." The court noted that the evidence would have supported a conviction based on a theory of accessory before the fact, but the jury was not instructed on that theory of criminal liability, nor was the defendant charged with other offenses, such as conspiracy, that apply to those who help plan a criminal act.

No error where the defendant was held in criminal contempt for willfully violating consent order

State v. Mastor, ___ N.C. App. ___, 777 S.E.2d 516 (Oct. 6, 2015). Trial court did not err by holding the defendant in criminal contempt for willfully violating the Consent Order provision which forbade her from allowing the children to be in the presence of a convicted sex offender.

Sufficient evidence existed of possession of the precursor chemical pseudoephedrine where the substance was not chemically analyzed; the chemical analysis requirement is limited to controlled substances

State v. Hooks, ___ N.C. App. ___, 777 S.E.2d 133 (Oct. 6, 2015). The evidence was sufficient with respect to 35 counts of possession of the precursor chemicals pseudoephedrine with intent to manufacture methamphetamine. As to possession, the State introduced evidence that the defendant purchased pseudoephedrine, was seen "cooking meth," and that others had purchased pseudoephedrine for him. The court rejected the defendant's argument that the evidence was insufficient because the substance was not chemically identified as pseudoephedrine. The court concluded that the holding of *State v. Ward* regarding the need to identify substances through chemical analysis was limited to identifying controlled substances, and pseudoephedrine is not listed as a controlled substance in the North Carolina General Statutes.

There was sufficient evidence that crime against nature occurred in the state of North Carolina

State v. Goins, ___ N.C. App. ___, 781 S.E.2d 45 (Dec. 15, 2015). Based on the victim's testimony that the alleged incident occurred in his bedroom, there was sufficient evidence that the charged offense, crime against nature, occurred in the state of North Carolina.

(1) The corpus delicti rule applies where the confession is the only evidence that the crime was committed; it does not apply where the confession is the only evidence that the defendant committed it; (2) Trial court properly denied defendant's motion to dismiss conspiracy charge based on corpus delicti rule where there was sufficient evidence corroborating confession

State v. Ballard, ___ N.C. App. ___, 781 S.E.2d 75 (Dec. 15, 2015). (1) In a case involving two perpetrators, the trial court properly denied the defendant's motion to dismiss a robbery charge, predicated on the corpus delicti rule. Although the defendant's own statements constituted the only evidence that he participated in the crime, "there [wa]s no dispute that the robbery happened." Evidence to that effect included "security footage, numerous eyewitnesses, and bullet holes and shell casings throughout the store." The court concluded: "corpus delicti rule applies where the confession is the only evidence that the crime was committed; it does not apply where the confession is the only evidence that the defendant committed it." The court continued, citing *State v. Parker*, 315 N.C. 222 (1985) for the rule that " 'the perpetrator of the crime' is not an element of corpus delicti." (2) The trial court properly denied the defendant's motion to dismiss a conspiracy charge, also predicated on the corpus delicti rule. The court found that there was sufficient evidence corroborating the defendant's confession. It noted that "the fact that two masked men entered the store at the same time, began shooting at employees at the same time, and then fled together in the same car, strongly indicates that the men had previously agreed to work together to commit a crime." Also, "as part of his explanation for how he helped plan the robbery, [the defendant] provided details about the crime that had not been released to the public, further corroborating his involvement." Finally, as noted by the *Parker* Court, "conspiracy is among a category of crimes for which a 'strict application' of the corpus delicti rule is disfavored because, by its nature, there will never be any tangible proof of the crime."

Impaired Driving

Evidence Rule 702 requires a witness to be qualified as an expert before he or she may testify to the issue of impairment related to HGN test

State v. Godwin, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016), *temporary stay allowed*, ___ N.C. ___, 785 S.E.2d 93 (May 9, 2016). In this appeal after a conviction for impaired driving, the court held that Rule 702 requires a witness to be qualified as an expert before he may testify to the issue of impairment related to Horizontal Gaze Nystagmus (HGN) test results. Here, there was never a formal offer by the State to tender the law enforcement officer as an expert witness. In fact, the trial court rejected the defendant's contention that the officer had to be so qualified. This error was prejudicial.

In post-*McNeely* case, trial court did not err by suppressing blood draw evidence after finding that no exigency existed to justify warrantless search

State v. Romano, ___ N.C. App. ___, 785 S.E.2d 168 (April 19, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 25, 2016). In this DWI case, the court held that the trial court did not err by suppressing blood draw evidence that an officer collected from a nurse who was treating the defendant. The trial court had found that no exigency existed justifying the warrantless search and that G.S. 20-16.2, as applied in this case, violated *Missouri v. McNeely*. The court noted that in *McNeely,* the US Supreme Court held "the natural metabolization of

alcohol in the bloodstream" does not present a "per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." Rather, it held that exigency must be determined based on the totality of the circumstances. Here, the officer never advised the defendant of his rights according to G.S. 20-16.2 and did not obtain his written or oral consent to the blood test. Rather, she waited until an excess of blood was drawn, beyond the amount needed for medical treatment, and procured it from the attending nurse. The officer testified that she believed her actions were reasonable under G.S. 20-16.2(b), which allows the testing of an unconscious person, in certain circumstances. Noting that it had affirmed the use of the statute to justify warrantless blood draws of unconscious DWI defendants, the court further noted that all of those decisions were decided before *McNeely.* Here, under the totality of the circumstances and considering the alleged exigencies, the warrantless blood draw was not objectively reasonable. The court rejected the State's argument that the blood should be admitted under the independent source doctrine, noting that the evidence was never obtained independently from lawful activities untainted by the initial illegality. It likewise rejected the State's argument that the blood should be admitted under the good faith exception. That exception allows officers to objectively and reasonably rely on a warrant later found to be invalid. Here, however, the officers never obtained a search warrant.

(1) DMV's findings supported its conclusion that officer had reasonable grounds to believe Farrell was driving while impaired; (2) Over a dissent, court rejected argument that State's dismissal of DWI charge barred DMV from pursuing a driver's license revocation under implied consent laws

Farrell v. Thomas, ___ N.C. App. ___, 784 S.E.2d 657 (April 19, 2016). (1) The DMV's findings support its conclusion that the officer had reasonable grounds to believe that Farrell was driving while impaired. During a traffic stop Farrell refused the officer's request to take a breath test after being informed of his implied consent rights and the consequences of refusing to comply. Officers obtained his blood sample, revealing a blood alcohol level of .18. Because Farrell refused to submit to a breath test upon request, the DMV revoked his driving privileges. The Court of Appeals found that "DMV's findings readily support its conclusion." Among other things, Farrell had glassy, bloodshot eyes and slightly slurred speech; during the stop Farrell used enough mouthwash to create a strong odor detectable by the officer from outside car; and Farrell lied to the officer about using the mouthwash. The court held: "From these facts, a reasonable officer could conclude that Farrell was impaired and had attempted to conceal the alcohol on his breath by using mouthwash and then lying about having done so." (2) Over a dissent, the court rejected Farrell's argument that the State's dismissal of his DWI charge barred the DMV from pursuing a drivers license revocation under the implied consent laws. This dismissal may have been based on a Fourth Amendment issue. The majority determined that even if Farrell's Fourth Amendment rights were violated, the exclusionary rule would not apply to the DMV hearing. The dissent argued that the exclusionary rule should apply. A third judge wrote separately, finding that it was not necessary to reach the exclusionary rule issue.

Trial court did not err by denying DWI defendant's request for jury instruction that would have informed jury that breath test results were sufficient to support a finding of impaired driving but did not compel such a finding beyond a reasonable doubt

State v. Godwin, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016), *temporary stay allowed*, ___ N.C. ___, 785 S.E.2d 93 (May 9, 2016). In this DWI case, the trial court did not err by denying the defendant's request for a jury instruction concerning Intoximeter results. The defendant's proposed instruction would have informed the jury that Intoximeter results were sufficient to support a finding of impaired driving but did not compel such a finding beyond a reasonable doubt. Citing prior case law, the court rejected the defendant's argument that by instructing the jury using N.C.P.J.I. 270.20A, the trial court impressed upon the jury that it could not consider evidence showing that the defendant was not impaired.

Supreme court affirmed trial court's denial of defendant's motion to dismiss DWI charge based on flagrant violation of his constitutional rights in connection with a warrantless blood draw but remanded case to Court of Appeals and trial court to consider suppression

State v. McCrary, ___ N.C. ___, 780 S.E.2d 554 (Dec. 18, 2015). In a per curiam opinion, the supreme court affirmed the decision below, *State v. McCrary*, __ N.C. App. __, 764 S.E.2d 477 (2014), to the extent it affirmed the trial court's denial of the defendant's motion to dismiss. In this DWI case, the court of appeals had rejected the defendant's argument that the trial court erred by denying his motion to dismiss, which was predicated on a flagrant violation of his constitutional rights in connection with a warrantless blood draw. Because the defendant's motion failed to detail irreparable damage to the preparation of his case and made no such argument on appeal, the court of appeals concluded that the only appropriate action by the trial court under the circumstances was to consider suppression of the evidence as a remedy for any constitutional violation. Noting that the trial court did not have the benefit of the United States Supreme Court's decision in *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013), in addition to affirming that portion of the court of appeals opinion affirming the trial court's denial of defendant's motion to dismiss, the supreme court remanded to the court of appeals "with instructions to that court to vacate the portion of the trial court's 18 March 2013 order denying defendant's motion to suppress and further remand to the trial court for (1) additional findings and conclusions—and, if necessary—a new hearing on whether the totality of the events underlying defendant's motion to suppress gave rise to exigent circumstances, and (2) thereafter to reconsider, if necessary, the judgments and commitments entered by the trial court on 21 March 2013."

Impaired Driving Procedures

Defendant had no right of appeal to Court of Appeals from the superior court's reversal of the preliminary determination of the district court suppressing the results of the defendant's blood alcohol test

State v. Hutton, ___ N.C. App. ___, 780 S.E.2d 202 (Nov. 17, 2015). In this DWI case where the district court judge entered a preliminary determination that the results of the defendant's blood alcohol test should be suppressed but the superior court reversed the preliminary determination on the State's appeal and remanded to the district court for further proceedings, the defendant had no right of appeal to the court of appeals. Because the district court did not enter a final judgment pursuant to G.S. 20-

38.6(f) denying the motion to suppress, the defendant could not seek review of the ruling on that motion. Although the court found it had authority to grant certiorari, it declined to do so.

(1) Defendant who pled guilty to DWI had no statutory right to appeal from the trial court's denial of her motion to dismiss based on a violation of G.S. 20-38.4 and *Knoll*; (2) The court lacked authority to consider the issue by way of a writ of certiorari; (3) The court declined to suspend the rules of appellate procedure

State v. Ledbetter, ___ N.C. App. ___, 779 S.E.2d 164 (Nov. 3, 2015), *temporary stay allowed*, ___ N.C. ___, 781 S.E.2d 462 (Dec. 17, 2015). (1) In this case where the defendant pleaded guilty to driving while impaired, the court concluded that the defendant did not have a statutory right to appeal the issue raised. Following the trial court's denial of the defendant's motion to dismiss, the defendant entered a guilty plea. The plea arrangement stated: "[Defendant] expressly retains the right to appeal the Court's denial of her motion to dismiss/suppress her Driving While Impaired charge in this case and her plea of guilty is conditioned based on her right to appeal that decision[.]" The defendant then appealed, arguing that the trial court erred in denying her motion to dismiss, which had asserted that the State violated G.S. 20-38.4 and *Knoll.* The issue that the defendant attempted to appeal is not listed as one of the grounds for appeal of right as set forth in G.S. 15A-1444. The court rejected the defendant's argument that she had an appeal of right pursuant to G.S. 15A-979(b), noting that provision applies to preservation of the right to challenge a denial of a suppression motion, not a motion to dismiss. While the trial court's order denying the defendant's motion was styled as an "order on motion to suppress Defendant's DWI Charge" and the defendant's transcript of plea purported to reserve the right to appeal the denial of the "motion to dismiss/suppress," the record reveals that the only motion filed by the defendant was a motion to dismiss. In fact, her motion specifically cited G.S. 15A-954, the motion to dismiss statute. Thus, because the defendant did not file a motion to suppress, she had no right of appeal under G.S. 15A-979(b). The court rejected the defendant's argument that because the court had reviewed denials of motions to dismiss based on *Knoll* in *State v. Chavez*, ___ N.C. App. ___, 767 S.E.2d 581 (2014), and *State v. Labinski*, 188 N.C. App. 120 (2008), it should do the same in her case. The court noted that in both of those cases it had failed to consider G.S. 15A-1444 or G.S. 15A-979(b) and that it was bound to follow decisions of the Supreme Court and its own prior case law on this issue. (2) The court lacked authority to consider the issue by way of a writ of certiorari. In this respect, Appellate Rule 21 limits the court's ability to grant petitions for writ of certiorari to three specified situations, none of which were at issue in this case. (3) The court declined to exercise its authority under Appellate Rule 2 to suspend the rules of appellate procedure.

Defendant who pled guilty to DWI had no statutory right to appeal from the denial of his motion to dismiss or ground to request review by way of certiorari

State v. Miller, ___ N.C. App. ___, 777 S.E.2d 337 (Oct. 20, 2015). Where the defendant pleaded guilty in this DWI case "and preserved his right to appeal" the denial of his motion to dismiss, the court found that the defendant had no statutory right to appeal the issue or ground to request review by way of certiorari. The defendant's motion alleged that he was denied his constitutional right to communicate with counsel and friends and gather evidence on his behalf by allowing friends or family to observe him and form opinions as to his condition. The court thus dismissed the appeal without prejudice to the defendant's right to pursue relief by way of a MAR.

Sexual Offenses

With respect to indecent liberties charge, trial court correctly allowed jury to determine whether evidence of repeated sexual assaults of victim were for the purpose of arousing or gratifying sexual desire

State v. Kpaeyeh, ___ N.C. App. ___, 784 S.E.2d 582 (April 5, 2016). The trial court did not err by denying the defendant's motion to dismiss a charge of taking indecent liberties with a child. The victim testified that the defendant repeatedly raped her while she was a child living in his house and DNA evidence confirmed that he was the father of her child. The defendant argued that there was insufficient evidence of a purpose to arouse or gratify sexual desire; specifically he argued that evidence of vaginal penetration is insufficient by itself to prove that the rape occurred for the purpose of arousing or gratifying sexual desire. The court rejected the argument that the State must always prove something more than vaginal penetration in order to satisfy this element of indecent liberties. The trial court correctly allowed the jury to determine whether the evidence of the defendant's repeated sexual assaults of the victim were for the purpose of arousing or gratifying sexual desire.

Evidence was sufficient to convict defendant of both attempted sex offense and attempted rape where a jury could infer that defendant intended to engage in a sexual assault involving both fellatio and rape

State v. Marshall, ___ N.C. App. ___, 784 S.E.2d 503 (Mar. 1, 2016). The evidence was sufficient to convict the defendant of both attempted sex offense and attempted rape. The court rejected the defendant's argument that the evidence was sufficient to permit the jury to infer the intent to commit only one of these offenses. During a home invasion, the defendant and his brother isolated the victim from her husband. One of the perpetrators said, "Maybe we should," to which the other responded, "Yeah." The defendant's accomplice then forced the victim to remove her clothes and perform fellatio on him at gunpoint. The defendant later groped the victim's breast and buttocks and said, "Nice." At this point, the victim's husband, who had been confined elsewhere, fought back to protect his wife and was shot. This evidence is sufficient for a reasonable jury to infer that the defendant intended to engage in a continuous sexual assault involving both fellatio (like his accomplice) and ultimately rape, and that this assault was thwarted only because the victim's husband sacrificed himself so that his wife could escape.

Trial court did not err by instructing on first-degree sexual offense where there was evidence to support finding that victim suffered serious personal injury

State v. Gates, ___ N.C. App. ___, 781 S.E.2d 883 (Feb. 16, 2016). Where there was evidence to support a finding that the victim suffered serious personal injury, the trial court did not err in instructing the jury on first-degree sexual offense. The trial court's instructions were proper where an officer saw blood on the victim's lip and photographs showed that she suffered bruises on her ribs, arms and face. Additionally the victim was in pain for 4 or 5 days after the incident and due to her concerns regarding lack of safety the victim, terminated her lease and moved back in with her family. At the time of trial, roughly one year later, the victim still felt unsafe being alone. This was ample evidence of physical injury and lingering mental injury.

(1) Superior court lacked jurisdiction with respect to first-degree statutory rape charges where no evidence showed that defendant was at least 16 years old at the time of the offenses; (2) Over a dissent, majority held that jurisdiction was proper with respect to statutory rape charge with an alleged date range for the offense which included periods before and after defendant's 16th birthday because unchallenged evidence showed the offense occurred after defendant's birthday

State v. Collins, ___ N.C. App. ___, 783 S.E.2d 9 (Feb. 16, 2016). (1) The superior court was without subject matter jurisdiction with respect to three counts of first-degree statutory rape, where no evidence showed that the defendant was at least 16 years old at the time of the offenses. The superior court may obtain subject matter jurisdiction over a juvenile case only if it is transferred from the district court according to the procedure set forth in Chapter 7B; the superior court does not have original jurisdiction over a defendant who is 15 years old on the date of the offense. (2) Over a dissent, the majority held that jurisdiction was proper with respect to a fourth count of statutory rape which alleged a date range for the offense (January 1, 2011 to November 30, 2011) that included periods before the defendant's sixteenth birthday (September 14, 2011). Unchallenged evidence showed that the offense occurred around Thanksgiving 2011, after the defendant's sixteenth birthday. The court noted the relaxed temporal specificity rules regarding offenses involving child victims and that the defendant could have requested a special verdict to require the jury to find the crime occurred after he turned sixteen or moved for a bill of particulars to obtain additional specificity.

Trial court erred by denying defendant's motion to dismiss attempted rape charge

State v. Baker, ___ N.C. App. ___, 781 S.E.2d 851 (Jan. 19, 2016), *temporary stay allowed*, ___ N.C. ___, 781 S.E.2d 800 (Feb. 5, 2016). The trial court erred by denying the defendant's motion to dismiss an attempted statutory rape charge. The parties agreed that there were only two events upon which the attempted rape conviction could be based: an incident that occurred in a bedroom, and one that occurred on a couch. The court agreed with the defendant that all of the evidence regarding the bedroom incident would have supported only a conviction for first-degree rape, not attempted rape. The court also agreed with the defendant that as to the couch incident, the trial testimony could, at most, support an indecent liberties conviction, not an attempted rape conviction. The evidence as to this incident showed that the defendant, who appeared drunk, sat down next to the victim on the couch, touched her shoulder and chest, and tried to get her to lie down. The victim testified that she "sort of" lay down, but then the defendant fell asleep, so she moved. While sufficient to show indecent liberties, this evidence was insufficient to show attempted rape.

Defenses

Trial court committed reversible error in its jury instruction on self-defense, which deviated in part from pattern jury instructions

State v. Holloman, ___ N.C. App. ___, ___ S.E.2d ___ (May 10, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 27, 2016). Construing the new self-defense statute, the court held that the trial court committed reversible error in its jury instruction on self-defense, which deviated in part from the pattern jury instructions. The court held: "The trial court's deviations from the pattern self-defense instruction, taken as a whole, misstated the law by suggesting that an aggressor cannot under any circumstances regain justification for using defensive force."

Trial court did not err by declining to instruct jury on voluntary manslaughter based on acting in the heat of passion upon adequate provocation

State v. Chaves, ___ N.C. App. ___, 782 S.E.2d 540 (Mar. 1, 2016). The trial court did not err by declining to instruct the jury on voluntary manslaughter. The trial judge instructed the jury on first- and second-degree murder but declined the defendant's request for an instruction on voluntary manslaughter. The jury found the defendant guilty of second-degree murder. The defendant argued that the trial court should have given the requested instruction because the evidence supported a finding that he acted in the heat of passion based on adequate provocation. The defendant and the victim had been involved in a romantic relationship. The defendant argued that he acted in the heat of passion as a result of the victim's verbal taunts and her insistence, shortly after they had sex, that he allow his cell phone to be used to text another man stating that the victim and the defendant were no longer in a relationship. The court rejected this argument, concluding that the victim's words, conduct, or a combination of the two could not serve as legally adequate provocation. Citing a North Carolina Supreme Court case, the court noted that mere words, even if abusive or insulting, are insufficient provocation to negate malice and reduce a homicide to manslaughter. The court rejected the notion that adequate provocation existed as a result of the victim's actions in allowing the defendant to have sex with her in order to manipulate him into helping facilitate her relationship with the other man. The court also noted that that there was a lapse in time between the sexual intercourse, the victim's request for the defendant's cell phone and her taunting of him and the homicide. Finally the court noted that the defendant stabbed the victim 29 times, suggesting premeditation.

Sex Offender Registration and Satellite-Based Monitoring

Defendant was not eligible for SBM where conviction for statutory rape could not be considered a "reportable conviction"

State v. Kpaeyeh, ___ N.C. App. ___, 784 S.E.2d 582 (April 5, 2016). Because the defendant's conviction for statutory rape, based on acts committed in 2005, cannot be considered a "reportable conviction," the defendant was not eligible for satellite-based monitoring.

Indictment alleging failure to register change of address was not defective

State v. James, ___ N.C. ___, 782 S.E.2d 509 (Mar. 18, 2016). In an appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 774 S.E.2d 871 (2015), the court per curiam affirmed for the reasons stated in *State v. Williams*, ___ N.C. ___, 781 S.E.2d 268 (Jan. 29, 2016) (in a case where the defendant, a sex offender, was charged with violating G.S. 14-208.11 by failing to provide timely written notice of a change of address, the court held that the indictment was not defective; distinguishing *State v. Abshire*, 363 N.C. 322 (2009), the court rejected the defendant's argument that the indictment was defective because it alleged that he failed to register his change of address with the sheriff's office within three days, rather than within three business days).

Evidence was sufficient to prove that sex offender failed to register change of address after being released from jail and thereafter failed to register another change of address involving an out-of-state address

State v. Crockett, ___ N.C. ___, 782 S.E.2d 878 (Mar. 18, 2016). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 767 S.E.2d 78 (2014), the court affirmed the defendant's convictions, finding the evidence sufficient to prove that he failed to register as a sex offender. The defendant was charged with failing to register as a sex offender in two indictments covering separate offense dates. The court held that G.S. 14-208.9, the "change of address" statute, and not G.S. 14-208.7, the "registration" statute, governs the situation when, as here, a sex offender who has already complied with the initial registration requirements is later incarcerated and then released. The court continued, noting that "the facility in which a registered sex offender is confined after conviction functionally serves as that offender's address." Turning to the sufficiency the evidence, the court found that as to the first indictment, the evidence was sufficient for the jury to conclude that defendant had willfully failed to provide written notice that he had changed his address from the Mecklenburg County Jail to the Urban Ministry Center. As to the second indictment, the evidence was sufficient for the jury to find that the defendant had willfully changed his address from Urban Ministries to Rock Hill, South Carolina without providing written notice to the Sheriff's Department. As to this second charge, the court rejected the defendant's argument that G.S. 14-208.9(a) applies only to in-state address changes. The court also noted that when a registered offender plans to move out of state, appearing in person at the Sheriff's Department and providing written notification three days before he intends to leave, as required by G.S. 14-208.9(b) would appear to satisfy the requirement in G.S. 14-208.9(a) that he appear in person and provide written notice not later than three business days after the address change. Having affirmed on these grounds, the court declined to address the Court of Appeals' alternate basis for affirming the convictions: that the Urban Ministry is not a valid address at which the defendant could register because the defendant could not live there.

Reversing Court of Appeals, Supreme Court held that evidence was sufficient to sustain defendant's conviction for failing to register as sex offender

State v. Barnett, ___ N.C. ___, 782 S.E.2d 885 (Mar. 18, 2016). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 327 (2015), the court reversed, holding that the evidence was sufficient to sustain the defendant's conviction to failing to register as a sex offender. Following *Crockett* (summarized immediately above), the court noted that G.S. 14-208.7(a) applies solely to a sex offender's initial registration whereas G.S. 14-208.9(a) applies to instances in which an individual previously required to register changes his address from the address. Here, the evidence showed that the defendant failed to notify the Sheriff of a change in address after his release from incarceration imposed after his initial registration.

(1) Rule of Civil Procedure 62(d) cannot be used to stay SBM hearing; (2) Trial court erred by failing to determine whether SBM search was reasonable under the totality of the circumstances

State v. Blue, ___ N.C. App. ___, 783 S.E.2d 524 (Mar. 15, 2016). (1) The court rejected the defendant's argument that because SBM is a civil, regulatory scheme, it is subject to the Rules of Civil Procedure and that the trial court erred by failing to exercise discretion under Rule 62(d) to stay the SBM hearing. The court concluded that because Rule 62 applies to a stay of execution, it could not be used to stay the SBM hearing. (2) With respect to the defendant's argument that SBM constitutes an unreasonable search and seizure, the trial court erred by failing to conduct the appropriate analysis. The trial court simply

acknowledged that SBM constitutes a search and summarily concluded that the search was reasonable. As such it failed to determine, based on the totality of the circumstances, whether the search was reasonable. The court noted that on remand the State bears the burden of proving that the SBM search is reasonable.

In SBM case, trial court erred by failing to determine whether search was reasonable under the totality of the circumstances

State v. Morris, ___ N.C. App. ___, 783 S.E.2d 528 (Mar. 15, 2016). The trial court erred by failing to conduct the appropriate analysis with respect to the defendant's argument that SBM constitutes an unreasonable search and seizure. The trial court simply acknowledged that SBM constitutes a search and summarily concluded that the search was reasonable. As such it failed to determine, based on the totality of the circumstances, whether the search was reasonable. The court noted that on remand the State bears the burden of proving that the SBM search is reasonable.

Based on binding precedent, trial court's order that defendant enroll in lifetime SBM did not violate ex post facto or double jeopardy

State v. Alldred, ___ N.C. App. ___, 782 S.E.2d 383 (Feb. 16, 2016). Relying on prior binding opinions, the court rejected the defendant's argument that the trial court's order directing the defendant to enroll in lifetime SBM violated ex post facto and double jeopardy. The court noted that prior opinions have held that the SBM program is a civil regulatory scheme which does not implicate either ex post facto or double jeopardy.

Indictment charging sex offender with failure to provide timely written notice of address change was not defective

State v. Williams, ___ N.C. ___, 781 S.E.2d 268 (Jan. 29, 2016). In a case where the defendant, a sex offender, was charged with violating G.S. 14-208.11 by failing to provide timely written notice of a change of address, the court held that the indictment was not defective. Distinguishing *State v. Abshire,* 363 N.C. 322 (2009), the court rejected the defendant's argument that the indictment was defective because it alleged that he failed to register his change of address with the sheriff's office within three days, rather than within three *business* days.

(1) Attempted second-degree rape does not fall within statutory definition of an aggravated offense for purposes of lifetime SBM and sex offender registration; (2) In issue of first impression, trial court erred by entering no contact order under G.S. 15A-1340.50 preventing defendant from contacting victim as well as her three children

State v. Barnett, ___ N.C. App. ___, 784 S.E.2d 188 (Jan. 19, 2016), *review allowed*, ___ N.C. ___, 784 S.E.2d 474 (Apr. 13, 2016). (1) The trial court erroneously concluded that attempted second-degree rape is an aggravated offense for purposes of lifetime SBM and lifetime sex offender registration. Pursuant to the statute, an aggravated offense requires a sexual act involving an element of penetration. Here, the defendant was convicted of attempted rape, an offense that does not require penetration and thus does not fall within the statutory definition of an aggravated offense. (2) Deciding an issue of 1st impression, the court held that the trial court erred when it entered a permanent no contact order, under G.S. 15A-1340.50, preventing the defendant from contacting the victim as well as her three children. "[T]he plain

language of the statute limits the trial court's authority to enter a no contact order protecting anyone other than the victim."

(1) Trial court's conclusion that defendant was a recidivist was not supported by competent evidence and therefore could not be used to support lifetime sex offender registration and SBM; (2) IAC claims cannot be asserted in SBM appeals

State v. Springle, ___ N.C. App. ___, 781 S.E.2d 518 (Jan. 5, 2016). (1) The trial court's conclusion that the defendant was a recidivist was not supported by competent evidence and therefore could not support the conclusion that the defendant must submit to lifetime sex offender registration and SBM. The trial court's order determining that the defendant was a recidivist was never reduced to writing and made part of the record. Although there was evidence from which the trial court could have possibly determined that the defendant was a recidivist, it failed to make the relevant findings, either orally or in writing. The defendant's stipulation to his prior record level worksheet cannot constitute a legal conclusion that a particular out-of-state conviction is "substantially similar" to a particular North Carolina offense. (2) Ineffective assistance of counsel claims cannot be asserted in SBM appeals; such claims can only be asserted in criminal matters.

Sentencing and Probation

Trial court violated the defendant's Sixth Amendment right to a trial by jury by sentencing him under G.S. 14-27.4A(c) to a term above that normally provided for a Class B1 felony; statute fails to require notice that "egregious aggravation" factors may be used, and does not provide a mechanism for submitting such factors to a jury to be proved beyond a reasonable doubt

State v. Singletary, ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). In this sexual offense with a child by adult offender case, the State conceded, and the court held, that the trial court violated the defendant's sixth amendment right to a trial by jury by sentencing him under G.S. 14-27.4A(c) to a term above that normally provided for a Class B1 felony on the trial court's own determination, and without notice, that egregious aggravation existed. G.S. 14-27.4A(c) provides that a defendant may be sentenced to an active term above that normally provided for a Class B1 felony if the judge finds egregious aggravation. The court held that the statutory sentencing scheme at issue was unconstitutional under the *Apprendi/Blakely* rule. *See* Blakely v. Washington, 542 U.S. 296 (2004) (holding that any factor, other than a prior conviction, that increases punishment beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt). Specifically, the statute fails to require notice that "egregious aggravation" factors may be used, does not require that such aggravation be proved beyond a reasonable doubt and does not provide any mechanism for submitting such factors to a jury. The court rejected the State's argument that under G.S. 14-27.4A, the trial court may submit egregious aggravation factors to a jury in a special verdict, concluding, in part, that the statute explicitly gives only "the court," and not the jury, the ability to determine whether the nature of the offense and the harm inflicted require a sentence in excess of what is otherwise permitted by law. Because the defendant did not challenge that portion of the statute setting a 300-month mandatory minimum sentence, the court did not address the constitutionality of that provision. The court remanded for resentencing.

(1) Trial court erred when sentencing defendant as habitual felon by assigning PRL points for an offense that was used to support habitual misdemeanor assault conviction and establish defendant's status as a habitual felon; (2) Trial court's restitution award was not supported by competent evidence

State v. Sydnor, ___ N.C. App. ___, 782 S.E.2d 910 (Mar. 15, 2016). (1) The trial court erred when sentencing the defendant as a habitual felon by assigning prior record level points for an assault inflicting serious bodily injury conviction where that same offense was used to support the habitual misdemeanor assault conviction and establish the defendant's status as a habitual felon. "Although defendant's prior offense of assault inflicting serious bodily injury may be used to support convictions of habitual misdemeanor assault and habitual felon status, it may not also be used to determine defendant's prior record level." (2) The trial court's restitution award of $5,000 was not supported by competent evidence.

(1) State failed to prove absconding probation violation where defendant's whereabouts were never unknown to probation officer; (2) Other alleged probation violations could not support revocation

State v. Jakeco Johnson, ___ N.C. App. ___, 783 S.E.2d 21 (Mar. 1, 2016). (1) The trial court erred by revoking the defendant's probation where the State failed to prove violations of the absconding provision in G.S. 15A-1343(b)(3a). The trial court found that the defendant "absconded" when he told the probation officer he would not report to the probation office and then failed to report as scheduled on the following day. This conduct does not rise to the level of absconding supervision; the defendant's whereabouts were never unknown to the probation officer. (2) The other alleged violations could not support a probation revocation, where those violations were "unapproved leaves" from the defendant's house arrest and "are all violations of electronic house arrest." This conduct was neither a new crime nor absconding. The court noted that the defendant did not make his whereabouts unknown to the probation officer, who was able to monitor the defendant's whereabouts via the defendant's electronic monitoring device.

Trial court did not err by revoking defendant's probation where evidence showed he willfully absconded

State v. Nicholas Johnson, ___ N.C. App. ___, 782 S.E.2d 549 (Mar. 1, 2016). The trial court did not err by revoking the defendant's probation where the evidence showed that he willfully absconded. The defendant moved from his residence, without notifying or obtaining prior permission from his probation officer, willfully avoided supervision for multiple months, and failed to make his whereabouts known to his probation officer at any time thereafter.

Trial court lacked subject matter jurisdiction to revoke defendant's probation because violation reports were filed after the expiration of probation

State v. Peele, ___ N.C. App. ___, 783 S.E.2d 28 (Mar. 1, 2016). The trial court lacked subject matter jurisdiction to revoke the defendant's probation because the State failed to prove that the violation reports were timely filed. As reflected by the file stamps on the violation reports, they were filed after the expiration of probation in all three cases at issue.

(1) Trial court erroneously sentenced defendant for sexual offense against a child by an adult when defendant was actually convicted of first-degree sexual offense; (2) 15-year-old defendant failed to establish that sentence for sexual offense against a six-year-old child was so grossly disproportionate as to violate the Eighth Amendment

State v. Bowlin, ___ N.C. App. ___, 783 S.E.2d 230 (Feb. 16, 2016). (1) The trial court erred by erroneously sentencing the defendant for three counts of sexual offense against a child by an adult under G.S. 14-27.4A, when he was actually convicted of three counts of first-degree sexual offense under G.S. 14-27.4(a)(1). (2) The defendant's constitutional rights were not violated when the trial court sentenced him on three counts of first-degree sexual offense, where the offenses were committed when the defendant was fifteen years old. The court found that the defendant had not brought the type of categorical challenge at issue in cases like *Roper* or *Graham.* Rather, the defendant challenged the proportionality of his sentence given his juvenile status at the time of the offenses. The court concluded that the defendant failed to establish that his sentence of 202-254 months for three counts of sexual offense against a six-year-old child was so grossly disproportionate as to violate the Eighth Amendment.

Trial court improperly sentenced defendant in his absence where defendant was not present when trial court corrected an erroneous oral sentence in a written judgment

State v. Collins, ___ N.C. App. ___, 782 S.E.2d 350 (Feb. 2, 2016). The trial court improperly sentenced the defendant in his absence. The trial court orally sentenced the defendant to 35 to 42 months in prison, a sentence which improperly correlated the minimum and maximum terms. The trial court's written judgment sentenced the defendant to 35 to 51 months, a statutorily proper sentence. Because the defendant was not present when the trial court corrected the sentence, the court determined that a resentencing is required and remanded accordingly.

Trial court erred by assigning additional PRL point on ground that all elements of the present offense were included in a prior offense

State v. Eury, ___ N.C. App. ___, 781 S.E.2d 869 (Feb. 2, 2016). In calculating the defendant's prior record level, the trial court erred by assigning an additional point on grounds that all the elements of the present offense were included in a prior offense. The defendant was found guilty of possession of a stolen vehicle. The court rejected the State's argument that the defendant's prior convictions for possession of stolen property and larceny of a motor vehicle were sufficient to support the additional point. The court noted that while those offenses are "similar to the present offense" neither contains all of its elements. Specifically, possession of a stolen vehicle requires that the stolen property be a motor vehicle, while possession of stolen property does not; larceny of a motor vehicle requires proof of asportation but not possession while possession of a stolen vehicle requires the reverse.

Appeal and Post-Conviction

(1) Trial court erred by failing to conduct evidentiary hearing where defendant's MAR alleging IAC raised disputed issues of fact; (2) Appellate court remanded for trial court to address whether State complied with post-conviction discovery obligations

State v. Martin, ___ N.C. App. ___, 781 S.E.2d 339 (Jan. 5, 2016). (1) Because the defendant's motion for appropriate relief (MAR) alleging ineffective assistance of counsel in this sexual assault case raised disputed issues of fact, the trial court erred by failing to conduct an evidentiary hearing before denying relief. The defendant claimed that counsel was ineffective by failing to, among other things, obtain a qualified medical expert to rebut testimony by a sexual abuse nurse examiner and failing to properly cross-examine the State's witnesses. The defendant's motion was supported by an affidavit from counsel admitting the alleged errors and stating that none were strategic decisions. The court concluded that these failures "could have had a substantial impact on the jury's verdict" and thus the defendant was entitled to an evidentiary hearing. The case was one of "he said, she said," with no physical evidence of rape. The absence of any signs of violence provided defense counsel an opportunity to contradict the victim's allegations with a medical expert, an opportunity he failed to take. Additionally, trial counsel failed to expose, through cross-examination, the fact that investigators failed to collect key evidence. For example, they did not test, collect, or even ask the victim about a used condom and condom wrapper found in the bedroom. Given counsel's admission that his conduct was not the product of a strategic decision, an evidentiary hearing was required. (2) With respect to the defendant's claim that the trial court erred by denying his motion before providing him with post-conviction discovery pursuant to G.S. 15A-1415(f), the court remanded for the trial court to address whether the State had complied with its post-conviction discovery obligations.

(1) Defendant had no statutory right to appeal where appeal pertained to voluntariness of his plea; (2) Defendant could not seek review by way of certiorari where his claim did not fall within the grounds set forth in Appellate Rule 21(a)(1); (3) Court declined to exercise discretion to suspend rules of appellate procedure

State v. Biddix, ___ N.C. App. ___, 780 S.E.2d 863 (Dec. 15, 2015). (1) The defendant, who pleaded guilty in this drug case, had no statutory right under G.S. 15A-1444 to appeal where his appeal pertained to the voluntariness of his plea. (2) Notwithstanding prior case law, and over a dissent, the court held that the defendant could not seek review by way of certiorari where the defendant's claim did not fall within any of the three grounds set forth in Appellate Rule 21(a)(1). The court distinguished prior cases in which certiorari had been granted, noting that none addressed the requirements of Rule 21. (3) The court declined to exercise its discretion under Appellate Rule 2 to suspend the rules of appellate procedure, finding that the defendant had not demonstrated exceptional circumstances warranting such action.

G.S. 15A-1027 precluded defendant's assertions in his MAR that his plea was invalid because the trial court failed to follow the procedural requirements of G.S. 15A-1023 and -1024

State v. McGee, ___ N.C. App. ___, 780 S.E.2d 916 (Dec. 15, 2015). The defendant's assertions in his MAR, filed more than seven years after expiration of the appeal period, that his plea was invalid because the trial court failed to follow the procedural requirements of G.S. 15A-1023 and -1024 were precluded

by G.S. 15A-1027 (“Noncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired.”).